IN THE COMPETITION APPEAL TRIBUNAL

Case No:1266/7/7/16

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Monday 16th January 2023

Before:

The Honorable Mr Justice Roth
Lord Ericht
Jane Burgess

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Class Representative

Walter Hugh Merricks CBE

V

Defendants

Mastercard Incorporated and Others

A P P E A R AN C E S

Marie Demetriou KC, Victoria Wakefield KC, & Morag Ross KC (On behalf of Walter Hugh Merricks CBE) Instructed by Willkie Farr & Gallagher (UK) LLP

Sonia Tolaney KC, Matthew Cook KC, David Johnston KC, Ewen Campbell, & Daniel Benedyk (On behalf of Mastercard Incorporated and Others) Instructed by Freshfields Bruckhaus Deringer LLP

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Monday, 16 January 2023

(10.30 am)

Opening remarks

MR JUSTICE ROTH: Morning. We have had, helpfully, two letters about future directions regarding the section 32/section 6 issues. We think it sensible not to address that now, but to leave that until tomorrow. The letter from Freshfields came only this morning. That will give time for the Merricks team to consider that. Perhaps further discussions to take place. We will revisit that at the end of the hearing tomorrow.

The only thing we would say is we do think that it's sensible to list -- fix a date for the hearing of those issues or that issue. As can be seen just from those letters, the later you leave it to fix a date, the greater the problems of counsel's availability. So we think to get a date in the diary now, whatever that date may be -- it can always be vacated if things change in these cases -- so that's something that ought to be done. Beyond that, I won't say anything now, and we will leave it until tomorrow. Yes, Ms Tolaney?

Submissions by MS TOLANEY (continued)

MS TOLANEY: Good morning to the Tribunal. Good morning, sir.

I wanted to pick up on a few of the questions the Tribunal asked on Friday, and to complete my submissions.

Starting with one of the questions, sir, that you asked, which was at the transcript page 86, lines 19 to 25, you asked whether there was any authority to support the position that section 11 of the 1995 Act is applied differently to consumers. The answer, we submit, unsurprisingly, is no. On the contrary, we have found a number of cases dealing with the 1995 Act which concern claims by consumers. It was not suggested in any of those cases that the fact that the claimant was a consumer was of any relevance or had any impact on the relative significance of the place of loss.

I will show you one of those decisions, which is a decision of Mr Justice Arnold, as he then was, in the Chopra case and I will come to that in a moment in the right place in my submissions.

I think there should be a copy of that on the Tribunal's desk. It was sent to the other side. I will come back to that in a moment.

The reason for that, we say, is the statute -- just to remind you, sir, the reference in our skeleton to the appendix is A2/50. Sections 11 and 12 are there set out. The statute provides on its face what is required. No reference is made in the statute to consumers being treated differently, in contrast to other statutes at the time, for example the Rome Convention on choice of law in contract claims which had a specific regime in relation to consumer contracts.

Can I just remind you, sir, looking at section 11, what the Act requires, which is first of all, obviously identifying the relevant tort, and then identifying the elements of the events constituting the tort in question. Then finally, the court makes a value judgment as to which is the most significant event or element of the events constituting the tort, in order to determine the applicable law.

Significance is to be determined in relation to the tort in question, not on the basis of what requires the most investigation. All of that is common ground between the parties. It comes from the VTB case and the Deutsche Bahn case, and the reference in the Deutsche Bahn case to the relevant paragraphs are paragraphs 38 and 41.

So that is all common ground. It is also common ground that the tort in question here is for breach of statutory duty. So that is the tort of which the constituent elements must be examined, and the value judgment made. In Deutsche Bahn, Mr Justice Barling undertook this exercise in relation to a claim based on the setting of the MIF, and determined that the most significant element of the tort was the restriction of competition on the market. And specifically, he found the MIFs were found to restrict

competition, in breach of competition law, because the MIF effectively imposed a minimum price for merchants in the acquiring market. That's why it was anti-competitive.

If one looks at that case again, please, at paragraph 121 -- bundle B3, page 2060.

What you see here is the value judgment he's making. The most significant element of events in the tort allege the breach of statutory duty is not --

MR JUSTICE ROTH: Just a moment.

MS TOLANEY: I am so sorry.

MR JUSTICE ROTH: It is B/2060?

MS TOLANEY: That's correct.

MR JUSTICE ROTH: Yes.

MS TOLANEY: So you see the value judgment is being made. The most significant element is not the loss --

MR JUSTICE ROTH: This is paragraph 121?

MS TOLANEY: 121. Significant though that element undoubtedly is, nor is it the setting of the MIFs, it is the restriction of competition.

If one drops down, one sees the argument as to the different elements and what is said is the infringement of competition, the restriction of competition, is necessary and is at the heart of such an infringement because the relevant tort is the breach of Article 101. That's why one looks at what the essence of the tort is.

The judge rightly says:

"If there is no restriction of competition, there is no tort."

And he says:

"The mischief at which Article 101 is aimed, or to put it more positively, the beneficial aim of that provision, is the protection of the competitive process. Competition does not occur in the abstract, but on a market."

Then he explains that:

"The markets are national markets for providing acquiring services. It is those separate markets which are alleged to have been subjected to the restriction of competition. Those markets are the theatres of the wrong allegedly done by the defendant."

So we see that. I will show you the reference in my learned friend's skeleton, but it is accepted here that the relevant tort is indeed this tort and that this finding is one of the elements of the cause of action for the claimant's claim.

That's important because that is the basis of the claim before the Tribunal. One can see that in my learned friend's skeleton argument at paragraphs 47 and 48, which is A51.17.

MR JUSTICE ROTH: Yes. I think that is clear, that that's an element of the tort.

MS TOLANEY: That's right. What is clear is the statement in 48, elements 1 and 2 -- it is 2 that we are concerned with -- apply in the present case.

The quotation we have just looked at is a helpful place, sir, to address a number of questions you asked me on Friday concerning the location of the restriction of competition. I wanted to clarify it so you have my answer in one place on the transcript.

The restriction of competition identified by the EC decision is the restriction of competition between acquirers for the business of merchants, and that restrictive competition takes place in the acquiring market.

And the decision found that there are separate national acquiring markets, as we've seen from paragraph 121 as well, and that means that each national market is partitioned from each other national market, and customers -- so here, merchants -- are exclusively or predominantly limited to obtaining acquiring services from acquirers in their own national market. So in practice, a French merchant will nearly always have a French acquirer, and that means the location of the acquirer in

practice, as well as the merchant, and the national acquiring market will nearly always be the same and that will be the country in which the merchant is based.

I didn't address the Tribunal on the provisions of Rome II, because it is no longer in issue, but it may be helpful to note that under Rome II, article 63A is that:

"The law applicable to a non-contractual obligation arising out of the restriction of competition shall be the law of the country where the market is or is likely to be affected."

So that's come in in Rome II.

I should say for fairness --

MR JUSTICE ROTH: Which article?

MS TOLANEY: It is paragraph 6, subparagraph 3, subparagraph A. The reference is B2/44, at 1389.

I should say that in the Deutsche Bahn case, it was argued that Rome II was relevant to the construction of the 1995 Act and that submission wasn't either accepted -- and the point was not determined by Mr Justice Barling in the submitter's favour. That's at paragraph 28. I simply make the point on the acquiring market question that, sir, you asked and that's a helpful pointer.

You also asked me, sir, about the Scottish law position on Friday.

That was in relation to intra-UK transactions. That started at page 79 of Friday's transcript. We did duly take away the question and look at it very carefully this weekend. The difficulty in addressing this at this point is that, obviously, the issue was not listed for determination, the issue was only in relation to foreign merchants. As a result of the Commission's finding that there are separate national markets, that didn't give rise to any factual complexity. The whole essence is separate national markets, that a merchant will nearly always transact with an acquirer in his national market.

Now the position, as you indicated, sir, may be more complicated for intra-UK transactions, since the national market will include three separate jurisdictions. The problem is because the issue has not been listed for determination at this hearing, no attempt has been made to determine whether there is relevant evidence on how acquiring actually operated in the UK market in 1992 to 2010. And despite our best attempts, that evidence isn't obtainable --

MR JUSTICE ROTH: Aren't we bound by the Commission's decision that these are national markets?

MS TOLANEY: Well, sir, we're bound that that is likely to be the position --

MR JUSTICE ROTH: Yes, I mean bound means not that it is likely that that's been determined, whether rightly or wrongly, you might have evidence showing the Commission's view that Germany was a national market is wrong, that actually, in Bavaria, people use Bavarian banks but it has been decided and doesn't it bind us?

MS TOLANEY: Well, except that it depends whether you look at the national market as the UK market, which is the way it has been approached, or as different markets.

MR JUSTICE ROTH: Well, I would have thought by "national", they mean the nation state, don't they? That's what they mean? They are not --

MS TOLANEY: Well, sir, what we say --

MR JUSTICE ROTH: It makes a certain sense that it may have varied in intensity through this long period, but we know that English banks operate heavily in Scotland and RBS operates in England and so on, so merchants will be using both.

MS TOLANEY: We do know that, but we don't have the evidence --

MR JUSTICE ROTH: It might be a different degree. But if one is looking at distortion of competition in a market -- I take your point, French merchants -- it doesn't follow, it doesn't necessarily follow in the abstract that Belgian merchants will use Belgian banks and not French banks, I don't know, but the Commission has so found and that's

where we are. We can't get behind that, nobody is suggesting that we can. Similarly, that Belgian merchants don't use Dutch banks although Dutch banks might, for all I know, be active in Belgium. But they have held these are national markets and it seems to me it is difficult, when we are bound not to arrive at any contrary conclusion to the Commission to say: well, actually, they are wrong about the UK and we can start looking at lots of evidence and hearing expert evidence, industry evidence, looking at how merchants dealt with it. It is a huge inquiry.

MS TOLANEY: You may well be right, sir, I don't know, I don't have the evidence, so I don't --

MR JUSTICE ROTH: It is not a matter of evidence, it is a matter of law.

MS TOLANEY: What I would say, though, is the issue was not listed for determination. It may be that we would have wanted to consider the position more carefully, and see whether there was a reason to argue against that decision.

MR JUSTICE ROTH: Hopefully you can address me on the point, having had notice of it, whether as a matter of law, we are bound to apply the Commission decision as to what is the relevant market. If we are, that's that. We don't have to think what the evidence might or might not reveal.

MS TOLANEY: If you give me a moment, sir, I will come back to you on that, just so I have the Commission decision paragraphs to hand.

MR JUSTICE ROTH: Yes.

MS TOLANEY: What I was going to say, was it would be, we thought -- given it had not been listed -- more sensible to deal with the intra-UK position once we knew whether there were substantial differences between the relevant limitation rules. That's all I was going to suggest.

MR JUSTICE ROTH: Except it may inform the way we approach the whole balancing and the application of section 12, when we know what's involved in this case.

MS TOLANEY: Sir I will come back to you on that in a moment. I am just going to take instructions. Can I carry on now with the rest of my submissions, which is there are certain arguments in my learned friend's submissions which I think demonstrate why the analysis that you are being urged to adopt is wrong. I would just like to outline those briefly.

We submit as a starting point that Mr Justice Barling's decision is correct, and it provides the correct answer in this case. Mr Merricks' argument is that the analysis somehow changes because this action is a collective action brought by consumers resident in the UK and not by merchants.

MR JUSTICE ROTH: Yes.

MS TOLANEY: It is helpful to break down Mr Merricks' argument as it, in fact, elides a number of points. The first argument, if you have Mr Merricks' skeleton argument, the first argument is at 49A of Mr Merricks' skeleton argument. That is A51.17.

MR JUSTICE ROTH: Yes.

MS TOLANEY: What you see there is that the first argument made is that the court's approach to section 11, in respect of the claim by what's called an indirect purchaser of the acquiring services, so a customer or on their language, a consumer, should be different from a direct purchaser, i.e. the merchant. That's the argument that's advanced.

The supposed basis for this argument is that the passing on of loss is the basis for the cause of action by the indirect purchaser. That's what they say. The basis of the cause of action.

Now we say that confuses the relevant elements of the cause of action and the way a particular claimant actually proves those elements. So the conflation's between what constitutes the cause of action and how do you prove it.

On Mr Merricks' own case, it is not an element of the tort that the loss has been passed

on. The relevant element of the tort is that loss has been caused by a breach of competition law and that's exactly the same as the merchants' claim.

MR JUSTICE ROTH: It is all a bit conceptual, isn't it? Clearly, an element of the tort is that the claimant has suffered loss.

MS TOLANEY: Yes, but the loss --

MR JUSTICE ROTH: Then that's equally an element, as Mr Justice Barling said, bound towards his breach of competition law. These are all elements of the tort.

MS TOLANEY: That's right.

MR JUSTICE ROTH: The real point is what is the most significant one. And as you point out, you have in your favour the judge's evaluation in that case, in a similar kind of claim, saying the most significant element -- never mind what are all the other elements -- is the breach of competition law.

I think it is really, for my mind -- I don't want to spend too long on this, because we have other things to do -- is subparagraph D, which you alluded to, of 49, where they say that two particular aspects of this --

MS TOLANEY: Yes, but sir, I think it is important that I just have a moment to show you why, if you break down each paragraph, it is wrong, because then it is cross referred back to in the later paragraphs. 52A relies on all those factors, that the claims in the present case are materially different from the merchant proceedings.

While we are in 49D -- I will come back to this. You do have to strike through -- the first is that these are follow-on claims because Ms Demetriou made the concession that that is not the point she relies upon now for section 11, only section 12.

MR JUSTICE ROTH: Yes.

MS TOLANEY: Can I just work through this, because it is important because it is important that when one is looking at the significance of the elements, that we have actually identified the elements and the passing on aspect is not an element of the tort.

So therefore, that can't amount to something that one places extra significance on, in order to get home that loss is significant.

MR JUSTICE ROTH: Yes.

MS TOLANEY: What, in fact, the skeleton is saying is that the claimant has suffered loss in a particular way. But that doesn't elevate the element of loss to being the most significant for the purposes of section 11. We are talking about the mechanics of how you suffered the loss.

MR JUSTICE ROTH: Yes.

MS TOLANEY: To put that another way, the customer's loss, like the merchants' loss, is because he has paid more than he should have done, because of the restriction of competition.

You can test that by a simple example. Let's suppose in a merchant claim you have the direct contracting party with Mastercard. That directly contracting party with a Mastercard acquirer is subsidiary 1 of the merchant. Subsidiary 1 of the merchant recharges the merchant service charge, including the overcharge, to subsidiary 2 of the merchant. So you have a recharge of the same charge, plus a bit more potentially. The fact that subsidiary 2 of the merchant establishes its loss by the recharge, does not mean that the loss element is suddenly more important. And it is not more important than the restriction of competition because that is the heart of the tort. And it's the same for both of them, it is just the second person has acquired it by recharge but doesn't elevate the significance of the loss.

The suggestion that a different law would govern the claim by subsidiary 1 and subsidiary 2 on that basis, must be wrong, because it's the same tort and it's the same loss. And I made the point on Friday that in these cases it's not accepted that the merchants passed on 100 per cent of any overcharge to consumers, so the Tribunal has to approach this on the basis that there may be competing claims for the same

loss, as has indeed been the case in DSG, and the consumer's claim --

MR JUSTICE ROTH: You made that point.

MS TOLANEY: And the consumer's claim is parasitic. The reason I am making that point in some detail, sir, is because, really, what it shows is that this case stands or falls -- or the argument made by Mr Merricks does -- on his second point, which is that these are consumers. And that's what it stands and falls on.

What is said at 49B and C is that consumers should be treated differently. What we say is that there are a number of reasons why that cannot be right. First of all, unlike the Rome Convention, as I mentioned, the 1995 Act did not provide for special rules for consumers. Although it already existed for contractual choice of law, parliament did not create the same regime for tort. And this would be inviting the Tribunal, retrospectively, to create such rules, and it doesn't work.

The reason for that is it is no element of the cause of action of the tort that the claimant is a consumer. To test it another way, many customers may not be consumers. You might have small businesses. So in order to create a new consumer protection regime under section 11, my learned friend says that loss, which is an actual element of the cause of action, is more significant where the claimant is a consumer because that is the element with which they are most concerned, and which affects them more.

So on my learned friend's case, the Tribunal is being asked to decide that loss to consumers, which on their case is an undefined term, is more significant than loss to non-consumers -- again, an undefined term -- and that consumers, undefined, are more concerned about loss than non-consumers, undefined. That's what this argument amounts to, the Tribunal being asked to decide what constitutes a consumer and say that those consumers are more bothered about their loss than others. And that would be, we say, a remarkable but also clearly erroneous finding. The only interest that any claimant has is in recovering the amount of its loss, and the

importance of that will depend on the sum in question, compared to the claimant's available funds.

The court can't conclude globally that consumers are more concerned about losing money than, for example, a small business. Article 101 gives a right of compensation to anyone who has suffered a loss by reason of an infringement. It is not put in terms of consumer protection.

The 1995 Act simply does not contain a regime for consumers or even define what counts as a consumer, and the court should not be trying to create a new legislative regime which does.

We can see from the Chopra case, if I could just show you that now, that Mr Justice Arnold, in a case where it was held that he was dealing with consumers, did not apply a different analysis under the 1995 Act.

So the relevant facts are set out at paragraph 1 by Mr Justice Arnold, as he then was. And you see that in June/July 2008, the claimants each invested a sum of money in a bond issued by a company defined as FLC. The claimants' purchases were arranged by the first defendant, AIPB, and FLC subsequently defaulted on the bonds. The claimants alleged that the bonds were mis-sold to them, and in particular, because AIPB represented that they acquired the Russian sovereign risk, when that was not the case, and then in June 2014, the claimants commenced proceedings against AIPB and its parent company.

At paragraph 3, the judge noted that Mrs Chopra graduated from a UK university and lived permanently in the UK, and her work and that in paragraph 4, he made findings about where the second claimant was based. In particular, in relation to consumer statutes, UCTA and the UTCCR 1999 rules, the defendants did not contest the status of the claimants as consumers habitually resident in the UK. You see that from paragraphs 129 and 134.

So this is a case where it is very clear that the claimants were as defined under a particular statute as consumers and that was not disputed.

Then the relevant findings are made at paragraph 121. The passage starts at 119.

MR JUSTICE ROTH: Yes.

MS TOLANEY: At paragraph 121, the judge noted the claimants' argument that the applicable law was English law. At 122, that the defendants' argument was that it was Singapore law, and at 123, he set out the relevant elements of the tort which I will invite the Tribunal to read. At 124, the claim for negligence. And nowhere in that analysis is there any suggestion that the position changes because the consumers are -- well, the claimants are consumers, and that therefore, English law should apply.

You will see that the decision was that it was Singapore law that was the applicable law, given the facts, the representations originating, et cetera.

MR JUSTICE ROTH: Yes.

MS TOLANEY: May I then just pick up on the point that you, sir, raised at paragraph 49D of my learned friend's skeleton?

At paragraph 49D, the claimant says that loss has more elevated importance due to the fact that liability is already established. We say that's wrong. The appropriate choice of law for a claim does not change depending on the stage of the proceedings.

My learned friend accepted that the fact that infringement has been established does not mean this infringement is a less significant element for the purposes of section 11.

That was the transcript day 2, page 88, line 11.

It must therefore follow that the fact that infringement has been established does not mean that the element of loss becomes more significant either.

For example, if these were not follow-on proceedings, and shortly before trial the defendant admitted liability, the appropriate choice of law would not suddenly change.

The next point made in paragraph 49D is that the fact that these are collective

proceedings somehow changes the significance of the elements of the tort. Again, that is wrong. Collective proceedings are a procedural mechanism for bringing multiple causes of action. The procedural mechanism adopted to pursue a claim, in this case many years or even decades later, cannot change the underlying proper law for those causes of action.

That's everything I had to say on section 11.

Very briefly, on section 12 --

MS DEMETRIOU: Sir, I am sorry to rise but I am very concerned about time. I thought Ms Tolaney was going to have five minutes on England/Scotland. We haven't had anything on England/Scotland but she's just rehashing the submissions she's already made on Friday. We're 45 minutes in.

MR JUSTICE ROTH: You answered the question about consumers and you have introduced the Chopra case which is relevant, as an addition. You said something but not much about Scottish law. I have to say, I am also concerned about time, Ms Tolaney.

We heard you at length on this on Friday. It is important that Ms Demetriou has a chance to respond. So can you wrap up in five minutes?

MS TOLANEY: I will. I am just going to answer your question on section 12.

MR JUSTICE ROTH: Yes.

MS TOLANEY: I have been trying to answer the questions put forward.

MR JUSTICE ROTH: Yes.

MS TOLANEY: Section 12 is wider but still limited to factors which connect the tort with a particular country. Nothing about that test refers to factors not connected to the tort itself, or which arise years or decades after the tort. Including the form of action and so on.

That's because the proper law of the tort cannot change, based on subsequent events

which are part of or connected to the tort itself.

MR JUSTICE ROTH: Yes.

MS TOLANEY: So the fact that the claim seeks aggregate damages is completely irrelevant to the proper law of the tort because it is not part of the event constituting the tort. Similarly, the fact that the claim has been brought on behalf of people resident in the United Kingdom at the present time, cannot alter the proper law of the tort.

The same point arises in relation to the argument that because this is a follow-on action, the only significant element of the tort is the loss. The fact that there was a regulatory decision concluding that there was that infringement cannot alter the significance of the elements constituted as the tort, otherwise the proper law of the tort would keep on changing.

In any case, we would say that Ms Demetriou's portrayal of the EC decision is not right, because there are still -- and I can deal with this in reply -- still decisions to be made on the EC decision. But I will wait to see how she relies on it.

You asked me, sir, about whether the fact that class members are consumers is relevant to section 12, because of the reference to factors relating to the parties. But there is nothing to suggest that the fact that a claimant is a consumer is relevant, and the sort of factors to which section 12 has regard is set out in the Court of Appeal's decision in VTB Capital. It is at paragraph 149 and the reference to that is B3/69, 1829. And the kind of factors that were considered relevant are:

"A pre-existing relationship of the parties, whether contractual or otherwise; B, any applicable law expressly or impliedly chosen by the parties to apply to that relationship."

So the alleged consumer status (undefined what consumer means) could not be.

Can I just finally come back to you, as I said I would, on the Scottish point. We are not seeking, sir, to go behind the Commission decision that there were separate

national markets which means, in practice, a separate UK market. But what the Tribunal, we say, is required to do in applying section 12 to intra-UK transactions -- since there are multiple countries in the UK -- is to look at the countries in which the elements of the tort occur. In those circumstances, it would be significant, we suggest, if for example, the vast majority of acquiring was undertaken by acquirers that operated their acquiring businesses from locations in England. That would be a strong pointer that the principal place in which the elements of the tort occurred was England. And that is not contradicting the Commission's finding that there is a single national UK market. It is properly focusing, for the purpose of the domestic choice of law rules, on where the elements of the tort in fact occurred. And that's why we are saying evidence is relevant. But it all depends on whether it is found that there are significant differences between the relevant limitation rules, as to whether that is a necessary inquiry at all.

MR JUSTICE ROTH: It is pretty clear that the majority of the acquirers were English because -- on the basis that there are many more English merchants than Scottish merchants through this period. So it seems inconceivable that of merchants throughout the UK, and the majority had their acquiring bank in Scotland. Just looking at the population differences.

MS TOLANEY: That may be so, sir. I simply don't know.

MR JUSTICE ROTH: I think we can take judicial notice of that, I would have thought, if one is just asking where are the majority of the acquirers.

Yes.

MS TOLANEY: Those are my submissions.

MR JUSTICE ROTH: Yes.

Yes, Ms Demetriou?

Reply submissions by MS DEMETRIOU

MS DEMETRIOU: Sir, members of the Tribunal, the issues between the parties on applicable law are as follows. Mastercard contends that the claims are governed by the law of the country where the restriction of competition took place.

It has, I am afraid, been imprecise over time about where that is because it's amended defence states that that is the place where the merchant is situated but Ms Tolaney has now at last been clear that it is the place in which the acquiring bank is located. So we take it that is their position.

MS TOLANEY: I am relying on the passage in Mr Justice Barling's evidence and the judgment. I am not saying that at all. I am saying --

MS DEMETRIOU: Sir, could Ms Tolaney come back to this in reply because --

MR JUSTICE ROTH: Can we listen to Ms Demetriou, Ms Tolaney. I think it is right that you said it is where the restriction of competition takes place, and that's the acquiring market. And that's where the acquiring bank is, that's my understanding.

MS DEMETRIOU: Yes, I am simply making the point that that's not what their pleading says. They say it is where the merchant is located. That, for your reference, is paragraph 23 of the amended defence, A1/12, 231 but I'm not going to take a pleading on that.

MR JUSTICE ROTH: Yes, because it is said that will be the same country.

MS DEMETRIOU: Mr Merricks, on the other hand, contends that the claims are governed by the law of the country in which the represented person suffered their loss, i.e. where they were resident when they suffered their loss. We see that in our amended reply.

Sir, as to the impact of this difference, we say that in most cases, the place where the acquiring bank is located and where the class member was, are likely to be the same country and so there will be no difference.

There will, however, be cases where the purchases were cross-border within the UK.

That was the point canvassed by the Tribunal on Friday. So, for example, an English consumer buying from a Scottish merchant or vice versa. In those cases, the difference in legal approach between Mastercard and us will lead to different applicable laws. It may lead to a different conclusion in relation to where claims are time-barred or not, depending on where the Tribunal gets to on limitation. If that is right, it will be necessary to seek properly to distinguish those claims, when considering the relevant data.

It will also matter, the difference between us, in relation to remote transactions between represented persons in the UK and merchants located outside the UK. As we said in our amended reply, Mr Merricks does not wish to pursue such claims unless the associated loss is more than de minimis, and in due course and following relevant disclosure --

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: Exactly. Now, there are two periods of time that are live. One relates to the 1995 Act and the other, the earlier period, to the common law rules of double actionability. I am going to start, as Ms Tolaney did, with the 1995 Act. You have seen the general rules. I don't need to go back, I think, to the legislation.

You have seen that where elements of the events constituting the tort occur in different countries, the applicable law is the law of the country in which the most significant element or elements of those events occurred. Then, as the Tribunal has seen, section 12 can displace the general rule in certain circumstances.

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: Our submission is that when applying section 11, the applicable law is the law of the place where the class members resided, where they suffered loss. In the alternative, we say under section 12 that is the substantially more appropriate law to apply.

I am going to start with section 11. As Ms Tolaney has indicated, there is common ground between the parties that the correct approach is set out by Lord Justice Lloyd in the VTB case. I don't think we need to turn back to that.

But I would like, please, to turn back to the Deutsche Bahn case, the judgment of Mr Justice Barling, which is in B3, tab 69.

Can we pick it up -- it starts on page 2029. Before we go to the passages of the judgment that I want to take you to, in some cases take you back to, I just want to remind the Tribunal that this was a case in which the contenders, as it were, for applicable law, the contenders that were being argued for, were on the one hand, the place that the MIF was set, being Belgium, and on the other hand, the place of the restriction of competition, i.e. the acquiring market.

This was, of course, a claim brought by merchants, and the factual position was that the acquiring market was usually the same market in which the merchant was located, and therefore, in which the merchant suffered loss. So in Deutsche Bahn, the place of restriction of competition and the place of loss were one and the same. We see reference to that through the judgment.

So the contenders were different and the place of restriction of competition also was the place where loss was suffered.

If we could take up the judgment starting from page 2043, we see -- just to note at this stage, at the bottom of the page, paragraph 40, the judge there setting out what the test is under section 11. It is over the page, at paragraph 41, that I want to highlight for present purposes. The court there says correctly, that:

"In relation to significance, it is clear that the correct approach is for the court to consider the significant relevant events, in the light of the facts of the case before it."

That's important, in our respectful submission, because it's not a question of standing back, saying "Well, this is a competition claim, so what's the most significant element

in a competition claim?", the Tribunal has to say, "Well, we have a particular claim for competition damages here. On the facts of this case, what are the most significant elements of the tort?"

Now here, of course, the tort is one of breach of statutory duty; the statutory duty being the competition rules. At paragraph 42, the judge there sets out the elements for the purposes of section 11, the elements constituting the tort in that case as being first of all, the adoption of the relevant MIFs; secondly, the restriction of competition; and thirdly, loss and damage caused to the claimant.

We agree with that taxonomy, so we agree with what the court said there. But of course in this case, category C, which is loss or damage caused to the claimant; the claimants here are the indirect purchasers and not the direct purchasers. So we agree with the principle but there is a factual difference which is that the claimants in this case are not based in the acquiring market, because they are not merchants. Or they may be based in the acquiring market, but they may not be.

Then going forward in the judgment to page 2047, we see -- and I don't think I need to read these passages out, but you see in paragraphs 53 to 55, the court is essentially finding there that the location of the restriction of competition was the acquiring market, and this was the same as the market where the merchants were based.

Then, at 56, you have the point about location of the loss. So the location of the loss was the same market, the market where the merchants were based.

Now moving on to page 2058, paragraph 110 at the top of the page, you see the claimant's argument there which is that the most significant element was where the wrongful conduct was engaged in, i.e. the setting of the MIF. So that's the argument that the claimant was making.

Then you see the court then addresses some of the case law that's relevant to section 11. You can see -- I am just going to pick up a couple of points. If you look at

paragraph 112, they consider a point there, where Mr Justice Moore-Bick in Protea Leasing held that the location of the economic consequences of the alleged wrong were entirely fortuitous and have no real significance at all. What I am going to be saying is that this is not a case where the location of the loss was fortuitous at all. We are very far from that kind of case.

Then if you look at paragraph 118 over the page, you see two points I want to draw from paragraph 118. The first point is the point made first, at the beginning of that paragraph. The court, we say, correctly says that "The significance of elements of a tort may differ, even as between cases involving the same type of tort." And we say that that is right because you need to look at the significance of the elements on the facts of every case. Then you see further down in the paragraph:

"In at least two of the cases, the place of loss appears to have been a matter of pure happenstance, unrelated to the real meat of the case."

In the present case, by contrast, the location of the alleged loss is not fortuitous, and we agree with that.

MR JUSTICE ROTH: Ms Demetriou, it seems to me that the difference on section 11 between the parties is not so extreme as necessitates this analysis. I don't think Mastercard is saying that the claimant suffering loss is not an element of the tort.

MS DEMETRIOU: No --

MR JUSTICE ROTH: I think they accept it is. They are saying another element of the tort -- I think you pretty much agree what are the elements of the tort. What they are saying is on the evaluation of what is the most significant element, you look at the tort, not the way the case is being argued out. You follow Mr Justice Barling saying that the most significant element of this tort is the restriction of competition. Then the question is, does section 12 -- should it displace it? And you do that by looking at the tort and not at what actually happened to be the way the proceedings play out. So it

is all about, it seems to me -- and he's clearly not doing it, although he says it reinforces the view he's reached, but that's not the basis of the view, in his paragraph 121.

MS DEMETRIOU: Yes. Let me turn to paragraph 121 --

MR JUSTICE ROTH: So I am not sure we need to go through, with respect, all of this.

MS DEMETRIOU: Sir, very well. Let me turn directly to paragraph 121. If we turn that up on page 2060. In fact, you have seen the conclusion in paragraph 124. As you say, the reasoning is set out in paragraph 121. So what the judge does there is he rejects the setting of the MIF, which was the claimants' argument, and he also rejects the place of loss. We say it is important to look at the reasons why the court rejected loss as the most significant element of the tort, because this is where we part company with Deutsche Bahn and we say that in our case, loss is the most significant element of the tort.

So the court said first of all -- and we see this a few lines down:

"Although, as the claimants have pointed out, loss is not a necessary element of an infringement of Article 101, a restriction of competition is necessary and, indeed, is at the heart of such an infringement."

Now we say that there, the court is placing too much emphasis on the infringement of competition. It becomes a similar proposition, as it were. The tort is -- the breach of statutory duty, of which loss is an essential element, as is common ground. So Mastercard accepts that.

MR JUSTICE ROTH: As did Mr Justice Barling.

MS DEMETRIOU: He did. But what he's doing, we say, here -- what he's done here is he's said: well, let's focus on the restriction of competition, rather than other elements of the breach of statutory duty, and restriction of competition is necessary to show a restriction of competition -- a competition infringement, whereas loss isn't.

We say that that approach, in a sense, is apt always to yield the answer in

a competition damages case, that it is the place of restriction of competition that is important. Because he's approaching it at this stage -- having accepted elsewhere that loss is a part of the tort, he's approaching it here by zooming in, as it were, only on the infringement, the competition infringement. When you do that, then of course you are never going to find that loss is the most significant element of the tort, because you are not considering loss. So that's the first point we make.

Then the court says that the -- he says: if there is no restriction of competition, there is no tort. Correct, but we say equally, if there's no damage, if there's no loss, there's no tort.

The mischief at which Article 101 is aimed -- or to put it more positively, the beneficial aim of that provision, is the protection of the competitive process. Competition does not occur in the abstract but on a market. Again, we say that that again, in a sense, is an approach which will always yield the answer which the judge arrived at, because again, he's focusing in on the purpose of Article 101, rather than looking more broadly, as he accepts elsewhere, on the tort of breach of statutory duty.

If you take the approach that he's done here, if you say: well, what's Article 101 getting at? Then it is difficult to see that the place of loss will ever be the most significant element of the tort. So in that sense, what we are saying -- the criticism I am making -- is that he set up the questions in a way which is guaranteed to yield the answer that he came to. What he should have done is said: well, look, the tort is breach of statutory duty. Yes, that involves infringement of competition, but it also involves loss. But he hasn't asked himself, with respect -- he hasn't put the questions correctly here.

But I make the other point that even if one is zooming in on Article 101 and saying what is the purpose of Article 101, of course it is, he's right to say it is protection of the competitive process but it also seeks to protect persons harmed by the

anti-competitive process. And the Tribunal will have well in mind the line of cases establishing that, such as Crehan and Manfredi and so on.

So we say that's where the judge's reasoning falls down, in Deutsche Bahn.

Now I want to turn next to my learned friend's skeleton argument. So if we could pick up bundle A1, tab 2, page 42. It is paragraph 79 of Mastercard's skeleton argument.

So here, at paragraph 79, Mastercard have adopted a different approach to that of Mr Justice Barling in Deutsche Bahn, in terms of identifying the different elements constituting the tort. You can see that, for example, they don't include the setting of the MIF. So they exclude Mr Justice Barling's first element. Then if you look at A and B, they have separated out two different elements which they say are elements going to the restriction of competition. In fact, A and B completely overlap. So A says:

"The finding of an infringement is based on the MIF having restricted competition in the acquiring market."

Then B says -- Mr Merricks alleges the same, essentially, that acquiring banks were caused to pay higher interchange fees. So they are one and the same point.

What they have done is separated them out, and we can see at paragraph 80 over the page, they've said: ah, both of these lead to the acquiring market. But they are exactly the same thing. It doesn't really work to restate the point in different ways and say: that is two nil up to us.

Then you see, going back to 79 -- the next point is "pass on to merchant." Now I think that Ms Tolaney has effectively, this morning, disavowed that element, because she says: well, that's all just part of how the loss flows to the consumer. We would agree with that.

Then D, it's consumer loss, which we agree with. So we don't like this taxonomy. We say Mr Justice Barling was correct in how he broke it down, but then you see over the page at paragraph 82, Mastercard then plumps for the setting of a minimum price for

merchants in the acquiring market as being the most significant element of the tort. So we are back to the two contenders.

The relative significance of each of these elements, so restriction of competition on the acquiring market, as per Mastercard, and loss suffered by the claimants, as per Mr Merricks, the relative significance of those elements has to be judged on the basis of the facts of this case, as we have seen, and by reference to the identification of the issues we have made which correspond to those of Mr Justice Barling.

In our submission, the loss and damage suffered by the consumer members of the class in this case is the most significant element of the tort in this case.

Now we are not saying -- Ms Tolaney suggested repeatedly in her submissions on Friday and this morning, that our case is that every time a consumer comes along, then the place of where the consumer suffered loss will always be the most significant element. She spent a long time saying: well, the Act doesn't say that. We agree the Act doesn't say that. We agree with that. That doesn't mean that you exclude from the consideration of significance, the fact that this is a claim brought by some 43 million consumers who are resident in the UK.

Indeed, we make the following submissions. We say, first of all, these are collective proceedings brought under a statutory regime, the very purpose of which is to provide compensation to consumers for loss they have suffered as a result of competition law infringements. In this case, the class seeks an aggregate award of damages which, as the Tribunal is aware, is a novel remedy introduced by the collective actions regime, as the Court of Appeal said in these very proceedings. The focus of a claim for an aggregate award of damages is the loss suffered by the class as a whole.

Secondly, we say that the Tribunal should ask: well, why has this claim been brought? Unlike many competition claims, the purpose is not to establish that certain conduct constitutes a restriction of competition and to seek an end to that practice or behaviour,

the purpose of this claim is solely to recover damages for the loss suffered by the class.

Thirdly, we say in this claim, brought by some 43 million consumers who, by definition of the class, were resident in the UK, significant weight should be attached to the elements of the tort which concerned them, and which affect them most directly. In other words, the infliction of loss on them.

Fourthly, we say that loss and damage to consumers --

MR JUSTICE ROTH: I am not sure quite what the third element amounts to. The elements of the tort which concern them are the restriction of competition in the UK market. You can put it either way. I am not sure it takes you one way or the other, the third element.

MS DEMETRIOU: I think standing back, maybe points 2 and 3 are really part of the same point.

MR JUSTICE ROTH: I think so.

MS DEMETRIOU: I think they probably are. But standing back, we say the point is this. One has to ask: what are the consumers interested in in this case?

MR JUSTICE ROTH: Every claimant who brings a claim for damages, all they are really interested in is getting some money. They are not interested in an analysis of, you know, the market effect. They want to account for damages.

MS DEMETRIOU: Sir, to some extent that is true. But there may be claims. Take, for example, some of the tech claims that are going on at the moment, where there is a practice, for example --

MR JUSTICE ROTH: Yes, there are cases. But I mean all the follow-on cases and there are lots of those, as you know, it is only recently we are starting to get these stand-alone cases -- anyway, I have your point.

MS DEMETRIOU: We also say that loss and damage to consumers is also

a significant part of the infringement of competition law established by the decision. We make those points at paragraph 107 of our claim form. Can I just quickly turn that up? That's in bundle A1, tab 11, page 209.

What we rely on here in this paragraph, paragraph 107, are, for example, various recitals in the decision which establish that loss to consumers was foreseen. We give you the reference at subparagraph A to those recitals in the decision. So it's not the case that even if one is looking solely at the infringement, the decision, that loss to consumers is irrelevant to that. That's part and parcel of what the Commission found. Indeed, we say that such loss was foreseen.

So we say standing back, when you have a case such as this -- so on the facts of this case which is what the Tribunal is concerned with -- where you have a claim brought by some 43 million consumers, who by definition, are resident in the UK, the very purpose of the claim being to establish an aggregate award of damages to the class, which is a novel concept, a novel concept introduced by the collective actions regime, and in circumstances where the purpose of the claim is to establish such damages rather than to establish an infringement of competition, and where, if you ask the consumers: well, what's the important thing to you here?, they would say: well, it is the loss that we have suffered, it is the fact that every time we've bought goods and services, we've paid more than we should have done. We say that for those reasons, loss is plainly the most significant element of the tort in these proceedings.

Now going back to Mastercard's skeleton argument, at A1, tab 2, page 43, what do they say? They say at paragraph 82 they rely on Deutsche Bahn, paragraph 121. I have made my point on that.

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: Then at paragraph 83, they seek to place emphasis on the fact that in order for the class to establish that it suffered loss, it must first show that loss

has been caused to merchants. So it says: well, that's another pointer to the acquiring market. It says that this is relevant for two reasons. They say, first, because it's a further element of importance. Secondly, because it would be logical for the applicable law to be the same in this consumer claim as it is in the merchant claim. We say both of those points are wrong.

The first point, as I say, Ms Tolaney has effectively disavowed this morning, because she says: well, the fact that merchants have suffered loss and it is then passed on, that's not an element of the tort, that's just how you go about proving your loss. We say, well, she's right, so that gets rid of her first point.

The second point is wrong under section 11, because the fact that the merchant claims resulted in the applicable law being the law of the acquiring market, does not -- cannot -- be said to be the definitive criterion which leads to the same conclusion in this case, because as you have seen, the Tribunal needs to look at the tort on the particular facts of every case.

So we say, at most, it is a section 12 point and not a section 11 point. But in any event, it's a bad point because there's no reason why the Tribunal should apply the same applicable law in these proceedings as in the merchant claims. There is no risk of conflicting judgments.

The only difference -- the only difference that anyone is relying on -- are different limitation periods. But it is completely unobjectionable if merchants' claims have gone time-barred under their applicable law, but the claims by consumers haven't. That doesn't give rise to any conflict at all.

Then at paragraph 84, Mastercard says the place of loss is not significant. Again, its reasons are wrong. So its first reason is that consumers are further away from the infringement giving rise to the claim. But with respect, that's the point that we don't like in paragraph 121 of Deutsche Bahn. What they're doing is focusing only on the

infringement rather than the breach of statutory duty. And once you have focused only on the infringement rather than the breach of statutory duty, you are always going to get the same answer, you are never going to get loss. The way you have set up the question answers it for you.

The second point is that the claim issue here arises from remote sales by non-UK merchants. The merchants could have made sales to persons anywhere. This is their point about had we defined the class differently, there would have been a multitude of different applicable laws.

That's a bad point. It is an unprincipled objection but it is a bad point because, of course, the Tribunal has to consider the class definition which it has in front of you. Indeed, it is unprincipled because it is Mastercard's case that will lead to multiple, different applicable laws for remote sales. That's not our case. Our case leads to one applicable law, or two, England and Scotland.

Finally, sir, on section 11, on Chopra, can I just quickly turn that up? I just want to go to paragraphs 122 and 123, because we say Chopra helps us. If you look at paragraph 122, you see that the claimant went to Monaco. So there was an auction which was in Monaco. Yes, so this is dealing with the authority that the court is referring to, Morin v Bonhams. So in that case, the defendant was from Monaco, the claimant was English. The auction was in Monaco. The claimant went to Monaco and bid successfully for the car.

So you see further down the paragraph the specific transaction which caused the claimant to suffer his loss occurred in Monaco. That's a point which assists us.

Then over the page, the judge considers the claimant's claim for misrepresentation. You see the elements of this tort are misrepresentation, reliance and loss. So the representations originated in Singapore but were received in England, and the initial reliance occurred in England, when the decision to invest was made.

Then the claimants implemented those decisions in Singapore by giving instructions to purchase the bonds. As a result, the claimants suffered loss in Singapore.

So again, you have a position which assists us, because insofar as you can take anything from it -- because for a misrepresentation claim, here, Mr Justice Arnold, as he then was, focused on loss being the most significant element of the tort, even though misrepresentation happened in England. I don't think you can take much from it, because it is a different tort, different case, but insofar as it is relevant, it helps us and not Mastercard.

So, sir, moving on to section 12. We say that if we are wrong on section 11, which of course we say we are not, then section 12 applies. We say in particular, Mr Merricks places weight on the following factors.

First of all, factors relating to the parties, in particular the collective proceedings, are brought on behalf of many millions of consumers, all of whom have to have been resident in the UK for a minimum period in order to fall within the class definition.

The points that I made under section 11 about the nature of the regime and the claim for aggregate damages being the focus of these proceedings, are relevant here. Now Mastercard, looking at Mastercard, Mastercard's position, it doesn't have any specific overriding connection with the acquiring markets in other member states. So where you have a remote sale, where you have somebody, for example, based in England, a consumer who suffered loss in England, who buys some wine from a French merchant online -- take that for an example -- it is no skin off Mastercard's nose, in terms of its factual position, as to whether the applicable law is English law or French law. It doesn't have any particular contact with France which means that that should be borne into account.

Mastercard, this was an EEA-wide MIF and Mastercard, in terms of its factual position, ought to be entirely neutral as to which applicable law it is most connected to.

Then factors relating to the events which constitute the tort in question. In relation to purchases from merchants outside the UK, the claims brought on behalf of the represented persons relate to remote transactions only. So namely where the represented person was in the UK at the time, and where the merchants made the goods or services available for purchase in the UK.

Causation of loss to consumers was obvious and predictable. Indeed, Mastercard's own defence to the merchant claims is that they passed on the loss to consumers. So Mastercard can't say: well, that is a surprise to us, a surprise to us that consumers would have been caused loss.

As I say, the recovery of such loss is at the heart of the present proceedings. Now we do here say that the present proceedings are follow-on claims, so in terms of when you are looking at the most significant elements of the tort in this case, in terms of what the Tribunal has to do, then what the Tribunal doesn't have to do is it is not going to determine any issues relating to liability. All of the focus of litigating this tort is going to be on loss.

So we say, accordingly, in the present case, there are numerous factors of significance linking the tort to the UK. When one looks at the factors linking it to the acquiring markets, those are less significant or even if they are not less significant for the purposes of section 11, it is substantially more appropriate that these many millions of UK consumer claims be determined according to the laws of the relevant part of the UK in which they reside.

So that's what we say about section 12, sir, members of the Tribunal.

I am going to turn, finally, on to the common law rules.

Can I just pick up, first of all, bundle B3 again? This is Dicey & Morris this time. B3, tab 86.

Sir, does the transcriber need a break? I am just looking at the time.

MR JUSTICE ROTH: I am wondering how long you will be on the common law.

MS DEMETRIOU: I think probably about 15 minutes.

MR JUSTICE ROTH: Yes, then we probably should take a break.

Yes, we will take ten minutes now and come back at five past 12.

(11.56 am)

(A short break)

(12.06 pm)

MR JUSTICE ROTH: Yes, Ms Demetriou.

MS DEMETRIOU: I was going to turn to the common law rules and ask the Tribunal to pick up relevant excerpts from Dicey & Morris in bundle B3, tab 86, page 2618, please.

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: So you see the Dicey rule 203, which is the double actionability rule. I just ask the Tribunal to read to remind yourselves of it. It carries on over the page. Subparagraph 2 is the exception to the rule.

Then focusing on the exception for the moment, whilst we are in this excerpt from Dicey & Morris, if you turn on to page 2630 of the bundle at the bottom of page 2630, the authors note that -- they ask what system of law may be applied by virtue of the exception and what circumstances will be sufficient to bring it into play. It then notes that on the facts of Boys v Chaplin itself, which was the case giving rise to the double actionability rule, the exception did apply in favour of English law, the lex fori.

And then moving down page 2631, the authors say that there would be no reason why, in an appropriate case, both the lex fori and the lex loci delicti should not be displaced in favour of the law of a third country. And there has not been a case doing that so far, but there has not been one saying that that can't be done.

Then if you look at page 2632, you can -- I am not going to read out, but if you look at

the second half of that page, it deals with the types of circumstances which might lead to disapplication, displacement of the lex fori, in favour of the lex loci delicti alone, or in favour of the application of a third law, if the consideration of the tort reveals that the environment of the tort or the relevant pre-tort relationship is centred in that third country.

Then it says that:

"The strength of the case for displacement may also depend on the type of issue before the court."

MR JUSTICE ROTH: Sorry?

MS DEMETRIOU: On page 2632, sir, towards the bottom of the page.

You see --

LORD ERICHT: Strength of the case -- yes.

MS DEMETRIOU: Then if we move on to page 2644 -- this is going back to the rule rather than the exception. I am looking at the final paragraph on page 2644. That says that:

"English law will apply the substance test to determine the place of the tort for the purposes of clause 1B of the rule."

It says that it is sufficiently -- so:

"Adoption of such a test avoids a mechanical solution inherent in an outright choice between the place of acting and the place of harm. It is also sufficiently flexible to take account of factors such as the nature of the tort alleged to have been committed, material elements, and will enable the court to locate the tort in one place, for choice of law purposes."

So again, when applying the rule, there is an evaluative judgment so as to arrive at one place for the commission of the tort, rather than looking mechanistically at whether it is harm or the act.

So before going to a couple of other authorities, the primary submission that we make on the common law rules is that the application of both the main rule and the exception is highly fact-sensitive. The rationale for the rule is to avoid the situation where an act takes place in, say, country A, where it is not tortious, and the defendant is sued in England, where it is a tort, in circumstances where there is little connection with England, and to avoid the attendant unfairness of such a situation. That's the rationale, as I will show you when looking at a couple of the authorities.

Our submission is that the present case is very far removed from that. So it is very far removed from the mischief at which the common law rule is aimed. Because what we have in this case is an EEA-wide MIF which foreseeably caused damage to consumers throughout the EEA, and so there is simply no unfairness in applying the law of the country where the consumer suffered the loss. We say on the contrary, that's the appropriate thing to do.

So to put the point another way, the connection with the place of loss in this case is not tenuous or happenstance, such as to give rise to unfairness. On the contrary, we say looking at all the facts of these proceedings, that's the appropriate thing to do when one is applying the common law rules. So we say for English consumers, as under the 1995 Act, the applicable law is English law, and for Scots consumers, it's Scots law because that's where the loss was suffered respectively.

Back, please, to bundle B3, this time tab 71, and this is the Sophocleous case in the Court of Appeal. The facts are not analogous at all with the facts of this case. There were claims for damages brought by Cypriot people resident in Cyprus, claiming they had been assaulted by members of the British security forces between 1956 and 1958. So it is very different. I am taking you to this case because it sheds some light on how the common law rules work, because that's what the court was applying. What actually happened in this case was that at first instance, Mr Justice Carr applied the

exception and then the Court of Appeal said: this is not a case where the exception should be applied. But as I say, we are not relying on it for the facts. We are not saying it is analogous but I just want to show you some of the Court of Appeal's reasoning.

If we could start at page 2134, please, at the bottom of that page. So you see the issue that arises, which is the application of rule 203 in Dicey & Morris, and the application of the exception. Then if we go over the page, we see that from paragraph 13, that it's the speech of Lord Wilberforce that is to be treated as authoritative in Boys v Chaplin, and then we see at paragraph 14, that the exception was applied in Boys v Chaplin, and it goes through the facts of that case, or the broad facts of that case.

Then at paragraph 15, there is an excerpt from Lord Wilberforce's speech. The point that you can see -- at the bottom of the page, he talks about necessary flexibility. He says that:

"It is important to identify the policy of the rule, to inquire to what situations, with what contacts it was intended to apply, whether not to apply it in the circumstances of the instant case, would serve any interest which the rule was devised to meet."

So then he says, over the page, still in the citation, that:

"The general rule must apply unless clear and satisfying grounds are shown why it should be departed from and what solution, derived from what rule, should be preferred."

He ends up applying the exception to the facts of Boys v Chaplin.

We do say that he was right to say that you need to identify the policy of the rule, what mischief is it aiming at, when deciding whether or not to apply the exception.

Our submission, as I have said, is that the policy of the rule -- the mischief at which it is aimed -- is to avoid the unfairness of torts being litigated here, where they are not

unlawful abroad, and that simply does not arise in this case. So we say that it is an appropriate case, in principle, for the exception.

I want to take you now to Metall v Rohstoff, in bundle B2, tab 56, please. If we could please pick it up at -- just give me a moment, I have a wrong reference in my note.

MR JUSTICE ROTH: Just a moment.

MS DEMETRIOU: Of course.

MR JUSTICE ROTH: Tab 56?

MS DEMETRIOU: Page 1588, sir.

What you have in that page is a consideration of Lord Wilberforce's speech, if I could just take you to the end. At E to H, you see that the court here is talking about the reason for the rule. If we go down to the bottom of the page, and read from G -- so:

"Ordinarily, no doubt, in applying our law of tort in cases where all the relevant events have taken place in one foreign country, it would be unfair for our courts to judge a person's acts, save by the laws of the country where he did them. In general, a person, when in a foreign country, should, for the time being, be entitled to regulate his conduct by reference to the laws of that foreign country, without having to look over his shoulder to discover whether, by his conduct, he's exposing himself to liability in tort under English law."

Then:

"Secondly, the principle of comity will ordinarily require that a person who's given protection by the laws of one country in respect of acts done in that country, shall be protected against legal proceedings in other countries."

Then you see over the page:

"However, if a person, by an act or acts committed in a foreign country, has caused injury or damage to a person in this country, we see no reason in principle why he should necessarily be able to invoke a plea that the act which caused the damage was

performed in a country whose civil law rendered it non-actionable. Everything must depend on the facts of the case."

Then you see further down the page, a reference to the Distillers case which was discussed by Ms Tolaney on Friday. So:

"In deciding where the tort has been committed, the familiar substance test is applied."

Then:

"If, on the application of this test, they find the tort was, in substance, committed in this country, they can thenceforth wholly disregard the rule in Boys v Chaplin."

Just pausing there for a moment and thinking about the English consumer, the English member of the class who has bought from the French wine merchant. We say that, in substance, the tort -- applying the in substance test and looking at the factors, so restriction of competition on the one hand and damage and loss on the other hand, we say, in substance, you arrive at a result where the tort took place here, where the loss was suffered --

MR JUSTICE ROTH: The loss was suffered here, but the tort, of which everyone agrees an essential element is restriction of competition between acquiring banks, that didn't take place here. So we are back to the same argument we had before.

MS DEMETRIOU: Sir, yes. We are back to the same argument. But, of course, you will have in mind my submission which is the tort is a tort for breach of statutory duty which includes the infringement of the competition rules and the loss. So we say that an evaluative judgment has to be conducted under the in substance test, in the same way -- or in a very similar way -- to the way it's conducted under section 11 and you have a tort of breach of statutory duty, where restriction of competition takes place on one market --

MR JUSTICE ROTH: The tort is being committed by Mastercard. That's why you are suing them. It is not being committed by the merchant. The activity of Mastercard

constituting the tort is not in this country.

MS DEMETRIOU: Sir, with respect, we say that that is, in a sense -- that's not, we say, the right way, with respect, of looking at it. Because the tort is the tort for breach of statutory duty. So what did Mastercard do? It did something which restricted competition and it caused loss. So one is looking at both things. It is wrong to say they restricted competition on the acquiring market and that's the end of the story.

MR JUSTICE ROTH: No, I am just saying it is hard to say it was, in substance, committed in this country. An element was committed in this country and an important element was committed abroad. That's why I say we seem to be back to the same point. Then the fact that, you know, where, in substance, it was committed is a difficult question.

MS DEMETRIOU: Sir, yes. We are back to the same point. I am not seeking, as it were, to say that some different approach applies to the evaluative judgment under the common law. But it is clear that the common law is very flexible and fact-sensitive. But I do, as it were, invoke the reasons that I invoked under section 11, for saying that the evaluative judgment here points, in substance, to the place where the loss was suffered.

In a sense, the Tribunal has already seen the Distillers case. And that case is in some ways analogous to remote sales because in the Distillers case the drug, Thalidomide, was manufactured and initially supplied in England. So one could say, well, the tort was committed by the manufacturer in England, one might say, but what then happened was the suppliers in Australia supplied it to the claimant where the claimant suffered the damage, the injury.

So that's, in some respects, similar to a position where the infringement of competition takes place in, say, France, but then what happens is, as a consequence, a sale is made to a consumer in England, who suffers loss. In Distillers, on applying the

substance test, they didn't say "Well, it is all where the manufacturer defaulted".

MR JUSTICE ROTH: Because the claim was failure to warn the purchaser. So that was the tort.

MS DEMETRIOU: That was the tort.

MR JUSTICE ROTH: It wasn't negligent manufacture, in which case it could have been said the other way round.

MS DEMETRIOU: Sir, no. But there's an analogy, we say, to be drawn. It is difficult to draw much from different cases involving different torts and different facts, but it is not very different to say where you have online sales -- so where you have a merchant based in France, who is specifically selling into the UK online, then it is easy to see that the tort and the losses suffered here, that the substance of the tort, we say, is suffered where the loss has been incurred. The substance of the tort for breach of statutory duty.

So just sticking with Metall v Rohstoff for a little longer, if we go over the page at 1590 of the bundle, we see there at D:

"If, in any given case, the court concludes that under English law, a tort has both been committed by the defendant and committed in this country, we see no reason, either on principle or on authority, why he should be entitled to claim exemption by reference to some foreign law and we so decide."

Now applying all of these principles in Dicey & Morris and in the case law, then for English consumers, we say that the way it works is that double actionability doesn't arise if you are with us on where the tort was committed in substance. Of course, you have my point that that's because we say, in substance, the tort of breach of statutory duty was committed in the place the consumer suffered loss. So in those circumstances, the lex fori and the lex loci delicti will be one and the same, so you don't get into double actionability at all.

If you are against us on location of the tort, then our submission is that the exception to the double actionability rule applies in favour of the lex fori for English consumers alone. That's really because when you stand back -- so assuming against us at the moment that the location of the tort was in the various acquiring markets -- when you stand back, there simply is no reason why the rule should apply. So why the primary rule should apply. Because we are simply not within the mischief it is intended to guard against. This is an EEA-wide MIF. Mastercard has no particular connection with any of the acquiring markets, over and above the UK. We say in all the circumstances, there is simply no good reason why foreign limitation periods should apply to consumer members of the class, in circumstances where what's at stake were remote sales from merchants specifically selling into the UK.

Now, for Scottish consumers, if you are with us on location of the tort, meaning Scotland, because that's where they suffered the loss, then that does mean that double actionability prima facie applies because the lex fori, of course, is England. But then we say that the exception should apply so that only Scots limitation rules apply. And we say that's because there is absolutely no reason in this case to hold Scottish consumers to have to satisfy English limitation rules as well as Scottish ones.

As the Tribunal has pointed out, this is a UK tribunal. It would be especially odd in those circumstances to be subjecting Scots consumers to English limitation rules as well as to Scottish limitation rules. We say that would be plainly wrong.

Now that's if you are with us on location of the tort. If you are against us on location of the tort -- so in other words, take my sale, take somebody in Edinburgh buying French wine from a French merchant, so if you are against us that the location of the tort is nonetheless where the loss is suffered, Scotland, but you say that the lex loci delicti is French law because that's where the restriction of competition took place, and then you have the lex fori is English law, we say that you should disapply both in favour

of Scots law. And we have seen where in Dicey, the authors say that that approach is available.

Again, we say it is because none of the mischief at which the rule on double actionability is based, is designed to guard against, arises on the facts of this case, for the reasons that I have given. So for that reason, it is just Scots law that applies.

So just addressing the point that the Tribunal was debating with Ms Tolaney. Take the position where a Scottish person buys something from an English merchant. Then we say you are bound by the Commission in terms of the UK market being the relevant market, relevant acquiring market. You are bound by that. So the place of restriction of competition, if we are wrong on substance of the tort, would be the national UK market. But then we say that that's all the more reason to apply Scots law.

Sir, I am conscious I have just given you various permutations. I am sure you are all much more clever than I am, but it took me a while to work through what the permutations were. If it would help to have a one side note -- I think, anyway, you will see it on the transcript, but if, on reflection, it would help to have a one-page note explaining how the permutations arise, we are happy to do that.

MR JUSTICE ROTH: We will get it from the transcript. Once we start getting notes, there will be no end to them.

MS DEMETRIOU: Sir, I think that is absolutely fine.

Those are my submissions, unless you have any questions.

MR JUSTICE ROTH: No, thank you very much.

So Ms Tolaney, just by way of reply?

Reply Submissions by MS TOLANEY

MS TOLANEY: It is. I have very few points, sir. First of all, it was said that I had somehow abandoned my pleaded case. That's not right. My pleaded case is entirely consistent with what I said and, indeed, the way Mr Justice Barling put the position in

the Deutsche Bahn case at paragraph 22. I urge you to look at that. It's bundle B3, tab 69, 2040, for your note. There has been no change.

The second point was from my learned friend that our case, where we set out in paragraph 78 of our skeleton, didn't include the setting of the MIF. But it is obvious, as we say in paragraph 78 of our skeleton, that we are engaging with my learned friend's pleaded case and that does not include the setting of the MIF.

Now she says in her skeleton at paragraph 51 that it doesn't matter that her pleaded case is not complete. That may be the case but she can't criticise Mastercard for not inventing it as part of her case. So that was an arid debate.

The third point is that my learned friend said that she was not suggesting that it was her case that all her submissions applied to consumers generally, just to the ones in this case.

Well, that is not apparent from the text of 49B and D of her skeleton which talks about consumers generally. It's not clear because no case has been advanced, as to specifically why the consumers in this case, other than it is said resident in the UK and it's a competition infringement case. It certainly doesn't narrow it down. Indeed, the use of the word "consumers" from my learned friend in all of these contexts is very vague and undefined which makes my point. There is no principled reason as to why a section 11 analysis would change, and specifically it is being said only in this case, not generally.

The fourth point is that my learned friend is inviting the Tribunal to engage in that inquiry that formed no part of section 11. She says the Tribunal should enquire why this claim has been brought and decide, essentially, that consumers need more protection. Section 11 is not the forum for that exercise and there is no consumer protection mechanism built into it.

Importantly -- this is the next point, my fifth point -- not a single case was cited by my

learned friend supporting her approach. Indeed, her case recognises that the Tribunal would have to find Mr Justice Barling's decision in Deutsche Bahn wrong. In fact, she put it that the judge asked himself the wrong question, which led him to the answer of the acquiring market.

MR JUSTICE ROTH: You would not find it wrong, because the loss was in the same place. The outcome would be the same.

MS TOLANEY: What she said, in fact, though, was that he had asked himself the wrong question.

MR JUSTICE ROTH: Yes. But not --

MS TOLANEY: Not the decision --

MR JUSTICE ROTH: Not the decision wrong.

MS TOLANEY: -- but that his process was wrong.

MR JUSTICE ROTH: Yes, she criticised his reasoning in paragraph 121.

MS TOLANEY: She did. What we say is that that is completely unfair, because it is clear from paragraph 121 and 124 that the judge clearly understood that he had to identify and weigh various elements, including loss, and he reached his conclusion. So if there is a principled criticism, then my learned friend needs to advance it. But what you have before you is a criticism of the one authority on point and no authority supporting her consumer-led approach.

On that point -- and this is the sixth point -- my learned friend asserted quite blithely that the case of Chopra supported her. I have to say, I have completely failed to understand how this was the case, because the passage that she looked at was, in fact, not Chopra at all but the decision of Morin, cited in Chopra. And, in fact, that was not a cross-border sale. The consumer was an English resident who travelled to Monaco and made the purchase there.

Neither Chopra nor Morin support my learned friend on the point for which they were

cited. The point for which they were cited was that despite the court recognising that they were dealing with English resident consumers -- and that was under a specific consumer regime in the Chopra case, UCTA and UCCTR -- the analysis of the judges -- it was, I think, Lord Justice Mance, as he was, and Mr Justice Arnold, as he was, neither of them suggested that the status or location of the consumer had any impact on the analysis.

My learned friend simply didn't engage with that point.

In any event, Chopra did not support the analysis because Mr Justice Arnold, as he then was, weighed up several factors, including on negligence in paragraph 124, where the main issue was the breach of due diligence, and he reached his conclusion that Singapore was the right law, notwithstanding that the consumers were resident in England.

So Chopra certainly did not support my learned friend.

Moving then to section 12, my learned friend said that recovery was at the heart of this case. Again, this seemed to be an invitation to the Tribunal to go down an enquiry that forms no part of section 12. The fact that my learned friend's focus is on the loss, can't change the analysis of the tort.

It was also said that because this was a follow-on action, there will be no need to consider the actual effect on competition in the relevant foreign national market. But yes, there will be. Because the EC decision did not make a finding that every single national market was affected throughout the 16-year period of the claim or at all. As Mastercard notes in its defence -- I will give you the reference -- it is paragraph 41E, bundle A1, tab 12, page 237 -- the Commission concluded, for example, in recital 650 of the EC decision -- bundle A2, 25, page 793 -- that the EEA MIFs appreciably restricted competition in most EEA member states, without identifying those specific states.

Therefore, in order to establish a claim for damages based on transactions with, for example, a merchant based in Spain, Mr Merricks will have to establish that competition in the acquiring market in Spain was affected by those MIFs. He will also have to establish the extent of the effect and, in turn, on the prices paid by the merchants. And the Commission made no findings on that.

So that is all a necessary part of showing whether charges to, for example, Spanish merchants, were higher than they would otherwise have been and if so, by how much.

So the fact that the EC decision establishes an infringement has no impact on the analysis under the 1995 Act.

Then turning to the common law. I have very little to add to the submissions I made. It rather follows the main submissions on the 1995 Act. But in citing Sophocleous in tab 71 of bundle B3, my learned friend didn't, I think, refer you to paragraph 33, referring to the "high authority", that the flexible exception should not be made too readily available. That's at page-bundle 3, tab 71, page 2140.

Those are my submissions.

MR JUSTICE ROTH: Thank you very much. I think sensibly, as that concludes the argument on foreign law, it is appropriate to rise early, take an earlier lunch, and to come back at quarter to, to start with exemptibility.

(12.44 pm)

(The short adjournment)

(1.45 pm)

MR JUSTICE ROTH: Yes, Ms Demetriou.

Submissions by MS DEMETRIOU re exemptibility

MS DEMETRIOU: Sir, members of the tribunal. As you know, the Commission decision which forms the basis for this follow-on claim was adopted in December 2007. It followed a very lengthy investigation which commenced initially in 1992. There were

repeated meetings between the Commission and Mastercard, various rounds of submissions and expert reports, statement of objections, a supplementary statement of objections and a hearing.

In that investigation, in that procedure, Mastercard adopted a particular position. It argued that its MIF and the various rules and decisions underpinning it was lawful. It sought to justify it on the basis of economic theory. Mastercard did not seek to justify any particular level of MIF by reference to specific evidence. It chose not to put any different MIF to the Commission.

What happened was that Mastercard's strategy failed because the Commission found in the decision that its MIF infringed Article 101. It restricted competition within 101(1) and it was not exempt under 101(3). We say that what Mastercard is now seeking to do in these proceedings is to have another bite at the cherry.

Its case is that in circumstances where it's been established that the entirety of its MIF was unlawful, and assuming for present purposes that the resulting overcharge was borne by the consumers in this class paying higher prices for goods and services that they purchased over the relevant period, Mastercard's case is that class members should not recover that overcharge, but instead, should only recover the difference between the unlawful MIF and the highest lawful MIF that Mastercard could, in theory, have charged over the relevant period. That's its case.

Indeed, the position is more extreme than that, because Mastercard argues that it could lawfully have charged an even higher MIF than that considered by the Commission and found to be unlawful, and so its position is that consumers have no claim at all.

Now before I get on to the various flaws -- legal flaws -- in Mastercard's argument that we have identified, I want to focus on one flaw which is fundamental. Mastercard does not put forward any case as to what it would have done absent the infringement. It

has not, for example, said: well, we would have put forward this different MIF arrangement, different form of MIF to the Commission and it would have granted us an exemption; and it has not said, for example: well, we would have engaged with the Commission with better evidence than that which we actually relied on, and the Commission would have been persuaded by that evidence and granted us an exemption. So it is not saying anything like that. There's no pleaded case to that effect at all. Instead, Mastercard's position is that this is unnecessary as a matter of law. So Mastercard says it doesn't need to prove any case on the balance of probabilities as to what it would have done, what would have happened; instead, it can throw it over to the Tribunal to determine what is the highest MIF that Mastercard could lawfully have charged.

Now in our submissions, we are going to show the Tribunal why Mastercard's approach is wrong as a matter of basic tort law. The correct question is what, on the balance of probabilities, would have happened, absent the infringement?

No doubt Mastercard has not pleaded any case to that effect, because the best guide to what would have happened is what Mastercard actually did in the real world. It didn't approach the Commission with a menu of different options supported by different expert reports, and ask the Commission to determine whether any of those were lawful, and if so, which, it adopted a much more aggressive --

MR JUSTICE ROTH: Sorry to interrupt you, but could it have done that when it was notifying?

MS DEMETRIOU: Sir, we say yes. In fact, we have the example of the Visa decision which I am going to show you. So Visa notified its MIF and it received a statement of objection saying "We think this is unlawful", and it pivoted. It came back with a different proposal which was then consulted on.

Mastercard chose not to do that. It was fully aware of that. The Visa decision was in

2002. It stuck to its guns and asked the Commission to find that its MIF was lawful. It did so knowing that the Commission might find its MIF to be unlawful. But it didn't do what Visa did, it didn't pivot and come back with something different. It didn't engage with the Commission.

The Commission consulted on Visa's new position. It didn't engage with the Commission in that sort of constructive way at all, it just stuck to its guns. Now we say that not only is Mastercard's pleaded case, which I am going to come to in a moment, inconsistent with basic principles of tort law, but we say, second, that it's an abuse of process for it, essentially, now to seek to re-run the Commission process in these proceedings.

Its case in these proceedings is to say: well, we could have had a MIF which was a bit different and which would have been exempt. The answer is it should have put that forward to the Commission when it had the opportunity to do so. Having failed to do that, Mastercard shouldn't be permitted now to put it forward to the Tribunal.

MR JUSTICE ROTH: Isn't it a bit odd? The trouble with these cases is one is looking at what happened, and then one is looking at a counterfactual which, by definition, is hypothetical, it never happened.

MS DEMETRIOU: Yes.

MR JUSTICE ROTH: So when one says they failed to do that, well, they weren't in the counterfactual world.

MS DEMETRIOU: Sir, no. But in this case, the best guide to what would have happened -- this is not a cases like, for example, a cartel, where you have, say, a price fixing cartel and you are saying: well, what would the price have been, absent the cartel in the counterfactual world? This isn't that sort of case. This is a case where this was a -- the MIF was an arrangement of Mastercard's and it was in its gift to engage with the Commission to put forward something different and to achieve an

exemption. But that's not how it ran the proceedings.

So for Mastercard to say: well, that didn't work; actually, in the counterfactual, absent this infringement, what we would have done is something very close to that and the Commission would have granted us exemption. We say that that's an abuse of process, because it's essentially having another bite at the cherry. It could have done that at the time.

MR JUSTICE ROTH: Not quite. I understand what you are saying in a sense but it is not quite another bite at the cherry. They are not saying: therefore, we get an exemption. They are saying: therefore, our damages should be calculated on the basis of what would have been exempt and what we charged.

MS DEMETRIOU: Sir, that's what they say.

MR JUSTICE ROTH: So it is not quite another bite of the cherry. They are accepting they are stuck with what they did charge and which was subject to the qualification that you referred to. That's not exempt.

MS DEMETRIOU: Sir, that's how they put it. But it’s interesting -- I am going to come on to show you this, but it's interesting how in the merchant proceedings which led to the Court of Appeal and to the Supreme Court's decision, it is interesting that what happened there -- I will take you to it in due course -- is that exemption and exemptibility were really treated by the Court of Appeal as being the same thing.

So you will recall that those proceedings relate to a period of time which mostly post-dates the decision. So the Asda proceedings claim loss from October 2007 going forwards. So there is no binding finding on exemption. So in those cases, Mastercard in that case, in those cases, sought exemption. So its position was: well, this MIF was exempt, and we are asking the Tribunal, the court, to find that it was exempt.

So what the Court of Appeal then said is that it is that finding of exemption which you use to determine damages. So once we have found whether or not any part of the

MIF is exempt, then obviously, any part that's exempt is not unlawful, and so you can't claim damages for that part. It is exactly the same exercise.

But what they are seeking to do here, they are bound by the finding of exemption that we say the logical consequence of what the Court of Appeal has said is, well, once you have the finding in relation to exemption, whether it is from the Commission or from the court, that's what determines damages. They are saying: no, no, no, that's wrong. Although we have this binding finding of exemption, we are entitled to go back and reconstruct things and say: this is what we could have done. What we could have done. We could have got exemption for something else. And we say that that is wrong.

We also say, thirdly, that the question of what realistically would have happened, absent the infringement, has already been answered by the CJEU in Mastercard's appeal against the Commission decision, and by our domestic courts. They have all found that absent the infringement, there would have been no default MIF and a prohibition on an ex-post pricing. And that conclusion is materially identical to the question posed by tort law in the context of loss. So what would have happened absent the infringement. And we say it is binding.

I propose to develop our submission as follows. I am going to take the Tribunal first to Mastercard's pleaded case on this issue. Second, I am going to take the Tribunal to relevant parts of the Commission decision and also briefly to the Visa decision. Thirdly, I am going to explain by reference to the relevant case law why Mastercard's case is inconsistent with the proper approach to determining loss in tort law. Fourthly, I will address the abuse of process argument, and finally, fifthly, I will address the binding finding we already have in relation to the counterfactual.

So to start, if I may, with Mastercard's pleaded case, can we pick up, please, bundle A1, tab 12, page 225. Starting under the heading "Exemption", so paragraph 11. So

Mastercard said here that the decision did not establish that positive consumer --

MR JUSTICE ROTH: Just a moment.

MS DEMETRIOU: So sorry, sir. Bundle A1, tab 12, page 225.

I am really looking at the structure of their pleading, what their case is. They say at paragraph 11 that the EC decision did not exclude, did not prevent Mastercard from setting alternative MIFs at a level above zero which met the conditions for exemption. So they did find, the decision did find that the MIF that had been applied couldn't satisfy the conditions for exemption. That Mastercard say: well, nothing prevented it coming back.

Then at 12, it therefore remains open to Mastercard to demonstrate through appropriate evidence that the conditions of Article 101(3) would have been met in relation to alternative EEA MIFs set at a different level.

Then over the page, you see that at paragraph 13, that Mastercard is going to rely on the Visa exemption decision from 2002 which exempted MIFs which were set by reference to the cost of processing transactions, the interest free period and the cost of the payment guarantee against fraud and card holder default.

Then at 14, an alternative case is put forward that Mastercard will rely on the Commission's press release of 1 April 2009, in which the Commission accepted that Mastercard's proposed alternative MIFs were set in accordance with the reasonable benchmark. Then you see at 15, that they propose to call expert evidence, and they expect this to show that alternative EEA MIFs were above -- above -- or close to the EEA MIFs actually set.

So their position is quite stark. They say they accept that the Commission found that its MIF was unlawful but they are proposing to adduce expert evidence to show that they could have achieved exemption through an even higher MIF. Then at 16 --

MR JUSTICE ROTH: Just stopping there. Presumably -- perhaps you will take us to

the press release. That's a level that is significantly lower than the levels that were set in this period.

MS DEMETRIOU: Yes. So that's at a level that is lower. We will take you to that.

MR JUSTICE ROTH: Yes. So they are saying they rely on that, but then they want to say: actually, it can be much higher than that.

MS DEMETRIOU: Yes. So what you are going to see in the subsequent parts of the pleading that explain this in more detail is that Mastercard are not saying:

"This is what we would have done. We would have gone to the Commission in the counterfactual with this, and the Commission would have exempted that on the basis of this evidence."

They are putting forward a menu of different options and essentially throwing it over to the Tribunal, saying: you work it out, you work out what is the highest thing we could have done.

You see that in paragraph 16:

"If the lawful MIFs were higher than the MIFs actually set, the represented persons will not have a claim for damages. Alternatively, their claim for damages is limited to the loss, if any, caused to them by the difference between the MIFs actually set and the alternative EEA MIFs which could lawfully have been set."

"Could lawfully have been set." Not: this is what we would have done, but you, Tribunal, look at our alternatives and work out what is the optimum thing we could have done for our business.

Then if we could go to page 259 behind the same tab in the same pleading. That's the summary section I have just taken you to. You see this set out in rather more detail.

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: So page 259. Again, you will see the heading "Exemption." You

see there, at 82, reliance on the Visa decision that's been foreshadowed in the earlier part of the pleading.

So they say:

"The Mastercard scheme could have lawfully adopted alternative MIFs based on ... "

And you see what follows. Just pausing there, just to foreshadow the submission I am going to make, which is that this really accentuates the abuse of process point I am going to make. They say: we could have done what Visa did, but of course, they knew what Visa did, because apart from anything else, they attended various hearings and so on and Visa's proposal was consulted on and they chose not to do it. And what they are asking the Tribunal to find now is to limit damages by reference to something they could have done at the time and chose not to do.

Then they say at 83, that they will also contend --

MR JUSTICE ROTH: Sorry, it is in the decision, isn't it: when did they notify?

MS DEMETRIOU: When did who notify?

MR JUSTICE ROTH: Mastercard.

MS DEMETRIOU: 1992.

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: I am going to take you through all of the chronology, including Visa. Then if you go to paragraphs 84 to 85, you have an alternative plea. So you have 82 and 83 is Visa. Then 84 and 85:

"Alternatively, Mastercard will contend that it could have lawfully adopted [again, I emphasise the words 'could have lawfully adopted', not 'would have'] alternative MIFs based on these categories of costs, subject to the caps in the Visa Europe exemption decision."

Then you can read A, B and C. Then moving to paragraph 86, there is a further alternative case on page 260. It says that:

"Further, alternatively, Mastercard will contend that the Mastercard scheme could, in any event, in respect of the full relevant period, have lawfully adopted alternative EEA MIFs which were based on, (a), the costs avoided by merchants as a result of accepting Mastercards, as compared to more expensive means of payment. Alternatively, the costs avoided as compared to accepting cash and the benefits which merchants received."

That is 86.

Then you see at 88, two further alternative cases:

"Further or alternatively, Mastercard will contend that the Mastercard scheme could, in any event, in respect of the full relevant period, have lawfully adopted alternative MIFs which were based on the costs avoided by merchants, as a result of accepting Mastercards, as compared to more expensive means. Alternatively, the costs avoided as compared to cash."

Then you see reliance on the Commission's press release. Then you see at 89:

"Mastercard will seek permission to call expert evidence to quantify each of these categories of costs benefit in relation to the 16-year relevant period. Particulars of the relevant levels of interchange fee will be provided once permission for expert evidence is obtained and the expert has carried out their analysis. Mastercard expects expert evidence to show that the lawful alternative MIFs were higher than the EEA MIFs actually set or, alternatively, were close to the level actually set."

So just pausing there, what is Mastercard proposing to do? Well it is proposing to bring forward expert evidence to establish that it could have achieved an exemption from the Commission during the relevant period. And its experts are going to put forward material to support the various alternatives and different rates which emerge from these alternative cases that are pleaded. That's what it is proposing to do.

Then it is asking the Tribunal to find that those rates that its experts will support would

have been granted an exemption during the relevant period. That's what it requires the Tribunal to do.

We say that it's important in that context to bear in mind that for most of the relevant period up to 1 May 2004, when regulation 1 of 2003 came into force, Mastercard would have had to have obtained an exemption from the Commission. So it could not lawfully have operated a MIF without obtaining an exemption from the Commission. And so the position is its experts are going to seek to justify these various MIFs pleaded in Mastercard's defence. As I say, it is then over to the Tribunal, on Mastercard's case, to determine whether the Commission would have exempted them during the relevant period.

So it is important to be clear about the nature of the exercise. Mastercard is effectively asking the Tribunal to re-do the exercise that the Commission carried out in its very lengthy investigation, but this time on the basis of different evidence and on the basis of a smorgasbord, as we said in our skeleton, of different, alternative MIFs, such as its experts particularise. And our overriding submission, as I have indicated, is that Mastercard has had its opportunity. The liability stage of proceedings has long closed. It is really not appropriate to ask the Tribunal to carry out this extremely complicated, we would say impossible, exercise, in the context of quantification of damage. I will explain how we say we get there --

MR JUSTICE ROTH: Just so I understand the headline points; suppose Mastercard had not pleaded all of that, they had just said it can be seen from the Visa decision that a MIF of whatever it is, 0.3 per cent, would be granted exemption. Accordingly, we say that a MIF of 0.3 per cent would be exemptible damages, the difference between -- would you have the same argument then --

MS DEMETRIOU: We would have exactly --

MR JUSTICE ROTH: -- or would you say: well no, they are accepting what the

Commission has done and they say that's the relevant counterfactual world?

MS DEMETRIOU: We would have the same argument. The difference would be if they said -- so if they said: well, this is what we would have done, so in the counterfactual world, we would have adopted the same stance as Visa, that is obviously better than what they have done. (a) because --

MR JUSTICE ROTH: I see that.

MS DEMETRIOU: But also better in law, because they are not saying -- they are at least then grappling with the fact that the relevant test is what would they have done absent infringement, rather than what is the best that they could have done, which we say is wrong. But we still say it would be an abuse of process to do that because they could have done at the time, exactly what Mastercard did, and I will explain why we say that as we go through.

So we say they could have said at the time to the Commission, once it got the SO, once it got wind of the fact that the Commission didn't like this, it could have done exactly the same as Visa and said "This is what we are going to do. We are going to do what Visa suggested. We want you to consult on that. That's the MIF that we are going to apply, can we please have an exemption?"

And they didn't do it. They chose not to do it. So we do say it is an abuse of process now to seek to ask the Tribunal to fix the consequence of that, of their strategic choice.

MR JUSTICE ROTH: I am sure you will explain it in due course.

MS DEMETRIOU: I will.

MR JUSTICE ROTH: I struggle a bit, just thinking in terms of -- rather simplistically, if an undertaking is investigated by the Commission for excessive pricing and says -- defence saying: our price is reasonable, it is not excessive, and they lose, the Commission finds it is excessive, and then someone brings a damages claim, who has paid that excessive price, it would be a bit odd if, in calculating damages for the

purpose of the counterfactual, you can't say "Well what's the price they could reasonably have charged?" Otherwise, effectively, the person claiming damages gets the goods for nothing. That doesn't seem right.

MS DEMETRIOU: That's very close, of course, to Albion Water which we are going to come to.

MR JUSTICE ROTH: I know. But you will square that with the line you are taking here.

MS DEMETRIOU: Yes.

MR JUSTICE ROTH: I don't want to take you out of your course.

MS DEMETRIOU: But, sir, no --

MR JUSTICE ROTH: It is just to help you that that's what is troubling me.

MS DEMETRIOU: Thank you. I will grapple with that point as I go through.

So I was going to go through the decision as quickly as possible. I want to show the Tribunal the structure of the decision and some of the key points on which we rely. The decision is in bundle A2 behind tab 25.

In advance of going to any particular section of the decision, if I could just set out -- summarise -- what are our five key propositions that we advance and that we would ask the Tribunal to have in mind when looking at the decision. So the first proposition is that Mastercard had every opportunity to put whatever case it wanted to the Commission and to adduce whatever evidence it wanted. The second is that Mastercard chose not to present the Commission with any alternative MIFs. It sought to justify its MIF, including the rules underpinning it which provided for it to make changes to its levels.

So whilst Mastercard now invites the Tribunal to hold that a MIF such as that which was the subject of the Visa decision would have been exempt, as I say, it didn't make that argument at the time.

Thirdly, the evidence adduced by Mastercard sought to justify its MIF at the level of principle or theory. It chose not to adduce empirical evidence to show that its MIF in fact met the conditions of Article 101(3).

Fourthly, unsurprisingly, the Commission's view of interchange fees, its position on interchange fees, moved on since its Visa decision.

Fifthly, the infringement of Article 101 found by the Commission was that setting any minimum price that merchants must pay to their acquiring banks was unlawful. That's what the Commission found, setting any minimum price that merchants must pay to their acquiring banks was unlawful.

MR JUSTICE ROTH: Unlawful meaning contrary to Article 101(1), and incapable of exemption under Article 101(3)?

MS DEMETRIOU: Yes. So we can see that from the operative part of the decision. Let's take that first. If we go to page 823 of the bundle, you can see:

"Mastercard has infringed article 81 by, in effect, setting a minimum price merchants must pay to their acquiring banks for accepting payment cards by means of the intra-EEA fall back interchange fees for Mastercard branded consumer credit and charge cards ... "

So there is a finding that setting the minimum price merchants must pay to their acquiring banks infringed what is now Article 101. What we will see in terms of the structure of the decision is that the Commission found that Mastercard's MIF which did that was not exempt under Article 101(3). But the finding is the finding of infringement of Article 101. As a whole.

If we go to the front of the decision -- so if we go back all the way to the executive summary, so page 617, you see at paragraph 1 that the present case is dealing with Mastercard's network rules and decisions on intra-EEA fallback interchange fees.

Then at paragraph 4, the Commission makes the point that an open payment card

scheme such as Mastercard can operate without a MIF, as is evidenced by the existence of comparable open payment card schemes without a MIF.

Then over the page, paragraph 6, the Commission says there that it doesn't dispute that:

"... in general, payment systems are characterised by indirect network externalities and in theory, a revenue transfer between issuing and acquiring banks may help optimise the utility of the network to its users. However, whether a collectively fixed interchange fee should flow from acquirers to issuers or vice versa and at which level it should be set, cannot be determined in a general manner by economic theory alone."

Then at the end of that paragraph:

"Despite repeated requests by the Commission, Mastercard failed to submit any empirical evidence on the positive effects of its MIF on system outputs and related efficiencies."

Then at 7:

"The Commission does not share Mastercard's view that the competitive process and market forces automatically lead to a MIF that can be safely assumed to be efficiency enhancing."

So you see there a flavour of how Mastercard was arguing this. It was saying: well, market forces mean our MIF was inevitably efficiency enhancing and lawful, and the Commission disagrees with that.

Then we see over the page reference to Article 81, or at the bottom of that page, going over the page, Article 81(3). At 12:

"Due to unrealistic assumptions underlying the conceptual underpinnings of Mastercard's MIF, due to the lack of evidence for a causal link between this MIF and objective efficiencies claimed and due to the fact that Mastercard's methodologies do not sufficiently reflect the underlying framework and operate with inflated cost

benchmarks, the Commission concludes that such a MIF does not fulfil the first three conditions of Article 81(3)."

Then you have paragraph 13. So remedy. Mastercard has to withdraw its MIF. And you see there that at the end of the paragraph is the sentence relied on by Mastercard: "The order does not prevent Mastercard's member banks from adopting an entirely new MIF, other than the intra-EEA fall back interchange fees that can be clearly proven to fulfil the four conditions of Article 81(3), based on solid empirical evidence."

Of course, that related to the position going forwards. The Commission found that what Mastercard had been doing until that point was unlawful. So what it can't do is come back again to the Commission with different evidence to justify this MIF or any part of it. That's now been conclusively determined.

Now the procedure, as I said, in front of the Commission, was lengthy. If we go to page 625, we see from recital 15 that there was a complaint from the British Retail Consortium in March 1992. Then Mastercard made its notifications in instalments, you see this at recital 16, spanning from May 1992 to 1 July 1995.

If you go to recital 20 -- so there was a statement of objections, as we can see from paragraphs 18 and 19, which didn't concern the intra-EEA MIF. Then recital 20, Mastercard informed the Commission in July 2003 of its intention to instigate proceedings for failure to act. Just to note that in terms of timing, by this point in time the Visa exemption decision had been taken. That is dated 24 July 2002.

Then you get at 21 a statement of objections on the intra-EEA MIF was sent to Mastercard in September 2003. Then just skipping across the page to paragraph 30, you see there a number of meetings. Seven meetings with Mastercard, beginning in 2004. Back to paragraph 23, you see that there was an SSO, recital 23, that was sent on 21 June 2006, and then Mastercard had exercised its right of access to the file. And there was that hearing in November 2006. One can see that from recital 26.

There was then an exchange about the further letter of facts. We see that from recitals 27 and 28.

Then in terms of substance, we see from recital 31 that Mastercard and others submitted written comments, opinions of expert consultants, et cetera. But it is perhaps telling that this evidence is expressed to be evidence in favour or against the use of multilateral interchange fees. So it accords with the approach of Mastercard before the Commission which is, namely, to defend its MIFs at a high level of principle.

Then if we move to the next page, page 628 of the bundle, we can see that in this part of the general background section, it deals with the Visa decisions. It was, of course, the case that, of course, the Commission had well in mind the Visa decision. We see references to it throughout this decision, which I am going to take you to some of them shortly.

But if we note for present purposes, recital 34, you can see that the exemption was based on an offer of reforms that Visa made regarding three main elements and the elements are set out. I am going to come back to the elements when I take you to the Visa decision in due course. But you see a summary of them there.

A key point we make is that Mastercard could have done exactly what Visa did and proposed reforms leading to a different and exemptible MIF, but it didn't. You see from the pleading that it is, indeed, what Mastercard wants to do now in the context of quantum. So it wants the Tribunal now to find that it could have proceeded on the same basis as Visa before the Commission, and it would similarly have achieved an exemption.

Now in fact, we see from recital 35, rather, that the Visa exemption decision expired in December 2007. But whilst we are thinking about Visa, let me just take you to some of the other references to it in the decision. So if we jump forward to page 678 of the bundle, and recital 202. So we see there, that is 678, recital 202:

"Mastercard kept the level of its intra-EEA fall back interchange fees unchanged for nearly five years, even after Visa had started to gradually reduce its fall back rates for intra-European card payments under the terms of the exemption decision. Mastercard did not, however, reduce its fall back interchange fees in parallel with those of Visa."

So the Commission is expressly pointing that out.

The same point is made -- I think we don't need to turn it up -- recital 496 which is on page 752. It really does highlight the stark choice made by Mastercard at the time. If we move forward to page 801 of the bundle, and looking at recital 686, there is a footnote -- footnote 829 -- which refers to the Visa decision. This relates to the cost imbalance argument for exemption. What the Commission is doing here is explaining that -- it is explaining its approach in the Visa decision. I am looking at the footnote. Namely, that the cost benchmark in Visa was accepted as part of reducing the Visa board's discretion for setting interchange fees rather than as relevant to the question of why Visa's MIF is paid by acquirers to issuers and not vice versa.

So in this formulation again, we see how the very principle of the direction of payment of the MIF was in issue in the Mastercard decision. If we look at the last sentence of recital 686, also that makes the same point:

"Robust empirical evidence is therefore required to establish the necessity for and the direction of a fall back interchange fee."

What this is helping to show is the extent to which the entire principle of the Mastercard MIF was in issue before the Commission in its investigation. It also shows the difficulty, in our submission, with Mastercard now saying it can rely on the Visa decision, because this was considered directly by the Commission at the time. Of course it had it very well in mind.

On that point as well, if we go to page 815 of the bundle, we have recital 742, and there is a footnote to that, footnote 891.

MR JUSTICE ROTH: Sorry, paragraph 742?

MS DEMETRIOU: Yes. It is the footnote I am taking you to, which is footnote 891, a footnote to recital 742.

The Commission is there saying, if you go halfway down that footnote, so it is saying: "In the framework of the Commission's research with respect to Mastercard's MIF which applies both to cross-border payments and to domestic payments, the Commission reassessed to which extent a free funding period may lead to incremental spending at merchant outlets. The result of its research did not provide support for upholding its assumption in the Visa case of 2002. Mastercard, in turn, did not provide convincing empirical evidence ..."

So really the point that I make is that the Commission's thinking was moving on. Of course, because several years had passed, it now had a whole lot more evidence in front of it from Mastercard and from others, and so it is all very well now for Mastercard to seek to rely on the Visa decision, but the well-foundedness of the Visa decision was directly at issue before the Commission in the Mastercard investigation. You can see from this an example of a point of substance on which the Commission's thinking had moved on. It says in terms: we now take a different view.

So going back to what Mastercard is asking the Tribunal to do in its pleading. It's saying: we want to rely on the Visa exemption decision. But it's not saying: had we relied on the Visa exemption decision -- well, sorry, it is requiring the Tribunal to find that if it had done the same thing as Visa, that that would have been exempt. You can see that that puts the Tribunal in an almost impossible position because the Tribunal is going to have to reach a view as to what the Commission would have done at various points during the 16-year infringement period, in circumstances where it directly considered Visa. You can see that its thinking had moved on in certain respects.

Now in terms of the Commission's thinking moving on, we can pause here just to consider Mastercard's response to the SSO, or part of it. You will find that in the same bundle behind a couple of tabs on, behind tab 27. So bundle A2, 27. If we can go to page 873, please.

It is paragraph 648 at the bottom of the page. What we can see here is that --

MR JUSTICE ROTH: This is part of the response to the original SO, is it?

MS DEMETRIOU: To the SSO, I think it is.

MR JUSTICE ROTH: The SSO not the SO.

MS DEMETRIOU: Yes. And so if we go to page 873 and paragraph 648, you can see that Mastercard here is positively arguing that the Commission has shifted approach. We can see there, towards the bottom of the page, three lines up:

"The most dramatic example of shifting ground is the position of the Commission on the question of the legality of interchange fees, from apparently believing they were legal, until it issued its statement of objections to Visa, to claiming that the setting of interchange fees constitutes price fixing in the Visa SO, to finding that an interchange fee set by reference to certain costs, similar to those measured by Mastercard, qualifies for exemption under Article 81(3) in its Visa exemption decision, to claiming that the only acceptable interchange fee is that of zero in the Mastercard SSO."

So here, Mastercard itself is saying: look, the Commission's thinking has moved on. This is a submission, but we say it is undoubtedly true that the Commission's thinking did develop over time. I've already shown you some examples of that in the footnote in the decision. Again, we say that's highly relevant, because it does go to the complexity of the task that Mastercard is setting the Tribunal. Because as I say, it is asking the Tribunal to determine, at every stage throughout the relevant period of 16 years, whether or not one or more of the alternative MIFs that its experts were identifying, would have been treated as exempt under Article 101(3).

So in order to make such determinations, the Tribunal would not only have to consider all of this different expert evidence adduced by Mastercard, but would have to put itself back in the Commission's shoes at the different stages of the relevant period and determine whether the Commission would have regarded those MIFs as meeting the conditions of Article 101(3). One almost needs just to state it to see how impossible that task would be.

Now going back to the decision, can we go back, please, to tab 25, this time page 638. It is notable that Mastercard was obviously aware of the competition law risk and that it decided to react to those risks not by changing the MIF, as Visa did, but rather, by changing its corporate structure and governance. That was the choice it took at the time. It knew, of course, that it may well be found to be unlawful. It had an SO and an SSO, but what did it do? It didn't put forward a different MIF, it changed its corporate structure. We can see that addressed at the bottom, the heading at the bottom of page 638. If we look at page 639 we can see recital 77 and also footnote 72, relate to the possibility of changing the governance in order to meet the regulatory and legal threats, those being the competition law risks.

Recital 78 says in terms that:

"During 2004, several possibilities of addressing these regulatory and legal risks to Mastercard were contemplated and the management of Mastercard in particular, considered changing the Mastercard MIF."

So they did actually consider doing that.

But then over the page:

"However, in November 2004, the global board discarded that option and rather, adopted the following measures."

And those measures were not to do with changing the MIF, they were to do with changing the governance structure, in order to try and argue that this was not a

decision by an association of undertakings, that they were not within Article 101(1) in the first place.

The following recitals, I don't need to go into the detail but they set out in some detail the proposed and ultimate changes to governance and structure.

If we just look at footnote 96 on page 643, you can see there that there was a prophetic, express reference in the middle of footnote 96 to the monetary scale of potential private actions following a negative decision of a competition authority, and that was given as a reason for urgency to change the governance structure and although they'd thought about, "Can we meet that risk by actually changing the MIF?", they discarded that option, as we have seen.

MR JUSTICE ROTH: You are in footnote 96?

MS DEMETRIOU: Yes. It is on page 643. It is talking about urgency for change. It is the aspects of the European competition network and the monetary scale of potential private actions, following a negative decision of a competition authority. It was something they expressly bore in mind when considering the urgency with which they had to act.

If we go forward to page 721, please, and recital 378, you see that set out there too. So:

"As it was set out in the earlier sections, Mastercard's member banks shaped and eventually approved the IPO in order to perpetuate the MIF as part of the business model, in a form that they perceived to be less exposed to anti-trust scrutiny."

LORD ERICHT: Can you give us that reference again?

MS DEMETRIOU: Of course, I am sorry. It's page 721. The same tab, 25, 721 of the bundle, sir.

It is paragraph 378, so just below halfway down the page. What that says is that the IPO was approved, in order to perpetuate the MIF as part of the business model, in

a form that they perceived to be less exposed to anti-trust scrutiny. This was a clear driving force. Rather than modifying the business model to bring it in line with EU competition law, the banks chose to change the governance of their coordination specifically for anti-trust-sensitive decision-making. They outsourced this decision-making to a new board.

Again, we will say, when I come to my legal submissions, that Mastercard having made this election in the real world not to change its MIF, not to change its business model but to seek to change its structure, in the hope that that would mean it wasn't scrutinised under competition law, having made that election in the real world, it shouldn't be permitted now, retrospectively, to limit its liability to pay compensation for the choice it made, by saying that in the counterfactual, it would have adopted some other course of action; the other course of action that it expressly discarded.

So, sir, I am going to come to this. But one point I make in response to the question that you put to me a little earlier is when one is looking in a case like this about, well, what would have happened in the counterfactual? We say it is wholly implausible for Mastercard to say: well, in the counterfactual of no infringement, what we would have done is come forward to do this completely different thing which in the real world, we rejected. Because the real world is extremely similar to the counterfactual world. Because they knew that this might be unlawful. They knew it. And they took a calculated risk. They took a calculated decision not to change their business model, but instead, to change their corporate structure.

Then if we -- in terms -- just now going back to the structure of the decision, if we go back a few pages to page 710, we see there the section on Article 81(1). I am showing you the structure. I am not going to take you through the recitals addressing restriction because, of course, Mastercard accepts that any counterfactual MIF would be restrictive by effect. Its case is that it would have had an alternative, exemptible MIF.

But what we do see from these sections of the decision -- again, I don't have time to take you through all of it -- is that Mastercard's arguments all operated at the level of principle. Just to take some examples -- there are a couple of very short examples. If we go forward in the section to page 742, we see at the bottom of the page, recital 455, an argument that's then been run with, as it were, by both Visa and Mastercard in some of the domestic actions which is that interchange fees are like an excise tax, they don't restrict competition. That has been rejected by our courts now.

Then at 745 of the bundle, again you see a reference at 467 to Mastercard believing that the competitive process and market forces will ensure that the average MIF is optimum and is efficient.

We then see, moving forward in terms of the structure of the decision -- if we go forward to page 798 -- in fact it starts on 796 -- you see the section on exemption, article 81(3). In fact, just looking at 664, you see the conclusion on Article 81(1). So the decision restricts competition between acquiring banks by inflating the base on which acquiring banks set charges to merchants and therefore setting a floor.

So it is a very broad finding that setting the floor is itself restrictive of competition.

Then moving on to exemption, you can see in terms of the structure of this -- if you go to page 798 of the bundle, you see Mastercard's argument set out. I am not going to read them out, but recital 673 through to 678 really do show that Mastercard was defending the existence of the MIF at the level of principle, and also that it made some very bad points.

MR JUSTICE ROTH: Before we get to that, Mastercard may have made lots of bad points, but the Commission, in its introduction at recital 666 on page 796, says that, as you noted, that MIFs have the object or effect of restricting competition. But in the second sentence, I think it is, of 666, five lines down:

"Multilateral interchange fees that have the object or effect of restricting price

competition between a scheme's member banks are not, as such, illegal, as they may potentially fulfil the conditions of article 81(3)."

MS DEMETRIOU: Yes.

MR JUSTICE ROTH: So they are saying there, even though they do, of their nature, restrict competition by effect, they are capable -- may be capable -- of exemption.

MS DEMETRIOU: Sir, yes, that's right. We accept that. But, of course, what Mastercard were doing in this case -- so they put forward their arguments on exemption, and they did argue at the level of principle, as it were. So they weren't saying, "Here's some granular evidence showing that X level of MIF meets the conditions of Article 81(3)."

And those were all rejected by the Commission, and so the upshot, as you have seen in the operative part, is that setting a minimum price is unlawful under Article 101(1). Under Article 81 as a whole, as it was then, so Article 101 as a whole. We see that in the operative part. Because they didn't discharge their burden of showing that they were exempt.

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: If we turn to page 799 and recital 678, we see there that Mastercard argues that the Commission was wrong to request Mastercard to establish under Article 81(3), that the interchange fee set at a certain level was indispensable to achieve objective efficiencies, because such requirement amounted to an attempt to regulate the level of Mastercard's interchange fee and the Commission would lack such powers.

So pausing there, the Commission is saying to Mastercard: look, come to us with some evidence showing that particular levels of interchange fee are exempt. Essentially, Mastercard, what we see here, eschewed that invitation and took a different tack, took a different commercial line which was to say: well, we shouldn't have to justify any

particular level of interchange fee because we think the whole system is justifiable on the basis of the evidence based on economic theory that we have put forward.

So you see that there in crystal clear terms. The Commission, effectively, was expressly inviting Mastercard to come forward to say: well, part of this MIF is lawful and here's the evidence to show it. But they deliberately chose not to do that, and that's important, in my respectful submission.

So as a result, the consequence was that the whole thing was unlawful.

So just going back to a question you put to me at the outset, which is they notified the MIFs, weren't they sort of stuck with that? No, they weren't. Not only because Visa showed how it could be done, but because the Commission was expressly saying: show us a particular level is indispensable, show us the evidence, convince us. And Mastercard said: no, that's not how we are doing it.

Then you have the Commission's analysis. Again, just to take you through the structure -- we have set a lot of this out in our skeleton argument but you can see it is recital 680 to 682, that it rejects Mastercard's joint services, joint costs argument. Then at 683, it rejects its balance of demands argument. At 801, recital 685, it says that the imbalance between costs of issuer as compared to acquirer is that point was circular. Then it says that imbalance can't be assumed -- we see this at 686 -- on the basis of cost considerations alone but has to comprise an analysis of revenues.

And that robust empirical evidence, we see at the end of that recital, is therefore required to establish the necessity for and the direction of a fall back interchange fee. So any fall back interchange fee. They have not done it. They have not given the evidence.

Then at 687, the Commission considered the claim that the MIF maximises system outputs, again holding that Mastercard had failed to demonstrate on the basis of appropriate empirical evidence. 690 -- recital 690:

"Hence, whether a MIF should be based by acquirers to issuers or vice versa, and whether it should be set at a certain amount or at zero, cannot be determined in a general manner by economic theory alone.

"A claim that an interchange fee mechanism creates efficiencies within the meaning of article 81(3) must be founded on a detailed, robust and compelling analysis that relies in its assumptions and deductions on empirical data and facts. Apart from Mastercard's general assertion that balancing of the demands of card holders and merchants leads to a better performance of the Mastercard system, is inherent and indispensable to the operation of a four party payment card system [et cetera, et cetera], no such analysis and empirical evidence was provided to the Commission."

So again, the Commission is saying: we need empirical evidence to establish that any interchange fee, and that it should be paid in this direction, is justifiable under article 81(3). And you need to justify particular levels, and Mastercard did not accede to that invitation. As I say, it exercised a different choice.

Then if we go over the page to page 804, we see at 696:

"The Commission's request for empirical evidence for a positive impact of Mastercard's MIF on the scheme's output and possible related efficiencies, is supported by the relatively good output of card schemes without a MIF."

So you then see that the Commission rejected Mastercard's argument that by requiring empirical evidence, it was imposing too high a burden of proof. It says that Mastercard has merely -- looking at 698 -- sorry, I think I have the wrong reference here. Just give me a second.

So 699, empirical evidence is required. Mastercard didn't demonstrate these things.

Then 600:

"None of the three annexes, the two exhibits and the 64 appendices to Mastercard's reply to the first SO, the subsequent submissions of Mastercard's expert or the report

of the merchants' acceptance of the ...(Reading to the words)... payment cards, nor the research market study contain empirical evidence that would have enabled the Commission to assess how and to what extent ..."

So how and to what extent:

"... Mastercard's MIF contributed and continues to contribute to an efficient balance of card holder and merchant demand, what the efficient balance would be and how this could contribute to economic and technical progress. This is even more surprising, as supposedly this type of evidence forms the basis which Mastercard uses to set its MIF."

So in conclusion, the MIF doesn't meet the first condition of article 81(3).

So you see that what the Commission is doing here throughout, is inviting Mastercard to provide empirical evidence to justify its MIF or any part of it, any particular level. It hasn't acceded to that invitation.

Then if we go over to page 806, even though the Commission had concluded that the causal link with efficiencies was not made out, it did consider the theoretical underpinnings of the MIF put forward by Mastercard, in particular the Baxter framework. We see that heading. It found it was not convincing. That's in recital 702 to 708.

It further considered in the next recitals, through to 724, the methodologies used to apply the Baxter framework in practice and rejected them.

Recital 725, on page 811, it goes through, under that heading, assessment of other efficiency arguments that had been put forward by Mastercard and rejects all of those.

If we go to page 812, please, and recital 731:

"Contrary to Mastercard's perception ..."

This is under the "Conclusion" on the first condition of article 81(3):

"... the Commission's position is not that only the level of a MIF is decisive criterion for

assessing whether it fulfils the first condition of 81(3), rather the existence of objective appreciable efficiency is assessed in relation to the MIF as such, the effects it produces on the market and the manner in which it is set."

It then says that:

"In particular, the Commission verifies, on the basis of the evidence submitted, whether the model underlying a MIF is made on realistic assumptions (which is not the case here), whether the methodology used to implement that model is objective and reasonable (which is not the case here) and whether the MIF, indeed, has a positive effect on the market to the benefit of both customer groups which the model claims."

At 732:

"Any claim that the MIF creates efficiencies within the meaning of 81(3) must therefore be founded on a detailed, robust and compelling analysis that relies on its assumptions and deductions on empirical data and facts. Mastercard has not provided such analysis and empirical evidence, only a general assertion that the balancing of the demands of card holders and merchants, through a MIF, leads to a better performance of the Mastercard system and is inherent and indispensable ... ".

Et cetera, et cetera. So you see what the Commission is saying there.

You see the conclusion at 733. Footnote 876 at the bottom of page 812 is again a reference to Mastercard's reply to the supplementary statement of objections. If we can just go back to another part of that. That's again behind -- we have seen it already once -- behind tab 27. If we can go to 893. So paragraph 708 to 893:

"The Commission’s analysis is wrongly focused on the level of the interchange fee, as opposed to the freedom to set and, if necessary, vary the level of the interchange fee, so as to balance the scheme. It is the latter which Mastercard claims is indispensable, in order to maintain the Mastercard network at its present size, not a specific level of interchange fee.

"Indeed, any outcome which fettered the freedom of the scheme as to the proportions in which it can recover the overall costs would put the scheme at a severe disadvantage. Without this freedom, the scheme would be unable to complete effectively and could not, therefore, grow or even maintain its current level of business."

So again, we see in very clear terms, Mastercard discarding the opportunity to seek to justify a particular level of MIF within the MIF that it has been applying.

If we go on to the next page, we see in the very final paragraph, 712, that the Commission proposes that setting --

MR JUSTICE ROTH: You are in?

MS DEMETRIOU: The same document, sorry. It is the reply to the submission, page 894, tab 27, the final paragraph, 712.

So:

"The Commission proposes that setting the interchange fee with reference to the weighted average of relevant costs, would allow Mastercard to set the interchange fee tiers for specific card technologies at a level to incentivise the introduction of technology. This proposed solution to Mastercard's concerns misses the point. It is not so much Mastercard's concern that reduction to a particular level will curb participants' ability to innovate but rather, that Mastercard should retain the unfettered freedom to be able to use the interchange fee in this manner."

So it is apparent from this that the Commission had specifically proposed to Mastercard that it set its interchange fee by reference to certain costs. I.e., what it is now saying in its defence, it would like to be able to argue in the context of quantum and Mastercard rejected this, saying it needed the unfettered freedom to set its interchange fee at whatever level it saw fit, according to its rules.

Just going back to decision at tab 25, 813, and just to finish on the structure of this.

We see at recital 735, on page 813, that:

"Mastercard argued that the key direct benefit of its MIF for consumers is to optimise the use of the services which is characterised by collaborative joint service and joint demand and indirect network effects."

We see at 737, in support of its arguments it submitted a study and the Commission rejected those arguments -- we see over the page -- and says -- you can see at the end of recital 740, that Mastercard has not submitted evidence in this respect.

742, on page 815:

"The Commission has reviewed how Mastercard sets an upper limit to its interchange fee."

And held that:

"It remains unproven that merchants benefit from bearing the financial burden of issuers ..."

You can see that in the first inset:

"... for the provision by issuers to card holders of the free funding period. Moreover, the Commission doubts that merchants sufficiently benefit from bearing the financial cost of issuers writing off bad debts ..."

You see at 744 that Mastercard had insisted on including all of these cost items in its cost studies but the Commission found that the second condition of article 81(3) was not met. You see that over the page at 816.

Then it moves on to the third condition, indispensability. And Mastercard argued, we see this from 748, that its MIF setting methodology is designed to lead to an optimal MIF level. We have seen that before. It relied on its discretion in that regard.

We see at recital 750:

"Mastercard also seems to argue that its MIF causally contributes to maintaining the Mastercard network at its present size .... Mastercard does not offer any factual or

empirical evidence for any of these conjectures."

So Mastercard also concludes that the third condition, we see this from recital 752 of article 81(3), was not met.

Again, you see at 751, I have made the point before, that the Commission refers to card schemes which can operate successfully without a MIF. It says they are not only viable but successful. So here, the Commission is up for grabs, is the whole concept of having a MIF and the direction of travel of the payments at all. And also up for grabs is what level of MIF might be permissible. But Mastercard, as you have seen, did not engage with that. They chose not to engage with it and, instead, chose to adopt a different tactical course before the Commission.

Remedy we see dealt with at page 819. It is plain from recital 759 to 761 that the entirety of Mastercard's MIF was found to be unlawful, and that Mastercard has to cease and desist from determining, in effect, a minimum price that merchants must pay for accepting payment cards by way of setting intra-EEA fall back interchange fees.

So that's at 759. So that's a very broad finding. So no part of the interchange fee was exempt. No part of it was exempt. Mastercard had to desist from setting any minimum price at all.

And of course, now Mastercard wants to argue that it could have shown that some part of it was exempt.

MR JUSTICE ROTH: If you say the Commission -- if an undertaking notifies a MIF of, for argument's sake, 3 per cent, the Commission could, in its 81(3) or 101(3) analysis, say "Well, that is too high to meet the conditions of exemption, no more than 1.2 per cent could be justified."

MS DEMETRIOU: Sir, yes, that's what we say the Commission was effectively inviting Mastercard to do. We see that from the various passages that I have taken you to.

So they were inviting Mastercard to come back and show that some particular level of MIF was justifiable and to provide the evidence to show that. What we see is that Mastercard is saying, we see that clearly from its SSO, Mastercard saying: no, that's you, Commission, acting as a price regulator. We just don't want to engage with that kind of debate at all.

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: We are saying the whole thing, it is our discretion that is very important.

Ms Wakefield asks me to show you and she's right -- recital 765 over the page, page 820 of the bundle:

"To remedy the competitive harm in the market as fast as possible, it is important that acquiring banks pass on the cost reductions resulting from the absence of the interchange fees to their customers."

So there is not going to be any interchange fees and those benefits have to be passed on to their customers. So, essentially, to sum up on the Commission decision, it is an extremely broad finding of infringement. The position was that Mastercard could have taken a different tack and could have sought either to reframe its MIF in the way that Visa did, or in some other way that would have been more successful in terms of gaining exemption, or to argue that within its MIF, some particular level was justifiable and to put forward evidence to show that.

It deliberately didn't do that. We saw the reference in that context to the restructuring, that Mastercard actually did, in fact, consider whether to adopt a different MIF or a different business model, but discarded that option and instead thought: what we will do is restructure and hope that Article 101 doesn't apply.

Then, of course, the EU process didn't stop there, because Mastercard appealed to the General Court against the Commission decision, both in respect of Article 81(1)

and in respect of Article 81(3). That appeal was rejected. Then it appealed to the CJEU and, again, that appeal was dismissed. So it is an essential part of our argument that they have had every opportunity to establish in the real world that some lesser MIF, some other MIF, some part of their MIF, was lawful, was exempt, and they decided not to do it.

Now I want to show you the Visa decision. That's in bundle B2, behind tab 27, please. We see from recital 1 that the Visa notification was made in January 1977, so a long time earlier. That's page 1301 behind tab 27. Then recital 2, over the page.

There was initially a comfort letter and then in 1992, the Commission reopened the investigation. So you do see here some more flavour of the evolving understanding of the Commission of the effects of interchange fees and how its position did indeed evolve and change.

You see that there were complaints filed in May 1997. It seems likely from the dates and the complaint from Eurocommerce that these were the same complaints that were brought in relation to Mastercard. Then you see from recital 3 that it relates to the intra-EEA MIF. And the critical difference between Mastercard's approach to the Commission investigation and Visa's approach is that Visa then proposed a modified MIF; so a modified MIF, not the one that it had notified. And we see the first reference to this in recital 9 at the bottom of page 1302, that the present decision relates to the proposed modified MIF.

Then we see at recitals 13 to 15, we see the heading above those:

"The current MIF scheme ..."

And then in recitals -- over the page, you see at the top of 1304, "The modified MIF scheme."

And you see that:

"In 2001, the executive committee of the Visa EU board approved a proposal for

a modified MIF scheme. It was further clarified and slightly amended by Visa, following comments of the Commission and third parties. The modified scheme involves four main changes, as compared with the present scheme."

Just pausing there, we see a contrast between the approach of the Visa board and the Mastercard board, because we know that the Visa board considered changing its MIF but didn't do that, but that what the Visa board did was to change its MIF. We also see the second point we make is that these proceedings were very much proceedings of engagement with the Commission. It wasn't a "This is what we have, tell us if it is lawful or not, take it or leave it."

It didn't have to be like that. That's how Mastercard played it, but you can see from recital 16 that there is a to-ing and fro-ing. There are comments from the Commission and indeed from third parties, so the modified scheme was consulted upon.

Then we see at the paragraphs after that, the modified MIF is described and there are four important changes. So you can see recitals 17 to 20 deal with the level of the MIF and you can see from recital 17 that there is going to be a reduction by Visa of the level of the MIF in a phased way. The credit rate, we see from recital 19, the credit rate will be 0.7 per cent by 2007. So that's one of the changes.

The second change is objectivity. We see the heading there in the middle of that second column. That's addressed in recitals 21 through to 24. And what's set out here are three categories of issuers' costs which Visa will use. So first of all, the costs of processing transactions. Secondly, the cost of the free funding period, and thirdly, the costs of providing the payment guarantee.

And the methodology is going to be that Visa will submit the costs study to the Commission, we see that from recital 22, within twelve to 18 months of the adoption of the decision, and it will be audited by an independent firm of accountants which has been approved by the Commission.

So, again, we see the Commission actively engaging with Visa to arrive at a MIF which it is prepared to accept. So again, very much not the position that there is a simple notification and that's it. There is going to be an ongoing engagement, an ongoing process.

Then we see on page 1305, the heading "Transparency", so Visa is going to change its regulations to allow member banks to disclose to merchants both the MIF level and the relative percentages of the three cost categories and merchants must be made aware of the possibility to request this information from the banks. Then there is going to be a separate MIF -- this is the fourth element -- for mail order and telephone order transactions.

That was added, we can see -- this is recital 26 -- following comments from third parties in the consultation.

Then recitals 30 to 33, so going on to page 1306, they set out the proceedings. At recital 30, we see that after the reopening of the Visa case, the Commission sent several requests for information to Visa and several of its members, supplementary statement of objections in 2000, stating that the MIF restricted competition and that it had not been established that the conditions for exemption were fulfilled. Visa's written observations were received in December 2000. Oral hearing in February 2001. March 2001, supplementary observations, particularly on issues which arose from the oral hearing and from the third parties which attended that hearing.

So Mastercard did attend that hearing. It seems as if Mastercard filed supplementary observations in March 2001. We see at recital 31 that in April 2001, Visa contacted the Commission to discuss possible changes to its MIF. You have the concrete proposal approved by the Visa board in June 2001. In August, the Commission published a notice describing the scheme and consulting on it and inviting third parties to comment. So that's what happened.

Then we see recital 33, further contacts between the Commission and Visa led to one further specific modification, concerning mail order and telephone operations. So it is very much a transparent, flexible and a cooperative approach that Visa took vis-à-vis the Commission.

Then we see at 1307, recital 36:

"One other card payment system commented that it failed to understand how, in law, a reduction in the level of a price could have any relevance for the granting of an exemption. It had the impression the Commission was acting as a price regulator in this regard."

We take it that that must be Mastercard because that's very much what Mastercard was arguing in its own proceedings. Then Mastercard is here directly saying: well, Visa is bringing down the level of its MIF. That's part of the package that the Commission is prepared to endorse. And Mastercard's position is not: well, let us do the same, it is to say: we don't think that that is necessary.

So, in fact, we think it is wrong. The Commission is taking the wrong approach, it is acting as a price regulator.

Then if we go over the page, please, to 1308, we see in recital 39, in the second indent, the Commission reject that assertion. So as concerns the points made by the reduction in the level of the MIF, the Commission emphasises that reductions were part of a package of modifications proposed by Visa and these proposals must be considered as a package, not in isolation.

MR JUSTICE ROTH: Where in 39?

MS DEMETRIOU: Sorry, it is the second bullet, as it were. So it says: well, we are not acting as a price regulator. We see that from the last sentence.

MR JUSTICE ROTH: Yes, I see.

MS DEMETRIOU: Then 1311, recital 60, second column. The Commission holds

that the MIF is not outside article 81(1). So it is caught by article 81(1). In fact, recital 64 on page 1312 of the bundle says in terms that it restricts competition within the meaning of article 81(1).

But then it considers exemption and we see at page 1314, if we go first of all to recital 80, we see that the Commission explains that the unmodified old MIF was unlawful, and didn't satisfy 81(3). In particular, because the board was free to set the MIF at any level it wished, independently of costs.

In fact, we would ask you really to read the whole of this recital, because what the Commission is saying there is that Visa's original MIF did not fulfil the conditions of 81(3), but the reasons it gives apply with equal force to Mastercard's MIF.

MR JUSTICE ROTH: I am sorry, this is which recital?

MS DEMETRIOU: 80. 1314.

MR JUSTICE ROTH: Yes, "Prior to modifications."

MS DEMETRIOU: Yes, so it is saying prior to modifications. It is looking at the old Visa, the Visa MIF has notified and it's saying, for example, that does not satisfy 81(3), because for example, amongst other things, the Visa board was free to set the MIF at any level it wished, independently of costs. There are various other points made in that recital that really apply with equal force to the Mastercard MIF. In our submission, Mastercard, on reading this, should surely have changed tack and proposed a modified MIF. So it had every opportunity to read this and say: well, the Commission have said that about that original Visa MIF. Well, all of these problems apply to ours too, so we had better jolly well do the same as Visa did. But it didn't do that.

Then you see at 1319 the conclusion, the operative part of the decision in article 1 at the bottom of page 1319 on the left-hand side. You can see that it was exempt but that the exemption was granted subject to conditions. We can see that from article 1, subparagraph 2, that the conditions were things like the generation of audited cost

studies that we have seen. That was a requirement, that there are cost studies that are produced that are scrutinised by an auditor and approved by the Commission.

So we do say that Mastercard could hardly have had a clearer example of constructive engagement with the Commission in which an alternative MIF was exempted. As I say, it didn't go down that road, it chose to adopt a very different strategy.

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: Sir, I was now going to move on to the law. Is now an appropriate --

MR JUSTICE ROTH: I think we had better take our break. I have let you go on a bit longer to finish.

Yes, we will come back at 3.30.

(3.16 pm)

(A short break)

(3.34 pm)

MR JUSTICE ROTH: Yes, Ms Demetriou.

MS DEMETRIOU: Sir, just before moving on to the law, you asked me about the press release. Can I just give you a reference? The press release is at bundle D3, tab 30. I am not going to ask you to turn it up now, but I just want to say what it says. Page 1629, you will see the rates which are between 0.2 per cent and 0.3 per cent.

Again, for your note, the actual rates of the MIF that was considered in the decision was between 1.2 and 1.3 per cent. You will see that -- I am going to give you the reference -- A2, tab 26, page 863.

Then the Supreme Court said something about a press release, or rather, the memo that was produced alongside it. I am going to come now on the law to the Supreme Court, so I will show you that when we pick up the case, but I just wanted to just give you those references to complete the factual picture because you asked.

So I am going to turn now to our submissions on the law, and first of all, to the question of the proper approach to determining loss or the measure of loss in tort cases. I would ask you to pick up the Supreme Court in Sainsbury's in bundle B2, tab 21. Before I get to the point I really want to get to, I will just show you the bit on the memo. That's at tab 21, page 1144.

Paragraph 134/135 on page 1144. I don't want to dwell on it now. But the punchline, as it were, is that the Supreme Court looked at the memo of 1 April 2009. Now, although we have the press release in the bundle, we don't have the memo, but we do have copies that we can hand up to complete the picture if you would like it. Really, what is said at this part of the judgment is that you can't rely on this for Article 101(3) purposes, and it explains why.

So just further on in this judgment -- now moving to the question about the measure of damages from tort cases. Could you please turn up page 1159 of the bundle. On page 1159 at the bottom, paragraphs 193 and 194, essentially the Supreme Court says:

"It is trite law that as a general principle, the damages to be awarded for loss caused by tort are compensatory. The claimant is entitled to be placed in the position it would have been in if the tort had not been committed."

So that's the general principle, as the court knows. I just want to turn now to the Court of Appeal in Sainsbury's. That's behind tab 18 of the same bundle. If we could go to page 996 behind tab 18, you will see a third of the way down the page, there is a heading "The quantum issues"; does the Tribunal have that?

MR JUSTICE ROTH: Can you give me paragraph numbers?

MS DEMETRIOU: Yes, 306.

MR JUSTICE ROTH: Thank you.

MS DEMETRIOU: It says:

"There were only two quantum issues that remained at the hearing, whether, if the agreement is not exempt, the merchants nevertheless carry the burden of proving what MIF agreement, if any, would have been exemptible. That's to say a lawful level of charge is the starting point for assessing the loss that the merchants have sustained."

There is then a second point which is not relevant here.

LORD ERICHT: Parts of it.

MS DEMETRIOU: Yes. The question before the Court of Appeal was on which party did the burden of proving that level lie? Paragraph 308 sets out that question. And 309 sets out the merchants' position. So the merchants' contention is that:

"Once it has been established that the default MIF as set is illegal, the established loss is the full amount of the MIF of the merchants' service charge. And if Mastercard asserts it could and would have charged a lawful lower MIF, then it is for Mastercard to prove such assertions."

Then we have a summary in the judgment of the differing approaches of Mr Justice Popplewell and Mr Justice Phillips, as they then were, to the question of burden of proof. At paragraph 310, you see what Mr Justice Popplewell decided. So he held that -- he distinguished between exemption and exemptibility in connection with the assessment of damages. He had held that the MIF did not restrict competition because of the death spiral argument which he was subsequently overturned on but he did go on to consider exemption in case he was wrong on that.

If we look at paragraph 311, he held that -- sorry, 312. He had established that a certain level of MIF was exempt. Then in order to look at what level of MIF should be taken into account for the assessment of damages, he raised it by 10 per cent to reflect the shifting of the burden of proof in his view. So that's how he dealt with it. You can see at paragraph 312, that's set out.

MR JUSTICE ROTH: If one looks back at 310, Mr Justice Popplewell's view, the last sentence, two-thirds of the way down the paragraph, just above letter C, he said:

"It is for the merchants to establish the extent of their loss by reference to the extent of the unlawfulness."

So it is for the merchants to establish the measure of loss. The difference between, on the one hand, what Mastercard could lawfully have charged by setting an exemptible MIF, and on the other hand, the amount of MIFs actually charged.

MS DEMETRIOU: Yes.

MR JUSTICE ROTH: So that is contrary to your argument?

MS DEMETRIOU: It is. It is essentially what Mastercard are arguing now, save that they don't allege that the burden of proof is on us, because that's now been established.

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: So what he did, just to be clear, is he then addressed the question of exemption; so what level of MIF was actually exempt. Because, of course, these proceedings all post-dated the decision.

MR JUSTICE ROTH: Yes, you didn't have a decision on that.

MS DEMETRIOU: He decided that a particular level of MIFs were exempt and then in order to work out what level of MIF should be taken into account for quantum -- so exemptible -- he raised it by 10 per cent. He thought that in doing that, he was reflecting the shifting of the burden of proof. So that's what he did.

You see the upshot in paragraph 3.13, because as far as he was concerned, the default MIFs as set, were below the exempt and exemptible levels. So on his view, he's accepting that the exempt and exemptible levels of MIF were higher than those that were actually set. So there was no loss. That was his conclusion.

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: And you see that on the appeals, Mastercard supports Mr Justice Popplewell's approach.

MR JUSTICE ROTH: But looking at 309 --

MS DEMETRIOU: Yes.

MR JUSTICE ROTH: -- it looks like the merchants did not run the argument you are running. They didn't say, it is merchants' -- the full amount -- if Mastercard says that it could have charged -- could and would have charged lower MIF, they just said: well, Mastercard has to prove that. They didn't say the argument is not open to them.

MS DEMETRIOU: That's right. So they proceeded on the basis that the argument was open to them.

MR JUSTICE ROTH: But on the other hand, this is all a MIF that had not been considered by the Commission at all.

MS DEMETRIOU: Exactly.

MR JUSTICE ROTH: And what's the period --

MR COOK: I don't like to rise during the course of submissions but that's not right, just to clarify that.

MR JUSTICE ROTH: There was an overlap in the period.

MS DEMETRIOU: I think there was a short --

MR JUSTICE ROTH: It is from May 2006, isn't it, in this case?

MR COOK: That's correct.

MR JUSTICE ROTH: But that is all post the time of notification, because there would be no notification in 2006 at all because notification had gone.

MR COOK: That's right.

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: I think I said earlier that the vast majority of the claim post-dates the period. I didn't say that it all did.

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: So there were two, if I can put it this way, key points of distinction. Just pausing here for the moment. One is that the merchants took the burden of proof point but didn't argue the principle that we are arguing now. The second is that for the majority of the period there was no Commission decision/finding that the MIF was not exempt. So in the majority of the claim, if I can put it this way, exemption itself arose and was being argued by both Visa and Mastercard in these different cases.

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: Then if you go back to page 997, please, and look at paragraph 315, you see that Mr Justice Phillips, as he then was, disagreed with the approach of Mr Justice Popplewell on this issue.

He said that having reached the decision on the extensive evidence before him as to what levels of MIF could be shown by Visa to be exempt, if any, those levels were necessarily the same for both exemption and for the assessment of damages. He rejected the proposition that a percentage discount should be applied to the outcome, based on an assessment of that evidence to reflect a theoretical difference in the burden of proof.

Then you see the Court of Appeal agrees with the conclusion of Mr Justice Phillips on this issue. The correct analysis is to apply articles 101(1) and (3) in order to determine whether or not the default MIF, as charged, is in whole or in part unlawful and then assess damages on the unlawful amount or level as so determined.

So we say that that's important because what Mr Justice Phillips found and what the Court of Appeal endorsed, in preference to the approach of Mr Justice Popplewell, is that what you do first of all, is establish what part, in any, of the MIF was exempt -- actually exempt -- and then you assess damages on that basis. So that's the level you take when deciding what the amount of damage is.

So just to try to make it a little more concrete, let's say that the MIF as charged is 1.2 per cent and let's say the court then finds that a MIF of 1 per cent was exempt -- is exempt because they were arguing actual exemption -- then when you are looking at calculating damages, the damages are the difference. The loss is the difference between those two things. Because you can't claim for the whole 1.2, because 1 was exempt.

So that's what is being said. We say that that is very important in our case. Because applying those principles here, you ask yourself first of all: well, what part of Mastercard's MIF is exempt? The answer is none. None of it was exempt. The Commission held that.

So you then approach damages on the same basis as the Court of Appeal says, that's what's relevant for the purposes of quantum.

Essentially, just standing back, what Mastercard is seeking to do is reintroduce Mr Justice Popplewell's finding which has been overturned.

It can't be right -- it can't be right -- that where a court finds that a certain level of MIF is exempt or not exempt, that's then used for the damages calculation. But where the Commission found it, then that's somehow not relevant and you start all over again and work out what might have happened, had Mastercard played things differently. That can't be right.

Apart from anything else, because -- well, it is, first of all, not right in principle. There is no material distinction. Secondly, in the relevant period, only the Commission -- most of the relevant period -- only the Commission could grant an exemption.

Moving on to paragraph 317, this identifies a separate related flaw in Mastercard's argument. So there is then the question about the burden of proof. So that lies -- we also agree with Mr Justice Phillips -- in any event, as a matter of principle, the burden

would lie with the merchant.

Then you see at the end of that paragraph --

MR JUSTICE ROTH: That would lie with the scheme?

MS DEMETRIOU: With the scheme, so sorry. Not with the merchants, exactly. I am so sorry, I misspoke.

Otherwise a heavy burden would be placed with merchants. Then you see it would require the merchants to prove a complex negative, namely the highest level at which the MIF would be exempt.

MR JUSTICE ROTH: I don't think, although you don't agree about most other things, Mastercard is saying the burden is on you.

MS DEMETRIOU: No, they are not saying that. I just want to draw attention to the final words in that paragraph:

"... would require the merchants, leave aside the burden for the moment, sir, to satisfy the court as to what, on the face of it, the defendant could and would have done."

And we emphasise the word "would". Because of course, as I said at the outset, Mastercard here, has not pleaded any case as to what it would have done. It is asking the Tribunal to find the optimum thing it could have done.

So, sir, those are the passages of the Court of Appeal that I wanted to take you to.

I want to now turn to Albion Water. That is bundle B1, behind tab 14. A decision of the Tribunal chaired by Ms Vivien Rose, as she then was.

Just before we get on to the passage of the judgment on which we rely, in earlier proceedings the Tribunal had found that the defendant, Welsh Water, Dwr Cymru, had abused its dominant position by charging Albion Water an excessive price for the service of carrying its water through its pipes to Albion Water's customer. This judgment is concerned with the question of quantum.

Can we, just initially, please turn up page 358 of the bundle, just so you can get

a flavour of how this all evolved. So paragraphs 45 throughout 49. So there was -- this is on page 358 -- an unfair pricing judgment you see referred to. Essentially, in that judgment, the Tribunal found that the price charged by Dwr Cymru was excessive to a material extent. We see that at the bottom of page 47.

MR JUSTICE ROTH: Paragraph 47?

MS DEMETRIOU: I am so sorry, sir, paragraph 47. Yes, that's right.

Then paragraph 49 on page 359, you have the heading, "The remedies judgment", just towards the top of the page. So there is a further hearing as to remedies. The Tribunal made a declaration as to the abuses of the dominant position, ordered Dwr Cymru to bring the infringement to an end. And it further ordered that any common carriage access price that it offered to Albion Water must not exceed 14.4p per cubic metre, so that was a price that was agreed by the parties as being a fair and reasonable common carriage price. So, in effect, it imposed a cap going forward.

Then if we move on, please, to page 365, you see the heading:

"The counterfactual common carriage price."

This is paragraph 67 at the bottom of the page. So Dwr Cymru, second sentence, argued that:

"The Tribunal's task here was not to find a reasonable access price ..."

This is all in the context of damages calculation:

"... but, rather, to find the highest price that Dwr Cymru could have charged without committing an infringement of the chapter 2 prohibition. That [Dwr Cymru says] is because the Tribunal should strip out of the counterfactual only the unlawful element of its behaviour."

It accepts that the 14.4 may be a reasonable access price. It argues, however, that:

"The Tribunal did not rule that any price above that level would be unlawful. As the unfair pricing judgment makes clear, an abusive price is a price which is not only

excessive but also unfair. In Dwr Cymru's submission, the Tribunal must, in principle, first work out what is the highest margin above the cost price that Dwr Cymru could have charged and then assess what is the maximum value that Albion would have placed on the service."

Pausing here, we say that is materially similar to the submission that Mastercard is making in these proceedings. So Mastercard is saying that in the counterfactual, you -- yes, we can't rely on what the Commission has found to be unlawful and not exempt but it's for the Tribunal to establish what is the highest MIF that we could have charged that would have been exempt. That's Mastercard's submission in this case. It really is the same material -- materially the same submission as Dwr Cymru was making.

Then going to page 366, paragraph 68, you can see there that Dwr Cymru didn't press its submissions to their logical conclusion. So it was a bit more pragmatic. It limited its claim to a common carriage price of 16.5. That was essentially a price -- I think it was a pragmatic price which they said that the Tribunal could safely conclude was not an unlawful price, but which was higher than the cap.

Then 69 is the tribunal's reasoning:

"We reject Dwr Cymru's submissions on this point as wrong in principle, as well as entirely impracticable. It will be very rare that an infringement decision, whether adopted by a domestic competition authority or the Commission or, indeed, on appeal, would determine the precise borderline between lawful and unlawful conduct. If Dwr Cymru is right that the claimant in a follow-on damages claim will have to show precisely where that line should be drawn, that will often involve the court in redoing much of the work done in the earlier infringement decision. Further, it is a task that is almost impossible to accomplish, as is demonstrated in this case. If 16.5 is not abusive, a point we do not decide, what about 16.6 or 16.7 or 16.8? We do not see

how a claimant could prove that one rather than the other is the tipping point between lawful and unlawful conduct. Dwr Cymru has recognised the impracticality of the test by making the two tactical concessions we've described. The fact that the Tribunal's task would be impossible in the absence of those concessions which Dwr Cymru was not, of course, obliged to make, indicates to us that the test proposed cannot be the right one."

Pausing there, and again, seeking to draw some analogies with the present case, we say similarly, Mastercard's submissions on this point are also wrong in principle and entirely impracticable. Just as the Tribunal has found there, that it is rare that an infringement decision will determine the precise borderline between lawful and unlawful conduct, of course, here the Commission decision didn't. The Commission was, we say, chomping at the bit to do that. It was saying: tell us, justify a particular level and we will reach a decision on it. But Mastercard rejected that course. What it is now doing is saying that the Tribunal should itself do the exercise.

We say that the exercise in this case is even more complicated and even less practicable than that in Albion Water, because, of course, one is talking about a 16-year period. One doesn't have the tactical concessions made in this case. Instead, one has the range of different alternative options which will all, no doubt, be supported by expert analysis. One has the shifting position of the Commission over 16 years, and the requirement that this Tribunal is being asked to consider this different menu of options in terms of rates, the evidence supporting all of them and then to decide whether at each of the periods throughout the 16 year period, depending on the Commission's stance at a particular period of time, it would or would not have exempted those levels. We say that that is wholly unworkable. And the fact that the Tribunal here says it is wholly unworkable tells you something about it being wrong in principle.

Then we see at paragraph 70, the Tribunal here correctly finds that its approach in rejecting Dwr Cymru's submission is consistent with the House of Lords decision in SAAMCo. We have SAAMCo in the bundle. I don't need to go there, because they have set out here the relevant passage. You will remember that SAAMCo involved a case where the defendants had negligently overvalued properties which were security for loans and then what happened was the borrowers defaulted and the property market fell and the claimant suffered losses.

What we see here is a passage from the speech of Lord Hoffmann. Again, a similar argument is being made:

"So I must notice an argument advanced by the defendants concerning the calculation of damages. They say that the damage falling within the scope of the duty should not be the loss which flows from the valuation having been in excess of the true value but should be limited to the excess over the highest valuation which would not have been negligent. This seems to me to confuse standard of care with the question of damage."

Then:

"Once the value has been found to be negligent, the loss for which he's responsible is that which has been caused by the evaluation being wrong. For this purpose, the court must form a view as to what a correct evaluation would have been. This means the figure which it considers most likely that a reasonable valuer would have put forward as the amount which the property was most likely to fetch. Whilst it is true that there would have been a range of figures which the reasonable valuer might have put forward, the figure most likely to have been put forward would have been the mean figure. There is no basis for calculating damages upon the basis it would have been a figure at one or other extreme end of the range."

The Tribunal says:

"That same principle applies by analogy in this case. There is a range of lawful access

prices that Dwr Cymru could have offered and we should take the figure in the middle of that range. The counterfactual must be based on an assumption that Dwr Cymru would have offered a reasonable access price, rather than an access price which is the highest it could lawfully have charged."

MR JUSTICE ROTH: That helps you, obviously, on the argument that it is not the highest MIF that could have been exempt. I see that. Does it help on the question that there should be no exemptible MIF at all, when SAAMCo says the court must form a view as to what a correct valuation would have been?

MS DEMETRIOU: Sir, we say it does on the facts of this case. Because one goes back to the scope of the infringement found by the Commission. And the scope of the infringement found by the Commission was that the whole of the MIF was unlawful.

Let's take a hypothetical excessive pricing case. So if the facts of an excessive pricing case were, in fact, that no charge could have been made to the relevant service, and so charges were being made for something but in fact, no charge could properly be made, then what you have is the position where damages are the whole of the price that's been charged.

So here we are in that situation, analogically, because here, the Commission has found that the whole of the MIF was unlawful. So it helps us, with respect, on both points. When one strips out -- what one has to do is you have the finding of the Commission, the whole of this MIF is unlawful and not exempt. You have the backdrop of the Commission leaving open the possibility of Mastercard arguing that some part of it was exempt. Didn't accede to that invitation, so the whole MIF is unlawful.

When one says: what would have happened absent the infringement? Well absent the infringement, there would have been no MIF. That's really the start and end of it.

We also say that Mastercard, as I said, it has not pleaded any case as to what it would have done in the counterfactual, so it's wrong on that. We say it is easy to see why it

hasn't pleaded any alternative case as to what it would have done. We say that's because what happened in the real world is the best guide to what Mastercard would have done in the counterfactual world of no infringement. That's because Mastercard knew full well, as I said earlier, that there was a risk the Commission would find its MIF unlawful. It had an SO to that effect, an SSO. It had seen what the Commission had said about Visa's original MIF. Even then, it didn't do as Visa did and pivot and put forward a different MIF that could be justified. It stuck to its guns. And so to say now: well, we could have done something different, we say is completely implausible. That's why they are resting on this legal point which is not what it would have done but what's the best it could have done.

What's impermissible -- so in this case, as I say, where the infringement is that the whole of the MIF is unlawful, and so the counterfactual has to be, we say, no MIF -- you strip out the infringement, you strip out the whole of the MIF -- the counterfactual has to be no MIF. You just can't at the same time say: well, in that counterfactual world, we would have come back with an array -- what -- an array of different options we would have put to the Commission, in circumstances where they could have done that and they didn't do that.

Nor can they say: well, in the counterfactual, you have to assume that we've got perfect legal knowledge, so we could have predicted where is exactly the highest of where the Commission would have pitched it. Of course, that's not a permissible approach to the counterfactual.

As I say, we say quite simply, the correct approach in this case is you strip out the infringement and once you've done that, what you are left with is no default MIF.

Now I just want to look briefly at Mastercard's argument and the basis on which it says that its approach is permissible in law. If we could turn up their skeleton, please, in bundle A1, tab 4, page 52.11.

The very bottom of the page, paragraph 41, they say the basis of Mr Merricks' argument is a contention that the correct approach as a matter of law, is to ask what Mastercard would actually have done.

Then if we go over the page, 42, Mastercard says that that argument is wrong. Do you have that, sir? 42.12 in the bundle, behind tab 4.

MR JUSTICE ROTH: Yes, I have it loose, yes.

MS DEMETRIOU: It is paragraph 42. They say that our argument is wrong, for two reasons. And they say that it is the wrong legal test because they say the legal test requires the Tribunal to consider what Mastercard should have done, i.e. the highest level of EEA MIFs. Now they have introduced -- we have had a "would" and a, "could", and now we have a "should".

Then they say:

"Even if it is relevant to consider what Mastercard would have done, it is clear from Mastercard's pleading and its actual conduct that it would not have adopted settlement at par and a zero MIF but would have set the highest MIF that it lawfully could."

We say that is not pleaded and it is not clear at all.

I just want to start with the word "should", because it is, at first sight, a little confusing.

If we can put this away for now and just pick up A2, tab 70, page 1010. This is in the correspondence. It is a letter from Freshfields. The purpose of the letter, you see it refers to a letter from my instructing solicitors, saying that Mastercard has not pleaded back to these issues on exemptibility. Then they say that they were under no obligation to respond. Then at 3:

"However, in the interests of ensuring that the skeleton arguments properly assist the Tribunal by focusing on the issues in dispute, we set out Mastercard's case on these key issues."

That's the purpose of the letter.

Then if we go to the next page, and paragraph 6 at the bottom of the page, we see there that Mastercard there is using the word "could". So:

"In any assessment of damages, the court is required to identify the harm caused or loss suffered as a result of the wrong. If Mastercard could lawfully have set MIFs above zero, it would be wrong as a matter of principle to assess damages on the basis that Mastercard should have set the MIFs at zero."

So the "could" there picks up on paragraph 16 of the defence, which is pleaded as a could: what's the highest thing we could have done. That's how the argument proceeds.

MR JUSTICE ROTH: It must be could --

MS TOLANEY: It must be could.

MR JUSTICE ROTH: -- at 42A, Ms Tolaney, mustn't it, it can't be that Mastercard was required as a matter of law to charge the highest possible MIF.

MS TOLANEY: My Lord, I think that is right. I should say, however, Mr Cook is addressing this aspect of the argument.

MR JUSTICE ROTH: I'm so sorry.

MS TOLANEY: I wish I'd told you but you are right. I will hand over to Mr Cook.

MR JUSTICE ROTH: I think it --

MR COOK: My Lord and obviously, this is something that can’t be immediately unpacked but the test in Beary v Pall Mall, is what should the defendant have done. In many cases, that is simply a question of on the basis that they wanted to produce a certain result, what is the limit they were allowed to go to on that.

So it is a mixture of could and should.

MR JUSTICE ROTH: Well it does seem like --

(Inaudible due to overspeaking).

If it's what the --

MS DEMETRIOU: Sir, I am going to come to theory. But essentially, just as a matter of plain logic, we say that "should" is meaningless in a context such as this, because what Mastercard should have done is comply with competition law.

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: Asking that question just does not yield any useful response as to the level of the MIF, it doesn't yield any useful response for the purposes of calculating damages and it certainly does not yield the answer that Mastercard wants because Mastercard could have complied with competition law by setting no MIF at all. It can't say, well, it should have set the highest MIF open to it.

MR JUSTICE ROTH: I don't think that's what is being said.

MS DEMETRIOU: I don't think that is what is being said. I think probably the reason they use "should" in their skeleton argument is because they are trying to align themselves with the test in Beary v Pall Mall Investments. I will come on to that now. That's at D1, tab 9. It starts at 378.

You can see from the headnote -- I'm not going to read it out -- but the essential facts were that the defendant advised the claimant that he should transfer his pension into a fund known as the PMI fund. The claimant claimed -- argued -- that the defendant had been negligent in advising him to transfer his pension into the PMI fund rather than advising to the possibility of buying an annuity. That, for relevant purposes, is the dispute in the claim.

Then if you go to page 385, paragraph 27, you see that the claimant argued that the judge should have asked himself two questions: what advice would he have given as a matter of fact on a balance of probabilities if he hadn't been negligent; if as a matter of fact the defendant would still have advised the drawdown arrangement as opposed to an immediate annuity, would that advice have been negligent?

In putting forward that formulation, counsel for the claimant relied -- is it for the

claimant? I think it is. I think it must be. Let me just check. Yes, it is. That's right, it must be. Relied on the Bolitho case. Bolitho was a case in which a child was admitted to hospital with respiratory difficulties. The doctor was called but didn't attend. The court held that causation was not proved because even if the doctor had attended, she would not have arranged for the child to be intubated and that decision would not have been negligent. That decision was upheld by the House of Lords.

Paragraph 30 of Beary is what is relied upon by Mastercard in its skeleton argument in this case. Of course, what is said here is that in Bolitho it was necessary to consider those questions because it is just obvious where you have the omission -- so failure to attend -- what would have happened had the doctor attended? Would they have intubated, and if not would that have been negligent? You have to go through those questions.

But then what's relied on by Mastercard is the finding at the bottom of the page:

"In many negligence cases, the question is what would the claimant or some third person have done if the defendant had not been negligent. Usually, the only relevant question in relation to defendant's conduct is: what should the defendant have done? It will not often be meaningful to go on to ask what the defendant would have done if he had not been negligent. It is tautologous to say that, if the defendant had not been negligent, he would not have acted negligently.

"In my judgment, there is no scope for the application of the Bolitho principle in the present case. The negligence lay in failing to advise on the possibility of an annuity, advice which the judge found would not have led Mr Beary to reject the recommendation of the PMI fund. In such a case, it is meaningless to ask what Mr Jefferies would have done if he had not been negligent. If he had not been negligent, what he should have done and what he would have done are one and the same: i.e. advise on the possible option of an annuity. I would reject the first ground of appeal."

This doesn't help. We are in a different case here for the reasons of logic that I gave you. This just doesn't help Mastercard because the reason why in Beary it was not helpful to go on and ask what the defendant would have done is because what he would and should have done is exactly the same thing. He shouldn't have acted negligently. So that meant, in the circumstances of the case, that he should have advised on the possible option of an annuity.

But of course in the present case, it is not like that at all. Because when you ask, "What should Mastercard have done?", it should have complied with competition law. It should have not committed the breach, so the equivalent of not being negligent. But that doesn't tell you what it would have done. It is not one and the same question, so this simply doesn't help.

Paragraph 31 really explains why. It is because in cases of negligent omission, it will often be tautologous and meaningless to ask what the defendant would have done had he not been negligent, because as the court says what he would have done and what he should have done are one and the same thing: advise on the possible option of an annuity.

We put into the bundle the case of Robbins v Bexley, which is at D3, tab 31. Can I just take you very briefly to that? Supplemental D, supplemental 3. I hope it has been put into your bundle. It starts at 1631.

Do you have that, sir: Robbins v Bexley Council?

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: So the claimant had been awarded damages against the defendant council, so this is on appeal. It concerned roots from trees for which the council was responsible that had damaged her property. It is really not similar to this case, but there is a discussion of Beary and Bolitho.

I just want to take you to one paragraph at 1644. This is in the judgment of

Lord Justice Moore-Bick. There are two main judgments. So there is a judgment from Lord Justice Voss, a judgment from Lord Justice Moore-Bick and then Lord Justice Aikens agrees with both.

If we look at paragraph 68 on 1644:

"There was a good deal of discussion in the course of the argument of the decisions in Bolitho and Beary. In my view, these cases demonstrate that where the breach of duty consists of a failure to act, as is the case here, it will often be necessary to consider what would have happened if a defendant had in fact fulfilled his duty to the claimant."

So really these cases are concerned with negligent omissions to act. The question is: do you need to go on and consider what the defendant would have done; or is it sufficient to ask what they should have done? Beary says in lots of cases it will be one and the same thing; in Bolitho, it was not one and the same thing so both questions have to be asked, and none of this sheds any light on the relevant question in the present case. Indeed, we say it is rather revealing that this is all Mastercard can point to in order to support its view as to the proper legal approach in this case.

As we have said, the correct legal analysis is as follows: if the Tribunal stripped out the unlawful conduct in this case, it must strip out the whole MIF, because it was the whole MIF that was found by the Commission to be unlawful. So really Beary doesn't take us anywhere.

MR JUSTICE ROTH: If doesn't take us anywhere, would that be a good point to stop?

MS DEMETRIOU: It would.

MR JUSTICE ROTH: Are you on target?

MS DEMETRIOU: I am on time. I have abuse of process and binding decision. I have really laid the groundwork for most of my submissions. I am not expecting to be very long. I will certainly finish by the mid-morning break.

MR JUSTICE ROTH: Yes. I think that should be satisfactory for Mr Cook.

Very well, 10.30 tomorrow.

(4.22 pm)

(The court adjourned until 10.30 am,

Tuesday, 17 January 2023)