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

Tuesday 24 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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Tuesday, 24th May 2022

(10.15 am)

Submissions by MR RABINOWITZ (cont.)

MR JUSTICE MARCUS SMITH: Yesterday I asked Ms Smith why no collective action and she didn't give me the response that I was expecting, which was *Lloyd v Google*, because there is, of course, a significant difference between a collective action and an individuated action, and it may be that the way that the retailers are seeing their loss is as very individuated losses, which are inconsistent with collective actions.

One of the points that might be taken, if one took a statistical approach, or a sector approach or market approach, or however you call it, is that that would not satisfy the need to prove one's loss on an individuated based as per Lord Leggatt in *Lloyd v Google*.

It is something that crossed my mind as a point that we ought to be alive to when we are framing, first of all, obviously framing what pass on is but, more particularly, when we are framing the sort of directions that we would want to make in terms of how pass on is proved. It is obviously not a problem that Ms Wakefield has. She has a collective action. But it is something that I think we ought to be alive to.

MR RABINOWITZ: If I may come back to that.

Just on the threshold legal point then, for the Tribunal's note, we deal with this in our written submissions at paragraphs 7 to 25. That's bundle 1 tab 9, pages 94 to

99. In our skeleton argument it is paragraphs 11 to 19, bundle 1, tab 3, beginning at page 7.

Following *Sainsbury's*, we would respectfully submit that the position is relatively straightforward. Perhaps I can just identify -- I think there are five points which we think cover the territory. Some of them are very obvious and I hope you will forgive me for making them.

First, and as has been clear for some time, English law does, of course, recognise -- I am going to call it "the doctrine of pass on", and I am going to call it pass on, with my apologies to my learned friend Ms Smith, because that is what it is. It is collected under the heading of mitigation because it is similar to and indeed reflects principles of mitigation, but it is about pass on in one way or another.

Obviously, by accepting the doctrine of pass on into English law, we have adopted a path which differs from other jurisdictions, most notably the United States, which does lead me to my second point, which is maybe more substantive than the first one, because it relates to the reasons why English law has adopted a doctrine of pass on.

This is made clear in the Supreme Court, and I will give the references now. They identified what they call two sound reasons for this. The first sound reason is because, as the Supreme Court says, the application of the doctrine is something that is, as they put it, required by the compensatory principle. Let me give you the references for that. The Supreme Court said that about the compensatory principle being required at paragraph 197 of the judgment. I will take you to that later, internal page references 860, H to J.

It was a point which they reiterated at paragraph 216, page 64, H to J, and it was repeated a number of other times, including at paragraphs 218 and 224.

As the Tribunal may also recall, the Supreme Court explained what the

compensatory principle was, at paragraph 194, by reference to Lord Blackburn's speech in *Livingstone v Rawyards*. The Court said the principle is that: “the Claimant is entitled to be placed in the position it would have been if the tort had not been committed."

In other words, it is entitled to be fully compensated for the loss, but it is not entitled to be paid more than that. We do not have a principle of punitive damages here.

Pausing there, we would respectfully submit that the fact that pass on has been accepted into English law, in order to reflect the compensatory principle, is we say an important point to be kept in mind when considering the more detailed issues that arise with respect to pass on.

In particular, we would respectfully submit that when the Tribunal has before it competing arguments as to how pass on is to be established and the like, the Tribunal may find it useful to evaluate such arguments by reference to which is more likely to produce a result that reflects the compensatory principle, that is to say avoiding a claimant not only being under compensated but also being overcompensated.

Because you have the possibility of more than one claim being made arising out of the supplier, direct and indirect claimants, it becomes very important, for reasons that we discussed yesterday, to work out who should get what. That is to say you do not want a situation where, for example, the retailer gets overcompensated and, in consequence, the consumer gets undercompensated, because that would produce a result which in a sense betrays the ground or the principle by reference to which pass on has been adopted into English law.

If as a matter of fact a particular loss said to have been caused by a defendant turns

out on analysis to have been avoided, then that is something to which the law will have regard. So that is the first sound reason, as the Supreme Court put it.

The second sound reason identified by the Supreme Court, and again this is at paragraph 197, is that taking into account pass on is required because, as the Supreme Court said:

"there are cases where there is a need to avoid double recovery through claims in respect of the same overcharge by a direct purchaser and by subsequent purchasers in a chain, to whom an overcharge has been passed on in whole or in part."

I wonder if I should just take you to these passages, because I have referred to them now twice.

MR JUSTICE MARCUS SMITH: Yes, of course.

MR RABINOWITZ: Volume 3, tab 13. It is internal page 860, paragraph H. Bundle page 1094. At the bottom of the page, between H and J:

"There are sound reasons for taking account of pass-on in the calculation of damages for breach of competition law. Not only is it required by the compensatory principle but also there are cases where there is a need to avoid double recovery through claims in respect of the same overcharge by a direct purchaser and by subsequent purchasers in a chain, to whom an overcharge has been passed on in whole or in part."

In a sense, that's one of the obvious points that arises in the context of today's hearing. So the idea is that one of the functions of pass on is to ensure that the defendant is not paying twice, once to the person who has not, in fact, suffered the loss, because they passed it on or, as it is also put, has avoided the loss.

We would submit this is an obvious point and also we say an important point when it comes to evaluating competing arguments as to what the requirement for pass on might be or how they are to be applied. That is the second sound reason.

Before I move on to my third point, can I just pick up a point that the Tribunal raised with my learned friend, Ms Smith, yesterday, about whether the test for proximate causation, in the sense of whether you get pass on, is the same whether it is used as a shield or a sword. The Tribunal I think indicated a view, obviously not a settled view, that it was very likely the test was going to be the same in order to avoid double recovery or overlapping payments. Indeed, as my Lord may recall from your decision in *Forex* --this is at footnote 116, authorities bundle 4, page 1477, your Lordship expressed the view as being precisely that, that the test has to be the same. I think your Lordship expressed the view that it was obvious that it was going to be exactly the same. We would respectfully agree with that, because if it wasn't the same, one would get into all sorts of messes.

MR JUSTICE MARCUS SMITH: Indeed. In a sense there are two very closely related questions. One is the test having to be the same, and one can have a test that is the same which is divorced from, as it were, the economic realities, provided one is equally divorced at all levels. The problem with being divorced from economic realities is that whilst one achieves the objective of avoiding over and under compensation, one has a tension in one level of claimants possibly saying: "We haven't been given proper compensation for our loss".

So there's a separate, I think, thought that is one needs to get the rules right, in the sense of justice at all levels, but what one can't do is one can't have different

criteria for what is right, otherwise a court would be delighted to give every claimant what they ask for. It is just that the defendants may be significantly less delighted. One gets into the overcompensation problem.

MR RABINOWITZ: Indeed. We would respectfully entirely agree with that. Can I just make one comment about that, which is the idea of having a test which is divorced from economic reality.

In my respectful submission, the notion which appears to have taken hold in some places, that the test which the law applies is divorced from economic reality, in my respectful submission, is not right.

In my respectful submission, as soon as one understands properly what proximate causation is, one is not going to have a test which is divorced from economic reality. The whole point of proximate causation is, in fact, to ensure that what happens reflects economic reality, and you are not bringing into account benefits which should not be brought into account. That doesn't in a sense nullify economic reality. It reflects economic reality.

In my submission, if the law departs from economic reality, as it did, for example, with compound interest, it very quickly puts itself right. In that case it took a long time. But it doesn't stay wrong for a long time, because the law does not like to be thought of as an ass.

MR JUSTICE MARCUS SMITH: That's the reason the Commercial Court was founded.

MR RABINOWITZ: Precisely. If one is in a position where one is entertaining submissions which produce a result which is divorced from economic reality, then in my submission something has gone wrong, and it is not economic reality which has gone wrong, if I can put it that way. That was our second point, about looking at the reasons why pass on has been adopted and saying

both of those reasons can provide a guide as to how pass on is intended to work, and when we come to the question of proximate causation, again how that is intended to apply.

The third point, and again this is a fairly obvious one, and indeed it is common ground, the Supreme Court made clear, the burden of establishing pass on, subject to the modifications to this principle in the Competition Act 1998, which do not apply to these claims, at least our claims, is always on the person alleging that there has been pass on.

In a case such as the present, and as between the merchants and the card scheme, the burden is on the card schemes. That's clearly established by *Sainsbury's*, paragraph 216, which you have been taken to before, internal page 864.

That's not a point which is in any way in dispute, but it is a point which matters. It matters when we get to the practical proposals that parties are making, because, of course, if we say that we ask the Tribunal to accept particular evidence, which we say will establish pass on, and in the end the Tribunal is not satisfied that it does -- the Tribunal says "if that's what you want to do, do it, it makes sense. It produces a generic approach, etc". If the Tribunal is not satisfied that it works, then we lose.

We accept that burden and we accept that responsibility. It becomes relevant when we get to the second part of the submission.

MR JUSTICE MARCUS SMITH: Yes. There was something of a pushback when we framed the order that led to this proceeding, because we said we wanted an articulation of the principles applied in a particular case, without reference to the burden of proof, and that led to a response along the lines of "We can't articulate our case without relying on the burden of proof". That struck me as an intrinsically odd thing to say. I mean, it is no secret that the courts don't

like deciding cases on the burden of proof.

MR RABINOWITZ: No, indeed. But in this particular case, where pass on is difficult, may be difficult to establish, in our respectful submission it is not, and there is enough evidence out there which is useful to apply. But if in the end it doesn't establish what we say that evidence establishes, then we fail.

MR JUSTICE MARCUS SMITH: Sure. If in the end you don't meet whatever it is you have to meet, you lose. The fact is one doesn't, in a breach of contract case, one doesn't have that high in the batting order of points that matter the burden on the claimant to prove the existence of the contract. It is something which we all accept, but no-one frets about it to the degree that one frets in this context, and that to my mind is indicative of something not being quite right.

MR RABINOWITZ: No. Again, I would respectfully agree. There is a tendency in some of the cases to make decisions on the basis that pleading something in a particular way reverses the burden and the Tribunal is not going to have it. In a sense, I think Royal Mail may be an example of that. *Stellantis* may be another example of that. It is in this area an issue which apparently looms very large in the minds of everyone involved. We would respectfully agree with your Lordship. Let's get the principles right and see what happens at the hearing. Once one establishes what sort of evidence one can take, perhaps things about burden fall away.

MR JUSTICE MARCUS SMITH: Precisely, because I think the reason burden matters is because one has a sense that one can't actually find the evidence to adjudicate the answer in a reasoned judicial way. Now, if that is the case, that is intrinsically unsatisfactory, but it does mean that the burden suddenly matters, because if neither side can bring anything to the party to enable

a rational decision, well, the burden will have to fall in the way articulated by law without, you know, the evidence really mattering.

MR RABINOWITZ: Yes. It may be it matters in another way, which is a purist legal way, which is in front of the Supreme Court no-one wants to say that the Claimant has to come to court and prove its loss is avoided, i.e. the burden is on it to show not only what is its *prima facie* loss but precisely how much of the loss it has avoided, and if it can't show that, it loses, which may have been the way the arguments ran at some points in *Sainsbury's*. If you can't be precise about your damages, you get nothing, and the Supreme Court and the courts below wanted to avoid that result, and said: "You show your primary loss. We use a broad axe. That's okay. So far as the other bits are concerned, that's for the defendants".

They may have been trying to avoid this problem of saying: "You have no claim because you can't prove with precision..." Another aspect of: "You have no claim because you can't prove with precision what you need to prove."

I'm not going to labour the point. We do accept the authorities as they are. The burden is on us.

That brings us on to the fourth point. Maybe this is the point that matters most. In terms of what has to be shown to establish pass on, in fact, there is a causal link, in fact and in law, between any overcharge and what was passed on to the consumers. The two, that's to say causation in fact and causation in law, are obviously very different.

Factual causation is established by asking whether there is a factual link between the overcharge and the action taken by a claimant in response to that overcharge. It is ordinarily tested by producing a counterfactual and examining whether the overcharge led, as a matter of fact, to some cost or

loss being passed on to others.

But, as English law has made clear, it is not enough to establish factual causation. It is necessary also to establish legal or proximate causation, maybe "proximate causation" is a better expression, which in effect involves asking -- this is the way it was put, for example, in *Fulton Shipping* -- asking whether there is a sufficiently close link between the breach and the action which avoided the loss.

It not only asks whether there is a sufficiently close link. As I think I said yesterday, there is an element of a judgment being brought as to whether it is the right sort of link.

MR JUSTICE MARCUS SMITH: This is your gratuitous assistance --

MR RABINOWITZ: Gratuitous assistance point and insurance. There is a very sufficient link between a loss suffered as a result of a breach and recovery from an insurance company, but that is never brought into account in assessing damages, because it is not regarded as a relevant benefit. Is it sufficient and is it a benefit of the right kind, a relevant benefit? I think that's also the way it was put in *Fulton Shipping*.

Whether or not in any particular claim proximate or legal causation can be established will obviously depend on the facts and circumstances of that claim and whether the law regards the link between the incurring of the costs and the avoidance of some or all of the damage which might have been caused as being sufficiently close and of a relevant type.

The need to establish factual and legal causation has been made in a number of authorities in the context of mitigation, obviously by *British Westinghouse*. *Fulton Shipping* is another Supreme Court authority in the bundles. *Allianz* in the Court of Appeal recently turned on proximate causation. More directly

relevant to the present case, because it is in the context of pass on, is *Sainsbury's*.

To be very clear about this I am going to be very clear about this, we do not suggest a test for pass on or mitigation which is in any way different to that which has been established in the authorities. Going from *British Westinghouse* -- not intending to leave it out -- Ms Smith said there are hundreds of years of cases -- we are happy with that. We accept that that is the test for mitigation. It requires both factual and legal proximate causation.

The question is how does it apply in a particular factual circumstance? What is the judgment the court makes having regard to the approach that legal causation requires of saying is this a sufficient link? What is the answer to be given to the question where you have merchants who have incurred an overcharge, over a process of annual budgeting, which in effect ensures that overcharge is passed on in one way or another?

This takes me to my fifth point, which is that the answer to that is very clearly given in paragraph 215 of *Sainsbury's*. In our respectful submission, it is very important when you look at paragraph 215, which I am going to take the Tribunal to now, to recognise that it is not only posing the question. It is answering the question. It poses the question, or at least identifies the need to establish legal and factual causation, and then says in a particular type of case the answer is straightforward.

Can I just invite the Tribunal to go to that? You may have it open. Bundle 3, tab 13, 864, bundle reference 1098.

My learned friend took you to this yesterday and I hope you don't mind if I take you back to it, given its neutrality. Can I just before taking you through this make this point? I think both my learned friends Ms Smith and indeed my learned

friend Mr Woolfe made some comments about whether this was *obiter*. I think at one stage it was said this is just something the Supreme Court said. I don't know whether that was another way of saying it is just *obiter*.

MR JUSTICE MARCUS SMITH: They certainly said it.

MR RABINOWITZ: They definitely said it. This point was made by reference to I think showing the Tribunal paragraph 40(i)-(iv), which you have at page 1056. It begins at 1055. Identifies the issues. 40(iv), Ms Smith took you to this:

"Did the Court of Appeal find ... the Defendant has to prove the exact amount of loss mitigated."

This is the basis of the "maybe this is *obiter*" comment. What I think you have not seen is paragraph 180, at page 1091, where, as is explained in the judgment of the court, just looking at paragraph 180:

"The scope of the issue expanded as a result of exchanges with the bench during the hearing of the appeal. On the invitation of the court, Mastercard and Visa made further written submissions on the burden of proof. They argue that the legal burden lies on the claimant to prove its loss in the form of lost profits, that no question of mitigation of loss arises, and that there is no burden on the defendants in relation to the quantification of the merchants' claims resulting from the pass on of the overcharge. AAM and Sainsbury's have lodged written submissions in reply."

Then one gets to paragraph 181, which carries on:

"In addressing the issue and these submissions, we examine, first, the requirements of EU law… secondly (in order to determine whether there is a question of mitigation of loss) whether the merchants are entitled in law to use the overcharge which is included ... (Reading to the words) ... as the *prima facie*

measure of their losses; thirdly, the burden of proof in the assessment of damages due to the claimants, and, fourthly, the question of the degree of precision required in establishing the likely extent of any pass on."

So this was very much an issue that the Supreme Court was interested in, expressly invited written submissions, because the original submissions did not include this, and received very substantial written submissions on this.

If we can go back to paragraph 215, page 1098:

"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 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."

I am going to just pause there to pick up a point that my learned friend Ms Smith made, and Mr Woolfe made the same, which is the suggestion that there is a very close relationship between two aspects of this, that's the duty aspect, the duty to mitigate, and what the Supreme Court is dealing with here, which is avoided loss in fact as a consequence of running your business.

I think the suggestion made by Ms Smith was that if this wasn't -- I am not sure how it was put. It is only where you are in breach of duty that there could have been avoided loss. No, it is only where you complied with your duty that there could have been avoided loss.

MR. TIDSWELL: I think she was saying if you have a duty to identify the action, then it is the other side of the coin, that you identify the actions in order to show that you have, in fact, mitigated.

MR RABINOWITZ: It was maybe an important feature of Ms Smith's argument to say that these two are symbiotic is perhaps a way of putting it. With respect,

that is inconsistent with *British Westinghouse* itself.

MR JUSTICE MARCUS SMITH: I was wondering if you were going to take us to the case.

MR RABINOWITZ: If you go to volume 1, tab 1, page 17. I am grateful to Ms Wakefield for this point. About three-quarters of the way down the page, (inaudible) he says:

"As James LJ indicates, this second principle does not impose on the plaintiff an obligation to take any step which a reasonable and prudent man would not ordinarily take in the course of his business."

That's the duty point. Then this:

"But when in the course of his business he has taken action arising out of the transaction, which action has diminished his loss, the effect of actual diminution of the loss he has suffered may be taken into account even though there was no duty on him to act."

So there isn't that relationship between those two. They are separate, standalone principles, all intended to ensure that the compensatory principle is applied properly, and you are not having to compensate for loss you shouldn't have to compensate for. They operate in different ways.

Finally, going back to paragraph 215. The suspense is killing us. Back at 1098:

"In the classic case of *British Westinghouse*, Viscount Haldane described the principle that the 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'."

Then he says this:

"'Here also a question of legal or proximate causation arises, as the underlined

words show'."

Pausing there, he identified what is said by Viscount Haldane in *British Westinghouse* as an articulation of the principle of legal or proximate causation. It is one way it has been articulated. It has been articulated in a number of different ways, including in *Fulton Shipping* by Lord Clarke talking about a sufficient link of the relevant kind.

Of course, on the facts of *British Westinghouse*, it made perfect sense to talk about the action having to arise out of a transaction, because that was a transaction. It was a breach of contract claim. It works less well -- I am not saying it has no relevance, because plainly what it is trying to draw attention to is the need for a link between the circumstances in which they were placed by reason of a breach and what you did which avoided the loss. It has to be sufficiently close and of the relevant kind.

In my respectful submission, it is wrong to be fixated about one particular way. I don't have a difficulty -- in fact, I can answer the questions by reference to the transaction, but in my submission, it is wrong to be fixated by one particular articulation of the principle. It is simply a way in which one articulates the principle of proximate causation.

What the Supreme Court says is the situation here, where we are not dealing with a breach of contract, but we are dealing with a breach of Competition Act, competition law, which gives rise to a loss, we also have a principle of legal or proximate causation. You have to identify whether there is a sufficiently close link between the circumstances in which the loss placed you and that which is claimed to have avoided the loss before you get into factual causation.

Is it a sufficient link? Is it a benefit of the right kind?

Then he goes on to say this. Having posed the issue, he says this:

"But the question of legal causation is straightforward in the context of a retail business in which the merchant seeks to recover its loss 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?"

He says in relation to proximate causation it is straightforward, in a particular factual circumstance, i.e. in relation to particular sorts of claims, and the relevant question is the factual causation one. Has it actually passed on its loss?

MR TIDSWELL: (inaudible) transaction. Is it a question as to how broad that type of transaction is? So you could read this as saying where you have a merchant who has identified its cost base and gone through an exercise in which that is a relevant component in setting its prices, it necessarily follows that the overcharge has been part of that process and is connected causally to the outcome of the pricing. Therefore, once those elements are shown in that situation, the causation box is ticked.

That doesn't seem necessarily to determine what the case is in relation to every merchant seeking to recover its costs.

MR RABINOWITZ: No, it doesn't, but in my submission it is very important when you look at this to keep in mind the factual position is going to be a different point. Okay?

All the Supreme Court is saying is there are occasions -- it doesn't say this, but I am articulating what they had in mind. Look at cases like *Allianz*, which the Court of Appeal had, where there is some fiddling around with fixing -- I can't remember whether they are foreign exchange rates, and this is said to have given rise to loss, and the allegation is you passed on that loss, because when people had to redeem, they redeemed at a lower price. The Court of

Appeal says "that's not proximate enough".

You could argue that was very proximate, i.e., in the sense of very close, but the Court of Appeal is saying as a matter of policy we are not going to allow you to get out of the claim by saying it has been passed on to someone else.

Take *Fulton Shipping*, where there is a breach of contract, as a result of which the person sells the vessel at a time when they couldn't have sold the vessel, and makes a profit which it couldn't have made had the earlier contract not been breached, because it would have run to a later date when the market had dropped. The Supreme Court says that's not a sufficient link, that link. It is not a proximate cause.

What is happening here is that the Supreme Court is saying this is not like that sort of case. Where you have someone who is running a business and you are saying that they have paid more by way of costs than they should have, but it is in the very nature of the business that they have an annual budget in which they look at their costs and work out their prices, not the only thing they take into account, because it never is, then that question of is there a sufficient link is answered.

That doesn't require it being identified in a particular way. It is just saying whether you have that sort of business and that sort of loss, and a process whereby prices are charged which reflects costs, the action is sufficiently proximate to the loss to satisfy the legal causation box. Factual causation is a completely different question, i.e. would it have been different? You can only test that by the counterfactual.

MR TIDSWELL: Yes. So it leaves open the possibility there may be plenty of merchants who could read it in a different way, plenty of examples. *Sainsbury's* springs to mind, in the original case, where they say, as

I understand it, they say actually that's not what we did. What we do is we look at our variable costs, because that's the way (inaudible) and we didn't include variable costs so actually it wasn't something we took into account.

MR RABINOWITZ: It wouldn't, in fact, have been passed on.

MR TIDSWELL: So it falls outside the line of logic --

MR RABINOWITZ: That may be for reasons of factual causation rather than legal causation.

MR JUSTICE MARCUS SMITH: Are you going so far as to say that the articulation of the test for proximate causation in this case is actually the economists' view of the world?

MR RABINOWITZ: That's exactly what I am saying. That is why I made the point.

MR JUSTICE MARCUS SMITH: In other words, subject always to factual causation, when the economist says, "Look, an undertaking in a market economy seeks to cover its costs, and it does so, in part at least, by generating revenues that will do so", that is enough to put a tick in the proximate causation box, subject, of course, to the factual questions that it may be that you are in a market where you simply can't raise your prices, and your competitors don't have the same problem because they receive payments in a different way. Then you are going to have to look elsewhere, but that is the counterfactual.

MR RABINOWITZ: That is the counterfactual. In my respectful submission -- your Lordship yesterday said what the Supreme Court was saying here was *res ipsa loquitur*. It is obvious. The reason it is obvious is because, as a matter of economic reality, there is a very close link between costs you incur and prices you charge. Does that mean there is no occasion in which economic reality and the law will depart? I don't want to go as far as to say there will never be a link, but effectively what the Supreme Court was driving at here

was an approach which brings the law very close to economic reality. It was obviously doing it within the construct of, as they say, and I don't need to go further than what they say here, where you have -- sorry -- the question was:

"... seeks to recover its costs in its annual or other regular budgeting."

That reflects economic reality.

My learned friends refer to some of their clients who are universities, who are local authorities, where the same -- I don't know what the economic reality is there. In a sense this is not about those economic outliers, if I may put it that way.

There may be a different economic reality and the law may require a different response. But where you are just dealing with your run of the mill merchants who fall into that description, then it is *res ipsa loquitur*, as far as the proximate cause is concerned.

Factual causation is completely different, another challenge entirely.

MR JUSTICE MARCUS SMITH: I think what you are saying is one is not even talking about a misalignment between law and economics at the second stage, because if you talk to an economist about pass on of costs, they will say the general position is you will seek to recover your costs. But every economist will recognise that there are circumstances in which that cannot be done, and it may be because of the market in which you sit, or it may be because of the nature of the organisation that you are, local authority versus a proper merchant retailer. But these are all matters which are departures from the general case and which slot into the second stage.

MR RABINOWITZ: Precisely.

MR JUSTICE MARCUS SMITH: There isn't any tension between the two. All one is doing is saying the battleground is at the second stage, because the first stage has a general principle, which is, the economist would say and you are

saying, straightforward.

MR RABINOWITZ: It is sufficiently closely related. There is a sufficient link. That would be so whether the MSCs are in the cost stock or out of the cost stock. You could be reacting to competitor pricing. It is in the very nature of a business actually that when you incur costs, what you want to do is to recover those costs through a price. Again, it doesn't give you the answer to whether there is a pass on or not, but the burden, in my respectful submission, is going to be on factual causation. In my submission, that is where it should be.

The reason I say that is where it should be goes back to the compensatory principle point, which is the sound basis for the introduction of the doctrine of pass on. What you do not want to have is a situation in which it is absolutely obvious that costs have been passed on, because, by the very nature of that business, it receives an overcharge. That's factored into the price, whether knowingly or not. It just knows that its prices are whatever they are. It passes it on by higher prices to consumers. So the consumers bear the costs. It is clear to anyone, not just the economists. The man in the street knows that when costs of supply go up for a shop, the shop's prices are going to go up, so that he or she is bearing the burden of that.

It would not give effect to the compensatory principle to allow a claimant, who quite obviously, as a matter of fact, factual causation, passed on the costs, notwithstanding that, to have a claim for that loss. How does that reflect the compensatory principle? I think Mr Tidswell made that point to my learned friend yesterday. If you land up in a situation where the legal test confounds reality -- I am not talking about economic reality, because that gets you into theories, but just the reality of the person on the Clapham omnibus, again the

law has gone wrong. That's not the object of the rules relating to pass on.

We know that because the Supreme Court has said that. It has said one of the reasons why you need a pass on principle is to reflect the compensatory principle.

So a test which says: "Oh, no, no, you have to find someone specifically having in mind these tiny costs and specifically and expressly", as it is said, saying we are going to pass on that cost to our customers, that's going to produce a result which is completely out of sync with, in a sense fairness, because we know the loss has actually been avoided, but on my learned friend's case her clients would still have a claim.

That brings us to how does the second sound reason apply? If we are all together here and Ms Wakefield is here, and my learned friends have a claim, because they can say in the circumstances everyone knows the cost has been passed on, you can't point to some person specifically having in mind the MSC and specifically and expressly deciding to pass it on, the consumers get nothing. Again, that is not fair. There is only one loss there. Apparently, if the person is allowed to claim for it, when someone else has not suffered it. That cannot be right. But if you introduce into the proximate causation stage the kind of technical, limited, narrow approach for which my learned friend urges, that is what is going to happen.

It is not just in this case. It is in every case where you have, as the Supreme Court recognised you would have, chains of claims.

MR TIDSWELL: With the competitor setting prices, if you genuinely -- maybe this is going to be a very small core of people, if any -- but if you have a business which sets prices only by reference to what its competitors do, and you are saying I think that if the competitors have been through a different exercise of

setting their price, in accordance with their costs, then you are more or less in the same situation --

MR RABINOWITZ: Precisely.

MR TIDSWELL: -- just in terms of the economic reality argument, is that because you are saying it is an indirect effect of incorporating the costs? Is that what you are saying?

MR RABINOWITZ: Exactly. I know my competitor. Since my competitor is bigger than me and more sophisticated than me, it looks at costs and it decides what it is going to do in terms of price, price up, price down, because it is keeping a careful account of costs. I don't because he/she is bigger than me. I am just going to react to whatever they do with their price. If their price is affected by costs and gets reduced or raised, and I follow them, then indirectly that's also because of that cost, which is how you put it. It is an indirect effect of that, taking into account that cost indirectly.

MR JUSTICE MARCUS SMITH: There are always going to be idiosyncratic hotheads. There are industries, for instance, where you can to an extent ignore your costs, because they accrue in the future. I mean, insurance is an excellent example of that. But for the regulation of insurers, you can quite easily undercut your competitors' premiums by simply saying that the losses that you would anticipate you will worry about another day. That is pernicious, but to the extent one has an industry that can do that, you have a disjuncture between price and cost that would obviously be explicable by the economist but would not be part of the economist's general case.

MR RABINOWITZ: I will accept that. That's another way of illustrating the point. There will be subsectors of some industries where what I am saying -- in a sense it always reflects economic reality. My Lord has given the example

where it is the economic reality that where I set my prices or set my premiums has nothing to do with what competitors are doing. It has nothing to do with price. That would not fall -- I don't know how in that case you would decide on proximate causation. It may be that an increase in price -- an overcharge would not give rise to proximate causation, because it literally has nothing to do with it. It is not in the nature of that kind of business.

Again, going back to the examples my learned friends give of the outlier claims, and I don't use that term in any derogatory way, but the bulk of the claims are merchant claims, of the university, the local council, again, that might be different and I accept that might be different. We just don't know enough about those. But you do know about merchants and how merchants operate.

MR JUSTICE MARCUS SMITH: What is the point of the two-stage test? Why do we have it? Why do we not go straight to factual causation?

MR RABINOWITZ: Well, take *Fulton Shipping*.

MR JUSTICE MARCUS SMITH: Yes.

MR RABINOWITZ: Where you do have an avoided loss, and it is definitely factually related, and it is fair to say that, but for the breach, that recovery wouldn't have been made. The law has to have a mechanism of saying that is not a relevant benefit, or the link is not sufficiently close. It is not a value judgment. It is just like duty of care. Where does it arise? Where doesn't it arise? It is the ability of the law to be able to say "I am sorry, you are not going to be able to pull that into account as a way of adducing what you are liable for".

It is a little bit like gratuitous payment. *Allianz* is a case where proximate cause really did matter. *Fulton Shipping* is another case where proximate cause really did matter. So it filters out those cases where on a "but for" or

counterfactual analysis you would suggest that there is an avoided loss.

MR TIDSWELL: Quite a number of those cases deal with the interventions of third parties. You could, I suppose, argue that the price has been set by a third party here. That's the reference point for the merchant setting the price is the act of a third party.

MR RABINOWITZ: Well, it is so closely related. So the merchant is setting a price, but I am not sure the merchant is a third party, because the merchant is in a sense the second party. Ignore for this point the acquirers. It is the Claimant and the Defendant. The Claimant has received an overcharge and the Claimant is setting its price.

MR TIDSWELL: I am talking about a situation where you have a merchant who sets his price by reference to another entity's strategy.

MR RABINOWITZ: But it is still setting its price in a way where there is a sufficiently close link. It is slightly less close, but it is sufficiently close. It is setting its price by reference to competitors --

MR TIDSWELL: Because the competitors are subject to the same inflated price at which the merchant sets its charge.

MR RABINOWITZ: Exactly. Another way of looking at it is to ask whether this is the right sort of benefit. I think *Fulton Shipping* is one authority where it says it is not about that kind of benefit. It is about the relationship between the benefit and the costs, and that may be a way in which you describe the gratuitous payment. The law just says that relationship is not such. In those cases it is all about do you think it is sufficient. Do you think it's a sufficient link?

MR JUSTICE MARCUS SMITH: I think what you are saying, though, is that the two stages are getting at really quite different things. In a sense, the first question, and the reason it is first is it is either putting into play or putting out

of play certain factors, and it is describing the areas in which one actually requires the receipt of granular and specific evidence.

So one could hesitate to say it's a policy question, but it's a policy question.

MR RABINOWITZ: It is a policy question.

MR JUSTICE MARCUS SMITH: That's why it is operating at an altogether broader level than the factual premise. You have articulated, you know, the gratuitous assistance question, the insurance question. I think it also arises in personal injury cases when one has private healthcare versus national healthcare, and what one can recover there. It crops up in all sorts of places. What you are doing is saying: "Look, in an insurance case, I am not interested as a court in receiving evidence about the insurance payment that was received, not because the insurance payment is somehow in debate or the terms of the policy are somehow in argument." We don't go there because we are not interested in that kind of compensation, even though it has held your victim harmless to an extent.

MR RABINOWITZ: Yes.

MR JUSTICE MARCUS SMITH: This is a reiteration of the question I put earlier. Here we are in a market economy. What the economists tell us about the market economy is that, in order to stay in business, you have got to recover your costs, and that's what happens. All we are talking about at the first stage is whether one ought to consider whether the (inaudible) response ought to be different according to whether it is (i), (ii), (iii) (iv) in the four responses articulated by the Supreme Court. You mentioned yesterday maybe when one has got a squeeze on employee rates, one ought to have a different response, as a matter of policy, to the situation where one is simply increasing one's prices and recovering from the (inaudible). I don't want us to get into

the specifics of that. We may have to later on down the line, but that is the sort of question one is articulating.

MR RABINOWITZ: In my respectful submission, yes.

MR JUSTICE MARCUS SMITH: You push therefore the exceptions to the case, the points Mr Tidswell is articulating about "What happens if I am watching someone else's price? Is that a cost-based response to pricing?" You push that down to the factual enquiry and say maybe in this case he didn't. But because the overall framework is a market economy, that's why you put it into the second stage.

MR RABINOWITZ: That would have been a better answer to your point. In a sense, if there is a difference, it is going to emerge at the second stage.

MR JUSTICE MARCUS SMITH: If we were, for instance, in a command economy, the whole question would be different, because you would be recognising that cost and price might bear no necessary relation, and maybe if one had a series of claims that were entirely in a highly regulated industry, where price was controlled by all kinds of rules that were not necessarily related to cost, then you might have to say: "Well, I am afraid the economists' general rule, whilst a general rule, doesn't pertain here".

MR RABINOWITZ: Exactly. In my respectful submission, that is what the Supreme Court -- let me take it slightly differently. As soon as you identify the fact that pass on is required by the principle of compensatory loss, you are almost compelled to an approach which is an economic reality approach. Effectively, all one is saying in economic reality is: You didn't suffer that loss. We all know you didn't suffer that loss.

So the legal proximate filter, it doesn't have a big job to do in a merchant situation. It will in other situations. The big job, as the Supreme Court actually said, is the

factual question. That's expressly what they said and that is why.

MR TIDSWELL: It is a (inaudible).

MR RABINOWITZ: It is obvious. It is obvious this is the right sort of sufficient link. To be very clear again -- sorry. I keep using that expression. I was listening to Steve McManaman commentating on football. Very clear and very true.

I just need to deal with certain straw man arguments which the Claimants make in their submissions, para 35, that it is Visa's case that the effect of what was said by the Supreme Court in *Sainsbury's* is that the merchant claims are to be denied simply because a defendant can show that the merchant was profitable and therefore implicitly recovered all of its costs.

Now, in our submission, that is simply wrong, and we say this at paragraph 17 of our skeleton argument. It is no part of our submission that it is enough for Visa simply to show that the merchant was profitable and therefore simply recovered all of its costs. Nor for that matter is it a fair or accurate representation of Visa's approach that it entails, as the HK Claimants suggest -- this is also paragraph 35 of their written submissions -- that there could never be any recovery by a profitable business.

With respect, there is simply no connection between the business being profitable and what we are saying.

If what my learned friend was saying was true, businesses are profitable or loss-making for lots of reasons. They usually have to do -- it always has to do with not making as much revenue as your costs. You may not make a lot of revenue, because no-one wants your products. You may make a loss because no-one wants your product. You may make a big profit for reasons having nothing to do with whether your cost-base goes up a little bit, but just because people love your products and they are willing to buy it,

notwithstanding your mark-up is huge.

On my learned friend's logic, our analysis would not work for a loss-making company, but, with respect, the one has nothing to do with the other. A company can be loss-making and still have passed on its costs. There is simply no connection at all between the two.

By way of dealing with a different straw man point made by the Claimant -- this is at paragraph 31, page 69 of volume 1, tab 7, they also say:

"Contrary to Visa's plea ..."

This is their language, paragraph 31:

"Contrary to Visa's plea, the question of proximate causation is not a question of what would have happened in the counterfactual. Pass on is a form of mitigation and, as the Supreme Court has made clear, the existence of pass on is to be resolved in accordance with long established tortious principles: it is a factual question involving the analysis of what, in fact, the Claimants did in response to the imposition of unlawful MIF."

Now that's their language, not mine. Just responding to that a little bit, because in a sense some part of that I would probably agree with -- it is a factual question -- we have never alleged that the question of proximate causation is a question of what would have happened in the counterfactual. What would have happened in the counterfactual is a question of causation, but it is factual causation.

Our case is proximate causation is a legal question. It depends on the facts, but it is a characterisation or categorisation of facts, as a matter of law. Does the law recognise it as sufficiently close, of a relevant type?

I have dealt with the reasons why our approach better reflects the sound reasons that the Supreme Court had for saying pass on should be part of English law.

I will really be focused on the compensatory principle, but I think the court will have my point as to why it is also relevant for the other sound reason, the possibility of additional claims, because otherwise you get a party who has not suffered the loss claiming loss it has avoided at the expense of another party who has suffered a loss, where, because the first claimant says, “even though, as a matter of fact I avoided the loss I can rely on legal causation to stop you bringing that into account, and that's to the detriment of another party.”

That's again completely contrary to what the Supreme Court had in mind could happen.

The last of the reasons why we say -- I have not really gone through them and numbered them -- why the Claimants' legal threshold point is wrong is because it produces results that are wholly illogical and unsupportable. As to this, the Tribunal will have seen that this is a point made in some of the skeleton arguments. I have in mind particularly the Mastercard skeleton. For the Tribunal's note that's at paragraph 17 and following of their skeleton argument, internal page 5. I don't intend to steal the thunder of my learned friend, because I am sure he will enjoy developing those points, but we respectfully in advance adopt -- I'd better be careful -- subject to what he says, adopt and support the points that he makes about illogicality, because in our respectful submission there is an illogicality in the Claimants' position.

We respectfully submit that there is no basis for the Claimants' submission as to what is required by legal and proximate causation, and indeed that the answer is as simple as a single line in the Supreme Court judgment. The fact that it is a single line doesn't mean it is wrong. It is a single line because it is straightforward and, in my respectful submission, it is a *res ipsa loquitur* point.

Subject to the Tribunal, that's all I was going to say about the legal threshold point.

Can I then deal with the approach to be taken in the present case to dealing with pass on? I am going to deal with this lightly, in accordance with the indication the Tribunal gave.

On this the Tribunal has seen, first, the expert report produced by Mr Holt, volume 1, tab 14, page 165. Our written submissions, in particular at paragraphs 43 and following, bundle 1, tab 9, page 103. We also address this issue in our skeleton argument at paragraph 20 and following, bundle 1, tab 3, internal page 11.

The Tribunal will have seen that what we respectfully put forward as our approach is one that involves a data driven approach, using existing studies of pass on, for example, in the academic economics literature and a new analysis of public and claimant data, considered in light of the relevant economic theory, to estimate a series of sector pass on rates.

We propose that those estimated pass on rates might then be combined to produce the economy-wide rate that is required for the exemption analysis. That's a point we explain at paragraph 39 of our written submissions. Those sector-wide pass on rates will also be capable of being used to produce prima facie quantum pass on rates for each claimant operating in the relevant area.

On Visa's approach, and in terms of identifying the quantum of pass on, Visa suggests that if any party contends that a particular claimant passed on its loss at a materially different rate than the sector average, then the Tribunal could conduct a short trial of that issue.

I need to say a little bit more about that, because the way Ms Smith presented that is what we anticipate is many, many, many dozens of mini trials. With respect, that is to misunderstand or misinterpret what we are saying. We are saying

that one can, by use of existing data, identify sector rates or pass on rates which are likely to be applicable to particular sectors, having regard to the amount of competition in those sectors and the like, but it is possible once you do that -- let's assume that the economist decides in relation to a particular sector that the pass on rate is high, because what matters for pass on rates includes something about how competitive the sector is. Some claimant says: "You have treated me as within the sector, but there is a subsector within that sector where it is not competitive at all. So my particular position is entirely out of line with the general generic conclusion or the facts giving rise to the general generic conclusion, such that I am just outside of that generic approach. Not that my specific facts are different, but my specific circumstances are so different as to make that simply inapplicable".

That would be very much the exception rather than the rule. So we don't anticipate that there will be any number of these standalone one to two day trials. Of course, the Tribunal will have the ability to say: "Your position is not that different and it is actually an abuse for you to say that you are in a different situation, because you are broadly covered by this broad axe", and all of that.

We don't anticipate there will be any number of these trials. We anticipate it is a mechanism to allow someone who is truly out of step with the sector to say: "I am not in line with the sector. You need to look at my circumstances specifically and differently".

MR JUSTICE MARCUS SMITH: I want to make clear that I am articulating this question on the assumption that we agree with your formulation of the proximate cause stage, in other words, that it is *res ipsa loquitur* or costs are passed on axiomatically, however you want to put it. But if you are wrong on that, then one obviously has to move to --

MR RABINOWITZ: I accept that.

MR JUSTICE MARCUS SMITH: Assuming we are with you, that makes the parsing of these issues through expert analysis broad-brush possible, subject to the *Lloyd v Google* point that we will be no doubt addressing.

The question is how far the Tribunal ought, if we agree with you, to lay down with granularity the process by which the economists should go about their business. One can see that different experts might very well take different approaches to the broad-brush picture. You say a sectoral approach. It may be there is a different way of parsing the market which would commend itself to a different economist.

Equally, there are likely to be outliers or exceptional cases that it would be helpful to articulate or identify well in advance of the experts doing a great deal of work.

Would it be helpful if we were to follow your submissions to say the way in which we are going to try these matters is on the basis that there is a presumption that costs are passed on, whether it be by a *res ipsa loquitur* mechanism, or this is just what happens in this market, subject to exceptions, to say what you have to work out is how you are going to establish the factual causation side; in other words, how far the general case is as a matter of fact true, and as part of that process, taking a leaf out of Mastercard's book, say that we would want a question or questionnaire sent to persons in the retailer market to say: "Look, if you say you are different, that you don't pass on your costs, then stand up, be counted, but give us the reason", in other words, to feed that in early so one has a sense of the sort of points that the economists ought to be thinking of, so when we get to column 4, I think, in our list of issues, where with granularity one is saying "here is how we are going to prove this at trial", one has a sense of the terrain.

There will be no question of trying these exceptional cases. It would just be a question of identifying them so they could be taken into account, because it may be that a number of points are just bad, and the economists will say "My theory will be able to deal with it". It may be there are a number of points that are incapable of being answered in that way, where one would need to think about different points of evidence which might be sector-specific or even retailer-specific, in order to achieve the right outcome.

One does not know, but the question is, is there a process by which one could flush this sort of thing out?

MR RABINOWITZ: In my respectful submission, again, we would respectfully adopt and endorse what your Lordship just said. Can I just explain where we are coming from?

MR JUSTICE MARCUS SMITH: Of course.

MR RABINOWITZ: I am not going to go into more detail about the proposal, because you have seen Mr Holt's proposal and the sort of things he wants to look. Mr Falcon has said: "I don't accept that that produces the necessary correlative effect." I don't want to use correlative differently from causation because everyone will shout at me. That is a debate we can have at trial. This is just an identification of the fact that there is a lot of material out there which shows, in particular sectors, there is a pass on and it's a methodology which has been used by the European Commission apparently to produce pass on rate for sectors, and we think it can be done and can be done in a way which allows the Tribunal to proceed by reference to generic issues, that's to say issues which are capable of affecting sector-wide claimants rather than having to try every single person differently, which is unmanageable.

You talked yesterday about how many witnesses there are going to be. At least 83. They are going to be cross-examined. Possibly more. There is no binding effect here, with respect to what Ms Smith says, although she says her clients agree to be bound.

Let's take an example. Let's say in the automotive industry there are four claimants who are going to have to give witnesses, who are going to be identified as samples, and you get evidence from four of them. For two you decide there is pass on and for two you decide there is not pass on. Which ones are Ms Smith's clients agreeing to be bound by? The two that succeeded or the two that failed. There is no reason to think they are all going to land up in the same way, particularly if my learned friend is right about what you need to look at, i.e. who expressly considered and who didn't expressly consider. It is not a mystery how it is going to work. It is a muddle. With respect, it will not work.

So we have tried to come up with an approach which is proportionate, which adopts a broad axe approach to these things, which is imperfect. We accept it has its imperfections. But as Maurice Chevalier said -- you probably know this one -- when he turned 90, he was asked by an interviewer how it felt to have reached the age of 90. His answer was "It's better than the alternative". It is very nice to be 90. I am not saying it is a bad thing. It is not perfect. But, with respect, it is better than the alternatives. It is proportionate. It enables the Tribunal to deal with these things in an expeditious and appropriate manner. It will get as close to the result as is required for fairness.

Beyond that, we don't have a fixed idea. Mastercard have this idea of having a thousand -- whatever it is, a questionnaire. If that enables one to fine tune a sectoral analysis, in our submission, it is a very good idea, as long as it

doesn't become disproportionate.

It is difficult to see how else one is going to gather the sort of evidence that you need to ensure a sense that justice is done and that the right approach is taken for people, and working out which sector they are in, who falls within the generic area and who doesn't.

We have not come here with an approach which says there is no part of our scheme or our suggestion that can be improved. On the contrary, it is a proposal which we say can work. The more one fine tunes it, the better it will work, having regard to trying to balance proportionality against precision, because that's where you get.

In our respectful submission, the suggestion that is made by the Tribunal about adopting some parts of Mastercard's approach is a good idea.

Just to be very clear, we do not say there will be no need for any disclosure whatsoever. We accept and the economists have made clear that there will be areas where they do require limited disclosure, but it will not be (inaudible) disclosure. It will be targeted disclosure. It will be disclosure intended to feed into a process which enables a generic approach to be taken so as to produce sector-wide pass on rates, but allows for the possibility for someone to say -- maybe we identify that in advance if we use the Mastercard approach: "I am not within that category. This cannot apply to me, for reasons identified in my questionnaire".

In a sense, it is the only way in which you are going to get a result which has any bindingness, to use the expression Ms Smith uses, because we know, with respect to what the Claimants have said -- in our submission what the Claimants have said about bindingness does not work. *Ashmore* doesn't work. *Ashmore* of course is not a case about bindingness. It is a case about

abuse of process, where you go through a process, you elect not to be part of the sample. Your facts are identical and then you say: "I want my case heard". The Tribunal says: "What is the point? Your facts are identical. You are not bound, but it is an abuse of process".

On Ms Smith's analysis, if she is right about the law, no-one will be bound, because every case depends on its own facts. With respect, it is a recipe for chaos. There is no bindingness there.

In our approach, where you are producing generic-wide, sector-wide pass on rates, it will certainly bind the parties to this process. Would it bind anyone who is not part of this process? No. But it will be pretty persuasive, in terms of identifying a rate which is going to be applicable even to people who were not part of this substantial process.

I could spend more time developing Mr Holt's analysis, but you have read it. I am not sure you are assisted by me going into the detail. That's really what we say the advantages are. We don't say it is perfect. We don't say it can't be improved upon. It is an attempt to enable this court not to be slumped by having to deal with this for the next ten years, which has to be a good thing.

It is an unusual thing for a defendant to say we would rather this was dealt with not in the next ten years. In our respectful submission, it is the only way in which this can sensibly be taken forward.

Subject to the Tribunal giving me a chance just to be able to answer the point that the Chair raised with me about the Claimants' position and why there hasn't been a collective action, I think subject to just checking behind me, that was all I was going to say. This may be a convenient moment.

MR JUSTICE MARCUS SMITH: Would it be worth taking our mid-morning break? I will rise until 11.45 and resume then.

MR RABINOWITZ: Thank you very much.

(Short break)

MR RABINOWITZ: Just addressing my Lord's *Google* point, and why the Claimants have brought individual claims and whether that cuts across anything we are proposing, just to put this into context, the Tribunal will appreciate these are standalone claims, in the sense they don't follow from any determination by the European Commission or anyone else. They include claims in respect of the period pre-2015. In terms of a claim in the CAT for collective proceedings under rule 119 they could not do that. A different question, of course, is the *Google v Lloyd* point.

So far as concerns a representative claim, as per *Lloyd v Google*, under CPR 19.6, that of course would have enabled a claimant to bring a claim in respect of loss which could be established, since it is a common loss, identifying a common loss in respect of a number of people. For example, they all paid the same fixed fee. They all lost exactly the same thing, in respect of a data breach.

In our respectful submission, this is not a claim which has any *Lloyd v Google* point. The Claimants -- I think my Lord put this to me -- the Claimants are all claiming for individuated loss. Nothing we are doing or suggesting undermines the fact that they are claiming for individuated losses. We accept they are claims for individuated losses, and they will have to be dealt with ultimately by reference to each claim for an individuated loss.

All that we are proposing is that the way in which one goes about proving the individuated loss might be done not in a representative way but by reference to generic points. I hope that assists.

MR JUSTICE MARCUS SMITH: Yes. I think what you are saying is that even

though they are individuated claims, a generic approach is an appropriate way of resolving those individuated claims, and the fact that one wasn't hearing from each and every claimant might not even be the most efficient way of dealing with it – certainly not the most efficient way of dealing it with it. It is not even necessarily the best way of dealing with it, given the nature of the question we are talking about. Of course, that's what's in debate. There will not be any issue of saying you have not made good your case simply because you are relying on various economists --

MR RABINOWITZ: Indeed.

MR JUSTICE MARCUS SMITH: -- to make this good, if that's what happens.

MR RABINOWITZ: Indeed, because also, once one gets down to counterfactual analysis, one in a sense is looking within sectors at individuated cases. They are going to have to prove their claim by reference ultimately -- the pass on rate is going to be applied, but ultimately there is going to have to be some data from them, in order to determine what their loss is. In that sense, the claims which are individuated will be dealt with on an individual basis. It is simply how you prove the pass on rate that you apply.

Unless I can assist the Tribunal further, those are our submissions.

MR JUSTICE MARCUS SMITH: No. I am very grateful, Mr Rabinowitz. Thank you. Mr Cook.

MR COOK: Certainly. Give me a moment just to arrange myself.

Submissions by MR COOK

MR COOK: Thank you, sir. I am going to start with a few comments about the role of pass on in this litigation. We are here today because at the last CMC Ms Smith raised the fact that there's a standalone legal dispute, as she put it,

about pass on, which she said the Tribunal should determine at an early stage in the proceedings. We obviously now know that's the proximate causation issue. I will come back to address you on that, although Mr Rabinowitz has stolen a lot of my thunder this morning already.

I make no criticism of Ms Smith's suggestion that this issue should be resolved now. It is clearly a sensible issue to get out of the way immediately.

What it does mean, sir, is to some extent that we are focusing on the issue of pass on in a way which is completely out of step with the logical order in these proceedings, and in a way which gives undue importance to this single issue and what is an issue which is going to be very late in the proceedings in the logical step. Pass on is going to be effectively almost the last issue. One gets interest at the end. This is close enough the last issue in the proceedings. It is an issue which either won't arise at all, potentially, or if multiple earlier issues are determined in a way that's favourable to the schemes, or it may arise in a way which is rather different, or at least the evidential arguments will be rather different, because, depending on where we get to on exemptible level, etc, we may be talking about a different size of cost, a cost that arises in relation to certain types of transactions only, for example, or with other factors involved.

I do need to unpack this a little bit, because it is going to be important in terms of understanding some of the distinctions between this case and Merricks as well, in terms of the joint case management suggestion. I can do this by reference to the list of issues in the merchant claims, which if you would like to turn up, it is at tab 6 in the bundle. The list of issues has grown into something of a beast, and I'm not necessarily going to all of the sub-issues under each heading, but it is a useful way of effectively showing these are

common ground matters. So that's tab 6.

MR JUSTICE MARCUS SMITH: Yes.

MR COOK: Issue 1, relevant market. I will not worry about this too much for present purposes. Issue 2 is a point about Visa and Visa's argument about relevant agreement or concerted practice, association of undertakings, which is a short point the Court of Appeal will or may determine.

Turning then to the meat of the issues. The first one we come to starts at issue 3, and that's restriction of competition, which includes within it also issues of ancillary restraint or objective necessity. There are, in fact, I think sort of eight or nine of these, which reflect the number of individual claims that are brought in the merchant claims.

Issue 3 concerns UK, Irish and EEA consumer MIFs in the post IFR period, so that's post-2015. Issue 4 is inter-regional MIFs. Issue 5, commercial MIFs. Issue 6, multiple domestic MIFs in multiple countries, other than the UK and Ireland.

Issue 7 I can skip over. That's another point about Visa's culpability.

Issue 8, then we get into a series of claims in relation to specific scheme rules. Issue 8 is the cross-border acquiring rule.

Issue 9, honour all cards rule.

Issue 10, non-discrimination rule.

Issue 11, surcharging.

Issue 12, co-branding.

So that's the multiple, separate allegations breach of Article 101 that we are dealing with in this case.

There, of course, remain substantial disputes about every single one of these. Some of those are going on appeal to the Court of Appeal, which may resolve them or simply say those are matters for trial. The majority of them are not going to

the Court of Appeal, so they will definitely need to be resolved.

I need not take you to them, but a number of those same claims are then repackaged as Article 102 claims and that is issues 17, 18, 19 and 20 in the list of issues.

The second set of issues then concerns exemption of the actual MIFs and the rules at issue. That's issue 14.

Then exemptibility, which is the idea that the actual MIF may not be exempt but some different lower rate, some different rule might have been exempt.

That certainly raises the possibility that the rates as set may be lawful -- we would say they are -- or a possibility they were at least close to the lawful level, so any (inaudible) charges is limited. That's particularly relevant to the post- IFR period, where rates were much lower. Pre-IFR credit card MIFs were more at the level of 1% for consumer cards. The cap was 0.3%. So there was a 70% reduction around that time period.

Again, that gives us much lower rates, correspondingly easier to justify, to show they were exempt or close to the exemptible level.

The next issue is issue 22, which is the extent of the overcharge, and that includes within it the issue of acquirer pass-through.

Sir, you made the point yesterday that the addition of acquirer pass-through is a disputed issue, with a significant shift from *Sainsbury's* and that's factually completely right.

The shift arises because Sainsbury's, being I think the second largest merchant in the UK, was on what was described as an interchange plus-plus contract. That meant that acquirer pass on was mechanical and automatic. Simply, whatever the MIF was, then that was passed through in the MSC plus a little bit, plus a little bit, with the plus being scheme fees and the other plus being

an agreed margin.

It also meant, being one of the largest merchants in the UK, that the MSC and the MIF were very, very close, and the figure normally quoted is that the MIF was about 90% of the MSC. One sees that in the Supreme Court judgment.

The position is factually we think very different in this case. Again, this is one of the points on which we are going to need individual claimant information. The Claimants have never jumped up and said our assumptions are fundamentally wrong here. But what one would expect for these slightly smaller merchants, with the exception perhaps of the Co-Operative supermarket, I think all of the other Claimants are significantly smaller than the sort of big merchants who were litigating in the first wave of these claims. We would expect that the majority of them will have blended MSCs, blended rates, and that will mean that one or a small number of MSCs were agreed with their merchant acquirer, which will be payable regardless of the nature of the transaction.

Sir, you asked yesterday about the structure of these MSCs. We address that at paragraph 34 of our first set of submissions. that's in bundle 1, tab 11, page 127. If we could briefly go to that, sir. You asked the parties to agree this, but I suspect what we have done is take the information from the payment systems regulator's report, which is likely to be the most authoritative.

It is bundle 1, tab 11, which is our first set of submissions, and it is paragraph 34 where we deal with these points.

Just to show some of the differentials, paragraph 34(a), over 95% of merchants and 98% of small and medium sized merchants paid MSCs, effectively the blended MSC, though we see in sub-paragraph (b) that the PSR has a different description. It uses the term "standard pricing", but one gets MSCs

which are not simply linked to costs in any form of automatic way.

Sub-paragraph (c), the other big differential, is MSCs on standard pricing are generally very far in excess of the underlying MIFs. We give an example there. The typical MSC for one group of merchants was 1.8%, even at a point when the capped MIFs were at 0.3% for credit and 0.2% for debit, and had been for several years. We are not talking about the MIF being almost identical with the MSC as you get with a giant merchant like Sainsbury's. There is a great deal more built into these numbers.

Sub-paragraph (d) deals with sort of the distinction of the different kinds of acquirers available and deals with their acquiring practices and particularly how they charge. Some will have an MSC for debit cards, all debit cards. Some will have an MSC for credit cards. The historical distinction behind that was classically that all debit cards in the UK were fixed fee, whereas all credit cards in the UK were *ad valorem* fees, which is related to the classic point that pubs did not like using your debit card because they would be charged 15p, even if you bought a 50p Mars Bar, which is why people have minimum spends, which meant debit cards were very expensive for small transactions, very cheap for big ones. Credit cards were the other way around, effectively cost nothing almost for buying a Mars Bar, but if you bought a car with one that did cost a lot of money. That was the classic difference in those kinds of rates.

Some have differential MSCs based on one MSC for Mastercard, one for Visa, some by the type of transaction, card present or online. Again, classically different MIFs apply to those, but certainly different risks and costs involved in relation to that.

Essentially, there are a variety of different ways of setting these kind of blended MIFs

that exist out there.

I think that's probably the best authoritative source of the range that exists. Beyond that it would simply be sort of specific examples the Claimants could give of their own practices, which is only a sub-set, and Mastercard has no direct visibility of the deals done by acquirers with merchants. So the PSR report is the best independent source I think we can identify for these purposes, at least at this stage.

If we turn back to the list of issues at tab 6, issue 23, which is a Mastercard issue. That raises the possibility of changes to the scheme rules. So rather, for example, than having a default rule, the required issue was to pay, even for fraudulent transactions. That was on the basis that acquirers contributed to those costs through the interchange fee, and simply have a default rule that says issuers only have to pay for legitimate transactions by their cardholders. There is no logical reason to go for one rule rather than the other. But that, of course, changes the allocation of costs.

Similarly, with cardholder default. Similarly with timing of payment. Amex has always had a longer payment schedule than Mastercard, for example. That again is a factor that can change the allocation of costs to acquirers. You have an issue of how those costs are passed on to merchants. That may offset some or all of any MIF reduction.

Issue 24 is switching to other payment methods, in particular, from our perspective, Amex, being one of the major alternatives, which simply meant that if our MIFs were uncompetitive, Amex would soak up the business, and its MSCs are generally higher than Mastercard's have been throughout this period. That was certainly something we say is a very credible possibility, that a large part of the business would have been lost.

Mr Justice Popplewell did consider in detail in the AAM trial the size of the interchange fee differential that influence banks' thinking. His conclusions there were that quite small differentials could be significant enough to lead to large scale switching.

Now that was a point that the Court of Appeal said he shouldn't have asked himself those questions when he did, but I rely on it more as an example of he considered the evidence and on the evidence he did make findings of fact of what would happen if Mastercard was uncompetitive. So I simply point to that.

There is also issue 25 next, which is the Claimants assert that if they had been given freedom under the surcharging rule, for example, that they would have discouraged or refused to accept certain kinds of cards or surcharged them in different ways, which again will impact on the number of transactions they would have had, the volumes of business, etc.

Visa raises a similar kind of issue at issue 26. It is only at issue 28, we come to the question of retailer pass on. That's the order of issues that has been agreed between the parties. It reflects how they logically arise.

You can take points out of the issues as they logically arise, but ultimately if you are looking at what costs were passed on, the first question you have to know is what is the additional cost, because, as you have seen from the expert evidence, there's certainly arguments that are being raised -- at one point we will have to decide if they are good or bad arguments -- about the quantum of cost having an influence on whether it is passed on or not. If we are dealing with a relatively small increase in merchants' costs, because we show certain things are not restrictions or are exempt, or the exemptible level is close, or they are at such a high level of switching that they would have had the same

costs in any event, all these factors might mean we are dealing with much smaller costs than the amount of the claim currently advanced.

Sir, I have gone through that I am afraid in some detail for two reasons. Firstly, it is important not to let ourselves get sucked into looking at pass on as though it is going to be the key issue in those proceedings. We would say that's absolutely not going to be the case. There are a number of logically prior issues which need to be determined.

MR JUSTICE MARCUS SMITH: I don't think, Mr Cook, that need trouble us. I mean, the reason we are here is, for better or worse, we are only going to be able to finalise this list of issues in the course of the coming months, and that's partly because of the appeal to the Court of Appeal.

The reason we're here is because Ms Smith said, and I think said rightly, that there was such a fundamental difference between the parties' understanding of the pass on that one could not sensibly frame the fourth column, even the third column of the list of issues in order to provide a meaningful response, because there is such a divergence in terms of how pass on is understood to be established.

Now, I think she is right about that, and one of the benefits of this proceeding is simply that we are going to be able to say this is how we think you are going to be able to resolve this.

Now, that says nothing about the other issues. But one does need a completed tab 6 in order to work out how the trial or trials are going to run. But what it does give us is a tool for working out how one kaleidoscopes together the various issues so that we have a trial this side of eternity rather than the far side of eternity. It may be that one of the things that we ought to be thinking about today is actually an end date so that we don't have various cottage

industries rowing up about how one can slice complicated issues ever finer, so that we have a process that is simply disproportionate. I see the list of issues as a very important case management tool for us to get a grip on what we try when, because clearly one is going to have economic evidence, across multiple issues, where the same facts are likely to be deployed in respect of those issues, and it would make logical sense to try those together.

You may be right that there is a need to have a certain order not simply in resolving those issues but in trying them. But that is something we would want to have flushed out sooner rather than later.

We absolutely understand that there is more in play than pass on, but we think that it boils down to do we have 83 witnesses or a smaller number of economists, hopefully a lot smaller, is something that it will benefit everyone to have resolved whilst they are framing the further parts of the issues. That's why we are here.

It certainly takes nothing away from your point, that there is more to this case than pass on. Absolutely there is. But we are certainly not proposing that we have a separate trial on each issue. What we want to do, we want to ideally work out how we deal with as many issues as quickly as possible, in a fair and proportionate way. That's all we are debating today.

MR COOK: When I come on to the sampling versus market based approach, that's one of the points I will grapple with, that how you characterise this, sir, which is do we have a trial with 87 witnesses or economists, and I will be saying – to give it away now -- in part, if we resolve a number of issues first, there is a very real chance there will simply not be 87 sample claimants needed by that stage, and I will also be suggesting this may be a situation where it could be done in waves, and frankly a lot of these cases will ultimately settle

long before there being a final judgment from the Tribunal.

It may be simply a question of what is the best way of trying to provide enough information for parties to settle, as opposed to considering now the idea that we are going to have a pass on trial involving a thousand claimants, whether behind the scenes or being sampled at that stage. That is what I will come to in relation to those points, because we respectfully do not think it is realistic to think by the time we get to pass on, unless it is brought up the list dramatically, that we are going to be faced with anything like that number of claimants. As I say, that's what I am going to be coming to in due course. It will be better developed once I get to it, I hope.

That was sort of the first reason for putting that breakdown there. In particular, the point that it does make a difference to the size of the cost, who actually bore it and the consequences of it, which is going to be quite claimant-specific, because a number of those factors are quite claimant-specific, particularly the point about what they may have done, how their business might have been impacted by consumer -- whether they have a high proportion of commercial cards or not, the risk they face from other forms of payment method, depending what industry they are in.

The other point is at this stage, having set out the issues in relation to the merchant claims, just very briefly point to some of the fundamental differences between that litigation and, of course, the consumer claim.

You have had already an insight into some of the distinctions. Just to summarise them briefly, at the risk of flogging the cake idiom to death, the consumer claim is about a completely different cake. That's the essence of where we are faced today.

We start with the temporal point that you are familiar with. The consumer claim

relates, as currently pleaded, exclusively to the period 1992 to 2008. The only live merchant claims go back no further than August 2010. That overstates it a little bit, because actually many of the claims don't go back earlier than 2015 or so.

There has been a back and forth in correspondence about the fact that there are two unserved claims that go back a little bit earlier, potentially go back to December 2007. It is three merchants. They have not been served yet. They are not live claims and even then, would only overlap by six months.

MR JUSTICE MARCUS SMITH: I am in grave danger of thrashing a metaphor to death. I am going to because I hope it will assist you in your submissions. I don't necessarily see this as a one cake case. I see this as a two or more cake case. I appreciate that the cakes will be of different sizes. The presumption I am making however -- I may be right, I may be wrong -- is that the market in which these cakes are baked are broadly speaking similar.

MR COOK: You might have to explain that bit of the metaphor a bit more to me.

MR JUSTICE MARCUS SMITH: I will unpack it. What I mean is this. When one is looking at the operation of pass-through and the nature of the damages that are claimed and where they end up, their location, we attach a high value in terms of consistency. So it may very well be that Ms Wakefield's clients are seeking to have three quarters of the cake for their period and Ms Smith's clients are seeking to have three quarters of the cake in their period. Now, there is no question of over or under compensation per se, because we are talking about different cakes, but it would seem to me that if the markets are broadly speaking operating in the same way, one would expect a consistency of outcome; in other words, the slices of the cake that are allocated to different Claimant groups ought, between the cakes, to be broadly consistent,

unless there is a material difference in the way the markets operated in a temporal way. It is very much Mr Rabinowitz' point. We are concerned with actual over or under compensation, and that must not happen, but we are as concerned with the credibility of the system, that one has a process by which not merely actual over and under compensation is avoided, but that one has a broad consistency of outcome, both because it is just in the individual cases and, for the future, that one has got the mechanisms and tools ensure that there is, so far as possible, a proper outcome that withstands the views of the passenger on the Clapham omnibus.

I frankly don't care that there is a mismatch between period, and I don't care whether there is a mismatch between the retailers involved on the one side and the consumers involved on the other side. The fact remains we need to evolve a system whereby the outcomes are, broadly speaking, comparable, unless there is a material difference in the time-frame. If the market operated differently earlier, and so you can say actually consistency is not relevant because they are different cases, well, that's fine. Equally, I am not concerned about the pass on in trucks and interchange fees, because they are different things. But here we have the form of overcharge that is in broad terms similar. What we are not going to have in this court is the sort of outcome that occurred on the infringement level in the *Sainsbury's* and other cases, because that frankly does our jurisdiction no credit and it does the parties no good, because what they end up with is unpredictability and unsafe results. That's not what is going to happen.

MR COOK: I am very alive to the concern you have and that is very much -- I am planning to address that concern. I do think it is important to very briefly set out what are actually some quite radical differences between these two claims

that feed into the question of how worried you should be about the possibility of different outcomes, because actually different outcomes would be frankly very, very likely, given the time periods in question. I will be saying how the payments market has changed and how radically the retail market has changed over the past 30 years in this country.

MR JUSTICE MARCUS SMITH: All I am saying is we have the Merricks representative here. It seems to me a good thing that that is the case, at least for this particular issue. We have flagged that we are taking the view that an umbrella process may be appropriate, but let me be clear, we will not be adopting that process without hearing from the parties. So I don't think you should take from what we have said about an umbrella process, nor indeed Ms Wakefield's presence here today, that we are going to say, without more, because it is pass on with interchange fees, we are going to hear it altogether. We will want to hear argument about that, but we want to hear I think argument about that in light of a framed list of issues and in light of a similar process by Ms Wakefield's clients and the scheme operators in her case.

To be clear, these claims will be run by this Tribunal. *Prima facie* the Merricks claim will be run by Mr Justice Roth's Tribunal, but we are very alive to the potentiality of achieving a consistent result through hearing two or more cases ordinarily before separate Tribunals before one, but we are not going to make an order today and we are certainly not going to make an order before hearing from the parties. I hope that is helpful.

MR COOK: That's hugely helpful. I can curtail at least part of my submissions which it must be said were drafted on the premise that there was a possibility that the Tribunal would make those kind of decisions today.

MR JUSTICE MARCUS SMITH: No.

MR COOK: If that's the case, it does allow me to take this rather more swiftly.

MR JUSTICE MARCUS SMITH: There is the possibility we will make such orders in the future and we would want the parties to be alive to that, but I don't think we can say just like that we are going to hear pass on together. I mean, frankly, we don't know when pass on is going to be heard, because we haven't actually worked out how we are even going to try these cases. So we need to know far more before we can make any kind of sensitive or sensible decision about that.

MR COOK: That's hugely helpful. We were worried that essentially this was my moment to make those submissions and dissuade you against it. If that's a matter for another day --

MR JUSTICE MARCUS SMITH: Put it this way. If Ms Wakefield wants to persuade us to do something different, we will obviously hear her and then hear you in response. It seems to that us whilst this is a process that is very much on the cards, it is not for today. Ms Wakefield, maybe you can put Mr Cook out of his misery and indicate --

MS WAKEFIELD: In support of the outcome -- of course, I entirely see the need to settle the list of issues in the merchant proceedings. We have not got to a list of issues yet in the collective proceedings. We have a CMC I think coming in September that will do similarly.

My submissions are targeted at seeking to convince you, at least in some kind of preliminary state, to a position where you might see that single joint trial of pass on for which I contend in my skeleton arguments.

MR JUSTICE MARCUS SMITH: I think you are accepting that this is not something that we could make an order on today.

MS WAKEFIELD: I think yesterday you said a very firm push of the rudder --

MR JUSTICE MARCUS SMITH: Yes.

MS WAKEFIELD: I think. So I am asking for that push of the rudder, rather than a final order.

MR JUSTICE MARCUS SMITH: I mean, the push of the rudder is that like issues will be dealt with ideally by a single Tribunal, but I don't see how we can do more than what we said yesterday, given that both the process of trying this case and the process of trying your case are in a state of some uncertainty.

MS WAKEFIELD: Certainly, in terms of the final order, I see that entirely. You may perhaps feel able to say, were the stars to align, that ideally you would hear all of this together. If I could get you to that point, then that would be a happy landing point for my submissions. I do entirely see that you couldn't make a final order at present, because you simply don't know how the two proceedings would mesh together.

MR JUSTICE MARCUS SMITH: No. I mean, the trouble is the alignment of the stars begs a very large number of questions. First of all, it begs the outcome of this hearing.

MS WAKEFIELD: It does.

MR JUSTICE MARCUS SMITH: Secondly, though, it begs the scheduling of both this set of proceedings and the Merricks set of proceedings. If, for example, we came to the conclusion, and I make clear that we will not be coming to this conclusion, but if we were to say that actually things are so complicated that we are only going to be hearing pass on somewhere around 2029, I imagine you would think that that was an outcome that was sufficiently undesirable in terms of timing for you to want to be detached from that.

On the other hand, if one has got a situation where pass on is scheduled in both trials somewhere around mid-2024, then it is I think worth debating. So that's

the push of the rudder that we are going for, but --

MS WAKEFIELD: I do see that, sir, but in a sense this is not the case, is it, if the stars are aligned, even though I use that phraseology, because you are in charge of the stars to a considerable degree. So if I manage to convince you of the enormous benefits which I say would flow from pass on falling at the same time in both sets of proceedings, then that can guide your decision-making and the decision-making of Mr Justice Roth, and we can get that on sooner rather than later.

MR JUSTICE MARCUS SMITH: Well, I am quite anxious to avoid hearing submissions on something that we are actually not going to be able to resolve, and that goes for both you and Mr Cook. I think you can take it that we are going to try to get both trials on as quickly as possible. I think you can also take it that so far as there are common issues, there is going to be liaison between Mr Justice Roth's panel and this panel in terms of efficiently resolving disputes. So if it is doable, and if Mr Cook is wrong and that there is the sort of synergy I agree *prima facie* seems to exist, then we will want to do it together.

I am not sure that it is profitable to debate this question when there are so many unknowns. The fact is one of the unknowns is whether you are right or Mr Cook is right about common issues, but there are I think at least two other major variables which are unknown. One is the outcome of this hearing and the other is how we manage both sets of proceedings going forward. Both of these things are in the process of being articulated, and it seems to me that this is a row, if we are going to have it, that we ought to have later on.

The steer of the rudder is very much if it is possible, i.e. alignment, and if it is sensible, i.e. common issues, we will undoubtedly do it.

MS WAKEFIELD: I see that, sir. Thank you for that. I wonder if it might make sense for me to make my submissions and you can always tell me if I am straying into areas which I shouldn't be straying into, but the reason I say that is because when you are asking yourself the second question, of course I am not familiar with the list of issues and exactly which column is which, but when you are saying should it be 83 witnesses or a couple of experts, one of the things which will inform your decision there, I submit, is whether there is going to be -- my sectoral approach in the same proceedings, because there are enormous benefits if I am there as well and you have that sectoral approach. You have the two cakes next to each other, or the long Swiss roll, or whatever it is, for the same approach to be adopted in the merchant proceedings.

So I do wonder whether you can make that column 4 decision, the how are you going to go about proving pass on, before you have formed a view on whether ideally you would have consistency between the two, either by way of joint trial or perhaps, I suppose, if they are heard separately, but I think one loses an awful lot of the benefits if one hears sectoral approaches differently and separately.

MR JUSTICE MARCUS SMITH: I would be quite reluctant to allow the synergies that you say exist to drive what would be the correct outcome in this case. In other words, if, leaving on one side the Merricks case, we came to the conclusion that a sectoral approach was right for this claim, then we would want to debate the synergies, but I think it would be the wrong approach and I think Ms Smith would have a lot to complain about if we said "Actually, we think the better way of resolving this is to hear the 83 samples, but we are not going to because of the synergies that exist with Merricks". That seems to me to put the cart before the horse.

At the end of the day, we are tasked with resolving individual actions justly, according to our responsibilities in this Tribunal. It is only I think if the synergies are evident in these cases in a self-standing way that we come to your question. In other words, you are here because it seems to us that we ought to have all the stakeholders in the pass on debate present, because we are anxious to ensure that we articulate a form of outcome on the pass on question that takes account of the various levels of claimant that we have, because we are anxious to avoid the sort of situation that I debated with Mr Rabinowitz of having a consistent outcome but not just to one or other group of Claimants.

That's why you are here. I don't think you are here because the configuration of your claim as a collective action almost inevitably means you are going to be expert and sector-led. That I am quite sure is right. But I don't think it should be a factor that ought to influence how we choose to decide the pass on case here. It may very well be the case that we do adopt a course that is similar to yours, but I think the two streams need to be kept separate whilst that case management decision is made, because this is ultimately a case that needs to be resolved properly, in accordance with the issues that arise in it.

Does that answer why I am not particularly interested in hearing from you on this point? I don't want to cut you off, because if you think that there's mileage in articulating why it would be sensible to hear all these things together, then, of course, we will hear you, but I am just not sure that now is the time.

MS WAKEFIELD: I might seek to address you in a much abbreviated form in my submissions in due course, when Mr Cook has had his go, just so I can explain to you why it is that I do say the approach in the collective is relevant, not least because of the credibility issues we have already discussed or you

put to counsel, and it does matter if there is a disjunct between the findings in the merchants, even taken totally separately, chopped off, and what happens in my claim, and I also, of course, am supported in the fact that within the merchants I have Mr Rabinowitz contending for an extremely similar approach to the approach I have. So that's already part of what's on the table in the merchants. So I will seek to address you but in much abbreviated form. I have piles of notes here. Rainforests have been felled. I will shrink them down so I can make my core points to you, if that's acceptable.

MR JUSTICE MARCUS SMITH: All right. Mr Cook, I don't think you need address us further on this point. We will hear Ms Wakefield on the synergies, because it may assist us on what we think are the matters before us, but if you need a response, you will obviously have it.

MR COOK: Sir, I am very grateful for that. It does allow me to spend less time on these points, you know, which is largely turning out to establish how radically different the cake is in multiple respects, not simply temporal and geographic scope of the claims, that it is simply UK and consumer claims, as opposed to commercial and interregional, all those kind of points. That is Mastercard only. It doesn't include Visa, and Visa had the benefit of an exemption decision at the time, so Visa was acting lawfully, which raises issues like switching to Visa, which the CAT has said we can't raise in the merchant claims when Visa is also said potentially to be a bad player, but we can then, because it is acting lawfully.

So these are a whole variety of things that feed into just how disparate the issues are that we say. On the basis of that guidance, sir, then I can move on rapidly from that.

That takes me to the Tribunal's note. You may already be starting to feel that your

suggestions have not been met with universal approval. I am afraid I am going to add to the chorus of dissenting voices to some extent.

I mean, by way of general submissions, sir, we absolutely understand why the Tribunal and you in particular, sir, with your relatively new hat of President of the Tribunal are thinking about pass on issues far more broadly and trying to foresee and forestall potential problems in the future, in particular, as Mr Rabinowitz has said, most of the possibilities you are raising are ones that would require, you know, certainly new rules and probably new primary legislation. One understands why you want to be ready, if a case like that arises, to have the appropriate tools available.

We will be saying, with respect, this is not that case. It is not a case that gives rise to the problems to which the note is directed. Respectfully, in this case, and you have just alluded to it, sir, the Tribunal's sole function is adjudicating on the claims before it. Your role in adjudicating on those claims is to do so in accordance with the compensatory principle, which is ensuring that each Claimant here is compensated for its loss, not that Mastercard is required to disgorge the total harm that it theoretically might have caused.

Unpacking those briefly, but not in perhaps too great detail, I mean, the core of the problem identified in the note is the idea of conflicting claims essentially to the same cake from different stages of the supply chain. You know, we are not in that situation at all.

Insofar as we have got different parties in the supply chain, it is just a different cake and I don't need to unpack that any more than I already have.

What you have, of course, raised, sir, this morning, and you did yesterday as well, is what is a less direct form of conflict, not the two sets of parties fighting for the same cake, but just the man on the Clapham omnibus being concerned about

the Tribunal being inconsistent in answering what are superficially similar questions, in a way that at first sight looks inconsistent. You raise the possibility of the 0% pass on finding in the merchant claims or 100% pass on in consumer claims and vice versa, or whatever it might be, and obviously with very much in mind the spectre of what happened in the first instance decisions, starting with *Sainsbury's v Mastercard* and the three conflicting decisions.

Just a few comments in relation to that. Firstly, one has to bear in mind with these three decisions, and that was one of the first competition damages claims that had come to trial, and a very large proportion of the disagreements between the judges arose from fundamental issues of law about how to approach these things. It is particularly true of the disagreements between Mr Justice Popplewell and Mr Justice Phillips, that there were just very different legal views of how these kinds of cases should be approached.

With respect, once the law is clear, and, of course, a hearing like this goes a long way towards clarifying some of those kind of legal issues in advance, one rather hopes that the scope for profoundly different decisions is radically more limited.

MR JUSTICE MARCUS SMITH: That's the point, isn't it? I mean, the reason the Court of Appeal said that these claims should be steered in the direction of the Tribunal was only the first step to avoiding that sort of inconsistency. Once you have them housed under one roof, you have the ability to, as you say, have hearings like this or to ensure that like issues are heard by the same Tribunal or at least to ensure there is a degree of appropriate liaison between the different Tribunals that are hearing similar cases, much as occurred in the OFT cases, where one had different Tribunals hearing

appeals on similar matters, where obviously they reached their own views, but where it was important that there was a degree of understanding of how these claims were being tried in each individual case.

That's the consequence of having a one roof solution. But the one roof is only the first step, and in a sense this is a second step down that line, and there may be others, the umbrella hearings, being something which we want to actively consider, without at this stage determining. So that's where we are coming from.

MR COOK: I absolutely understand. Given the indication you are making no decision today, there is only so much I am going to trouble you with in terms of trying to persuade you that this is not an appropriate case for an umbrella solution.

The short point I will develop at a later date is going to be, as I have already alluded to, we are talking about periods of time which are radically different, both in terms of the payment market and things that younger people won't remember, things like cheques, postal orders, the days when you filled in paper slips or the merchant would fill in a paper slip for your credit card, which would be carbon copied to put your details on and you would sign it. That's the kind of market one is dealing with in the 1990s. The payment market today of contactless cards, cash dying out in many people's lives, things like that, they are radically different. The same is, with respect, we say true of the retail market.

Obviously, the really big game changing one, and there will be no doubt similar game changing ones in individual specific markets, is the internet and the advent of internet shopping, which simply didn't exist at all really in the period covered by the consumer claims. We can quibble about whether it started to

come in in 2007 or not -- nothing like it is today -- and how that radically altered the extent of competition in retail, because in most circumstances it might be that, you know, you were faced with two or three local suppliers, or you could drive 100 miles to London to go to the shop.

Now, internet shopping, you know, in many cases gives you simply thousands of retailers supplying, you know, competing products in order to choose from. Those are just radical changes, undeniable changes, in what has happened in the retail market.

What I would say in relation to this, sir, is it would not be surprising at all if, faced with what are fundamentally very different questions, that different answers were given. That is not a lack of consistency. It is just those are different questions, based on different evidence. I don't mean that in the sense of, you know, simply parties have put different evidence before the Tribunal. Just evidence will be fundamentally different, as it is looking at something fundamentally different.

I wouldn't say this is a situation where there is that kind of -- there is nothing outrageous -- nothing inherently outrageous about the possibility of different answers, because they are simply being asked completely different questions, when you actually understand the question that's being asked to the Tribunal, even if, very superficially, you think it's a similar point. It is just actually a rather different one.

We say, therefore, you know, the concern about, you know, the superficial concern of the Clapham omnibus man ultimately cannot supersede the actual role of the Tribunal, which is to decide on a compensatory basis. That also leads to what, in effect, again is a fundamental difference between the two claims, it is going to be, which is in the merchant claims the focus is always going to have

to be on the individual loss suffered by an individual merchant, and as already has been alluded to, in the class action claims, inevitably Merricks is going to be trying to look at averages. Just the obvious point. An average, in almost all circumstances, is built up of many people lower, many people higher, and a few people around the average.

The fact that one comes to an average, you know, if it is the case that you then say "I have looked at an individual merchant within that sector, who has something very different from the average". There is nothing inconsistent about that. It is what you would expect, there to be some merchants who are not consistent with the average, because that's the whole point of an average. It reflects lower and higher.

We do say in relation to this that the concern is understandable, but it is not actually a real one that should exercise you too much, just because the nature of the exercise and fundamentally what you are being asked to address will be completely different in due course, and actually a process whereby the Tribunal is trying to create superficial similarity is potentially a problem, because you are going to be forcing yourselves against different questions to try to answer them consistently, when the answers might well be inconsistent superficially.

Sir, like I said, that simply means, when we come to it, we will be suggesting that it is not simply something that's going to be sensible to try and produce one answer which covers a 30-year period. It would be surprising if there was one answer, quite frankly.

So that's in relation by way of general points in relation to the note.

The next point then is the role of the Tribunal. Sir, you have already alluded to it, but I want to take you to a particular paragraph of the Supreme Court in

Sainsbury's. It is a very good formulation -- it is paragraph 242 -- of what the role of the court in making decisions is. That is volume 3, tab 13, paragraph 242. It is a very salutary reminder of what the role is.

"In the adversarial system… the task of the courts is to do justice between the parties in relation to the way in which they have framed and prosecuted their respective cases, rather to carry out some wider inquisitorial function as a searcher after truth… It is fundamental to our adversarial system of justice the parties should clearly identify the issues that arise in the litigation, so that each has the opportunity of responding to the points made by the other. The function of the judge is to adjudicate on those points alone."

Then a quotation from Lord Wilberforce in *Air Canada*:

"In a contest purely between one litigant and another, the task of the court is to do, and to be seen to be doing, justice between the parties. There is no higher or additional duty to ascertain some independent truth. It often happens, from the imperfection of evidence, or the withholding of it, sometimes by the party in whose favour it will tell if presented, that an adjudication has to be made which is not, and is known not to be, the whole truth of the matter,yet, if the decision has been in accordance with the available evidence and with the law, justice will have been fairly done."

That paragraph does sum up the fundamental role of the Tribunal here. You know, the job of the Tribunal is to do justice between the parties in the room and nobody else.

Now, I recognise with your hat as the President of the Tribunal on, sir, that you are concerned, entirely understandably, about wider issues, ensuring the Tribunal has procedural tools available to it to deal with it, where there are different parties fighting over the same cake. We are not that case, my Lord. The role

of this Tribunal then is limited to determining these claims. The benchmark for that is the compensatory principle, the third point.

MR JUSTICE MARCUS SMITH: I agree with all of that, but at the end of the day we can decide who is in the room.

MR COOK: With respect, you can decide who is in the room to a very limited degree, which is you can decide who is in the room based on parties who have commenced proceedings.

MR JUSTICE MARCUS SMITH: Agreed.

MR COOK: And that, sir, is in essence one of the great problems and a number of your proposals fall into it, as you have yourself recognised sir, that actually in most circumstances, when we are dealing with the cake being talked about in the merchant proceedings, there is only one set of Claimants that have brought proceedings in relation to that, and the same in relation to consumer class action, and for the most part we know that those are the only Claimants who can bring claims, because limitation means nobody else can now join. That's true in relation to the merchant claims at least going back six years.

MR JUSTICE MARCUS SMITH: I understand the fund point and the pushback that we are getting on that. You can lay that on one side. (inaudible). What I am getting at is the point you have made in relation to 242, which is, of course, a court has to determine the matters before it on the basis of the evidence it hears. That is fundamentally absolutely right. We are not seekers after truth. We are the resolver of disputes. But it does lie within our power to articulate who, they being parties to a list, are before a court and adducing evidence. There is no bar, as far as I can see it, if it is sensible to do it, that leads to your similar issues point, to have different actions before the court on the same point so that the matter can be resolved in all actions.

Now, whether that is appropriate is a matter that I think we have flagged fairly clearly is not for today, but it is a way of squaring the 242 circle.

It would be outrageous were we to hear the retailer claims here and separately deal with the Merricks claims there, and then say: "Oh, well, because of what was said in the Merricks claims, we are going to read that across and use it to assist resolving the retailer claims". We can't do that unless both groups are before the Tribunal and we are hearing the evidence in both. Now whether that is sensible or not is not for today, but it is something that we ought to have our eye on the ball. Indeed, it underlies the whole fact that we have I don't know how many hundred retail actions, all in the same court room. I mean, no-one is suggesting that we try those separately. Obviously not. The question is whether it is useful to do so in relation to another form of proceedings. All we are saying today is that we are very much open to doing it that way if it assists.

Now, the loaded word there is "if". I know what you will say about that. I know what Ms Wakefield says about that. But we can't possibly take it any further. We are not going to be, as it were, steering the rudder in a different direction and saying we are not going to be alive to these synergies that exist even between temporally different claims, because that's something that goes to the broad question of consistency at the high level, and that is something which is something that the Court of Appeal in *Sainsbury's* was particularly concerned about. It is why they said these things go to one Tribunal, and it is why we are taking the sort of stance that we are taking at the moment.

MR COOK: Sir, to some extent that is the only matter with respect we will be saying out of the options canvassed in your note, which is the umbrella jurisdiction is the only one that is potentially available here.

MR JUSTICE MARCUS SMITH: Yes.

MR COOK: You know, essentially my submissions on that are not to say that that is not something that is, you know, inherently unacceptable. Of course not. You know, it may potentially in the right case be a very sensible form of case management. You know, if the court has to decide exactly the same issue twice, or very closely issues twice, why not do it once, with everyone in the room. Of course, one can see the case management advantage to that. My submission on that will in due course entirely be that these are not sufficiently similar issues. It will just simply be a proliferation of parties and expense, but that is very much for another day.

Essentially, within that bit of the note, my Lord, I don't dissent from that.

MR JUSTICE MARCUS SMITH: To be clear, we are deciding the nature of the pass on test in both sets of proceedings. I don't want anyone to be under any illusions about that. We are going to determine both in the retail actions and in Merricks how one does resolve the pass on question.

Now, how far we can do so is a difficult point, but that's what we are doing.

MS WAKEFIELD: (inaudible) it is the threshold legal question that you are determining, definitely determining finally today. The evidential question --

MR JUSTICE MARCUS SMITH: The evidential question is something which we will certainly not be touching in Merricks.

MS WAKEFIELD: Yes.

MR JUSTICE MARCUS SMITH: The extent to which we can touch it here is largely dependent upon how we choose to resolve the threshold question of resolution. So don't worry. You are not going to be stuck with sampling if that's --

MS WAKEFIELD: I am grateful.

MR JUSTICE MARCUS SMITH: That's not on the agenda. So there is going to be a slight asymmetry in terms of what we decide. But you are paying a certain price for your presence here, in that you are going to have resolved how we see the pass on question and, of course, if you are unhappy with it, then you can have the course of appealing it and it being directed at a higher level. So that's what we are aiming to do. Probably very narrow, but it does seem to us important that everybody knows what they are doing, because if we were to take the route of saying this is something that can only be resolved by an individuated loss, even in the context of a collective action, which I appreciate is very different, then that is something that you need to know sooner rather than later, because it affects the whole shape going forward.

MS WAKEFIELD: Of course.

MR JUSTICE MARCUS SMITH: That's what we see as being a common issue across the board for today. It won't go further, in respect of the list of issues, because we don't have a similar document in Merricks, and we certainly don't regard it, even if there was, as being before us today. We are looking in terms of case management very much only at the columns 3 and 4 of the list of issues that have been framed.

MS WAKEFIELD: Thank you.

MR COOK: Sir, it is 1 o'clock.

MR JUSTICE MARCUS SMITH: So it is.

MR COOK: Would that be a convenient moment. How long would you like to break for?

MR JUSTICE MARCUS SMITH: How are you going for time. I thought we were doing pretty well. I think we are now doing pretty badly.

MR COOK: I am certainly going to be in a position to take the legal test relatively

quickly because Mr Rabinowitz and I are very largely in agreement -- I largely agree with a lot of what he said. Then there is more for me to say when it comes to the question of the approach going forward. I would have thought I will be done within probably an hour, I would have thought.

MR JUSTICE MARCUS SMITH: Right. I wanted to get on to the list of issues by 3 o'clock. How are we doing on that, Mr Kennelly.

MR KENNELLY: If I may reassure you on that at least, we have made a great deal of progress. Save for one short point to update you on the application, which should take about five minutes, there is only one outstanding dispute on the list of issues, which again should take about ten minutes. That's issue 22. We are not going to ask you to resolve the application to amend the pleading today. So that should be all done in about 15, 20 minutes.

MR JUSTICE MARCUS SMITH: Okay. Right. Well, we will want to I think get on to the list of issues at 4 o'clock. We will start at 1.40. Ms Wakefield and Mr Cook, you are going to have to cut your cloth. We have also got -- strictly speaking, I am not sure this is a case for reply, but I think, Ms Smith, it would help us if we had your pushback on what the other persons are saying, because it is very much a three against one alignment on the way in which the pass on test is being heard. So we will hear you in reply, but I think we do need to be finished by 4 o'clock to deal with the list of issues in time to rise at 4.30. So we will impose a guillotine, if necessary, but we would rather the parties secured the parameters of their own execution before we impose it. I don't think you are going to get an hour, Mr Cook, but I leave it to negotiation over the short adjournment. We will rise until 1.40. Thank you.

(1.01 pm)

(Lunch break)

(1.40 pm)

MR JUSTICE MARCUS SMITH: Good afternoon. Before you begin, we found this morning's submissions from yourself and Ms Wakefield extremely instructive and something of a wake-up call, in terms of general management of these matters.

We have got to bear in mind that court resources are extremely limited in terms of the extent to which one can allocate time efficiently to deal with all of the matters that are before this Tribunal, and one of the thoughts that we think will concentrate everybody's mind, including in particular ours, is if we allocated a certain amount of time for the trial of this matter so that everybody can have an end date in mind.

Now clearly we are going to articulate this without reference to how we are going to try matters. These are matters which are still very much up in the air, but we think that even a matter as complicated and as interesting and as difficult as this ought to be capable of being resolved within 18 months from now, and we are going to put in the Tribunal's diary a two-month period, January and February 2024, at which we will try this matter.

That is a date which is not set in stone. It is writ in moderately firm butter. We will keep it under review, but it is something that we are going to expect all of the parties in the retail action to bear in mind when they are thinking about how they want to try these matters.

I hope that that will be of some assistance to the Merricks Claimants, because you will at least have a written in butter, not stone, end point for these proceedings, and it will be a question of how far practically speaking one can dovetail to the extent it is appropriate the two claims. I say nothing about whether dovetailing is appropriate or not. That is for reasons that we have

gone into not something that we can resolve today. We may hear a little bit more on it, but certainly not resolve today, but I think that that is an important indicator.

The Master of the Rolls has said on a number of occasions that proportionality of resource is something that all courts need to bear in mind, and we think that there is no action that is too complicated not to be done in a fixed time period with a fixed length of time, and what we have done in a pretty arbitrary way -- it will require fine-tuning and adjustment -- if say it is January and February 2024, and I think that will hopefully enable all of us, including in particular the Tribunal, to work out where things go.

So I say that à propos of nothing in particular except the rather helpful exchanges that we had this morning, because that forced us to think about exactly how we are going to do this going forward, and I think that is an indication, a soft, not hard indication, as to where we are going.

Mr Cook, over to you.

MR COOK: If I could just ask a question in relation to that.

MR JUSTICE MARCUS SMITH: Yes.

MR COOK: At the last CMC, sir, you indicated you anticipated this might be a case where there would not be one giant trial at the end, that there would be a series of smaller trials ruling on separate issues. I appreciate that's a matter of detail to go into. Does that still remain?

MR JUSTICE MARCUS SMITH: That still stands. That still stands. What we are really articulating is not how we are going to deal with this at all. It is very much a question of when, and what we felt is it is good to articulate an end point, which is early 2024. Equally the commitment that I think the Tribunal must make is that time will be made available, but we are absolutely not

saying that we are resiling from anything that we said last time.

Looking at the list of issues, it seems to us that a series of staged matters might well be the way forward, but we do not think that it is appropriate to cause staged trying of matters to push the end date on too far. The problem with staged matters is not that the stages are unmanageable, but that diaries of everyone make it impossible to do quickly.

So that is something which we are entirely open to discussing. Obviously we need to get the list of issues finalised first, but unless we all have in mind an end point, we are going to be chasing our own tails, and, well, the clock will be running and we won't be. So that is the reason we have given that indication.

So I am very grateful to you and Ms Wakefield for having, as it were, sounded the alarm bells, because they certainly were ringing over the short adjournment. So thank you very much.

MR COOK: Sir, turning back to the Tribunal's note, I essentially largely adopt Mr Rabinowitz's submissions on the detail of the note. We agree with what he said in that regard. The only paragraph I was going to come back on as well in addition was paragraph 1.4 and this is, you know, potentially the four different categories of pass through or not pass through.

In relation to that, of course, paragraphs 205 and 206 of the Supreme Court's judgment says that category 2 is not pass on and category 3 is pass on. So we have a ruling from the Supreme Court on that.

Now, you know, I can say on a personal level I can understand why the distinction the Supreme Court drew there may be --

MR JUSTICE MARCUS SMITH: Paragraph 242 you said?

MR COOK: Paragraphs 205 and 206 of the Supreme Court judgment, in *Sainsbury's*, of course. It is page 1096, sir.

MR JUSTICE MARCUS SMITH: Yes.

MR TIDSWELL: I think the question is not so much about what is in 205 as to what each of the categories means or can be defined to mean. That is really the question I think, because if you look at category 2, for example, reduced discretionary expenditure could involve expenditure which impacted on items in category 3, for example, people who were suppliers, and so I think it is really more a point of whether there's a bright line and, if so, where is that line drawn.

I mean, could you say that category 1 and category 2 are nothing more than an articulation that a retailer has absorbed the costs themselves and that obviously has some implications. If they've absorbed the costs, they're likely to stop doing something else. So at that level you might say a line can be drawn, but I think that's -- I am not sure that 205 helps us very much in understanding where one makes the distinction between the categories.

MR COOK: Yes. I mean, I absolutely understand those points. The fact that the Supreme Court tells us that category 2 is not pass on and category 3 it does not, with respect, explain necessarily the reason why the distinction is being drawn and its categories 2 and 3 are far less fleshed out than the Tribunal has done today. I recognise essentially the difficulty is where the lines are drawn. I mean --

MR JUSTICE MARCUS SMITH: And indeed how one frames the examples. I mean, the fact is we had the example yesterday of the case of let us say an employee's hourly rate being cut versus new employees being taken on at that hourly rate.

Now one could see an argument for treating those two cases differently. It would be quite an odd result if one did and that's leaving altogether on one side

Mr Rabinowitz's point of policy.

I think what we would say is that we are not going to even try to articulate what falls within 1, 2, 3 and 4, nor indeed how in specific factual terms pass on works. What we are going to do is focus on the material we need in order for the point to be argued in court, but for my part I don't regard the Supreme Court as having finally spoken on what are ultimately questions of fact.

What we have got is a broad-brush articulation of how a retailer might respond to an increase in cost and that's all I think the Supreme Court has done. It has taken these four categories and said, "Well, looking at them generally speaking, the response of the law is no pass on or pass on", but I don't think that that ought to inhibit the factual enquiries that go on in terms of how it all operates, and that's where we are at now.

MR COOK: Two separate questions. One, the Supreme Court has given us some clarity. So reduction of supplier costs, they have said that is acceptable for pass on. So there are areas where we have a clear ruling. There are, you know, areas where there is not a clear ruling and employee costs is a good example of that. You know, respectfully in relation to (inaudible) I don't think one can actually get anything from the Supreme Court in answer to that question, because quite clearly the Supreme Court were not addressing it.

So if the case arose in which people were saying that that was, you know, a category of pass on, that would be a point for the Tribunal to consider, you know, whether or not that was category 2 or category 3, and would have to unpack -- essentially, you know, another time where I say that is not this case, that nobody is saying that is a category of pass on.

There is, of course, a distinct question, sir, which is in the context of carrying out factual causation, evaluating factual causation, should one consider these

possibilities? The answer, of course, you know, might be that in evaluating causation if the evidence demonstrates sort of an absurd hypothetical world in which somebody -- there was a file note of a meeting that said, "Since we have had this giant cost increase, we must reduce pay rates", which theoretically one could imagine, then clearly the Tribunal could not be blind to that.

In many ways that might be the answer, depending on how you categorised that, to whether or not there was pass on in retail prices. If there was manifestly on the evidence a clear example of it going elsewhere, that might completely rebut the idea that it had been passed through to retail prices, and then there will be a question of whether or not that was -- and depending on how you characterise it, is it legally pass on or not is obviously relevant in the context of whether or not it is offset and reduces the merchant's damages. Clearly in the context of the next stage down the path in Merricks, in those circumstances it would clearly, you know, be relevant, but the ones in that level of evidence may be different, but it would clearly be relevant, because that would contradict the theme of retail pass on.

So factually you can't turn your eyes to anything that clearly happened on the evidence, but whether it was legally relevant and how essentially is a point for another case we would say.

Those are the points I was going to make in relation to the detail of the note.

This is probably a convenient point for me to address a submission made by Ms Smith that the collective regime has sort of radically modified the compensatory regime. Of course, to one extent the Supreme Court has said that, but something that is obviously right in the sense it is only necessary to calculate aggregate damages rather than the individual loss of the class

members, but, with respect, I do not accept that there is anything in section 47C(2) which beyond that alters the -- in the context of assessing the aggregate damages alters in any way the way in which damages are to be assessed. Simply it doesn't do anything more. You still have to identify the aggregate loss suffered by the class as much as you have to calculate the individual loss suffered by an individual claimant. It is just the nature of the group on whose behalf you are calculating damages which is all that alters.

I think Ms Smith relies on *O'Higgins* in support for that proposition. With respect, that simply becomes a question -- it is not a different legal standard. It is simply a question of evidentially can you prove it if you are -- the point being made there is it is not different stages in the chain. Theoretically it is an individual consumer suing versus a class of consumers suing.

It may be evidentially an individual consumer could never show he or she had suffered loss, because, you know, of the Tribunal's unknown and unknowable point in *Sainsbury's* about exactly which product the retail price -- you could say it is clear that prices have gone up -- say it had gone into -- potatoes was the example Mr Brealey was most fond of in *Sainsbury's*, but whether it had gone into potatoes or bananas or alcoholic drinks might well be completely impossible to do, but that's just simply a question of factual proof, and the broad axe is only so broad before it becomes plucking numbers from thin air, but in terms of the test fundamentally I would say it is the same. You have to be able to identify the loss suffered by whichever group you are claiming on behalf of.

It may just simply be easier if, you know, you can just look at -- if you are representing everybody who might potentially have paid those prices, it is easier, because you don't need to evaluate exactly which prices went up,

which is the point I say that *O'Higgins* decided. It is paragraph 226(4) that Ms Smith relies on and I rely upon paragraph 226(2), which explains essentially that distinction.

In terms then of the legal test, that really is something I can take pretty swiftly. Mr Rabinowitz has largely made the points I anticipated he would and that I was planning to make if he didn't, including his pre-emptive adoption of the points made in my skeleton argument in relation to illogicality. Those are in writing. I don't need to repeat them out loud.

There are just a very small number of points I would just take briefly. Firstly, it is common ground that in order to show mitigation, actual mitigation, there are two requirements. There is the factual requirement and the legal requirement, and those are -- this was the common ground -- those are both necessary conditions.

Those points in Ms Smith's submissions, she talked about the requirement to show legal causation as being sort of the first condition and that obviously leads into her idea there should be a stage 1 trial on just legal causation.

With respect, we don't agree. There is not a first stage of showing legal causation and a second stage of showing factual causation. They are both necessary conditions and, you know, which one you take first may be something that in most cases turns on the fact that one of them is obvious or not, and in some ways you could say legal causation logically comes second in the sense one needs to know what the factual act is in order to decide if it is legally sufficiently closely connected, but I just wanted to make clear we don't accept that legal causation logically comes first in any way at all. They are both necessary conditions. Depending on the case, one may be easier to prove than the other.

Fulton Shipping was a case where factual causation was obvious and so the only point was legal causation. Here we say the other way round. Legal causation is obvious if the factual condition is met. That's the reason why we look at factual causation.

The next point arises out of a question you asked, sir. I think Mr Rabinowitz did address it directly, which is action arising out of the transaction. You asked "What is the transaction?" We would say that is the imposition of the MSC, which has built into it some putative overcharge element, not obviously the individual payment card transaction.

The next point is what is the point of the legal causation test? Essentially there's a variety of mechanisms one uses particularly in causation cases for sort of limiting how far one follows through a chain of events. What is too far away? You use words like "a break in the chain of causation". There was an independent action, action of a third party. Something is too remote, which can be both a legal and a factual test.

This is all about saying there comes a certain point when things are just simply too far away for the law to take account of them, and Mr Rabinowitz has fairly pointed out there are some examples like insurance, like gratuitous payments which are probably very close, but for policy reasons the law ignores them, and then cases like *Fulton Shipping*, where there is actually an application of that kind of break in the chain of causation approach, where you are saying there that there was a moment of time when the shipowner had a choice. Should he sell his ship? Should he try to recharter it to somebody else? Either choice was independently reasonable, so he made his own sort of independent legal choice, and effectively then that breaks the chain of causation would be the other way one would phrase it in a different case.

That is in most cases what legal causation has is two aspects: either a policy aspect of "We don't think certain things are relevant for policy reasons" or "We have to draw the line somewhere" and the law draws the line before things become too far away.

We say that is essentially -- that is all that has happened in the Supreme Court in *Sainsbury's* is they have identified where the line is drawn in this case as a matter of law.

With respect to the Claimants' submissions fundamentally they continuously confuse factual and legal causation. All the Supreme Court has ultimately said in paragraph 215 is effectively just saying, you know, there are certain things that it would be logical to do. If you are a merchant, if you are engaged in budgeting, it would be just a very natural process to recover your costs through higher prices. That's not to say you did, in fact, do it. That's a factual question. However, if you did do it, it is a natural and normal process. It is not some intervening third party act too far away, too remote. So it simply said "If, in fact, you do it", which is a factual point, "then it is clearly going to be sufficiently logical and normal that we are not going to say it is an independent act", and that's what legal causation is doing there.

In those circumstances they just told us the answer at least for many of these Claimants, accepting that there are some more unusual ones on the edges of this case where we will need to get into the issue in greater detail, they say it is straightforward. It is obvious. That's just what you would expect, but it doesn't mean they did it, which is the factual point, but if they did, in fact, do it, well, it is not surprising. Therefore, it is not too remote.

Sir, you asked the question about *res ipsa loquitur*. That allows you to assume an obvious fact without any evidence in the absence of any other explanation.

It is sort of yes and no about whether that is applicable. It is more analogous than directly applicable. It is not so much you are assuming a fact in practice. You are not assuming there was, in fact, pass on, but they did, in fact, recover their costs. You are just saying that's a logical thing that people often might be expected to do.

So we accept that if something is closely connected to the kind of behaviour you would expect, then it is proximate -- sufficiently proximate action that it is not too remote, but we are not making assumptions about it happening. That's the factual question. Did it, in fact happen? That's the distinction that we draw there.

In terms of some of Ms Smith's straw men, Mr Rabinowitz dealt with one of them, that with any profitable business there is pass on. Again that is just not what we say. A loss-making business can involve -- can pass on a particular cost if it raised its prices. It may still be loss-making, but there will be a point where you say, "I have to raise my prices even though I am not making enough money". Similarly a profit-making business might not pass on because it decides it is making loads of profit and so does not need to raise its prices. It is entirely a factual question of did it pass on? Did it, in fact, recover its costs?

Ms Smith raised another straw man in oral argument. She said wherever there is a claim by an indirect purchaser, there will be pass on. That's just no. There is a factual question which we acknowledge arises in every case and factual causation is the live issue. That's just not -- that is the non-straightforward issue. Legal causation is straightforward the Supreme Court said at least for merchants who engage in budgeting.

I turn then to the final issue I am going to address, which is sort of the option in terms of how we are going to resolve pass on in this case. Given the indications

earlier, sir, I am going to focus on this case and not about whether Mr Merricks should be in the room for any part of it or not. That's for another day.

You characterise it, sir, as being the granular approach, which is supported by the retailers and Mastercard or the sectoral approach supported by Mr Merricks and Visa.

I think the position is, with respect, slightly more nuanced than that, in the sense that the position adopted by Mr Merricks, which is the extreme 'sector is all you need to look at', which we would say is simply wrong in the context of merchant claims where you are looking at the individual loss suffered by merchants, which Visa essentially accept, and Visa has a more nuanced approach. Firstly, it accepts and, in fact, positively contends that there should be disclosure from some Claimants, and as soon as you are getting disclosure from some Claimants, and that's to look at specific examples of these Claimants dealing with specific costs, probably not the MSC, because it is largely acknowledged that it would be very difficult to see that directly in some kind of econometric way feeding through into prices, but looking at comparable costs, VAT being one of the examples floated.

So Visa is saying there should be evidence from these Claimants which is evaluated. So we are already into something which is somewhat linked to these Claimants, and there would need to be some kind of identification process of, you know, sample Claimants, representative Claimants to see whose evidence is relevant. Clearly we don't want it from a thousand. That would be utterly disproportionate.

Even on the sectoral approach, Visa floats the idea of the possibility that Claimants could say: "Well, that's an interesting number, but it doesn't apply to me

because".

Mr Rabinowitz tried to mitigate that conclusion on his feet today by trying to create quite a narrow window for a claimant saying that the average didn't apply to them, that they are in a subsector outside the rest of the sector. He suggested it would be the exception rather than the rule but, with respect, there is no principled basis for that kind of narrow restriction. All that your Lordship needs to say is for a claimant to be able to say that there are special circumstances that take them outside the average, the client base. They have a different approach to managing costs than some of the competitors. Those are all reasons where an average would not be applicable to them.

MR JUSTICE MARCUS SMITH: That is essentially saying we actually need to hear from everyone, subject to an attempt to make sampling work, and how does sampling work given, by definition, you are saying they are outliers from the average?

MR COOK: How I say something worked -- Mr Rabinowitz basically opened the door to a process which results in far too many -- potentially something which is far too many mini trials. In terms of how I anticipate sampling would work, my submission on this now, and again I recognise my position is shifting from where we were in our submissions in the light of the other submissions and of course the Tribunal's sort of questions. First thing to emphasise, and the reason I started where I did this morning, as I say, I say that pass on only logically arises relatively late in the piece, and there is a very real possibility by the time we get there that claims will either have fallen away, because we win on some points, or because, you know, there are resolutions of issues which provides enough clarity that points can be settled. These cases are very unlikely to actually result in a judgment covering a thousand. It is almost

impossible to imagine there would be a judgment at the end covering all of these Claimants. They will settle at some point. It is the history of interchange fee litigation in general.

Secondly, I am not suggesting, and in this I do differ from where Ms Smith was on her feet, that it would be in any way sensible to have a single trial covering all 87 sample Claimants. Firstly, by the time we get there, I anticipate the sensible number of sample Claimants would be far lower. But even if theoretically all claims were live, with respect, we would say it would be entirely sensible in this kind of case to deal with a small number first. People would say this is a sample of a sample, but that's not what I am suggesting.

It is not uncommon in mass claims to, you know, litigate in waves, without trying to delay matters too much. For example, that is what was done in the *MGN v Mirror* phone bugging cases that Mr Justice Mann tried the claims in waves on the basis that would create enough guidance case law to facilitate settlement, with the result that actually you didn't have to try waves 2, 3 and 4 because everyone saw the way the wind was blowing and settled them out.

It may well be that if there was a wave one, with a small number of claimants, that would be sufficiently informative, not in a way because it is binding or determinative or anything else, but that that would provide a very clear direction of travel for what arguments, what evidence meets the appropriate Tribunal, that actually if we have a small number of wave one, you know, one gets a resolution in particular for that sector. It can be one sector, two sectors, a small number, that one would actually be in a position at the end of that to say: "Well, even if there are technically different arguments in the car sector or whatever else, we can see where the Tribunal is going with this. It is the same Tribunal. That's going to simply promote settlement."

That was exactly the purpose of using waves in the mass tort litigation in the *MGN* case and it worked. That was the result.

So we do say, you know, you should not be looking at this on the idea that there is any sensible prospect or that it would ever be sensible to have this giant trial of 87 witnesses. We don't suggest that would be in any way sensible at all. It is not cost effective or proportionate. A much smaller one would provide a lot of guidance, and it may well be that a lot of people don't feel the need to litigate after that.

MR JUSTICE MARCUS SMITH: We are I think, in terms of settlement, natural pessimists. Courts obviously welcome negotiated agreements. That has been said many times. But I think in terms of planning a trial, we ought to have a mechanism that works on the assumption that there is no settlement. Is your position that one ought to have a wave-based approach of sample witnesses on that basis, in other words, assuming all of the claims stand up and we are having to resolve it? That's the way to do it, in waves?

MR COOK: Well, I would suggest that is the way to do it, because actually it opens the door to what I say the history of interchange litigation has been, that none of them have got to judgment. *Sainsbury's* did, then it went to appeal and settled before it got to judgment on the remittal. So there has not in fact been a judgment and there have been literally hundreds of claims which have settled. So one should not be that pessimistic in this litigation. That is not consistent with the history in general.

We would say waves are the ways to do it. It imposes a far more limited burden, and there is a very high likelihood that doing it like that will result in sufficient clarity. We are not going to keep on asking the same questions of the Tribunal, once it is pretty clear what the outcome is. Even, frankly, if it's

a question of it's not settled generally, but are we going to keep coming back saying "this sector is slightly different", we can simply agree and treat that number as being relevant, without needing to resolve absolutely everything.

Where this falls in the litigation, the reality is it will be close to the end, unless it is brought very much out of step. We do say that's a sensible approach.

Then it becomes a question of how is the Tribunal focused between what I say is Visa's rather nuanced sectoral approach versus sampling, including my wave-based sampling approach. I say, you know, essentially there are two questions you have to ask. One, what is the Tribunal's task. We know that. That's in accordance with the compensatory principle, to determine the loss suffered by these Claimants.

Determining an average of a sector with respect really does not do that. The whole point about an average is some people are above it and some people are below it. That is why it is an average.

It is partly why Visa acknowledges the idea of a need for a second trial, particularly when one is talking about sectors, that one can talk about the car industry, but there is going to be a big difference between vans, trucks, luxury cars or whatever else.

MR JUSTICE MARCUS SMITH: I see where you are coming from and I do appreciate the Visa stance. Put crudely, although you come from it analytically in a very different way, you are actually quite happy with the Claimants' 83 samples?

MR COOK: I think so. We don't think it would be sensible ever to have that many cases, but we just don't anticipate --

MR JUSTICE MARCUS SMITH: Taking my glass as extremely empty approach, assuming that one just does not get a settlement, and we are trying to work

out how to try all of these cases, your position is the 83 samples is one that gets you to an appropriate outcome, but the 83 ought to be phased in terms of how they are heard in batches of ten or whatever.

MR COOK: Yes. (inaudible) focus in relation to that. That's sort of my next point, which is what is the nature of the dispute going to be? What evidence is relevant to it? Secondly, that Visa's approach essentially ends up with the possibility of a lot more small trials anyway. They say: "Well, it is going to be difficult. People have to prove very narrow factors." But, you know, there is the possibility of a large number of small trials anyway. So the differential is more modest than one thinks.

In terms of my first point, which is what is the nature of the dispute going to be, that I do say is the central reason why we are more aligned with the Claimants in relation to this.

We have seen, from the Pendragon example, what is said, we have seen from the expert evidence. What it is going to be primarily is expert evidence, in econometric terms, in relation to other costs, VAT being one example, you know, other ones that will be identified over time. The argument is going to be we say those are similar. Claimants will say they are not similar. So, you know, it is not going to be econometrics generally on exactly the MSC, because the detail is probably not going to be there to see it working its way through to prices in that sort of mechanical, econometric way.

There is going to be evidence on other costs, essentially. With respect, we don't see how -- in terms of how we know the Claimants are going to answer that, which is they are going to say: "That's all very well. It is the case we pass through VAT. VAT is 20%. That's a huge cost and applies across our entire business. Of course we pass that through. These costs are completely different,

because these are small, non-transparent", all the factors we have seen in the expert evidence. We don't agree with them necessarily, but that is the kind of points they are going to make, including “actually internally our accounting process means that these are completely different.

VAT, of course, that's a major line item in the way we set prices. But actually we say MSCs are an overhead or they are not part (inaudible) worry about, headline costs or whatever the factors are that we have seen in Pendragon”, they say.

As soon as one acknowledges that the Claimants are free to put forward the evidence they want, which is to explain that in practice their budgeting process does not take account of these costs, whatever it might do for VAT, or other notionally similar costs, and the dispute is how similar are they, then it seems to us we are inevitably into a process that must involve some element of considering the position of individual claimants.

If that's the case, then, you know, there has to be some kind of process that must involve sampling, because we can't do it for a thousand. So we have to find some way of taking that into account.

MR JUSTICE MARCUS SMITH: In the nicest possible way, let's jettison Mr Rabinowitz and Ms Wakefield, and pretend that their solutions are not on the table. We will have to consider how far the points you make about Mr Rabinowitz's approach resulting in lots of mini trials. How far that's right or not we will think about. Just looking at how you say the matter can fairly be tried, are you saying that one should have an expert led process with identified sample factual witnesses, according to what the expert led process leads you to think is necessary in order to resolve matters correctly, or are you saying no, actually the lead ought to be the factual witnesses on the ground, and the question is really how, out of the many hundred factual

witnesses one might have, one distils it to a representative sample that won't be binding, but will be indicative of the results in other cases.

MR COOK: The problem, as I am saying, is both. What we are saying, you know, we will certainly rely upon econometric evidence, in relation to other costs, and we also know that the Claimants -- it may amount to the same thing -- the Claimants will put forward evidence of their actual processes. So a trial will need to consider both, because one is essentially going to be more our position and one is going to be more their position.

In turn, we will then need to respond to the detail of what they say about their cost setting process, and they will need to respond to what we say about what happens with other costs, including their own costs. We will want specific evidence of examples. This has been done in other cases. You find time when the VAT changed for them, or some other cost, fuel duty if they are a petrol station, something like that. So you look at specific examples like that.

Both of them reflect what the parties respectively are going to try to argue. Unless the Tribunal is ruling, as a matter of principle, that a merchant cannot defeat a pass on claim by proving, in fact, it did not set prices by reference to -- without taking account of MSCs, which would be slightly surprising, then one has to take account of that evidence, which is always going to require some kind of indicative sampling, you know, process to try to make it manageable in this case.

MR JUSTICE MARCUS SMITH: And you say that that can't be achieved by the application of an average, pursuant to the broad-brush or broad axe, however you want to frame it?

MR COOK: The problem is, sir, to some extent what we are doing is recognising

what the Claimants are saying, the fact that we need to grapple with it. The problem with the average is the way it's been suggested is you are going to get average pass on rates for VAT. The Claimants' answer is: "That's all very interesting, probably right, but this is not VAT". That's the disagreement. They will say it is an overhead. So yes, we do pass on VAT. We 100% pass on VAT but we don't take account of this here. That is a sort of factual disagreement.

If one looks at what the factual test is for causation, then we do have to grapple with that.

I am not saying in any way I am going to accept that evidence or I am not going to disagree with it or we are not going to set out to demonstrate it is wrong, but that's going to be the answer that we have faced and do face, and we need to respond to it.

MR JUSTICE MARCUS SMITH: Yes. I am not sure that was quite my question. You are obviously right that if we let the evidence in, you need to be given the ability to test it, which implies disclosure and cross-examination of a large number of witnesses.

What I am testing is whether you are right effectively to concede that there is no way in which one can achieve a proper assessment of an individuated claim simply by using expert evidence. I think your position is expert evidence may very well help, but there is no choice but to hear, ideally, all of the factual witnesses, but because that's not practical, one has to have a sample. Is that a fair articulation of Mastercard's position?

MR COOK: I think the articulation is rather more that it is the case that we face an answer to. It doesn't seem to us that we can say that evidence is completely irrelevant, given the factual case that's being advanced against us,

and that, therefore, there needs to be something which sufficiently takes account of a sufficient number of factual witnesses to take account of that -- you know, to respond to and meet and answer that point.

MR JUSTICE MARCUS SMITH: Yes, but in almost every case there's something of a dispute between the parties as to how they prove a case. Often the court will give the party their head, but that's because the evidence is within manageable parameters. Here we have a situation where I don't think anyone is saying that one can hear from each and every Claimant, but I think what you are saying is that if one is to reduce the evidence to a manageable proportion, the only way is sampling, whereas I think Mr Rabinowitz's position is that's not the only way. Never say never. There may have to be some factual evidence, but his starting point is you can get a long way with averages, and that that should be our starting point. There may be outliers we need to control for. But he is starting at the very opposite end of the spectrum, I think, from where you are at. You are saying: "No, we agree with the Claimants. The factual witnesses are key. The experts, we will hear from them, but they are secondary."

MR COOK: Sir, that's certainly not my position.

MR JUSTICE MARCUS SMITH: No? What is your position?

MR COOK: My position is I am saying the nature of the dispute that is in front of the Tribunal is that we will certainly be seeking to prove points, including through econometrics, but the answer we have to that, and an answer we recognise the Claimants are entitled to make, is "That's not right. That's not how it works." We have to counter that. So that is where we are coming from, which is not to acknowledge that we think their evidence is right. It is to acknowledge that there is a legitimate question about whether or not -- when

you talk about something that's factually passed on, to try and prove it simply by reference to a completely different cost, you know, it is very much a question of argument whether or not that potentially different cost, you know, is close enough.

MR JUSTICE MARCUS SMITH: I think, Mr Cook, it is probably important that we be very clear what we are talking about here. Looking at Rule 4 of the Tribunal's governing principles, they are very broadly framed. Rule 4(5) identifies active case management, including the adopting of fact-finding procedures that are most effective and appropriate for the case.

Now, the claimants are very clear. They are saying that the appropriate way of fact-finding is a matter of looking at the pool of people who give factual evidence, and taking a very clear sampling approach that they have articulated extremely clearly in their submissions and in their materials filed with us. Obviously, we will take that very seriously. But we can control what evidence is adduced, and if we are satisfied that there is a more appropriate and better fact-finding process, Mr Rabinowitz's approach, then we are not going to go down the route of sampling. We are going to go down a different route.

So it is not I think a sufficient answer to my question for you to say: "The Claimants say this. So that's what it has to be". I am interested in what you are saying or what Mastercard are saying is the most appropriate and proper way to resolve what is, on any view, a very large area of fact.

Now, I know what Ms Smith is saying, but what do you say is the appropriate way efficiently but fairly to resolve these factual questions? At the moment I am not sure whether you are in the Rabinowitz camp or whether you are in the Smith camp.

MR COOK: I am both geographically and figuratively halfway between the two. I bear in mind Ms Smith's approach, her astonishing position, which is the idea of two trials, is premised on the legal proximate causation point. So her approach is perhaps less extreme if you find against her in relation to that legal point, but in terms of what I am saying is acknowledging there is this difficulty in making assumptions based on a VAT rate, not that, you know -- simply acknowledging there is going to be an evidential fight about that, in circumstances where the Claimants say "VAT is one thing, but these costs are overheads and are completely different", that the sensible way to resolve that is to have a sample approach which includes econometric evidence in relation to other costs, econometric evidence in relation to these Claimants, but also includes sufficient factual evidence for the Tribunal to make some decisions. We say that can be done on a wave basis, which will basically provide a very clear indication of where the Tribunal may well go, and that is likely, you know, to result in resolutions which will mean you never have to do waves 2, 3, 4, 5, etc.

MR JUSTICE MARCUS SMITH: Thank you very much, Mr Cook. That's very clear.

MR TIDSWELL: May I pick up a point about VAT as a comparator. If an expert were to advance their case based on that, they would need to have some factual foundation for that. Surely it would be open for another expert to challenge that factual foundation. It may well be that in the course of that there would need to be some evidence from one or more underlying Claimants to substantiate that. That is quite different from having a trial on the issue.

MR COOK: That, of course, is what Mr Rabinowitz says is, that there will need to be disclosure from some Claimants, some kind of sample, and he endorsed my

idea of questionnaire, on the basis that he does think there is going to be a need for evidence from Claimants about those kind of natural experiments, and the question is how useful are those natural experiments. So there would be a question about whether there was historically a change in VAT in whenever it was, 2018. Let's look and see what happened to prices.

The problem with that is it may be absolutely clear that there was 100% pass on for VAT. The question is whether that tells you, and the Claimants say it doesn't, anything about what would have happened with merchant service charges, which they say is dealt with completely differently. It is a different quantum of cost, different type of cost, and they don't in fact --

MR TIDSWELL: I understand that. I don't understand why you need to have a wave of Claimants coming to give evidence on that point in order to resolve that point. It may be capable of resolution through the way in which it is put through the expert evidence, may it not? Bear in mind that already we have seen the experts have quite a lot to say on this already, and mostly what they seem to say is that nobody paid much attention to this charge to their business. So to the extent that there's likely to be any evidence from them, it is going to be "I never paid any attention to it".

MR COOK: I don't think it is fair to say that is the consensus of the experts. That's essentially the Claimants' position, that it was not something that was paid attention to.

MR TIDSWELL: I think --

MR COOK: I mean, it is always going to be a relatively small cost.

MR TIDSWELL: That's the point I am making.

MR COOK: If fundamentally they look at the total costs, that total cost would be different if the MSCs were materially different.

MR TIDSWELL: I am not making the point in the context of the argument about legal causation. I am making the point in the context of whether if you went to the finance director of most of these Claimants and said to them "What's your view on the MSC", it is going to be well down their list of priorities for considering how they deal with their costs generally. The point is it is not VAT, which is clearly going to be something they spend a lot of time thinking about whether they are going to pass on or not. It is one of a number of costs which they will take into account in the round, probably not in individual cost lines. So I struggle a little bit to see why their argument about whether the MSC will be treated in a particular way compared with VAT is something that evidence from a factual witness is going to help us with very much. It may be it is. I am not saying it wouldn't. But it just seems to me it is something which is as easily dealt with through experts giving their view on -- with the benefit of some underlying factual material, which may have to go beyond disclosure, as it would be by having a trial with factual witnesses being cross-examined, when it is very likely they are not going to have very much to say about it.

MR COOK: I am not understanding the distinction between something that goes beyond disclosure and is not yet factual evidence --

MR TIDSWELL: You could have requests for information. There are lots of ways you can get information about this point, which may well show, in the generality, that most people say: "I have never thought about that", compared with "I absolutely think about VAT". Maybe this exposes the point about the basis on which the expert evidence can proceed, whether it is in Mr Rabinowitz's proposal or whether it is in yours, obviously it affects your foundation in order to build the expert evidence, but I just am struggling with -- you seem to be attaching a lot of weight to the example of comparing the

treatment of VAT with comparing the treatment of another cost, MSC, in circumstances where it is not obvious that anyone is going to have anything to say about that or that it could not be dealt with in an expert process, and yet you seem to be justifying having a trial on this issue, involving factual witnesses and cross-examination and goodness knows what else, on that basis.

MR COOK: Maybe the question is for Ms Smith on the basis that these are the answers that she is trying to put forward in her witnesses as to why it is not passed on, but one can certainly see how having a description of a price setting process from a factual witness may be useful, particularly if there are points when it is not fully documented what goes on, which doesn't mean, of course, we don't accept when they say MSCs are irrelevant. That may simply factually not be right, in the sense that they may not actively spend a lot of time on that line item, but what in reality they do is have a budget which includes that element in there, and then they work from that. You don't need somebody to have spent a lot of time considering that line item for it actually to be something that feeds into your price setting. The disagreement is whether it does feed into the price setting or not. They say no, and we want to challenge that.

Certainly one can see how evidence of what, in fact, happened at a merchant is clearly going to be relevant to that issue. Those are submissions primarily in terms of how it is approached.

Two other points briefly. Our suggestion of a questionnaire, which Mr Rabinowitz picked up. Ms Smith complains about it and says it is excessive. She has put forward proposals for splitting up her clients and identifying a sample. I mean, we can't engage with that process.

MR JUSTICE MARCUS SMITH: Do you have a sample questionnaire?

MR COOK: We have not produced that. In terms of a questionnaire, I mean, again we are not suggesting this needs to be every Claimant. Effectively, it depends again on my wave suggestion that we wouldn't need to do everybody initially, but, you know, it would only be a category of potential Claimants who are the ones that are potentially sample Claimants. If you were going to do a wave, it might be simply the Claimants within a particular sector, but certainly we are not going to want questionnaires from a thousand Claimants, most of whom are not going to be potential sample Claimants in any event. But, you know, simply there is going to need to be at some point -- whether that is in order to allow us to identify who should give disclosure for econometrics in terms of actual costs being used, we need to identify some kind of representative group of Claimants, because we can't have a thousand, but we need it to be something that we can participate in identifying a representative group, rather than the Claimants self-selecting the ones that are most likely to support their case.

MR JUSTICE MARCUS SMITH: Obviously, the unspoken assumption is that this side of the court room wins on the theoretical argument about pass on. If Ms Smith wins, then I think the course in terms of sampling is much clearer. Sticking with the assumption that you win on the argument about pass on, what is wrong with a disclosure process that is informed by the experts? In other words, one says: "There is not going to be any form of sampling. There is not going to be any form of disclosure, except there is going to be an ability in the experts that are instructed by all sides to identify the information that they need in order to properly opine on that which is passed on and that which is not".

Clearly, there will be a whole raft of data that will be available in the public sphere, and it will be important to identify that, so that everyone knows what everyone is looking at. Apart from and in addition to that, why can't one say that you leave it to the experts to say "we would really like to have this form of information", and if it is proportionate to obtain it, then either it will be voluntarily provided by whoever needs to provide it or it will be ordered by the Tribunal to be provided, but you don't have a specific form of disclosure that is detached from what the experts need.

Is that something which you think might work or are you of the view -- is it your case that one can only properly resolve this by having experts plus factual evidence running, as it were, interrelated but separately?

MR COOK: It is something that has already been suggested, and we agree this is right, that if one is going to do this by econometric analysis, one is going to want some data from a representative group of Claimants to see what they did with their costs. To an extent, that is some of the best data available. That is a process that Visa is already suggesting we need to embark on and we agree with them in that regard.

Obviously, as soon as you do that, you need to make sure it's a representative group rather than just picking all the companies that start with “A” to give that evidence. You want to do it in a way that is sensible and selective.

MR JUSTICE MARCUS SMITH: What I am getting at is we don't make any kind of *ex ante* articulation of what the experts might need. We leave it to them.

MR COOK: The problem with that is we have had indications of that and the Claimants have said what they would like to have to support their expert evidence. So, I mean, to some extent it is a question of whether we have the argument about whether or not that data is something that can be -- that

evidence is something that can be advanced or not.

So the questionnaire is something that we say at some point there is going to need to be a way of identifying evidence which is relevant to these issues in a way that's a sensible sample. However, regardless of how one is doing it, whether it is done on a market basis, it is common ground there needs to be some Claimant evidence. So it should be selected in a way that's consistent with the issues in the case.

In terms of the criticisms Ms Smith makes about the evidence we are suggesting, what she has done is gone through and identified every place we said there may or may not be relevant evidence, dependent on how the argument is run by the Claimants. We are not saying every one of those items will be relevant in every case. Is going to depend on the specifics. At the moment what we are lacking, other than Pendragon, is actually very much specifics of how these Claimants will answer the case or why they say they didn't, in fact, pass on. The evidence will fundamentally have to respond to that kind of detailed response which we have seen in Pendragon, but generally and frankly unsurprisingly, given the number of Claimants, has not been provided more generally. Unless I can help further, that's ...

MR JUSTICE MARCUS SMITH: No. Thank you very much, Mr Cook. Much obliged. Ms Wakefield.

Submissions by MS WAKEFIELD

MS WAKEFIELD: Thank you, sir. Sir, I will start with the test for legal causation, the primary issue before you today.

I entirely endorse the submissions of my learned friend, Mr Rabinowitz, and I adopt them entirely. I have some very limited points to add.

Firstly, I sought to make clear yesterday morning that my position is whatever the right legal approach is to causation, viewed from the perspective of the merchants, i.e. putting on a merchant hat and passing a cost on to my consumers, that same legal approach has to apply from the consumer perspective, putting on the consumer hat. That is the sauce for the goose, sauce for the gander point.

Secondly, and critically, section 47C(2) in the collective regime, the aggregate damages power, in no sense abrogates or changes that principle. As you said yesterday, sir, what that statutory permission does is to allow losses to be assessed without allocating losses for each class member, and instead one assesses loss to the consumer class as a whole. But when one is asking that question, loss suffered by the class as a whole, one applies entirely conventional tests.

MR JUSTICE MARCUS SMITH: Yes. In other words, you can't get more by aggregating people into a collective action. What one can get is more individually, because one allocates differently within the class, but the total will always be the same, otherwise you would get --

MS WAKEFIELD: Absolutely, sir. Ms Smith referred yesterday I think to our seeking in the consumer claim to prove pass on, on an average basis. So that's the sectoral generalised basis I think. But if Ms Smith were to be right on the legal requirements for causation, I could not do so. Just as in the merchant proceedings, the only show in town is, frankly, I think Mr Cook's, to the extent that I understand it, everyone has to be heard approach, and I don't see how sampling would even meet the posited legal test. But certainly my sectoral approach would not meet the posited legal causation test.

Thirdly, in that connection, sir, you raised the issue in opening, I think because you

had in mind the consequences for consumers, and in particular for the consumer claim in this case, and you are entirely right that the consequences would be catastrophic. They would mean that we could not sensibly litigate the claim. There is no other way of doing it. It would be, in the old language, practically impossible or excessively difficult, actually impossible. That, of course, is in the context where we have a bespoke statutory regime designed to facilitate exactly these sorts of consumer proceedings, a regime which is generally seen as having consumers at their heart, and yet those consumer claims would be impossible to bring.

So I do say, of course, that that speaks against that being the right legal test.

I also say that when one is thinking about injustice, and whether that matters or not in any particular case, one might take into account the likelihood of pass on down to the consumer level. You have the pleadings in the bundle. You have my claim form at tab 73. You have Mastercard's defence at 73A. You will see how they are pleaded out if you are interested to go there. At paragraph 107 of my claim form, I set out various bases of plausibility for pass on to the consumer level. First of all, I cite various recitals of the Commission decision, in which they either find or say it is likely that there would have been pass on to the consumer level. They also set out a paragraph from the general court decision, saying exactly the same thing, and recitals for the interchange fee regulations. It says one of the bases for intervention in this area is harm to consumers.

I also rely on the expert reports of Mr Coombs, Mr Holt and the various studies in general, not in this instance IFR specific, but nevertheless studies which we say support pass on to consumers in this area.

To the extent that when you are thinking about the injustice, does it really matter in

this context, I say yes, it plainly does. There is every reason to believe, as Mr Rabinowitz put it, that this is a case where the real world position is that my consumers suffered at least a significant amount of that loss, and so were the court, the Tribunal, to formulate a legal test which precluded a proper recovery of that loss and instead facilitated over-recovery at the merchant level, that would be a grave and serious injustice.

Moving away from both points of principles, I have two references which I take you to under this legal causation heading, if I could. First of all, *Sainsbury's*, as if we have not been there enough. That is in volume 3 of the authorities bundles.

MR JUSTICE MARCUS SMITH: Yes.

MS WAKEFIELD: Tab 13. I am on page 1100.

MR JUSTICE MARCUS SMITH: Yes.

MS WAKEFIELD: I just wanted to complete the suite of references to which you have been taken. Apologies if you have been taken to this and it passed me by. We have paragraph 225.

MR JUSTICE MARCUS SMITH: We have been taken to that.

MS WAKEFIELD: Have you? I apologise.

MR JUSTICE MARCUS SMITH: Not at all.

MS WAKEFIELD: Of course, the important point here is the first sentence that:

"The loss caused by the overcharge included in the MSC (Reading to the words) would in all probability not address as an individual cost but would take into account with a multiplicity of other costs when developing their annual budgets."

The straightforward point, of course, is that if that, as a descriptor of a factual situation, would mean that legal causation was not met, was not found, one wouldn't be being told in the next sentence by the Supreme Court that what

we have to do is estimate the extent to which it is being passed on. So that is flatly inconsistent with the submission of Ms Smith that the test has to be that the MSC has been individually considered. The Supreme Court considered that in terms and rejected it. So that's reference one. I am sorry that you were taken to it already.

MR JUSTICE MARCUS SMITH: No, not at all.

MS WAKEFIELD: Damages directive. That's in authorities bundle 4, tab 25. We have articles of the directive which address pass on at page 1667. Of course, these are all relevant and of interest to the issues before you today, sir, the one most acutely before you and the other issues which we will turn to in due course. We have Article 12, pass on of overcharge, right to full compensation. Article 13, passing on defence and 14, indirect purchases. Article 15, what you do when there are claims at different levels in the supply chain.

The core sentence or phrase to which I wanted to direct your attention in the context of legal causation is in Article 14:

"Member states shall ensure that, where in an action for damages the existence of a claim for damages or the amount of compensation to be awarded depends on whether, or to what degree, an overcharge was passed on to the claimant", and here are the words, "taking into account the commercial practice, that price increases are passed on down the supply chain."

So that idea, whether it's a *res ipsa loquitur* idea, or whether it is a common sense idea or a policy idea, whatever it is, it finds its expression on the face of the damages directive. So that's the second reference which I wanted to take you to.

Finally, on legal causation, and I am sorry if this is very slightly overstepping the

mark -- I hope it is not -- earlier when you formulated your approach to legal causation -- we say it is entirely right, you weren't deciding your approach, but you were discussing with Mr Rabinowitz, and you focused on the factual test. We say that's entirely right. You said, in those circumstances, pass on could be presumed. Of course, there is a need for a degree of caution, in case it be said against you that you flipped the burden.

MR JUSTICE MARCUS SMITH: Well, that did cross my mind.

MS WAKEFIELD: I thought it may have done. Of course, nobody here is suggesting the burden should be other than as we know it to be. I bear the burden in my claim. The Defendants bear the burden in the merchant claims. Hopefully, the burden should not matter much, such is the great strength of our evidence, but should the burden matter, we bear the burden.

If our evidence passes muster, you have that factual causation made out. You see that the higher cost caused a higher price, and then you can from that treat the question of legal causation as being straightforward in the language of the Supreme Court, rather than reversing anything.

MR JUSTICE MARCUS SMITH: Yes. I mean, we will look at the law in relation to *res ipsa loquitur*, because my thinking is that does cause the burden to move. I am not quite sure how it does it, but what it is saying is that it is so obvious that what happened was let us say due to negligence, that unless the person who doesn't normally bear the burden can show that it was an un-negligent cause, the Claimant wins.

Now, that's not I think a formal burden of proof shifting. It is simply saying the thing speaks for itself. So although one can't articulate how it was done or why it happened, it happened, and it was in this example negligent. The question is how far that is either an analogy that is helpful or unhelpful, or whether it is, in

fact, a statement of what the Supreme Court was getting at in 2015 when they said straightforward.

MS WAKEFIELD: Sir, it may be, on closer examination, it is not helpful, and instead it is easier, rather than to think of circumstances where one is left scratching one's head and thinking if a thing fell from a ceiling in a factory, and things shouldn't fall from a ceiling in a factory, so I am going to assume negligence, otherwise it is an act of god, instead one is just looking at the facts, factual causation, were the prices caused to be higher by the costs, so we have got home on what actually happened, and is there a distinct and discrete policy reason for treating that very natural legally proximate causal relationship as something other than legal causation and, in fact, it is really much more straightforward than the *res ipsa loquitur* cases. It doesn't need the development of a new principle. There are lots of instances, as we all know, where legal causation is just treated as something very instinctive and very obvious on the part of the court. That's really what it is at its heart.

That's what category 4 has, in contradistinction to the other categories perhaps. Of course, I took you to the damages directive, and you will have seen, and you know this anyway, but it is all reasoned by reference to the position of indirect purchases. It is just category 4.

We see that as well if we go to the guidelines on pass on. It is all about purchasers. It is that most straightforward, likely, everyday, commonsensical approach. Really causation is a common sense gut concept. It is not a complicated concept. This is its most straightforward application, in my submission. So we probably don't -- of course it is a matter for you, sir -- we probably don't need to reason by reference to legal principles which have been developed to deal with slightly more taxing and difficult situations.

That's all I wanted to say on legal causation.

I was then going to launch into hours of peroration on the various other issues that are not, in fact, before you today. I will take the rest of my submissions as quickly as I can.

These submissions address the two issues which you opened with yesterday. There were three issues. There was legal causation. I have spoken about that.

Then, how are proceedings to be configured and how pass on is to be addressed, ranging from granular to sectoral or market-wide. Of course, we saw as well, your interest in how proceedings should be configured from the note on Friday, and those are the issues which I think you were turning over.

Now, I say court answering those questions is the proper identification of the governing principles, because you have a discretion on how to approach these issues.

First of all, guiding principle number one, one we have spoken about a lot today, is the nature of pass on. So multi-layered, indirect and direct, and that need to ensure consistency and guard against over and under compensation. Really, all matters to do with pass on, that's guiding principle number one.

Secondly, guiding principle number two, the need to do the best possible job which you can do of quantifying loss with the evidence which you've got. So that's the core common law and civil procedure obligation of the trial judge, as explained in terms in *Merricks* in the Supreme Court.

Of course, in *Merricks* in the Supreme Court you will know, in those paragraphs from 45 through to 63, where Lord Briggs is setting the scene for Merricks, he reasons entirely by reference to what would happen in an individual claim. It is all about the broad axe in an individual claim. You will recall -- I will not take you to these paragraphs -- we have been through them before. You will

recall that he goes through *Chaplin v Hicks*, *Wrotham Park* and *Experience Hendrix*, and what you do in an individual claim and how, in individual claims, the broad axe works. It is from that he reasons as to what's available in collective proceedings. So we have that, the duty on the trial judge.

The error he says was the most serious error that was committed in first instance in *Merricks* was to lose sight of that principle. But most importantly in this case I say that that principle applies here to allow you to respond to the position in which you find yourself.

So when you are confronted by thousands of merchant claims -- and I have tried to add up the figures and, of course, I am not party to it properly, but I have tried to add them up and I get to 2,722 in total, including ones that are not transferred yet, including the Stephenson Harwood ones, but knocking on 3,000 -- when you have all of those claims, you have the ability to select a way of quantifying loss which applies across those claims, and you have, more importantly almost, the ability to choose a method which produces the best and the most robust estimate of loss.

So that speaks in favour, I say, of a method which allows for deployment of the maximum amount of evidence, including the evidence from my claims, and also a method which targets and gives rise to the best possible chance of general peace breaking out, so everything is settled. You have a complete answer. Of course, there may be the dipping in and out of merchants who were in specific positions. Who knows? But you have sector by sector, year by year, pass on rate.

Then, if more claims emerge, not only will it work for the claim you already have, but if more claims emerge, as Mr Woolfe adverted to yesterday -- MIFs have been charged on a day-by-day basis -- you can slot them on. I am going to expand

shortly on how consistency in that way speaks for a general, starting in 1992, carrying on for as long as you need to, the present day, approach to all of this. You have this massive backbone of consistent and robust approach to quantum. I say that meets the second principle which I am talking about, which is actually something a bit distinct from the pass on point.

Thirdly, and I know you are very mindful of this, and this is allied to the second one, we have the need to determine cases justly and proportionately and efficiently. Those are sometimes I think labelled just as case management concerns, but I think they are more than that. They are access to justice concerns, aren't they? They are the ability for the Tribunal to determine these claims in a way which provides efficient and proper access to justice. So that means that you are not bogged up for all eternity hearing individual trial after individual trial.

It means that frankly, when nearly 3,000 people who have very similar claims come to the Tribunal, it is not that surprising if the Tribunal uses a method of assessing a common issue across their claim on a basis which is non-individualised, and it also speaks in favour I say of having all affected parties before you any time, and it is only natural that each of us as parties speak with the interests of our clients at heart. Of course we do.

I don't mean this in any sense disrespectfully, but we heard a bit today in Mr Cook's submissions of how he finds himself between a rock and a hard place, as indeed he is, and I say he needs to stay there. I need to be the rock or the hard place. You need to have us all here, otherwise we will hear that even though he is supporting Mr Rabinowitz on the legal causation test, he essentially sought to take you back to an individualised way of assessment. I know this will not have passed you by, sir. So he can't ignore the law, but he

is pushing you in a way that will diminish the total outlay for his client. Of course he is. He has to. But that third principle, proper case management, proper access to justice, that speaks in favour of my being before you, sir.

Against that backdrop, I will seek to develop those points as quickly as I can.

The first point, which I know you have extremely close to your heart, if that is the right way of putting it at this stage, on the second day of the hearing, is the risk of inconsistency point. Mr Cook began addressing you on issues: Is there an overlap? Is there not an overlap? He was seeking to amend to have a longer run off period in our claim so there is more of an overlap. In fairness to him, he has not developed that point. The greater concern for you, sir, perhaps today is -- I call it a credibility concern, I think, that under powers it, because, as I was describing with having the spine and the long backbone of consistent cases, the nature of the issues before you, and in particular the nature of the sectoral approach, which I urge upon you, and Mr Rabinowitz urges upon you, is that if one were to just chop it in half and have half determined at one place and half determined separately, plainly there's a risk of actual genuine inconsistency, not just optical, but actually findings that do not make any rational sense, they do not hang together. Also, there's a massive risk of under-deployment of the available evidence.

So no-one is saying that the evidential task for you is easy, but when you would have the benefit of my 16 years, each of which, of course, involves extrapolation between the years of all of the public data which we are compiling of -- and I should correct I think the position. The merchant data which we will need, and Mr Coombs explains in his report he thinks for about 30% of the VOC, there is insufficient public data for his regression analysis, so he will need to have that informed by the merchant data, and when you have a sectoral

approach -- and I will come on to this shortly -- even the other approaches in the merchant proceedings, they should cross-fertilise. They should cross-pollinate. One should refer to what happened in 2009 in my claim, rather than just what happened in 2008.

It really makes no sense when you have your Merricks hat on -- I am talking about the obligation to quantify damages as best as you possibly can -- it makes no sense to Nelsonian one time ignore one bit of evidence, another time ignore another bit of evidence. You should take it all together and in the round.

Now, as for the Claimants' approach, they might say: "That's fine, maybe if it was sectoral in both". Actually, there is less inconsistency if you go on the individual approach. I say no, not a bit of it.

If we think, first of all, just about the coverage of the merchant actions, I have said that I think it is 2,722 if they all come over and they are all fought. Even looking at the 673 Humphries Kerstetter Claimants, Mr Coombs has divided them up between the different sectors.

If I take you to hearing bundle 1, tab 15, and I think it is page 221, it says 1,224. It is a significant number, but still less than half what I think the total present is.

Essentially, what he has done is worked through the sectors. So these are the 11 sectors of the UK payments authority, which is the ones we have used the whole way through for Merricks, because it allows for divvying up of the payments more easily. Then the sectors I think come similarly from the same source.

In the far right-hand column, he has split all the merchants. We see that they cover all 11 sectors. They cover all of the subsectors. So there is at least, even from this smaller group of merchants, (inaudible) all of them, coverage all over the economy. Ms Smith was wrong to say no, there might be sectors that are

unaffected or this is only part of the economy. Not so. There will be the same risk of inconsistent judgments with them.

I also say this about the proposed approach by the claimants. Again, I apologise if this sounds disrespectful, but I would say that Ms Smith's approaches are in a sense quite like a sectoral approach, but just one done a bit badly. Really what she is proposing is not that you hear a thousand or 2,000 or 3,000 claims. She says I think 12% of sampling, so we are saying 83, but that's 83 out of 680. So if you ramp it up for the 2,700, it is 333, if you are going to take the same approach, so 333 samples. The way they are taken, the samples are extracted, is by having your category, sector, ordering it by reference to card turnover, taking for sectors where there is more than 20 of them one from each quartile, sectors where there is fewer than 20 merchants, one above the median, one below, determining pass on by reference to that sample, and then applying it to the others in the group. So that really is a generic approach. It is a segmented approach. But it is one that doesn't have the economists' support. It doesn't have the public data in support. It has none of the robustness which we say that brings with it.

You will have seen that Mr Coombs in his defence of the sectoral approach posits it as a particularly robust approach actually even compared to assessing on an individual merchant by individual merchant basis, because, of course, what's so important for this kind of pass on question is that you can properly distinguish between market-wide costs and individual costs, and he says there is a lot to be said for the sectoral approach that he puts forward in that regard, but what the Claimants are proposing is essentially something that functions sectorally but is poorly constructed.

I say that there's a real risk that if you go down that route, you will end up with

an outcome for amusements parks or catering services, or whatever it is, which is flatly inconsistent with the sectoral outcome which I will be contending for in my claim.

As for Mr Cook's waves, as I say, I appreciate he is between a rock and a hard place in today's hearing, frankly, I say that's even worse. I mean, how are they selected? Five of them out of how many? How binding or not binding is that? To the extent it is meant to be a soft indication, that is really an exhortation to it being treated as capable of being consistent with other things, if you see what I mean. It would only have any persuasive effect if others are meant to look at those outcomes and think: "Oh, maybe I should be treated like that. Maybe I shouldn't".

So if you have those waves, and I have different findings in my proceedings, again you have at least that superficial inconsistency.

I am mindful the Claimants have to reply as well so I will go as quickly as I can. I am mindful that the sectoral approach has been criticised on its own terms. It is what we are doing in *Merricks*. There is no other show in town so far as we are concerned. I just wanted to say something in its defence.

First of all -- I am not going to take you to the Supreme Court in *Merricks*, but plainly what Lord Briggs does is say that that is a methodology and those are data sources which can take you through to a quantum award. He plainly says that, because otherwise he wouldn't have gone through all of those other cases about the court having to do whatever it can do with the data it has available.

I am not saying that I will win ultimately, but were Mr Cook to seek to have the battle again, that the only way of going about it in collective proceedings was on an individual basis, he would lose. I say that at a bare minimum.

I also say, much more importantly for today's purposes, there is nothing which limits the sectoral approach to collective proceedings. It is part of the broad axe. It is something which you can do in individual proceedings. It in no sense abrogates the entitlements of the Claimant or Defendant to run the case they would like, because all of us have ways we like to run cases. The best laid plans rarely survive first contact with the enemy. You try to run the case how you would like to but there are other principles which dictate how justice has to be administered. You have the pass on principles. You have the best possible exercise in generating quantum that you can do, and you have the reality of case management access to justice. I say plainly the sectoral approach is available here.

I am not going to address Mr Cook's I think criticisms of the regression model in any great detail. But, of course, you have Mr Holt's report. You have Mr Coombs' report. You have the Falcon report, which was lodged on Wednesday with the skeleton argument. You have Coombs 2 on Friday, in which we sought to address -- and of course you are not going to determine these issues now -- we sought to address those arguments, put, as they were, as arguments of principle, about the regression approach proposed, which is the pass on rate approach. It absolutely is a case where we will be looking for other cost changes shown by the data. The economists will say what they need, public data. They will say if they need data from the merchants. It is an economist-led conventional approach.

We say it is good enough to win. We may be wrong on that but that is how we are going to run it. There is nothing wrong with that from the point of principle.

Mr Cook is wrong and contradicts his earlier legal position when he responded to your question, Mr Tidswell, by saying: "Oh, well, you would have to explore

with the merchants actually did they treat MIFs like they treated VAT". That's not at all the exercise that is needed, not needed as a matter of law or as a matter of fact. You have the power to say that is not how we are going to go about it. In this case it is unworkable. It is contrary to principle. We don't need it. We are going to determine it by reference to an economist-led approach. The economists saying the data they need to do the best possible job they can do of showing what went on.

I have my eye on the clock.

The final point I think which I need to make is just about timing. I am very grateful for your indication just after the short adjournment, sir, that you have in soft butter listed this for January and February in 18 months' time. That gives us a great date to work towards, were you to be minded to accede to my submissions, tentatively made as they are, and allow us to join in.

One thing I would say is I know, and of course I would such cloth ears not to have picked up, that you are not going to make those rulings today. I would urge upon you a need to make those rulings as soon as you possibly can, because we need to get moving with it on *Merricks*. We need to know what we are doing. We have the CMC in September. At that CMC inevitably we are going to be talking about the order in which things are ventilated. Are there preliminary issues? Is there going to be a split trial? Can pass on be taken out of order? We say plainly it can, but it sounds like we are going to have a fight about it. As soon as we have your indication as to the person who is seized of this issue presently in both claims, and you have heard my submissions, you may want to hear us again on this point, but as soon as we could get movement towards something not written in butter on this occasion but in hard stone, that would be fantastically helpful, from our perspective.

MR JUSTICE MARCUS SMITH: One of the reasons we articulated a date was to make a first cut at aligning the stars to enable this to be considered. How it is considered is slightly murky ground, because Mr Justice Roth is, of course, taking the day-to-day running of this case and he has listed, as I understand it, a CMC in September.

MS WAKEFIELD: 19th or 20th September.

MR JUSTICE MARCUS SMITH: It seems to me it would be appropriate for you to identify within the Merricks action an issue and a time-frame for the issue to be heard that could, as it were, be excised from the Merricks matter, and at least in theory heard by a different Tribunal, because the problem one has got is that we have got one set of proceedings here. Issues are inevitably quite complicated and interlinked. We are lucky enough today that we have something which is detachable and can be dealt with across two sets of proceedings.

If you were to say: "Well, look, we have identified this pass on question", and Mr Justice Roth were to say: "Look, it is so embedded in the rest of Merricks that a separate Tribunal can't possibly deal with that issue in isolation", then I think your attempt to shunt it over to us, even if Mr Justice Roth were one of the Tribunal, would fall on unfruitful soil.

At the end of the day, how one frames these common issues needs to be consistent with the proper trying of both sets of proceedings. So you would have to I think satisfy Mr Justice Roth that it was sensible to do this, and if he were to conclude that one just couldn't draw a nice little line around an issue, extract it and pass it over somewhere else, then that I think would be certainly a very strong indicator that it couldn't be done. Even if it can be done, there is then the question of whether it is sensible to do that, and that I suspect is more

a matter for this Tribunal, in order to see whether the point you are making about the backbone consistency is something that is right, or whether Mr Cook's view that actually we are talking about two separate worlds which just don't touch is the right answer.

Now, no-one wants to conduct a mini trial. One of the questions we would have in mind is, even if Mr Cook is right, what would be the harm, if they are worlds apart? Well, maybe it adds to the sum total of knowledge and it is a good thing to have the evidence there, even if ultimately it proves differences rather than similarities.

So that is a debate we would have. But I think there's an element of a two-stage process, and it is inevitably quite messy, because in both *Le Patourel* and *Merricks*, the Tribunal's guidance has not actually been followed. Both Mr Justice Waksman and Mr Justice Roth took the view that they should not relinquish control of the collective actions and pass it over to a fresh Tribunal, because they were best placed to take both trials further forward, as indeed they both are, and so that is one aspect I think of the Tribunal's guidance that is going to have to be rewritten, because it's been -- not ignored. I think it's been trumped by the case management decisions of the two Chairs in those two cases. But it does make the management of these umbrella issues much harder, because I had frankly anticipated that once Merricks was certified, there would be a new Tribunal. I don't think that would have been the right decision frankly. But that's what I was thinking, and I was rather thinking this could be that Tribunal, but that's not going to happen.

So there's a degree of very careful management that is going to have to be undertaken in order to ensure that if it is appropriate to cut out an issue, that is done properly.

MS WAKEFIELD: Yes. Would you excuse my back? I will just take instructions.

Sir, the first point -- you may well have seen all this correspondence already, but I think we are still in correspondence with Mr Justice Roth about that decision, to which we objected. We thought it was the wrong course, if I can put it that way.

Secondly, the position as it transpires with the pass on issue I think may be something which when we alert him to it, not that he isn't already I am sure, but we can make a further application or submission, whatever is the right way to put it, saying in this particular case, leaving the guide to one side and what may happen in the general run of cases, in this particular case it would make sense to move the trial Tribunal because of these great benefits, and a third fallback option might be, as adverted to already, perhaps having Mr Justice Roth come and sit with you, at least for that first decision about how pass on is going to be determined, even if you then go on to determine it with the normal Tribunal, just so we don't have an unfortunate situation where I am making submissions, Mr Cook is making submissions in front of you, and then we essentially have a re-run or a re-run plus in front of Mr Justice Roth, and we begin actually to have that inconsistency of judicial thought which has been one of the lode stars of this hearing that we are trying to avoid. That may be avoided in the happy case of this Tribunal, where you don't sit singly. I have had experience of two High Court judges sitting together where there was an overlap, and it does happen even outside of this Tribunal.

MR JUSTICE MARCUS SMITH: It does happen.

MS WAKEFIELD: Those are my suggestions. One, we are still writing about it. Two, we will, if you are happy for us to do so, say this really changes the picture, what's going on in pass on. Not your normal case. Three, if he is still

against us and he is going to carry on as the trial Tribunal, if we might have coordination on this issue, just because it makes sense.

MR JUSTICE MARCUS SMITH: Well, what I will do is I will ensure that this is taken up with Mr Justice Roth so that at least we are both speaking from the same hymn sheet. I am very conscious that we have to avoid the suggestion, even the hint of a suggestion, that we are, as it were, carving things up behind the parties' backs. That is something which would be most unfortunate. It is one of the tricky aspects of this. But what will happen is we will endeavour I think jointly to articulate how we see this matter going forward, so that the position of both Chairs is clear in ideally I think a sort of joint statement as to how things operate. So I will take that up with him and all the parties will get an indication of how we see this operating. Part of it obviously is what benefit there is in a complete change, but I must say, given the issues arising in Merricks about which Mr Justice Roth knows a great deal, and about which I know nothing, which have nothing to do with pass on, it does make a degree of non-sense to say that those points should be shunted over to a newly constituted Tribunal, in circumstances where the Chair of that Tribunal has no capacity to hear them this year.

MS WAKEFIELD: I do see that.

MR JUSTICE MARCUS SMITH: There are issues directly concerned with case management. We will endeavour to do this first of all transparently and secondly correctly, but in that order, because I think it is important that everyone knows where they stand on that. So I hope that assists everyone in terms of our thinking.

MS WAKEFIELD: Thank you very much. That's of great assistance. Unless I have forgotten anything, and it doesn't look like I have, unless I can assist you on

anything further, those are my submissions.

MR JUSTICE MARCUS SMITH: Thank you very much, Ms Wakefield. Mr Cook, have you anything to say out of that? If you think I have committed us beyond what I promised I wouldn't do, then do say so, but I don't think I have.

MR COOK: Sir, it certainly didn't sound like you committed anything, other than trying to ensure that Mr Justice Roth knows what's happening in these proceedings, which is very much a sensible matter.

MR JUSTICE MARCUS SMITH: That's exactly what I wanted to say. I am glad you got the message. Ms Smith.

Reply by MS SMITH

MS SMITH: Following that conversation just now. I do see what the time is. I should make it. I don't know if you are planning to rise this afternoon before I reply, but I should make it clear that I do need at least an hour to reply. I was hoping to get on my feet about just after 3 o'clock. I am happy to proceed right now, but just thought it would be useful to give that indication.

MR JUSTICE MARCUS SMITH: Did you say at least an hour --

MS SMITH: Yes. As regards the list of issues, we have been speaking behind the scenes. We have managed to agree pretty much everything. I think we have agreed everything, except one point with Mastercard, everything except two points with Visa. They are two very short points on issues that could be dealt with by way of exchange of correspondence to the Tribunal. I think the other point is -- there was an application, but I think we have now reached agreement on terms that allow that to be dealt with on papers, application for an amendment by my clients.

MR JUSTICE MARCUS SMITH: Well, in that case we will deal with any outstanding

issues on the list of issues and amendment, we will deal with those on the papers rather than today, and you can have until -- well, we will not cut you off, but if we could rise at 4.30.

MS SMITH: I will be as swift as I can be, but there have been quite a lot of important points made --

MR JUSTICE MARCUS SMITH: We will rise for five minutes and then we will start.

(Short break)

MR JUSTICE MARCUS SMITH: Ms Smith.

MS SMITH: Thank you, sir. Can I start by addressing the first and most important issue before you today, which is the threshold test for establishing mitigation by pass on.

The schemes both accept that in order to prove mitigation by pass on, in principle, they have to prove both factual and legal causation. So they are the two elements. But in my submission it has now become clear in the course of oral submissions that actually they take somewhat different positions, Visa and Mastercard, as to what each of those means, particularly as to what they mean by factual causation.

Visa's case is on factual causation, if I can ask you to look at tab 11 of the first -- Visa's submissions, it is tab 9 of the CMC bundle. It is paragraph 25(b). On page 99. Visa's case is they say:

"The only issue is whether and to what extent the defendant is able to establish that, as a matter of fact, the claimants' prices would have been lower in the counterfactual."

So it's a counterfactual "but for" test.

"The comparison between the prices as they are currently charged by merchants, or actually charged in the relevant period by merchants, with prices that would

have been charged in the counterfactual, where there is no MIF overcharge on the MSC."

That's repeated in their skeleton argument, which is at tab 3 of that bundle, paragraph 17. It is made more explicit in the middle of paragraph 17:

"By contrast, a business passes on a cost if its prices would have been lower if that cost had been lower or absent. Pass on, therefore, entails a comparison between factual prices and counterfactual prices and therefore is an issue of causation."

So it is a comparison they propose that you need to carry out for the purposes of factual causation between the prices actually charged and what would have been charged in the counterfactual without the overcharge.

Now, it appears, however, that what Mr Cook is suggesting is somewhat different from that and this may explain -- I will explain why I say that. Although he appears to be saying the same thing, when you actually dig down into what he is saying, it is not the same thing. This may explain the different approach to the evidence.

If you look at what Mr Cook -- this only became clear to me when he was making his submissions today. Let's look, if we could, at Mr Cook's skeleton, which is at tab 4.

MR JUSTICE MARCUS SMITH: Let's just make sure we are not chasing a false hare. 25(b) first of all seems to be very consistent with what Mr Rabinowitz was saying this morning.

MS SMITH: This was the position, absolutely.

MR JUSTICE MARCUS SMITH: The question is has Mr Cook sent a hare running, in that, despite adopting Mr Rabinowitz's submissions, he didn't? Is this a point --

MR COOK: In 9(b) of my first set of submissions I put it exactly the same way. Retail prices would have been lower in the counterfactual. That is a comparison between the factual and the counterfactual. The evidence that goes into that may be that the Claimants --

MR JUSTICE MARCUS SMITH: Mr Cook, if there is a difference between the two of you on the law, then I need to understand it. If there isn't, I quite understand that you have very different views as to how that legal question is to be resolved -- factual question -- you are quite right. If there is a difference on the law, then I have not spotted it, and I need to know that there is, because it would be important to understand, but I don't think there is.

MS SMITH: That may or may not be useful. My understanding of what Mr Cook said this morning, and I wrote this down because it came as a surprise to me, he said he needs to determine whether, as a matter of fact, the merchants reflected the overcharge in their prices, and that is consistent with what he says at paragraph 14 of his skeleton, which is:

"The factual question of whether the merchant has, in fact, recovered the MSC."

So looking at the factual and what was done in the factual rather than the counterfactual. This explains why he understands that you need evidence from individuals, because what he is interested is what do the merchants actually do when they set their prices in the factual? Did they reflect the cost of the overcharge? Did they reflect the MSCs.

Now, I may have misunderstood that, but that appeared to be what he was saying this morning, and that appears to be consistent with the evidential position that he is taking.

MR JUSTICE MARCUS SMITH: Look, I have heard from Mr Cook. I have heard from Mr Rabinowitz. On this point I don't understand there to be any clear

blue water between Mastercard and Visa. We all in submissions look back, including the Tribunal, and wish they had said things more clearly. I don't know if this is such a case or not. If Mr Cook were advancing a nuanced different proposition on law to that of Visa, then now is the time to stand up. I see Mr Cook is not standing up. There we are.

MS SMITH: My Lord, perhaps it just shines a spotlight on what we are actually saying. We are saying, whether you put it as -- and we had understood it to be the question of proximate causation, as set out by the CAT in *Royal Mail* and the Court of Appeal in *Stellantis* and I will take you to those. The question that needs to be considered, and this has coloured our approach to the evidence but also our approach to the legal questions, the question is what did merchants actually do when they set their prices? Did they set those prices in response to the overcharge in the MIF? Were the acts they took by way of mitigation, the setting of their prices, triggered by the overcharge? Is there that proximate causal link between the overcharge and the prices that were set?

We say that is a matter of fact. It is a question of establishing legal or proximate causation but it is established as a matter of fact as to what the merchants did.

MR JUSTICE MARCUS SMITH: Yes. You go a little further than that, don't you, because you say one of the facts that is relevant is actually the thinking and the state of mind, as it were, of the retailer.

MS SMITH: Well, they have to have taken action. Whether it is a mens rea type of thing. What exactly was in your mind when you made this decision. Were you thinking about what you had for lunch or were you thinking about MSCs? What we say is they have to have taken action in response. So there has to

have been an active response to the overcharge. I am not sure that is quite the same as saying there was some mens rea that has to be established. There has to be an active response. That could be established by looking at the evidence as a whole that is presented to a pricing committee, and deciding whether or not, in light of that evidence, the pricing committee acted in response to the MSC.

It may be you don't need to get into the mind exactly of every person who sat round that committee table, but you need to be clear that the action that was taken in setting prices at a certain level was action in response to the overcharge.

I will take you to the test before I come back that we say has to be established to support that before I come back to what the schemes say about paragraph 215 of the Supreme Court in *Sainsbury's*.

In our submission, that test in *British Westinghouse*, as decided by the Supreme Court, is clear. You have to establish steps taken, action taken arising out of the transaction. It is only then that you establish that proximate causation. It is clear, and I took you yesterday to the Court of Appeal case in *Apex*, I think it was, that that is a different question from "but for" factual causation.

If I could ask you just to go back to the CAT in *Royal Mail*, because we think this is important. The CAT interpreted what the Supreme Court said correctly in our submission.

MR RABINOWITZ: Can I just rise and gently object. I do it gently because in the end the Tribunal will hear what it wants to hear, but this is a reply. My learned friend didn't open on *Royal Mail*. She didn't open on *Stellantis*. I didn't address them at all. So I am not sure in what sense this is a reply to anything I submitted. I am going to sit down. Maybe that is why it is going to take nearly an hour. I took I think an hour. It is not a reply if she is going to things

that she didn't address and that I didn't address.

MS SMITH: Well, my Lord, you have my point. It is pretty simple what the test is.

MR JUSTICE MARCUS SMITH: The test is pretty simple. I am not going to stop you taking us to these positions.

MS SMITH: I don't need to do that in reply. Those cases are fully cited in my submissions.

MR JUSTICE MARCUS SMITH: We will be looking at all of these again.

MS SMITH: Yes, and you will have seen them and I would ask you to go back and look at them again in my written submissions.

Turning then to the point made against me by the schemes as to legal or proximate causation in the case of interchange fees specifically. They say that because of the reference to "straightforward" in paragraph 215 of the Supreme Court's judgment, the existence of legal causation has, in effect, already been established in cases such as the present, and that one can proceed immediately to the question of "but for" factual causation. This is Mastercard's skeleton, paragraph 14:

"The only live issue is factual question."

Visa's written submissions, paragraph 25(b) is that the only live issue is that of 'but for' causation.

In these cases they say, all of the cases in front of you, all of the merchant claims they say that is the only live issue, is "but for" causation. Can they really get that from 215 of the Supreme Court's judgment in *Sainsbury's*? We say clearly not. I will explain why for two reasons.

If I could ask you to go back to the Supreme Court judgment in Sainsbury's, which you have seen before, which is at tab 13 of authorities bundle 3. It is tab 13, page 1098. If you have that open, the first point is this. All that the Supreme

Court says in 215 is:

"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 regular budgeting."

Our first point is that, on its face, 215 is limited to those factual circumstances, but the schemes say, and again I will give you the references as I need to, in fact, it is not just where a merchant recovers its costs in its annual or regular budgeting. They say, in fact, legal causation is established on the back of paragraph 215, where a merchant sets their prices by reference to prices their competitors set, merchants set their prices by reference to general market conditions, merchants set their prices in line with the recommended retail price set by a wholesaler? They say all those, although in my submission they are not reflected in what the Supreme Court says in 215, are also covered by 215. Those references are set out in paragraphs 29 to 31 of my skeleton.

Those factual situations on their face do not fall within 215 of the Supreme Court's judgment.

Just to give you an example of one of the Claimants setting their prices by reference to their competitors' prices, a number of my clients are hotels. Hotels set their prices generally for rooms. Prices change almost day by day by reference to an algorithm, a piece of software that scans competitors' prices on the internet and sets the prices in response to those.

As I understand the schemes' case, they are saying 215 covers that sort of situation. That can't be right. On its face -- that's my first point -- on its face, 215 cannot be extended to cover all the situations that the schemes say it covers, regardless.

In our submission, what it actually covers is situations where a merchant seeks to recover its costs in its annual or regular budgeting. Seeks to recover, active steps taken to recover its costs in a budgeting process.

What are the costs it is seeking to recover? Well, in context, that clearly has to be the unlawful overcharge in the MIF, the unlawful cost.

We have explained why the wording on 215 is, we say, just as apt to cover our submissions as it is to cover the schemes' submissions. To be fair to the Supreme Court, it was not putting its mind to the questions that the Tribunal is now putting its mind to. But certainly we cannot say that, in my submission, para 215 is the end of the matter for legal or proximate causation in any case that's to do with interchange fees, which seems to be what the schemes are saying.

Then, if I can move on to the second point, which is you need as well to read 215 not just on the words as set out in 215, but in the context of the following paragraph, 216.

What is said in 216 is that -- well, it is clear from 216, if you look at it, that the Supreme Court clearly envisages that merchants should provide evidence on how they have dealt with the recovery of costs in their business, what they have actually done to cover their costs.

If you look at 216:

"The legal burden lies on the operators of the scheme to establish the merchants have recovered the costs incurred in the MSC. But once the defendants have raised mitigation, in the form of pass on, there is a heavy evidential burden on the merchants to provide evidence as to how they have dealt with the recovery of costs in their business. Most of the relevant information about what a merchant actually has done to cover its costs, including the cost of the

MSC, will be exclusively in the hands of the merchant itself. The merchant must, therefore, produce that evidence in order to forestall adverse inferences being taken against it by the court which seeks to apply the compensatory principle."

The Supreme Court specifically envisages the merchants giving evidence as to how they actually set prices, and they are giving evidence here not to establish some factual "but for" causation test as to what might happen in the counterfactual. They are giving evidence here that goes directly to the question of legal or proximate causation, what they actually did when setting their prices.

MR JUSTICE MARCUS SMITH: You are saying 216 deals with legal causation?

MS SMITH: Of course. Legal causation establishing what -- this is what I said at the beginning. Has the Claimant taken action arising out of the transaction, which action has diminished his loss? What action has the merchant taken in the course of his business when setting his prices. That is what is being considered in paragraph 216.

MR JUSTICE MARCUS SMITH: You are saying that 216 is an expansion of the question of legal causation is straightforward?

MS SMITH: Absolutely.

MR JUSTICE MARCUS SMITH: Okay.

MS SMITH: Absolutely. It is a question of how to establish, as a matter of fact, this proximate causal link. It is not a question of what modelling or what evidence do you look at in order to determine what might have been done in the counterfactual or what might have happened but for the overcharge. It is focusing on the factual, what actually happened when the merchants set their prices. What do you need to establish as to what actually happened in order

to establish that proximate causal link between what steps the merchants took in response to the overcharge.

Moving on to perhaps the third point, Mr Rabinowitz sought to characterise the Supreme Court judgment as effectively a policy decision being made by the Supreme Court, that in interchange cases this is the type of case that proximate causation can be presumed and you go straight to factual or "but for" causation.

He said that approach reflects economic reality because in a market economy you can presume that a merchant would cover its costs. In fact, he has to have said you can presume that a merchant will cover the cost of the overcharge, the specific overcharge, the MSC.

Now, that sounds superficially attractive. If it is a merchant economy, of course they are going to cover their costs. But in our submission it is an over-simplification of the economics, and certainly is an over-simplification that's based on untested and controversial assumptions.

In a market economy, it is not necessarily the case that a merchant's prices will cover all of their costs. It depends on the nature of the costs. This is the fundamental difference between fixed or overhead costs and variable costs.

If I can take you to the scheme's own evidence on this, if I can take you to I think -- this was bundle 1, tab 14. This is Visa's evidence from Mr Holt, page 78. Make sure I have the right one. 178 I think. Yes, 178. It is paragraph 26(b).

MR JUSTICE MARCUS SMITH: Yes.

MS SMITH: Visa's expert's own evidence is that:

"Economic theory is clear that the most relevant category for price setting is variable costs. An increase in variable costs directly affects the margin earned on incremental sales and hence strategic pricing decisions: a higher retail price is

necessary for retaining the same level of profitability. Fixed costs, on the other hand, do not affect incremental profit margins or profit maximising price setting since the retailer incurs them anyway as long as they are in operation, regardless of the number of units sold or the price they sell at. That said, fixed costs can affect pricing in the longer term, through changes in industry dynamics."

That feeds into the point I did take you to yesterday in opening at paragraph 53, where he says that one of the matters that may be in issue is whether MSCs are fixed costs or treated more particularly by merchants, more specifically treated by merchants as fixed costs or variable costs, not what they may be defined as a matter of technicality, but how they are treated by merchants.

That point is again picked up by Mr Falcon in his report, which is at tab 15(a), page 226.28, which I do think that I have marked up. I can't remember -- I think it was Mr Woolfe took you to this. It was certainly taken to you in one of the opening submissions, because it is marked in orange. 226.28, paragraph 84:

"While the MIFs / MSCs are technically a variable cost, what matters - for making predictions based on economic theory - is whether the Claimants treated the MIFs/ MSC as variable costs for the purpose of making pricing decisions or instead treated them as central overhead costs. This is why the Claimants propose to obtain evidence from a representative sample… and indeed why the European Commission's guidelines say that “when estimating passing on based on qualitative evidence, internal documents describing a firm's pricing policy may be of particular relevance”."

That's the European Commission's guidelines. I will not take you to them, but they are in the authorities bundle 5, tab 30.

Then para 90, which I think was also opened to you:

"Accordingly, to the extent that the Claimants (and/or any merchants) treated the MIFs/MSCs as central overhead costs, rather than variable costs, then economic theory predicts (as Holt and Coombs attest)", and I have shown you Mr Holt's evidence in relation to that, "that such costs were much less likely to be passed on (at least not in the short run)."

MR JUSTICE MARCUS SMITH: "At least in the short run" is a huge qualification. I mean, I don't think anyone is suggesting that there is no relationship between fixed costs and price.

MS SMITH: If your Lordship is saying that proximate causation can be established by the fact that in the long-term merchants are likely to cover all their costs, then I would say that's absolutely not the correct approach to proximate causation, because that is what the argument you have just put to me collapses into.

If at some point in the future a merchant or any business will cover not only its variable costs but its long-term fixed and operational costs, that is enough to establish proximate causation and I say no, that's not correct as a matter of law.

MR JUSTICE MARCUS SMITH: Okay. All of the cost controls -- take a different area where one is looking at a way of controlling prices not in the long-term but in the sort of 18 month, three-year period, where one has measures like LRIC, in order to ensure you are looking not merely at variable costs but fixed costs and common costs, this is material which takes, you say, the case out of a proximate cause and into a recovery that you make, because it is not passed on.

MS SMITH: Yes. My Lord, that argument, taking it that far, that's saying as long as

some time at some point a merchant will cover its costs overall -- it has been put it was a straw man, but it does lead you to the conclusion that any direct purchaser who is obtaining an input that has been affected by an unlawful overcharge, in order to incorporate it into a good or service which they then sell on, any direct purchaser in that situation would not be able to claim damages, which cannot be correct, because -- I have made the point I think.

MR JUSTICE MARCUS SMITH: If we test it in this way. Let's suppose we have a very careful retailer, who actually wants to be completely transparent for its own purposes, in order to work out what is priced in, what is priced out, and they take an approach in relation to their fixed costs that they are not going to let those fixed costs changes in price affect current prices. They will review them, as it were, two years in arrears. So they will look at the changes in fixed costs in year two, but they will only adjust prices in year three. They do that quite consciously. They pass on the increase in costs after a time lag, because that's the way they want to choose to do business. Your case is that that's just not recoverable or rather is recoverable and isn't ever passed on.

MS SMITH: Well, my Lord --

MR JUSTICE MARCUS SMITH: Because there is such a time lag.

MS SMITH: -- it is about whether -- it is not a question of time lag. It is a question about -- one needs to look at the evidence in order to apply a test, and the test cannot be that do you at some point, whether it is over two years, whether it is over five years, whether it is over six months, ensure that your income covers your outgoings? That is not enough in my submission to establish a proximate causative link. I cannot at the moment -- this is the reason why evidence is required and a factual question needs to be answered. On the facts, is this proximate link established? It is not enough to say, and this is

what the schemes say -- the Supreme Court has already made that decision, but in any case where my merchant, in my interchange case, a merchant will cover its costs, and that's the end of the matter. We say that is not how you should correctly read the Supreme Court decision. In any event, it makes no sense in our submission. It is a question of fact. Is there this proximate causal link? Has the Claimant taken steps that were triggered by or at least causally connected to the overcharge directly. That is the test. You cannot answer that on every shade of grey, on every hypothetical, unless you look at how merchants actually set their prices. That's not the point. Not how merchants generally set their prices. How the claimants who are here with a claim in front of you, my Lord, today, how have they set their prices? Have they set their prices so as to establish, as a matter of fact, that proximate causative link? That's what we need to do.

With the greatest respect, the hypotheticals as to how long does it take to cover their costs really do not assist on that the matter, because it is a question of not saying at some point they will balance, or maybe they don't even, because I understand a number of the Claimants represented by Mr Woolfe are in administration. So they may not have actually covered their costs. Does that mean they don't claim and others do? It is not the correct test. The correct test is establishing that link.

I have given the reason why as a matter of policy I say that's the case and I am not going to read it out again, but it is in my skeleton argument. Really it is paragraphs I think 26 and 28 of *Stellantis*. Why as a matter of policy the starting point is the overcharge and the *prima facie* loss, and then it's a question of whether that has been mitigated. In order to mitigate that, it's not just a question of "but for" causation. It is a question of establishing

a proximate causal link.

So we say that's the fundamental point and I think the Tribunal agrees that that's the fundamental issue on which the Tribunal needs to rule as a result of this hearing.

You said yesterday that this is the point on which you are going to concentrate on giving judgment, and that having done so you may provide a steer to fulfil that requirement, but that you are not going to make definitive findings on that.

MR JUSTICE MARCUS SMITH: No, I don't think we can say how you must complete, as it were, column 4 in the list of issues. I think it would be going too far to say, having resolved this question, there is an unequivocal, only one way to prove it. I think the most we can do, as I say, is provide a steer. It will be as firm a steer as we can manage, but I don't think we can properly say the issue is closed and you can't push back. That is what we say.

MS SMITH: In that case, sir, I can make two very brief submissions then. They are these. First, we say that given the nature of the test, as I set it out, you cannot and should not start, as Visa and Merricks suggest, with a market-wide approach, which rests on faulty assumptions. The problems with that approach are not just that it is market-wide and we are looking at claimant specific, but also because it rests on faulty assumptions.

MR JUSTICE MARCUS SMITH: Sorry. Stop there. Just to be clear on what you are saying. Are you assuming you win or you lose on that submission?

MS SMITH: I am assuming I win. I am assuming a win.

MR JUSTICE MARCUS SMITH: Because, you see, if you win, I don't think even Mr Rabinowitz is saying that his sampling approach works, and indeed I think it is Ms Wakefield's point that we would be driving a stake through the heart of her claim. You can take it that if you win -- never say never, but if you win, we

are likely to go down your factual sampling process. It might be with gritted teeth, but I think that is the outcome.

The more interesting question is if you lose whether Mr Cook is right or whether Mr Rabinowitz is right, or whether Ms Wakefield is right. In terms of where you will help us, I don't think you need push very hard on the if you win scenario. It is a question of how much you want to say on the if you lose scenario.

MS SMITH: Perhaps I can make that this point, in light of your indication about gritted teeth on the if we win scenario. We have proposed a detailed sampling process. As we said, this is a proposal. That's all we have put it forward, as a proposal to try to get a representative sample, but we do take on board fully the concerns of the Tribunal at having to deal with 83 witness statements, and if the Tribunal considers that that's not appropriate or proportionate, then, of course, our proposal can be revisited and refined by way of surveys, smaller samples, possibly even industry evidence. But the most important point in our submission is that the CAT has before it qualitative factual evidence on how prices are set.

MR JUSTICE MARCUS SMITH: Ms Smith, can I just help you on this as well? I said through gritted teeth, and that's because 83 witnesses is a large number of witnesses. But of the pool, and looking only at the pool of persons you represent, it is only 12%, which I would say is at the lower end of the acceptable sampling process. If one takes Ms Wakefield's count of 2,725 --

MS SMITH: Those figures are wrong. I can waste my time showing you how they are wrong, but I won't.

MR JUSTICE MARCUS SMITH: It is more than 700, isn't it?

MS SMITH: Yes. But certainly not --

MR JUSTICE MARCUS SMITH: That count was pretty close to mine --

MS SMITH: The table she took you to double counted. On the notes on the table it says "We have counted twice, one for the case against Mastercard and one for the case against Visa." So that 1,200 double counted. In any event --

MR JUSTICE MARCUS SMITH: The point I am making, Ms Smith, is that the gritting of teeth occurs because I am not sure, if you are right, there is any other way of doing it. Your proposals seem to be actually quite conservative if you are right in your analysis.

MS SMITH: My Lord, that is why I said it can be refined, because it may not be simply sampling evidence, but that may be combined with a broader survey evidence or industry expert evidence, which goes to the factual setting of prices rather than -- and this brings me into my second point -- an econometric modelling of other costs and how they are related to price when that rests on the vast assumption, which we say is wrong, that this will be the same or similar to the pass on of MIFs.

This goes to the point, even if I lose on my legal test, the proposal set out in Visa and Mr Merricks' reports for statistical sampling to draw a correlation between other costs, VAT, fuel wholesale prices, etc, to try to draw the correlation between those other costs and prices and say one should read that across sector by sector into a correlation between MIFs and prices, we say that is wrong even if I lose on the correct threshold legal question.

Certainly we should not start with econometric evidence, and then only if there are -- those weaknesses in that evidence are recognised by both Visa and Merricks, their experts recognise that there may be exceptions or there may be different circumstances, which mean that the general cannot be applied to the particular.

Mr Coombs, just to quote paragraph 3.13 of his report, which is in CMC bundle, tab 15, paragraph 3.13, Mr Coombs says:

"By its very nature, a sectoral approach will not capture variations in pass on rates between individual merchants."

Mr Holt makes points to the same effect at paragraph 53 of his report, bundle 1, tab 14, page 187. Their experts accept that this statistic correlation, econometric modelling cannot do the job, that there will be exceptions.

We say let's not put it that way round,starting with the statistical modelling and then, almost as a presumption, that there is this reflection between other costs and MIFs, because you have to assume that. So that's the starting point. It is only where you can show that you are an exceptional case. You should be able to put in factual evidence as to actually how you dealt with your costs. Let's get straight to them and spend masses of time and money instructing economists to produce very detailed evidence and expert modelling based on other costs, relationship with other costs and prices, and then get to the point of saying, actually that doesn't tell you anything and let's now look at the factual situation of the Claimants in these particular cases. We say that just gets everything the wrong way round.

Even if I lose, we say the proposal made by Visa and Merricks just doesn't work.

MR JUSTICE MARCUS SMITH: Well, perhaps more in the case of -- yes. Sorry. You are in this aligned with Mr Cook and Mastercard in terms of how one would approach it. I mean, my understanding of Mr Cook's position for Mastercard was that assuming he wins on the law and you lose, factual evidence is still central, supplemented by economic evidence, but I think it is that way round, whereas Mr Rabinowitz is much more economic evidence, supplemented as necessary by factual evidence.

MS SMITH: I think that's right, my Lord, but it is all, of course, subject to the Tribunal's indication that you are not going to make definitive decisions yet.

MR JUSTICE MARCUS SMITH: No, no. That's absolutely right.

MS SMITH: But I think that's a fair characterisation.

So then can I just deal with the last point -- before I move on I need to just make one very short point about how Mr Cook characterised our two-stage approach. Our two-stage approach is not looking at proximate causation and then looking at factual causation.

As is made clear in our written submissions, paragraph 38 -- CMC bundle, tab 7, page 70 -- we are proposing that the first question that be asked in stage 1 is: Did pass on happen as a matter of fact? Then the second stage is: If so, what effect did it have? How far did it reduce losses? So it is a qualitative stage 1 and a quantitative stage 2. That's made clear in paragraph 38.

Then to the last point, which is what we now understand to have been driving the Tribunal when it produced the note on Friday afternoon and that's a fear of inconsistency between specifically our merchant claims and Merricks collective proceedings, but also merchant claims generally and consumer proceedings generally, and a desire to divide up the cake so that 100% of the overcharge can be allocated even if it is not all claimed or paid out.

Sir, you referred to wanting to avoid a situation such as that which arose in the first wave of interchange fee claims, where there were three different and inconsistent judgments at first instance, and we wholly sympathise with that and I will address that point.

You also made the point I think specifically to Mr Woolfe that there were advantages in having evidence as to the consumer level before the court, as well as evidence from merchants, so that the Tribunal could get an overall view of

where the losses fall. You even went as far as to put to Mr Woolfe, if in the merchant claims the Tribunal hears from these 83 merchants giving evidence, and they establish they have not passed on the overcharge, then it will be unfair, because that evidence could be used against Merricks. So Merricks should have been involved in the proceedings. I think you put that point to Mr Woolfe.

MR JUSTICE MARCUS SMITH: I put the point -- let's suppose you call your 83 witnesses.

MS SMITH: Yes.

MR JUSTICE MARCUS SMITH: And they all do extraordinarily well and show that there is no pass on.

MS SMITH: Yes.

MR JUSTICE MARCUS SMITH: We then have a separate Merricks case and what is done in that case is that we get 83 Civil Evidence Act notices saying: "Here is the evidence and also here is the conclusion of the Tribunal on the basis of the evidence."

MS SMITH: In that case I will address this point if that is still troubling you. My points in response to that are as follows. First, the effect of the rule in *Hollington v Hewthorn* is obviously, of course, the findings of the Tribunals, such as any judgments that the Tribunal reaches on the pass on in the merchant claims are not even admissible in evidence in separate and subsequent proceedings between different parties.

So the findings that any Tribunal might make on the merchants' claims would not be admissible in the collective proceedings brought by Merricks, and Visa makes reference to that authority and its previous reliance on the authority when we were last before you, my Lord, in March, in paragraph 23(b) of its skeleton

argument.

Now it may be that you say: "Okay. The findings can't be used" --

MR JUSTICE MARCUS SMITH: I wasn't referring to the findings when I put the point to Mr Woolfe.

MS SMITH: It may be that the evidence given by the merchants may be admissible in evidence. I make the point if that's the case, then that evidence will be weighed against the evidence produced in the Merricks proceedings. The Tribunal can come to a conclusion, and the Merricks proceedings they will put in evidence, and the Tribunal can come to a conclusion on the totality of the evidence before it. But perhaps even more important, and in any event, the fact that such evidence or such material exists out there is, in my submission, highly unlikely to give rise to any inconsistency, and, if I can just please explain why I said that, you have heard the points made by Mr Cook, and that I also made in opening.

On the claims actually before the Tribunal there is no overlap, so there can be no inconsistencies. You have already heard my points and I am not going to repeat them on the temporal difference and the fact that there is no common unlawful costs in the Merricks proceedings and the merchants' claims.

More fundamentally, there is no inconsistency because in the collective actions all that Merricks has to do is to prove loss on average across the market as a whole. It is perfectly possible, in my submission, for the Tribunal to find that there was pass on, on average across the market as a whole. If I could just develop this point -- even though particular merchants or particular groups of merchants did not in their particular factual situation engage in pass on, there is no inconsistency in such a situation.

That can and should be contrasted with the situation that was criticised by the Court

of Appeal and Supreme Court in the first wave of interchange cases. You will remember, in paragraph 93 of the Supreme Court judgment -- and I can take to you that if necessary -- the point that was made in the Supreme Court judgment is that the relevant factual circumstances were factually indistinguishable on the question of whether the MIF was a restriction on competition.

In paragraph 93, the court, having considered the essential factual basis of all the three cases that went up to the Court of Appeal, held that:

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

They then set out the common factual basis, the facts. It was in those circumstances that they came to the conclusion that there should have been the same answer to the question as to whether or not there was a breach of Article 101(1). The cases were factually indistinguishable. As a result of that, I say, that underlines the criticism that was made by the Court of Appeal initially, but different conclusions have been reached on the question of whether there was a breach of Article 101(1), even though the essential factual basis was the same.

We say that's quite different from the situation as regards pass on, where individual merchants in the case of pass on may not necessarily be in the same factual situation as regards pass on as the market as a whole, the average across the market. That is explicitly recognised by both Mr Holt and Mr Coombs for Visa and Merricks.

Consider a situation where the Tribunal is faced with an individual claim by a merchant, say Co-op, on the one hand, and the Merricks collective proceedings on the other hand. In my submission there is clearly no

inconsistency if the Tribunal reaches a conclusion that Merricks has been able to establish pass on, on average across the market, but applying the correct legal test to the facts of the particular case in front of it, the same Tribunal or a different Tribunal finds that pass on has not been established in the case of that particular supermarket.

Then there shouldn't be any difference in approach taken just because Mr Woolfe and I represent hundreds of merchants. As I have made the point, they still only represent a tiny proportion of the market. It is only -- this goes to the cake. I am not going to try to talk to the metaphor any further. In the proceedings currently before the Tribunal there is no common cake. Only if the Tribunal were considering claims by all merchants who account for all transactions across the UK for the same time period as the Merricks collective proceedings would we be considering the same cake. Only then would this Tribunal be in a position to make properly consistent decisions about 100% of that cake.

One might hypothetically in that situation, which is not before the Tribunal, be able to say that on average there was pass on and on average that pass on by merchants to consumers was 50% of the overcharge. Totally hypothetical situation. But in even that hypothetical situation, when you are dealing with 100% of the cake, the situation of each individual merchant may be different from the average. An individual merchant may on their particular facts pass on at a rate above or below the 50%. They may pass on 100% of the overcharge. They may pass on none of the overcharge at all, and such a result would still be consistent with the market-wide finding that pass on was on average 50%. There is no inconsistency in such a situation.

Moving then perhaps to an even higher level of theory -- not higher level of theory,

but taking it from a slightly different angle, which is Ms Wakefield's sauce for the goose is sauce for the gander point, that you have to apply the same test, we accept the same test should be applied in consumer claims as it should be applied in merchant claims. But the same legal test applied in different situations and in different ways may lead to different results. All that Ms Wakefield needs to establish for the collective proceedings is that applying the correct legal test overall merchants generally passed on the overcharge. She does not have to prove that every merchant passed on the loss.

In other words, the question in the collective proceedings is did the merchants generally across the UK in the relevant period take steps to mitigate the overcharge by passing it on to consumers through their price setting?

She can do that, perhaps, by taking the sort of econometric, sector-wide market-wide approach that she is proposing. When I am answering that question she would say the relevant evidence might be that, in general, did merchants generally pass on the overcharge during that relevant period?

In the merchant claims, by comparison, for each claimant, the schemes have to prove that this particular claimant took steps to mitigate its loss by passing the overcharge on to consumers in its prices. We say it is perfectly feasible, applying the same test, namely to different results in different cases, on different facts, particularly when you are applying the test to the UK as a whole, or market as a whole, versus applying the test to the particular circumstances of particular merchants.

So we don't resile from the fact that the same test -- we don't say sauce for the goose and sauce for the gander is different. Sorry for these awful metaphors. We say the same test should be applied.

MR JUSTICE MARCUS SMITH: Yes.

MS SMITH: I was going to take you to the final paragraphs in the Supreme Court's judgment in *Sainsbury's*, but I believe Mr Cook took you to it, so rather stole my thunder. Obviously, great minds thinking alike. Paragraph 242 of the Supreme Court judgment, which I think your Lordship indicated you had perfectly on board, as to the Tribunal's role in the adversarial system is to determine the cases in front of it and not to act as a searcher after truth.

That is what we say has to be done in the present case. The risk of inconsistency, although we wholly understand the concern that the Tribunal expressed, given the unfortunate history of the first wave of interchange claims, that is a totally different situation from the situation that you are looking at today as regards pass on. The risk of inconsistency as regards pass on is a small risk, if not negligible, for the reasons I have given.

MR JUSTICE MARCUS SMITH: Ms Smith, thank you very much. Can I just be clear? Yesterday when you opened your submissions you attached a nexus between the duty to mitigate and mitigation in fact. We have been taken and indeed we did look at the full quotation in *British Westinghouse*. Is that a submission you maintain?

MS SMITH: My Lord, I should, in fact, have marked it as a point I should come back to you on and I should make it clear that -- I think Mr Tidswell may already have made the point. The only point I was making about drawing parallels between the duty to mitigate and the test for establishing mitigation by pass on is that both of them envisage an action to be taken, and that is borne out -- an action to be taken and in response to the overcharge, and that, my Lord, is made clear I think on the *British Westinghouse* authority, that in both situations we are thinking about actual steps. That was the only -- that's the only point.

MR JUSTICE MARCUS SMITH: Thank you. I am very grateful.

MR TIDSWELL: Can I ask another point of clarification. I think when you were talking about stage 1 and stage 2 just now, I think I shared Mr Cook's understanding, which I thought was that stage 1 was intended to deal with legal causation. I think I am hearing you say that is not the case. It would be a mix of legal and factual.

MS SMITH: No, I apologise. If you look at the submission and proposal we actually make, it is paragraph 39 of our written submissions. It is CMC bundle 1, tab 7, page 70.

MR TIDSWELL: Yes. I suppose I was -- I mean, if one looks at --

MS SMITH: 38.

MR TIDSWELL: In the body of it, I was reading it. For example, at paragraph 58:

"Defendants finally established (reading sotto voce)."

There is quite a lot in here that suggested you were just dealing with the legal causation point.

I am not entirely sure what the factual causation point would be if it was not just quantification, which is stage 2.

MS SMITH: Yes. It is possibly as a matter of fact what the -- whether one points it as -- I think we would put it as a question of qualitative and quantitative, because we accept that the first stage is you have to establish whether the pass on was -- the claimants did pass on the overcharge. If we succeed in our characterisation of the threshold legal test, primarily the evidence will be what as a matter of fact did the merchants do, and it may be that the defendants in response to that say: "Well, we are going to put in economic evidence that shows that, on our modelling, what they actually did was different from what some of the public studies on pass on of VAT show." So

there was "but for" causation, but --

MR TIDSWELL: I suppose you also might in stage 1, as a result of the evidence, sort people into categories one and two of the four category formulations. So you might on the basis of the evidence say: "I didn't do anything with it. I was careful. I didn't do anything." I think once you get into the question of whether or not it was passed on, I would have thought of your stage 2. I am not sure it matters terribly.

MS SMITH: Yes. I suppose the other way of putting it -- perhaps puts it more in context, if you look at the flow chart, page 80 of that bundle, which is what we propose is acquired by way of evidence at each stage, acquired by way of evidence at each stage. That is our position of what we would like put in in evidence at each stage. Stage 1 identifies there has been pass on. Stage 2 is to quantify the pass on. So the stage 1 evidence we say is primarily witness evidence and documentary evidence, as to the price setting process, and then stage 2 is if you have established on the basis of that that prices were set in response to the overcharge, then you look at evidence enabling the quantification of pass on.

MR TIDSWELL: Thank you.

Reply by MR WOOLFE

MR WOOLFE: I have about five minutes. I can be brief. Stepping back, there are three different strands of the submissions that have been made to you, but I think all of us have been guilty at some times of running them into one another.

The first strand concerns the question of whether or not a question of proximate causation arises for decision by the Tribunal. Clearly on the claimants' side

we say yes, it does. You have had my submissions about that comment in *Sainsbury's* being *obiter*.

Even if you think that comment is right and refers to a retailer engaged in annual or other regular cost budgeting, there is still a separate factual question of whether or not the Claimants who are before you actually fit that description. We have heard about hotels. We have an airline. We have betting operators. Think about the way a bookie manages, instead of managing risks with a whole series of bets or whole series of events, the idea is analogous to a retailer doing cost budgeting to build up a margin on a tin of beans. It is a very different world. The idea that that is within the Supreme Court's contemplation and therefore no issue as to proximate causation arises, we say, is a non-starter. That's the first question, which is about is there a question of proximate causation.

The second strand is whether or not the assessment of the Claimants' loss in our claims has to be done on the basis that aims at individualised assessment.

We say yes, it does, in principle, but that's not just about proximate causation. That applies to both proximate causation, factual causation, pass on, and any other quantification issues as well. I say “aimed at” advisedly. You will see where I am going with this in a moment.

These are individual causes of action that have been brought before the Tribunal as individual claims. So the substantive right is an individual one and the procedural vehicle is an individual one as well, but it has been brought by the people who *prima facie* suffered the overcharge. You will recall the Supreme Court said the overcharge is the primary measure of loss, and then there is the question of mitigation.

For the avoidance of doubt, this is not some form of procedural contrivance which

avoided having a collective action. I think you were asking at one point why we did not adopt that mechanism. For the Stephenson Harwood claims at least these are claims where the clients came forward to us to bring their claim. They wanted it adjudicated upon.

Collective action was not really available as a vehicle for these claims. Rule 119 of the Competition Appeal Tribunal rules you will recall is a transitional provision about limitation. Effectively, one can only bring a collective action in respect of facts going back before October 2015 as a follow-on within two years. It doesn't really cover merchants' loss.

Final point on the question of individualised approach. If it was not an individualised approach, then what was the Supreme Court thinking of when it referred to merchants bearing a heavy evidential burden? Paragraph 216 of *Sainsbury's*. Because these are individual causes of action in an individual claim wrapper, they are different from the Merricks claim where, although it may in origin be individual causes of action, they have been put into a statutory wrapper that has different consequences, which allows an aggregate assessment of loss. That's the second strand.

The third strand is what is the proportionate way for the Tribunal to try those individualised claims, including the question of proximate causation but also individualised more generally, having regard to the principle of proportionality, but also thinking about what evidence is actually probative? That is a difficult question which I think you have indicated you can give us some steer on but you can't finally decide.

The two extremes would be, on the one hand, trying each case out fully by witness evidence in a full way as separate actions. Obviously, that's not something anybody here is advising that you do. The other extreme we would say is to

apply a market-wide average and not allow the merchants to have their claims individualised.

MR JUSTICE MARCUS SMITH: Are you addressing us on the basis you win or lose at the moment?

MR WOOLFE: On which question, sir?

MR JUSTICE MARCUS SMITH: On the question of what pass on is?

MR WOOLFE: On the question of what pass on is, there is the proximate causation issue. The second issue is about individualised assessment.

MR JUSTICE MARCUS SMITH: Yes.

MR WOOLFE: I imagine, win or lose on the proximate causation issue, it doesn't matter, because even the factual causation question is one that requires individualised -- a method of assessment that aims at individualised assessment.

MR JUSTICE MARCUS SMITH: Okay.

MR WOOLFE: That's where I am. So in a sense I don't have to worry about whether we win or lose on the primary question.

MR JUSTICE MARCUS SMITH: We do, because I have already indicated that if you win on the proximate causation test, then we are rather more inclined, and indeed the schemes are not particularly pushing back on that, that some kind of sampling approach in lieu of calling everyone is called for. So you will be giving us most assistance if you address us on the basis of your losing on that point.

MR WOOLFE: In which case, assuming we lose on the proximate causation issue, I still say these individual claims require some aim at individualised assessment. And one thing I would say is having just a market-wide approach, saying that that is a sector-wide approach and we are going to

assume that all merchants recovered in line with the average does not do that, and I say would not be an available approach.

I would also say it would be wrong to adopt what Visa says, particularly as put in Mr Rabinowitz's submissions, that it is a very narrow gateway -- he referred to facts that really set one apart entirely from the rest of the sector. Adopting a market-wide approach is a very strong presumption from which you can only depart if you can show you are nothing like the rest of the sector do you need to say anything else. We say that is also wrong in principle.

So the question is in a sense there is then a world of possible options that Mr Cook was addressing you on to some extent, and Ms Smith has addressed you on as well. One possibility is the sample claims which Humphries Kerstetter have been suggesting. Mr Cook suggested a variant of that where you have the sample claims but they are tried in waves as an available approach. One suggested by Mr Tidswell and you as well, sir, would be to have an expert-led process, in which you can have some individualised information, data and disclosure, perhaps we would say being led by industry experts or the like.

We suggest the Tribunal should start from the position that it does require some individualisation of its assessment, and then we can have a variety of discussion about what can be done with the time and resources available and that is proportionate that can somehow sort these Claimants into different buckets and have some individualisation. That is the way we say it should go.

My final point is you referred to having gritted teeth I think at one point, about the idea of 80 witnesses is a lot, and certainly would be if you had them all in one go. I think you also said it is the lower end, if one is sampling. Simply on the subject of any sample size, obviously I think we have a lot more Claimants than Humphries Kerstetter and the Scott + Scott actions. However, that does

not have to necessarily lead to a proportionate rise in sampling. You don't just say: "We have taken 12% of what is there", you need to say "12% of the new ones. If one is sampling say hotels, and you want four hotels and different quartile approaches adding in more hotels does not mean you need a whole lot more samples. You get the claims and in the sample you can stick with the same number, possibly from a different pool, but adding more Claimants of the same type does not actually increase the number of sample claims.

MR JUSTICE MARCUS SMITH: The question is how consistent will the members of the sector class be? I mean, you are presuming a high degree of consistency in terms of conduct between hotelier A and hotelier B. Now if that's right, then yes, you can probably get away with one, but how do you know that's right?

MR WOOLFE: Sir, standing here today I can't say I do know that's right. That's correct.

MR JUSTICE MARCUS SMITH: So how do you test it? I mean, the thing about sampling is that you get an accurate perception of the whole. Now that means you have a confidence before you undertake the exercise that a sample will work.

MR WOOLFE: As I am standing here today, clearly one can do -- one could find an industry expert who says how the market is divided up. One can find market study reports that are out there saying "The hotel sector, as market analysts in the city we regard them as being divided between premium, luxury sector, the business travel, whatever it may be". There will be information out there. There will be something about the sector. One can use that to help you.

Alternatively, you could use the same question as to the -- there will be a variety of approaches. I was simply making the simple point that there's no reason to

think if there is already disputes on variation already in the class, that adding more claims to the class necessarily increases radically the degree of variation within it.

MR JUSTICE MARCUS SMITH: I would accept that necessarily, and in a sense this is why we are not going to be able to decide this, but I think the reason the issue is important is that I don't think we can necessarily say that 83 is the upper boundary.

MR WOOLFE: No, and indeed --

MR JUSTICE MARCUS SMITH: It could well be more.

MR WOOLFE: It is the case I think we have added a couple of sectors, as it were, which are new. Absolutely.

MR JUSTICE MARCUS SMITH: Indeed, but even if you don't add sectors, you have got the problem of are the sectors consistent, and then one has got further issues, like if you are saying, in order to have a proper sample we need to call, say, 300 witnesses, at that point we need to start thinking about questionnaires and ways of cutting it down or having a trial at which 300 witnesses are called. This is why we can't make a final ruling on this, whoever is right. But what I hope we can do is articulate what steps need to be taken to ensure that one has a manageable trial. I mean, if the only way of achieving a fair outcome is to call 300 witnesses, then that is what will happen, but you can expect a certain degree of testing of that proposition in order to ensure that it is the only way forward.

MR WOOLFE: I think everybody involved would want that assumption to be well tested. Yes, absolutely. I think the point I want to get across is our position is that the assessment is the aim at individualised assessment, that does not mean that one has to sit down and assess each and every case separately

only on the evidence in relation to that case, without any attempt to sample or do other such things. An individualised assessment does not mean each case is actually assessed separately. Thank you, sir.

MR JUSTICE MARCUS SMITH: I understand. Thank you all very much for your very considerable efforts over the last two days. We will, as we indicated earlier, reserve our judgment and seek to hand something down as quickly as we possibly can. We are conscious that there is a time element ticking, particularly since we have actually put a trial date in the diary. So we will get cracking. Thank you all very much.

(4.48 pm)

(Hearing concluded)