IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1266/7/7/16, 1517/11/7/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Tuesday 23rd May 2023

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

BETWEEN:
Merchant Interchange Fee Umbrella Proceedings

And

Claimants

Walter Hugh Merricks CBE

v

Defendants

Mastercard Incorporated and Others

A P P E A R AN C E S

Adrian Beltrami KC, Mehdi Baiou, David R Wingfield and Alexandra Littlewood (Instructed by Humphries Kerstetter LLP, and Scott+Scott (UK) LLP)
Philip Moser KC, Philip Woolfe and Oscar Schonfeld (Instructed by Stephenson Harwood LLP)
Derek Spitz and Greg Adey (Instructed by Mishcon de Reya) on behalf of Ocado
James Segan KC and George Molyneaux (Instructed by Hausfeld & Co. LLP) on behalf of Primark
Laurence Rabinowitz KC, Daniel Piccinin KC, Jason Pobjoy and Isabel Buchanan (Instructed by Linklaters LLP and Milbank LLP) on behalf of Visa
Sonia Tolaney KC, Mathew Cook KC and Ben Lewy (Instructed by Jones Day) on behalf of Mastercard
Marie Demetriou KC and Anneliese Blackwood (Instructed by Willkie Farr & Gallagher (UK) LLP) on behalf of Walter Hugh Merricks

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Lower Ground 20 Furnival Street London EC4A 1JS
Tel No: 020 7404 1400 Fax No: 020 7404 1424

Tuesday, 23 May 2023

(10.42 a.m.)

MR BELTRAMI: I appear today with Humphries Kerstetter, and Scott and Scott with a large cast of characters which I will not read out otherwise I will use up my allotted time already. Just to indicate, there has been a measure of agreement and a small measure of disagreement, I think, about timetable, obviously subject to the Tribunal, but if I can indicate that the broad sense is that the Merchant Claimants, if I can call them that, intend, subject to the Tribunal, to take up most of today and then the schemes most of tomorrow, and on Thursday there will be the rest of the schemes and Merricks and then the replies. So, that is the broad sense. I think we will see where we go on that, but subject to the Tribunal if that is acceptable.

MR JUSTICE MARCUS SMITH: Mr Beltrami, that is acceptable but I am going to throw a significant health warning into that. We, unsurprisingly, have been discussing matters amongst ourselves and we have reached, I think, a common consciousness that the issues are extremely tricky. We have not reached a common consciousness as to how to resolve that trickiness but we are likely to be giving indications as to what evidence we would find more helpful than other evidence in the course of this hearing. We do not want to do so now because that would be, I think, to anticipate what is being said by your clients and the schemes but I think the parties should expect that in the course of this hearing we are going to give a fairly firm steer as to what sort of evidence we are likely to find more helpful at trial rather than less. We will do that in order to encourage submissions. We appreciate though that saying something like that in mid-stream is likely to cause a desire on the part of those who have spoken to speak again. We will be sensitive to that but we do not feel in a position to give that sort of steer as we normally would at the outset and enable everyone, as it were, to address on equal

terms the points that we have run but everyone should bear in mind that we are actively thinking about the questions and the parties helpfully addressed us on in their written submissions.

MR BELTRAMI: That is very helpful, thank you. I think it is common ground that these issues are tricky. Now, in that event, if I can lead off in any event and see where we go, as you know, a three-day hearing pursuant to the order of the Tribunal to discuss evidential issues in relation to pass-on and specifically by reference to the Tribunal's letter of 5 December where you set out three possible solutions or routes to trial: the sampling process, the expert process and the party-led approach, and as you have seen from the skeleton arguments, the parties have broadly coalesced on that approach, obviously with disagreements as to how one achieves that but in terms of the overall sense of process, that is where the parties are heading subject to or as a result of your guidance.

The principal areas of disagreement as we see it are four, although I think there are sub-issues as well but four in any event that I want to address if I may. First, there are what I call substantive or methodological objections principally by Visa and Merricks to the merchant's proposals specifically about evidence. There are substantial methodological objections to that as a matter of principle, is the first point. The second point is there are procedural objections to that as well. Third, there are objections from the merchants and this is, I think a smaller point; I hope a smaller point – in relation to Visa's proposals about Article 101.3. It fits into the argument, but it is a separate point, I think. And there are also some issues we need to discuss and I hope resolve in relation to acquirer pass-on which will we will look at the end.

Now, there is, I am afraid, an anterior disagreement, which is as one might have expected, as to what can sensibly or appropriately be done at this hearing and clearly things have to be done but it is a question of which things have to be done. We submit,

and clearly one has to have an idea – we welcome the Tribunal's indication of helpful evidence but in a sense much of the benefit of the exercise has already been achieved in that the parties are set on the experts. They are the process that the Tribunal has suggested. The main questions for the Tribunal now as we see them are essentially procedural to seek to ensure efficiency in the process and fairness in the process that has been indicated but that should not involve, we submit, early findings on my first category, mainly methodological disputes as to how one goes about the exercise, which are essentially disputes between the experts. That is as we see it, and always subject to the Tribunal knowing so much more but not what was envisaged as we see it in the Meta judgment, which the Tribunal referred to in their recent letter, where the Tribunal observed, obviously in a different context, because it was a collective action, but you will accept that the principle has similarities – but even in the context of the Meta judgment, the Tribunal indicated it had no interest in the strength of the methodology that was being proposed provided it could be done efficiently and by way of process.

So, there is a difference between the procedural process and the issues and the underlying methodological disputes between the parties and we say that the methodological disputes, unless the matters are clear, as I have indicated, are not something that the Tribunal should willingly tread on at the moment. That would only be appropriate, we submit, if satisfied on what would essentially be a strike-out test, namely that the evidence, for example, that the Tribunal – I am talking about the methodological dispute, not the procedural dispute – that the evidence which the merchants seek to adduce for their expert-led process was incapable of assisting the Tribunal with the answer.

So, that is why I say it is a strike-out test. The Tribunal should not now be deciding in advance the answer to the question or even necessarily the basis of the answer to the

question but unless, we submit, it was so obviously an incorrect process that the Tribunal should at this stage say, for example, that the evidence cannot be allowed because it is not going to help.

It is clear, we submit, from previous decisions, which I am going to have to show you – although I know you will be familiar with them, including the Trucks judgment that these are difficult issues and you are now presented with expert reports at a preliminary level as to the way in which the experts seek to arrive at the answer to the question. Everyone knows where the answer ought to be but the experts have a dispute as to how to arrive at that answer.

MR JUSTICE ROTH: Can you just help me? At what point do you say the methodological dispute, as you describe it, should be resolved?

MR BELTRAMI: At the point of trial when the Tribunal has the expert evidence in its full glory set out by reference to the material relied upon, the Tribunal will be in a position to determine the best way to arrive at the answer.

MR JUSTICE ROTH: We hear of experts using quite different methodologies – that is what you envisage at trial?

MR BELTRAMI: Well, you say quite different methodologies. In a sense they are not that different in fact but they are methodologies based on different evidential bases, certainly.

MR JUSTICE ROTH: I think your simulation method is certainly very different from what the other experts are suggesting.

MR BELTRAMI: Well, we might look at some of that, but, yes, in principle and process on that point, yes. At the point of trial, the Tribunal will have a better grip of the evidential basis of the evidence being put forward by the experts. What I would urge the Tribunal now to have caution about is deciding now the best way of arriving at the answer.

MR JUSTICE MARCUS SMITH: Yes. I do not think this is a question of, as it were, strike out or the best way of arriving at the answer. However, we are going to have to set a course in the course of these three days that enables the Tribunal to produce a deliverable in the form of a judgment that is defensible on its own terms and sets out according to its terms the process by which an outcome has been reached. Now, that, I think, implies certain factors or characteristics in the expert evidence that we are I think keen to articulate in the course of these three days. Let us take, for example, a regression analysis or a simulation model which you have just been adverting to. We would be unkeen to have a form of expert methodology at trial which was presented to us in effect on a take it or leave it basis. In other words, we would not want to have before us a simulation that the Tribunal could not of its own ability manipulate so as to triangulate between the views of experts. Similarly, we would not want, for example, expert evidence on a sector-based approach to be untranslatable from one expert to another; in other words, we are extremely unkeen for the experts to identify certain sectors which are, they say, sufficiently homogenous so as to draw common conclusions as regards what is going on in those sectors and there may be certain factors which inform the path on outcome in relation to those sectors. We would want to have translatability between the experts as to what those factors were. We do not have a problem in them disagreeing as to their weight or their relevance, but we would want, if one expert is talking about a particular factor, for that language to be common across the range of experts of that discipline so that we can take, and it is no secret that my approach is essentially to try and triangulate between experts. What I do not want to have happen in this trial, Trial 2, is for the Tribunal to be unable to manipulate of its own volition the material that it has and that is why the idea that we might be presented with, for instance, a regression in a particular sector, or a simulation of a particular sector which has just landed on us; we have there the model and you say,

well, if you want the Tribunal can ask us to change various parameters in it. Well, that I do not think will work for us. I think we need something where the expert evidence is in some way intermediated such that two lawyers and an economist can unpack it, manipulate it, explain it without having to simply say, "Well, Professor X told us that the outcome of the simulation was this. We've seen this in relation and it looks wonderful but we cannot actually say any more about it".

MR BELTRAMI: I do not anticipate that would be the outcome. In answer to your questions, we do not envisage that that would be what would happen at trial. Each of the parties has not only adopted on the Tribunal's proposal an expert process but specifically with a view to arriving at benchmarks by – you can call them sectors, you can call them categories, but that is the aim everyone is working towards and therefore it could be envisaged that at trial the Tribunal will be presented with a series of reports seeking to arrive at a similar form of answer. It may be that one seeks to do it by way of a simulation exercise or set out and one seeks to do it by a pass-on exercise, so be it, but both seeking to achieve the same answer. Now, in taking the steps to get there, it has been envisaged certainly by the merchants that there will be a process be the experts of working out questionnaires or a sample exercise or whatever to find the evidence, the answer to what the evidence is, but there will be a common process that is envisaged to obtain evidence so there will be some form of measure of uniformity as to what material underlies the experts' reports. Now, there seems to be a dispute at the moment as to their sectors. I think these are the 12, and Merricks have maybe 10, merchants have rather more, and that may be something that needs to be worked out as well, but it may be that there has to be a common set of sectors or categories or whatever you call it, but it is not envisaged and it would be quite wrong to envisage ships passing in the night when it comes to trial. It is envisaged that once essentially we get the green light if we do from the Tribunal as to how to go ahead, it is envisaged

that the experts will have to work together to ensure that the Tribunal can coordinate. That does not detract from what I am suggesting as to the caution that the Tribunal should be engaging in in shutting out or not shutting out issues. It just means that there will have to be a more constructive process in the future to make sure that what you are presented with at the trial works. But that is not, as I say, methodological at the moment. That is not, as I see it, between a simulation model versus a pass-on rate model. Those are not far from variations of something similar. The real dispute is the material underlying those exercises. Is there going to be claimant-based material which informs that or is it simply going to be market material which informs it. That seems to be the biggest dispute between the parties as opposed to that precise economic exercise.

MR JUSTICE MARCUS SMITH: There are one or two questions that arise out of that. First of all you indicated that there is not complete agreement as to the sectors that would be considered and each party grouping has a different articulation of sectors. Now, the only reason, I assume, that one is taking a sector approach is because there is an acceptable degree of homogeneity across the undertakings in the sector such that certain things on the whole hold good for every participant in that particular sector. Now, if there is disagreement about sectors, surely we need to understand the factors that are informing the experts as to why they are saying a particular sector should be approached in a particular way and that implies an articulation of the relevant factors so that each expert is speaking, as it were, a common language one against the other. So, that is the first important question of standardisation almost of the expert evidence that we are talking about. Secondly, you mention material. Now, the one thing that an expert-led approach is not contemplating is a vast disclosure exercise. That, I think, is not being presented by anyone as an approach but if you are relying on claimant material, then of course the schemes must be entitled to test that and so inbuilt into

your proposal, which is, as I say, survey evidence based upon claimant material, you are going to have to have a solution that enables Mastercard and Visa and whoever else, Merricks, to challenge that evidence. It cannot simply be presented as, "Well, here's a survey which my economist has used to arrive at pass-on rates". You can interrogate the economist as to the pass-on rate but actually the survey, that is a survey. You cannot examine that. That would not be from our standpoint a particularly acceptable process.

MR BELTRAMI: Yes. On the first point, you are obviously right that the benefit – the premise of a sector-based approach is that there is homogeneity within the sector because otherwise the benchmark is meaningless – so, it must be envisaged, because this is the exercise that the parties are engaged in, that that will be something that can be presented to the Tribunal. At the moment there is a disagreement or at least there has been no agreement as to that sector – not that there should not be a sector approach, but as to the composition of the sectors, and that is to some extent based, I think, on the experts' starting point about the underlying premise of pass-on. Is it uniform across a broad sector of entertainment, for example, or does one have to bury into a bit more detail, into subcategories for example, where different forms of industry or subindustries have different processes and therefore the assumption is not the same? Now, that is an issue that remains live between the experts and it may be that that is an issue that is not resolved as a matter of agreement. I do not know if that can be possible, but then again you could get to a position where you get to the trial and there is a list of sectors and a list of subsectors and there is disagreement as to whether a subsector fits in a sector or does not but there it is. The Tribunal will at least have the materials before it without absolute agreement as to what the sectors are as to whether or not one sectors work (inaudible).

But it is envisaged that you will have the material to determine whether it will be 10

sectors, 12 sectors or more sectors, because the underlying information will be there but I think it responds to a slightly deeper question about the assumption as to homogeneity across all industries or subindustries.

On the second point, obviously I need to address you on the procedural aspects of this and as we say in our skeleton argument, the reason we put forward the proposal of starting with the claimant-specific evidence and working up to the experts and having the experts subjected to cross-examination is because we thought that was a way of seeking to address the different pressures that are on the parties and the Tribunal and trying to resolve the Meta case within a reasonable period of time. So, something has to give at some point. Now, it does not mean everything has to give but it does mean that you throw the baby out with the bathwater. But something has to give to enable the process to work efficiently. We thought at the time that the underlying survey material that we are envisaging would be likely to be objective; it would be likely to be supported by documents because we are talking about pricing tactics and policies and that area. So, as we saw it, it appeared to us less likely to be the sort of contentious evidence that requires days and days of cross-examination, potentially likely to be the sort of material that could be examined through the experts or relying upon them but if necessary we will have to find time for some measure of cross-examination of that underlying material. We still do not envisage it will be extensive because we are not envisaging necessarily controversial evidence in relation to underlying surveys and we are not envisaging evidence distant from the documents. It is difficult to know at the moment exactly how it works out and we cannot be too specific about it but of course we do not want to shut any party out from exercising legitimate challenging rights to material which ought properly to be challenged but one has to find some measure of compromise across the piece to ensure that the evidence is before the Tribunal, the evidence is fairly before the

Tribunal and the matter can be determined within the seven weeks or however long the Tribunal has given us to do it. That is how we came up with that proposal, but if it requires writing off a week of the trial to deal with the potential for cross-examination then it appears practically it would fit within the trial timetable to do it.

MR JUSTICE MARCUS SMITH: Well, the problem is likely to be anterior to the trial timetable. If you are, for instance, basing your survey evidence on selective materials taken from the claimants anyone opposing that articulation of the world would be saying, "Well, we need to see the complete universe of materials to extract from it the material that assists our case." So, is not there going to be not merely a problem of timetable of the trial but a whole series of disclosure questions that will emerge in advance?

MR BELTRAMI: There may be disclosure questions. The intending sequencing is that the survey process is undertaken; there will be some form of sampling exercise, I suppose, to identify the recipients, but in any event the survey process will be undertaken, and there will be a disclosure exercise of supporting material. There will be a disclosure exercise of some sort so as to open up the possibility of an added disclosure exercise if the original disclosure exercise is not sufficient. That is just part of the process of litigation, but it does not mean again it cannot be done within the timetable that we have. It is just a matter of ensuring that there are some procedural steps to enable that to be done efficiently.

MR JUSTICE MARCUS SMITH: How about if after the event suppose one has a truly expert-led approach which essentially focuses on generic materials and seeks to reach a pass-on conclusion in relation to sectors which are according to pre-articulated factors that are common to the experts resulting in a sector rate which is inevitably going to be something of a broad brush. One could then after the event say, "Well, you are in this sector. This is the outcome. If you want to show that you are different,

you can beat the pass-on rates that have been achieved, well by all means come to the Tribunal after judgment has been handed down, present your argument that your pass-on rate is different, see if you can beat whatever the court has ordered for the sector. If you can, well fantastic. If you can't, well then the costs consequences follow".

MR BELTRAMI: I think there are two difficulties with that. The first is that the claimant's experts are very clear that you cannot focus from the back, which is, as we said in our skeleton argument, assuming there is a pass-on effectively within the sectors and the question is working out how much within the sector, because you have to start first of all by analysing the actual pricing processes themselves and then you have to factor in on the claimant's expert evidence that material into their economic approach that they wish to undertake. So, fundamentally the claimant's experts say it is the wrong starting point to work out on a purely expert-led process what the answer is because we have not got the building blocks to get into that – I need to develop that in due course. The second difficulty, which is the more fundamental, we submit, is what we are trying to achieve, or what everyone is trying to achieve is a single trial which wraps up as much as possible. If the exercise is that we seek to make it a claimant-specific – you know what I am talking about when I say "claimant" – at least grounded on the claimant-specific facts, then the benchmarks that will be established will be claimant-specific benchmarks through the categories or sectors or whatever and at that point there is a greater prospect, we submit, of the aim of the exercise being that the finding is prima facie binding on the widest category of persons. The trouble of course is that a decision on a benchmark is not in and of itself a finding on anyone. It is a decision on a benchmark. It is not a binding decision on any individual claimant and this is the difference between the exercise that has been undertaken here and other sorts of cases that one has.

This is a purely expert-led process given by the expert assumptions about pass-on in one or two sectors, in and of itself there is no obvious binding effect or no necessarily related to anything because any claimant can turn up and say, “Well, this is a theoretic exercise based on benchmarks. My situation is different”. Now, there is, I think, a little dispute about the possibility of an exceptions process and it is envisaged that there ought to be some form of exceptions process, but the exceptions process cannot be the new process. The new process … is aiding a purely expert-led exercise which is unrelated to the claimant. You are simply establishing an economic answer. You are giving each individual claimant then a chance to go back for another go. So, it may be a short trial which turns into a very long process and one can understand any individual claimant who believes that his claimant situation is different. He is that much more divorced from a purely expert-led economic answer. If, however, this exercise can be combined, so that it is an expert-led process in reality but is grounded in claimant specific material, there is much more prospect at that stage that the claimants can be legitimately valued and legitimately coaxed – not coaxed to be bound but legitimately bound by the outcome, because they are invested in it. It is not just a market-wide answer; it is a claimant category answer and therefore you might be in a situation, you are likely to be in a situation of a true exceptions process and as to the outliers within a category, may come back and say, “I want to have a go at the exception”, because that is nothing to do with me. The materials that you have relied upon are different from my materials for these reasons”. If it purely expert-led there is no restraint at all. There is nothing to bind anyone from that economic answer and the danger is you will end up with 2000 cases afterwards each wanting an exception and their cost constraints and all that, no one wants to be in that situation and it is another reason we submit why the Tribunal ought to work through this problem to try to ensure that it is binding in the exercise because that will produce the outcome that everybody

seems to want, which is prima facie – I think the words used in your letter are "prima facie binding on all parties" otherwise it is prima facie non-binding on anyone and that is a real difficulty.

So, I am not saying any more than this is a difficult question but there are real challenges to finding a shortcut to this, I am afraid.

MR JUSTICE MARCUS SMITH: Yes, that much we knew.

MR BELTRAMI: Yes. Can I move on a little to where I am going to try to go to build this up, which was to start with – and I will not take a long time; we are all familiar with it – with where we had got to in the CAT on these pass-on questions because there is as we see it more than one fundamental difficulty which has been articulated in part but has not of yet finally been resolved asking the question as to what to look at because that will then inform, we submit, the Tribunal's decision about what materials we adduce, once you work out what the question is that we are asking for. As we all know, and it has been debated at length, certainly before my involvement, the question of causation that arises on the pass-on issue and discussing the cases of legal and factual causation, which is fine. They are not separate as such because the question of factual causation has a legal component as to what is needed for a factual causation and the question of legal causation has a factual component, namely are the facts sufficient to satisfy legal causation. They are a useful tool in considering the questions but not separate categories, and there is a danger sometimes in calling them that that one falls into the trap of thinking they are separate but they are not.

The factual question which is likely to be the immediate question for present purposes has two, we say, foundational issues subsumed in what you called in your previous judgment the evidential difficulty, and the evidential difficulty as we see it, has two parts to it. First, what evidence has the Tribunal been looking at to find the answer, but secondly, at what level of specificity must the case be proofed simply on the factual

causation in order to show that a given overcharge was in fact passed on.

So, what are we looking at? At what level of specificity are you even asking the question and if one looks at these previous cases with those two questions in mind, obviously there are different sorts of cases. There were individual claimant cases but the points of principle are obviously the same. I will show you what I want to show you on that and start with the Sainsbury's decision which is at authorities bundle 2, tab 4, page 284.

Now, in terms of the first question, what they were looking at to find the answer or to seek to find the answer on the pass-on – we can pick it up at page 312 under the heading, "Witnesses of Fact" and there is a list of the Sainsbury's witnesses including witnesses on pricing processes and budgeting. Also, if you go to paragraph 30, there were experts including at paragraph 35 a Mastercard expert on supermarket pricing. Now, what we see from the judgment if you then go on to page 490 is that they then went into – this is when we get into the passing-on question – a detailed assessment of the facts relating to the process by which Sainsbury's priced. So, the question of how do we work out whether the interchange fees were passed on involved an assessment in that case, as you see from the heading, so 438 about setting the budget policy and 451, pricing and other matters of analysis. So, what they were looking at, or what they appear to have found on assistance in asking the questions was – and this is the starting point. I know that this is not our case, but in principle, was what were the pricing processes within Sainsbury's.

Now, the next question they say, "At what level of specificity are they trying to reach the answer?" If you go to 455 under the heading, "Analysis" and there is the now famous analysis in 455 of the different possibilities, at 459 the Tribunal accepted the theory, the economic theory of pass-on. "Prima facie we anticipate Sainsbury's would have sought to pass on the cost to customers. In the range of products, the multitude",

etc “is impossible to say what part of the price of any given product was attributable to the UK MIF” and when we get on to 464 we are getting into the answer, we submit, a to level of specificity. The conclusion at this stage: “… therefore conclude that exactly how Sainsbury’s dealt with the costs is unknowable but that (viewing matters at a high level of abstraction) Sainsbury’s would have passed on to consumers what it could, made whatever cost savings it could and to the extent that its draft budget returned a profit that was … different to market expectations … adjusted its spending so as to return the expected profit. This approach we find is exactly what one would expect for complex business, so there are different possibilities. At 465, “Because the way in which the costs constituting the UK MIF are dealt with is unknowable, it is our conclusion that it is impossible to say what proportion of this cost was passed on in the form of high prices or paid out or paid by reducing expenditure and so service levels.” So, they were looking at a level of specificity when you can actually identify it, essentially, whether you can identify a jump from A to B. That was, essentially it is the same thing several times. If you go on to 478, at the conclusion. At 469, having dealt with the economic theory. 469, “If that is the full extent of Mastercard’s submission the theory accepted, Sainsbury’s didn’t seriously seek to challenge the analysis of Mastercard by its submission of seeking to assert it was possible to link a given cost incurred by Sainsbury’s to a specific price charged by Sainsbury’s for a product sold by it, submission we have to reject is unarguable. Obviously, the manner in which Sainsbury’s carried on its business at such a nexus just does not exist.” So, again, it is the identification of a nexus that the CAT, the Tribunal considered was going to be the determining factor. At 478, the conclusion, page 506, 478, the conclusion and subparagraph 4. “Because we have concluded that the way in which the costs constituting the MIF were dealt with by Sainsbury’s ...”, so it is rooted in the factual analysis “... is unknowable in that it is impossible to say what proportion of the

overcharge was passed on ...", et cetera. The mitigation case should fail for this reason alone. So, the way the CAT approached that case was by looking at the price setting processes within Sainsbury's and saying, if you can't identify the link from A to B, for that reason alone, you fail. So, the level of specificity which that Tribunal considered was necessary to answer the question, was a high-level of specificity which was factually based on the underlying pricing. Now, that decision wasn't clearly appealed to the Supreme Court, therefore there is nothing the Supreme Court said specifically about that analysis or the way it approached that question. But what it did indicate, and again a passage you are very familiar with, but if you can turn to authorities bundle 3, tab 9, page 721, which is the Supreme Court in Sainsbury's, and move on to 778. At paragraph 216 there has been much talked about, I know about the legal burden and the factual burden, but in line with the way I submit one properly reads the Tribunal's decision, at 216, the second sentence, "Once the defendants have raised the issue of mitigation in the form of pass-on, there is a heavy evidential burden on the merchants to provide evidence as to how they have dealt with the recovery of their costs in their business." So, what the Supreme Court is envisaging is precisely what the CAT said they were looking for, which is evidence as to how the costs are dealt with.

MR JUSTICE MARCUS SMITH: Well, let's go back to Sainsbury's in the CAT where we had a great deal of evidence, as you have shown us, on how Sainsbury's priced and dealt with its costs. No one is suggesting that one goes through each claimant with that level of granularity, but it may be that one can group all supermarkets together, and instead of having Mr Coop give evidence as to how Sainsbury's did it, we can have an industry expert explaining how supermarkets do it. Now, if one goes down that route, why does one need granular evidence from the bottom up from the individual claimants, why can't one deal with an industry expert's take on how the

industry does it, on which of course that expert would be cross-examined?

MR BELTRAMI: No reason at all. Let me just put this in context. The case I am trying to meet is there isn't any factual evidence at all because it can all be done on theory. That's the case I am trying to meet and that is why I am showing you what has been done before, which plainly involved looking at, in an individual case, pricing evidence that we have proposed, or our experts have proposed, an exercise that involves claimant-specific surveys, but also in some industries, industry-specific evidence, exactly what you said there. We gave the two examples, the automotive industry and the local authority industry, and that's been objected to too. But we put that forward, again we hope as a pragmatic solution, to the sort of difficulty you have just identified. If there is a homogenous industry or a homogenous category and there is a witness who can explain how that category homogenously operates, then we'd be happy to have that as the evidence for that industry and we can talk about the cross-examination issues that flow from that. That's why I say we put in those two reports because that informs, it's a matter of obvious, we submit, reality informs the sort of questions that CAT will have to be asking which is, was there in fact a pass-on in this industry, given the way they dealt with their pricing? So, I wouldn't disagree with that and it may well be better and we said in our skeleton, an industry expert on the face of it is likely to be more representative of the category than an individual completely bottom up exercise. But, again, we are not dogmatic about that either. What we want to ensure is that there is some link to the claimants in the exercise that is being done, quite how it comes through may be worked out in the wash. But, in principle, individual or industry experts, that's not a point of difference, that's a point of detail I think.

JUDGE TIDSWELL: Well, is there any difference in that analysis between the facts necessary to determine legal causation and factual causation? In other words, do you

accept that you can get to a conclusion on legal causation from, effectively, generic evidence?

MR BELTRAMI: No, you can't do that either. No, that is, as I said earlier, the legal and factual are both legal/factual and factual/legal. For legal -- for the factual there is a legal question as to what are you looking at and how specific is the answer. For the legal causation question, which is really about collateral benefits is that, as they used to say, res inter alios acta, or something that is actually recoverable or not. That is a factual component because it has to know how the causation actually happened. So, factually is there a link between A and B, was this cost bound into the higher price? Legally causation, is that a relevant link and the question is it a relevant link may require some factual analysis as well. If we are still on the Supreme Court in the famous passage in the Supreme Court in Sainsbury's where they say legal causation is a no-brainer, in the context of a business which is accounting for its costs through its budgeting exercise, so it is saying that in that context if you can establish factual causation to the relevant standard, there is no extra point about legal causation because there is a link that gives you a sufficient legal connection. Now, there may be different facts that don't give you a link for a sufficient legal connection, there may be a different mechanism that produces the factual causation, there may be a different answer to legal causation.

MR JUSTICE ROTH: Yes. So when I use the (inaudible) -- I am not saying that you need individual evidence to determine legal causation for an individual claimant, you are saying you are accepting it can be dealt with at an industry evidence level for those who have the common characteristics --

MR BELTRAMI: Yes.

MR JUSTICE ROTH: -- in that sector, so, for example --

MR BELTRAMI: We entirely accept, given the position we are in that we have to do

this at some level of generic approach, that we can't turn up with three thousand claimants, (inaudible). So, what we do submit, though, is that for both, if you want to divide it up, legal causation certainly and possibly -- sorry, factual causation definitely, legal causation possibly, depending on what the facts are, one will need claimant-related evidence. Now, if that claimant-related evidence is industry evidence, it can be done that way, that may be more convenient, there may be some industries where it is not possible to do it that way and there may be more need for claimant bottom up exercise. But certainly I am not saying it has to be done claimant by claimant, it has to be done, if I can say, category by category, if that can be resolved, and quite working out the makeup of the category is something that can be determined as the exercise undertaken.

MR JUSTICE MARCUS SMITH: Well that's, I think, where I have the difficulty because we have got an unspoken assumption that simply because they're all, let us say, supermarkets, they're homogenous. Now, that may well be the case, but how can a court be satisfied that that is the case? Don't we need, before we go to our sectors, to work out what are the relevant factors in order to determine pass-on, in other words, list them out so that we know what it is we are looking to the facts to establish. And then, having identified the relevant factors and ensured that they are commonly understood across all of the protagonists giving evidence before us in due course, you then say, well, having identified these factors, we now look at them, we see what evidence there is, we need to work out what evidence needs to be produced to answer the question, one then achieves an outcome where one says, yes, the following persons comprise a sector which is sufficiently homogenous so that we can treat them as generic, rather than treat them as individual. But one can't simply ex-ante say, well, they're all in this particular, they're all selling this particular product, therefore they all operate in the same way, it seems to me that doesn't inevitably follow?

MR BELTRAMI: No, if I may say so, that is something to (inaudible). You make a very central point there and it is one of our objections to the schemes approach which is to take 10 categories and say, there you are, that will do for all of them and it is imprecise and it is not a robust way of approaching it. Now, what our expert has sought to do is be more granular about it and has ended up with more categories. Now, what you postulated is essentially the possibility of a starting position to agree a set of homogenous groups and, in principle, if there were the time within the process to do that, that could well make a lot of sense. Now, there are differences, I think, between the experts as to what would constitute the relevant criteria for homogeneity, so in a sense we are arguing about an argument at that point.

MR JUSTICE MARCUS SMITH: Yes.

MR BELTRAMI: But, in principle, if that were an anterior step to work out the categorisation steps, then that might make the end result easier to manage if there was a set of homogenous categories. But, I think it has been envisaged so far that that wouldn't be a court mandated process, maybe it ought to be, but it sort of kicks the can down the road a bit, because I think the experts are disagreeing quite fundamentally as to what goes into the homogeneity. The scheme, certainly Visa's approach appears to be, you can look at it at a purely industry basis, on a very broad industry basis approach, so travel or whatever and everyone within the travel gets the same treatment, the merchants wish do it more, in a more detailed way, but also specifically by reference to the way, the factual way particular industries deal with pricing, which the Visa are saying that is not particularly relevant. So, there are quite significant differences as to how one goes about that exercise, even though I can't quite see, the exercise itself has a lot of value attached to it, but it may be difficult to get to an answer on that question. All I am at the moment trying to impress upon you, if I may, is that at the very least however one structures the process it ought, and

whether it is individual claimant or industry claimant related, one has to factor into that exercise evidence as to how claimants or claimant groups deal with their pricing. That's, I think that's one of the core disputes for today whether that is something, whether that is a relevant aspect of the inquiry or whether it is --

MR JUSTICE ROTH: How they deal with their pricing or what exactly do you mean by that?

MR BELTRAMI: Well, how they price, how they price and how they budget. There is evidence that we saw from Sainsbury's as to how they price their products. Now, I know there is an argument last time about whether it is subject of decisions and that's not the way, but this isn't a subject to question, how you actually, how they go about pricing their products. So, the reason I took you to the Sainsbury's decision in the CAT is sometimes I will read their judgment, they are looking at the need to identify, through the pricing process, a link between the original charge and the price. Therefore, you can't get into that unless you have some evidence, at whatever level, of that process. Now, can I just show you also where they have got to on Trucks.

MR JUSTICE MARCUS SMITH: So, what you are saying is if you had very clear evidence that a particular sector absolutely priced on the marginal cost, plus 10% --

MR BELTRAMI: Yes.

MR JUSTICE MARCUS SMITH: -- you'd be fine because the MIF is included in the marginal cost of the sale, your pricing is that plus 10%, it is obviously passed on?

MR BELTRAMI: Yes.

MR JUSTICE MARCUS SMITH: In that example?

MR BELTRAMI: On a question of pricing, one can imagine a situation where like (inaudible) price on in fact some of the double price exercise, where you can see on the evidence the link that the CAT was looking for between the interchange fee and the price and the process could show that link. Now, the merchants' evidence, belief

is that the converse will also be able to be shown that there may be some industries or some claimant groups from which one can look at the pricing alone and say that shows there was no link between A and B and therefore, so as to satisfy the test. And it may be there is a lot in between. But the lot in between, we submit, will still be relevant for the economic exercise because the economic exercise has also to be informed as one of the relevant factors as to how the claimant group did actually do their pricing. So it is never irrelevant, it is potentially determinative in favour, potentially determinative against and other schemes, or Visa would say it is never going to be determinative against, but that is a matter for argument, but in any event it is always going to be relevant in the overall assessment if only the categorisation assessment, but also the economic assessment of that pass-on. Given the nature of the test which I took you to in the -- can I show you the way that it has been dealt with in Trucks because in some ways the Trucks judgments, the two judgments, crystallise some of the debates we are having today. So, authorities bundle 4, tab 15, 1078 is the Trucks judgment. Again, individual or two claimants there, so it is not in our situation but the approach is going to be, it can't be radically different. The same questions, what they looked at, if you to page 1121, the witness who is identified from paragraph 97 onwards, a number of witnesses from the claimants again, you can see the first one on "pricing strategy" and witness on costing, that's for Royal Mail and 98, similarly BT, a number of the factual witnesses on the pricing exercise. So, again, the same sort of factual material was considered and, as we will see, was expressly considered in the judgment. If one asks my second question, what's the level of specificity? What is the CAT trying to find or looking at to determine the factual causation issue? If you go on to page 1159, 186, the Tribunal identified the previous judgment from the CAT. So, 488(4) is what I took you to earlier, the need for the identifiable link between A and B. So, they're not changing the test, they are applying the test. At 189, paragraph 189,

confusion between the economic concept of pass-on and the legal test for causation in relation to mitigation of loss is what they identify as a relevant distinction. If you go on to 1171 at 216, "... a legal and proximate causal connection", "there must be a direct causative link between the overcharge and in a category (iii) case, the reduction ...", well it's a category (iii) case, "... is insufficient as was admitted by Mr Beard at the hearing, mainly to allege the claimants were seeking to recover their costs. We did not think that the Supreme Court were suggesting otherwise in saying that legal causation is straightforward. It was still necessary for the defendant to prove a sufficient causal connection on the facts to satisfy the legal test for causation." At 223, DAF must prove there was a direct and proximate causative link between the overcharge and any increase in prices. That means there must be something more than reliance on the usual planning and budgetary process." It is back to the question about legal causation in which the overcharge was input and at some point prices increased. The substance to the point made in CAT Sainsbury's, the identification of -- well, that's the identification of persons which the Court of Appeal didn't entirely agree with. At 228 is a summary of the legal test for causation, when it says the legal test for causation what I think they mean is the legal test for factual causation at this point in relation to pass-on for mitigation defence. We respectfully conclude that must prove a direct and proximate causative link ... any increase in prices for the claimants. It is not enough to say that all costs, including increasing costs, are fed into the claimants or their regulated business, it must be something more specific ...", this is the point about specificity that both Tribunals are looking for.

JUDGE TIDSWELL: (Inaudible) ... He is talking about the legal test for factual causation, is that right? It's in the section that's about the test for legal causation. He is talking about legal causation here, isn't he?

MR BELTRAMI: Well, when he talks about what must be proved, a direct and

proximate causative link, it seems to me he is proving causation, both legal and factual at that stage. When he says the legal test, as I understand it, he is saying the legal test for causation which includes those two elements.

JUDGE TIDSWELL: Well, the legal test for factual causation is different from the legal test for legal causation.

MR BELTRAMI: Yes.

JUDGE TIDSWELL: And isn't that the legal test for legal causation as set out in 228? The legal test for factual causation is much simpler, isn't it?

MR BELTRAMI: Well, it is not simpler because what he is talking about, I submit what he is talking about is the level of specificity that he must be able to establish in order to show factual causation. Is it any old link or is it specific, a specific link that is identifiable? That is what we submit this judgment indicates and we will see the dissent in a different context. You have to identify the factual link at a sufficient level of specificity.

JUDGE TIDSWELL: So would you say that if you satisfy the test of factual causation, you automatically satisfy the test for legal causation?

MR BELTRAMI: No, legal causation is a different question about collateral benefits so you can identify a specific link from A to B, but it could nevertheless be a legally irrelevant link if legal causation isn't always satisfied. It may well be in the context of these charges, legal causation in most cases is easy to satisfy but it is theoretically a different question because it is about collateral benefits. The first question is, can you establish factual causation at all at the right level of specificity and what this Tribunal is indicating, as we submit the earlier Tribunal indicated, is that you must know a level of, a specifically identifiable connection. That doesn't mean you have to be able to see it necessarily but you must be able to show how you get from A to B, it is what, in our submission, they seem to be saying, they are saying. If you go to the application

of this at 1285, having set out the test, and the test was unanimous, page 1285. We then get into the actual question, the majority judgment. If we can pick it up at 552 to see the way the claimants were seeking to resist the pass-on defence and at the bottom of 552, the claimants' main point is that their prices were not fine-tuned enough to be able to conclude that they were actually higher as a result of the overcharge. That, in response to your question, that is a factual causation question, there is no factual link between the prices and the overcharge. Following on from the approach from the previous Tribunal, you have got to be able to identify it. Now, 564, the Tribunal then dealt with the general point about costs recovery. Looking at the notion of costs recovery in a bit more detail seemed to underpin much of the defendant's analysis, particularly in relation to the unregulated periods. All businesses seek to recover their costs and make a profit but in itself that tells you nothing about whether a price increase has been caused by an increasing cost against it. It is a factual question they are looking at and not the legal question or the legal causation question. 572, you then get into the detail. As we have said in relation to the four factors identified in 550, none of them are present, the absence of knowledge, together with the tiny size of the overcharge means there was obviously no specific decision, not requirement, but no specific decision by the claimants to increase prices in response to the increase in costs. Nor was there any direct association between Truck costs and the products sold by the claimants, even though an element is properly attributable to each product. Even if it can be shown that there was an increase in prices because of an increase in costs it will be impossible to identify which prices in relation to which specific products actually increase because of the overcharge. So, one can see, we submit, specificity and identification is part of the majorities test, as it was in the previous decision. At 573, "In the circumstances we do not think that DAF can satisfy the legal test for causation which requires the overcharge to be a direct and proximate

cause of the increase in specific prices." He is not talking about collateral benefits, he is talking about basic causation. "Even if, as a matter of forensic accountancy, they are able to show the miniscule overcharge can be traced through a series of internal steps, judgments and regulatory intervention resulting in any higher price setting, the absence of the four factors means that the overcharge is too removed from the downstream prices. While the four factors are not themselves decisive or necessary we think that in a situation where none are present, the evidence of factual causation needs to be that much stronger so the requisite proximity can be established." What they then went on to do was to examine the facts, to say, well, that's the background, are the facts, the pricing facts sufficient to overcome this specificity requirement? What they were then asking, and this is in a sense the core of what they were looking for, if you go to 584, we will now look at whether the overcharge can indeed be tracked through to increases in prices, that is the A to B point I have mentioned earlier. Can you find the overcharge being tracked through from A to B, and to cut a long story short, having gone through all the pricing evidence, there is about 100 paragraphs of evidence, we say it can't. There is too much, there is too much noise between the overcharge and the price. They could have gone in all sorts of different directions, and if the answer is it could have gone in all sorts of different directions, you can't identify the increase. So it is a factually-based analysis, very much requiring a specific connection between the overcharge and the cost. Now, just to finish that off, if you go to 688 is the conclusion.

JUDGE TIDSWELL: Yes.

MR BELTRAMI: 688. The last sentence, "We have been clear that as a matter of law we do not consider there to be a necessary proximate and direct causative link between the overcharge and the downstream prices so as to satisfy the legal test for causation." Now, that was the majority. The minority, Mr Ridyard could be different,

and we say it is a philosophical approach, but a different approach to the question. He didn't consider the test required that level of specificity and identification. He was driven more, we submit, by economic approach which starts in the presumption, well pass-on is a likely thing to have happened in a profit maximising business and the real question is, is it plausible it happened here? So, he is asking a different sort of question and that's why he comes to a different answer by way of dissent. So, you can see at 1326, at 698 he starts with the economics of pass-on. Then about 10 lines down he says, "The considerable economic literature that exists in this area does not regard pass-on as a phenomenon that has focused on cost of profit recovery, but rather an understanding how a change in one cost facing a firm, such as an increase in the input costs is likely to cause the firm to adjust its profit maximising price in selling products that depend on the affected outcome." Then five lines from the bottom, "The economics of pass-on explore the factors that affect this trade-off to derive predictions about the most likely rate of pass-on under different market and competitive conditions. Many outcomes are possible, but a large proportion of predicted outcomes involve some degree of downstream pass-on because in all but extreme cases the firm's optimal response is, adverse cost influence is to restore at least some of its lost profit margins." So, it's not just a difference of interpretation, it is a fundamentally different approach to asking the question. The majority say, you have got to see can you show a jump from A to B, Mr Ridyard is saying well, economics tells you are already at B, you don't need to show the jump because economics will get you there and the real question is, is it plausible how you get there? So, it is a philosophical question and in some sense it is the difference between the experts that we have got today, in some sense.

MR JUSTICE MARCUS SMITH: Do you say that the choice is determined by what higher courts have said the approach is? In other words, are we able to triangulate or

select between the majority's approach and Mr Ridyard's approach, or is Mr Ridyard's approach, for legal reasons, correctly a minority and the majority is articulating the evidential question rightly?

MR BELTRAMI: I don't -- I understand that that is now going to the Court of Appeal, so to that extent, watch this space. I don't understand that quite fundamental difference of approach to have been resolved in another higher court.

MR JUSTICE MARCUS SMITH: No.

MR BELTRAMI: So it is still there as to how one asks the question, never mind how one finds the answer.

MR JUSTICE MARCUS SMITH: Okay.

MR BELTRAMI: Now what I can, however, say is that well, it is a live debate which I'd invite this Tribunal not to determine on this application, certainly the one, but in any event so far as the numbers are concerned, the exercise that we wish to undertake accords more closely with the exercise which the Sainsbury's Tribunal undertook and which the majority in Trucks undertook which involves, at least to some extent, not to the same extent because there is a different sort of exercise, but to some extent analysis which has a founding in pricing evidence.

MR JUSTICE MARCUS SMITH: Mr Beltrami, don't we actually have to determine it because we are trying to work out the shape of the trial at the end of 2024 and the parties are entitled to understand with a high degree of clarity what it is they must adduce? If one can fairly and properly get to an outcome involving generic economic evidence buttressed by some factual evidence, rather than starting, as you say, from the bottom up and looking to the facts and then allowing the facts to inform the experts, that, as you say, is a fairly fundamental, philosophical difference. Isn't that something that we need to resolve so that everyone knows where they are going? Indeed, I remind myself that one of the reasons we timed this hearing for May before was to

enable this question to be resolved on appeal in time for Trial 2 at the end of 2024.

MR BELTRAMI: Well, this Tribunal would only need to worry about resolving that question at this hearing if it took the view that the trial could not progress without such a resolution or could not progress efficiently without such a resolution.

MR JUSTICE MARCUS SMITH: Well, I think that's the word, yes.

MR BELTRAMI: Now, that's why one goes back to what I said earlier, they identify the first two issues for the CAT. What I said was the methodological issue which is really, should the expert evidence be informed by some measure of underlying factual evidence about pricing, whether individually or on an industry-based process? Now, at that level as a matter of principle we submit the CAT should be so informed, the fact that both previous decisions, I shall stop, I understand you wish to take a break at some point and I shall --

MR JUSTICE MARCUS SMITH: At some point when it is convenient for you.

MR BELTRAMI: We submit the CAT should be so informed as a matter of principle because, first of all, that is the approach that has been taken in the two previous decisions we have looked at by the unanimous and by the majority. It is also, we would submit, I hesitate to say it is a matter of common sense, but if one is asking the question about, ultimately about pricing whether it is something that follows through as a matter of pricing, it is difficult to say it is theoretically irrelevant to see how a particular claimant or a particular industry priced. So, we would submit that, as a matter of principle, there ought not to be a decision of principle for the CAT today because as a matter of principle some measure of claimant-specific evidence ought to be fed into the analysis.

MR JUSTICE MARCUS SMITH: Well, of course you are right, Mr Beltrami, and if this was a limited number of claimants versus the scheme defendants case, then it may be we wouldn't be having this debate. But the problem is, it is not, we have got rather

a large number of claimants and a class action before us today. The geometry of trial, looking simply at the procedural and evidential questions, is in this case all together different to what happened in Sainsbury's in the CAT and what happened in Trucks 1 in the CAT because the factual arena was so much smaller.

MR BELTRAMI: Of course, but the question is the same question. One is still asking the same question and the role of the Tribunal, we submit, ought to be how one asks the same question fairly to the parties within the procedural straitjacket that we have. So, there may be procedural questions to consider as to how one fits it into the pot, but the anterior question is, should you be worrying about claimant-specific evidence at all? We submit the answer ought to be yes -- now, there may be a second question as to how much or how it is going to be done or how it is going to fit into the process, but should one say now, no, no, no, I am going to deal with this as a matter of theory and study, or I am going to factor into the process the availability of actual evidence about the pricing? Now, on that point we submit the answer ought to be, yes, and you don't have to resolve that philosophical debate at this stage, the answer is yes and we may have a further discussion as to how it can be done efficiently and fairly, but I am having to deal with their submission against me from Visa that we shouldn't do it at all, we just cut it all out and have a sort of blind exercise that is unrelated to the claimants and we would submit that's not the way both those Tribunals approached the question and the question hasn't changed, the fact that we get a different format of action. It is a different format of action so one has to modify the procedure, one doesn't modify the substance underlying of goods and that. Now, is that a point -- or do you want me to --

MR JUSTICE ROTH: (?) No, that's very helpful, Mr Beltrami. So, it is midday. We will resume at ten past.

MR BELTRAMI: Thank you.

(11.58)

(A short adjournment)

(12.21)

MR JUSTICE MARCUS SMITH: Mr Beltrami.

MR BELTRAMI: Could I just move on to show you - I know you have read - but just to summarise the evidence that we are proposing and how it fits into our scheme? As you know, we are envisaging a process which culminates in two sets of testifying experts. So, a pricing expert and an economic expert, and there is a point about duplication, but we are talking about points of principle at the moment. So, the pricing expert that we are proposing responds to the summary report from Dr Bloomfield, which is in bundle 1, tab 6, page 111, and this builds upon, I hope, the material I showed you earlier on the question, "What are we looking at?" And what the pricing expert proposes, in terms of what he is going to, or what he wishes to see, that is at page 113, where he sets out in the second half of the page and over the page at 114, the evidence which he requires in relation to pricing, and he talks about a pricing questionnaire filled out by claimants, and the detail of that is something that can no doubt be worked through, the content is what he describes, and the aim is to highlight what we would describe as objective evidence of the actual pricing history policy, strategies, etc. of these parties. It is not - as I say, I think there was some debate at a previous hearing as to what any individual claimant thought he was doing at any individual time, but that has gone off the table and you have dealt with that, so that is not being sought: as they appeared to look at it in Sainsbury's: how did they actually go about it? If you are going to ask the question, "Can you get from A to B in an identifiable way?", you need to start thinking, "Well, how did they go about going from A to B?" So, his evidence, that is what he wants to obtain, and whether it is done on a claimant basis or an industry basis, again that is not a, that is a detail point rather than a point of substance. That is what he wants to obtain. What he wants to do with

it are essentially - well, three things. First, collate it, put it together so that it is manageable for the Tribunal. Secondly, synthesise it within his expertise of pricing. So, for example, on page 112 he explains different types of pricing. So, the context of the expert will explain to the Tribunal the different mechanisms, or a range of mechanisms to price goods or services, and he will then synthesise the underlying factual material within that structure so that the Tribunal has an understanding of the mechanisms within the context. And, third, to express a view whether, in the circumstances and by reference to whatever categories they are, the price setting processes reveal identifiable links between the interchange fees and the - and, unashamedly, I keep coming back to those tests that I sought to show you: "Is it identifiable? Is there a link?" And that is what he wishes to do. Now, I quite understand - we had a little discussion before - the outcome may be obvious, it may be not obviously, and it may be something in between. But we do not know what the answer is going to be until he does it, but in principle, we submit, it is a relevant question for the Tribunal by reference to the facts as synthesised by this expert. So, that is, if you like, the first layer of expert evidence that we wish to adduce. This expert, it has been envisaged, will be testifying. As we envisaged it, he could then be cross-examined on the materials he relied upon and that is the way that we sought to square that circle, but if that circle cannot be squared and we need the underlying people to be cross-examined, we will have to work that out, but that is not a point of principle, that is a point, we would submit, of detail.

MR JUSTICE ROTH: That is a very detailed series of questions even if applied in one year. Of course, these are claims over quite a long claims period, so things change. So, this is a huge amount of information that he is going to gather from each claimant.

MR BELTRAMI: Yes, because the premise is that it is going to be relevant information because the actual pricing processes will be material to the Tribunal. His statement

gives the information that he would like to see, and all experts, I suppose, live in an ideal world. So, ideally, to find his best answer, he would like all of this information. If the answer to that is, “Well, you’ve got to cut it down and you can only have half of it”, then, so be it. Again, that is not a point of principle, that is a point of detail. What I want to keep coming back to is that we have got to have, the Tribunal is going to have to have at some level, we submit - we submit that the Tribunal will be informed by some form of pricing evidence at some level. Now, whether it is at this level of detail or a different level of detail, that is something that can be worked out. As I said earlier, what we have envisaged is that, after this hearing, the experts will coordinate to produce, ideally agreed, non-ideally, not fully agreed but semi-agreed, questionnaires for evidence. So, if it is going to be cut down, it may be cut down, and that is a matter of discussion, but the principle is that he wishes to engage in an exercise within his expertise, built on underlying factual material, to examine pricing processes in order to seek to answer the question which, we submit, the Tribunal asked in both those cases.

MR TIDSWELL: On the process that the economic experts are suggesting, does it stand as a separate reference point that we use as a check or does it feed into the work that they are doing?

MR BELTRAMI: What we envisage is this, and the second limb is the expert evidence which I will come on to in a minute, so what we envisage is, and what one imagines will happen at trial, is that the pricing expert, I suppose, would go first, logically would probably go first and give his evidence about the factual basis of the pricing. Now, that may lead to submissions from the merchants, for example, that for some categories the answer can be seen from that evidence alone. So, it is so clear on the basis of the pricing strategies that the court can conclude the link is non-identifiable. That may or may not be the case but that would be the intended first submission. I

anticipate no doubt, particularly from Visa, that they would say, “No, no, no, you can never tell ‘never’ because economics can always say ‘sometimes’“ - and I think Visa’s case is that the pricing evidence may enable you to say, “Tick Yes, but will never enable you to say, “Tick No.” Because that is an argument that will be had. In any event, we would submit that a first - I say first, at least at this level of presentation, we would wish to submit that on certain categories of claimants, the Tribunal can conclude, on the basis of the pricing strategies alone, that there is no identifiable link, applying that test, if that is the right test. That feeds into the second part of the analysis which is the economic evidence because, obviously, we are aware that Visa’s case, for example, is that pricing will never give you the full answer. So be it. Visa’s case is that economics will give you the answer and, even if it does not look as if you are doing it - you do not have to worry about if you think you are doing it - even if you do not look as if you are doing it, you still might be doing it in any event. So, the answer from Visa will be that pricing will never give you the negative answer, and that is an argument to be had. But that is where we wish to factor in this evidence, not only as evidence of pricing but as evidence which can then be used by the economist, because the economist approach, which, as you saw from our structure, is to build upon market evidence plus pricing evidence in order to develop the model he wishes to develop. So, the pricing expert will serve two purposes on our structure; he will be a testifying expert in his own right to support the submission which we envisage being able to make, that for some categories of claimants the answer is derived from the pricing evidence alone - so, that is his first role, and his second role will be to feed into the expert economist evidence to assist the economist evidence to undertake his simulation model. So, we are trying to deal with it at the different levels at which the argument has been put.

MR JUSTICE ROTH: I understand why you might need it for a simulation model, but

effectively this is a means of getting evidence from every single claimant through the intermediary of a pricing expert, is it not? Each claimant is going to give this information, because we are not going to hear them individually, which is what they would do if they gave evidence, but it is going to go to the expert, not to the Tribunal, who will then collate it and sort of present it in some combined form?

MR BELTRAMI: It is not envisaged, to be clear, and I accept not every detail has been worked out, we are not at that stage yet, but it is not envisaged that this is a way of compressing all claimants' evidence. I think it seems to be accepted on all sides that, if we are going to go down a route such as this, or a similar route, it will have to be by reference to some form of representative sample. So, it will be limited within the categories to some form of sampling process, so it will not be as extensive as it might otherwise have been.

MR JUSTICE MARCUS SMITH: We have seen, indeed, at page 113 he refers to a small sample of claimants.

MR BELTRAMI: Yes. Going back to a question we asked earlier - that is in a sense why we also proposed, or we gave evidence of the proposal, of the industry experts, and we have given evidence of Mr Whitehorn in the automotive industry and Mr Waite in the local authorities sector, where they give evidence, in a broad sense at the moment, of practices within their industry, which may well be homogenous, and in the local authority, one imagines, is, and the automotive may well be, too. So, we have put that forward as a way to cut through some of the practical difficulties of having to go into individual claimants and, indeed, sample claimants.

MR JUSTICE ROTH: I thought, but I may have misread it, I thought he was saying this was the questionnaire that goes to pretty much all claimants and it might be supplemented by data gathering from a smaller sample. That is what he seems to say.

MR BELTRAMI: You may be right. I had understood, and maybe I misread it myself ...

MR JUSTICE ROTH: Because this is the questionnaire. I can see why you might want to have that evidence, but ...

MR BELTRAMI: To be clear, we do not envisage - whether he was speaking in his best world - we do not envisage that it would go to all claimants, not least because in certain industries we wish to have the industry experts cut across that problem anyway.

MR JUSTICE MARCUS SMITH: And does the industry expert, like Mr Bloomfield's evidence, have the double-barrelled value of standing alone but also feeding into the simulation model, is that how it works?

MR BELTRAMI: We have not envisaged in our proposal that the industry expert would be cross-examined. What we envisaged was, the industry expert would feed into the pricing expert, who would be cross-examined. Now, one of the objections to that is, "Well, we want to cross-examine the industry expert" and, if we have got to accommodate that, we will have to find time to accommodate that. So, in terms of where at least our proposal sat, that is where he would fit into the exercise, but, yes, his evidence would feed into both experts.

MR JUSTICE MARCUS SMITH: And I am sure it is my fault, but a simulation model would look like what exactly?

MR BELTRAMI: What he has sought to explain - if we just go on to Mr Falcon and Dr Frankel - what he has sought to explain in his report, which is at tab 3, at paragraph 69, page 71, and that is where he talks about his model. Just before I answer your question, 75, just following up what we have just discussed, is the information which he says needs to be fitted into his model, which is there set out, and includes information by reference to, in (v), how interchange fees were treated, and (vii), how

the pricing models were undertaken. What he envisages doing, as described, to me, in any event, is to model pass-on under different assumptions. So, you have different assumptions as to the nature of the competition in the particular markets and the particular categories, you have different assumptions about pricing models, you have different assumptions about how particular costs were treated and particular budgets were set and you end up with probably not a number, you probably end up with a range; you probably end up with a range depending on the assumptions into the model. But the significance, we submit, is this: that enables the model to reflect, for example, the pricing policies. So, if a pricing policy is plus, plus, or whatever, and it is not plus, plus, that can be put into the model and different assumptions can be made depending on how it is actually undertaken.

MR JUSTICE MARCUS SMITH: Really what you need first, though, is the parameters into which you feed the assumption. So, you need to have a series of variables and you can then inform those variables by, let us say, assumed values, and get an output. But does this report or proposal set out the assumptions or the variables that would inform the model? Is there a common list?

MR BELTRAMI: There is not a list. What he has focused on, I think more than anything, is the material he requires in order to undertake the exercise. I do not think he has set out the particular parameters of the exercise which would then be undertaken because of the focus of this exercise at this stage was, certainly from our perspective, was to identify where one looks for the material which can then be used for the expert evidence, rather than any more detail of exactly what the expert evidence is going to look like. But in answer to your question, no, he does not set out the particular parameters. But, again, if that is necessary to be done, I am sure that can be done. The starting point is that he wishes to have the information in order to set the assumptions which he says will be relevant for his model.

MR TIDSWELL: Presumably, there will be assumptions in the model which are not claimant-specific, or at least not gathered through the pricing?

MR BELTRAMI: No, the ...

MR TIDSWELL: So, for example, you would expect quite a significant factor in relation to the nature of the competition in the relevant sector of the market. So, one of his assumptions would be the concentration and the degree of competition, I expect, and would he then - how does that then translate into some sort of way of passing on?

MR BELTRAMI: You are certainly right. What he indicates, at 86, as well, he refers to public domain evidence also, which he would wish to rely upon, including information about the markets, pricing dynamics, etc. So, it is not simply claimant-specific material he is looking at; he wishes also to factor into his model market material as well. So, you are absolutely right.

MR JUSTICE ROTH: He sets it out there, including, I think, the point that Mr Tidswell raised about the market and the market shares. The difficulty is his (vii), which is why he wants all that information about what claimants actually do when setting prices.

MR BELTRAMI: Yes, that is, I think, the core level of dispute and right at the beginning we had a little debate about simulation model v. pass-on model, and ultimately these may just be ways of arriving at an outcome or asking the same question. The real point of dispute is ...

MR JUSTICE ROTH: They are very different techniques.

MR BELTRAMI: I think the real point of debate or dispute between the parties is what feeds into the process, and the real dispute is: should the price setting information feed into the process?

MR JUSTICE ROTH: I am not quite sure, Mr Beltrami, that that is, if I may say so, correct. I think that is one dispute and you have been addressing us on what should feed in and the nexus and so on, but I think there is a dispute as to what is an

appropriate methodology to use, and indeed quite a lot of opposition to the use of the simulation model.

MR BELTRAMI: There is opposition to that, but the basis of the opposition, I think, as I understand it, anyway, is that it is reliant on - well, two bases. It is reliant on a lot of assumptions and it is also reliant on this factual information.

MR JUSTICE ROTH: And that it requires a vast amount of data to be robust. I mean, that is the criticism that is made of a simulation model.

MR BELTRAMI: Clearly, if it is allowed to continue, to the extent to which it is not supported, then the model will not do its job. One does not know whether it is reliant upon a large amount of data or not until one sees what the exercise actually involves. So, what he has described does not, we would submit, require an unmanageable amount of data.

MR JUSTICE ROTH: He says this is the minimum. He refers to the Commission's guidelines, and they do not exactly give simulation models a resounding endorsement, do they?

MR BELTRAMI: Yes, the difficulty, of course, is that the Commission refers to three ways of doing this, and everyone seems to be agreed that, if you can do it, a comparative way is the best way, simplest and most effective. However, equally, as I understand it, everyone seems to be agreed you cannot do it here. So, you are into the less desirable territory in any event, so you are in between the pass-on rate approach or the simulation approach, and I think, to be fair, the Commission is a bit doubtful about both of them because both of them are relied upon assumptions, and as soon as you are into relied upon assumptions, obviously the outcome is only going to be as good as the assumptions you put in. But we are faced with this task of - if it is a choice, and we submit it ought not to be a choice, but what is being presented as a choice between the two least good options. And if I can just contrast, to put this into

three dimensions, the alternative approach from Visa, which undoubtedly has the at least superficial attraction of being simpler and less data heavy: so, it has that attraction to it, but one of our concerns is that it also is reliant upon assumptions, and whereas the model that we are proposing intends to enable the assumptions to be examined and possibly tested by reference to the facts, the assumptions that underlie the, or appear to underlie the Visa pass-on approach are much more brittle, are less transparent and may be less helpful to the Tribunal at the trial. It is not the time to argue that point now but can I just show you just for five minutes one of our concerns about the Visa approach?

MR JUSTICE MARCUS SMITH: Well, before you do, look, let's look at Mr Bloomfield's questionnaire at page 114, with the tab 3 document in mind. So, let's assume that Mr Bloomfield's data is not going to be used in a self-standing way (I accept that that is one of the ways you want to use it), but it is going to be feeding into the model. So, let's suppose you send out a questionnaire to all or some of the claimants and you get an answer, which will not be in algebraic form, to pricing policies and pricing process, and there is an explanation as to how one of the claimants does it. How do you translate that into a parameter to go into the model?

MR BELTRAMI: What we envisage is that we translate that through the medium of this pricing expert evidence. So, what we will not end up with, we envisage, is a hundred different pricing processes, all marginally different. It ought to be grouped.

MR JUSTICE MARCUS SMITH: So, you have classes of pricing processes; you have cost plus or ...

MR BELTRAMI: Yes, exactly.

MR JUSTICE MARCUS SMITH: And those will become variables in the model.

MR BELTRAMI: Yes, because, going back to where we started, what we are trying to do is establish a benchmark, and you have to accept that that will never be precise for

everybody, but there it is. And it may well be not everyone is exactly the same in every particular, but the pricing expert ought to be able to run through that and synthesise it.

MR JUSTICE MARCUS SMITH: Yes, I see, and then that synthesised material is put into basically what is a regression analysis?

MR BELTRAMI: Yes, exactly. It is not a regression analysis.

MR JUSTICE MARCUS SMITH: Is it not?

MR BELTRAMI: It is a simulation model.

MR JUSTICE MARCUS SMITH: What is the difference between a regression analysis and a simulation model?

MR BELTRAMI: I am afraid I do not know how to answer that, but he does not undertake a regression model. He says he wishes to run a simulation model based on the variable assumptions that he wishes to put into that model.

MR JUSTICE MARCUS SMITH: I mean ...

MR BELTRAMI: I agree, it sounds like a regression model, but that is what he wishes to do.

MR JUSTICE ROTH: It is quite different - modelling how the market would work with different changes in price, creating, as it were, a proxy for the marketing operating.

MR BELTRAMI: A proxy for the market, with references to the different assumptions.

MR JUSTICE MARCUS SMITH: Yes, but that is - well, it may be the lame leading the blind here, but the statistical technique used will be to take the figures, put them into the form of an equation and work out how the process of repeated calculations of varying data results in a probability curve which will give you an outcome as to what the price, or whatever other variable that is dependent upon the independent variables comes out at. So, I think I would be assisted, not rightaway, but I would be assisted in understanding what actually is driving a simulation model if it is not some form of statistical analysis of data that is input according to synthesised variables.

MR BELTRAMI: I can certainly work on that basis. Can I just move on to the alternative? On the face of it, they are very different but whether in practice they are all that different may also be open to some doubt. But can I ask you just to look at Mr Holt's proposal at tab 15? And we are not doing this to say that he cannot be allowed to do it, of course, but what we do say is that this proposal certainly raises questions and raises the danger if allowed to proceed on this sort of basis that the Tribunal will find it does not have the information it needs when it comes to trial. Equally, what we say is, in order to respond to this adequately, we are going to need, and the Tribunal will need, for example, actual pricing evidence because the relevance of the pass-on is itself dependent on the similarities between the studies and the reality - so, unless you have a very broad assumption of homogeneity. Can I just show you? The approach from Mr Holt, as you know, essentially there are three components to it. If you go to page 223, where he summarises the methodology that he is proposing, and it is based on three routes. The first - he starts with the economic theory, but put that to one side for the moment. At (b), he wishes to rely on public information, two forms of public information. So, existing academic studies about costs, which he says can be used to estimate reasonably robust pass-on rates, and, secondly, existing public data which can then be used to quantify pass-on. So, he relies, first of all, upon studies and, secondly, on public data, essentially price and cost data, largely. The third element, at (c), is where there is not available study or pass-on data, he wishes to rely upon some claimants' data to assist, essentially as a proxy for the public data. They are the three types. Now, we do have some concerns about the approach, or at least questions that ought to be considered in the round. If you go to 231, please, and, of course, I accept that there has been some correspondence on this, and he is not identifying this as the clutch of material - more work needs to be done, etc., etc. But what he has set out here, he identifies in paragraph 49 of his previous report, he

identified 47 public domain studies and at para 50, he has since narrowed it down to 43 that he has found reliable and relevant based on a predetermined set of criteria. So, the argument is going to be, on this aspect of the case, that previous studies are going to inform sufficiently, you can cut out the claimants' stuff, previous studies will inform on a sector basis pass-on of the interchange fees. The studies themselves that he identifies are on page 233, where he sets out on the left hand column the industry segments. So, in answer to points you mentioned earlier, that is his version of the categorization by reference to Visa segments, then particular product sectors, identifies the number of papers he has so far identified and the geographies and the relationship. So, it is a very broad industry set of groups to start with and some of these at least throw up the potential, I put it no further, for these questions. The starting point which he accepts and which everyone must accept, if you go to page 226, paragraph 25, that the validity of the approach is based on the premise - that is the assumption from the guidelines - that the other cost changes considered in those data and studies are comparable. So, the underlying premise is that these are in fact comparable and therefore there has to be some understanding of the comparability, I think he accepts that, there has to be some understanding of that comparability exercise. That will have to be done at some level. We have some concerns from what we have seen at the moment that those questions are going to be quite difficult without some form of relevant claimant-specific analysis. As an example, if you go back to 233, at the bottom of his table he has got the sector of travel which then covers the industry relevant sectors of lodging and airlines, and he has identified so far only, but so far two studies to assist that exercise. There is no separate category of hotels, and a number of the claimants are in fact hotels, and there are only two airlines. The only paper in relation to lodgings is a single report from 1993 on US room taxes on lodgings based on data between 1970 and 1989. That does not mean it is not relevant, we are

not saying that. It does not mean he might find some more, we are not saying that. We are not saying any of that, but if the Tribunal is going to be presented with a pass-on rate approach that says, "Well, there's a premise that one can discern from an examination of US lodgings taxes in the 1970s relevant information about pass-on rates for hotels in the 2000s/2010s", we submit that that is, on the face of it, a large step to take. It is a different geography, it is a different time period, it is before algorithmic pricing took effect. So, what we wish to be able to ensure that we can say to the Tribunal, if we are going to be presented with, for example, that report, "Well, you can look at that report and you can take what you want from it", but the Tribunal has got to know that the actual pricing undertaken by these hotels is completely different. So, the relevance of the analogy is weakened once you know the actual facts of the claimant group. It does not make it any easier about identifying the composition of the claimant group but as a basic point, if that is the basis on which the argument is going to be put, it must be relevant for the Tribunal to know what the true position is, what the real position on the ground is. That is almost a sort of fundamental objection we have to this issue being determined now. These questions, even on the defendants' approach, need answering by reference, at some level, to claimant-specific material. Similarly ...

MR JUSTICE MARCUS SMITH: Is it not the case, though, that this material - I am looking now at pages 234 and 235 - is then itself synthesised and popped into an equation and regressed and then you produce a pass-on rate that is the best fit for the curve of data that you have got? It is probably an unfair question to put to you, but I do throw it out for Mr Rabinowitz to assist us on. Are we just talking about a differently constructed model for assessing the synthesised data in a statistically helpful way so that one produces an outcome that may or may not have a sufficiently narrow confidence interval for the Tribunal to regard as relevant evidence?

MR BELTRAMI: Maybe after lunch I can do better on this, but that is essentially my understanding, that these processes, they are called different things and they may involve different bits, but ultimately they are heading in the same direction. Our objection to this is: yes, it has to be put into some sort of model, but what is going to be in this model? At the moment we get US lodgings in 1970. One needs to find a way to make that relevant to these claimants in the hotel sector. And all we are saying at the moment is that at the very minimum evidence as to what these claimants actually did, how they did their pricing, is going to be relevant to our model and, on the face of it, it is going to be relevant to Mr Holt's model because he might need that, too, because he has got to persuade the Tribunal, presumably, that this analogy fits. But it is a difficult exercise to run the analogy and to put it into a model without some grounding in the facts because then you are purely in the interest of theory, you are simply running from the theory that the hotel lodging in 1980 can be transferred across without much ado into hotels in 2010. I think the blind is leading quite a lot of the blind here, but there are processes that are being undertaken by both experts. Both of them, we would submit, need similar sort of information because ultimately, whether it is done through the simulation model or through the pass-on rate model, the expert needs to explain to the Tribunal why the information that is being relied upon is relevant to find the answer. And as we see these studies, as set out helpfully, there is a gap of relevance that needs to be filled and the gap will need to be filled at some level with claimant-specific material because otherwise you are purely in the realm of theory. Just to run one more point on that, and there are a number of points about this, but if you go to the automotive section, he has got three reports there. One of them is the US industry from 1984 to 1994. That may or may not be informative, it may help, it may be very relevant and there may be, once it is fed into the machine, a proper curve that can be used by reference to that information, but standing back - and a rather

basic point - we would submit: how can that be less relevant, now can it be more relevant than Mr Whitehorn's evidence about how the automotive industry actually operates? Neither may give the full answer but, if the Tribunal wants to have a coordinated answer, then there is going to be room, we would submit, for both the economic approach and the factual based approach which informed it.

MR JUSTICE MARCUS SMITH: Is that a convenient moment, Mr Beltrami?

MR BELTRAMI: I am way behind but I shall speak a lot more quickly to finish.

MR JUSTICE MARCUS SMITH: We have been throwing some fairly fast balls at you and we take our share of the blame for the extent to which you are behind. What we will do is, we will resume at a quarter to 2, if that is convenient to the assembled masses, and we will claw back at least 15 minutes that way. We will discuss ourselves how long we can go on this afternoon, but you can certainly go until half past 4. We will see whether there is anything more that can be done.

MR BELTRAMI: Thank you very much.

(13.00)

(The short adjournment)

(13.48)

MR BELTRAMI: Can I pick up two things that I looked up from this morning? If we can go to our expert report at volume 1, tab 3, page 72, and just to pick up a point about the categorisation aspect, we looked at Mr Holt's report with, I think, 10 categories and it is shortly to be addressed by our expert from page 72, from 77 onwards. He makes the obvious point which the Tribunal made earlier at paragraph 78 that we need to get to a position where there are categories sufficiently homogenous for the benchmarking process to work. That has to be a fundamental position on which the experts can present the evidence to the Tribunal. We are not at that position as he explains at paragraph 79. There was a start at 10 but it was then

seen, at 80, 81, that there were the variations within the groups, and understandably so. One can immediately stand back and see these groups are so broad. One can see that there will be perhaps fundamental variations. There may be fundamental variations and that is why the experts came up with the wider group of 39 categories as a working group, but I say flexible group, which could be adjusted depending on what the evidence is. But it is a question that they are actively considering identifying the need to do it but it does not mean, as there are always issues on this case, that the answer is very straightforward. But if we end up with 39, so be it. If that is the right homogenous group, then it is the right homogenous group even if it is higher than 10.

That is the category point. In answer to a question you raised earlier, whether we can have a pre-set where experts agree a category list, in principle, possibly, if at least there was some guidance as to the sort of factors which might feed into that, I suppose that might assist but in principle if that could be resolved earlier rather than later then that might cut out one issue but it is a current issue, albeit that the experts recognise that there is an underlying principle of homogeneity that needs to be addressed.

On the second question of the modelling in answer to the discussion we had before lunch, my understanding is no expert wishes to undertake what might be seen as a conventional regression analysis on these interchange fees because they are too small and there is too much noise going on so one accepts you cannot do that and so you have to do it, and this is the start of our problem by an indirect route and the options are either the pass-on route or the modelling simulation route.

The modelling route that our expert is proposing involves the creation of a mathematical model which inputs qualities of evidence as to the price-setting process plus modelling assumptions about firms being profit maximising entities, the state of the market, etc. and uses those features – you said what are the characteristics; those

are the principal characteristics, the pricing characteristics and the modelling assumptions – to derive a mathematical analysis and a model. That is the intention behind it.

The benefit, as it is advanced, is that it will be transparent because the assumptions in making up the model will be set out so one can see the model and one can see the assumptions. It may be possible, I am sure everyone[?] will want to treat the assumptions because I expect as I said earlier there will be a range rather than a point, but that is the aim of the exercise and it is certainly not understood by those putting it forward that it will require an excessive amount of information to populate the model. It requires too much information then to cut it down but in principle it is perceived as appropriate in the circumstances of the case.

Now, just to put it in context, we looked at Mr Holt. Mr Holt does not apply standard regression analysis to the interchange fees. The passing-on rate seeks to use in part as we saw studies in relation to other costs, hotels, or whatever.

MR JUSTICE MARCUS SMITH: Well, that is because the interchange fee is so small, as you say, it gets lost.

MR BELTRAMI: Yes, you cannot do it directly. You have to go round the side.

MR JUSTICE MARCUS SMITH: Yes.

MR BELTRAMI: So, his approach is to look at the other examples at this level. The studies, of course, may themselves be the product of regression analysis so he also says studies may have done the standard analysis in that particular circumstance, VAT or fuel costs, or whatever, so there may be a regression analysis behind the study if you wish to rely on the study. The issue that is going to arise all the way through is you have to find a basis in which to apply the product of a study into our situation and that will require some form of analysis or modelling as well because one needs to work out whether and if so to what extent there is a pass-on, if you like, from the study into

our situation. And what we struggle with at the moment, and that is the reason I took you to Mr Holt's material, is that that gap is not obviously filled. It is not obvious how one fills that gap. How does one jump from US Hotels in 1980 to interchange fees. Maybe you do but you have to construct some form of intellectual exercise to do so. I keep coming back to this point. I have said it before but our concern is you cannot do it – how do you work out the model to model the transition? You cannot do it without being aware of the facts and that's why we wish the factors to come in, not just to support our model, or our exercise, but to enable us to scrutinise Mr Holt's exercise because that exercise requires that gap to be filled, so whichever way one looks at it, somehow in an efficient way one has to arrive at a situation of, we would submit, pricing evidence being introduced into the analysis. How we do it is a matter we have to discuss but the principle is there. That is, I hope, a bigger problem as to how the different modelling sits out against each other.

If I can then jump to the particular objections to the claimant's proposal, their first objection is to a simulation model itself. I hope I have sought to explain both why it is being done, the basis on which it is being done and the extent and limitations of the material on which it is sought to be done. As I said before lunch, yes, it is one of the three set out in the guidelines and there are qualifications to it, but we are not in a territory of the best result. We are in the territory of an achievable result and we submit it is no less achievable than the pass-on rate particularly because of the need to (inaudible) the pass-on rate approach. So, that is the model itself.

The next specific objection as a matter of principle is to the use of claimant-specific pricing evidence and I think I have sought to deal with a lot of that on the way but if I can just summarise the points on this, first it is really an objection of an expert nature. The objection comes from Mr Holt in principle who says that the value of the evidence is limited. He may be right or he may be wrong about that. We disagree about that

but ultimately the question of the value of the evidence is going to be a matter for the Tribunal rather than today an expert view on that.

Secondly, as we understand a lot of the objection, it is directed to the assumption that the evidence that had been sought is going to be subject to evidence of what the parties thought. That is not what we are aiming for. We are aiming for objective evidence of processes rather than the subjective evidence.

Third, we do submit we are going to need this either for our own or for their exercise either way, for the reasons I have explained and fourth, we say it is fully in line with the cases that we looked at and that is why I took you to cases where the primary question for both Tribunals was how do you identify this pass-on and both Tribunals consider that evidence of pricing to be fundamental to that question. The fact that we have a different process, an accelerated process trying to fit everything into a small tin does not mean that one abandons the underlying principles.

The last point on this is a point I also made earlier to the Tribunal, which is that by keeping this exercise grounded in claimant facts, there is at least a respectable position, a prima facie binding nature of it. If it is entirely theoretical and divorced from claimant facts, there is no reason why any claimant should consider themselves bound by that. It is simply a benchmark and what we do not want to end up with at the end of this trial is another 50 trials of different claimants wanting another go. There will be an exceptions process but one has to work out now what it is advisable to work out now, how best to confine that exceptions process and we submit that some measure of claimant-specific evidence along the lines we have suggested is the way to do that. It will be on a sample basis. It will not be everybody and it may be industry-related as well but it will at least ground the exercise in the facts of these claimants and this issue.

So, that is what we say about the general objection to claimant-specific evidence. There are two, I think, related principal objections. I think they are essentially the same

point. There is an objection to our industry-evidence expert. As I said this morning, we see that as a practical solution rather than an impractical solution. It solves the sample problem and therefore as a matter of principle – I will come on to the practicalities of it in a few minutes – there is no reason – there is actually (inaudible) we submit again more likely to be binding if it is an industry report rather than individual evidence based. There is also objection to the concept that these are pricing experts themselves but the reason that we say that pricing experts will synthesize that material, make it manageable for the economist and the Tribunal and will put that in some proper context. So, it does fit together as a pattern to give, we hope, the Tribunal the best route to the answer.

So, that is what we say in response to what I started off calling the substantive objections to the proposals. Claimant evidence, industry evidence, whatever. Now, there are also, and it is important we discuss the procedural issues that arise. Now, there are really two procedural issues that arise and there are a couple of add-on points that I will come on to. But there are two, that is, it is said it is disproportionate and there is a problem about cross-examination. The disproportionality point is informed by the relevant question. If the evidence is irrelevant, then it is likely to be disproportionate. So in a sense you have a judgment about the potential relevance of the evidence before you can engage in a disproportionality argument.

We do not consider that the proposals that have been put forward are disproportionate but I quite accept – and also we do envisage that the exercise of evidence-gathering, we hope it will be jointly mandated through the different parties' experts. So, it will be genuinely expert-led and it may not include everything that these experts have set out in their witness reports – we are conscious of the need to ensure that there has to be a balance and that an efficient exercise is done but a proper exercise is done.

So, we can deal with that – I am not saying that the Tribunal should simply say, "Off

you go and good luck to you". There is a structure already but it is not a rigid structure and if it has to be cut back, it will be sample sized. It can be reduced or whatever. That is a matter that can be sorted out but it is not a matter of principle. Similarly, we submit the cross-examination issue. Now, I dealt with this a little this morning. When putting forward our proposals we did not mean to exclude anybody's human rights to cross-examine on whatever they want to. We simply sought to have a practical solution to a difficult problem which is fitting this enormous action into a small tin. That is why, as I submitted, as I indicated earlier, we identified the pricing expert and economist who will be examined. If others need to be cross-examined then we will have to find time to do it.

Now, we have seven weeks, I think it is, on the trial. We still do not envisage it likely that there will be a lot of cross-examination in the exercise we have been looking at. We do not know. I cannot say for sure but we do not envisage it is likely, because we are looking at objective evidence which is likely to be supported by documents. Now, true it may be – there may be some evidence that is so controversial that it needs to be cross-examined on. We do not know the answer to that. There may not be. If there is, I am not going to resist that; I cannot resist it but I would submit that we will find time to deal with it. One way of dealing with it, perhaps, is to have some time posts on the way; to do the evidence-gathering, the expert report gathering and have a period, a point at which the parties have to indicate individuals or potential experts who they do wish to cross-examine. At least then we will know the scale of the exercise. Once we know the scale of the exercise it may be possible to work out the solution to the problem. I would hope that we can fit it into the period. We have raised the possibility of pre-trial depositions. It is not something I necessarily want to advocate but there are means to solve an excess evidence problem if there is such a problem. But at the moment the problem may not exist. What is relevant, we would

submit, with respect, for today is that we do not let that procedural issue wag this substantive dog. We cannot say, “Well, because there might be a cross-examination problem, we are not going to have this evidence, this examination at all”. That would be the wrong way round. And as a start, as a matter of principle: “Is this relevant or potentially relevant evidence (inaudible)?” “Yes.” Look at the evidence we have suggested.” “Yes”. “How can we fit it into the process?” Well, potentially we can but we can manage it. And therefore we say that the objection to cross-examination is not a principle objection to resist the approach but it is a warning that the parties need to be alive to the possibility that we may need to find some time for some probably limited evidence. The fact that as I said earlier the evidence is intended to be objective ought to mean that it is limited, but I cannot say one way or the other. All I can say is it is an issue to be flagged and to be monitored.

So, that is what we say about the procedural issues. The two other sub-issues, which I should just mention – there is a point – I think others will develop it more – about the exceptions process. I think everybody may be except possibly Mastercard will accept that whatever the process to achieve a benchmark, there has to be some ultimate safeguard to enable an exceptions process to be possible. I do not think it is envisaged that the Tribunal should mandate any particular parameters for that at the moment. That would be quite early to do that. We certainly propose that whatever happens there will be inevitably a cost consequence for any individual claimants or even a defendant to take a point such as that. But it is a safety valve which is a product of the benchmark process as we see it. One cannot have a benchmark process without some form of safety valve. It is important to try to construct the benchmark process to keep the safety valve as narrow as it can. I think there is an issue between some of the parties about that. We are in favour of the facility for an exception process, even if it is never adopted, so much the better, but certainly the more deeply based the

evidential basis of the expert evidence, the less the prospect of an exceptions process happening.

There is a point about the number of experts but I am not sure that that is necessary to make at the moment. My clients and the SH clients propose to have one set of pricing experts and one set of economists – so one pricing expert and one economist each without any amplification of that. I do not think there is a principle objection to that as an issue that appeared also on the list.

So, that is where I have got to on the merchant pass-on issues. Can I then move on to the two other issues I need to address also. The first is the suggestion from Visa that we factor into Trial 2 part of the Article 101.3 exemption issue, specifically it being said that that exemption issue will require an understanding on an economy-wide basis of merchant pass-on if one is working out the benefits aspect of that exemption and therefore it is said that it would be helpful to order that piece of the exemption trial to be heard in our Trial 2 or otherwise to try to ensure that the methodology adopted for our Trial 2 assists in resolving that issue when it gets to trial three. So, given what else we are talking about, this is a fairly esoteric point, but not an unimportant point.

Our position on that is frankly we have enough to deal with on Trial 2 without worrying about market-wide pass-on issues for trial three. The pass-on issue for trial three if it arises will be of a different nature, simply as part of an overall exemption and not claimant specific and therefore one will not be looking at the same thing. It is more likely to be beneficial to deal with Article 101, three exemptions in the round rather than piecemeal one part in one trial, the rest in another trial. There is an inherent advantage of having them all together. But even if all that were not right and the Tribunal wished to cut off the merchant, so the economy-wide issue for the purposes of Article 101.3, everyone's approach will be of some assistance to that because everyone seeks to have an answer on a sector-based or category-based analysis. So,

whatever that answer is, the Tribunal will be able to find whatever assistance it wishes for that material translating it into an economy-wide basis. Nobody's proposal gives a complete economy-wide answer anyway. So, we do not think it is the right thing to do. It is likely to interfere with what we have. It is better to deal with it all together in trial three but if there really is a need to assist trial three working out pass-on in Trial 2, the Tribunal will have on these approaches a wealth of material on a benchmark basis to assist in that exercise. So, it does not really distinguish between any of these options for trial three or two.

Can I move onto acquirer pass-on and explain where we are on that? This is, I think, a slightly moving proposition. The ultimate question on acquirer pass-on is the same as the question on merchant pass-on for the Tribunal but the facts are different because the interchange fee is observable in the context of acquirer pass-on because it is such a large portion of the Merchant Service Charge. So it is a different animal. It is the same question but the facts are different and therefore it is easier to see, which is one of the problems we had on the merchant pass-on. Also, it is different because in a measure and indeed it seems in a large measure, it is expressly catered for in contractual arrangements and this appeared in the Sainsbury's decision and you will have picked up from the documents that where it is what we call interchange plus and interchange plus, there is a direct line between the interchange fee and the merchant's service charge. So, as I said this morning, in relation to the pricing exercise there are some situations where you can see it and this is one of those situations where you can see it simply by looking at the way things were priced. And in those cases, it appears to be common ground – I hesitate to say that but I think it is common ground – that for those contracts, the plus and the plus plus contracts, either 100 per cent pass-on is agreed or it is agreed it is not worth arguing about. So, my understanding is that that is not going to trouble the Tribunal for those type of contracts.

MR JUSTICE MARCUS SMITH: What volume or proportion?

MR BELTRAMI: I am told that the transaction volume which is plus and plus plus, is between 75 per cent yet the claim value in terms of plus and plus plus is between 75 and 80 per cent.

MR JUSTICE MARCUS SMITH: And do you have a similar figure for the proportion of claims?

MR BELTRAMI: I do not. I think I am told it is about 50:50. So that is in terms of the raw claimant numbers. In terms of the approach, the claimants, my clients, propose to deal with this on a similar basis to the merchant acquirer pass-on issue but if you like at a less detailed stage because the evidence is rather clear and the proportionalities are different. So, similarly, there is a factual exercise which is proposed to be undertaken, which is Mr Martin's report, which is contract based. So, everyone agrees we will have to work out which are plus plus and plus and which are not. So, that is a primary contractual basis but it is also proposed that Mr Martin will undertake an examination of the blended contracts to see whether the blended contracts given the events that happened, also indicate pass-on, so it is anticipated that the plus plus contracts pass on the MIF on their face, but it is intended to look at those contracts and the fees paid to see whether in fact the same answer can be seen on a contractual basis for those as well. So that is, if you like, the first line of analysis.

MR JUSTICE ROTH: I am sorry, I did not quite follow the second part of that. We see that somebody has to look at the contracts to see which are either plus or plus plus, but those that are blended, and I think an example is given, there is the right of the acquirer to increase the MSC in certain circumstances. How is looking at the contract really going to tell us what happened?

MR BELTRAMI: It is hoped, as he says, that by looking at the contract you may be able to determine – it is his page 40. He starts off saying you identify the contracts

and that is all about 3.3.2, but then over the page on 3.3.6 –

MR JUSTICE MARCUS SMITH: What page in the bundle?

MR BELTRAMI: Well, certainly in my copy it is a very smudged page 40. Internal page 16.

MR JUSTICE MARCUS SMITH: Yes, I have it, yes.

MR BELTRAMI: Tab 2.

MR JUSTICE MARCUS SMITH: It is bundle 1, tab 2?

MR BELTRAMI: Yes, sorry. So, it starts off by identifying the contracts. That is all 3.3.2 and 3.3.3 but he then suggests in 3.3.6 that if it is established that the claimant had a blended pricing arrangement a further line of analysis is required of the matters that he identifies, the contracts, discussions, notifications of changes, etc., and a comparison of the rates to see whether from that material alone it is possible to do the same exercise.

MR JUSTICE MARCUS SMITH: Yes, but he is going to need the notification?

MR BELTRAMI: Yes, sorry. That is absolutely right. It is not just the contracts.

MR JUSTICE MARCUS SMITH: Yes.

MR BELTRAMI: It is the contracts plus the actual materials referred to.

MR JUSTICE MARCUS SMITH: Yes.

MR BELTRAMI: So, the first approach, and there is a parallel on the other one – there is a first approach to see whether you can get the answer from the contracts alone – sorry, I say “the contracts alone” –

MR JUSTICE MARCUS SMITH: The transactions?

MR BELTRAMI: The transactions, yes.

MR JUSTICE MARCUS SMITH: And how exactly does the blended rate work? What goes into the blend?

MR BELTRAMI: The blended rate, as I understand it there would just be a total

percentage, and there would be highlighted areas but it would be a percentage which would be on its face obscure as to its component parts.

MR JUSTICE MARCUS SMITH: I see.

MR BELTRAMI: But then if you followed the transactions, you may be able to see the corresponding increases in the rates, or whatever, but that would envisage the exercise being done.

MR JUSTICE MARCUS SMITH: So what you would anticipate doing is correlate the blended rate against the MIF++ changes?

MR BELTRAMI: Yes.

MR JUSTICE MARCUS SMITH: And see what correlation existed?

MR BELTRAMI: Yes, because the blended rate is opaque as to its detail but the detail may be revealed by those two –

MR JUSTICE MARCUS SMITH: Does one have to do that for each merchant?

MR BELTRAMI: I think the anticipation is acquirers had standard contracts. I think the anticipation is it can be done acquirer by acquirer rather than claimant by claimant by claimant on the basis that acquirers deal with everyone. I think that is right.

MR JUSTICE MARCUS SMITH: How many acquirers are there? I think there are maybe – well at internal page 14, he refers to 11. Whether that is the totality, but my understanding is that is the sort of number we are talking about.

MR JUSTICE ROTH: There is a clear – (inaudible) – the top four or five account for something like 90 per cent of all acquirers?

MR BELTRAMI: Yes.

MR JUSTICE ROTH: So, query how many claimants are actually accounted for through the smaller ones.

MR BELTRAMI: But it is clearly possible to reduce that to have a more focused analysis. I can quite see that once one knows what the actual figures are and of course

the percentages may also change over time but, I guess in principle.

MR JUSTICE ROTH: Is this going to require third party disclosure?

MR BELTRAMI: I do not think that is going to require third party disclosure because that information – unless I suppose you need to know when the MIFs were increased but it is all very well saying what happened as between acquirer and merchants but I suppose you do need to know what you are looking at so I can see that the sense would be to understand at least that information.

MR JUSTICE MARCUS SMITH: Well, when the MIFs were increased, you know from the defendant, do you not?

MR BELTRAMI: Well, do we know when each individual MIF was increased? I suppose we can work it out. It may be possible to work it out from the plus plus contract anyway.

MR JUSTICE MARCUS SMITH: I think what we are going to need is a schedule which has MIFs and then maybe several relevant ones, but the MIFs over time and the blended rate or rates over time and before one can do anything else, one needs that in a form that is agreed and that can be put together.

MR BELTRAMI: Yes, absolutely. The thing is it must be apparent from the plus plus contracts when the MIFs were increased because by its nature it will be revealed, so I am assuming that at least most of the information will be available from that detail alone.

MR JUSTICE ROTH: Well, the defendants would get that --

MR BELTRAMI: I assume that they would know –

MR JUSTICE ROTH: -- from the Mastercard MIFs and the Visa MIFs and so on.

MR BELTRAMI: I may be making more of a problem than exists.

MR JUSTICE ROTH: Is there a potential role for an industry expert? This is a small concentrated industry, maybe 11 and four or five principal players – just how they dealt

with blended MSCs.

MR BELTRAMI: We have set out – I think Mr Martin or my friend's expert –

MR JUSTICE ROTH: Yes, he is not an industry expert but I am asking whether there would not be in this, especially given the nature of the industry, you would think there would be people who have worked in it and know how it operates, who could give evidence of how you are dealing with four or five main players.

MR BELTRAMI: I thought that had been suggested. I cannot remember –

MR JUSTICE ROTH: It does crop up in one or two of the reports as a suggestion but only rather sotto voce.

MR BELTRAMI: Yes, as I say, I think it has been suggested. It certainly has been suggested – paragraph 20, I am told, of our proposal which is on page 7, tab 1. You may be right that it is analysis we have been just looking at. It might be more authoritatively examined by industry expert rather than a forensic expert. I think the important thing for the moment is that we essentially get the green light for the exercise and we can work out who the best person to do it may be is. I think it is the same question, but I can quite see that someone with more expertise in the field may be better placed to provide the answer.

MR JUSTICE ROTH: Because they might be able to avoid the sort of evidence on initial discussions between acquirer and each claimant, and that can be quite – one can see there may be quite a lot of documents on that and that will change over time and so on.

MR BELTRAMI: We anticipate – whereas we are talking about the merchant pass-on and the pricing expert evidence, and one can see a variety of possible outcomes which a pricing expert could arrive at, and our expectation is I think on this one that a proper examination of a blended situation will reveal an outcome not very dissimilar to the plus plus situation so it may well be that we cut across a lot of that.

MR JUSTICE MARCUS SMITH: Yes, that may or may not be the case. It does seem to me, given the level of factual expertise that is present in this room, that if we were to order the day's schedule along the lines that we have articulated be produced, it could be done within a fortnight or three weeks, I'd be quite interested to know why that wasn't possible. I don't think we want to be going into what that data would show. But if we can at least get out the data that can be pulled together relatively cheaply, it may be that that provides a decent baseline for working out what particular expert one needs to work out whether there is or is not the sort of pass-on that you anticipate. I mean, if one gets an absolute point-for-point correlation between the interchange fee and the blended rate, well then the question will resolve itself. If it's more complicated than that, well the data is a good starting point to see that complexity.

MR BELTRAMI: Yes, if I can say so, that is a very helpful indication. For this reason also, to go on to like the next stage of the inquiry, because that's the, if you like, the contractual MIF analysis that there are also proposals to undertake an expert analysis, if required. Now, the context of this of course is there is a much smaller point of the claim and it may be it is an easier part of the claim, but there it is, the various experts have made proposals as to what they might want to do to undertake an economic assessment. Our expert, again the same expert, Mr Falcon and Dr Frankel have suggested first of all, a comparative-based approach by reference to existing studies on the basis that the existing studies seem robust enough to enable the answer to be got, and to be issued. They have also suggested, if necessary, a limited form of modelling approach and simulation, referable principally to the contract again within market sphere, so it is a limited model, a reference to contracts on the market. Now, one of the difficulties with any further economic assessment is it will require much more data to support it and there has been discussion, including I think even up to today, exchanges of what data there is and what can reasonably be made available.

Just to explain where I think we got to this on this, so far as the claimants are concerned, the merchant Claimants, in order to undertake any form of modelling or any form of independent pass-on approach, or even a regression analysis, which could be done for these transactions, you would need to have the MIF data, the MSC data and the scheme fee data because those are the three components of any Merchant Service Charge, so two components in the total. The claimants have quite a lot of MIF data, they have been entitled to get that from acquirers and they have quite a lot of MIF data, largely in Excel spreadsheets across the piece, some of it primary and some of it extrapolated, but a large quantity of MIF data. They have a limited quantity of MSC data because that has not been available to date and the limited MSC data they have is largely on PDFs or hard copy, not entirely, but largely, so it is harder to use in any real form. They don't have the fee data. So, having arrived at the limitations of evidence, and we had understood that the schemes couldn't provide that and may not be right, other -- on that basis our experts have indicated, well, if we don't have a full, sufficient set of data, it can't, they can easily obtain, an independent exercise can't be done because the information won't be available. That's the, in very short form, the claimant's position on this. The defendants, both Visa and Mastercard, have indicated that reliance on reports as well, again with the possibility of independent studies, and I have set out quantities of data that they have wished the merchants to supply in order to enable the studies to be undertaken. And, no, that was objected to by the merchants, you will see in our skeleton because it was too onerous, and we don't have a lot of it. My understanding is there is some discussion going on exactly what it is that's required, now that the schemes know exactly what it is we have. So, I don't think I am going to take this any further before you, other than to tell you that's where we currently are. It may be in the next couple of days we may be in a better position to explain exactly what can be given, I think we can give what we have got, but we

don't think it is going to be enough versus exactly what it is the schemes want. I think it's a developing story at the moment. We are not seeking obviously to hold anything back, but we don't want to undertake a new exercise of data gathering if at all, it can be avoided. So, starting from, just circling back to where we are on the acquirers issue, a lot of it will be dealt with by plus, plus, proportionately a large part of the claim will be dealt with by plus plus. There is a prospect that much of the remainder can be dealt with by contracts. There are then existing studies that will assist a comparative-based approach. There is the possibility of an independent exercise after that and if the data which is currently held can assist that exercise, so be it. But, we have certainly been cautious about having to provide or to try to obtain from acquirers new data, if necessary to support an exercise which is rather down the list of requirements. As I say, there has been correspondence in the past week about this, I don't want to jump in now when things may be capable of being clarified, shall we say, between now and Thursday. But that's just to explain where we are in the acquirer pass-on. There is an outstanding issue as to who has what data and what data could be made available and therefore what exercises could be done with the data that we have.

MR JUSTICE SMITH: Well, that's very, very helpful, Mr Beltrami. It might, I think, be that we would be assisted if the schemes could give us some idea of what data they can lay their hands on in order to, as it were, fill the blanks of the contract-based approach. I don't want to say anything about what that would achieve but the first step is, can that data be pulled together relatively quickly? If it can, then the question is, what does it teach us? If it teaches us enough to resolve matters, then the other questions don't arise. It would, I think, be helpful, before we end these three days, to have a pretty clear idea of direction of travel in this, because we don't really want acquirer pass-on to become as complex and as expensive and as time consuming for

no good reason than the merchant pass-on, which obviously is pretty intractable.

MR BELTRAMI: Yes, that's very helpful. We have obviously just, I mean, as you say, the scheme is first, but obviously to move that on if we can. There may be a way of getting to the end of that without such a headache, I think you might be right.

MR JUSTICE SMITH: That would be very helpful. Thank you.

MR JUSTICE ROTH: Would you be objecting to the proposal in, I think it is, I can't remember now which party, as in which expert, Mr Coombs, of doing the natural experiment on the basis of the GMP rule? I have to look at what they did before, the acquirer pass-on?

MR BELTRAMI: We have reservations as to what that will tell us, but we don't object to providing information that we have.

MR JUSTICE ROTH: Yes.

MR BELTRAMI: Now, those have got to be married up. Insofar as someone is asking us to get new information, then that is a new exercise which is likely to be a cost exercise because we will have to get it from somewhere else, the acquirers, or whatever. It may need clarification from each of the parties who want more information as to what it is they want. But, as I say, we don't have any objection to providing the information that we have, if that's what they need for their exercise, we don't object to their exercise even though we don't think, it is doubtful as to whether it will show, but the provision of finding a new exercise, we'd have to rethink that.

MR JUSTICE ROTH: Thank you.

MR BELTRAMI: Thank you. Unless there are any further questions, I appreciate --

MR JUSTICE ROTH: No, Mr Beltrami, we are very grateful. Thank you very much. Is it Mr Adey next?

MR BELTRAMI: No, Mr Moser.

MR JUSTICE ROTH: Mr Moser.

MR MOSER: It is going to be me next. Thank you, sir. If I might just bring up a bundle. I will attempt not to duplicate what my learned friend has already said. I appear as you will know, for the SH claimants. I would like to structure my submissions in the time I have as follows: Relatively briefly, dealing with the nature of expert evidence and then the possible pitfalls in competition law cases, specifically where expert evidence is concerned. I would then deal with the proposed Visa evidence and, to some extent, the Merricks' evidence, but I am largely dealing with Visa. Finally, I want to set out specifically what it is we propose, which is similar but not identical to that which is proposed by the HK and S+S claimants. In our original pass-on proposal, on the 13th of March 2023, we referred to the authority of Declan Colgan Music for useful recent re-statement around expert evidence, not a competition law case. That is at authorities bundle 8, tab 30. We see at page 2944, behind tab 30, that this is before a Master, or Deputy Master. Masters are of course in a sense experts on experts because they deal with this all the time. This was a case about whether the claimant should have permission to adduce expert evidence concerning the market for digital consumption of music. We see that at paragraph 2 on internal page 1. The paragraph I'd like to go to is 93, which is at page 2958 where the judge there sets out the different kinds of evidence which can be given by an expert witness, even if on -- "which on a more or less detailed analysis, is evidence of fact." He says, "I have in mind the following." I add in parenthesis, we say this is a non-exhaustive list. First, "experts whose role is to educate the court in technical or scientific matters." And over the page, at 93.2, "Cases where the experts draws on the general body of his knowledge and understanding in which he as an expert to give evidence as to a matter of observable fact." I skip a bit down to the fourth line from the bottom, "Where an expert relies on his own knowledge or experience but has no first hand knowledge of facts in question, his evidence as to the facts may be admissible evidence of those

facts and within CPR 35. Expert evidence in those circumstances could be clarified as expert opinion evidence as to matters of fact." Other variations are at 3 where, "the expert collates and presents to the court in an efficient manner the knowledge of others in his or her field of expertise", so an expert collecting other experts. And 4, "Cases where the identification or observation of particular facts is something which only a person with a particular skill is capable of doing." The last sentence, "Without the expert's expertise, the fact would not be observable, hence, the expert's expertise would be a necessary element of his giving evidence of this nature." He then goes on to evidence of foreign law. I submit that all of 2, 3 and 4 are species of evidence which we propose to have in this case and are within what the Tribunal proposed when you, sir, set out in your very helpful letter the idea of expert-led evidence in order to make tractable those issues of fact which plainly cannot be given by calling 2,700 individual CFOs to give evidence. So, I put that away. As my learned friend, Mr Beltrami, has pointed out, one of the aspects of the case that is made against us is that it will be possible to do much of this by way of an analysis of studies and therefore at a theoretical level. So, that is why I am aiming some of my submissions at least at this siren call of Mr Holt's expertise and being able to do all of this in order to warn against what, in another case, I'm not going to turn up, but in The Race Course Association v OFT case a differently constituted CAT Tribunal called a triumph of theory over commercial reality. What would be the worst of all worlds is if we got to trial in 2024 and spent seven weeks finding out that there was a problem in getting us home on one or more of the points because there is a lack of claimant-related evidence in order to inform the methods. I'd like to show the Tribunal just one other authority, this time a competition authority and it is in authorities bundle 1 at tab 3. It is Cardiff Bus, and you will see it at page 102. On that page in the headnote we see by the second hole punch that the nature of the issue, Cardiff Bus accepted liability in respect of the

infringement for the chapter 2 prohibition, but the parties' positions diverged widely as to loss of damage flowing from it. Fundamental difference lay in their different submissions as to what would have happened had the infringement not taken place. There was considerable interrelationship between the various heads of loss and claims. If one looks at paragraph 397, which is at page 221, it perhaps simply underlines an obvious point, but that's the point I am warning against. "It is absolutely right that the Tribunal can only determine this case on the evidence before it, it cannot have regard to factual material that was not adduced before it. Neither Mr Good, nor Dr Niels nor Mr Haberman adduced such factual material, they provided expert opinion evidence." And so on. "The work was extremely helpful, I have taken it fully into account", says Lord Carlisle. "But we do not consider the opinion evidence must be used on a take it or leave it basis. It is for the Tribunal, based upon the factual evidence, to make an assessment of what would have happened in a counterfactual scenario may very well involve reworking calculations done by the experts or adopting an approach which both draws on the work of both, experts adopt neither approach completely. That is what has occurred in this case and our approach is neither of Mr Good or Dr Niels, but based on factual evidence we have heard represents our concluded view." So, I venture to suggest that that is a triangulation approach that you were mentioning to my learned friend. So that is what we are aiming at, it has to be usable in that way. The evidence can't either miss, like two ships in the night, or be one-sided so that only one party's approach can in the evidence be adopted because of course the Tribunal can only make findings based on the facts actually before it. So, I warn of a particular danger which I submit is peculiar to this hearing which is in deciding the nature of the evidence that the experts are going to give, whilst taking the advice of the same experts themselves on the point of what that ought to be. So, without wishing to attack the independence of any of the experts in any way,

it is a fact of litigation, and there is a passage in the Royal Mail v Trucks case about this, I won't read it out, it is at paragraph 235 but the coincidence of the fact that each expert alighted upon the exact outcome that their client decided. But without wishing to attack the independence of experts, as I say, it is a fact of life or litigation that once experts have been selected and involved, they tend to favour the desired conclusions. The extra risk is that where the experts are contending for different methods, even before they have reached their conclusions, the choice of methodology is going to be subject to that same, shall I call it, selection bias. My learned friends would probably say, oh not at all, the choice of methodology is essentially neutral but of course it isn't. Mr Holt, very fairly, has already made it clear that he is looking at examples of the passing-on of big costs in order to seek to extrapolate something about the passing-on of little costs. That, of course, runs the risk spelled out in the Commission guidelines at paragraph 124, but there might be a mismatch between that big figure and the smaller figure. The Commission guidelines are in authorities bundle 7 at paragraph, sorry at tab 25, page 2282 and 2283. I would like, in particular, to look at page 2283, this is on other methods, it is all about the passing-on rate approach which is suggested by Visa. At 124 we see, in the second line, "If the input affected by the infringement constitutes only a very small fraction of the margin in costs, even a significant increase in the cost of that input may hardly be detected in the purchaser's price data even if it is passed on in full. Although an alternative approach may be to estimate the passing-on rate based on changes in costs of more significant inputs, not just the cost of the effective less significant input. Such an approach comes at the price of an assumption that may go too far, namely that the marginal cost increases are being passed on at an identical rate, irrespective of the source of the cost increase." Then there is the advice at 126. "When assessing the indirect evidence of passing-on based developments of cost components that are not affected by

overcharge, it is advisable to also take into account qualitative evidence that may show the passing-on of small cost increases is in the specific case in line with the commercial practice of the direct or indirect purchaser." So you want some facts from the specific case if you are dealing with very small increments such as --

MR JUSTICE ROTH: Just while you are there, 125.

MR MOSER: Yes, sir, I skipped over 125. "There are also good reasons why firms may not always pass on small changes in their marginal costs, at least not in the short run, even if they would pass-on larger cost changes. Hence it may not be legitimate to assume that the passing-on rate will be similar for different changes in the input cost. One explanation may be that the firm may incur so-called price adjustment costs and thus prefer waiting until marginal cost increases accumulate beyond a certain threshold before changing its prices." That is a well-known fact that may be very different for different industries. If you are an online industry, you can change your price easily. If you are a supermarket, the price adjustment cost, for instance, would increase because you have to go around relabelling every single product on a very practical point. So, there are all sorts of aspects that are particular to each of these industries and the industries I represent and my learned friend represents are extremely diverse. You will have seen we deal with restaurants, we deal with local authorities, supermarkets, but also supermarkets that do many other things, like Marks & Spencer, and then how do you categorise that? So, I will come back to that individually, but that's what we see in the guidelines and that's why I warn of the danger of prejudging the outcome by the ostensibly neutral procedure of selecting the nature of the evidence. We have seen from Mr Holt's evidence the sort of evidence that he proposes to look at. If I can take you briefly, if I may, to Mr Holt's seventh report, which is in bundle 1 at tab 2, page -- forgive me, sorry, it is tab 15. Starting at page 232, we see at paragraph 53, for instance, Mr Holt has looked at three studies he identified in

the retail goods sector. They find, we see that in the penultimate line, about 75% pass-on of tax savings from VAT reductions. A few pages on, we find, at page 238, Mr Holt's example of the automotive fuel regression analysis and he calculates a range of pass-on there, between 102 and 111%. Over the page, at 239, at 85, the example of the restaurant regression analysis produces a pass-on estimate we see at page 240 of 83%. At paragraph 94, which is at page 243, he has looked at men's outerwear, a natural experiment analysis case study producing a passed-on estimate of 158% for a VAT decrease and 69-74% for a VAT increase. Now, of course Mr Holt hasn't yet produced Holt 8 with the conclusion to all of this. It may exist in draft and I would speculate that the method that looks at these studies will lead to a high pass-on rate; how could it not? We are really left arguing about, is it 75% or is it 158% or somewhere in between? So, if one adopts this method, I submit respectfully, an important part of the question that is to be determined by the Tribunal will have been predetermined. It is notable that what Mr Holt and Mr Coombs do not even attempt to do is to look at whether there was pass-on of the interchange fee at all in a certain sector. They start with the question, how much is it? Leaving out the logically prior question, does it exist in this sector? For that, one would have to look at factual evidence first. But Mr Holt and Mr Coombs don't propose to do that. Now, having said that, and to be fair, there are two things to be said about Mr Holt's evidence, the first is that on a careful reading he does say, here you will need to look at some facts and in two ways. So, the first way is in his fifth report. If I may ask you, please, to turn to bundle 6 at tab 59, the first tab of bundle 6 at page 1950. It is the part of Mr Derek, of Mr Holt's report where he talks about methods based on data and documents. One of the aspects of data and documents at paragraph 52 is apparently an important one and he says, "One important consideration that would need to be investigated at trial, if this approach were used - whether this approach were used - is whether reactions to MSC changes

differ from reactions to other costs changes. For instance, it could be argued that MSCs (a) are not explicitly taken into account as part of claimants' pricing decisions; (b) are too small to warrant price changes; or (c) may not be treated as a variable cost in management accounts." Those are all points that we would make of course. "I have considered these issues but do not consider these concerns significant enough to forego the advantages of my proposed approach." Then there is some justification for that. But at 53, he says finally, "Finally, I note that these sorts of claimant-specific objections could be taken into account in a two-stage approach in which one first determines average pass-on levels at the level of major economic sectors… and then allows the parties to contend that specific claimants were in a materially different position at the quantum stage." I make two points about that. The first is, this is either an important consideration that needs to be investigated at trial or it isn't. If it is an important consideration that needs to be investigated to trial the information would have to be available. The second point is, that paragraph 53, which is Mr Holt's liberating thought, why you can do it afterwards, simply leads to the point that my learned friend, Mr Beltrami, made to the President which is you are just going to postpone this and you will have maybe 50 people who want to say afterwards, we are in materially different positions, so that's not the exceptionality point. That would be, how shall I put it, a non-exceptional exception, everyone would say, look, we are in a materially different position because we are whatever we are. So the answer, I say, is obvious, it is the one we give, let us produce the relevant evidence in the most tractable way at the beginning, not afterwards, as Mr Holt suggests. So actually there is relatively little between us on that analysis, we agree it is important, we agree it needs to be done, we say if so, do it from the beginning. Mr Holt says, oh well, let's do it afterwards and we respectfully disagree. Now, the other point I just briefly wanted to make about Mr Holt's expert report, just to pick up on a point, sir, that the President

made to Mr Beltrami about, is as far as we can see it is not suggested by Mr Holt that he will do a regression analysis as his primary method. As I understand it, he will be using as his primary method looking at the public studies. Then in some cases, where there is publicly available data, he may also do a regression analysis but he has not yet decided to what extent regression analysis and to what extent essentially simply the analysis of studies is going to inform his answer. That is how I see Mr Holt's report. I can make that good by briefly taking you through those parts of his report where I think that is made out.

MR JUSTICE ROTH: Why don't we see what the scheme says then --

MR MOSER: That's fine. I am happy with that and happy to deal with it in my reply. I just thought I would make that point in case it somehow, in case there was any understanding, possibly by -- I'd like then, please, to turn to the experts whom we propose to instruct and to see what it is proposed that they would do. As regards the merchant pass-on, the SH claimants are proposing to instruct two experts, an economist and a pricing expert, just like HK and S+S, and our expert economists are Mr Dryden and Dr Trento. They are at bundle 1, tab 4, and at pages 91 to 98. You will have seen that they have set out, or I think non-controversially, the four broad possible approaches in such exercises. They actually propose to use three of them in a particular combination, so looking at the four, they start on page 92 and here is the estimation of the pass-on. As I think everyone agrees, and it appears to be common ground amongst those in the front row, sir, finally, it is not feasible in this case to use the empirical estimation of the interchange of pass-on because of the, more or less of, the size of the fee. It is different for the acquirer pass-on, but I will come back to that briefly. So the three that we say are in play are the pass-on by analogy, that is dealt with as approach number 2 in Dryden and Trento at 93, that is the use of econometric techniques to estimate pass-on of other categories of costs drawn by merchants,

whose pass-on may be similar to the pass-on of interchange fees, we see that at paragraph 2.8. These can be based either on fresh analysis or on existing studies. That is at 2.11. Mr Dryden and Dr Trento say, the use of this method depends on two things, whether the analogy between interchange fees and the model costs are sufficiently meaningful and whether the pass-on of the model costs can be estimated robustly, and that is 2.9 and 2.12. They do not reject that as an approach but it comes with that warning. Approach 3 is an analysis of industry and overcharge characteristics. Now, that involves considering key economic features of the relevant overcharge and the relevant market. As regards the overcharge, so in our case the interchange fees, it involves looking at whether it is treated as a fixed or a variable cost. As regards the industry characteristics, it involves looking at matters such as the degree of competition in industry and information as is available about the way in which demand changes with respect to price. It is worth emphasising that Mr Dryden and Dr Trento note that in principle one can build a mathematical simulation model which explicitly factors in these various matters and produces a function that relates downstream prices to interchange fees, although it is fair to say that they are sceptical about that, and that's at paragraphs 2.20 to 2.21. So, the way they propose to use approach 3 is to use it at a preliminary stage to group claimants into groups that appear to pass-on in similar ways, rather than for the ultimate answer. In combination with 2 and 3, they propose to use approach 4 and approach 4 is the assessment of pricing mechanisms, that's at paragraphs 2.22 following; page 95. That is dependent on obtaining a direct understanding of a pricing mechanism for claimants, covering matters such as strategy, pricing strategy, price setting, target margins and so on. A few points to note about this, and you get that at 2.23 to 2.25, is it could indicate cases in which pass-on is more or less likely, as well as whether there is likely to be zero pass-on or full pass-on. It won't identify an exact level of pass-on but they are

proposing that it can be used in order to complement the other approaches. They also say this could be something to be done in combination with the pricing expert, and I will come on to the pricing expert. But approach 4 does largely depend on also having the pricing expert in the mix. So, the overall approach, you will see from 2.27, which is at 96, first they want to use approach 3, that's the assessment of the characteristics of the overcharge of the industry to group claimants, which are likely to have broadly similar ranges of pass-on based on the industry characteristics and, secondly, apply the other approaches to seek to estimate the level of pass-on. So, that's a combination of a passing-on rate and an assessment of pricing mechanisms and possibly also direct econometric estimation, if that turns out to be feasible. Then you see the next detailed steps at 2.28. First, the clustering, secondly, assessing feasibility for direct econometric estimation, even though no one is optimistic about that. Then, thirdly, apply the other approaches and that includes the passing-on rate approach. Subject to this important point, one must consider whether there is a good analogy between the model costs and the interchange fees. On that of course Mr Holt's evidence will hinge also, however he puts it at the moment, that is going to be a feature on which the exercise is likely to hinge. It is fair to say that Mr Dryden and Dr Trento agree with the Tribunal, this is likely to be a tricky exercise, but I am afraid that's where one is with that. Just a word about clustering which is at the beginning, the first stage, as it were. The Tribunal has had some discussion with my learned friend around how to determine sectors. The way that the different experts are currently approaching this, as I see it, is as follows. So, Mr Holt, at paragraphs 40 and 41 of his seventh report, he suggests to use the merchant category codes, the MCC, which has 14 categories and 79 subcategories, which are helpfully set out in the tables at the end of his report. I am not sure where he intends to go with the 79 subcategories which are potentially more granular, but they are more numerous than the 39 suggested by the evidence,

and that is his suggestion. The problem with the MCC, the code that Visa uses, in other words, is that it is not a code obviously designed for pass-on. Mr Coombs has a similar proposition. He has 12 groups and they are based on the Payment Council and UK Cards Association codes, it seems. Fine as far as it goes, manageable number, not designed for a pass-on study. Dr Frankel and his colleague for HK have suggested 39 and my learned friend has taken you to it, at paragraph 80 of their report. It is fair to add, at 81, they also say, "But then we would like to combine some, to cut it down a bit." And they are basing that on the standard industry classification. What we suggest, what Mr Dryden and Dr Trento suggest, is the approach that I have just shown you, which is to class the clients by pricing behaviour in so far as possible, using approach 3 and the analysis of the industry and overcharge characteristics in order to do that. None of these are going to be perfect. We submit that our approach at least has the merit that we are looking specifically at pass-on related characteristics. What we have suggested, indeed what the claimants have suggested, in our timetable, which is at bundle 1, page 22, that is annex B to our original proposal, is that the first three steps between now and September at least in significant part be devoted to determining the industry categories. We do also suggest a number of other things that ought to be done in that time, but the proposed timetable was that by the 30th of June (page 22) apart from the matters at the bottom, "Each party's testifying economic experts shall set out the industry categories they are regard as appropriate." We are very far down that line. "By Friday the 28th of July economic experts will seek to agree industry categories." Certainly, for our experts, there will be some work that needs to be done in relation to give that some thought, but in the event the industry categories cannot be agreed, the Tribunal to rule on any dispute by, say, September 2023. None of this is written in stone but the parties have given some thought at least to the idea that perhaps there ought to be a step 1, which is determining the categories, and then

you can enable the triangulation, enable the experts' findings to at least relate to the same things. That is what we propose on that. In addition, we have of course the suggestion of our pricing experts, and to some extent when I left approach 4, that is where the pricing experts would partly come in. I propose to deal with the pricing experts under three headings. What are they supposed to achieve? Because one of the arguments made against me is that they are not going to achieve anything. "We don't understand what they are for." The second is, what evidence are they likely to look at? And the third is, what process are they proposing to adopt?

MR TIDSWELL: On approach 2 and the degree of correspondence or lack of correspondence with Mr Holt. It seems to me that approach 2 is quite similar to what Mr Holt is suggesting. Am I right in that? Is there a great deal of difference between the two?

MR MOSER: No, that is right, so approach 2 is Mr Holt's approach after a fashion.

MR TIDSWELL: And, indeed, of course, there are a number of different ways in which one might go about it in relation to both the availability of data and the availability of academic material but, broadly speaking, that is the same approach. The real substantive difference between your position and that advanced by Visa is, well, to some extent it is really about the pricing mechanisms. In relation to approaches 3 and 4, you are saying there is other material we can bring into account on these particular sectors and to some extent in relation to the particular claimants, albeit packaged up - that is the position, is it not?

MR MOSER: Yes.

MR TIDSWELL: And am I right in thinking that, in relation to both of those aspects, they - I know your experts mention the simulation model, but largely you are talking about contextual material that allows you to reach a view as to direction rather than outcome, is that fair?

MR MOSER: That is right. We are talking about, as far as possible, objective evidence, so the sort of material that can be tested against documents, and the information to be gathered not only on a documentary disclosure basis but a survey basis where necessary from the claimants, so that it might be grounded in the facts of the case, because we have not seen any public studies involving certainly most of the claimants in this case, and without evidence that is grounded in the nature of the sectors we are talking about, we are going to be left at the end with a situation of people saying, “Ah, but it doesn’t apply to me.”

MR TIDSWELL: This probably is not the way you would put it, I think, from the way you have described it, but you could see approach 4, and to some extent approach 3, as being a sense check on the outcome of approach 2? In other words, you are testing whether one can get from more general material, actually a good proxy, for what we are seeing on the ground in this situation?

MR MOSER: It is not very different from what the experts are saying. Obviously, they do not think it is just a sense check afterwards, like I showed you in Mr Holt’s report, but they say it is a sense check at the beginning, so you know where you are going. The differences are not that great. When you read Mr Holt’s report, I submit with some respect that the way that it has been portrayed by his own side perhaps make it seem more theoretical than it is because he does say in various places that he will require facts. For two minutes can I just show you paragraph 25 of his report, which is in this bundle at page 226? I believe it has been seen today, and he says at 25, “The validity of my proposed approach based on the public domain information and data summarised above rests on the premise that other costs changes in those data and studies are comparable to a change in ... as a matter of economic theory.” Just pausing there, again the whole dispute wrapped up in one as far as we are concerned. But he goes on and he says, “Factors I would consider to be relevant in this regard

include ...” and he gives costs change: “The nature of ... and the cost change.” And his source material for that in footnote 11 is the pass-on guidelines, at paragraph 54. If we look at the pass-on guidelines one more time, at authorities bundle 7, paragraph 51, what the Commission says is, “As set out further in ... in a given market ...” and so on. That is essentially what Mr Holt has described at paragraph 25. But the Commission then goes on and it says you have to, “ ... look at the nature of the product demand ... of the supply chain.” That is not mentioned in paragraph 25 of the seventh report but it should be if you are looking for factors that you ought to consider relevant in this regard. I respectfully submit all of these factors are relevant in this regard to test the validity of Mr Holt’s proposed approach. So, that is the evidence that we need ab initio, not ...

MR JUSTICE ROTH: He does say that the things he lists just include those, and he references the paragraph you have just taken us to.

MR MOSER: In which case Mr Holt and I agree and I add, of course, one needs it then from the beginning, not somehow afterwards. The trial is going to be a trial, it is not going to be a dress rehearsal. So, all the evidence will have to be there from now, starting from when the Tribunal gives its judgment; it has to be prepared and available. Leaving that there, thank you for that question, and just in the time I have left, and I must leave some time for Primark and Ocado, and, I am sorry, I did not ask how late the Tribunal in the end decided it wanted to sit ...

MR JUSTICE MARCUS SMITH: We will discuss it when we rise for the transcriber break, but we will see how far beyond half past 4 we can go.

MR MOSER: I am grateful. It may not be necessary. I certainly propose to finish in the not too distant future. (Laughter) Ultimately, what the pricing expert is intended to achieve is to allow the Tribunal to make findings as to how pricing is generally conducted in each industry sector, which is at the heart of the issue, and it may not be

necessary to say why that is relevant, but it is relevant to the economists who want to use passing on, like Mr Holt, Mr Coombs and Mr Dryden and Dr Trento, in part, and that specifically depends on that crucial point that I have just looked at in paragraph 25 of Holt, where he rightly says, "The crucial point is, is there a good analogy between passing on of modelled costs and passing on of MIFs?" And you cannot judge that without an understanding of the facts about each industry and how prices are set. Secondly, we need some degree of factual knowledge for approach 3 as well to group the industries. Thirdly, you need some of these facts for pricing practices to apply approach 4, as we have discussed. And then, lastly, to the extent that there is any question of whether the causal relationship between the IFs and the downstream prices is sufficiently direct and proximate to constitute mitigation, that needs to be investigated again with respect to the particular facts, and my learned friend took the Tribunal to Sainsbury's and those passages between paragraphs 438 and 452 or something where they set out all of the facts on that particular retailer. One could do a similar exercise in Trucks, between paragraphs 570 odd to 600 odd, so page 1293 to page 1321. There is quite a lengthy section on the facts there. That obviously will not be necessary or possible in this case, but I would expect that the Tribunal would find it necessary to write at least a few pages on each of the relevant sectors, however many there were found, whether it is 14 or 39 or 79 (it seems unlikely), but something about the facts of each sector in order to ground the findings for the pass-on rate, and for that it would be necessary to have some evidence on how pricing is done in these sectors. So, that is going to be mediated and presented by the pricing experts. It is important to remember that they are not all Sainsbury's, they are not all supermarkets, they are not even all merchants. We keep calling them the Merchant Claimants but you have got companies as diverse as Burger King, Bet 365, local councils or the Royal Shakespeare Company, which is not a merchant in the ordinary sense at all.

For some of them at least, pricing may be very bespoke, and that is why in some cases an industry expert may be necessary. So, the Royal Opera House or the Royal Shakespeare Company, they are not profit driven in the same way; they are, for instance, concerned with things like access and being able to put on Shakespeare or Puccini, or whatever it may be. So, it may be the Merchant of Venice, but not merchant as we know it. To get a sense of what the actual evidence may look like, if I can take you in the time I have left to the LEK letters, the Mr Economides letters, and the first one is the 13th of March letter and the second one is going to be the 16th of May letter. The letter dated 13th March is in bundle 1, tab 5, page 99. He gives us an idea of what he is expert in at paragraph 7 and what he and his team do in the ordinary course of business, and broadly speaking they analyze companies' pricing and margin and advise them on what they can do to improve those, in some cases to maximise profits, and one might say that this is an area of expertise that was made for the pass-on case. At paragraph 13 on page 102, if you can just look at that to give you a sense of the factual matters that he would want to explore on each of the sectors we are looking at: "Repetitive dynamics, the regulation or otherwise customer willingness to pay, discretionary/non-discretionary, the prevalent pricing model ..." and that is expanded on in the second letter. "The overall cost structure, constraints on price increases and investor return expectations" and I have touched on that. So, for instance, for universities or the Royal Opera House, they would not all be concerned that their total revenue exceeds their total cost. They would like so that they do not go bust, but they might have donations, they might have other non-commercial sources of income, including public funding. At 16, importantly, he tells us what his report would do: "Assist the economic experts and the Tribunal by gathering ... any appropriate methods." We have been quite bearish, I think, in our skeleton argument as to how far the pricing experts could go to give the actual answer. I say in oral submission, I

submit there is at least a chance that the pricing experts could go a long way to providing the actual answer. He describes at paragraph 22 and following how he would do that, including ...

MR JUSTICE MARCUS SMITH: By providing the actual answer, you mean actually saying, "The cost will be X%"?

MR MOSER: In some areas, yes. At 22 and following he explains how he is going to do this. He proposes a survey. There has been a certain degree of criticism of the use of the survey on not being able to cross-examine and so on. But I submit that surveys are a fairly standard way of collecting information in competition law cases, indeed in another case where my Lord, Mr Justice Roth, is presiding, and Mr Holt is an expert, he has proposed a survey, in the government case, endorsed by the CAT and the Court of Appeal. And it is not suggested that all the respondents to the survey have to be cross-examined. That is not, in my experience, ever suggested in competition law cases. It may well be that all of the experts would want to have some input into the design of the survey, and certainly as far as these claimants are concerned, we have no difficulty with that. He then explains at 25 what work he would do, including all of the things like reviewing the industry reports and analysis of costs and financial performance data that one would expect. We then have, finally, the LEK letter of the 16th of May and that is in the supplementary bundle, at tab 15. If I may pick it up at paragraph 9, because he summarises what he said before at 7 and 8, and at 9 there is the perhaps simply common sense point that there are factors that different between different industries and that this necessitates the adoption of differential pricing strategies and pricing models. I call this, "We are not all a Sainsbury's" letter. So, the pricing model is not somehow a separate formula but it depends on the economic characteristics of the particular market in each case. He gives two examples and the first example he gives is of goods or services that are

discretionary, so consumers must be very price sensitive, but the second is one where there are very high fixed costs and perishable inventories and so pricing is set to maximise demand, and he does that over the following paragraphs. At pages 234 and 235 he gives the typical pricing strategies observed in different sectors. I am sure the Tribunal has looked at this, I will not read it out again but I do urge these passages on the Tribunal because they give a greater sense of what he is referring to in his first letter when he talks about pricing models. So, no doubt these would be expanded on in his report and the reports of the other pricing experts, and there may be other models and there may be other variants. But what he is proposing to do is look at each industry with the benefit of the survey and say how pricing in that industry generally is to be characterised in terms of models like these and what the features of that model are. And there may be different models between smaller and larger operators and so on, but it is helpful because the pricing experts will be able to summarise those kinds of differences for the Tribunal, and they have differences of opinion between them and their pricing expert may say, “Oh, but that’s rubbish, this is not how it’s done and, anyway, I question the value of the underlying evidence he is relying on” or whatever. And then they could be cross-examined about it. That is the level of cross-examination that we envisage when we put forward a pricing expert in order to make tractable the industry evidence. So, they are going to do a number of things. They are going to do a lot of the basic work of assembling a factual picture so that there is something to do on a smaller scale, as we saw in Sainsbury’s and in Trucks, for that introductory paragraph describing the basic facts about how each industry operates, they would be able to test the factual material. We are not going to have a trial with witnesses for each claimant, so they are going to test it and all sides will have a pricing expert and they can scrutinize the factual assertions as against each other. Thirdly, they will be able to fit that factual material into a conceptual

architecture of how prices are set industry by industry that will assist the Tribunal to identify the key relevant features and explain the tendencies of models. Finally, they will be able to implement or assist in implementing the experts' approach 4. So, that is the pricing expert. I propose to say nothing more really about acquirer pass-on. What my experts say about that is at pages 97 and 98. It does seem to be a bit of a moving feast, so I will not touch it for now, and I do not want to add anything to what Mr Beltrami said about 1013 or indeed adding further aspects of the acquirer pass-on from Trial 1 into Trial 2. I submit the Tribunal has enough on its plate for Trial 2 without adding these further issues, but I will reserve any comments for my reply.

MR JUSTICE MARCUS SMITH: Thank you very much, Mr Moser.

MR JUSTICE ROTH: Mr Moser, if you go back to Mr Economides' first letter in bundle 1, tab 5, page 104 that you took us to and that passage, paragraph 22 and surveys often used and so on, and he goes on in paragraph 24 to say, "The claimants also propose that industry experts could be instructed to produce ... assess them." My question is, he puts it rather as though his primary basis is his research programme and this would be a sort of useful supplement, but if the industry experts are able to comment on these various aspects for the industry, does one really then need this sort of detailed survey?

MR MOSER: The premise of that part of his report is that he assumes that we are only going to use industry experts for very bespoke sorts of industries where a survey is not practical because you are not going to have a large data base. If there is going to be an approach chosen where there are numerous industry experts for industries, you can probably do without the duplication. So, it depends on the moving pieces. You can expand the industry experts, which should reduce the need for surveys, or you can shrink the industry experts and then the surveys have to bear more of the weight. In our original concept of all of this, the industry experts perhaps played a

smaller role than in the concept put forward by HK and S&S, although I do not cut across theirs, it is a matter for the Tribunal, but in so far as the industry experts are considered useful, they are certainly to be recommended to the Tribunal.

MR JUSTICE ROTH: Yes, thank you.

MR MOSER: Anything else?

MR JUSTICE MARCUS SMITH: No, thank you very much, Mr Moser. Will it be Mr Spitz and Mr Segan after the break? Yes. We will rise for 10 minutes and we will discuss how far beyond 4.30 we can go so that none of you are under undue time pressure. We will rise now.

(15.33)

(A short adjournment)

(15.46)

MR JUSTICE MARCUS SMITH: Mr Segan, we can run until a quarter to, and that should not be taken as an open invitation but if you need the time, that is the time we have available this afternoon.

MR SEGAN: I am most grateful and I shall endeavour to finish in the near future, in the traditional way. Members of the Tribunal, I appear for Primark. Primark has claims against both Visa and Mastercard, and the estimated value of those claims is very substantial, it is at least a £100 million against Visa and around £55 million against Mastercard, and that is only going back as far as 2006, those calculations. We have set out our - indeed, and before interest, that is quite right. We have set out our position on the issues for this hearing in our skeleton argument which is at tab 4 of the supplementary bundle, and in order to avoid any duplication I want to focus in my oral submissions on the importance under the expert-led approach on which all parties are now agreed of including an exceptions process as was envisaged by the Tribunal in its letter of the 5th of December 2022, and it is worth just to orient the point turning up

the Tribunal's letter which is in volume 3, at tab 31. The expert-led approach was set out from paragraph 6 onwards, but if I could take us to page 821, one sees that, in paragraph 7, we have, "This approach would involve expert evidence on a reasonably wide and deep sector-by-sector basis ..." etc. Paragraph 8, "The aim would be to end up with a benchmark, by industry, for pass-on… always leaving open an "exceptions" process where any party (claimant or defendant) could seek to persuade the Tribunal that the position of a particular claimant was different from the benchmark established for their particular industry." Our submission, in short, is that affording an exceptions process of that nature is an important element of ensuring the overall fairness of the proceedings and ultimately indeed their compliance with the compensatory principle. As Mr Beltrami submitted to you earlier this afternoon, that is in a sense the other side of the coin of adopting a benchmark approach in the first place. The only party before you which opposes the inclusion of an exceptions process is Mastercard and it is because of Mastercard's position that I make these submissions. I want essentially to deal with three main topics. First of all, the nature of the likely output from Trial 2 and why that makes an exceptions process so important. That is the first point. The second point is the safeguards that the parties are proposing to make sure that the process is only used in a proportionate way - the second point. And then, thirdly, Mastercard's objections to that process. So, turning to the first of those points, the nature of the outputs from Trial 2, the starting point here is that no party before the Tribunal disputes that ultimately, as a matter of principle, the question of whether a particular overcharge was or was not passed on by a particular merchant claimant is an empirical question. That is, of course, stressed by Mastercard's expert, Dr Niels, who emphasises throughout his report the important merchant-specific element, as it is put, in supplier pass-on. That is, for instance, paragraph 1.24 to 1.25 and 3.20 of his report, which is at tab 17. It is actually also recognised by Mr Holt, that is in his

fifth report, which you have already been taken to, at paragraph 31, and his seventh report, at paragraph 13. That recgonition is consistent, as we have already seen earlier today, with the Sainsbury's and the Trucks decisions in which the resolution of the pass-on question included extensive consideration of fact evidence as to how claimants had set their prices, and we will not go back over that. Why is that relevant to an exceptions process? The answer is that, as the Tribunal is only too aware, painfully aware given the length at which the issue has been considered, that level of detail at which the issue was considered in Sainsbury's or in Trucks is simply not feasible given the number of claimants before the Tribunal in this case. It is not going to be possible to replicate that level of analysis for each of the claimants. Of course, the Tribunal gave some very clear indications following the hearings in March, May and November last year that it wanted to try as many generic issues as it could before one had to turn to the facts of particular cases, and that included causation and quantum, and the Tribunal's letter in December '22 set out, as we have seen, some very helpful ways of approaching that task. All of the parties before you have responded to that indication and are now all proposing expert-led methodologies directed to producing a series of pass-on benchmarks by what I will call sector or segment. Although naturally the focus of this hearing in the nature of things is on the differences between the parties' approaches, it is worth emphasising the basic output of Trial 2 is now common ground. No-one is proposing that Trial 2 will result in pass-on determinations or rates for any particular claimant. All parties are proposing an expert-led two stage process under which, first of all, there will be a grouping exercise to determine the various sectors or segments for which benchmark rates will be constructed and then, secondly, a form of expert-led analysis to determine a benchmark rate for each of those sectors or segments. There is a dispute already canvased as to whether there ought to be any consideration of the facts of anyone's

cases at that stage, but that is a dispute which does not affect the overall output of the process, which will be a series of benchmark determinations on a sector-by-sector or segment-by-segment basis. The attraction of that structure in the particular circumstances of this case is reasonably clear: once the benchmarks are set, after a detailed trial, and no doubt extremely detailed judgment, then they will likely be strongly attractive to large numbers of claimants and will provide a clear basis for settlement ...

MR JUSTICE MARCUS SMITH: Mr Segan, I think you must be careful about reading too much into the exact nature of the exceptions process that we articulated in our letter of 5th December. In a sense, it is the flipside of the process by which we elect to determine the resolution of pass-on in Trial 2. So, there is clearly something of a nexus there and the reason we are so interested in hearing from you and indeed from Mr Spitz is so that when we state the precise extent of the bindingness of Trial 2, you have had your clients' interests placed before the Tribunal. So, whilst, of course, you may well be right that the outcome of Trial 2 is solely a non-binding benchmark to facilitate settlement, that is not, I think, necessarily the outcome, and it certainly would not be my preferred outcome for Trial 2. But that is why these submissions are so valuable. I thought I had better put that marker down because I would not want you to sit down thinking that this is a kind of *fac oblig* situation where you can wait for the outcome of Trial 2 and, if you do not like it, you can, without particular let or hindrance, relitigate the matter, because that is something which we do not envisage an exceptions process as providing.

MR SEGAN: I am fully aware of that, sir, and indeed, having been back through the transcripts, it is evident how concerned the Tribunal has been about that issue, and Ashmore abuse of process, res judicata and the such like, and that is why, when I come to my second point, we do stress the safeguards or controls that are built into

the process to make sure that it is only used by a claimant which has a genuine and properly founded belief that the benchmark, however determined, simply does not govern the facts of its particular case.

MR JUSTICE MARCUS SMITH: And we do not have really very much clarity about why it is that you say and why Ocado say you are so different from the range of others such that you cannot feed into the Trial 2 process directly. Is that something which you and Ocado have given thought to or is that something which you have simply gone for the stay and been bound by the result option that, of course, we have offered to all parties?

MR SEGAN: What we have said in that regard is that, and I will be coming to it in Mr Ramirez's report, exactly how my client sets its prices, but certainly it has never been any part of our position to say that automatically we will be out with whatever benchmark is set. All that can be said at this stage is that there is reason to believe that we may not, and it is actually a point that Mr Beltrami has already made to the Tribunal today: there may be an interrelationship between precisely what the sectors or segments considered at Trial 2 actually are and how those benchmarks are determined, the extent to which they are based on, for instance, wholly generic evidence, the extent to which they take into account the facts of the industry or particular cases. There may be an extent to which that interrelates with how attractive or otherwise, for the purposes of settlement, the benchmarks produced from the process are, and therefore inevitably there is an interrelationship between the two stages of the process. But at this point one can obviously see the attraction, having looked at the transcripts, that is one of the reasons why pass--on was identified as the topic for Trial 2. I have seen that from the transcript of the November hearing: that and the liability issues under 101 were the two areas that would make the greatest difference in terms of claimants dropping out of the proceedings and providing a

platform for settlement, and we actually see that. But as I have already submitted, the Tribunal has always recognised that that kind of expert-led benchmark process has to have some kind of safety valve built in.

MR JUSTICE MARCUS SMITH: Do not get me wrong, Mr Segan. Of course, that is right. What I am just trying to get a handle on is - we obviously have a problem in both Trial 1 and Trial 2 with the volume of claims, hence the very helpful grouping of parties so that one can actually manage this. The reason I am pressing you on this is partly to enable us to frame an appropriate exceptions rule but also to understand whether you are not participating in Trial 2 because you feel there is not room for you, or because you do not want - because if there is not room for you, one of the things I would not want to have undebated in these three days is the value of having outliers, if you are an outlier, in the main process, provided, of course, it does not derail the whole thing. So, I am really approaching matters in this regard from the other end of the telescope. I am not saying let's assume you are out and need an exceptions regime. Let's at least put on the table the advantages and disadvantages of you being in, and an exceptions process at least so far as you are concerned not therefore being necessary.

MR SEGAN: It is fair to say that our position as set out in the papers has not been an absolute "no" to participation in Trial 2. We have always accepted, given the number of different sampling proposals that are floating around in different people's methodologies, that if Primark ended up in one of the samples, then clearly we would want to be here and represented, and making sure the Tribunal was properly appraised of the facts of our particular case. So it is not an absolute no. To come to the question that you asked earlier, sir, about our pricing process, it is set out in my client's expert evidence, Mr Ramirez's report, tab 10 at paragraph 6. Essentially my client's overriding objective is to offer the lowest price point in the market, irrespective

of whether that price reduces its profit margin or not. We obviously say that sets us potentially in a rather distinct situation. I will obviously come back to that. But just on this question of why we need an exceptions process, as we say a safety valve, ultimately it is about compliance with the compensatory principle. Obviously the Tribunal has studied very closely Sainsbury in the Supreme Court and has indeed written a very careful passage on the decision in the pass-on judgment. So I am not going to go back through it but as the Tribunal will know there are many references to the importance of the compensatory principle in that decision. Giving some references, paragraph 182, paragraph 189, 194, 192 and 217. Indeed, just for the purposes I want to make later, it might be worth just turning up 217. Authorities 3, tab 9, page 778: "The court in applying the compensatory principle is charged with avoiding under-compensation and also over-compensation. Justice is not achieved if a claimant receives less or more than its actual loss." A similar point is made in the Trucks case at paragraph 175. So, the exceptions process, we say, is a vital safety valve to make sure that in an exceptional case one can ensure that that principle is complied with. Of course, if there were not such a process, then there would be scope for a claimant, or indeed a defendant, to end up with a result that simply does not fit with the facts of a particular case. The segments at this stage, according to which the benchmarks are going to be produced, are, of course, still up for grabs. But it is worth just having regard to the sectors into which, as things stand, my client would, for instance, fall. So, if we take Mr Holt, as we know, and as Mr Moser pointed out a moment ago, he proposes 14 industry segments at paragraph 41 and 43. Now on that classification my client would fall within 'Department and Apparel'. That is not just all department stores and clothing retailers in the UK; but it is also, as we understand it from paragraph 62 of his fifth report, all furniture retailers. Mr Coombs, for Merricks, proposes 12 categories of which we would fall into clothing and footwear. That is

paragraph 3.15 to 3.16 of his 7th report. Then, as you were shown earlier, under the approaches of Mr Falcon and Dr Frankel, Mr Dryden and Mr Trento, and Dr Niels, the groupings are all to be worked out subsequently by reference to factors relevant to the likelihood of pass-on. Under the original 10 category proposal of Mr Falcon and Dr Frankel, we would have been in retail major, so the whole of retail. Even under the 39 category list we would still simply be in 'Retail, Fashion and Beauty'. That is volume 4, tab 42, page 1535.

MR JUSTICE MARCUS SMITH: One cannot, without assessing pass-on homogeneity, commit to a sector approach. I mean, that is putting the cart before the horse. In a sense what your submissions are very helpfully highlighting is the importance of ensuring that divergences are factored into the generic process that Trial 2 considers.

MR SEGAN: Yes. And I do not take issue with that at all. The point I am trying to draw out from this is that when one looks at the various proposals, there is quite a diversity of different proposed approaches to determining what segments we will actually have, and at present at least no certainty at all as to what segments we will actually be dealing with.

MR JUSTICE MARCUS SMITH: No.

MR SEGAN: But what we do know is that the narrowest category that might embrace my client that has been suggested so far is all clothing or fashion retailers in the UK. As I have already explained, my client operates brick and mortar stores at the budget end of the high street. I have explained the pricing policy, and we say at present one simply cannot know whether whatever benchmark is set will capture those circumstances sufficiently or not. We obviously hope it will, but it would be wrong, we say, in principle, to rule out even the possibility of seeking to demonstrate otherwise.

MR JUSTICE MARCUS SMITH: Yes. That is assuming you have absolutely no role

in Trial 2. As you said earlier, if you were involved in, say, a sampling process, the position becomes rather more nuanced.

MR SEGAN: Then there may be different considerations --

MR JUSTICE MARCUS SMITH: Yes.

MR SEGAN: -- if we are in a sampling process, and also I think your question, sir, posits potentially two different types of challenges to the Trial 2 process, because in one sense you may have a case – any claimant may have a case - that the benchmark set in the Trial 2 process for a particular segment was simply set wrongly, and maybe some alleged error of law, whatever it may be. The correct avenue for that kind of challenge obviously would be an appeal. The exceptions process is a slightly different thing.

MR JUSTICE MARCUS SMITH: Oh it is, yes.

MR SEGAN: And it recognises -- That is a different type of challenge that recognises that whatever benchmark is set and however careful the Tribunal is to ensure that circumstances within a given segment are homogenous, there has to be scope for a claimant whose case is prima facie caught by a particular benchmark, however carefully set, to come along and at least to attempt to persuade the Tribunal that the circumstances of its case are sufficiently exceptional that the benchmark ought not to apply or ought to be adjusted.

MR JUSTICE MARCUS SMITH: No. That is entirely true, but one must bear in mind that it is the non-participating parties who have chosen that course, because the offer of participation has been made to all, and it is those who have accepted a stay on terms that they provide disclosure and are bound by the results. Well, that is your position and what we are talking about is really the amount of wiggle room that will be provided to a party who voluntarily accepts a stay on those terms. So, I mean, that is the geometry we are talking about. You have signed up to the stay. We have not yet

signed up to the process by which --

MR SEGAN: No, we have not signed up to the stay.

MR JUSTICE MARCUS SMITH: I see. What have you done then?

MR SEGAN: We are here and we are caught by the Umbrella Proceedings.

MR JUSTICE MARCUS SMITH: Of course you are caught by the Umbrella Proceedings.

MR SEGAN: But our case has not been stayed, unless I am about to be tapped on the shoulder --

MR JUSTICE MARCUS SMITH: Okay.

MR SEGAN: -- and told I am wrong.

MR JUSTICE MARCUS SMITH: So at the moment your --

MR SEGAN: Our claim proceeds.

MR JUSTICE MARCUS SMITH: You are participating in Trial 2.

MR SEGAN: The extent to which we participate depends on the extent to which Primark's particular case is actually in issue.

MR JUSTICE MARCUS SMITH: Okay. Then what happens if you do not participate?

MR SEGAN: If we do not participate at all, that will be because Primark's facts did not arise for consideration.

MR JUSTICE MARCUS SMITH: Okay.

MR SEGAN: Sorry.

MR JUSTICE MARCUS SMITH: No, no. It is, I am sure, my fault. One of the guiding points regarding the management of these cases is that I wanted everyone to understand exactly where they are coming from and we have got active participants; we have got stayed participants. In both of those cases the position is clear.

MR SEGAN: Yes.

MR JUSTICE MARCUS SMITH: You fall – my mistake – into the third class of "inactive

participant", and that is a class which has caused me a degree of concern. When we are making orders we take great care to ensure that those orders are regarded as binding, not merely on the active participants but also on the inactive participants – and that is something, clearly, we are going to have to consider with some care.

MR SEGAN: Certainly. As I hope I made clear, we have tried to give some careful thought to a procedure to make sure that the exceptions procedure is not regarded by anybody – be it my client or anybody else – as some kind of free-run.

MR JUSTICE MARCUS SMITH: No.

MR SEGAN: And I will be coming to the safeguards in a moment. That is a message that we have heard loud and clear.

MR JUSTICE MARCUS SMITH: Yes. It may be, because of course you should not be in the position of having to buy a pig in a poke yourself, that you ought to have an election once we have decided how Trial 2 is to be resolved, as to whether you come in or whether you stay. But we eliminate your position as an inactive participant which is, I am bound to say, a category that I have been at some pains to make smaller, not bigger.

MR SEGAN: Well, there is no question, as I observed earlier, that the usefulness or otherwise of the benchmark for particular claimants will depend on exactly how it is going to be constructed, for what sector, what segment – a topic over which we do not ourselves have any direct control and which is, on the papers and on the arguments before the Tribunal, very much up for grabs. So, it is certainly the case that we would know – I would hope we would know a lot more somewhat further down the line which would be relevant to the kinds of issues that you are raising with me, sir, very fairly. But I am not sure I can go any further than that, given that at present there is, as I hope I have explained, so much uncertainty over what the segments might be, how they can be put together and what evidence-base the benchmark is going to be set

on. Indeed, if one takes Mr Holt's approach, for instance, it is notable that he described the output of his analysis in his fifth report at paragraph 9, at page 1933, as a starting point for the quantum pass-on rate for claimants falling within each sector, subject to the parties having the opportunity to identify claimant specific reasons why the pass-on rate for any particular claimant is likely to have differed materially. So, his conception in his fifth report was what he was producing was a starting point. The other expression that is used in his fifth report, and indeed in his seventh report, is a baseline estimate of merchant pass-on at the broad sector level. That is his fifth report at paragraph 61(a) and his seventh report at 16, 19, 36, 51 and 115. At any rate, the Tribunal has my point that we say it is important that that safety valve is there.

MR JUSTICE MARCUS SMITH: Yes.

MR SEGAN: And that is the first of my three points. The second, which I have promised to come on to on a number of occasions, is the safeguards. As I say, we are very much alive to the need to ensure that the process is used in a proportionate manner. That is why, in our letters of 13 March and 26 April (tabs 9 and 18 respectively) we proposed three strong controls. First of all, and obviously, any exceptions hearing should be strictly time-limited. There has been reference to two days, but obviously that is ultimately up to the Tribunal. Secondly, whichever party invokes the process, the Tribunal will, of course, remain free to conclude that the pass-on rate had been lower or higher than the benchmark so that a claimant invoking the process would have to take the risk that its rate was found to be higher than the sectoral benchmark. It is not a one-way bet, and that is obviously intended to ensure that those – only those with a genuine belief in their case, no doubt based on experts' input, avail themselves. Then, thirdly, there is the point that you have already referred to earlier today which is the costs risk. Our proposal was that, if a claimant or a defendant failed to establish that the rate was different from the sectoral benchmark,

then they would bear the reasonable and proportionate costs of the hearing, and that would be clear from the outset. Now, in relation to that last point, Visa has suggested that we should not build in an automatic cost rule, and they have drawn attention to the usual Tribunal rules on costs. Now, we have indicated we will not press that if Visa disagree with it, but the point is simply that we included it. The reason it was there was intended to achieve the same outcome or the same pressure as the second control, i.e. people do not invoke this process unless they have a measure of confidence in their position. Now, Visa suggests, in para 31 of its skeleton, that there might be or should be perhaps criteria to be satisfied to enable the exceptions process to be triggered, but it says that it is premature to determine those criteria. Now, we respectfully disagree with that. We think the safeguards that I have just explained are quite sufficient and that no further criteria are necessary. Perhaps more importantly, we say that if there are to be criteria, then because the process is part of the overall balance in terms of the structure of resolving this issue, then those criteria need to be proposed and dealt with now, or in the near future. It is not something that can realistically be left until much further down the line. We have not seen any proposal of what those criteria might be.

MR JUSTICE MARCUS SMITH: One might have something that one could call a valued risk criteria in the sense that one would not want, even under an exceptions process, an argument that the pass-on rate, even if it were beaten as it were by a party seeking exception, would have a monetary value of less than a certain amount. If that were the outcome, even if you, as it were, beat the generic rate but only recover a tiny amount, one might say: well, the exceptions process ought not to have been triggered there and the costs might follow, even if you had beaten the amount by a margin.

MR SEGAN: Yes, I see.

MR JUSTICE MARCUS SMITH: So, a sort of control against the minor overshoot that

you might see, might have, and so to focus on exceptions which were, as it were, worth the candle.

MR SEGAN: Yes. I can see the sense of that. Obviously that is the first time that particular proposal has been advanced, and Visa have not put forward their own proposed criteria, and so obviously I would take instructions, but one can see the sense of that, and in a sense it comes from the same place as our proposed controls.

MR JUSTICE MARCUS SMITH: It is a variant on your costs risk point.

MR SEGAN: Yes.

MR JUSTICE MARCUS SMITH: That is absolutely right.

MR SEGAN: That then brings me finally to my third main topic, which was Mastercard's objections. As I have already explained, the principle of an exceptions process agreed with by everybody apart from Mastercard, and their objection is advanced in paragraph 60 to 61 of their skeleton argument. It reiterates points made in letters of 12 April and 2 May. Essentially the central complaint is they say that an exceptions process enables cherry-picking or gives rise to what they describe as a selection problem because they say only claimants with good cases will avail themselves of this process. We say that is plainly not any kind of answer to the need for an exceptions process for at least three reasons. First of all, as we observe in our skeleton argument, a claimant invoking this process would not, in any sense, in fact, be cherry-picking at all. It would simply be asking for its claim to be resolved in a manner which includes reference to facts which it says put it in an exceptional category. The ability to ask for that is not cherry picking. We say it is important to make sure that the overall process is capable of complying with justice, fairness and the compensatory principle.

MR JUSTICE MARCUS SMITH: Mr Segan, the question really is: are you – or how closely are you to be analogised to a party in collective proceedings where of course

there is the opting in/opting out choice, and where certainly those participants with significant claims think long and hard about whether they want to be in the collective action and obviously bound, or out and free to act as they wish.

MR SEGAN: Yes.

MR JUSTICE MARCUS SMITH: This is not that case, but it is obviously the case where we are concerned to ensure efficiency of trial, hence a narrow exceptions regime but also, and this is not what informs opting in and opting out of collective actions, we are equally concerned that those parties who have important evidence to bring, perhaps precisely because they are outliers, are not (inaudible) but are actually, if they can assist, incentivised to assist the parties at the price, of course, of being further bound.

MR SEGAN: Yes. I think the answer to your question, sir, requires a kind of bifurcation between the principle of the thing and the practical circumstances that we are faced with. As a matter of principle, and this is a position that I know has been strongly urged upon the Tribunal on previous occasions, as a matter of principle the actions of the Merchant Claimants are not collective proceedings. They are each individual claims for breach of statutory duty. For reasons of convenience and very good overall litigation reasons, a large number of them have been grouped together with the two sets of principal claimant groups, as it were. But that does not alter the point that as a matter of principle the Tribunal is faced with a whole – a very large number of what are in principle distinct claims for breach of statutory duty. That is the position in principle. As a matter of practice, of course, the Tribunal has indicated that because of the sheer number of claims with which it is faced, it has to adopt solutions that probably would not be adopted if you were faced with three or four claims. The Tribunal has adopted a process under which as many generic issues are tried as early as possible in order to progress everybody's claims in-so-far as one can before one

has to get to the facts of a particular case. That, as I have said, makes perfect sense. So, we do not see this as anything like a sort of opt-in situation. Because of the approach the Tribunal is taking, what you will end up with is benchmarks which are prima facie applicable to groups of claimants. As I say, if they take issue with those benchmarks, and how they were set, then they would need to appeal. But if there are cases instead, on the other hand, that there are particular circumstances that mean that the benchmark simply is not properly applicable to their case, then the exceptions test is the right way to go. I dealt with the first of the reasons why we say Mastercard's position is wrong. The second was that rather more prosaically the process we are proposing is, we emphasise symmetrical in any event. It is not a process which is limited just to claimants. If Mastercard wishes to identify and no doubt in order to be worth pursuing, they would be larger cases, for all the reasons that, sir, you have already put to me, but if it wishes to identify what it says are bad cases by contrast with the good cases in its skeleton argument, then it can invoke the process for those cases. Now, a suggestion is made that Mastercard will lack relevant information for those purposes. That depends obviously first of all on what information is actually gathered for the Trial 2 process. We know, for instance, Dr Niels, Mastercard's expert, is proposing surveys to each of the claimants. If they do not have that information, then they are at liberty to ask for it and to use the ordinary processes for obtaining information through a litigation process. So, we do not see that the information issue is a serious barrier here. Thirdly, their point rests to an extent on an assumption about the distribution of claimants within each segment which may or may not be true. If the Tribunal could just pick up, please, Mastercard's skeleton at paragraph 60(d) – I do not know if the Tribunal has them loose. They are also in the supplemental volume.

MR JUSTICE MARCUS SMITH: Yes.

MR SEGAN: We can see at 60(d) on page 16 they say: "A sectoral average rate of

pass-on includes (by definition) both firstly merchant claimants with above-average rates of pass-on and, secondly, merchant claimants with below average rates of pass-on." Then they say: "Using a sectoral average will therefore necessarily over-compensate the former and under-compensate the latter, whilst leaving Mastercard's overall liability unchanged." Now, that assumes, of course, that the population of claimants within any given sector – the distribution of them – is the same as the distribution of claimants within that sector nationwide, which may or may not be true. It also depends, of course, on how the benchmarks are constructed and the sectors that are chosen in the first place. That paragraph is important for a rather different reason because it encapsulates what Mastercard is asking the Tribunal to order by asking it to have no exceptions process. It explicitly acknowledges that, if there is no exceptions process, then what they are proposing will necessarily under-compensate some claimants and over-compensate others. To proceed on such a basis would, we say, clearly fail to comply with the compensatory principle. As I showed you earlier at paragraph 217 in Sainsbury's the Supreme Court say justice is not achieved if the claimant receives less or more than its actual loss. Now, of course I accept, as I have already accepted, that in attempting to identify what the actual loss is, the Tribunal can and will use estimates. The structure everybody is proposing will include that approach, because one has benchmarks and then a safety valve. It is quite another thing, however, to propose a method, as Mastercard does, that would necessarily fail to achieve that outcome. That would be, we say, inherently unfair. So, for all of those reasons we say, in common with all the claimant groups and Visa, that an exceptions process is an important part of the overall balance of an expert-led benchmarks process. Just one final point of detail: in paragraph 21 of Merricks' skeleton it is suggested that Primark agrees with assessing sectoral merchant pass-on as proposed by Mr Merricks and Visa. I think that is just a reference to us agreeing the basic

structure of having a sectoral benchmark and then an exceptions process, but if it is intended to suggest that we agree with the methodologies proposed by Mr Coombs or Mr Holt, then that is wrong. We broadly endorse the approach of Mr Dryden and Mr Trento as we have explained in our skeleton argument. Sir, unless there is anything else I can add. I just need to check one thing and then I shall be finished. (After a pause) Those are my submissions. I am grateful.

MR JUSTICE MARCUS SMITH: Just three sweep-up points which we put out there for general consideration – they do not necessarily need a response but we would like all the parties to bear them in mind – first of all, have the parties considered, and if not perhaps they should, some kind of mediation process before a formal exceptions regime was triggered so that court time can be dealt with on a really as needed basis rather than as the first port of call? Now, that might save court time but also facilitate a somewhat more generous exceptions process if one had a process of mediation beforehand. That is the first point. The second point is more one for the schemes. You are quite right that our letter indicated that the exceptions regime would be symmetric, in that it would be open to both the claimants and the schemes. The concern about that would be that one might have, in the case of the schemes, a root and branch revisiting of the Trial 2 outcome which obviously is not something that would be desirable or indeed, I think, intended. So, either one would need to have an asymmetric exception scheme whereby it is only the claimants who would say they were being under-compensated could exercise it, or some kind of filter that was specifically in play in relation to the schemes. I put that out there because it just struck me as something that we ought to close out because I know no-one is thinking of this at the moment, but if we were to have a wholesale attempt to revisit many claims because they were all exceptions, that is something which would be undesirable in the extreme, and I would want it closed out before it became a serious temptation for

anyone who did not like particularly the way in which we approach pass-on in Trial 2. The third point, and again I put it out there for consideration, is what costs regime applies to those who have neither put themselves in the active claimant camp, nor in the "I am stayed" camp, i.e. those who have not actually articulated their position. Normally, one would say in this case "costs in the case" which would probably mean that Primark would escape by keeping, as it were, a low profile. I am not sure that should be necessarily the outcome here, and it does seem to me that one needs to at least consider what the costs regime ought to be in relation to those, as it were, undeclared but unstayed participants going forward. That again I put for consideration and no need for an immediate response, but it is something that again I think we need to have in mind for the purposes of our ruling in this matter.

MR SEGAN: I shall obviously take instructions on all of those points as I am sure all my learned friends will.

MR JUSTICE MARCUS SMITH: Indeed. That is really why I have put it out there now. I see the time. Mr Spitz, is it perhaps better if we start with you tomorrow? I do not want you to feel under any undue pressure.

MR SPITZ: I am happy to start tomorrow. I do not expect that I will be very long because I do not propose to repeat, but I think it probably makes sense in any event. I do not think I can do it in seven minutes.

MR JUSTICE MARCUS SMITH: No. Speaking entirely for myself I found the exchanges with Mr Segan extremely helpful and I would not want either your style or mine, or indeed those of my colleagues, to be particularly cramped. If we started at 10 o'clock, would that be problematic for any of the parties? I am seeing shaking of heads. I am very grateful. In that case, Mr Spitz, we will start with you at 10 o'clock tomorrow morning.

(16.38)

(Adjourned until 10 a.m. on Wednesday, 24 May 2023)