IN THE COMPETITION APPEAL TRIBUNAL

Case No:1266/7/7/16

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Tuesday 17th 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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Tuesday, 17 January 2023

(10.30 am)

MR JUSTICE ROTH: Good morning. I perhaps should have said yesterday, although I wasn't asked, that if indeed this area of the case is being addressed by Mr Cook, Ms Tolaney, although it is always a pleasure to have you here, you would be excused if you don't wish to be present for this.

MS TOLANEY: That is very kind, sir. In fact, I am staying for the case management directions which are coming later.

MR JUSTICE ROTH: Right. I don't know if we can possibly do those straight after lunch and relieve you, if that would assist.

MS TOLANEY: Of course. I don't want the case to be interrupted.

MR JUSTICE ROTH: No, I see that. I don't think we can do them right now because we have had the new letter, which we were just discussing but we need a bit of time on it.

Yes.

Submissions by MS DEMETRIOU (continued)

MS DEMETRIOU: Good morning, sir, members of the Tribunal, I was about to start yesterday with abuse of process.

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: I want to first of all pick up Freshfields' letter again that we looked at briefly yesterday. It is in bundle A2, tab 70. I am just going to look at a different part of it.

You will recall it is the letter that purports to define the issues for this hearing, so it is bundle A2, tab 70. We looked yesterday at pages 1010 and 1011. I just want to look at the last page of the letter, page 1012.

Does the Tribunal have it up?

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: So paragraph 7 of the letter, that says:

"In relation to paragraph 35 of the reply, Mastercard does not contend that the same level of EEA MIFs considered in the EC decision would have met the criteria for exemption."

So they are not arguing exemptibility for damages. They recognise they can't argue that that level would have been exemptible. Because that would, they say, contradict the EC decision which held that the actual EEA MIFs were unlawful.

"However, Mastercard is free to seek to establish that alternative levels of EEA MIFs, whether higher or lower, would have met the criteria for exemption, since each different MIF will have different costs and benefits, and consequently a finding that an alternative EEA MIF would have met the criteria for exemption would not contradict the finding in the EC decision that Mastercard had failed to establish that the actual EEA MIFs did so."

Just pausing there, Mastercard is clearly right to accept that -- it is clearly right to accept that it can't argue that the MIFs it presented to the Commission would have been exemptible in the counterfactual because, as they say in that letter, this would indeed contradict the binding finding made by the Commission in its decision.

But we say, of course, that the binding finding goes further than that. Because, as the Tribunal has seen from article 1 in the operative part of the decision,

"The decision finds that the setting of a minimum price that merchants must pay to their acquiring banks was unlawful."

So the binding finding is a broad binding finding and it does follow from that, in our respectful submission, that it is not now open to Mastercard to argue that in respect of the same period, any other minimum price that merchants must pay their acquiring banks would have been lawful. Because we say in respect of that period, that has been definitively determined against Mastercard by the Commission.

Now Mastercard says two things about that. They say first of all, paragraph 13 of the executive summary at the beginning of the decision, which we looked at yesterday, left it open to them to come back to the Commission to try to justify a different level of MIF. But, of course, that's prospective. So that's after the date of the decision. They can come back and say: we want to adopt a different MIF, in respect of the future.

What it does do is operate to undercut the binding finding made by the Commission for the period it was considering which is, of course, the period at issue in these damages proceedings.

Then Mastercard argues next that the Commission decision was limited in its effect to the actual MIF levels notified by Mastercard. So it takes issue with what we say about the broad conclusion in Article 1, and it says that that conclusion only bites on the actual levels of MIFs notified by Mastercard. That's what it said in its letter in the paragraph 7 I just showed you.

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: Now we say, of course, they are wrong about that, just as a matter of construction of the decision. But if they are right that the decision was limited in that way, then we do say it would be an abuse of process for it now to argue that it could have done something different absent the infringement, that it is now free in these damages proceedings to establish that different levels of MIFs would have met the criteria for exemption.

We just ask you to think about it for a moment. We know that the Commission was positively encouraging Mastercard to justify particular levels of MIF. It was fully open to Mastercard to seek to justify not only the levels it had set, and notified, but also different levels. But as you've seen, Mastercard decided -- it took a conscious deliberate decision not to do that, and to stick to its guns. What it sought to justify was its discretion to set the levels of MIF that it chose and it said, you will recall, that any

other approach would entail the Commission acting as a price regulator.

Also it said: any other approach would mean our system wouldn't work, we need to be able to set whatever MIF we want. It said, indeed, under Article 81(3), that it was indispensable to have unfettered freedom to set the MIF at the level it chose.

So that's what it did do. But let's imagine for a moment that Mastercard had not adopted that strategy and that, instead, it had argued, for the sake of argument, a MIF of 0.9 per cent. So we know the MIF levels were around 1.2 and 1.3 per cent. But imagine that it instead said: well in the alternative, we want to justify a MIF at 0.9 per cent and here is all of the evidence why we say that if you are against us on our primary case, a MIF of 0.9 per cent is definitely exempt.

Let's say that the Commission had disagreed and had found that a MIF of 0.9 per cent was not exempt and that was unlawful, that would have been unlawful too. Then by parity of reasoning with its letter, Mastercard would not now, in these proceedings, be able to argue that the MIF and the counterfactual could have been 0.9 per cent, because it would have argued that point and lost.

Let's imagine, just to take the example, the hypothetical example a bit further, let's imagine that the Commission had accepted Mastercard's argument on 0.9 per cent and it had been convinced by the evidence that had been put forward and it had said: well alright, well, we are not with you on the MIFs at 1.2 and 1.3 per cent and we are not with you on "you should have the freedom to set the MIF at the level you choose" but we do think a MIF of 0.9 per cent is exempt for these reasons. Then clearly, in these damages proceedings, that would have been the benchmark for damages. Damages would have been the difference between the MIF charged in the period and 0.9 per cent which was a lawful level. And Mastercard could not have said in those circumstances: well absent the infringement, we could have argued that even a higher MIF was lawful. They couldn't have done that.

MR JUSTICE ROTH: Equally, it could have said you could not have contended that only a lower MIF would have been lawful.

MS DEMETRIOU: No, we couldn't have done. We would have been bound.

So we say, and essentially, this is the nub of our argument on abuse of process, we say the position should be no different in circumstances where Mastercard could but chose not to bring forward such arguments, because what it is seeking to do now is have another bite at the cherry. We say this would be an abuse of process.

Indeed, we say the point is similar -- very similar -- to the remission issue considered by the Supreme Court in Sainsbury's. Could we just pick the Supreme Court up for that purpose, we have not looked at that part of the judgment. It is B2, tab 21. If we can go to 1166 of the bundle, please.

LORD ERICHT: Can you give me the paragraph? I have it loose.

MS DEMETRIOU: It starts at 227, which in the internal pages, if we have the same report, is 1258. So paragraph 227.

LORD ERICHT: Yes.

MS DEMETRIOU: You can see there the remission issue. The heading "Remission issue, AAM's cross-appeal."

Just before we get into what's said, we traversed the backdrop to this yesterday which is that Mastercard had argued before Mr Justice Popplewell that its MIFs were exempt under Article 101(3). Mr Justice Popplewell had found that they were exempt. So he went on to consider exemption, even though he'd found that there was no restriction of competition because of a death spiral. He said: if I am wrong about that, they were exempt.

If we look at paragraph 229 over the page of the Supreme Court, we see what it said there by the Supreme Court is that at trial, Mastercard had a full opportunity to present any evidence it wished in support of its case that the default MIFs at issue should be

treated as exempt pursuant to 101(3). The point is made that Mr Justice Popplewell considered that it had established its case that they were exempt. Then the court says:

"A critical part of his reasoning was that part of the MIFs paid to issuers had been passed through to their cardholder customers in the form of incentives, to encourage use of scheme credit or debit cards to purchase more goods, thereby providing increased benefits for the merchants."

So that was part of Mr Justice Popplewell's reasoning. Then you see at paragraph 230, the Court of Appeal had held that that was flawed, that part of his reasoning. There were a number of flaws in the judge's analysis and there was a critical gap in the evidence put forward by Mastercard.

So the Court of Appeal overturned the judge's finding on the application of Article 101(3). But nonetheless -- and we see this from paragraph 233 on page 1168, for those who are using the bundle -- that the Court of Appeal nonetheless remitted the question, ordered that the application of Article 101(3) should be remitted to the Tribunal. So the Supreme Court there, at 233, are saying:

"Despite reaching this conclusion (i.e. that Mr Justice Popplewell's judgment was flawed), the Court of Appeal made an order remitting the AAM proceedings to the CAT for reconsideration of whether Mastercard's case under Article 101(3) should have succeeded in whole or in part" and "according to the order, it is not open to any party to advance a new case."

That was then challenged by AAM, before the Supreme Court, the decision of the Court of Appeal to remit it. And if you look at paragraph 235, you see AAM's argument. They say, they make a fundamental point. They say that:

"Having rightly decided that the trial judge should have dismissed Mastercard's article 101(3) defence and given judgment for AAM on its claim under article 101(1), it was

not open to the Court of Appeal to order that the 101(3) issue be remitted and hence permit it to be re-opened by Mastercard. This offends against the principle of finality in litigation."

That's the argument.

You can see the Court of Appeal's reasoning was. That's summarised at 236. The Court of Appeal had said that it is possible -- I am looking a few lines down in the excerpt from the Court of Appeal. It's possible, bearing in mind the acceptance by Sainsbury's in the CAT in the other two cases, that there was a lawful level of MIF. The judge would have found there was some exemptible level of MIF, albeit a lower one than he in fact found, if he had not made his error of reasoning.

That's why the Court of Appeal remitted it. Then you see the Supreme Court's response to AAM's argument at 237:

"In our judgment, this reasoning cannot be supported. We accept the submission of Mr Turner for AAM, that the Court of Appeal has erred in principle by allowing Mastercard to reopen the article 101(3) issue on which, as the Court of Appeal held, it had lost, after a full and fair trial of the issue. This offends against the strong principle of public policy and justice, that there should be finality in litigation, which the Court of Appeal did not take properly into account. The court was wrong to characterise victory for AAM as "an unjustified windfall" or the product of a "procedural mishap" or "accident". It was wrong to say that reopening the 101(3) issue involved "no real injustice" for AAM."

Then what the Supreme Court does is explains by reference to the case law why it reached that conclusion.

If you could look at paragraph 239, the court there talks about the well-established principle that there should be finality in litigation:

"There is a general principle of justice which finds expression in several ways, which

tend to be grouped under the portmanteau term “res judicata”, see Virgin Atlantic. When a legal claim has finally been determined in litigation, a cause of action estoppel arises and it can't be reopened. A binding issue estoppel may arise in respect of a matter other than a legal claim which is directly the subject of determination in proceedings. Further [and we rely on these words], parties are generally required to bring forward their whole case in one action and attempts to revisit matters that have already been the subject of a determination, even if not formally a matter of cause of action estoppel or the subject of an issue estoppel, are liable to be barred as an abuse of process."

That's the rule in Henderson v Henderson which we rely on.

Further down:

"Under this rule, first explored in Henderson v Henderson, a party's precluded from raising in subsequent proceedings, matters which were not but could and should have been raised in the earlier ones."

Again, we rely on that principle here because Mastercard could and should have raised all of these points in the proceedings before the Commission.

Then if I could just ask the Tribunal just to read -- I am sure it is very familiar to you -- the excerpt here which explains the rule in Henderson v Henderson for a moment.

And then you see, once you've read that, that the Supreme Court says at paragraph 240 that the order made by the Court of Appeal to remit the issue offended that principle.

Then just before paragraph 241:

"Mastercard had a full and fair opportunity to adduce any evidence it wished in respect of that claim. Yet as the Court of Appeal found, it did not attempt to obtain factual empirical evidence on that issue, choosing instead to support its claim of exemption

under article 101(3) by reference to economic theory."

That's a phrase we have heard before in the Commission decision. This is what it did in the Commission decision. It stood on economic theory, it didn't adduce empirical evidence. It decided the way it was going to play it, and lost. It could have done what Visa did, which is exactly what it is saying it should now be allowed to re-run. So you will recall --

MR JUSTICE ROTH: Yes. We see how you put the argument.

MS DEMETRIOU: Yes.

MR JUSTICE ROTH: It's not a direct analogy, I think. It is more like the general court, having then remitted it to the Commission, to say: well, let Mastercard now put forward the sort of evidence it failed to put forward, and that would have been analogous with what the Court of Appeal did. This is obviously different litigation.

MS DEMETRIOU: Sir, I see why you say that. Of course, that's correct. But one, it is not, in my respectful submission, not a material distinction. The reason why I say it is not material is this. These proceedings in AAM, they mostly post-dated the decision and they certainly post-dated Regulation 1 of 2004. So for most of the period of the MIFs at issue in AAM, the one chance -- the chance -- it was totally open -- the issue of Article 101(3) had not previously been determined, so it was open to Mastercard to ask the court to decide on whether or not the MIF during that period was exempt. But in our proceedings, our proceedings are very different, because the only possibility was for the Commission. Certainly, even as a matter of law up until 1 May 2004, only the Commission could have given these MIFs or any Mastercard MIF a clean bill of health under Article 81(3). They couldn't have gone to the court to say, either then or subsequently, these MIFs were in fact exempt during that period.

So the Commission was the procedure. It was the procedure by which it had to advance the arguments that it advanced in AAM before the High Court. That's why

we say it's not a material distinction. It is a distinction on the facts, I accept that and, of course, you are right, sir, to say that a more direct analogy would be if the general court had remitted back. But it is not a material distinction, for the reason I give, which is the forum for them to ventilate Article 101(3) was necessarily the Commission.

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: Now, it is important to point out that the upshot of this -- I am now back to AAM -- the upshot of AAM succeeding in the Supreme Court was not only that Mastercard was precluded from arguing exemption again but that it was precluded from running the kind of argument it's trying to run now on exemptibility. That's no doubt because, as I showed you yesterday, the Court of Appeal had found that the actual exempt level was the relevant level to use for the calculation of damages. So the two things stood or fell together.

If we just go back briefly to the Freshfields' letter --

MR JUSTICE ROTH: They were precluded from running the argument they were seeking to run here.

MS DEMETRIOU: Yes.

MR JUSTICE ROTH: That's because they had a go and failed, before Mr Justice Popplewell.

MS DEMETRIOU: Sir, there are two arguments that were being run in AAM. One is that: actually, our MIFs were exempt, so we want an exemption. The other was the analogue of the argument they are running here which is: in the counterfactual, we would have had a higher exemptible MIF.

You will recall that what Mr Justice Popplewell did was he decided exemption and then said: when it comes to exemptibility, the burden of proof shifts, so I am going to up the MIFs by 10 per cent to reflect that shifting burden and I will let you have, in the counterfactual, MIFs which were 10 per cent higher than the actual exempt levels that

I found. Then Mr Justice Phillips, as he then was, took a different approach. He said: well once I have decided what was exempt, that's the benchmark for damages. In the same way, sir, that I say had they argued 0.9 per cent and succeeded before the Commission, that would have been the benchmark for damages and we would not have been able to reopen that. So Mr Justice Phillips held, once you have decided the actual exempt level, that's the benchmark for damages.

When it went to the Court of Appeal, the Court of Appeal preferred the reasoning of Mr Justice Phillips. That's the passage I showed you yesterday in 225 and 226 of the Court of Appeal's judgment, where they said: yes, once you have the exempt level, that's the benchmark for quantification of damages. There is no shifting of burden of proof or anything like that. And so in this case, although it looks on its face like the Supreme Court is just dealing with the question of exemption rather than exemptibility in the counterfactual, in fact both points stood or fell together because it was the exempt level that constituted the exemptible level in the counterfactual.

We see where Mastercard accept that, if we just go back briefly to the Freshfields' letter in A2, paragraph 70, page 1012. so A2, tab 70, 1012.

And they have say at 8B:

"The issue of alternative exemptible levels of interchange fees is no longer live in ASDA. Exemption and alternative exemptible levels were considered at the first stage of those proceedings and the Court of Appeal held, overturning the decision of Mr Justice Popplewell, that Mastercard had failed to show that the first condition of article 101(3) was satisfied and so its case on exemption/exemptibility failed. Although the Court of Appeal remitted the 101(3) issues for reconsideration by the Tribunal, this remittance was overturned by the Supreme Court."

You have my point that we make materially the same objection to Mastercard's exemptibility --

MR JUSTICE ROTH: You don't take issue with 8B. That's correct, isn't it?

MS DEMETRIOU: That's correct. That's correct as a matter of fact, yes.

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: So I think the Tribunal sees how I put the point. I want to pick up the Volvo judgment in the Court of Appeal which, again, was -- sir, you probably have a recollection of this, because it was the abuse of process argument in the context of Trucks. You were a member of the Tribunal, I understand.

B2, tab 23.

MR JUSTICE ROTH: Just to be clear, this is nothing whatsoever to do with what we have called the Volvo judgment.

MS DEMETRIOU: It is a different Volvo judgment.

MR JUSTICE ROTH: (Inaudible) the Court of Justice for exemption, it just --

MS DEMETRIOU: Exactly.

Before I take the Tribunal to parts of the judgment, if I may just summarise how the relevant points in this judgment arose. And the point arose by way of preliminary issue in the context of follow-on damages claims in this Tribunal, following on from the European Commission's decision in Trucks, which was a settlement decision. So the truck manufacturers had settled with the Commission and admitted the infringement of Article 101.

A question arose as to what extent the factual findings made in the Commission decision in the recitals were binding in the damages claim before the Tribunal. So the defendants wished to argue that some of them weren't binding, and they wished to argue a different factual story in the context of the determination of causation and loss. So there was an issue as to which recitals were binding as a matter of EU law because they went to the operative part of the decision -- that was part of the preliminary issue, and that part does not need concern us now -- but then there was an issue as to for

those recitals which were not formally binding as a matter of EU law, whether it would be an abuse of process for the defendants to seek to argue something different, to seek to say that those factual findings were wrong, even though they weren't formally binding.

And the claimants succeeded in their argument which was that it would indeed be an abuse of process for the defendants to seek to resile from factual findings, even though those factual findings were not formally binding.

As I say, it's important to note that the defendants weren't seeking to challenge the findings in the context of liability because they accepted that that had been definitively established by the decision. What they were seeking to do was to resile from some of the factual findings in the context of the determination by the Tribunal of causation and loss. So they wanted to adduce different evidence in that context in the domestic damages proceedings.

Although I am not going to submit that there is a complete analogy between that case and the present case, there are nonetheless some analogies which are helpful, we respectfully submit, in determining the point at issue between the parties today. Because in these proceedings too, Mastercard accepts that it can't challenge the finding of liability in the decision, so it can't challenge the finding that the level of MIF it actually charged was not exempt, was unlawful. It accepts that, we saw that in its letter. But what it wants to do is adduce different evidence in the context of causation and loss, in order to show that a different level of MIF would have been exempt.

So there are, broadly, some analogies with the Trucks judgment, the judgment in Volvo.

Now in Volvo, in a sense, the claimants had a harder task because in Volvo, because it was a settlement decision, the defendants could not appeal against any of these findings. And in any event, they couldn't appeal against the non-binding findings

because they weren't essential to the operative part. So there was no opportunity to ventilate the matter before the European Courts. It was the Commission that the claimants said it would be an abuse of process to resile from.

Of course, in the present case, Mastercard could and did exercise its rights of appeal before the European Union courts.

If we just look at the headnote to start with on page 1227, we see by letter G that -- we see the summary of the relevant finding here. So we see that:

"The decision taken as a whole was a final decision, deserving the protection from collateral attack provided by the abuse of process doctrine, where that doctrine would otherwise apply and the Competition Appeal Tribunal's approach to the application of the doctrine had been correct and it had been entirely justified in deciding it would create great unfairness to the claimants to have to prove facts that the defendants had already admitted in the settlement proceedings, regardless of the distinction between essential and non-essential facts."

So regardless of whether they were formally binding. That's the summary. And that summarises, as well, what the Tribunal found in its judgment and, of course, the Tribunal judgment was upheld by the Court of Appeal.

If we turn on in the judgment to page 1255, you will see a heading on that page, "The domestic law grounds of appeal". The first argument that was made was that there was no final binding decision because the non-essential findings could not be appealed. That was rejected. That point is not really apposite in the present proceedings.

But more pertinently for the present case, if we turn on to page 1257, the defendants also argued that the threshold for an abuse of process had not been met. You will see the heading towards the bottom of the page:

"Did the CAT apply a high enough threshold?"

You see at paragraph 99, a summary of the CAT's judgment. You see there that the CAT said that:

"On the basis of the English authorities on abuse of process discussed above, we apply a broad, merits-based approach in asking whether it would bring the administration of justice into disrepute and/or be unfair to the claimants if the defendants are able simply to deny the facts which the decision records them as having admitted or to not admit those facts in their defences to these claims and thus require the claimants to prove them."

That was the test applied by the Tribunal on the basis of the domestic authorities on abuse of process and that was endorsed by the Court of Appeal. Then if we go to paragraph 103, we see -- this is in the judgment of Lady Justice Rose, with whom the other members of the court agreed -- she says there that:

"There is no substance to the criticisms made by the defendants of the CAT's judgment.

"The CAT did not simply engage in a broad merits-based approach but fully appreciated that a high threshold needed had to be crossed, in order for the abuse of process doctrine to apply. The CAT referred to cases emphasising that the situations in which it would be an abuse to litigate an issue which has not previously been decided between the same parties, would be entirely exceptional.

"I reject the suggestion that after citing this case law, the CAT in fact applied a lower threshold. The claimants are right to say that the appropriate high threshold is inherent in the Bairstow test, that proceedings are only regarded as abusive where they create manifest unfairness or bring the law into disrepute. The CAT recognised that the doctrine applies only in an exceptional case and went on to consider whether this case was exceptional. There was no error in the test that the CAT applied."

Then you see at 106:

"In my judgment, the CAT was entirely justified in deciding that it would create great unfairness to the claimants to have to prove facts that the defendants have already admitted in the settlement proceedings, regardless of the distinction between essential and non-essential facts."

And then they specifically endorse the reasons given by the CAT in its judgment.

And then at 107:

"As to whether it would be an affront to most people's ideas of justice for the defendants to be allowed to resile from the admissions and put the claimants to proof of those admitted facts, I agree with the CAT's conclusion that it would. Those facts found their way into the decision, despite all the procedural safeguards and opportunities for second thoughts that are provided to the addressees by Regulation 773 of 2004 and the notice."

Then: “The defendants stress this is not a case where the abuse of process doctrine is needed to prevent the claimants being vexed twice in the same matter. That argument is, however, an aspect of exceptionality of the application of the doctrine. It doesn't mean of itself that the doctrine can't apply."

So even though the analogy is not precise between the present case and that case, we do rely on the principles that are set out, because in the same way that the defendants in Trucks had been able, through the process before the Commission, to challenge and to dispute facts that were found by the Commission in the decision, in the same way that they were able to do that, and that was said -- it was then said to be unfair in the context of domestic proceedings on causation and loss to reopen that, we say that that broad principle applies here too --

MR JUSTICE ROTH: It was fundamental, in this case, that they had admitted the point and got the benefit of the settlement with the admission which they were then seeking to contradict and resile from. That was at the heart of the affront to justice, which is

rather different.

MS DEMETRIOU: Sir, I accept that there is that difference. That is why I don't say that the analogy is complete. But in some ways that was that harder case, as I say, because they could not appeal those findings. So it was an administrative --

MR JUSTICE ROTH: They didn't have to admit them.

MS DEMETRIOU: They didn't have to admit them either.

MR JUSTICE ROTH: It is slightly different when you actually admit something in the former procedure and then, when someone sues you as a result, you say "Well I don't admit it anymore." It is a pretty stark case really.

MS DEMETRIOU: I do accept that. I am not trying to push the analogy too far, but when one thinks about an affront to justice and when one thinks about what happened in this case, which is that Mastercard took a deliberate commercial decision not to bring alternatives forward before the Commission in a very lengthy procedure, it knew that Visa had done that. It decided not to do that. It thought it could get away with it all by restructuring instead. When it deliberately decided to do that, in circumstances where there was that lengthy procedure, the Commission was saying, "Please do justify specific levels of MIF", and it didn't do that. It would have been able to appeal any Commission finding. Then although you are right, sir, to say that we don't have the aspect of an admission here, we do respectfully draw an analogy and say it is not so very different in terms of the application of the principles of the abuse of process. So I am not trying to stretch it too far, but I did want to show you the authority and to say that the --

MR JUSTICE ROTH: I can see the analogy you are seeking to make. It is difficult to say it is a stronger case. But I see the point.

MS DEMETRIOU: It is stronger on that particular point, sir, because one of the key points that the defendants made, both before the Tribunal in Volvo and on appeal,

was: well, we couldn't have, compliantly with Article 6 of the ECHR, a right to challenge this. We didn't have a determination by a court.

Obviously, on that point, this case doesn't have that difficulty. I am not seeking to say that, in general, one is stronger than the other, but on that particular point, that difficulty doesn't arise in this case.

So drawing these threads together and trying to summarise briefly -- as briefly as I can, our submissions -- we say that Mastercard could and should have raised the arguments it now seeks to make in the proceedings before the Commission. It was invited to do so. It knew that Visa had done so and it chose not to do so.

Had it done so -- had it done so and those points been determined -- then it plainly could not have raised these exemptibility arguments in the context of quantum. Indeed, Mastercard accepts as much in paragraph 7B of its letter, when it concedes that it can't, in the context of quantum, seek to say that the MIF would have been the same levels as those considered by the Commission.

Sir, we say in those circumstances, Mastercard's arguments on exemptibility that it seeks to advance in these proceedings, in substance do amount to a collateral attack on the Commission's decision. Moreover, we say allowing Mastercard to run these arguments under the head of "Quantum", is manifestly unfair to class members who have suffered loss. Mastercard was obviously alive to the fact that there might be private damages claims against it. Indeed, we saw reference to that in the decision itself. I took you to the footnote which indicated that that was why Mastercard had acted urgently to restructure itself.

But it deliberately chose to adopt a particular different cause before the Commission over many years. What it is now seeking to do, having been unsuccessful in that choice, it is now seeking to underwrite that choice in these proceedings. In fact, one can think about it in this way. Mastercard's approach disincentivises lawful behaviour,

because an undertaking wishing to behave lawfully, who goes to the Commission seeking an exemption and engages in the process with the Commission, an undertaking wishing to behave lawfully has to form a view as to what that behaviour looks like, what that lawful behaviour should look like and adopt that case.

It may well be overcautious in its view. When it is approaching the regulator, it may well think: well, it's sensible to be a little cautious here because we are not sure what the regulator is going to do. If it is overcautious, that might be to its commercial disadvantage. But contrast an undertaking which decides to behave more aggressively as to lawfulness in the real world, to its commercial advantage. If, ultimately, its bet doesn't pay off, and its conduct is found to be unlawful, then on Mastercard's approach, it can then say: well, that doesn't matter in the context of damages because we can take advantage of a counterfactual that's better for us than we opted to go for in the real world.

Indeed, one can see the point quite starkly, looking at the Visa position. So applying this point to the facts of this case, Visa, in 2007, was in agreement with the Commission -- to take a snapshot in 2007 at the end of the Commission decision, Visa was in agreement with the Commission charging intra-EEA MIFs, credit MIFs, capped at 0.7 per cent. That's what it was doing.

Now Mastercard asks this Tribunal to find that it would have been able to charge MIFs over its real-world MIFs -- that's what it said, you have seen it in its pleading -- which were around 1.3 per cent. Now if that is allowed, then obviously, the message is: more fool Visa, you shouldn't have co-operated. What you should have done is stuck rigidly to your guns and then in a damages claim, come along and said, "Well we could, in the counterfactual world -- you, Tribunal, have to assume in the counterfactual world that we would have charged the highest MIF that was exemptible."

Visa would have been much better off adopting Mastercard's tactic and we say that

can't be right. We say for those reasons, it is an abuse of process for Mastercard now to ask the Tribunal to work out the highest MIF that could have been exempt during the relevant period.

All of that, of course, is without prejudice to the submission I made at the outset this morning, which is that the liability of Mastercard was definitively established by the Commission decision in a broad way. The decision found in the broadest terms that it had acted unlawfully in setting a minimum price for merchants to pay their acquiring bank. So we say if that is right, if we are right on that, then none of Mastercard's argument gets off the ground at all, because it is bound by that finding.

MR JUSTICE ROTH: This is an alternative to the binding determination, Article 1?

MS DEMETRIOU: Sir, yes.

Now I have done abuse of process. I need to deal with our final submission which is that there is a binding finding on the counterfactual. It will not take me very long. But it will take me 15 minutes. Shall I carry on?

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: So our final submission is that there is a binding finding as to the question of counterfactual for the purposes of establishing quantum. Now as the Supreme Court held in Sainsbury's and as is trite tort law, a central question in damages quantification is what would have happened if the tort had not been committed, if there was no infringement. First of all, you have to identify the infringement and the infringement here is set out in Article 1 of the decision.

As we have seen, Article 1 of the decision says that Mastercard has infringed Article 101 by, in effect, setting a minimum price merchants must pay to their acquiring banks for accepting payment cards in the EEA. We say that that infringement comprised setting any minimum price that merchants must pay to their acquiring banks.

So the position for the purposes of tort law is absent the infringement, Mastercard did

not set any minimum price. That's the position as a matter of tort law.

We say that that question is materially non-distinguishable from the question which was asked and answered by the Court of Justice in the Mastercard appeal, when considering the counterfactual for determining whether the intra-EEA MIFs constituted restrictions of competition.

So Mastercard says you can have different counterfactuals for different purposes. In principle you can. But here, the question that is asked by tort law and by the Court of Justice, when identifying the counterfactual for restriction of competition, are materially the same. So that's why we say the conclusion is binding. That's our short point on this.

If I could take you, please, to the CJEU's judgment, B1, tab 15.

If we could go, please, to page 559.

If we look first of all at --

MR JUSTICE ROTH: Just a moment. Again, can you kindly give me paragraph numbers.

MS DEMETRIOU: Yes. So it is perhaps starting at paragraph 164 which in the report is 1150.

In fact, if you look at 161, you can see the criticism which is that:

"The Commission should have considered what the actual counterfactual hypothesis would have been in the absence of the MIF."

So that's the argument. Then at 164, the court says:

"By contrast, the court should, to that end, assess the impact of the setting of the MIF on the parameters of competition. Accordingly, it is necessary, in accordance with the settled case law, to assess the competition in question within the actual context in which it would occur in the absence of those fees."

Then if we look at 166:

"It follows from this that the scenario envisaged on the basis of the hypothesis that the coordination arrangements in question are absent, must be realistic. From that perspective, it is permissible, where appropriate, to take account of the likely developments that would occur on the market in the absence of those arrangements."

Then at 169:

"The general court had made an error in failing to explain [it says] whether it was likely that such a prohibition, so a prohibition on ex-post pricing, would occur in the absence of the MIF, otherwise than by means of a regulatory intervention."

Then 173:

"It follows from this that the only other option presenting itself at first instance, enabling the Mastercard system to operate without MIF, was in fact the hypothesis of the system operating solely on the basis of a prohibition of ex-post pricing."

Just pausing there, they are saying the starting point for the counterfactual is no MIF, which is the point we make. So what it is then looking at is what the market developments would have been like, had there been no MIF. So what is being argued is would there have been a prohibition on ex-post pricing? And what the court is saying here is that:

"In those circumstances, that prohibition may be regarded as a counterfactual hypothesis that's not only economically viable in the context of the Mastercard system but also plausible or indeed likely, given that there is nothing in the judgment under appeal to suggest, and it is common ground, that Mastercard would have preferred to let its system collapse rather than adopt the other solution, that is to say the prohibition of ex post pricing."

Then you see at 174, even though the general court had made an error, it had no bearing on the analysis.

So that's what the Court of Justice says, when it is looking at restriction of competition.

It does say somewhere as well -- and I am not deliberately not taking you to it, but it does say somewhere too and no doubt Mr Cook will take you to it and I would if I knew the paragraph number -- 163, sorry, just so he doesn't have to turn it up. 163, page 559 of the bundle. You don't have to have the same counterfactual factual hypothesis for different issues. We do accept that as a matter of principle. What we say here, our submission is that where, materially, the same identical question is being asked -- and we say it is for tort as it is for restriction of competition -- then it is binding. So when the same question is being asked and determined by the Commission, by the court, then it is binding.

Ms Wakefield also asks me to point you to paragraph 108 of the judgment, which is at page 550 of the bundle, 1141 of the report:

"It should be pointed out that irrespective of the context or aim in relation to which a counterfactual hypothesis is used, it is important that the hypothesis is appropriate to the issue it is supposed to clarify and that the assumption on which it is based is not unrealistic."

MR JUSTICE ROTH: But the tort isn't a restriction of competition, the tort is a breach of Article 101 --

MS DEMETRIOU: It is.

MR JUSTICE ROTH: -- which is not the same thing. I.e., a restriction of competition which is not exempt.

MS DEMETRIOU: But the tort is the infringement of Article 101. The infringement of competition was to have a MIF which set a minimum price. That's the infringement in Article 1. So what the court is doing when looking at the correct counterfactual for restriction, is to ask itself the same question. What would the world look like without a MIF setting a minimum price?

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: So it is the same --

MR JUSTICE ROTH: Because they are looking here at only 101(1). They are not looking at 101 as a whole.

MS DEMETRIOU: Sir, yes. But then when one looks at the infringement found in Article 1, for the purposes of tort law, you end up asking materially the same question in the circumstances of this case.

MR JUSTICE ROTH: Isn't that just going back to the same point, that it is really Article 1 that has decided that?

MS DEMETRIOU: It may well be going back to the same point, sir, but it is another way, I think, of putting the same point.

Could we just look at the Court of Appeal, please, what it said? We are in B2, tab 18, page 972. It is paragraphs 185 and 186. You see there the court picking up the counterfactual of no default MIF and a prohibition on ex-post pricing. And so, again, just going back to my point, that what Article 1 of the Commission decision required was no default MIF. That's what it required. And it required Mastercard, going forward, to operate without any default MIF. That's what its remedy was.

So you then see that, 186:

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

So the court says it is binding on it. Then we see the Supreme Court say the same thing. That's behind tab 21 of the same bundle. Paragraphs 92 to 94, page 1129. So paragraph 92:

"Whether Mastercard is binding depends upon whether the findings upon which that decision is based are materially distinguishable from those made or accepted in the present appeals. We rejected Visa and Mastercard's argument that it can be

distinguished in the manner suggested by them."

Then you see:

"The essential basis upon which the Court of Justice held there was a restriction of competition."

So this is looking at restriction of competition, I accept that. Then you see there that ultimately the counterfactual was no default MIF with settlement at par. In the counterfactual, no bilaterally agreed interchange fees; the whole of the MSC would be determined by competition and the MSC would be lower.

We say of course -- it is interesting, just pausing there, that the domestic courts took quite an expansive view of bindingness. In the sense that the facts of these cases post-dated the decision, largely, but they didn't say: well, we think that Mastercard can argue for a different counterfactual on restriction for those periods not covered by the Commission decision. So it was taking an expansive approach. Yes, in the context of restriction, but taking an expansive approach to bindingness.

Again, you have our short point which is that where, as here -- you have a binding determination that in the absence of Mastercard's default MIF, the likely and realistic counterfactual would have been no default MIF with settlement at par. Again, we say that's materially indistinguishable from the counterfactual question for the purpose of causation and quantum.

Because it is materially indistinguishable, it is binding on that question too.

I just want, finally, to take you to the Tribunal's judgment in ASDA which is in the same bundle behind tab 25.

Sorry, it is tab 24. This is a judgment from June of last year. It is a judgment in the context of the non-remitted -- that ASDA damages action, where, as you have seen, there was no remittal on the exemption issue. This was just damages, it was in that context. It was quantum.

If we look at paragraph 8 at page 1270, you can see, paragraph 8, that:

"The present proceedings come before the CAT for trial on quantum. For the purposes of the quantum stage, AAM object to certain parts of Mastercard's defence, on the basis that Mastercard is now precluded from advancing these contentions by the previous judgments in these proceedings."

So they applied to strike out. Mastercard opposed the application and Mastercard seeks permission to re-amend its defences to raise some further contentions.

Then if we look at paragraph 10, over the page:

"The objections advanced concern three distinct aspects of Mastercard's case on quantum. However, all of those aspects concern the question of what would have happened in the marketplace, had Mastercard been constrained not to impose MIFs or to impose a zero MIF under its scheme, i.e. the counterfactual."

So pausing there, the Tribunal -- and I think the parties proceeded on this basis, that the correct counterfactual for tort was a counterfactual where Mastercard had been constrained not to impose MIFs or to impose a zero MIF. So that's the very starting point in this appeal on quantum.

Of course, that's not what it is arguing in this case. It is saying: you shouldn't have a zero MIF for the counterfactual for quantum, you, the Tribunal, should work out what is the highest MIF we could possibly have charged.

MR JUSTICE ROTH: Wasn't this in the context of what the Supreme Court had held?

MS DEMETRIOU: Sir, yes.

MR JUSTICE ROTH: So that should settle this question for the ASDA case.

MS DEMETRIOU: Sir, I think that must be right. It settled the question for this part of the case.

MR JUSTICE ROTH: So it had to be on that basis?

MS DEMETRIOU: I guess it had to be on that basis.

So what they are then saying is that then:

"For each of those three aspects of the counterfactual, the objection [of ASDA] is founded on the submission that for Mastercard to be permitted to advance that case would amount to an abuse of process."

So that was the argument being put by AAM.

Then if we look at paragraph 13, you can see what Mastercard wished to argue. So:

"In its original defence, Mastercard alleged that the claimants suffered no loss because if the Mastercard MIFs had been significantly lower or reduced to zero, then transactions would have been carried out by other payment methods instead, to which those low or zero MIFs didn't apply. That was both because issuers would have switched to issuing Visa or American Express cards, instead of Mastercard cards and because card holders would have switched to using other cards ..."

So: In other words, Mastercard's contention was based on the assumption that in this counterfactual scenario, while Mastercard was constrained in its level of MIFs, the other payment systems would have continued to operate as they did in the real world.

So that's what they wished to argue. If we go to paragraph 15 on page 1274, you can see that:

"AAM do not object to the plea as regards potential switching to Amex" but they do submit that "Mastercard is not now entitled to rely on potential switching by issuers or cardholders to Visa which depends on Visa not being subject to the same constraint as Mastercard i.e. an asymmetric counterfactual."

So then, if we go to page 1278, at paragraph 24, at the bottom of the page, it deals with what the Court of Appeal found. So the Court of Appeal addressed the first of the three primary issues in part 6 of its judgment:

"In effect, the court upheld the view of Popplewell and rejected the view of Phillips J, that the correct counterfactual had been established by the Mastercard decision as

a matter of law, which was therefore binding on the English courts. However, as already indicated earlier in its judgment, the court held that Popplewell J had been wrong then to rely on the death spiral argument to reach a different conclusion on the question of the question of a restriction of competition."

So that's making the point that the Court of Appeal had found that the counterfactual was binding which is what Mr Justice Popplewell had found.

Then if we go on, please, to page 1283, and paragraph 30, you can see there that what is said:

"The extensive extracts from the Court of Appeal judgment show that it is correct, as Mr Cook for Mastercard submitted, that the Court of Appeal's discussion of the counterfactual was in the context of Article 101(1), and that the asymmetric counterfactual was relied upon for the argument that if one scheme had to operate with a zero MIF, while the other was unconstrained, it couldn't have survived. He's also correct that Mastercard now seeks to put forward an asymmetric counterfactual not in support of an argument concerning ancillary restraints but in the context of quantification of damages."

So that's what is being argued.

Then the Tribunal goes to the bit of the CJEU in Mastercard, saying that as a matter of EU competition law, the relevant counterfactual is not necessarily the same for all purposes. Again, we accept that at the level of principle.

But then it says that:

"At the present stage of these proceedings, the issue to which the counterfactual relates is the assessment of damages and, therefore, a comparison between the MSCs which the claimants in fact paid to their acquiring banks in respect of transactions with the MSCs which they would, on the balance of probabilities, have paid, if Mastercard had operated with zero MIFs. The latter is the counterfactual world

which, by definition, never actually existed. It is axiomatic that the quantification is based on this counterfactual and we reject Mr Cook's submission that the statement of the CJEU at paragraph 108 [which I took you to] is irrelevant to the quantification stage."

Then at 33:

"We also don't think it makes any difference to say that the present stage of the case concerns causation of loss. It is, of course, correct, as Mr Cook emphasised, that AAM are not claiming for the effect of Visa's MIFs but for the loss they suffered, by reason of Mastercard's MIFs, but we don't see that this can justify calculating that loss on the basis of a counterfactual that's divorced from reality. If a counterfactual is completely unrealistic when put forward on the question of restriction, it doesn't become realistic just because it is put forward when the analysis moves to consideration of quantum."

So the Tribunal rejected the conclusion that the counterfactual should be different. Then we see at paragraph 37, "held that the pleas resting on the asymmetric counterfactual should be struck out."

So that's the conclusion in this case. What we say is that by parity of reasoning -- it is not exactly the same --

MR JUSTICE ROTH: The whole point there was that the Tribunal considered that the asymmetric counterfactual was completely unrealistic, it could never possibly have happened in the real world.

MS DEMETRIOU: That's right.

MR JUSTICE ROTH: That's what it was all about. Very different, I think, from the argument we are hearing in this case.

MS DEMETRIOU: Sir, it may be different. It may be what I can draw --

MR JUSTICE ROTH: Your point was not that the Commission might not have exempted a lower level of MIF, it is that Mastercard didn't ask for it. But you are not

saying it is completely unrealistic that they might have exempted.

MS DEMETRIOU: We are not saying it is completely unrealistic. What we are saying is, when you are essentially asking the same question for both counterfactuals. So when you are saying, what would the world look like without a minimum price, and you get the answer for restriction of competition, then it is completely unrealistic to say that the answer for quantification of damages should be something completely different. So we are making that point.

MR JUSTICE ROTH: Yes. But I mean, it is a very different kind of unrealistic. I mean, given that we don't know, it might have been exempted if it had been asked for, at 0.9 per cent. You can't say it is unrealistic to suppose it might have been, because we have Visa.

MS DEMETRIOU: Sir, yes. Then if that is the case, then you have our other submissions.

MR JUSTICE ROTH: Yes. That's separate. But just as to the ASDA point, ASDA does seem to me a very different point, so to say. Speaking for myself, I can't speak for my colleagues. But I am not sure it helps us very much one way or the other, the ASDA case.

MS DEMETRIOU: Sir, it may help us then in this respect. When one is testing Mastercard's argument about: well in the counterfactual, the Tribunal has to arrive at the highest MIF we could have had exempt, one does have to ask whether that's a realistic or plausible counterfactual.

It is extremely difficult to work out how Mastercard gets there, because if you eliminate the MIF in this case, as you have to for the purposes of asking the question in tort, then on what basis can it be said in any realistic or plausible counterfactual that Mastercard could have gone to the Commission and said, "Commission, please work out the highest MIF that we could plausibly charge."

So we say that we do rely on the words "realistic", and "plausible", which are well entrenched in the case law.

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: We say from that perspective, it is a useful way to test Mastercard's argument. In any event, you have my other submissions which arrive at the same result. These are really different ways of arriving at the same conclusion and we do say it would be wholly wrong in this case to allow Mastercard to do what it didn't do the first time round and to deprive the consumer members of the class of the damages to compensate them for what they have lost.

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: Sir, unless you have any questions for me, those are my submissions.

MR JUSTICE ROTH: Yes, thank you very much. We will take ten minutes.

(11.37 am)

(A short break)

(11.50 am)

MR JUSTICE ROTH: Yes, Mr Cook.

Submissions by MR COOK

MR COOK: Sir, the starting point is that Mastercard recognises, as it must, of course, that its actual EEA MIFs during the period 1992 to 2007 have been found to be unlawful. Mastercard cannot and does not ask the Tribunal to reach any conclusion that would contradict that finding.

However, there is no reason why Mastercard should be prohibited from arguing at trial, as part of its case on causation and loss, that alternative EEA MIFs would have met the criteria for exemptibility and damages should be calculated accordingly. There are

two analogies which have been sort of canvassed a little bit in exchanges with the bench and I would suggest that, with respect, those are, indeed, quite helpful. The first is a price fixing cartel. Obviously, Mastercard is always keen to emphasise that this is not this case, but nonetheless, there is a sort of potential analogy one can look at there. A claimant in a price fixing case cannot claim damages on the assumption that prices would have been zero, absent the cartel. The court, the Tribunal, removes the unlawful element, i.e. the price fixing, and looks at what should have happened. I.e., prices should have been set competitively and damages are based on the difference between those competitive prices and the fixed prices. We say that's a useful analogy to what Mastercard wants to do here. It is looking at the alternative, the lawful alternative.

Secondly, sir -- this is the example you gave yesterday -- an excessive pricing dominance case. Again, the fact that there is a finding that the price charged is excessive doesn't mean that the claimant is entitled to damages based on prices being zero. Subject to the grey area introduced by Albion about exactly how close to the line one goes, the court removes the abuse, i.e. the excessive element of the price, and damages are based on the prices that could lawfully have been set, or put another way, should have been set.

You asked the question, sir, yesterday: on Mastercard's case, are we talking about a should or could? Now, sir, you see both terms used in the cases. In this context, they are simply shorthand ways, in my submission, of saying essentially the same thing. Which is in a case where there has been unlawful conduct -- and there can be a difference in cases where there is a failure to act at all -- you have to take the defendant's actual conduct and remove the unlawful element. You are looking at the lawful bits which are left.

The reason why they are saying essentially the same things, so should and could, is

because when you are looking at what a defendant could have done in the counterfactual, implicit in that is what you are looking at is what the defendant could lawfully have done in the counterfactual. That's where we get into should, because it could lawfully or should have acted lawfully. So they end up essentially being shorthand for the same concept.

MR JUSTICE ROTH: I get the impression should is used more in cases where the duty was to act in a particular way and to give more negligent advice, or for a doctor to make the correct diagnosis. There you can see it is should, but not when you are talking about a price where there are a lot of prices you could have charged.

MR COOK: I will be giving the example in our skeleton argument of somebody driving at 40 miles an hour in the 30-mile an hour zone and there is an accident. Obviously, in that example, the court does not assume the defendant would have not driven at all. Driving is lawful. You remove the unlawful element of the conduct and so look at how the defendant could have driven lawfully which means at the speed limit of 30.

I understand your concern, sir, that to say the defendant should have driven at 30 is somewhat artificial. While he could not lawfully have driven above 30, he could, of course, lawfully have driven at 10, 20, or 25, so talking about should may be a somewhat imperfect shorthand but what it is, is shorthand for taking the actual conduct and removing the unlawful element. If it is a failure to act situation, it can often be: if there should have been action, what should that action have been?

Similarly, sir, when talking about his excessive pricing, there has been action. Also, you are saying a party in a dominant position should not charge an excessive price. So there is always an element of things a party should or should not do. Respectfully, sir, I don't say the word actually ends up really making a great deal of difference.

My learned friend's argument is that what the Tribunal knew to look at is what the defendant would have done. We say the problem with that is, as the Court of Appeal

said in Beary v Pall Mall -- and that's in bundle D1, tab 9 and I invite the Tribunal to pick that up now, although it is a quotation that you have seen before -- is looking at "would" in most kind of cases is, essentially, not a meaningful question.

So Beary v Pall Mall was a negligence case. There had been that failure to give advice which, ultimately, it was concluded should have been given. The points of general principle that I refer to are at paragraphs 30 and 31. This is the quotation the Tribunal has seen.

It is at the end of page 389 in the bundle. It says:

"In many negligence cases, the question is what would a claimant or some third person have done if the defendants had not been negligent.

"Usually, the only relevant question in relation to a defendant's conduct is what should the defendant have done. It will often not be meaningful to go on to ask what the defendant would have done, if he had not been negligent and it is tautologous to say that if the defendant had not been negligent, he would not have acted negligently."

To some extent, sir, we say that is the situation here. The only meaningful question is if Mastercard had not acted unlawfully, then the question is, what would they have done to act lawfully?

Then paragraph 31:

"There is no scope for the application of the Bolitho principal in the present case. The negligence lay in failing to advise on the possibility of an annuity. 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, advise on the possible options of an annuity."

So we do say that that explains why, essentially, it is a somewhat meaningless -- although the proposal by reference to what Mastercard would have done, essentially becomes a meaningless question. Because in all those cases -- and

this is a good example of it -- we know what Mastercard did do. It is just what Mastercard did do has now been held to be unlawful. Mastercard challenged that but ultimately didn't succeed.

So what we are looking at is a hypothetical counterfactual, where we take away the unlawful part of that conduct. What needs to be done is remove the unlawful element of the conduct. There is no sort of meaningful way of asking what would Mastercard have done, because that's determined exclusively by what it could lawfully have done in those situations.

So we do say, sir, for the reasons given in Beary, in a case like this it's essentially a meaningless distinction. It is tautologous to say if you remove the unlawfulness, then that is acting lawfully.

We say there is actually a very clear ruling of exactly the approach the Tribunal should take in Sir Terence Etherton, Master of the Rolls' judgment in Sainsbury's v Court of Appeal. That is at 316. Again, you have seen it, sir. It is bundle B2 --

MR JUSTICE ROTH: We can put away Beary?

MR COOK: You can put away Beary, sir. Sainsbury's v Court of Appeal which is bundle B2, tab 1. We find this at page 997.

MR JUSTICE ROTH: A moment. Paragraph?

MR COOK: 316, sir. It says:

"The correct analysis is to apply Articles 101(1) and (3) TFEU, in order to determine whether or not the default MIF as charged is in whole or is in part unlawful and then to assess damages on the unlawful amount or level, as so determined."

I will come back to my learned friend's attempt to try to show that that doesn't assist me in due course. But at the moment, I just wanted to show you that's what the Court of Appeal says the correct approach was. And we do say that, indeed, that's exactly what we are suggesting is the approach that should be adopted. That is the sort of

additional bit which we get to with damages. The Commission was simply saying: was the MIF unlawful? It was not determining by how much. There was not that need to do so.

We do, for the purposes of damages, have to go on to that second stage of working out by how much was it unlawful. It could be in whole, it could be in part. That's the issue of exemptibility, which we say the Commission simply didn't address in the Commission decision.

So we say that is the correct approach. That judgment by the Court of Appeal is central to two of the arguments my learned friend is making. It is central both on what I call the should/would argument. It says that what you look at is essentially removing the unlawful element and we say that's the should/could lawfully or however one phrases it, test.

It is also central to one of my learned friend's other main arguments which is the suggestion that because the counterfactual used to assess restriction of competition was the zero MIF, Mastercard is precluded from putting forward arguments about exemptibility for the purposes of damages. We say that illustrates the point that the Court of Appeal held, that it was appropriate to use the zero MIF counterfactual for restriction but saw no difficulty at all to then moving on to consider both exemption arguments -- exemption being whether the actual MIF was lawful -- and then exemptibility, i.e. whether some different MIF would have been lawful.

The only question then was the burden of proof point which is what the paragraphs that my learned friend took you to -- and I will come back to -- were dealing with: was there a different burden of proof on the two issues, in terms of who it lay on?

We say, simply, that it is quite clear from all of the cases -- and I will take you through what my learned friend relies upon -- that, yes, the Commission, the General Court, the Court of Justice, the English courts, assessed restriction of competition on the

basis of a zero MIF. They all went on, subject to the issues in front of them, to consider either exemption or in the English cases, exemption and exemptibility because that is stage 2 of the analysis. That is whether or not the behaviour which is a breach of Article 101(1), i.e. is a restriction, is nonetheless lawful because it restricts but there are benefits from it which ensure that that behaviour is exempted. It is legitimate. That's just inherent in the Article 101 analysis.

There are four main arguments put against me. There are a variety of different sort of formulations but it is said that the EC decision has ruled that there is no lawful alternative MIF. Or put another way, the entire actual EEA MIF was unlawful, or that setting any minimum price for merchants to pay was unlawful. While that is advanced as the first argument of four, many of my learned friend's submissions, in practice, on the other three arguments, ended up coming back to that core proposition, either in whole or in part.

We say that is simply wrong. The decision explicitly addressed Mastercard's consumer MIFs. Those are what had been notified to the Commission and those are what the Commission was addressing and the Commission held that those MIFs infringed Article 101 over the relevant time period. It did not consider or make any findings in relation to alternative MIFs at all and whether they would have met the criteria for exemption.

So not just did the Commission not deal with this, it expressly left open the possibility that alternative EEA MIFs could meet the criteria for exemptibility. That's recital 13 that you have seen, which makes clear that while Mastercard was being ordered to repeal the EEA MIFs, the ones that were the subject of the decision, this did not prevent Mastercard from adopting an entirely new EEA MIF, other than those which were the subject of the decision, that could be proven to fulfil the four conditions for exemption under Article 101(1).

MR JUSTICE ROTH: Is that not going forward?

MR COOK: It is going forward, in the sense that factually, of course, we can't rewrite history but in terms of what is said to be the basis of the finding that we acted unlawfully, that contradicts the idea that any MIF was found to be unlawful because the Commission is clearly identifying the fact that setting a new MIF may be lawful, provided it meets the conditions.

So we say, simply, it demonstrates that the Commission is not making a blanket finding because that would contradict that blanket finding. And we also rely upon the fact that, of course, that is demonstrated by events because Mastercard did set alternative EEA MIFs, following discussions with the Commission. Those were significantly lower, significantly lower than the actual EEA MIFs but still materially above zero and those were acceptable to the Commission.

To be clear, of course, I don't rely upon that as being a binding ruling of any kind. However, it is indicative of the fact that these are realistic arguments that Mastercard should be permitted to pursue. And in the same way, we rely upon the Visa 2002 exemption decision, again to show that these are real arguments.

Against that background, we say Mastercard should have the opportunity, having failed to justify its actual MIFs, to show that alternative EEA MIFs would have been exemptible and that damages should be assessed accordingly.

Once again, we say this is an issue which has been decided and argued out and decided previously. That was the decision of Mr Justice Popplewell, as he then was, in ASDA v Mastercard, and while that judgment was overruled on other issues, it was not challenged on this point.

Just to ensure we have the facts clear, sir, ASDA v Mastercard was a case where the claim in relation to EEA MIFs went back to 23 May 2006. So there was a distinct overlap period, with the period covered by the Commission decision. As a result, it

was a point Mr Justice Popplewell had to address and did, in fact, address.

If we could pick that up, sir, it is bundle D1, tab 7. If we could pick it up at paragraph 80.

MR JUSTICE ROTH: Paragraph 80, you said?

MR COOK: 80, sir. Under the heading "The legal effect of the decision and the General Court and CJEU judgments."

So the starting point for these cases is always how far have these points already been decided in a way which ties the English court.

So at this point, I am simply showing you the nature of the issue which was before the court. What goes on then is an elaboration, at paragraph 81 onwards, of the legal test. Article 16 of the modernisation regulation, that is 81(1), that you cannot take decisions running counter to a decision adopted by the Commission and the limits of that. Section 60, subparagraph 3 of the Competition Act, "have regard to any relevant decisions." Crehan v Inntrepreneur which is a Commission decision covering different subject matter and the approach is as set out in the House of Lords in Crehan which is that the court has an obligation in those circumstances, to consider, based on the evidence before it.

Then 82.1 which is the important paragraph: the outcome of that legal answer is 82(1). It follows that the court is bound by the Mastercard Commission decision insofar as the present claim relates to the application of the EEA MIFs. And there are some very complicated time periods based on limitation. The earliest of those, we see, is 23 May 2006. So in relation to this period, i.e. the overlap period, Mastercard acknowledges, as we do now, that the Commission concluded the EEA MIFs actually set did not satisfy the exemption conditions and that finding is binding. It is contended, however, that because the Commission did not consider whether different EEA MIFs would satisfy the exemption conditions, this court is free to consider that question and must do so for the purposes of the claimant's damages action. That contention is

well-founded:

"The Mastercard Commission Decision was that Mastercard had failed to provide the necessary evidence to establish exemption for its MIFs, in accordance with Article 101(3), but as recital 13 makes clear, the Commission did not regard its decision as precluding Mastercard from adopting new MIFs, if they could prove that such MIFs fell within the exemption criteria, based on further evidence."

So we say this is a point where it was being argued out and fought out before. It was a necessary part of the reasoning to see the binding effect of the Commission decision and there was already a ruling on exactly this point.

MR JUSTICE ROTH: But what is the point that we are being asked to decide? Was it fully argued in the ASDA trial or AAM trial before Mr Justice Popplewell, or was it of common ground?

MR COOK: Sir, I think I would be on dangerous ground trying to remember what the minutiae of an argument five years ago exactly was.

MR JUSTICE ROTH: Yes.

MR COOK: It was an issue which needed to be resolved. There were disputes -- in all these cases, people started off by putting a lot of weight on the Commission decision, and then we pushed back to say: no, the legal test is -- it is only something that has the limits set out in accordance with paragraph 81.

MR JUSTICE ROTH: There is not much reasoning. It just says that's right. If it had been subject to full argument, you would have expected the judge to analyse the argument.

MS DEMETRIOU: Sir, I wonder if this might help, under the same tab. If you look at 319 and paragraph 300. So the way the claimants pleaded their claims.

MR JUSTICE ROTH: 319?

MS DEMETRIOU: Yes. The same judgment. At the bottom of the page, it talks about

how the claimants pleaded their claims. I obviously was not there either but I think it seems from this that they were not arguing the point. That's how we have taken it, just in case that helps.

MR COOK: Sir, I am not sure I see anything on 319 that deals with that, sir.

MR JUSTICE ROTH: You can come back to it in reply.

MS DEMETRIOU: Sorry, it is at 320. It is the rest of that paragraph. The alternative case is that the overcharge is that ... sir, I am not sure how much we can get from it.

MR JUSTICE ROTH: I think you can come back to it.

MR COOK: I plan to make it good, sir, as well, in any event. But we do settle for saying that this is a point that has been looked at and decided before in our favour. So, sir, we say, essentially, there is a proper application of standard compensatory principles, that that is a necessary stage in establishing the level of damages.

Now if there had been a binding ruling on it, that would be different of course. But I will seek to make good in a moment that there is no such binding ruling in any event.

I am coming back to the excessive pricing analogy. We say the Commission has made a ruling equivalently, the actual EEA MIF was excessive, unlawful. But that leaves open the question of the lawful alternative. We are not simply forced to revert to zero automatically. That's the first point, that essentially the Commission has decided the position which I will unpack in a moment.

The second element which my learned friend dealt with at the end of her oral submissions is the idea that there is a legally binding determination that damages must be assessed based on a zero MIF counterfactual because that was the realistic counterfactual used to assess restriction of competition.

Again, we say this is simply wrong. We say that that is contradicted by the two passages I have already shown you from Mr Justice Popplewell in ASDA and the Court of Appeal in Sainsbury's. All of those cases went on to consider exemption and

exemptibility, despite the fact that restriction of competition was being assessed as it was. Both decisions held it was open to Mastercard, in principle, to establish an alternative exemptible MIF, if it could put forward the required evidence, despite having already found the appropriate counterfactual restriction was settlement at par.

We say the short point -- the point my learned friend quoted, of course, comes from the Court of Appeal. It is not necessary to use the same counterfactual for different purposes. Here there are inherent differences in the nature of the analysis under the restriction heading and in relation to exemption questions. Whether that is exemption or exemptibility of alternatives.

Article 101 inherently involves a two-stage analysis. First, whether there is a restriction of competition. So there is a breach of 101(1). Second, when you have shown there is a restriction, whether that restrictive agreement nonetheless gives rise to sufficient benefits to outweigh that harm to competition. So whether it is exempt or a different agreement could have been exempt.

Mr Merricks' argument amounts to saying that a finding that there is a breach of Article 101 rules out the Article 101(3) analysis and that contradicts the entire structure of Article 101 two stage analysis and we expect is clearly wrong.

Sir, you pointed out recital 666, an easy number to remember, perhaps, of the Commission decision and the point being made by the Commission there that the mere fact that a MIF sets a minimum price, doesn't mean it's unlawful. There is then the question of exemption and that is just inherent in the entire structure.

So:

"Thus, MIFs that have the objective effect of restricting price competition are not, as such, illegal as they may potentially fulfil the conditions of article 81(3)."

And that is a necessary part of the test, that stage 2 part.

The third argument is the abuse of process argument, that Mastercard shouldn't be

permitted to try to establish alternative EEA MIFs that would have met the criteria for exemption. It is said on the basis that we could have taken the different route before the Commission. We could have done as Visa did which is put forward an alternative and ask the Commission to rule on that instead. Of course, I acknowledge that we could have taken the Visa route.

The question is, is it an abuse of process for a party to say: I do wish to defend my actual conduct; I believe it is right and lawful. But then having lost on that point, to then be able to say, as you do in excessive pricing, as you do in a cartel: okay, in which case, now we for damages have to look at what could lawfully have been done. Now the problem with my learned friend's submission here, I say, is that if she's right that the Commission has already decided the point that all EEA MIFs are unlawful and she doesn't need abuse; however, if she's wrong on that, so the Commission hasn't decided the point, then at no point in her written or oral submissions did she identify any authority in which a party has been prohibited from running an argument which was not run in previous proceedings, where the proceedings are between different parties. That, we say, is the fundamental difference here. My learned friend essentially just took the Tribunal to the Supreme Court in Sainsbury's and Volvo, and neither of those are in any way close to being on point.

The Supreme Court was a case where the issue had been fully argued and ventilated in the same proceedings between the same parties. So the question was whether or not there was going to be, essentially, a retrial on the point. It comes as little surprise that that was seen as having a second bite at the cherry, as it was happening within the same proceedings. Similarly in relation to Volvo -- so there is really very little one gets from Volvo because the abuse, essentially, we would say, was having got the benefit of a settlement agreement by agreeing to the terms of that decision, a party then trying to step away from factual findings made in that decision. But, again, factual

findings actually made that then they had agreed to.

Neither of those, it can be said, provides any even tangential guidance to what the approach should be in a situation where the point was not decided in the previous proceedings. There was again no, as a result, attempt to identify what is said to be the legal test for this kind of situation. And in circumstances where, we say simply, where there is no ruling -- if I am right -- in the EC decision, there is no reason why Mastercard should be prohibited from trying to establish the exemptibility of alternative --

MR JUSTICE ROTH: The legal test, I suppose, is the test for abuse of process, the broad merits-based approach. Volvo was also argued on the basis there was no precedent for a finding of that kind. Different parties and so on. And for particular reasons which you mentioned, it was found to be an abuse.

I think, obviously, as you say, it was a very different situation, where the finding has not been made. But the test is the broad test for abuse of process.

MR COOK: It is, sir. I am putting to you that essentially there was no attempt made to really identify what that test is and why it is met here.

What I do pray in aid is that in a case where a party is seeking to challenge the conclusions reached in an earlier action -- and I emphasise that is not the case here -- the case law emphasises the exceptionally high hurdle that it will only be an abuse of process to challenge conclusions in a different action between different parties in exceptional circumstances. And the party should only be barred from doing so where it is manifestly unfair to the party to the later proceedings, for the same issues to be re-litigated -- to some extent one says that does not arise at all because the same issues are not being re-litigated -- or to permit such re-litigation would bring the administration of justice into disrepute.

We say even that high test can't be quite high enough in our case, because here there

isn't a rule, we say, in relation to alternative EEA MIFs. But even if one looks at that test as providing some guidance, I do say you would have to look to an even stricter standard. It can't be seriously suggested that there is unfairness or manifest unfairness to the class members from looking at unlawful conduct. That would be a fairly conventional way of looking -- I will come to those authorities -- that's a conventional way of seeing what harm was actually caused by unlawful behaviour. They don't have a right to recover the entire MIF, if not all of the MIF was unlawful.

Again, I say it cannot sensibly be suggested that it brings the administration into disrepute, in order to allow Mastercard to argue a point that it didn't argue in previous proceedings because it was trying to justify its actual EEA MIFs.

So we say, sir, again, that argument simply doesn't go anywhere.

MR JUSTICE ROTH: I think it does, if I may interrupt, come down to this question of whether Mastercard was trying to justify the actual level of EEA MIF or whether Mastercard was trying to justify the principle of charging a MIF.

MR COOK: We will come on to see what the Commission actually considered in relation to that.

MR JUSTICE ROTH: That's a key point of Ms Demetriou's argument, I think.

MR COOK: Yes.

MR JUSTICE ROTH: That you didn't get into, and chose not to get into looking at the level of the MIF.

MR COOK: Yes (several inaudible words) at the moment I am taking the headline points.

Then the final argument is that it is impermissible to look for what the defendant could lawfully have done. One has to look at what Mastercard would have done. I have already summarised our position on that. We say the compensatory principle is you remove the unlawful element. If we can show that there are alternative lawful MIFs,

that is the proper basis on which damages should be assessed and it would simply be wrong to disregard that possibility and that would contradict the approach in ASDA and the Court of Appeal in Sainsbury's.

Turning now to the detail of the argument and the EC decision, this is the argument that the EC decision has already ruled that there is no lawful, alternative MIF. Put another way, that the entire actual EEA MIF was unlawful. We say that is wrong, for three reasons. First, it is contrary to the plain terms of the decision. Contrary, secondly, to Popplewell's judgment in ASDA and, third, it's inconsistent with the steps taken by the Commission prior to and following the decision.

My learned friend took the Tribunal through the EC decision in some detail, in an apparent attempt to argue that the EC decision had already ruled that all EEA MIFs are unlawful. We say, with respect, that is simply not the case.

Before I come to the wording of the decision, it is important to bear in mind what the Commission was doing. Mastercard had notified its actual EEA MIFs to the Commission, pursuant to the specific procedure under Article 15.5 of regulation 1762. But, of course, that notification procedure was then removed with effect from 2004.

But the notification procedure allowed a party to seek confirmation that the notified agreement was lawful, or obtain an exemption, or if the agreement was ultimately found to be unlawful, meant that the notifying party was exempt from fines in respect of the matter notified. So that was the basis on which the Commission was reviewing it. As the investigating competition authority, the Commission's role was to determine whether the notified MIFs infringed competition law. We say that is what its role was and that was exactly what it did do. It considered Mastercard's actual EEA MIFs and not hypothetical alternatives that Mastercard might have set but had not.

So to assist the Tribunal, we have produced a schedule listing the key recitals that my learned friend took the Tribunal to yesterday, along with other recitals which we say

are of central importance on this issue.

Just to understand, we have the quotations. We have put in bold, bits where we say they are of particular importance. We emphasise them because they are ones that make clear the Commission was reviewing and considering Mastercard's actual EEA MIF, not anything else. Where bits are in italics, those are recitals that we point to that my learned friend did refer the Tribunal to yesterday. So I am going to canter through this. I hope I will be able to be -- with the benefit of the schedule -- somewhat quicker than my learned friend's canter yesterday was.

Let's start with the key point, which is the decision itself which is for this purpose, the operative decision, i.e. Article 1. Mr Merricks places particular emphasis on this and says it shows that setting any minimum price is unlawful. We say, simply, that is clearly wrong. It does not say that setting any minimum price is unlawful, it says the infringement was that -- it said:

"Mastercard has infringed article 81 of the treaty by, in effect, setting a minimum price merchants must pay to their acquiring bank for accepting payment cards in the EEA..."

That's where my learned friend sort of wants to stop the sentence, but it carries on:

"... by means of the intra-EEA fallback interchange fees for Mastercard consumer credit and debit cards and Mastercard and Maestro debit cards."

So the infringement is the actual interchange fees.

There is not a general ruling that -- now it is said that that finding is susceptible to only one meaning, namely that the infringement comprised setting any minimum price that merchants must pay to their acquiring banks, but with respect, that clearly isn't right. The ruling is the actual EEA MIFs had that effect. Nothing more than that.

So we say it is quite clear that that is a ruling on the actual EEA MIFs.

Then if we go down through the table, which essentially, the paragraphs consistently talk about, as you would expect, the Commission talking about the actual MIFs. So

recital 1:

"The present case deals with Mastercard's network rules and decisions of its member bank delegates and the organisation's management on the intra-EEA fallback interchange fees. These MIFs are retained ..."

Recital 2, "The MIF in Mastercard's scheme." Not "any MIF", it is "the MIF". That's what we see again and again. They talk about "the MIF", not MIFs generally:

"The MIF restricts competition by inflating the base."

Recital 6:

"Mastercard failed to provide empirical evidence that the MIF maximises the scheme's output, but the restrictive effects of the MIF on the acquiring market are duly offset.

"Mastercard failed to submit any empirical evidence on the positive effects of its MIF."

Recital 7, the same. "The MIF".

Recital 11:

"Its current MIF is indispensable."

All of these, sir, are about the actual MIF because that's what the Commission is considering.

Recital 12:

"Unrealistic assumptions under the MIF, due to the lack of a causal link between this MIF and objective efficiencies. As a result, the competition concludes that such MIF does not fulfil the first three conditions."

So sir, we say every step, as you would expect, is the Commission analysing the actual MIF because that's what it is before it. That is what its role is to consider. Then article 13 which, of course, as we say, is the critical bit which is that the Commission explains that while it is ordering us to withdraw the MIFs, and that's important to understand that is the remedy, the reason why I say, in fact, its perspective is not actually a point of particular importance in these perspectives, they have identified an infringement.

The remedy is, we are told, to withdraw that MIF but we are allowed to set alternative MIFs that would, provided they meet the criteria for exemption.

So we say that's the clear demonstration that the Commission has not reached any view that positive EEA MIFs are inherently unlawful, it is giving us the opportunity to establish that for different MIFs, having failed to establish that with our actual MIFs. So we say that is really quite critical.

It explains everything else, because the remedy should reflect the Commission's attempt to get rid of what it sees as the vice, but it allowed us to set new MIFs, provided they were exemptible.

Then we have the glossary. The glossary is sort of an important bit because that's where we get the definition of Mastercard MIF, which is used as a reference to the organisation's network rules and the decisions of its body's managers that determine the EEA fallback interchange fees:

"The Mastercard MIF is the subject of this decision."

It is buried away in the glossary, and it basically reflects the reality we get from everything else, that that is, with respect, obvious, that is the subject of the Commission decision, nothing else.

Then, sir, to some extent I can speed through it. Each time thereafter, it is to be notified the network rules. Mastercard asked the Commission to take a formal position in respect of our EEA interchange fees. And consistently, that's what one gets, going through. Throughout the thing, throughout the entire Commission decision. It's consistently "its interchange fees, the MIF, the Mastercard MIF." 378, we get the same thing, "the MIF, the Mastercard MIF."

457, "sees no reason why the MIF should fall outside article 81(1)." Mastercard believes the average MIF is close to an optimum. Again, sir, these are all arguments about the MIF. The points we are trying to argue to show that the MIF had certain

benefits.

Then, at 663 and 664, you see on page 5 of this note, this is a critical set of paragraphs, because these are essentially the conclusion paragraphs on 81(1), as it then was:

"The Mastercard MIF constitutes a decision of an association of undertakings."

We are seeing from the definition, that's the actual MIF:

"That decision restricts competition between acquiring banks, in the absence of the multilateral MIF interchange fee. The prices set by acquiring banks would be lower."

So the finding of the restriction is at 81(1).

Then, sir, recital 666 which I do say is a critical part of the Commission's reasoning, which emphasises the fact that MIFs are not, as such, illegal, as they may potentially fulfil the conditions of Article 81(3) which is important for two purposes, of course, because it shows, as I have said, the Commission carried out its restriction analysis using the zero MIF, but then having done so, it does move on to consider exemption, as you must. That is inherently a part of 81(3), for the reason it gives which is something is only unlawful if it is a restriction and not exempt. So it contradicts the entire argument that there is a binding determination that we can't, essentially, look at these arguments.

Then 674. We are now moving on to sort of the arguments and the consideration of them on exemption:

"Mastercard claims the technical and economic progress is achieved as a result of the Mastercard default MIF."

The Mastercard default MIF, it is all about the MIF.

675, the default MIF. 677:

"Mastercard suggest its MIF allocates costs according to their relative price sensitivity."

678:

"Mastercard argues the Commission was wrong to request Mastercard to establish that the interchange fee set at a certain level was indispensable, because such a requirement ...(Reading to the words)... attempt to regulate."

But that was the approach the Commission took, that we had to justify it at a certain level.

With respect, sir, we do say that the fact that we failed to meet what the Commission concluded and was upheld by the European courts was the right test of justifying the actual MIF doesn't in any way mean there is a ruling more broadly. That is still the Commission saying, "we have to look at the actual MIF and we have to show benefits from it", and that's what they considered.

681, "its MIF". 683, "its MIF", "whether the Mastercard MIF", "the Mastercard MIF", the assumptions underlying it at 684.

MR JUSTICE ROTH: I am just looking at 799.

MR COOK: 799 might mean you are looking at the wrong --

MR JUSTICE ROTH: Sorry, 678 which you just referred to.

MR COOK: 678.

MR JUSTICE ROTH: Yes.

MR COOK: Yes.

MR JUSTICE ROTH: That's a reference to your argument, or Mastercard's argument.

MR COOK: So that's an argument, sir, about the legal test for what needs to be done. Mastercard says we don't need to justify level, that's about price regulation; the Commission says, you do and you have not done so. But we do say that that is certainly not a ruling on -- you know, it might be a ruling on the legal argument that you do need to establish level, and indeed that's very well established then by the Court of Justice and the General Court decisions. Of course we need to establish the

level. But it can't be a ruling on anything more broadly than that point of principle, sir.

MR JUSTICE ROTH: But isn't that what you are asking the Tribunal to do? Equally, you are not saying this is the exemptible level; you are saying the Tribunal should decide. You are not putting forward a case saying 8 per cent, you say, was exemptible and that's what is the lawful position. You are wanting to put over a whole range of arguments to say the Tribunal should then establish what's the level.

MR COOK: Two things, sir. Of course, that's the opposite of the argument. There we were saying the Commission should not get into questions of level at all; it should just look at whether MIFs have advantages. So it is the opposite.

But, sir, we are only asking the Tribunal to decide the exemptible level as one does with the court in any issue, which is we are saying: this is the case we intend to prove -- that's what our pleading says -- we will submit the evidence --

MR JUSTICE ROTH: What is the case you intend to prove? What level of MIF are you seeking to prove?

MR COOK: We set out alternatives --

MR JUSTICE ROTH: But none of them have a level.

MR COOK: They do, some of them --

MR JUSTICE ROTH: You refer to Visa, but you don't say, "We are going to say that's the level". You have referred now in argument to what happened to Mastercard later which was accepted.

MR COOK: Which again we plead as well, sir.

MR JUSTICE ROTH: Yes. But you are not saying that is therefore the level. You want to put forward a lot of different levels.

MR COOK: That's right, sir.

MR JUSTICE ROTH: Yes. And then say the Tribunal should work out on all the evidence but act as a regulator and decide the level.

MR COOK: With respect, sir, you are not being asked to act as a regulator at all. You are being asked in a world which is now post the modernisation regulation --

MR JUSTICE ROTH: With reference to pre-modernisation period, largely.

MR COOK: Yes, but I am not suggesting that is a problem. Notification, of course, was abolished essentially at the start of modernisation, so you do now have the power to decide exemption issues. Or essentially determine them --

MR JUSTICE ROTH: We don't. We couldn't and we can't now. What we have to decide is what would the Commission have exempted.

MR COOK: Yes --

MR JUSTICE ROTH: Not what would the Tribunal have exempted; what the Commission would have exempted. What you would have notified, which would have been a level; what would you have notified? And you haven't said what you would have notified.

Then we have to decide whether that level that would have been notified would have been exempted. But you haven't said what you would have notified. You're just saying, "Well, we would have notified whatever would have been the highest level that the Commission would have exempted".

But it didn't work that way. You had to notify it. And that's what the counterfactual world would have been, and you haven't said what it is.

MR COOK: Sir, certainly there are numbers that fall out of our pleadings since we point to the cap rates that Visa did, we point to --

MR JUSTICE ROTH: But which one would you have done? It is your case you would have notified a different level. You would have had to notify until virtually the end of the period. It is not clear to me what you are saying you would have done other than to say we would have done whatever we think might have been best.

MR COOK: We expressly, sir, say that is -- what you have to do in these kind of cases

is work out what we could have lawfully have done. The problem with this is we don't know what we could lawfully have done until there is a ruling on exemptible levels.

MR JUSTICE ROTH: You would have had to take the initiative. You couldn't say, "We will notify to the Commission we want a MIF. You, please, tell us Commission, what is the highest MIF we can have?" You couldn't have done that. That's not the counterfactual world you would have been in.

MR COOK: Sir, I understand that.

MR JUSTICE ROTH: But that's how you are putting your case here.

MR COOK: No, sir. It has not been put against me that because we didn't apply for a notification that the Tribunal cannot determine whether or not a MIF is exemptible. That's not the --

MR JUSTICE ROTH: No, but it is being put that you can't ask the Tribunal just to select a MIF when you are not saying what you would have notified. I find that a real problem, because we are dealing with a period when in the counterfactual world you would have had to notify. And you would have notified a different level.

MR COOK: That's right. But that's what we say follows from the tort decision. The approach in tort cases is that you have to look at what we could lawfully have done. Either you say, sir, that no -- there was one notification that was the actual rates. There is no suggestion that we are debarred from arguing anything else because the only thing we notified in fact was that singular rate.

MR JUSTICE ROTH: No, I am not saying that. Sorry, you misunderstood me. I am saying you are not putting forward a counterfactual saying that in the counterfactual world we would have notified X per cent as the MIF.

MR COOK: Well, we are in a sense that we say there are various possibilities --

MR JUSTICE ROTH: Yes.

MR COOK: (Overspeaking) if one of them is not alternative. But, sir, as you would in

an excessive pricing case, if we were coming to consider what the excessive price was we can put forward a case which says, "This price would be lawful"; or if it is lower or -- you simply take bits off to whatever the Tribunal ultimately decides is the right price having heard the evidence.

The problem with the counterfactual here, sir, is that it is suggested it should be tested based on what Mastercard would have done by reference to its actual conduct. The actual conduct was to justify the actual MIFs. So we have to exclude, as all the cases say, the unlawful behaviour from the counterfactual. Clearly we can't rely on a counterfactual which is unlawful.

In those circumstances, we put forward alternatives that if we failed to establish that the Visa exemption level was exemptible because we don't have the evidence, then putting that forward is clearly not a lawful counterfactual. So which one of those ends up being, or we can establish are actually lawful counterfactuals -- we may fail to establish any of them. What we seek is the opportunity to establish which of those is a lawful counterfactual.

Otherwise, sir, in a situation where we say this is a lawful counterfactual; the other side disagree, and it's not right to be in a situation where effectively you get sort of only one possible rate that can be considered, as you would in an excessive pricing case. The Tribunal looks at what would in fact have been lawful.

The problem, sir, is it is a hypothetical situation and it is completely artificial to talk about what Mastercard would have done, because what you have to remove is the unlawful element. We know that Mastercard in fact did include an unlawful element. So we always have to remove something which can only be defined by the Tribunal telling us after the event what is that unlawful element. That's the argument that we seek to run, sir.

We say that that is something that is perfectly permissible on the authorities, and the

fact there are a range arises because there are potential different ways of doing this and arguments that may or may not succeed. And depending which of those arguments succeed, the resulting exemptible level will be different. That's just simply pleading, as one does in all sorts of cases, potential alternatives to your case.

MR JUSTICE ROTH: We don't find any alternative MIFs specified in your pleading, just considerations.

MR COOK: Well, you do de facto, sir, because we plead the rates that under the undertakings, for example, which are -- I am not sure if Ms Demetriou actually pleaded them out, but it is point 3 and point 2. So point 3 credit. I think those are referred to. We also plead the Visa caps. So again those are numbers, but there are, you know -- we are not saying that necessarily we stand or fall on those two alternatives.

MR JUSTICE ROTH: Yes.

MR COOK: Continuing just going through the decision, I can sort of speed it up a little bit. As we carry on going through, sir, we end up each time it's "the Mastercard MIF", "the Mastercard MIF", the specific one.

731 was one of the recitals which was particularly prayed in aid against us on the written submissions that the Commission's position is not only the level of a MIF is a decisive criterion of assessing whether that MIF fulfils the first condition of 81(3), rather the existence of appreciable objective efficiencies is assessed in relation to the MIF as such. So again it's all about the actual MIF.

Then 733, "The Mastercard MIF does not meet the first condition." Then we have the analysis of the second condition reviewing "its MIF", "the Mastercard MIF".

748, Mastercard claims that "its MIF" is indispensable to achieve efficiencies. "Its MIF-setting terminology". These are all about the actuals, sir.

MR JUSTICE ROTH: Are the arguments based on the actual level? All these arguments, are they based on the level of a MIF or are they based on the principle of

a MIF?

MR COOK: If you look through them, sir, there are quite a number of them that are clearly based upon -- the suggestion, for example, that the MIF is set at around the average of the right level. So there are a number of them that do.

Mastercard says legally you shouldn't be looking at level, but it does seek to show what its actual MIF does, and that's the basis on which the Commission finds that we failed to establish the actual MIF.

752, "In conclusion the Mastercard MIF does not fulfil the third condition". So that's the entire basis of it, sir.

MR JUSTICE ROTH: Yes.

MR COOK: Then 759, which my learned friend placed particular emphasis on in her oral submissions, which is effectively the remedied paragraph that in order to remedy the restriction of competition these undertakings should cease and desist from determining in effect a minimum price merchants must pay by way of setting EEA fallback MIFs.

She described that as a very broad finding which means no part of the EEA MIF was exempt and Mastercard has to desist from setting any minimum price at all. With respect, we say that simply cannot stand as an accurate description of the remedy the Commission argued or imposed here in the light of recital 13, which makes clear that in terms of the remedy we do need to abolish our existing MIFs but we can set new ones. That's indeed what we go on to do.

So in terms of the argument that I am addressing at the moment, we say the wording of this decision simply does not support the contention that the Commission found that all EEA MIFs were unlawful, or the Commission concluded the entire EEA MIF was unlawful. That's just simply not what the Commission was doing and not what the argument before it was.

Then to some extent, sir, the second and third points were add-ons to that. We rely upon Mr Justice Popplewell in the quotation I have already shown you, and also the fact the Commission had granted a Visa exemption and accepted that our new lower MIFs from April 2009 onwards were a reasonable benchmark for the conditions. And, sir, those are specific numbers in relation to both of those that are present.

We acknowledge, of course, that's not binding, but all of those demonstrate that these are realistic alternatives. We simply want the opportunity to try to make them good.

So just in terms of the first argument, then, we say simply that is not an argument that gets off the ground. The Commission did not find, as a fact, that the entire MIF was unlawful. That's just simply not what it was doing. It was only finding that there was an infringement in fact, or considering alternative EEA MIFs at all.

I was to going to deal next with the argument in relation to there is a binding counterfactual as a result of the restriction. I hope I can take that relatively quickly, sir.

It is five to one. Do you want me to start off with that or come back after lunch?

MR JUSTICE ROTH: I think it is easiest to come back after lunch and take it in one go, so we will come back at five to 2.

(12.55 pm)

(The short adjournment)

(1.55 pm)

MR JUSTICE ROTH: We said we would try to deal with the timetabling. We have had another letter in the course of the morning from Freshfields. We think, on reflection, it is probably not productive to try to deal with all the detailed steps of timetable in this hearing. If there is time spare at the end of the day, we can make an attempt but I suspect there won't be and it will be more satisfactory to do it in writing, having looked at what the parties say.

The one thing we wanted to address is the actual date for the hearing, which as we said, we would like to fix that. We have seen what is said by Freshfields in the letter. We do, Ms Wakefield, think that it is as between November 2023 or January 2024, which are the rival contentions. But given that Mastercard is engaged in a twelve week trial albeit about something completely different, through Michaelmas term, and that it is sensible in a case like this for Mastercard to be able to retain Mr Cook for this, especially as it was partially prepared for today or this hearing -- not today, the end of last week and the difference is not great, so we are minded to direct that it will be in January 2024. If you want to push against that, this is your opportunity.

MS WAKEFIELD: If I could push against that gently perhaps. Our concern is to have proper sequencing between the preliminary issues and the further issues to come in the litigation.

The concern thus far, I think, has been a focus on the preliminary issues and the order in which they should be addressed. We see that in some of Mastercard's correspondence. For our part, we really want to get limitation determined as soon as we can, before we hit the next set of issues.

One of those issues, of course, is the pass-on trial, jointly with the merchants. There has been a listing, as I understand it, of that trial for October 2024. I am not sure a firm date has yet been listed in the court's diary, but we do have the indication of the Tribunal in the hearing in November, that that will be heard in October 2024. I could take you to the transcript which is in the bundle --

MR JUSTICE ROTH: That's fine.

MS WAKEFIELD: Of course, the other impending issue is overcharge. Overcharge is an issue which we had sought to have determined more promptly. Then in the hearing in September it was pushed rather later because it was recognised that today's hearing, exemptibility, would have a bearing on that as well. Again, ideally we would

have that determined as soon as possible.

So that, hopefully, might be relatively soon in 2024.

In my submission, those point in favour of having section 32 determined as soon as possible in the Michaelmas term. Early in November is where we come out on our dates, of course. And that is preferable to January.

MR JUSTICE ROTH: Yes. I don't think a pass-on trial in October 2024 would be jeopardised by having limitation. It is just the section 32/section 6 aspect of limitation --

MS WAKEFIELD: It is, sir.

MR JUSTICE ROTH: -- heard in January, with a sort of judgment in February/March.

MS WAKEFIELD: Provided there is no appeal, that's right, perhaps.

MR JUSTICE ROTH: It is very difficult to programme any of this for appeal --

MS WAKEFIELD: That's true.

MR JUSTICE ROTH: -- because the moment you say there is an appeal, and then you say it goes to the Supreme Court, and Mr Merricks has experience of the Supreme Court's time-framing which is under nobody's control here. So I think we have just got to proceed on the basis of what we can do. I will just consult my colleagues.

Yes, well, thank you for that. We will adhere to our initial provisional view. It will be in January 2024, at the start of the Michaelmas term or a couple of days after the start of the Michaelmas term. It will be listed for -- at this stage, I think we are invited to say one week, plus one week in reserve --

MS WAKEFIELD: Yes, sir.

MR JUSTICE ROTH: -- until we know more about it. That, I think, meets your concerns; is that right?

MS TOLANEY: From January 2024, thank you, sir.

MS WAKEFIELD: I apologise, sir, I overspoke.

MR JUSTICE ROTH: Anything else you wanted to say?

MS WAKEFIELD: I just wanted to mention the date for pleadings. It may be that now you have correspondence from both parties, you have everything you need to make a ruling. Or is it your intention --

MR JUSTICE ROTH: I think we do. There is the suggestion in the latest letter that Mastercard will want to file a request for further information which we will take on board. I think what has emerged from -- if I call it the "unfortunate" way that the section 32 issue has played out, that to get clear pleadings of both sides' position is in everyone's interest. So if Mastercard feels it wants to get further information of your pleaded case, I think they should have that opportunity. It is just a question of what the time-frame is.

MS WAKEFIELD: It is a question of time-frame and moving as quickly as possible. If I might just pick up on something I think I just heard Ms Tolaney say. From January 2024. My understanding was the hearing would be listed in January.

MR JUSTICE ROTH: In January.

MS WAKEFIELD: I misheard, I apologise.

MR JUSTICE ROTH: Not the first day of term.

MS WAKEFIELD: Of course not.

MR JUSTICE ROTH: But yes, it will be in January. It may well be a similar date to the ones we have been having this year.

MS WAKEFIELD: We will look forward to another enjoyable Christmas then.

MR JUSTICE ROTH: On that basis, Ms Tolaney, you are excused, if that suits you.

MS TOLANEY: I will take instructions as to whether I'll be released by my client.

MR JUSTICE ROTH: Yes.

Yes, Mr Cook.

MR COOK: Sir, you asked me some questions before lunch in relation to the would

and should point. I don't want to give the impression I am running from those. I am not, I will come back and deal with those squarely on, and I will have another go at making my submissions in relation to that, sir. But I am going to deal first with the binding counterfactual argument and knock, I hope, that point on the head.

MR JUSTICE ROTH: Yes.

MR COOK: This is the argument it says the Court of Justice, the Court of Appeal and the Supreme Court found for restriction of competition purposes, the likely and realistic counterfactual is zero MIF and that is materially indistinguishable, it said, to the counterfactual question for causation and quantum. The ruling on the restriction question is therefore binding on the damages and causation question as well.

The first limb of that argument is common ground. We accept that the Court of Appeal and the Supreme Court did hold the correct counterfactual for restriction of competition in those proceedings. There was no default MIF, settlement par, or zero MIF. The second limb, we say, is a leap in logic and we say is fundamentally flawed.

A number of points on this. Firstly, all of that counterfactual reasoning relates exclusively to the issue of restriction of competition. That is the first limb of Article 101(1). There are two different stages to Article 101. There is the restriction stage, there is a restriction in breach of Article 101(1), and then the exemption stage, whether a restrictive agreement might still be lawful because it gives rise to economic advantages and so qualifies for exemptions. That second stage will only arise if the first stage is passed.

Each of the cases Mr Merricks relies upon relates to the appropriate counterfactual at that first stage, the restriction of competition. That counterfactual analysis inherently involves removing the agreement in question. That's just the nature of it. That is Cartes Bancaires most recently and the Court of Appeal in Sainsbury's confirms that approach back to O2 Germany v -- you know, those cases where -- what would the

position be in the absence of the agreement. But that is just simply identifying what the competitive situation would have been in the absence of the impugned agreement. But that, with respect, simply tells you nothing about that analysis -- that analysis at the first stage tells you nothing about then, stage 2, which is having looked at what happens absent the agreement, can you nonetheless say that the agreement or potentially another agreement for exemptibility, could nonetheless be lawful because it has pro-competitive effects?

So the analysis or the answer at the first stage is, by design, not informative as to the question of whether or not the agreement could nonetheless be adopted, due to having pro-competitive effects, because the case law makes very clear that those kind of arguments are only permitted within the specific framework of Article 101(3). That's something the general court makes clear in the Mastercard v Commission case, that there have been various criticisms about the Commission's approach to exemptibility, and that has no relevance in the context of arguments in relation to infringement under Article 101(1). It is only within the specific framework of 81(3) that pro and anti-competitive aspects of a restriction may be weighed.

It would be illogical and counter-productive to consider at the first stage of the analysis, the possibility that an agreement that at that stage may or may not be restrictive, might still be lawful because it gives rise to economic advantages.

That is something entirely for the second stage.

If I could take you to the Commission's guidelines just to make the point clear, which is bundle D3, tab 29, paragraphs 11 and 12. Having set out the way in which -- the treaty provisions of 8, 9 and 10, the Commission then explains articles -- paragraphs 11 and 12 of the guidelines:

"The assessment under article 81 must consist of two parts."

D3, tab 29, paragraphs 11 and 12, sir.

MR JUSTICE ROTH: Yes.

MR COOK: So I explain the structure which is a two-part assessment. Step one is to assess whether the agreement has an anti-competitive object or actual or potential anti-competitive effects. Then the second step which is 101(3), only becomes relevant when the agreement is found to be restrictive of competition. Then you look at the pro-competitive benefits and whether they outweigh the anti-competitive effects. That is exclusively within the 101(3) framework. Then it goes on to explain that the assessment of any countervailing benefits under article 101(3) necessarily requires prior determination of the restrictive nature of the act or the agreement.

So you have to do the restriction analysis first. It is only once you have done that, that you go on to look at whether there are advantages which outweigh the disadvantages. So the fact that you have analysed an agreement as being restrictive, with respect, this is what the Commission says at recital 666, that is just the first step. It doesn't mean the agreement itself is unlawful, until you have looked at the 101(3) stage of the analysis. So the counterfactual enquiry at the first stage is, by design, not informative of the question of whether the agreement in question might nonetheless be lawful because it has some pro-competitive effects. That is just deliberately what you are not allowed to look at in that context.

So we say the argument that the approach adopted on restriction in some way precludes looking at these issues under exemption, is circular and fundamentally flawed.

You obviously have the point -- that goes to this issue -- that the Court of Justice has confirmed the counterfactual must be appropriate to the issue it is supposed to clarify. As a result, the same counterfactual hypothesis is not necessarily appropriate to conceptually distinct issues. And my learned friend accepts that that is right. She says these are conceptually the same or fundamentally the same issues. But with

respect, it is clearly not the case. In one you are considering whether there are pro-competitive advantages, which is the second stage. So that is a fundamentally different question.

That is confirmed by the authorities that my learned friend relies on which show the analysis of restriction. Each time they went on, having said "There is a restriction by reference to zero MIF", they went on to say that exemption or exemptibility could and should be considered, based on the evidence. And recital 666 of the Commission decision says that in relation to the actual EEA MIFs. You get that from the European court cases. The Court of Appeal and the Supreme Court, in the ASDA and Sainsbury's litigation, considered the principles applicable to establishing exemption in two ways, both whether there had been an infringement and whether, for the purposes of causation quantum, alternative MIFs would have been exemptible. But all of them did that, having already considered the issue of restriction, by reference to the zero MIF. There was no suggestion that this was precluded.

So this was simply a necessary part of step one and then you move on from that, and look at what actually is for damages, the lawful element or the unlawful element, more importantly, of the conduct. At that stage you necessarily have to consider pro-competitive considerations.

So, those arguments -- simply, those cases don't support it at all as being precluding us from running an argument which they actually, those courts, went on to consider. We do say as well, that these issues have been demonstrated by previous cases, and that we are entitled to do this: Popplewell and ASDA. Sainsbury's v Court of Appeal I have already shown you. Sir Terence Etherton, Master of the Rolls' speech at 316, all of these cases went on to do exactly that. We say that is quite clear and entirely consistent with the framework of article 101.

So, what I will also say is Mr Merricks' approach is entirely inconsistent with what we

say is the correct approach to the assessment of damages. Whether you are looking at would or could, there is an element of removing the wrongdoing. If, essentially, you can't consider what behaviour would alternatively have been lawful, that's entirely contrary to that entire approach of compensating for the wrongful behaviour but no more than that.

My learned friend prayed in aid the ASDA Stores judgment and to some extent I can pick up on the points made by you, sir, in response, in relation to this. Of course, that was a judgment that happened at a point when exemption and exemptibility had already been considered on the merits. They found that we had failed on the merits but, nonetheless, the idea that that judgment somehow supports the fact you can't get to those issues, that is simply an impossible position.

MR JUSTICE ROTH: I don't think you need spend time on that.

MR COOK: Indeed, thank you sir. As you said, sir, it was entirely different. It was about whether or not this was a realistic scenario and it can't seriously be suggested that exemptibility is unrealistic here.

Having dealt with that, that brings me on to what Mastercard would have done versus what Mastercard could lawfully have done issue. You did raise with me before lunch the fact that Mastercard doesn't plead that it would have applied in the counterfactual. It would have applied for notification at a particular level. You are concerned about that. Respectfully, sir, we say that's the wrong approach. It is just not realistic to suggest we should plead that we would have applied at a particular level.

What happened in the real world is that Mastercard did, in fact, notify the actual EEA MIFs. It did not notify any alternative EEA MIFs. We know that was insufficient, because those EEA MIFs were found not to be exempt. They were found to be unlawful. So we are inherently dealing with a hypothetical world. We are dealing with a world when the real world, Mastercard didn't apply to exempt, or didn't notify

alternative MIFs.

So I say once we are in that hypothetical world, the whole point of the counterfactual is to remove the unlawful element of the conduct. We don't accept the Tribunal has to evaluate some hypothetical notification process which did not take place. You can't assess the counterfactual on any basis than what Mastercard could lawfully have done, because you are entirely considering conduct which is not real world conduct, it is counterfactual conduct, and is about what Mastercard lawfully could have done, in order to make it a lawful counterfactual.

Because any other alternative level that is not acceptable, is not a lawful counterfactual. So the only ones which are lawful are if we are able to show that there is a level which is lawful.

So we say what that means is Mastercard has to show what it could lawfully have done in the counterfactual. The burden is upon us to do so. That's one of the big differences from Albion Water, as I will come to in a moment. The burden is on Mastercard as the defendant. We plead alternatives in exactly the same way that parties do all the time, which is the legal answer about what the correct legal approach is, is not clear. Therefore, we identify alternatives. We plead those. We will seek to make them good. And what the Tribunal will do is evaluate that evidence and decide if any one of those alternatives reaches the threshold for exemptibility, we say.

That is no different from a negligence case saying, you know: I wasn't negligent, but if I was negligent, I should have done this, or: I should have done this and that.

That's what you do often in these cases. If you don't know with clarity what the answer is, you -- as any party does -- plead a series of potential arguments as fallbacks. That is just simply how it is sensible to litigate because otherwise, you know, parties are not required to put all their eggs in one basket, in a situation where it is not clear what the outcome, necessarily, will be of that evaluation.

We do say that this is a Beary kind of case, where it is simply not meaningful to go on and ask this hypothetical, "What would Mastercard, hypothetically, have applied, have notified?", because the only way that can be evaluated is by looking at what Mastercard could have notified lawfully. And that's what the Tribunal needs to do, is determine what Mastercard could lawfully have done.

MR JUSTICE ROTH: Yes.

MR COOK: Otherwise, it is a position of saying: the counterfactual is this and the answer from the other side, the Tribunal, is: maybe that's not a lawful counterfactual. If that is not a lawful counterfactual, you are always entitled to plead more than one possibility to deal with exactly that uncertainty. We say that's simply what we are doing here. We will, you know, seek to make that good on the evidence, if we are given the opportunity. But that is the way in which a party faced with uncertainty deals with that, by giving --

MR JUSTICE ROTH: Is it necessary? You gave the example of excessive price. If there is an excessive price and the counterfactual is charging a reasonable price, you would expect the defendant to say: well, the reasonable price would have been X; the claimant to say: no, no, it would have been Y, rather lower than X. Both sides argue for their position, but the Tribunal is not bound to find it is either X or Y, it could find it is somewhere in between, having looked at the evidence, but they do actually say: this is what we say is the reasonable price that we would have charged in the counterfactual.

MR COOK: We say what the lawful price is in those circumstances, possibly, sir, but what we might well do in those circumstances and whether we do in the pleadings -- and we say our pleadings have actually probably gone further than one often finds, but whether in the pleadings or in the evidence, you would have analysis that says, for example, in those kind of cases: these are the costs which we say are

relevant and, effectively, if you agree with us that costs A, B and C are appropriate, the reasonable price is 10. If you agree it is costs A and B, the right price is 7, for example.

So, it is perfectly realistic for a party to either directly or by implication within its sort of evidence and expert evidence, to put forward different possibilities, in that example, when there is a dispute about whether or not one element of the costs should properly be included in the calculation. That's to some extent -- that's very similar to what we are doing here, sir. Some of our alternatives are about which sort of comparators, for example --

MR JUSTICE ROTH: What you say is we could lawfully charge prices that were based on, or MIFs that were based on, these factors. You don't say what these MIFs are.

MR COOK: What you are raising there to some extent, sir, I will say is not part of this hearing which is a pleading point. That is a question of the extent to which what point we quantify down to the nearest decimal point or two decimal points, which ones those will be in relation to credit, debit and across a 16-year period. That, we say, is very much not an issue for now. That is something that will be done -- it will be detailed and it will be in the evidence. It is not for a matter now.

But, obviously, unless we are in a position at some point, through our evidence, to establish specific numbers, we will fail. And that, sir, I have no qualms about acknowledging, in the light of the history of what the cases show, is we will need to have specific evidence to back up specific numbers.

MR JUSTICE ROTH: Yes.

MR COOK: But, sir, that is a matter for trial and the ordinary process of sort of expert reports and filling in the detail.

So, sir, there will need to be specific alternatives on the evidence before you. If they are not, then that particular alternative won't succeed.

To some extent you can test this by looking at the situation with a zero MIF, which is, you know, the idea that Mastercard would have adopted a zero MIF. Again, it is simply not a realistic sort of counterfactual situation. There is no reason why Mastercard would have done that, unless it was the case that, simply, there was no other higher lawful alternative available. So that's as much suffering from the problem of why would Mastercard do that? Clearly it had the option, theoretically, to do that at any point. It didn't want to.

So we say that is as much a problem of -- that is just simply not a realistic alternative, unless there is no higher possibility, which is why theoretically it says you look at the lawful action and it is simply not meaningful to go beyond that. We say that's exactly the same situation here.

Because all we could do -- in the real world, we did something which is inadequate and we have to look at what we could have done lawfully in the counterfactual. We say that is entirely consistent with the general principles of how compensatory damages work in the context of tort claims.

My learned friend took you to the Supreme Court in Sainsbury's but to that extent -- I think it was said it was trite law there. But it is trite law because it is very well established that damages are to be awarded for loss caused by the tort and putting the claimant in the position it would have been if the tort had not been committed, which always requires removing the unlawful element.

That's what we want to do. We want to strip out from the "but for world", the unlawful element. And that entirely depends on whether we are able to show that there would have been some element that was lawful, which is the exemptibility issue. We say that is an entirely orthodox case, and there is simply no reason why that should be barred as a matter of principle at all.

MR JUSTICE ROTH: Yes.

MR COOK: Yes. So my learned friend referred to the Court of Appeal judgment in ASDA and Sainsbury's, which is at bundle B2, 18. I took you to sort of the punchline of that, which is the conclusion. But there were various submissions that she made prior to that in the context of the reasoning about whether or not Mastercard is simply trying to uphold what Mr Justice Popplewell said -- and was effectively his argument on that front were rejected.

With respect, we are not, at all. We are squarely putting our position in accordance with what the Master of the Rolls said at paragraph 306. Just to go back to those, it is bundle B2, tab 18. The section of this is under the heading, part 1F which is above paragraph 306 in the judgment, page 996 in the bundle.

We see the formulation of the first issue which is the one we are interested in under 306:

"Whether, if the agreement was not exempt under Article 101(3) [and obviously, in the present case, we know that it wasn't], the merchants nevertheless -- "

We are talking here about burden of proof:

"... whether the merchants carried a burden of proof in this agreement, if any would have been exemptible, that is to say, had a lawful level of charge."

So it is looking here at burden of proof, but it is rightly focused on what is the lawful level of charge. The question is, who has the burden of trying to prove that? And the issue here was that Mr Justice Popplewell had suggested, effectively, there was that different burden of proof for exemption. That was on Mastercard to show that the actual MIFs were lawful and exempt. Whereas he suggested when it came to alternatives, the burden of proof shifted to the merchants and he added a sort of a little bit on to his analysis to reflect some of the uncertainties. We see that at paragraph 312 of the judgment.

You emphasised, sir, the last sentence of paragraph 310. We say that with the

exception of the point about the burden of proof, this is an entirely conventional approach to the question of damages. The final sentence:

"Mr Justice Popplewell said for the merchants to establish the extent of their loss by reference to the extent of the unlawfulness, and it is for the merchants to establish as their 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 the MIFs actually charged."

That was not challenged. The burden of proof is who was the one who actually had to show this. The ruling was that we do. But we say that is an entirely conventional approach endorsed by the Court of Appeal, about how you approach causation and loss.

But the end result we get to is that the burden of proof is reversed, but exactly that approach is endorsed then at paragraph 316. You apply 101 and 101(3) in order to determine whether or not the default MIF, as charged, is in whole or in part unlawful. And you assess damages on the unlawful amount or level as so determined. We say that is the conventional approach to tortious damages in this kind of context.

With respect, my learned friend's submissions yesterday appeared broadly to accept that there was force in that approach. It's the bottom of page 91 of the transcript. If you go over to page 92, she gave the slightly more concrete example to say the MIF as charged is 1.2 per cent and let's say the court then finds a MIF of 1 per cent was exempt. It says "is exempt" because they are arguing actual exemption.

Pause there for a moment. With respect, that is wrong. There would be no question of the court finding that a MIF at 1 per cent was exempt at that point, for two reasons. One, that was not the actual agreement. In her example, the actual one is 1.2. So as we see at 306, that's exemptibility, not actual exemption.

Part of why it is not -- also as well, why it is not exempting, as opposed to dealing with

exemptibility, is because all of this was historic, that the claim periods had finished being cut off by the time we get before the Court of Appeal. So they are entirely dealing with a historic position, not something of a ruling, saying: as at the date of the Court of Appeal judgment, Mastercard can lawfully charge X. That was never something that was going to happen in those proceedings. So it was not 1 per cent was exempt, it was 1 per cent would have been exemptible. That's important because that's a distinction my learned friend then goes on to make.

Then when you are looking at calculation for damages, the damages are the difference. You can't claim the whole of the 1.2 because 1 per cent was exempt. That, with respect, is entirely consistent with what we say. Unless you want to say --

MR JUSTICE ROTH: So far as it is post May 2004, the court can historically look at exemption, can't it?

MR COOK: The court absolutely can, sir. I think there is an issue here that the parties have not actually fully addressed in submissions, about how far the court can deal with exemptibility pre- May 2004. Looking back, that is certainly something which has been done in the past. The court has made rulings on that and the original Mastercard OFT case back in 2004, the OFT made a ruling in relation to the application of Article 81 and 81(3) in respect of the period 1 March 2000 to, I think, about October 2004. So as the regulator, it said "Right, we are now gifted the ability to deal with Article 81 by the modernisation regulation," and they did so. Then the appeal before the CAT was on the basis that the CAT should, in turn, do so.

So I do say, in essence, the court has to be able to deal with it. The reason why we say that is what happened with modernisation was the notification regime was swept away. It was not a process whereby existing notifications ran out, in the sense of the Commission carried on beavering away until it had addressed all notifications that had been made. All notifications were cancelled from that point onwards.

So there was never going to be, necessarily -- there might in some cases, there was in Mastercard -- there was never going to be, necessarily, a ruling on historic agreements that had been notified by the Commission. So I do say that modernisation regulation to that extent -- and there are other bits of it, I accept, which are of substantive effect -- to that extent, it is a procedural one and the court did have the ability, after 1 May 2004, to deal with agreements which were historic and certainly --

MR JUSTICE ROTH: I was making a slightly different and simpler point, that Mr Justice Phillips was dealing with both exemption and exemptibility. They were the same, and he was entitled to consider: this MIF, does it qualify for exemption?

MR COOK: Yes.

MR JUSTICE ROTH: That was open to the court to determine for that period.

MR COOK: Yes.

MR JUSTICE ROTH: The court had jurisdiction to do so. It was not precluded by any Commission decision because quite aside from the fact it was Visa, but the Commission decision was for a period before the period of MIFs that were before Mr Justice Phillips.

MR COOK: That would probably be right in terms of the time period.

MR JUSTICE ROTH: Yes. I think that's right, because I think the case before him was from December 2007 onwards.

MR COOK: Yes. Certainly it was Visa that would be the exemption in any event, until December 2007.

MR JUSTICE ROTH: So in that respect, exemption and exemptibility went together.

MR COOK: They do in all these cases, unless there is a decision which has sort of ruled one out. But yes.

MR JUSTICE ROTH: In deciding that it wasn't exempt, that MIF, he was deciding what MIF would be exempt. And that, therefore, would give exemption on that basis.

So he didn't have this counterfactual exemptibility, is what I am saying.

MR COOK: It is right to say -- certainly before Mr Justice Phillips, that wasn't an issue. The question, sir, -- and my submission to you -- it is something that -- the exemptibility issue is one that needs to be considered but that this Tribunal does have the ability to do it, and it should not be approached and doesn't need to be approached based on what the process of a notification which didn't take place would have been. It is simply this Tribunal, following modernisation, addresses that.

MR JUSTICE ROTH: The counterfactual world is what you would have done back in 1992. In the counterfactual world, it would have been a notification. That's the point I was making.

MR COOK: It is a procedural --

MR JUSTICE ROTH: The counterfactual world is replacing the actual world and it is covering the same period as the actual world. When there was notification, you would have had to notify.

MR COOK: Yes.

MR JUSTICE ROTH: That must be right, I think.

MR COOK: It is. But to some extent, sir, one way of looking at it, perhaps, is if one is dealing with a case where someone has acted unlawfully because they have not put in a permit or something like that. Certainly here, one aspect of the unlawful behaviour is the fact that Mastercard did not have notification for that MIF that was exemptible. That's the bit that, effectively, you overturn in the counterfactual by saying what would have been, what could have been exemptible.

So I understood -- or what I see from paragraphs 91 to 92 of my learned friend's submissions is she was accepting that was broadly the right approach but what she went on to say, she said: we say that's very important in our case because applying those principles here, you ask yourself first of all: what part of Mastercard's MIF is

exempt? Answer: none of it. None of it was exempt, the Commission held that.

So with respect, what we are back to again is my learned friend's argument in large measure sort of stands or falls on the basis that what she says is the Commission has found that, essentially, no part of the MIF is exempt. Whereas I say, as you know, that is simply wrong. What the Commission simply found was that MIF was not lawful but did not deal with a point which is actually only relevant for the purposes of damages -- by definition, not something the Commission would have a need to look at it -- which is what part of it was unlawful, which is the damages question we see identified by the Court of Appeal in Sainsbury's.

MR JUSTICE ROTH: Can I ask just you on the would and could point, whilst we have this open, you make the point that the Court of Appeal said that the only issue where they found that Mr Justice Popplewell was wrong was on the burden of proof, and the burden of proof should be on the scheme, not on the -- in that case the merchants and here Mr Merricks. One of the reasons for doing that is at the end of paragraph 317:

"It would require the merchants to prove a complex negative, namely the highest level which the MIF would be exempt would require the merchants to satisfy the court as to what the defendant could and would have done. That's to say, something on the face of it would be based on facts within the scheme's knowledge."

So doesn't it follow from that, that the burden of proof is on Mastercard and the burden of proof on Mastercard is to show what it could and would have done? That's their formulation.

MR COOK: Yes. The distinction between could and would was not actually one that was argued out in those cases.

MR JUSTICE ROTH: Yes.

MR COOK: What Beary said is it is a convenient shorthand because could and would are basically the same thing, is what Beary says, in the majority of cases. So with

respect, I don't think you can draw anything from the fact that they add "and would", as adding an additional standard to what, lawfully, could have done in those circumstances, particularly when you see what is said in 316 about simply assessing it, based on what amount of the MIF is unlawful.

It is certainly right to say -- this is again a distinction which is important in this case from Albion Water -- that one of the concerns they had about effectiveness, et cetera, was the argument that put the burden upon merchants, established essentially, a problematic burden upon them. The burden is very clearly, and we accept, upon Mastercard to establish exemptibility.

MR JUSTICE ROTH: Yes.

MR COOK: So the point simply does not arise.

MR JUSTICE ROTH: Yes.

MR COOK: We are back to, sir, with Beary, just how far it is meaningful to talk about "would", in circumstances where the only practical reason why Mastercard would come down lower than its actual MIFs which it wanted and tried to defend, would be on the basis of what it could lawfully do, what it could lawfully charge. There is just no meaningful distinction, we say, between would and could in these cases.

Albion Water was the other case my learned friend relied upon. To some extent, the starting point with Albion Water is it didn't really help my learned friend because, at best, it shows that there might be a little bit of a grey area about whether we get the absolute final sort of top penny in the pound. What it doesn't suggest, anyway, is provide any support for sort of the zero MIF that my learned friend's case is essentially based on. At most, Albion Water says -- it almost does the reverse to what Mr Justice Popplewell did and the Court of Appeal said was wrong, which is he added a bit on. It might be said that what is being suggested in Albion Water is you assume a bit underneath, possibly.

But that simply doesn't in any way support the idea that this process is one that we are precluded from seeking to pursue. It may be we don't succeed, but that's a matter for trial. The question is whether we are precluded from trying at all.

But the distinction that is drawn in Albion Water in particular, is about the significant uncertainty and the near impossibility of identifying the borderline, and the fact that burden was then going to be on the claimant. It said that that was obviously the concern which the Court of Appeal also had in Sainsbury's. That doesn't arise here. The burden is on Mastercard. But nothing about that approach altered the fact that the Tribunal was still fundamentally looking at stripping out the unlawful element, not going to zero. Because it was clear there was going to be some kind of price which was undoubtedly reasonable.

So, essentially, it doesn't take the matters very far. Of course, it was a case where, as well, there was actually an agreement between parties about a fair and reasonable common carriage price which was 14.4p, I seem to remember. So the fact that there was a ruling about what was a fair and reasonable common carriage price, one, it is perhaps not surprising, when there had been a ruling on the point. The Tribunal said: we are going to stick with the ruling there has been on the issue. It wasn't put in terms of re-arguing -- it was perhaps not put in terms of second bites of the cherry as clearly as the arguments before you today, sir, but in effect, that was the position. Having agreed one thing, they were trying to have a different ruling for damages.

But the second point was, of course, there was a slightly different standard going on there, because there was regulatory guidance to dominant water suppliers, such as Welsh Water, that they were expected to offer access to essential facilities on reasonable terms. That is paragraph 72. So there was a basis for saying, "Let's go for a mid-range number", but of course it was still a mid-range number, not zero.

So, with respect, we say Albion Water doesn't help my learned friend show that,

effectively, we are ruled out from trying to show what we lawfully could have done.

MR JUSTICE ROTH: Yes.

MR COOK: We say that is perfectly fair as well on the pleading, that they have pleaded the counterfactual is zero and we say no, it has to be about a lawful one. And that is a perfectly proper pleading, we say, given what is essentially, in this type of case, the immaterial difference between could and would. It is a perfectly proper pleading of the fact that that meets that requirement.

I can turn on, then, sir, to abuse of process, which is my learned friend's sort of final argument. The first limb of this was that there was a broad binding finding that any minimum price would be unlawful, which as I said, is just simply repeating the main submission about the effect of the Commission Decision. So abuse adds nothing, if they are right on that.

But the sort of point which doesn't stand or fall with the analysis of the Commission Decision is the argument that Mastercard had the opportunity to put forward a different notification to try to satisfy the Commission in relation to alternative MIFs. It chose not to do so. It chose to try and justify its actual MIFs. And the argument is that Mastercard, having tried to justify its actual MIFs, it is now an abuse of process to look at alternative lawful MIFs.

MR JUSTICE ROTH: I think the argument, as I understood it, is that Mastercard didn't seek to justify the level of its actual MIFs at all. Mastercard sought to justify the principle of having discretion to set whatever MIF. And it didn't focus on levels, although the Commission invited it to do so. That's how I understood the argument.

MR COOK: There are various points in the Commission Decision. What the Commission actually did is quite clear, is to look at the actual MIFs and evaluate whether they met the conditions.

MR JUSTICE ROTH: But what it invited Mastercard to do was to engage with

addressing the level of the MIF, and Mastercard chose not to. That's as I understood the argument. Whether it is right or not, I don't know. But it was certainly the abuse of process argument. It is a different argument from the binding nature of the decision argument.

MR COOK: Yes. It is certainly right to say that one of the points Mastercard tried to argue was that that MIF should not be assessed by reference to a level. As I say, basically that was an argument of principle which failed. That doesn't mean the Commission actually ever addressed alternative MIFs. So of course --

MR JUSTICE ROTH: But it invited Mastercard. It clearly advanced that argument but it invited Mastercard to advance a further argument or additional alternative, however you want to express it, argument, saying: well, the level of the MIF can be justified, and that would have enabled the Commission to engage with Mastercard and perhaps arrive at or suggest a different level of MIF which often happens on exemption notifications where there is a dialogue and discussion and in the end, an exemption is granted for something less than the party notifying had sought. Or the party amends the agreement in order to obtain exemption.

Mastercard abjured that. They said: we don't want to do that. That's the abuse of process argument as we understood it. I think as we all understood it.

MR COOK: That's very helpful, sir. We say in relation to that, sir, yes, it is right to say that Mastercard tried to justify without being able to -- failed to support, largely as a result of not trying sufficiently, failed to justify its actual MIFs, but the question then is, coming to the legal standard for what is an abuse of process, why failing to argue alternative MIFs in a different set of proceedings between different parties, why that would be an abuse of process.

MR JUSTICE ROTH: Yes.

MR COOK: Yes, it is right to say -- basically, we ran a legal argument that said level

was irrelevant. That failed. The question is then, having run that argument, are we prohibited from trying to support alternative MIFs by reference to the standard the Commission laid down in the Decision and was then supported by the European courts? And, indeed, by the Court of Appeal and the Supreme Court subsequently.

Sir, what we say in relation to that is that, essentially, my learned friend hasn't identified any sensible test for suggesting that that is an abuse of process, at all. And cannot properly do so.

Essentially, the cases that she took you to in oral argument were the Supreme Court decision in Sainsbury's, and the Volvo decision. Neither of those, with respect, are essentially of any real relevance whatsoever to this situation. The Supreme Court's rejection of remission is, you know -- basically, there were differences but they were not material differences. They are fundamental differences. What the Supreme Court was dealing with was a situation where there had been a full trial of an issue between the same parties and the question, effectively, is: because the judge approached it on the wrong legal test, should it be remitted for reconsideration of those points?

So that was potentially re-arguing the same point in the same proceedings. That is a huge difference away --

MR JUSTICE ROTH: Yes.

MR COOK: -- from the position we are here, where Mastercard didn't argue a point in different proceedings.

So with respect, we say, firstly, it is entirely unsurprising, perhaps, that the Supreme Court was not attracted to the possibility of there being, essentially, a re-hearing of a point that had already been fully argued before the same parties. That did offend against the principle of finality. But it tells us nothing about what the legal test would be, in a situation where an issue arose in different proceedings between different parties, and (inaudible) an issue did not actually arise -- was not in fact determined

upon.

LORD ERICHT: Can I just ask you about that. You are putting a certain amount of emphasis on our case here being different proceedings between different parties. Can you really say that in a rather unique situation, where this is a follow-on action, so they are not completely separate proceedings?

MR COOK: They are separate proceedings, in the sense that neither Mr Merricks nor any of the claimants actually participated in those proceedings. With most of those cases, the situation is what has been argued between these parties and a lot of the propositions we see from the Supreme Court that talk about the factors here, are things like cause of action estoppel, issue estoppel, which is the fact that once you have argued the point with the same parties, you are precluded by law from being allowed to do it again at all.

That is sort of the core difference which is the parties are not actually in the room to have the argument first time around. So they are different proceedings with different parties.

The fact that consumers get the benefit of the binding Commission's ruling, you still can't say that they were participating in that process, because they just manifestly were not. So we do say that those were absolutely different proceedings. That is a conventional analysis and that's what Volvo, for example, does. There is no suggestion in Volvo that it should be analysed on the basis that the claimants had participated in those proceedings, merely because they were trying to rely upon a settlement agreement.

Sir, you were looking at me over your glasses. I was worried that meant you had a question.

No, okay. I do say they are different parties and, therefore, different proceedings. But more fundamentally, it is a situation where a point had not, in fact, been argued in

those separate proceedings. That's just a world away from Sainsbury's and the Supreme Court, where the issue had been fully argued and decided.

So with respect, there is nothing there that helps. What the analysis looks at is cause of action, issue estoppel, and then it goes on to talk about the Henderson v Henderson point and we see the explanation of the rule in Henderson v Henderson. It may be worth picking that up, bundle B2, tab 21.

MR JUSTICE ROTH: You are doing it in Sainsbury's; yes?

MR COOK: In Sainsbury's. It is bundle B2, tab 21, paragraph 239. The discussion started a little earlier at paragraph 230. It is 239 my learned friend referred to, the need for finality in litigation:

"It is a general principle of justice which finds expression in several ways which tend to be grouped under the portmanteau term res judicata".

That shows the much more narrow focus of what they are doing here is dealing with -- issues between the same parties are actually then binding in the future, under res judicata principles, either cause of action or issue estoppel.

Now it is right to say they also refer to Henderson v Henderson, which is a principle about where a party could have run an argument or brought a claim in earlier proceedings between the same parties, it might be an abuse to do so again. But I would say it is quite significant to see what is said as being the test in Henderson, or the explanation for the basis of Henderson v Henderson. We see that in Barrow v Bankside, which is the quotation at the top of page 1170 in the bundle, between letters C and E:

"The rule in Henderson v Henderson requires the parties, when a matter becomes the subject of litigation between them in the court, to bring that whole case before that court once and for all. The parties cannot return to court to advance arguments, claims or defences which they could have put forward. It is not based on the doctrine of

res judicata in a narrow sense or on a strict doctrine of ...(Reading to the words)... cause of action estoppel, it is a rule of public policy based on the desirability and the general interest as well of the parties themselves. The litigation should not drag on forever, that a defendant should not be oppressed by successive suits, when one would do. That's the abuse at which the rule is directed."

But again, that is description of the nature of the rule. The abuse of the process is harassing somebody by basically bringing two proceedings, when you should have brought one. That's harassing -- oppressing -- a particular defendant.

Again, you know, that makes perfect sense as a principle, when it is an argument that two sets of proceedings -- it is in the same parties on more than one occasion. It is a world away from our case. There is no oppression of the claimant, or the representative persons who participate in the Commission process, at all.

With respect, the Supreme Court helps my learned friend in no way at all. It doesn't give us any form of test for our situation, where there are different parties and an issue was not, in fact, decided. Then the Volvo judgment which is at D2, tab 23. Particularly if we turn it up, my submission to some extent picks up on the point that Mr Justice Roth picked up this morning which is the distinction between, in that case -- that was a situation in which, firstly, the parties were trying to dissent from bits of a Commission decision, so it was something where the Commission had made a decision but they wanted to try to step away from that --

MR JUSTICE ROTH: Sorry, what's the reference?

MR COOK: Volvo, I think, is D2, tab 23.

MR JUSTICE ROTH: It must be D3.

Yes, B2.

MR COOK: Oh --

MR JUSTICE ROTH: That was a different party’s case, of course.

MR COOK: It is --

MR JUSTICE ROTH: That was analogous, in that it was claimants following an adverse Commission decision against the defendants which the claimants were not party to -- the procedural scenario was the same.

MR COOK: So it is a different party's case, but it's a situation where there is, in fact, a ruling on the relevant issues. There are, in fact, factual findings in the settlement agreement.

What we have, essentially, is a particular unique or special set of circumstances which made challenging findings made in that ruling between different parties unusually, exceptionally, an abuse of process. One of those particular factors was the fact that they had omitted those points in order to get the benefit of a settlement but now wanted to challenge them for the course of the proceedings. So in particular, the focus was on the fact -- I think this is picked up in the judgment of the Chancellor, Sir Jeffrey Voss, I think it is 145, that they made admissions in order to secure a 10 per cent reduction in the fine which amounted to some 330 million euros. The benefit of a shorter decision would have resulted from a contested procedure. As a result of that, both the Tribunal and the Court of Appeal thought that that was an abuse of process to basically take the benefit, admit facts and then try and dispute them later.

So that's an example of the rare, exceptional case. But there is simply no equivalent set of factors here. The Chancellor emphasised at paragraph 130 that nothing was being said about what the decision might be if there had been a contested decision. So nothing of that helps, even if you are dealing with recitals in that contested decision. But here, in accordance with our main submissions, there simply is no decision at all on these points. So we say that is an extreme case that doesn't help, other than the fact that it emphasises the test for what is actually a less problematic situation, in the sense of a situation where yes, you are right to say they are different parties but the

analysis is then that they are different parties, even though it is follow-on, but nonetheless, there actually is a specific ruling on the point.

So in those circumstances, we get clarification that the test which is essentially the Bairstow test, is:

"Where the parties ...(Reading to the words)... proceedings were not party to the earlier proceedings, then it will only be an abuse of process ..."

Paragraph 38D in the judgment:

"... then it will only be abuse of process of the court to challenge the factual findings in the conclusions of a judge or jury in the earlier action if it, one, would be manifestly unfair to a party in later proceedings for the same issues to be re-litigated or to permit such re-litigation would bring the administration of justice into disrepute."

And they emphasise that that, essentially, will be “entirely exceptional”. That is paragraph 103 of the Court of Appeal's, which is going back to what was said here by Lord Justice Flaux in Kamoka, or “rare”, per Lord Hobhouse in re Norris. So the case law emphasises that even in a case where a point has actually been decided, it is entirely exceptional and rare and you have to show the standard of being manifestly unfair to the new parties or bringing the administration of justice into disrepute.

So we say that standard can't be right for a case where a point was not decided because the decision -- you are not challenging the earlier decision at all. But in any event, even looking at that standard, my learned friend can't get close to discharging that kind of burden. There is no manifest unfairness to the claimants -- I say "the claimants", I mean the represented persons -- if Mastercard is able to establish that it could have lawfully set alternative MIFs. The reason why there is no manifest unfairness is the end result is they receive the compensation to which they are entitled, which is the compensation for such part of the behaviour as was lawful and not more than that.

With respect, that's not only unfair, it is certainly not manifestly unfair. That is entirely fair. That's what the proper level of compensation is, if you accept my submissions on the correct compensatory approach. So even looking at that standard, it cannot be said that it is manifestly unfair, but we are not re-litigating anyway. It can't be said that this is going to bring the administration of justice into disrepute, on the basis that the issue was not thought out in the earlier proceedings. And previous decisions have accepted, including ASDA before Mr Justice Popplewell, that we can now seek to show an alternative exemptible level.

So we say there is, again, simply no question of -- it is an incredibly high standard of bringing the administration of justice into disrepute. We say we are a million miles away from that kind of situation.

So, with respect, we say the claimants haven't -- or Mr Merricks has not here identified some sensible legal test. Still less has he identified one that he could possibly meet, in circumstances where the point was not decided --

MR JUSTICE ROTH: You say has not identified a legal test. This is the legal test, isn't it? You say you are a million miles away from fulfilling it, but this is the test for abuse of process when it is not the same parties.

MR COOK: Well, the problem is, sir, if --

MR JUSTICE ROTH: That's the test the CAT applied in Volvo. That's the test the Court of Appeal said they were right to apply in Volvo. They had to consider: is this an exceptional case? In Volvo they said it was, for various reasons. Ms Demetriou is saying these facts are different, but on that test, this is also an exceptional case. And you say: quite wrong, it's not.

But that's the test, I think.

MR COOK: The issue, sir, is if that it is the only legal test, then I have no difficulties at all, because the legal test talks about it is an abuse of process to challenge the

factual findings and the conclusions in the earlier action.

If that is the only legal test, then they fail at that first hurdle because we are not challenging any factual findings and conclusions because there were none in relation to alternative MIFs.

So that's why I say they don't have a legal test which applies to a case when you are not challenging earlier factual findings and conclusions. If you say, sir, that is the legal test, then I have no difficulty with that. It is just they, one, fall at the first hurdle of the definition but even if they were within the test, I say they can't come close to saying it was manifestly unfair to the represented persons or bringing the administration of justice into disrepute. So those are essentially the two ways in which I put the point --

MR JUSTICE ROTH: I understand.

MR COOK: -- which is we're just not in the territory of that test, i.e., they fail at the definitional hurdle or they simply can't meet it on the facts of this case. Particularly in relation to disrepute. I go back to the points I made earlier very briefly. The Commission granted Visa an exemption in 2002 for five years. So they'd already said there was an exemptible level. It permitted Mastercard, expressly said Mastercard could set new MIFs at exemptible levels. It then, in 2009, agreed to our new levels, at point 3 and point 2, for credit and debit respectively. So the idea against that background where the Commission has repeatedly accepted there is some alternative exemptible level, the suggestion that -- to allow us to rely upon that analysis and try and evidence it now for such alternative levels, really can't bring the administration of justice into disrepute at all. It is an obvious situation, where a party who is now being sued, should be permitted to show what the lawful alternative is. That is inherent, we say, in the compensatory principle.

It is suggested it would be an affront to most people's idea of justice for Mastercard to have another attempt at obtaining an exemption in these proceedings. But this is

about alternatives, it is not about the actual exemption itself. And that was a quotation from paragraph 35 of their exemptibility skeleton.

It was also suggested that what was a problem effectively discouraged parties from trying to behave lawfully. I mean, Mastercard tried to behave lawfully, it turned out to be wrong about what that was, but that's a part of the dispute process which is that parties take points which they hope to win on and don't ultimately succeed on sometimes.

Essentially, that's it. Just an inherent part of the process. What it means is we end up doing the same process that we could potentially have done at the time as Visa. We end up in no better or worse position than Visa, if we are able to put forward the evidence to do so.

So it simply does not come close to showing the kind of harm to justice, that the test requires the exceptional standard that we say was set out in proceedings and sort of repeated in Volvo.

We say on all of these points, ultimately it is right that Mastercard could have taken a different approach. Of course, if it had taken a different approach, it would have acted lawfully, and we are dealing with the consequences of it not acting lawfully, as a result of the subsequent findings and inherent within that is now looking at what alternative lawful conduct could have been and that is perfectly proper to be dealt with in these proceedings because it was not a necessary issue before the Commission, in order to determine an infringement and it is a necessary part of evaluation damages. So these are the right proceedings to raise the points and we should not be precluded from doing so.

MR JUSTICE ROTH: Yes.

MR COOK: Sir, unless I can assist further.

MR JUSTICE ROTH: Just a moment.

Mr Cook, can I ask you to look at the Mastercard defence which is in A1, tab 12, and at A261, which is paragraph 89:

"Mastercard will seek to ...(Reading to the words)... expert evidence to quantify each of these categories of costs/benefits in relation to a 16 year period. The particulars of the levels will be given and will be provided ..."

Et cetera.

Then the last sentence:

"Mastercard expects expert evidence to show that the lawful alternative, the EEA MIFs, was higher than the MIFs actually set or, alternatively, were close to the level actually set."

Then in the letter from your solicitors, Freshfields, to which we were taken which is in bundle A2 at tab 70, at page A1012 at paragraph 7. It's tab 70, at A1012. In paragraph 7, it said from Mastercard, in the second sentence:

"Mastercard is free to seek to establish that alternative levels of MIFs, whether higher or lower, would have met the criteria for exemption."

And that is said after the first sentence:

"Mastercard does not contend the same level of MIF, considering the decision would have met the criteria for exemptions and this would contradict the decision."

I am just trying to understand that. The MIFs notified, effectively, were about 1.3 per cent and Mastercard therefore accepts that that MIF is unlawful. What actually is being said here? Mastercard can therefore call evidence to say that a MIF of 1.31 per cent would be lawful?

MR COOK: Sir, if we are using that as a figure, there is obviously going to be a point at which a difference is immaterial. I do accept that.

MR JUSTICE ROTH: What actually is going to be said? Is it 1.31, is it 1.301, is it 1.4? What is the scope of the decision that you accept is binding?

MR COOK: The actual MIFs (inaudible words).

MR JUSTICE ROTH: Therefore, on that basis, 1.31 is not binding? (Overspeaking).

MR COOK: There has to be --

MR JUSTICE ROTH: (Inaudible) MIFs at that level. All your submissions, you have been saying -- and I have noted down:

"Mastercard would have been able to seek exemption for a lower MIF."

You said that a number of times. But that's not your pleaded case. Your pleaded case is "or a higher MIF".

MR COOK: Sir, I think I can acknowledge perhaps we were overly theoretical about the fact that the MIFs as found were binding. Other MIFs are not. I mean, if you are concerned that we should not be able to establish a higher MIF, sir, we will take that on the chin.

MR JUSTICE ROTH: Do you accept that it is inherent in the Decision that you can't seek to establish a higher MIF?

MR COOK: At an absolutely conceptual level, probably not, sir. But we are happy to proceed, in practice, on the basis it is going to be a MIF that is materially lower. By materially, I just mean that if the MIF is 1.3, that establishing 1.29 is basically -- sort of almost identical.

MR JUSTICE ROTH: Do you accept that in practice, the effect of the Decision is, is this right, that MIFs higher than notified are not exemptible? Is that right?

MR COOK: Sir, I am prepared to proceed on that basis.

MR JUSTICE ROTH: Yes.

MR COOK: In particular, sir -- analytically, I am not sure that is strictly right, sir, but I am happy to accept we will not try to plead higher MIFs (inaudible).

The reason I say, analytically, it is not the same, sir, is because each materially different MIF will have a different set of negative effects and positive effects. But as

a practical matter, sir, I don't think Mastercard is going to try to prove --

MR JUSTICE ROTH: Is this the case: you are content to proceed on the basis that Mastercard will not seek to establish that higher MIFs would have met the criteria for exemption, or that indeed, the last sentence of the pleaded paragraph 89, Mastercard accepts it needs to show that lawful alternative MIFs were higher than the MIFs actually set. That's what the pleading --

MR COOK: Sir, I am willing to take on the chin that I was the drafter of that sentence, and I may have been a little bit overly theoretical in drafting it.

MR JUSTICE ROTH: But you say that, in theory, Mastercard could do so? But, in practice, you are ready to -- is that right? I don't want to put words in your mouth, I want to understand what Mastercard's position is.

MR COOK: We are happy to accept today that we will not try to establish MIFs higher than the actual ones considered by the Commission Decision.

MR JUSTICE ROTH: And do you consider you are precluded as a matter of law from doing so?

MR COOK: I think, sir, there could well be an argument about being precluded, sir. Which is why we are willing to proceed on the basis that it would be lower MIFs.

MR JUSTICE ROTH: Yes. Can we then delete that paragraph from paragraph 89, the last sentence, if you not going to seek to show that? Can we proceed on the basis --

MR COOK: The only bit is the bit in parenthesis might still stand, sir.

MR JUSTICE ROTH: I thought instead of higher, you can say -- you wanted to keep “close to the level actually set", did you?

MR COOK: Yes.

MR JUSTICE ROTH: "Where close to the level actually set." That is how it should be read.

MR COOK: Exactly.

MR JUSTICE ROTH: Yes. Thank you. I think we will sensibly take our break now and come back just before 3.30.

(3.17 pm)

(A short break)

(3.33 pm)

MR JUSTICE ROTH: Yes, Ms Demetriou.

Reply submissions by MS DEMETRIOU

MS DEMETRIOU: Sir, members of the Tribunal. Mastercard's case is as follows. They say that the Tribunal should construe narrowly the Commission Decision because what Mastercard did was notify its particular MIF set at particular levels and all the Commission prohibited were those specific levels of MIF. So that is the first proposition that it advances.

But, it says -- and this is the second proposition -- Mastercard can now ask the Tribunal -- the Tribunal -- for the purposes of quantum, to work out what is the highest level of MIF that the Commission could have exempted. It doesn't need to show, it says, what it would have done. So whilst it says in the real world, it was restricted to presenting its particular MIF to the Commission, in this counterfactual world, it says: we don't need to show that we would have gone to the Commission to present a particular alternative MIF and that have would been exempted, we can throw open to the Tribunal the question of determining what is the highest MIF that the Commission could, in principle, have exempted.

And there is a fundamental tension between those two propositions and we say they are wrong on both propositions. I am going to take them in turn.

Starting with the scope of the Commission Decision, the Commission did make, in our

respectful submission, a binding finding in respect of the period in question, that Mastercard's operation of a default MIF was unlawful. We see that in article 1 of the Decision.

Can I just ask you, just to save time, to pick up the schedule that Mr Cook gave you, rather than turning back to the decision itself?

Mr Cook went through various recitals of the decision and emphasised the words "by means of the intra-EEA fallback interchange fees."

So the proposition, the argument he's seeking to advance is that the reference to the intra-EEA fallback interchange fees means that the scope of the prohibition is limited to only the levels of MIF in those interchange fees. We say that's wrong. It is wrong, both because that's not how the procedure evolved, it is not how Mastercard argued it, and it is not how the Commission proceeded. But it is also wrong just on the language.

So if we look at Article 1, yes, of course, the Commission is faced with these interchange fees, but you have to look at why they are unlawful. You see that squarely in Article 1. They are unlawful -- Mastercard infringed Article 81 by, in effect, setting a minimum price merchants must pay to their acquiring bank for accepting payment cards by means of these fees. So the reason it committed the infringement is by this mechanism, it has set a minimum price. That was the principle that was under scrutiny. That's what Mastercard was arguing about throughout, it was saying: we are not arguing about the level of MIF, we are arguing about the principle. Can we set a MIF at all, can it be up to our discretion?

MR JUSTICE ROTH: That would be applied to any MIF. Any positive MIF at any level?

MS DEMETRIOU: Yes, exactly. Exactly, that's our point. Any positive MIF at any level.

So they are not saying -- so there is no finding that these MIFs are unlawful because they are too high. That isn't the scope of the finding. The scope of the finding is they are unlawful because they set a minimum price. You have to look at the basis on which Mastercard argued this, and what the Commission said.

The Commission said -- invited Mastercard -- to come and argue about levels of MIF and all the way through, it said no. We saw that very clearly in its response to the SSO.

Now let's look at recital 759, please. That's at the very end of the document. This is the provision providing for the remedy. We say it couldn't be clearer. It says:

"In order to remedy the restriction of competition, Mastercard should cease and desist from determining, in effect, a minimum price merchants must pay for accepting payment cards by way of setting intra-EEA fallback interchange fees."

Not "these interchange fees". What you have to do, Mastercard, is stop setting a minimum price merchants must pay by way of default interchange fees. That's what it is saying.

What did Mr Cook say about that? It is interesting what Mr Cook said about that. He referred to paragraph 13 of the executive summary. He said: well, this provision, this recital can't mean what we say it means because you have paragraph 13 of the executive summary which says nothing is to prevent Mastercard coming back with a different form of MIF and seeking to justify it.

Apart from the forensic point I make, which is that it is not a very promising start to an argument to rely on a paragraph of an executive summary to override an operative part of the decision, apart from that point, it doesn't work as a matter of substance. Because it is perfectly possible to reconcile the remedy and what is said in recital 759 with paragraph 13. The reconciliation is this: you can't now, Mastercard, the Commission says, impose fallback interchange fees. That's the prohibition. "You

have lost, you've lost. But there is not anything to prevent you in the future coming back and trying again with a different fee and convincing us that it is exempt going forward." That's the way of reconciling the two positions.

But what it doesn't mean, what you can't read into recital 759 and the prohibition, is some finding on the part of the Commission that all it's done in respect of the past period is say that the very specific levels of these interchange fees are unlawful. Mastercard kept saying -- Mr Cook kept saying -- all Mastercard is trying to do in these proceedings is strip out the unlawful part of the MIF. That was his repeated submission.

But in a way, you can test that proposition this way: what if, after the decision, Mastercard had turned around to the Commission and said: "Well, thank you very much for the investigation that has been going on since 1992. What we are going to do now is adopt a MIF at 1.1 per cent, because you have not prohibited that because the MIFs that we put to you were 1.2 and 1.3 per cent."

What if Mastercard had done that? It is very clear in my respectful submission, what the Commission would have said. They would have said "No, sorry, we have prohibited your MIF. We have prohibited any part of this MIF. You can't operate another MIF unless you come back to us and show us, on the basis of evidence, that a different MIF is exempt."

That's really the long and short of it.

What happened, in fact, in this case --

MR JUSTICE ROTH: Can they come back and say "We now notify 1.1 going forward, and these are the reasons why we say you should grant exemption for 1.1", and it's the sort of concrete evidence justifying the level that the Commission had suggested they ought to apply. But it won't apply, of course, for the previous period. But they could do that going forward.

MS DEMETRIOU: Sir, precisely so. It is the previous period that is relevant in these proceedings.

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: So what you have is a binding finding that relates not just to MIFs of 1.2 per cent but a binding finding that relates to any default fee because Mastercard, as I said -- I am not going to repeat what I said in opening -- Mastercard exercised a commercial choice as to what it was going to do.

MR JUSTICE ROTH: We have all that.

MS DEMETRIOU: You have all that.

What happened, in fact, in this case is Mastercard did put an end to its interchange fee, in line with what the Commission asked it to do, and there was no interchange fee in 2009, when it introduced one at 0.3 per cent by giving undertakings to the Commission, so in agreement with the Commission.

MR JUSTICE ROTH: In 2009, it was introduced at 0.3?

MS DEMETRIOU: 0.3 per cent for credit cards. It gave undertakings to the Commission. So that was all in agreement with the Commission. But between the date of the decision and that date, it didn't set an interchange fee. Rather, to be more specific, there was a six month period after the decision, where they sought to negotiate with the Commission.

LORD ERICHT: Can you say where we find that in 2009?

MS DEMETRIOU: Yes, of course. The Commission press release is in bundle D3, tab 30, page 162. That shows you the rates as well.

Mr Cook is in difficulty on this point, as evidenced by his final exchange with the Tribunal. Because he's content to delete the part of his pleading which states that in the counterfactual, they could argue for a higher MIF than that found by the Commission. Obviously, that's a very unattractive allegation, and no doubt that's why

he's content to delete it. But taking away the unattractive part of the allegation doesn't really cure the fundamental legal deficiency in the whole of the allegation. He's presumably content to delete that sentence because it really seems quite obvious that a MIF that's higher than that found by the Commission would conflict with the Commission Decision. But actually, the same is true of a MIF lower than the Commission Decision.

So what if Mastercard were six months -- were, in response to the Decision, to come back and say "Well, instead of 0.2, we want one at 0.198?" It is really the point that you, sir, were putting to Mr Cook. Their position has to be, analytically, that anything other than hitting on the nose, the figures in the MIFs that were notified, is okay, and that all the Commission did was prohibit the very specific MIFs. And we say that that simply is not right. It is not a fair reading of the decision and it's not how the whole procedure evolved.

If we are right about that, that's really the very short answer to this whole case. They are bound. Nothing else. You don't need to decide anything else. They are bound, they are precluded from raising any other MIFs in the context of quantum. That's really it. Because they accept that anything that's covered by the Decision, they are bound by and they can't raise under the guise of quantum.

MR JUSTICE ROTH: The other cases are different, save perhaps for six months or whatever it is, of Mr Justice Popplewell's long period.

MS DEMETRIOU: The other case is different.

MR JUSTICE ROTH: (Inaudible) different periods which are not subject to --

MS DEMETRIOU: That's exactly right. I am going to come back to those in a moment.

MR JUSTICE ROTH: (Inaudible).

MS DEMETRIOU: Sir, that's exactly right. One might ask why should we be in a worse position? In those other cases, Mr Justice Phillips, as he then was, his approach was

upheld by the Court of Appeal in saying that: all right, because this is a different period, we do decide exemption. Once you have decided exemption, that's the level you used for quantification. That's what the Court of Appeal held and Mr Justice Phillips held. We say, let's just apply that to the facts of this case. We say it wasn't the court, it was the Commission, because that was the procedure at the time, that decided exemption. It decided it against Mastercard. It held nothing was exempt. Once you have that finding, well, by parity of reasoning, that's the finding that applies in the context of quantum. It is really exactly the same analysis.

It would be wholly wrong, we say, for that to be the position in the claims where there has not been a very lengthy procedure before the Commission. So that should be the position in those claims, but in these claims somehow Mastercard can reopen Pandora's box and argue it all again. And we say that can't be right.

Really what they are doing is by clever legal reasoning -- by no doubt the forensic skill of everybody on the other side -- they are seeking to reopen the liability point. That's what we say about the Commission Decision.

Now in relation to the second stage of Mastercard's argument, the stage where they say that the appropriate course before the Tribunal is to ask the Tribunal to work out what is the highest MIF that they could have charged that could have been exempt, we say that that's wrong too. Here you get into that debate about would versus could. We say it is not an arid debate, it is an important debate.

We say that, indeed, Mastercard needs to show in the counterfactual what it would have done. In other words, it would have gone to the Commission with a different MIF -- this is on the hypothesis that it is not bound -- with a different MIF at a particular level and the Commission would have exempted it. Mastercard say: no, the Tribunal needs to work out for us what is the highest MIF that could have been exempt. We say a number of things in response to that.

We say, firstly, that's not a plausible or realistic counterfactual. Mastercard is trying to have it both ways. They say, first of all, that our contention that it would have adopted a zero MIF is not realistic. They criticise our counterfactual as being unrealistic. They say: oh no, we wouldn't have done that, of course we wouldn't have done that.

Then they throw it open to -- in a sense they say: it is now for the Tribunal to work out what is the highest MIF that would have been exempt. We say that's not a realistic counterfactual because there is no way that Mastercard could have gone to the Commission back in 1992 or any stage up to 2007, and said "We are washing our hands of this, we want you to tell us what is the highest MIF that we could have charged." That is simply not realistic. That is the first point they make.

The second point is that their approach is flatly inconsistent with Albion Water which considered this very point. Albion Water said the decision was both wrong in principle and would present the Tribunal with an impossible task.

Can we briefly, please, turn that up? That is at B1, tab 14, page 366.

Mr Cook sought to distinguish Albion Water by saying that was all a case about the burden being on the claimant. He says: we accept now, because we have been told by the Supreme Court, that the burden is on the claimant. So the difficulty doesn't arise.

But that really is to undersell, as it were, the reasoning of the Tribunal in Albion Water. Its reasoning was not tied to the question of burden of proof. In fact, what we see is that it wasn't the critical point in the case at all, because Dwr Cymru realised that this was a problem and so it made a pragmatic concession which was that it said: well, here's a level that we are going to show is reasonable. And so it took away that legal difficulty, by making the concession.

What the Tribunal held was that despite the concession -- in fact they said: well, the concession actually demonstrates the difficulty with the point. The fact you have to

make the concession helps demonstrate why this is all so impossible.

I have shown you paragraph 69 before. If we just look at it again, we see that, really, it is very much on point in this case. What the Tribunal is saying is that the competition authority will rarely determine the precise borderline between lawful and unlawful conduct. It will say conduct is unlawful, as it did here.

If then it is right that the defendant, in the follow-on damages claim can say: well, Tribunal, you have to show us what's the highest lawful thing we could have done, the Tribunal says: that's both wrong in principle and it would impose an extremely difficult, impracticable task on the Tribunal. You see that at the end:

"The fact that the Tribunal's task would be impossible in the absence of these concessions, indicates to us that the test proposed cannot be the right one."

So the Tribunal, with respect, was really dealing with the same point as is in issue here and the question of burden of proof really wasn't of any practical relevance in that case, because of the concessions made by Dwr Cymru.

Mr Cook had another point. He said that, of course, what the Tribunal -- the Tribunal wasn't saying in Albion Water that there should be no price and we are saying there should be no MIF. So he sought to distinguish it on that basis too.

Of course, that is right as a matter of fact. That's because the Tribunal had found that it was legitimate to charge some price in that case. So it wasn't a case where there should be that zero price, it just found that the price that was charged was excessive and abusive. So if the Tribunal had found that the entire charge was excessive, then obviously the solution in that case would have been that in the counterfactual, no charge could be made.

In fact, just for your note, you see that earlier in the judgment. I did take you to the parts that set out the unfair pricing judgment, and they are around paragraphs 45 to 47, just for your note. Of course, in this case, what the Commission has done is said

that the whole of the MIF is unlawful. So that explains that difference. There is no inconsistency.

Mastercard really have to persuade the Tribunal that Albion Water is wrong and we say it has not made any attempt to do that. It has only sought to distinguish it, and it is plainly right.

The third point we make in relation to this stage of the analysis is that the idea that the test is "could have" in the present context, is just wrong as a matter of plain logic. Because Mastercard gets there as follows: they say, well, in the counterfactual, you need to remove the unlawful conduct. Now let's say I am going to assume against myself at the moment that they are right to say -- I am wrong to say that the Decision found that the entirety of the MIF was unlawful.

Let's say that it is possible to gaze into a crystal ball and say that the unlawful conduct was anything above 0.5 per cent. Well, it is meaningless to ask the question: what should Mastercard have done? It should have set the MIF at below 0.5 per cent. That doesn't tell you what it would have done. It could have done anything from zero MIF to 0.5 per cent. There is no "should" which comes into it.

The Tribunal would have to look at what Mastercard would have done. And those are indeed the words picked up by the Court of Appeal, "could and would have done", as the Tribunal put to Mr Cook during the course of his submissions.

That's why we say the two stages are wrong, of the argument. I now want to deal briefly with ASDA. Mr Cook relied on Mr Justice Popplewell's judgment in ASDA. There was a question, first of all, about whether or not the point had been argued.

Can I just pick that up, please? That's at D1, tab 7. Can we go to page 319? In fact, if we start at 318, please. There is a heading on 318, "Burden of proof". In fact, what you see in this judgment, just standing back, is that although the question of burden of proof was argued, there is nothing in the judgment that indicates there was any

argument about the point we are arguing about now.

Indeed, when it went up on appeal, it all went up on the question of burden of proof. So the prior question was not ventilated. You can see, perhaps, why that was, if you turn over the page to 319. So paragraph 296:

"Mr Lowenstein argued that once it was established that the MIF as set was unlawful, the claimants had established their loss at the full amount of the MIF element of the MSCs which they had paid, and that if Mastercard sought to challenge that fact by asserting that it could and would have charged a lower MIF, it was for Mastercard to prove such assertion as the party putting it forward."

So it does appear that the way that the claimants ran it was to say: well our starting point -- the measure of loss is the full amount of the MIF and if you are going to say that it is anything less, that you could lawfully have had a lower exemptible MIF, then it is for you to prove it." So it does seem from that, that they did not grapple with the argument before the Tribunal today.

That does seems to be borne out, as I say, by the fact that when it went on appeal, there was no discussion of this prior point, but it focused on burden of proof.

What we see, of course, when we go to the Court of Appeal judgment -- if we can go back to that, please, so at B2, tab 18, page 997. You have seen this a number of times now. If you will just bear with me one final time.

Paragraph 315, there is a disagreement between Mr Justice Popplewell and Mr Justice Phillips, as they then were, on the proper approach to all of this.

I will just wait, sir, until you have it up. It is B2, tab 18, 997.

MR JUSTICE ROTH: Can you give me a paragraph?

MS DEMETRIOU: Yes, 315.

MR JUSTICE ROTH: Thank you.

MS DEMETRIOU: You see at 315 what Mr Justice Phillips held. He disagreed with

the approach of Popplewell J on this issue. He said that having reached a 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 the assessment of damages. He rejected the proposition that a percentage discount should be applied to the outcome based on a theoretical difference on the burden of proof.

The Court of Appeal agrees with that:

"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 ..."

Pausing there, we say the finding here is that Mastercard's MIF was in whole unlawful. That's the only sensible understanding of the Commission's decision:

"... and then to assess damages on the unlawful amount or level as so determined."

So applying that to this case, as I say, we say that the Commission found that the whole of Mastercard's MIF was unlawful. They appealed it. They were not successful. Then, says the Court of Appeal, you assess damages on the unlawful amount or level as so determined.

As I said before, the answer should not be different depending on whether it is the Court or the Commission, followed the Commission upheld on appeal, that has made that binding determination as to the level of exemption, if any. That's really a fundamental point on ASDA.

Finally, on abuse of process, we say that the submissions made by Mr Cook about the legal test really don't come to anything. Because the legal test, we can see from Volvo that the parties don't need to be the same. That is clearly established.

We know from the rule in Henderson v Henderson that the abuse of process principle can be invoked not only in respect of matters that have been determined, but in respect of matters that could and should have been determined. So that is clear. That is all

set out in the Supreme Court's judgment.

So we say that this is such a case for all the reasons I gave in opening which I won't repeat, in terms of Mastercard's opportunity to make these arguments and its deliberate decision not to. Of course the categories of abuse are open and flexible, so to say that this isn't a case which, as a matter of principle, could be an abuse case if the threshold were met we say just doesn't get off the ground.

Indeed there is case law. I am not sure it is in the bundle but Bradford & Bingley, for example, in the Court of Appeal is a case which said that the rule in Henderson v Henderson can apply even where there are not identical parties.

But of course, in this case in a sense the identity of parties point is a bit of a red herring because we have a position where there was no counterparty to the Commission proceedings. The proceedings are so intimately linked by the legislation, which provides that the first set of proceedings can form the basis for a follow-on action by consumers. They are intimately linked.

So it is not a case, as in private litigation, where you may have a completely unconnected party seeking to argue something and then facing an argument that they shouldn't because it has been determined in earlier proceedings to which they are not involved. The very purpose of the follow-on regime is that consumers should be able to rely on the decision. That's its very purpose.

That's an important matter to bear in mind when determining whether the test is met. Because these are points, for all the reasons we gave, which Mastercard could and should have brought forward in the lengthy Commission proceedings. These are follow-on claims. The decision finds that the MIFs that were prohibited caused harm to consumers. Consumers should then be entitled to rely on the decision to recover their loss because liability has been done, it has been determined.

Effectively, that principle would be undermined if Mastercard were right because it

would allow them through the back door, under the guise of quantum, to reopen the finding of liability, and say: no, you can't get these damages because we could have argued that the Commission could have exempted something much higher, and Tribunal we want you to find out what that is. We say that would indeed bring justice into disrepute and cut across what this collective actions regime is there to ensure and protect.

As I said in opening, it would put Mastercard, bizarrely, in a better position than Visa, who was constructive before the Commission: who pivoted, who saw the writing on the wall, and who took a business decision to cooperate with the Commission and to achieve a lawful position. It can't be right -- it cannot be right -- that when Mastercard had every opportunity to do the right thing, it could roll the dice, decide not to do the right thing, and then come back and tell these consumers: it doesn't matter that we took that wrong choice, because now what we are doing is we are going to have our experts come and arrive at a menu of different options and we are going to ask the Tribunal to put itself back in the shoes of the Commission throughout the relevant 16-year period, and decide whether or not those different options would been exempt by the Commission, and if so, which is the highest one, and we are going to limit your damages accordingly.

We say that cannot be right. It would put the administration of justice into disrepute and it would be extremely prejudicial to the consumer members of the class.

Members of the Tribunal, those are my submissions in reply unless you have any specific questions.

MR JUSTICE ROTH: Thank you very much, Ms Demetriou.

Discussion re timetabling

MR JUSTICE ROTH: As we have just a little time, it may be sensible just to look at

the first stage in the pleadings timetable. I have it before me. There was option for setting out alternatives.

MS TOLANEY: We had a letter today --

MR JUSTICE ROTH: Today, yes. You say amended reply 18 February, that is agreed. You wish to serve a request for further information.

MS TOLANEY: Which we have suggested we do within seven days so that is pretty prompt --

MR JUSTICE ROTH: Yes.

MS TOLANEY: -- and we have asked for a response within 14 days. And then we propose, again pretty promptly, to serve our rejoinder 21 days thereafter.

MR JUSTICE ROTH: Yes. It is always difficult unless one works through the whole timetable, which we are not going to do, that the trial of this is in January 2024 --

MS TOLANEY: Yes.

MR JUSTICE ROTH: -- just on those two points, namely the further information and response to it, point one, and then the rejoinder, point 2: Ms Wakefield, is there anything you want to say about those dates?

MS WAKEFIELD: There is not. We are content with that, thank you.

MR JUSTICE ROTH: We will incorporate that in the order. It will tell you all where we get to in the next three weeks.

MS TOLANEY: Thank you, sir.

MS WAKEFIELD: Sir, in respect of the Scottish forum point which we discussed at the end of last week --

MR JUSTICE ROTH: Yes.

MS WAKEFIELD: Sorry, I'm taking us back in time.

Is it the position that the Tribunal would be assisted by any further submissions or a short note or nothing for the time being?

MR JUSTICE ROTH: Thank you for reminding us of that. Our feeling is we don't need any further submissions now. If we should at any point, then we will let the parties know. We certainly don't want you to go to the trouble and expense of making submissions if they are not necessary.

Our present feeling is that we don't think Scottish law will enter into any substantive way into the analysis of rule 31 and 119 of the CAT Rules. We may refer to the Scottish position, but I don't think it will be, as it were, at the core of the reasoning. So it, therefore, would not be appropriate to have a different forum and split up what is a single issue in a very confusing way, I think.

But that's our present thinking. Obviously we have not written the decision yet and sometimes our thinking evolves. So that's where we are. So thank you for the offer, but we don't think we need it.

Thank you all, counsel -- and that includes counsel who helped to draft skeletons whom we have not heard from -- and the teams behind you. You have left us with a lot of interesting arguments to think about. You will be notified when the decision is being handed down.

(4.08 pm)

(The case concluded. Decision reserved)