IN THE COMPETITION APPEAL TRIBUNAL

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

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Wednesday 24th 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 LLP) 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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Wednesday, 24 May 2023

(10.00 a.m.)

MR JUSTICE ROTH: Mr Spitz, good morning.

MR SPITZ: Good morning. I will begin by making introductory remarks about the nature of Ocado's claim very briefly and then I will respond to some of the matters the Tribunal raised yesterday and then I will make some submissions. I expect not to be very long and I don't intend to repeat what has been said so far. Ocado has claims against both Mastercard and Visa but they are confined to the UK MIF rather than to claims in relation to commercial card MIFs or for example interregional MIFs. The claims fall into the period both before and after the coming into effect of the Interchange Fee Regulation in December 2015. For the period prior to the Interchange Fee Regulation Ocado understands from the pleadings that the schemes accept that the UK MIF restricted competition under Article 101(1), although they rely on various defences, including pass-on and exemption under 101(3). The damages estimated for Ocado's claims against Mastercard it is at approximately £23 million. That's on the assumption that there is no lawful level of the MIF but would obviously change if there were one and approximately £17 million against Visa and both of those are before interest. Ocado's focus at this hearing is on the question whether there should be an exceptions process and if so how this process should work and in that regard our proposal is set out at Section 68 of our skeleton and that is at supplementary bundle, tab 5, page 97. It's worth turning that up briefly so that one can see how we have set out our proposals for the exceptions process and it begins at the bottom of page 97, paragraph 68 and the text of the proposal is then set out on page 98. So that is the way we propose the exceptions process might work.

MR JUSTICE ROTH: How confident are you, Mr Spitz that a short additional merchant

claimants' hearing following Trial 2 is feasible?

MR SPITZ: I think it would have to be feasible because there is a risk otherwise of the exceptions process expanding to unmanageable proportions.

MR JUSTICE ROTH: Yes.

MR SPITZ: With the evidence, expert evidence provided and with disclosure we have suggested that that process, that sort of exceptions hearing process ought to be able to be confined to two days. So, and we think that it would have to be confined in that sort of way for the reasons I have just given.

MR JUSTICE ROTH: Well, of course speaking now in the abstract what you say makes perfect sense and since we don't know the shape of the main hearing still less have any kind of judgment it all seems awfully reasonable when one is to say, oh yes a very short exceptions hearing that won't derail the intentions of having a significant Trial 2 and it all sounds wonderful, but let's fast forward to a situation where you end up, or someone ends up with an outcome they really don't like. Just how robust is a statement here at the CMC that the exceptions process will be short when a hypothetical claimant says, well, you've made such an error, it's not an appealable error, but you have made such an error or failed to recognise our exceptional case we are going to need two weeks to explain to you through our own expert evidence why it is that we are not within this generic band but we are entitled to damages calculated by reference to an altogether different pass-on rate. Now, that is in the face of it not a particularly unreasonable stance to take and I don't imagine our saying, "well I am terribly sorry you've got two days", because that's what we discussed at a CMC is going to hold that much water. I mean is that something that we ought to be worried about in the exceptions process or do you think that it is something that given the discussions we are having now expectations will be managed so it is unlikely to be rendered a problem in the future?

MR SPITZ: I think it is a potential difficulty that one needs to grapple with insofar as one can grapple with it, given the uncertainties that you mention. I think the Tribunal has made it clear how it envisages the exceptions process to work and I think that's coming across very clearly to the various claimant parties. One obviously, I think, cannot legislate absolutely because who knows what the contingencies are that may arise and I think that there are also one needs to be alive to the need to limit the exceptions process insofar as it is possible to do so and to disincentives parties taking a punt, for example, on the exceptions process and that's why we have said that the two mechanisms work pretty well towards that end. The one being the incidence of costs in the event that one doesn't beat the benchmark and the other being the risk that an award could be increased and not only a level of pass-on could be found that is higher and not merely lower. Yesterday the Tribunal raised the possibility of whether one could introduce a materiality requirement. Off the top of our heads, we suspect that that may not be necessary but we fully take on board that the aim of this process is to confine these to true exceptions processes. I am not sure I can advance it beyond that.

MR JUSTICE ROTH: Thank you.

MR SPITZ: What I would like to do before commencing the submissions themselves is clarify Ocado's position on a few of the matters that were raised by the Tribunal yesterday. The first point to make is that Ocado is ready to participate actively in the expert-led process for Trial 2 in this way at least, by providing its data or answering any surveys that the experts may require and by making such disclosure as is necessary. To that extent Ocado will participate in Trial 2 regardless of which of the expert-led proposals find favour with the Tribunal.

Just pausing there, because that is one of the reasons why we rejected the characterisation that Mastercard has provided, that we are somehow trying to opt out

of Trial 2 – not at all. We are participating in Trial 2 at least to that extent and potentially to a greater extent. The scope of that involvement depends upon assessing what the precise nature and scope of the expert-led process and the exceptions process are going to look like. At that point Ocado will be in a position to decide whether in addition to the information I have just mentioned, it wishes to be separately represented or to instruct its own expert for Trial 2.

There is a point that is worth making here that the Tribunal may bear in mind, and that is a proportionality consideration. If we are going to have a Trial 2, a six to eight week trial with experts processing masses of information and data across a whole host of claimant groups, it is one thing for those large claimant groups to be able to engage and participate; it is another from the point of view of costs and time for an individual claimant to be reviewing all of that material and participating to that extent. At the same time there may be parts of Trial 2 that involve advancing legal submissions and that is an area where on the basis of the information and understanding we presently have, that is an area where Ocado may seek to come in and make legal position (sic) so we are different to that extent from those proceedings that are entirely stayed.

When it comes to trial 3 and the exemptions, if one gets to a 101(3) inquiry, at that point Ocado would need the opportunity to be able to participate, and I am not certain, given the terms on which the stay is articulated, whether currently the stayed parties have that right to participate in proceedings at any stage afterwards. I am also not certain whether parties who have stayed their proceedings are entitled to take advantage of the exceptions procedure at the end of Trial 2.

MR JUSTICE MARCUS SMITH: Those are two entirely fair points, Mr Spitz. They are matters that we would want to make clear in any judgment we handed down now but just to give a provisional marker for those who are stayed and listening in, we have no intention of using the stay as a means of excluding someone who wants to opt back

in. Clearly, an application would need to be made to lift the stay and we are not saying that the stay would automatically be lifted with no conditions because there are obviously conditions in relation to the stay having been granted, namely an acceptance of prior rulings that are general, so we are not saying it is a no brainer but we are certainly not keen on a process of exclusion where someone for perfectly understandable reasons wants to come back in, so that is how we see it working. It is a point well made on your part but it is not something that has been expressly articulated by the Tribunal to date.

MR SPITZ: That is really helpful, thank you.

MR JUSTICE ROTH: Mr Spitz, I may have misunderstood in Mastercard's objection, in which case I will be corrected, but I thought when they talked about opting out it was not that you'll opt out of the process by which the benchmark is set, it is that you will participate in the process, that will therefore have an effect on the average, and then you will opt out and seek a better outcome, and therefore having already been part of the average and that is how the selection might work. I don't know if that is the right understanding but that is how I read it, I think you were saying you would participate. I think you were saying that was their concern, it was that the average goes down as a result of your participation but then, because you were below the average they are now saying "we are not going to take the benchmark, we want an exceptions process."

MR SPITZ: Yes, sir. I suppose there are two ways of approaching this. One is to say "does one want to feed in as wide ranging a set of claimant data as one can reasonably access, including, hypothetically the data from claimants who believe their pass-on is low, does one want to feed that into the process and produce the benchmark with the safeguard that as an individual claimant in a compensatory regime rather than one in which aggregate damages are available, in that landscape does one then allow the safeguard to be triggered", or does one say "if you are going to take the exceptions

route, if it is possible that you will take the exceptions route we don't want to have your data in at the first round" and I suggest that the second is the less attractive of the two options, that the benchmark for its own robustness ought to include – if one is going down the factually specific route – it ought to include as much of the information across the board, including from those who think their pass-on level is lower. I think, and this will bring me ... Well, let me come on to Mastercard's primary objection in a moment, but just to say before I do that, where we come out then on the questions that we discussed yesterday is this, we are not wedded in advance to invoking the exceptions process – in a sense, how could we be? – but we need to know the broad parameters that will apply to that process in advance and that touches on the point that Visa have made (and I will say a little bit about that in a moment) nor can we take a final view as to the extent of our participation in Trial 2 right at this minute because the nature and scope will be relevant in enabling Ocado to determine the level of its participation, but, as I have said, provided it has the safeguard of an exceptions process it will be bound by the outcome of Trial 2. It will in any event answer any questionnaires and make the disclosure required of it.

MR JUSTICE MARCUS SMITH: Of course, that is something which anyone who has accepted a stay is also obliged to do because we have written that into the stay as a pre-condition of the stay, that may be an obligation of the disclosure requests even though one is stayed, so in a sense that you are going to be obliged to do whether you are stayed or whether you are inactive. Secondly, the point that Mr Justice Roth has very helpfully made, there is clearly going to be a nexus between the matters that are debated in the exceptions process and that which is considered in the main Trial 2 in the sense that we are certainly not envisaging a process whereby you feed in data to Trial 2, it is fully taken into account in terms of a generic carve-up, and how that carve-up will be done is something which we will address in our judgment but we are not

obviously going to be drawn on today so you will have to see how we plan to do that, but if there is that kind of feed-in of data from parties like Primark and Ocado we would be singularly unsympathetic to an attempt to gain the exceptions process to say "Well, we've had our data fully fed into and taken into account in the generic process, we are now going to say 'actually, if you look at us specifically we can beat the average'" well that is not how we see the process working. Clearly, how one links the two processes, the main generic decision-making process of Trial 2 and the exceptions process, that is something we will have to think about very carefully because it is quite hard to frame, particularly in the abstract, but certainly that is something we would be looking to frame and it may well constitute an additional constraint on how the exceptions process can be triggered.

MR SPITZ: Yes, sir. I hear the concern. I would say this, that there is – it is a fairly obvious point and the Tribunal no doubt has it and has thought of it but it is a very different process, the feeding in of the information that will come from Primark or Ocado into the production of a benchmark where that pass-on rate gets blended with all of the others and an individually targeted claimant-specific focus that would be involved in an exceptions process and it is not self-evident to me that one can simply close out the ability to exercise the exceptions process, as I have said, in the compensatory regime purely because a claimant has fed into the benchmarking process.

I would like to then turn to in addition to the reasons that were advanced on behalf of Primark yesterday, with which we agree, I would like to submit that there are two further reasons why the Tribunal ought to adopt the exceptions proposal. The first one is what I have been outlining now, and that is that the proposed expert-led approaches of the claimants and Mastercard do make allowance for some claimant-specific factual evidence to be taken into account ultimately surveys, questionnaires and the like, but

these will not be capable of capturing all of the unique individual circumstances of each claimant. Aggregating the factual evidence to produce a benchmark rate means that an individual claimant's evidence is fed into that process blends with the rest of the body of evidence, whereas the exceptions process by contrast allows the Tribunal to do justice in the particular case.

If, for example, a claimant possesses particularly compelling factual evidence that pass-on did not take place at all or to a significantly different extent, and that evidence is not captured as part of the expert-led process then the claimant ought to have the opportunity to adduce that evidence in the exemptions process. Documentary evidence, for example, that might demonstrate that a claimant has decided to reduce discretionary expenditure in its business in response to an increase in costs similar to the limit or that it has adopted a policy along those lines, that would not necessarily feed into the expert process but is rather probative of the issue of pass-on.

Our second submission in relation to the exceptions process is that it is unnecessary to layer on an additional permission requirement on a party seeking to trigger the process, and it is partly for reasons that we have debated in the Tribunal, and we say that the twin risks of adverse costs and less favourable pass-on rates will limit the number of exceptions, exception hearings that will be required, but it is also that to raise an additional barrier along a permissions kind of line would necessitate further costly and time-consuming preliminary adjudicative processes and that runs the risk of becoming disproportionate when what is intended is a narrower limited process on exemption.

The core of Mastercard's objection, its reasons, it is necessary to turn it up but perhaps just for your note, Mastercard's reasons are at paragraphs 59 to 62 of its skeleton, in the supplementary bundle, volume 8, pages 166 and 167. The nub of the objection as we understand it is that the exceptions process would be likely to result in over-

compensation at Mastercard's expense due to self-selection bias. In our submission that concern is over-stated for several reasons: first, it fails to give due regard to the usual right that claimants have to adduce their own factual evidence if they so wish, which would be the case in individual proceedings. We don't need to rehash the fact that it is not possible for all the parties to present their evidence in that way and reasons of proportionality dictate that, but closing out the opportunity for the individual claimant to persuade the Tribunal that their particular circumstances merit consideration would be unfair to those claimants who do possess compelling factual evidence.

Mastercard's objection also doesn't take due account of the likely impact of Ocado's proposals as to the risk of adverse costs and pass-on rates being increased following the hearing, and Mastercard's objection also overstates the degree of information asymmetry that is likely to pertain following Trial 2. We submit that in making that criticism Mastercard hasn't taken sufficient account of the level of claimant-specific factual evidence that its own expert is seeking to collect for the purposes of Trial 2. If I could ask you to look at that, it is Dr Niels' expert report which is in the hearing bundle, volume 1, tab 17 at 353. If the Tribunal would read paragraph 3.29 on page 353 to themselves. (PAUSE)

MR JUSTICE ROTH: Yes.

MR SPITZ: Dr Niels envisages collecting factual information from all the claimants, including information on the nature of their business operations such as their size and geographic regions in which they operate, their budgeting, market targeting and price setting processes, whether they are surcharged in relation to the MIFs and various other factors. If one moves down to paragraph 3.32 on page 355, Dr Niels there explains that he proposes gathering that information through a survey, and at footnote 71 he gives some examples of the types of questions that might be asked.

In our submission, the provision of that information from each of the merchant claimants would significantly reduce the degree of information asymmetry, and the claimant's experts themselves might collect different factual information from the claimant, which would then also be available to Mastercard, so, as such, following Trial 2 Mastercard is likely to have a fairly extensive empirically granted data set at its disposal. I put aside for present purposes the question that was raised yesterday as to the possibility of an asymmetric exceptions process because that is probably best addressed by the card schemes, at least in the first instance, but assuming that it is a symmetrical process the asymmetry argument only goes so far, Mastercard will be in possession of significant information as a result of Trial 2 that ought to enable it to decide if it has the right to trigger the exceptions process and at whom to aim that process.

Dr Niels might, for example, come to the view that pass-on would be high for a claimant that deploys cost-plus pricing treats the MSC as variable rather than fixed and includes the MIF in the relevant cost base.

Our submission in a nutshell is that the information asymmetry is likely to be minimised substantially in the course of the preparation for Trial 2 and in the trial itself if the parties' proposals for gathering factual evidence find favour.

Turning very briefly to Visa's position on the exemptions process: that position is that it is premature for the Tribunal to make directions on the costs consequences and criteria required to trigger the exceptions process, and we disagree, from Ocado's point of view, but I think more broadly, determining those issues will enable claimants who anticipate the possibility of invoking the exceptions process to make an informed decision as to their level of participation at Trial 2. If the position as to any permission requirement in relation to the exceptions process is left unresolved or deferred to another time that uncertainty alone may lead such a claimant to have to take a more

active role in Trial 2 with the associated increased costs and complexity involved in that. If it turns out that no permission requirement is ultimately imposed those costs and the added complexity would have been for nothing. If, by contrast, the high-level mechanics of the process are set down now such claimants will be able to make fully informed decisions regarding their participation at Trial 2. In particular, if the Tribunal agrees with Ocado that no permission requirement is necessary then claimants like Ocado might decide that they do not need to instruct their own separate legal team and experts for the purposes of Trial 2 subject, as we have said in our skeleton, to the question of sampling, if Ocado were to be chosen as one of the sample claimants it may need to instruct an expert.

The final very brief point that I would like to make simply relates to experts and it is simply this, Ocado doesn't presently envisage instructing its own expert economist for Trial 2 in the event that our proposals and the other claimants' proposals for the expert-led process are accepted and the exceptions process is adopted and if Ocado is not selected as a sample claimant. That should hopefully go some way to assuage the defendants' concerns about wasteful duplication in the expert evidence.

As far as the exceptions process is concerned, in our submission the parties to such a process should have permission to instruct their own expert for that purpose, and that is because the role of the experts at an exceptions hearing will differ significantly from the role in Trial 2 and we say that an expert economist will be required to assess the individual evidence and the parties to that hearing should be accorded the usual opportunity.

Those are the points that I propose to make, and unless there are further questions from the Tribunal that is all we have to say.

MR JUSTICE ROTH: Mr Spitz, did you have the chance to consider the President's question that he posed yesterday whether one might incorporate, if there is an

exceptions process to safeguard before bringing the matter back to the Tribunal the parties would have to engage in mediation?

MR SPITZ: We did give some consideration to that, sir. We had some concerns, to be completely frank about it, and the concern is really if one goes to the mediations process it is difficult to foresee that it might have a positive outcome given a party that is interested in invoking the exceptions because they feel the benchmark is materially removed from what its actual pass-on rate is, I think that it is possible to encourage the parties to consider mediation, but I would not put it any higher than that. I am not sure that there can be any condition on the basis of which to trigger the exceptions process, a prerequisite to triggering the expert process.

MR JUSTICE ROTH: Because you think it is unlikely to be productive, is that what you are saying?

MR SPITZ: I suspect that with the benchmark and with the correspondence that might flow in advance of an exemptions process, whether or not the matter can be settled will be crystallised through that process. It is not clear to me what the mediation process would add to that. It is not pre-action correspondence because one is so far down the road, but one would envisage that there would be some correspondence that sets out the parties' positions in advance of the exceptions process and I suspect – who knows – that that sort of process is at least as likely to generate settlement if it is going to happen.

MR JUSTICE MARCUS SMITH: I suppose the point that is that we don't yet know the nature of the outcome that is envisaged for Trial 2, and, clearly, if one were to get inflexible and broad sectorial outcomes, there is inevitably a considerable tension between the generic outcome and the individual case. That tension, if it is high, is liable to generate a large number of exceptions and is therefore something that one wants to avoid, not simply because the tension is likely to make mediation

unproductive, but also of course volume of exceptions is something that we regard as undesirable for obvious reasons. It does therefore seem that what we may be looking at is not so much the establishment of a benchmark, or benchmarks, as the establishment of a clear identification of those factors which cause pass-on to shift either from a default of zero or a default of 100, so that one can by reference to clearly defined factors say "Well these factors, if they exist, will involve a movement away from the extreme" – it doesn't really matter which end of the spectrum it starts from – one articulates those factors and articulates also under the rubric of those factors what specific elements will cause a change in, as it were, the pass-on rate. Now if one were to take an approach along those lines one has the rather more flexible outcome in terms of Trial 2 and the debate might be to what extent an individual case falls within one or other of multiple rubrics or the extent to which one of those rubrics applies with what force. That may well be something which is more susceptible of mediation if one had an economist well-versed in how the judgment was functioning and the ability to analyse the market than simply a series of very broad benchmarks which are inherently inflexible. I articulate that not so much because I want your response – although, of course, I do – but to enable others to think about slightly different ways of configuring the generic outcomes of Trial 2 because I am a little concerned that we don't want to be unduly wedded to the idea of an inflexible tectonic plate emerging out of Trial 2 which can't be adjusted and must be opposed by exception, and it may be – as I say, it can be done this way but it may be that one can achieve a rather more fleet of foot outcome that achieves all the advantages of, or most of the advantages of, a generic Trial 2 hearing with an ability to take the parts of the judgment and say "Well, we slip into this bit, we don't fall within that and therefore the pass-on rate is broadly speaking going to be X rather than Y". That is something which articulated in that way one can see a significant role for expert intermediation between the outcome of Trial

2 and the commencement of the exceptions process and it may be that that is something that we ought to be giving some thought to, in particular the identity of the expert because given the number of parties we have got we are rapidly going to be running out of experts who are not conflicted, and that may be something that we would want to invite the parties to give some thought to if that were a route that we go down.

MR SPITZ: Yes, all I would say about that, since that is really in the domain of other parties before you, is that I can see that that more nuanced approach would certainly signal to the various claimants in a potentially useful way where they fit in the scheme of things. One can image, for example, that certain pricing policies may be more or less likely to produce pass-on results and if that were the sort of process that the Tribunal had in mind I could see that that is potentially a helpful one.

MR JUSTICE MARCUS SMITH: Mr Spitz, we are very grateful. Ms Tolaney, please.

MS TOLANEY: Good morning, sir. Can I start by just standing back and giving two things by way of overview, in my submissions? First of all, can I identify what is common ground between the parties and then, secondly, can I explain at a high level, before I come on to the detail, what each party is proposing and why Mastercard's proposal is the sensible middle course for the Tribunal? So, can I start with the points that are common ground - and I have five points? The first point is that the parties, as you have heard, agree that in a normal case, with one claimant and one defendant, the issue of pass-on would be determined with close factual and expert evidence and that is the approach this Tribunal has taken in every other MIF case to date. Likewise, in the ordinary courses, no doubt, that evidence would be tested by cross-examination. The second point of common ground with the Merchant Claimants is that this would be too expensive and disproportionate, so the problem arises because of the scale of this litigation and that is why we have to find a pragmatic and practical solution for

marshalling the necessary evidence. The third point of common ground is that it is crucial, I am sure the Tribunal will agree, that any shortcut has to work because the worst scenario is that we end up at trial without the necessary evidence to enable the Tribunal to make the necessary findings or a situation where the Tribunal is driven to make findings based on evidence the Defendants have not been permitted to challenge, because both of those scenarios will result in an appeal and a retrial, as we saw in various other litigation. Fourthly, what the Tribunal ultimately needs to happen --

MR JUSTICE MARCUS SMITH: You are referring to MIF litigation.

MS TOLANEY: I had in mind Asda, Argos, Morrison's.

MR JUSTICE MARCUS SMITH: Yes, I mean that wasn't because of a failure to deal with factual evidence.

MS TOLANEY: It was remitted was my point, it was just an example.

MR JUSTICE MARCUS SMITH: It was remitted, of course, but it was remitted for altogether --

MS TOLANEY: Different reasons.

MR JUSTICE MARCUS SMITH: Different reasons.

MS TOLANEY: I understand that, but the point is that if there was not a factual basis ultimately for the findings there is a real risk of remittal because one would have to then try and get the factual findings before the decision could be made.

MR JUSTICE MARCUS SMITH: Of course. All I am saying is that the spectre of remittal can occur for many reasons and the reason it occurred in the three MIF trials we are talking about was not this.

MS TOLANEY: I don't suppose that, no. I was just simply saying that it is not unheard of for a case to be remitted, for whatever reason.

MR JUSTICE MARCUS SMITH: No. The reason they were remitted --

MS TOLANEY: Indeed.

MR JUSTICE MARCUS SMITH: -- was precisely why we are all here today, namely because there were violently inconsistent outcomes in cases where one would have expected the outcomes to be the same --

MS TOLANEY: Indeed.

MR JUSTICE MARCUS SMITH: -- and that caused the problem.

MS TOLANEY: There is multiplicity as well --

MR JUSTICE MARCUS SMITH: Yes.

MS TOLANEY: -- and that's relevant here. The fourth point, sir, is that the Tribunal ultimately needs to have sufficient probative evidence to make proper findings in respect of each Merchant Claimant and that is significant. The Tribunal needs to determine rates of acquirer merchant to supply pass-on for each and every Merchant Claimant, however, if one does it whether by formula, or so on, that's the ultimate goal. As my learned friend, Mr Beltrami, identified, this needs to be done in a way that a large number of Claimants do not opt out and trigger the exceptions process. The fifth point of common ground is that the task for the Tribunal and the parties at this hearing, therefore, is to design an information gathering process that provides a sufficient factual basis for making necessary findings for each and every Merchant Claimant, but without flooding the Tribunal with an enormous and unmanageable volume of evidence. So, can we then, with that in mind, but briefly, at a high level, first look at competing proposals? And then I will come back to the detail, particularly in Mastercard's proposal. So, starting with the Merchant Claimants proposals. There was some movement by Mr Beltrami on his feet but the starting position for his clients remains Mr Bloomfield's expert report, the pricing expert, and that is in Bundle 1, Tab 6. What Mr Bloomfield is proposing is an extensive survey to be answered by more Claimants, including overviews of products, pricing histories, policies and processes -

and the reference to that is at page 113 at Bundle 1. Now, originally, because of the sheer volume of information that would produce, the proposal was to dispense with the cross-examination of the claimants. Now, that is a shortcut that we say could lead to an instant appeal and Mr Beltrami backed away from that in his submissions but it wasn't entirely clear what his proposal on cross-examination was. Alongside Mr Bloomfield, Mr Falcon and Dr Frankel, for his clients, are proposing to assess merchant pass-on using both the pass-on rates and the simulation approach and it is important to note that their report identifies that Claimant-specific evidence is necessary on either approach. I make that point because the simulation approach is something of an outlier, but even on the other approach there is a series of factual matters which it is said they suggest may prevent the pass-on approach applying and a list of information they say that is required for their simulation approach. So, on either approach, they need that information. You see that in paragraphs 67 and 75 of their report.

MR JUSTICE MARCUS SMITH: Just pausing at the Bloomfield questionnaire, speaking entirely for myself, the problem I have got with the questionnaire is that it is going to produce, first of all, discursive answers, rather than answers that are susceptible of specific categorisation and I note Dr Niels, in his report, indicated that any questionnaires emanating from him or his clients would be, as it were, drop down menu questionnaires, which avoids the problem of the discursive. That is something which has a certain degree of attraction, whatever approach one takes. The second problem with the questionnaire approach - and that is true I think not merely of Mr Bloomfield's approach but also of Dr Niels - is that there is no point in asking questions which are not clearly referable to the effects that the answers to those questions will have on pass-on. My sense is that the point which is at the moment being missed is that no one is actually listing what factors actually go to bumping the

pass-on rate up or down. What one has got instead is a series of questions that are going to produce the series of diffuse answers which we might be able to control by a drop down menu approach, but, actually, even taking that approach, we are not going to get data that is tied to the question that is being asked of the Tribunal to resolve and it does seem to me that that is an anterior question that we need to address before we consider the acceptability of any questionnaire process. At the moment all we are getting is: here are a series of questions which will produce answers that may or may not be interesting, depending on how one approaches the question of pass-on. But one can't have in the questionnaire process a production of chaff, rather than grain, we want the grain and the chaff needs to be excluded right from the beginning. So that seems to me the key question in terms of questionnaires.

MS TOLANEY: Sir, can I make two points? I am going to come back to it. The first is that a questionnaire can be tailored with this in mind and so if there are anterior questions, obviously there would need to be agreement from the parties but that can be marshalled and then the questionnaire produced. The second point is the drop down, I agree, is a better option because it reduces the amount, the volume again, and as you say the discursive nature of answers. Dr Niels had produced an example of a questionnaire, and I will pass that up when I come on to address it in more detail, it is obviously a starting point but it would be a good starting point after this discussion and I will come on to it in a moment. Just going back to what Mr Beltrami's clients are proposing with their questionnaire - and I think this is what you are touching on, sir - would come a large volume of information that would then need to be trawled through and filtered and would produce quite a lot of work for the parties when it could be more tailored. What we say is: that approach at the huge volume of information is at one end of the spectrum of what the Tribunal could do and it seems to be a similar approach taken by the SH claimants, although the submissions suggest it might be a

touch more limited, it wasn't entirely clear. At the other end of the spectrum is Visa and Mr Merrick's approach, which is to say no factual evidence relies solely on expert evidence. Now, we say that that is undesirable and dangerous because it will result or seriously risk resulting in the Tribunal not having the requisite evidence before it. The nub of the problem is that the methodology put forward by Visa and Mr Merrick relies on taking results about pass-on rates with different types of costs in different context and at different times and using those costs as proxies for MSCs. Mr Beltrami gave you the example of hotel taxes in the 1970s, but there are many others. If you look at the list of articles attached to Mr Holt's fifth statement, report, at Volume 6, Tab 59, page 1960, there is a remarkable array of different costs, EU emissions allowances, exchange rates, minimum wages, different types of excise tax. All that any expert can tell you is that those different types of costs might be approximations or proxies for MSCs. They might be treated by merchants in the same way. We think it is unlikely, but what is absolutely clear at this hearing is that the Tribunal cannot proceed simply on the assumption that those costs are treated in the same way by merchants as MSCs. We suggest that the studies put forward by Visa and Merricks are simply not apposite, for the reasons we set out in paragraph 33 of our skeleton argument. The other point made by Visa is that claimant-specific evidence is of little probative value because merchants can pass-on costs unintentionally; that is at paragraphs 13 to 15 of their skeleton. Again, the same point, you can't decide that now. So, if you adopt the approach of shutting out factual evidence, which would be, we say, an unusual approach, particularly when all the claimants suggest that they need factual evidence, but we exclude factual evidence in its entirety, the danger is that the Tribunal will be proceeding on assumptions that will subsequently be shown to be incorrect.

MR JUSTICE MARCUS SMITH: Let's generate a little more specificity. Let's have a

look at the supplemental bundle, Tab 15, page 234. This is the second LEK letter that we were taken to yesterday.

MS TOLANEY: Yes.

MR JUSTICE MARCUS SMITH: At page 234 we see that Ms Economides has set out four different types of pricing strategy that might be adopted in consumer-facing sectors, and you see them there. Quite clearly, the pricing strategy that is adopted is going to be quite significant in terms of how pass-on operates. I mean, if one has an undertaking that is operating a cost-plus process and is doing so properly, then the pass-on question really does resolve itself, it is quite clear.

MS TOLANEY: Yes, I have got that.

MR JUSTICE MARCUS SMITH: 234. Now, if one were to have a questionnaire that has one of the questions: we'd like you to pick one of these four, you don't have any other choice, I mean obviously one would then want to make sure that there was expert buy in, that the list of factors is comprehensive and appropriate, that is clearly right But let's assume that Ms Economides (?) has got this right and these are the only four ways of doing it. If one had a questionnaire on that basis where you basically tick one box and that's it, one might have apps for different years, different options, but these are variants on a theme. One gets the factual evidence in, one gets manipulable data that is capable of being assessed by the economists and where the opinion comes in is on the extent to which these are factors in causing pass-on to be higher or lower, which is a matter of opinion evidence. Now, I would suggest the opinion evidence will be pretty straightforward in 10.1, I imagine it will be rather harder in 10.2 through to 10.4, and that's where the economists are going to be adding serious value. Now, if one tries to do that for all factors that are relevant to pass-on, don't we get the best of all worlds in that we get controlled factual data, we lose the chaff and we get material which the experts can then knock themselves dead on in terms of how significant each

factor is in relation to the pass-on rate that applies to a given claimant in this case. Now, if that is possible, then in a sense articulating the two extremes of generic questionnaires or sampling on the one side and a pure economist approach on the other actually resolves itself, doesn't it?

MS TOLANEY: What I was going to say in the two answers, the first answer is that the Mastercard proposal is the one that is in the middle which is taking a questionnaire, trying to get information in a factual information that is pertinent, relevant, not chaff - getting, in fact, filtered information and then allowing it to be tested by virtue of sample claimants if underlying disclosure is necessary.

MR JUSTICE MARCUS SMITH: Why, on this approach, is either cross-examination or disclosure necessary? If you can reduce the questions to an articulation of the specific factors that may or may not, depending upon expert opinion, influence the outcome? Why is that not sufficient?

MS TOLANEY: The answer is that first of all it is not clear that you could necessarily reduce it to a specific factors that would be agreed.

MR JUSTICE MARCUS SMITH: Right.

MS TOLANEY: That's the first question of contention. The second is whether the parties, certainly the Defendant parties, would wish to have their underlying material to test any of those answers. But you don't usually have is a pleading with the statement of truth, so let's say the questionnaire has the statement of truth, you do usually have some underlying evidence to be sure that the analysis that has been put forward in, for example, the pleading is actually backed up by when you look at the underlying documents. That is one of the purposes of having a sample, but that is a separate question of testing it.

MR JUSTICE MARCUS SMITH: If you were to take this hypothetical case that if we have a factor of pricing strategy, everyone's going to tick the cost-plus box because

that's going to make pass-on to some extent easier if you need a way of testing that that outcome is right. Is that right?

MS TOLANEY: Or they will do the opposite.

MR JUSTICE MARCUS SMITH: Or the opposite, yes.

MS TOLANEY: Yes, so we --

MR JUSTICE MARCUS SMITH: Well, depending on who's --

MS TOLANEY: Exactly. We need a way of testing it. So what Dr Niels has put forward, we say, is -- how could I put this? - the embryonic proposal that could be the one the Tribunal moulds. It could be the flexible proposal, which is to identify what the crucial questions are, to see if one can get to honing it down to limit any factual disputes. That must be the goal. I am not sure we could say here and now that will be possible, but that must be the goal: to have limited, but sufficient disclosure from a sample - not from the 1,000 plus merchants - but from a sample, and a sensible sample, to ensure that everybody has the opportunity to test it, particularly the Defendants. Again, that may never trouble the Tribunal because if, factually, the documents quickly show that what has been ticked in the questionnaires is correct, then that ends the point. If it doesn't, then obviously there has to be an opportunity to challenge it.

MR JUSTICE ROTH: Is that what one is doing? Because, as I understand Dr Niels' report, stage 1 is precisely what the President has been discussing with you, namely, it's the questionnaire in a standardised form, really a drop down menu. It will include, indeed precisely pricing (inaudible), that's one of his criteria and putting all the criteria in together for everyone. But I thought, as I understood it, (I may have misunderstood it), the second stage is not just to verify the accuracy, but is actually needed for the empirical assessment. Looking at Dr Niels at 3.3.5 and so on.

MS TOLANEY: Yes, well --

MR JUSTICE ROTH: It is stage 1, which may be non, -- I say non-controversial, one may say everything in this case becomes controversial -- but at least less contentious, and deals with it. But I think the method proposed goes on then, more specifically, a sort of verification, but once you have that, that enables you to group claimants by categories - not just industry sectors - for criteria, and then you need some more in each such category to actually work out the pass-on rate.

MS TOLANEY: So, sir --

MR JUSTICE ROTH: Stage 1 might get you the likelihood of pass-on, perhaps but --

MS TOLANEY: That's right.

MR JUSTICE ROTH: -- to get to an actual rate, I think, as I understand it, Dr Niels has to go to the second stage.

MS TOLANEY: That's right and that's what I understood the President to be saying: --

MR JUSTICE ROTH: Yes.

MS TOLANEY: -- that you would get the factual basis but in a more simplified way. I think what was being put to me: is there a way of honing the factual process to get it packaged for the experts without a discursive approach or volume?

MR JUSTICE MARCUS SMITH: Well, yes, but also without sampling and without cross-examination.

MS TOLANEY: Well, that I don't agree, though. I don't think one can. I think the way I put it is, I don't think you can make the decision on cross-examination now because one would have to see whether it needed to be tested, but permission would have to be there, and indeed you would need to allow the sampling for the whole process that Dr Niels is putting forward for really any expert process, and indeed to test what the claimants are saying is in fact the only analysis. So, the other point is, I think, sir, your position is assuming that there is only one pricing methodology per claimant, and of course with supermarkets we have seen it is cost based and competition based, so it

may be slightly more complicated per claimant as well.

MR JUSTICE MARCUS SMITH: Well, yes, but then how, without stooping to resolving each individual case, is one to resolve that?

MS TOLANEY: Well, I think the grouping point will --

MR JUSTICE MARCUS SMITH: Yes, but how does that help, I mean presumably you are not saying that supermarkets are all going to price in exactly the same way?

MS TOLANEY: No, but there may be a range of permutations that --

MR JUSTICE MARCUS SMITH: Yes, okay, so you have got a range, but then immediately you are saying, well, I am outside the range, I am an exception, you have got to deal with me again in the exceptions.

MS TOLANEY: We will come on to the exceptions process, but I think --

MR JUSTICE MARCUS SMITH: Well, yes, the two have to be seen as one process because --

MS TOLANEY: They do.

MR JUSTICE ROTH: -- if you are creating a situation where you are not dealing with cases in the individual, which we are all accepting you can't do, unless you buy into a degree of genericism you are going to have a big exceptions process.

MS TOLANEY: Yes. But what we are suggesting, if I can just show it to you --

MR JUSTICE MARCUS SMITH: Of course.

MS TOLANEY: Sir, I am coming on to my proposal, because what I was trying to show you is, in a way, the Tribunal can obviously come up with its own proposal but at the moment what you have got is the drowning in detail, or not the right evidence at all, or no evidence at all. Mastercard tried to take a middle ground. It is obviously a starting point for discussion but we say it is the right starting point and it can be modified by the Tribunal. The summary of that proposal is in Bundle 1, Tab 17, page 318, para 1.25. I think Mr Justice Roth is ahead of us, which sets out what in a nutshell

the proposal is and the explanation starts at page 351.

MR JUSTICE MARCUS SMITH: Yes.

MS TOLANEY: The proposal obviously applies to all forms of pass-on, but I am just going to focus on merchant pass-on for the moment. What the essence of the proposal was, was to get sufficient factual material in a marshalled way and then have a controlled expert-led process of disclosure to create a body of evidence that can then be applied to all the claimants that it is applicable to and we would want to test the material, not by the interposition of experts that Mr Beltrami's clients wants, but through the underlying material itself. The proposal is, so step 1, which starts at 3.26 is that each merchant claimant creates, completes the short questionnaire. Now, can I hand up what is an illustrative questionnaire that Dr Niels has produced?

MR JUSTICE ROTH: Yes.

MS TOLANEY: I think this was circulated by email to the parties but I have hard copies. Can I start by saying: this is obviously illustrative, it is not a definitive document, it is just for discussion at this point in the hearing. The first point is it shows that it is a relatively limited amount of information that could be sought in this stage and, sir, if you look on the right-hand side of the columns you will see that the purpose of the information has been identified in an attempt, I think, sir, for what you were getting at, which is that we don't want lots of irrelevant information. So, there has been an attempt to identify why it is needed.

MR JUSTICE ROTH: Yes.

MS TOLANEY: So this is a sort of, and it is something that we would envisage, the question is the surveys would in fact be jointly agreed by the parties' experts.

MR JUSTICE MARCUS SMITH: They would be?

MS TOLANEY: They would be, that's what we would envisage in this process that there would be. There may be disputes, I know Ms Demetriou says it will lead to

disputes, but any of the processes before the Tribunal today could be - that could be said about. What this would envisage is that the parties' experts would cooperate and then the Tribunal would impose a timeline for agreeing the survey and resolving any disagreements as to its contents. If the Tribunal had views as to what the contents should be aiming for, or including, then obviously that could be something that was said at the outset for the experts to consider.

MR JUSTICE MARCUS SMITH: Just to be clear, and it is not a criticism, Ms Tolaney, there has not been dialogue with Mr Beltrami's clients about this questionnaire. You are not presenting it----

MS TOLANEY: No.

MR JUSTICE MARCUS SMITH: -- as something that is a common position between the Merchant Claimants and your client?

MS TOLANEY: This has been produced overnight in order to assist and circulated to the other parties. It is purely illustrative. There has been no agreement or discussion with any of the parties, and I would anticipate it would need discussion to be agreed, but it is the sort of document that we would suggest would (a) be useful and (b) is surely capable of agreement as the first stage. What it shows is we suggest that the relevant factual information could be more honed than perhaps the proposals on the claimants' side, but we agree with them that factual evidence is necessary. All we are trying to do is marshal what would be before the Tribunal a little further. The second stage, then -and as I say the questions in here mirror what we have set out in Dr Niels' second report at paragraph 3.29, including business location, size and industry - we say that the survey should be accompanied by a statement of truth which would assist then in terms of how – That is a matter for the Tribunal but we suggest that might be helpful and signed by somebody reasonably senior within each Claimant which again ought to minimise the potential for disputes later down the line, but that is very much

a matter for the Tribunal. We say that what it shows is it is not an onerous burden, this example survey. We do not want to try and do something disproportionate. We are trying to balance what is really needed for the purposes of this case. Step two (which starts in the description at paragraph 3.26 of Dr Niels' second report) is that using the results of the surveys actually as Roth J said, the experts group the Claimants into distinct categories based on the characteristics which are likely to give rise to similar rates of pass-on. Now, I take the President's point. It may be possible to have an idea of that in advance. I simply do not know whether that is right, but that may be one way of honing the expert process. The experts would then pick a sample Claimant from each of the groups and they would provide disclosure and have the opportunity to put forward factual evidence going to as to how they deal with the recovery costs and in particular the charges in their business. I can see that, sir, you are looking concerned about that, but we would have in mind with this first of all the need to keep disclosure and evidence proportionate. We suggest that as much of the information as possible is provided on an agreed standardised template or spreadsheet, and that the experts would cooperate in producing those templates. We say it meets several concerns. First of all, it is clear that some factual evidence as to what the merchants were doing is thought to be relevant by the majority of parties in court. Secondly, it might well help with - and I am going to come on to the exceptions process because it provides a way of evidence being before the court - if there is an outlier it might be possible to see that at that point. Thirdly, it gives this court the comfort that it is not a case that you are going to be determining on the basis of assumptions which we would say would have to be extraordinarily robust and Visa's expert does not suggest they are. You heard the criticisms made of Visa's expert report at this point, and that is not a criticism of him, but a recognition of the limitations of his approach. So, if this Tribunal tries to determine a case of this quantum and size

and scale on assumptions without being 100 per cent sure that they are utterly robust it would be, we say, very dangerous. Whereas having the factual evidence, and I am going to come on to it (I have taken this out of turn), having the factual evidence that underpins the relevant findings but honed down in the way we suggest, we submit is the right way of going forward. There are, I think, three benefits of our proposal. The first is we have taken on board the Tribunal's suggestions from last year, so we are trying to limit disclosure from the thousand claimants. We have put that to one side.

MR JUSTICE MARCUS SMITH: Ms Tolaney, let us look at Dr Niels' questionnaire. Let us take more or less at random question 15A. "Does your business set prices by reference to target levels of margins/profitability following periodic budget setting prices?" You then have a multiple choice "Select one option". Now, what sort of disclosure and over what number of merchant claimants are you envisaging this question would trigger?

MS TOLANEY: I cannot answer that, sir, other than to suggest that we are saying that you would take – you would use these questions to group together the relevant claimants into categories, and then you would pick a sample Claimant to give disclosure and it would go to the issues in dispute. So, I cannot really answer with any more specifics than that, to say that this is trying to hone down what the relevant features would be to identify different types of factual situation.

MR JUSTICE ROTH: As I understand it, the stage one questionnaire involves no disclosure from the respondents.

MS TOLANEY: That is right.

MR JUSTICE ROTH: It is used for grouping.

MS TOLANEY: That is right.

MR JUSTICE ROTH: Gathering together. You then look in group to fix samples within each group, a representative sample, maybe more than one, a couple, maybe three –

I do not know. Then those two or three have to give disclosure. Now, the disclosure is what Dr Niels sets out at 3.34 to 3.36 --

MR TOLANEY: That is right.

MR JUSTICE ROTH: -- on page 256.

MS TOLANEY: That is our proposal.

MR JUSTICE ROTH: It is not modest, Ms Tolaney. I am not saying that is necessarily a criticism, but I think one has to, you know, confront it. It may be that that is right. That is an expert. One needs that sort of detail, particularly bearing in mind what he says in 3.36, particularly things like relevant costs variants. So, I think that is, if I have understood it, that is what it is saying.

MS TOLANEY: That is absolutely right. Sir, it is modest in one sense in that it is going to be from a representative --

MR JUSTICE ROTH: Oh yes. It is only a few of the Claimants.

MS TOLANEY: Indeed. That is why it is modest in comparison to the other proposal on the table on factual evidence.

MR JUSTICE ROTH: Yes.

MS TOLANEY: But I think the criticism is made by the Merricks' team: Oh, well it involves vast disclosure. Well, the whole point of our proposal is that it involves disclosure.

MR JUSTICE MARCUS SMITH: Yes, but this is why I do not really understand the implications of your proposal because you have got all these questions, and they are going to result in some sort of grouping, but you cannot tell us what sort of grouping that is going to be – whether one has five, 10, 15 groups – because it is dependent upon the outcome of the questionnaire. Is that the point?

MS TOLANEY: That is right. I think that is the fairest answer because until you have the facts, it is impossible to say. Now, obviously the Tribunal is entitled to say: there

has got to be a proportionate approach, even on the grouping. This is why I am saying to you this is a proposal that is flexible for the Trribunal to be able to give guidance at different stages. So, I fully accept that if my Lord came back and said: right, we are going to have a million groups, that would not work. Is it realistic to say there is only going to be three? Probably not. So, there has to be some proportionality in the grouping, but I could not tell you at the moment what the number is, and I do not think any party could. That is not a flaw because we are effectively at the management of the case stage and so we are at a very early stage in the process.

MR JUSTICE MARCUS SMITH: I am not sure I agree with that. The fact is we have been debating the management of this case on at least two occasions before today. The three day evidential hearing with the letters that the Tribunal has communicated intended rather more specificity than: well, let us wait and see what number of claimant samples we undertake. So, I mean, at the moment it seems to me we are in a significantly worse position than the position that was articulated by the claimants a year ago saying: well, we will sample according to sector and we will pick 11. What you are saying now is: well, it will not be three, it will not be a million, but it may very well be more than 11.

MS TOLANEY: I think the range that was given by other parties was 14 by Visa, and 39 by the Claimants, the Merchant Claimants. So, that is the range they had.

MR JUSTICE MARCUS SMITH: Where do you fit in that range?

MS TOLANEY: I would have to take instructions on that. I can do that --

MR JUSTICE MARCUS SMITH: Will it be more than 39?

MS TOLANEY: -- in the transcript break. I do not think so, sir, but I do not want to give you an answer that I do not have on instructions. What I would say is that this proposal allows now – it has a degree of granularity. The Tribunal can – Unless the Tribunal is going to go down the route of saying: 'no factual evidence' - and I must

address you on that - then this proposal one could impose quite a strict timetable on to make sure that – I understand, sir, that this has been going on for some time, but now it could be put into a strict timetabled proposal. You have all the experts who are on top of the material to the point of their reports at least, and one could impose that to make sure that it is rigorously managed and results produced.

MR JUSTICE MARCUS SMITH: Again, this is not a criticism, but a suggestion that all parties have bought into an expert-led approach is really not right, at least you are not.

MS TOLANEY: Well, sir, we have because as I said the starting point is that in an ordinary case there is no doubt that there would be disclosure and witness statements, and expert evidence in the usual way.

MR JUSTICE MARCUS SMITH: That would not be an expert-led approach.

MS TOLANEY: Exactly. Whereas here we are putting this in the hands of the experts because they are distilling from the survey what the grouping is, picking a representative and honing the process. So it is an expert-led process. What it is not, which is what Visa and Merricks are urging on you, is a process where the experts are substituted for the facts, and that is the essence of my criticism of that proposal, which is that if you go down the route of saying the experts are – you do not need facts; they can be the factual findings and decide the facts – I would suggest that is a very unusual approach, and here it would be dangerous because even their experts cannot assure you that the assumptions they are using are right. They might be; we just do not know.

MR TIDSWELL: Can I ask you when you get disclosure – so, we have got to the point where we have got our grouping and we have got our sample and we take in disclosure. What happens then? Are you then treating that sample as representative effectively for determination as if it was an individual claimant as in Sainsbury's? Are we going to then hear evidence and see cross-examination about that Claimant, and

then the outcome is applied to the rest of the group? Is that the plan?

MS TOLANEY: That is the plan. At this stage obviously the need for cross-examination is unclear, but one would have to build it into the timetable because otherwise – I will address you briefly on that.

MR TIDSWELL: So the sample representatives – the outcome of the sample representative becomes proxy for the group.

MS TOLANEY: That is right.

MR TIDSWELL: If people disagree with that – you say there is no exceptions process, I think.

MS TOLANEY: I will come on to the exceptions process, but in a nutshell what I would say is if you follow our approach there is going to be much less scope for exceptions because you will have actually done a proper analysis of the relevant characteristics of the group. I will come on to parties that choose to sit out. That is a different point and I will come on to that.

MR TIDSWELL: But if you are getting your group right --

MS TOLANEY: If we are getting our group right –

MR TIDSWELL: -- you will get actually the people that are comfortable and they are representative --

MS TOLANEY: That is right, and that is what Primark actually said yesterday, if you remember, that if there is a proper sampling process it may catch them, and they may want to come into it.

MR TIDSWELL: Yes. What happens if – just thinking about the verification point – what happens if unfortunately the representative sample turns out not to have properly filled in the form and has been – ended up in the wrong place, what does that do to the process?

MS TOLANEY: That is why I was saying disclosure would serve two processes – two

purposes, rather.

MR TIDSWELL: So you would weed them out at that stage.

MS TOLANEY: You have to test it. That is what I was saying. With a pleading, despite it having a statement of truth, you would not accept it or ask a party to accept it unless they have had a chance to see what underpinned it. So, we would weed it out at that stage.

MR TIDSWELL: And then do we go back into the corporates so they have done a sample -- Because we need -- It is not going to be sufficient, is it, for someone like an individual Claimant where if they lose, they lose. Here if the sample representative lost for some reason, say for example falsification of the form, then you could end up with a situation where the rest of that group was not then stuck with that result, because you would have to go back and presumably pull up another sample and do the process again. Is that right?

MS TOLANEY: That is right, but that may be why you would not just have one.

MR TIDSWELL: Yes.

MS TOLANEY: That would allow an assurance for that. So, that is why we put in place safeguards, which are statements of truth; senior person signing the form; a form that has more multiple choice than discussion, so the answers are quite clear; some underlying disclosure that would, if needed, check that. We would have to work on what that stage was, once there had been grouping, and it would be quite quick – it may be quite obvious at an early stage if there had been falsification of the one you picked, and in any case it would not necessarily just be one which would be the insurance policy against, without being blunt about it, one bad witness. So we tried to put in place those safeguards. Obviously this approach has two points to it. One is that at the moment the questions have not been agreed by all the experts but if they were, that would probably give some comfort. Two, this is an expert-led process

because the experts would no doubt be looking at then who the representatives should be carefully.

MR TIDSWELL: We are still going to have a trial, are we not? We are going to have – subject to your point about whether it is so clear there is no need for cross-examination – but for perhaps a substantial number of these groupings we are going to have to go through a mini-trial for each one of them on their particular facts with cross-examination and expert evidence in relation to those particular facts within the body of the trial.

MS TOLANEY: Yes. I would push back on the description "mini-trial" if I may, because this is actually quite a substantial trial with the seven weeks, and you often have in a seven-week trial multiple witnesses going to different points in the case, and this would be similar; that you would have cross-examination on the representative witnesses within the sample groups, query whether you would need to cross-examine more than one, but I do not know. They would be the witnesses of fact. The experts would no doubt be cross-examined in one piece on the different groups, which they would have to be on any proposal because everybody is suggesting that there would be different sectors or characteristics within groups.

MR TIDSWELL: There certainly would be an efficiency, would there not, to pick up the President's suggestion about a set of factors that were – and I appreciate they are not all going to be agreed – but substantially agreed, and there may be some outliers that can be resolved and might perhaps need to be done before trial – it might be helpful. But if you have got that set up you might find it convenient to have the evidence about those factors and then you would be able to go on and apply them to whatever the position was, whether it was sectors or something else. So, it really goes to the question of how much – what benefit you are getting from having the individual claimant – I am not going to use the word "mini-trial" because you do not like it, but a

day or two days (whatever it is) and focus with what extra that brings once you have dealt with the factors.

MS TOLANEY: That may well be right and I am not pushing back too hard on that because I can see that, but what, I think, I cannot accept at the moment is that there would not be the option in cross-examining. If Mr Beltrami's proposal was you would interpose experts and cross-examine the experts rather than the underlying people, that is the objection we have got. On his proposal, he needs that because of the volume because otherwise you would be cross-examining 1,000 claimants. On my proposal, I fix that by what I have suggested.

MR JUSTICE MARCUS SMITH: By sample.

MS TOLANEY: By sampling.

MR JUSTICE MARCUS SMITH: Yours is not an expert-led approach; yours is a sampling approach – that is what it is.

MS TOLANEY: Mine is a sampling approach but with the benefit of – I put it that way – serious expert input.

MR JUSTICE MARCUS SMITH: Yes, but at the end of the day it is the sample that drives this and you are then analysing the sample through the lens of factual cross-examination and expert opinion, but it is the sample that drives this.

MS TOLANEY: I accept that. What I would say is that that is the most orthodox --

MR JUSTICE MARCUS SMITH: No, no. That is absolutely fine, Ms Tolaney. I do not mind it being a sample process. I just do not think it is particularly helpful to say we have variants of an expert-led process here. We have got different processes being suggested by different parties.

MS TOLANEY: I am happy to accept that.

MR JUSTICE MARCUS SMITH: For my part, it is --

MS TOLANEY: I can call it a sampling approach, or I can say it is an approach that

puts emphasis on the expert input rather than having factual evidence from every claimant.

MR JUSTICE MARCUS SMITH: Yes. That is what sampling is.

MS TOLANEY: Indeed. May we take the break now, sir? Is that a good moment.

MR JUSTICE ROTH: Yes, indeed. Just one question before you rise. In terms of the sampling and the addressees of the questionnaire, these would go to the stayed parties as well as the unstayed parties. Is that right?

MS TOLANEY: I think that is a matter for you, sir. We can come into that in the context of the exceptions. We are concerned, as you know, about the exceptions process in a sense becoming its own massive process that completely undermines what we are doing. We are also concerned about the idea that either the stayed parties do participate but then somehow leave (inaudible) in the sample affect the rates and then try and claim something different, or that they choose to sit out of it and then try and have their own trial. So, in my view I think this questionnaire should go to the stayed parties, but that is a matter for the Tribunal.

MR JUSTICE MARCUS SMITH: No, but intrinsic in your proposal is that it goes to the stayed parties.

MS TOLANEY: Yes.

MR JUSTICE MARCUS SMITH: And certainly in terms of the conditions of the stay, disclosure – I think I can safely include a questionnaire in the disclosure -- disclosure is something that they are obliged to provide as one of the standard conditions of a stay that we are imposing.

MS TOLANEY: If picked as the sample.

MR JUSTICE MARCUS SMITH: Well, yes but I think your point is everyone will get a questionnaire.

MS TOLANEY: That is right.

MR JUSTICE MARCUS SMITH: And then within that you would sample according to what is rational --

MS TOLANEY: That is right.

MR JUSTICE MARCUS SMITH: -- driven by the outcomes of the questionnaire.

MS TOLANEY: That is right.

MR JUSTICE MARCUS SMITH: And I have got a couple more questions, but they will probably take a little longer.

MS TOLANEY: Also I need to take instructions if we can do any better on the groupings. If there is anything else over the transcript break you would like instructions on, I can take that.

MR JUSTICE MARCUS SMITH: Well, let me just go back to the Sainsbury's trial where we had very helpful evidence from Mr Coupe on how Sainsbury's worked out the cost versus pricing conundrum that they had. Now, that was, as is clear from the judgment, very helpful evidence and Mr Cook will remember it very well. Presumably you would accept that what goes for Sainsbury's is also likely to go for Tesco, Waitrose and Aldi and Lidl.

MS TOLANEY: I will come back to you on that.

MR JUSTICE MARCUS SMITH: Okay. Let us say that there is at least an argument that they approach things generally, which is why one groups parties by sector because if there was utter variance among sectors, why have a sectorial approach at all? So, my question is if that is right, and do push back on that, but if that is right why does one not have someone like Mr Coupe speaking for the industry, or a retired person who has been involved in the sector, to speak for the sector rather than plucking samples and having someone who may not have that breadth of experience and understanding on what is after all intended to be a common question? So, really what I am probing is why you are in disagreement with Mr Beltrami about the

interposition of the expert as a means of understanding what is going on in what I am assuming to be a generic case. Obviously, if it is not a generic case, if all supermarkets are different then it does not work, but if - and it seems to me this is the assumption underlying your questionnaire - there are groupings which are rational, then why insist on a process of plucking individual claimant witnesses and disclosure rather than relying upon the admittedly more remote but on another view more expert evidence of someone who has seen it all, if I can put it that way?

MS TOLANEY: So, two answers: the first is we do not accept that all the merchants in a particular sector can be grouped as one – and that is the whole purpose of this. You see that in paragraph 3.21, page 350 of Dr Niels' report. So, it is not the case that there could be the sector, and that is the whole point of having a sampling in this way. The point on: why can we not interpose an expert is two-fold. One is that we would, having gone through this process, take the view that we should have the benefit of cross-examining the relevant person giving the factual evidence rather than having an expert interposed whose read up on the factual evidence is removed, and trying to answer on a basis that does not give us, the Defendants, the right to actually challenge the evidence if we wish to. Obviously there will be expert evidence. We do not think it should be used as a way of giving factual evidence. There needs to be factual evidence and expert evidence.

MR JUSTICE MARCUS SMITH: Let us stick then with-- The Sainsbury's example: I do not think there was very much disclosure that made its way to the Tribunal in terms of how Sainsbury's conducted its business and operation. Now, the fact is we received evidence from someone who knew what they were talking about. No doubt there were documentary instances of how they went about the process of pricing and working out what prices they needed to set in the round in order to recover their costs. But I am questioning how far a disclosure-led process where you say: well, you are generic of

this particular group. You are a proper sample. I am questioning how far disclosure from that one person is going to assist in answering the generic question.

MS TOLANEY: Sir that may prove to be right, but I think at this stage, substituting an expert to essentially, if I can put it this way, undertake the Tribunal's fact-finding exercise may not be the right process.

MR JUSTICE ROTH: I can see you may be concerned about a sort of pricing expert who gathers information from lots of claimants and is the intermediary --

MS TOLANEY: Exactly.

MR JUSTICE ROTH: -- who then transposes them to the Tribunal. I do not think that is what the President has in mind. I do not purport to speak for him, but an industry expert is giving factual evidence based on their own experience of the industry. Often they have worked for different companies in the industry over their career, and they are saying this is the way things are done in this industry from their own experience and understanding, and they are not gathering a whole lot of Claimant evidence, and they, of course, can be cross-examined on that if that approach is taken. It has the advantage that, it seems to me, you would get your sample... If you end up with a sample of just one from each sector, you get a very nice, fine trial on that individual claimant as pass-on, but not much recognition that there might be some variation within the sector. Or you say, well, actually, the sample is not one, it is two or three, in which case you have three people giving evidence and being cross-examined, which immediately prolongs and complicates the trial, and that is a more elaborate form of sampling, and that may be the only way to get a fair result for the sector, but you then get, with 15/18 sectors, three claimant per sector, all giving disclosure, all being cross-examined. You have got a very elaborate trial and it is quite far away, I think, from the kind of trial we are thinking about. The advantages for the industry experts is that they can speak to the sector and the variations within the sector.

MS TOLANEY: Can I just push back on the use of the word “sector”, because this approach would not be by sector, and the reason I am pushing back on it is because it is easy to talk about an industry expert for a sector, it is far less easy to talk about an industry expert for a grouping of claimants who have a similar pass-on rate. So, that is the first reason why the industry expert may not be appropriate.

MR JUSTICE MARCUS SMITH: You are putting the cart before the horse there. You cannot group ex-ante persons who have a similar pass-on rate because that is the very question we are determining.

MS TOLANEY: Persons who have similar business practices that would lead to that.

MR JUSTICE MARCUS SMITH: Might lead to that.

MS TOLANEY: That might lead to that because that is the point that is being made by Dr Niels, that you cannot think of everybody in the same sector. So, for example, The Hilton at Heathrow is going to be very different from the provincial B&B, so within the sector there are going to be quite a lot of variants.

MR JUSTICE MARCUS SMITH: Well, indeed, but, I mean, let me be quite clear. Mr Justice Roth is absolutely right. I was talking about an industry expert, not an economist who is simply coming from somewhere with the expertise to give an economic opinion. I am on record as saying that that is not a particularly satisfactory way of doing things because the economist is being drawn into areas in which they are not expert. So, let’s talk about the industry experts and let’s take the sector to which they are addressing. Will not that industry expert be able to address precisely those variations that you say exist within the sector? So, if you are taking, let us say, a sale of groceries as the sector and you have got the local corner shop and you have got the other extreme, Sainsbury’s and Tesco and the big four supermarkets, and then you have got various chains in between: now, no doubt you may be right, they do things differently (I am quite sure your local corner shop does something rather like

cost plus pricing, and the Sainsbury's model is rather more dynamic - but who knows?) but that is something which would be captured, I am putting to you, by the expert and not necessarily captured by the sampling because what you are doing is, in sampling, you are assuming that your questionnaire is going to group together the people who, not knowing the answer to the pass-on question, will provide that answer because they are the same, but given that you do not know what the answer is, how can you say they are the same?

MS TOLANEY: I think what we can say is that it is clear that everybody within a sector is not the same.

MR JUSTICE MARCUS SMITH: Right.

MS TOLANEY: So, an industry expert who can talk about sectors is not going to be able to answer the question for this Tribunal, which is why we want the sampling process to group appropriately so we can go by grouping as opposed to sector. The next question then is: how do you test that? And there has got to be some disclosure. But rather than getting disclosure from everybody, one would pick sample representative claimants, and not just one, in order to make sure that it was not a disproportionate exercise. The third question, which, I think, is what is being put to me, is: at that stage why would you need to cross-examine the individual claimants? Could not an expert gather it altogether and you cross-examine the expert?

MR JUSTICE ROTH: Why do we need the sample claimants?

MS TOLANEY: The sample at all.

MR JUSTICE ROTH: And is that actually, (a) efficient, and (b) even helpful? I mean, I can see that there may be scope for the questionnaire, which is not an onerous process, and some general information can be done for all the claimants and that may be very useful. It is stage 2 that, I think, we are rather more concerned about, which is the sample and then really a trial for the sample claimants, accepting that they are

treated not as just a trial for them but a trial for their grouping, if you like.

MS TOLANEY: But, I think, if you were going down the expert route, then you are back to, in fact, the Visa/Merricks' proposal, which does not have any factual sampling - or are you suggesting, sir, that there would be the sampling exercise? That is what I am unclear about.

MR JUSTICE MARCUS SMITH: I am not suspicious or concerned about the questionnaire stage. I can see enormous difficulties there but I can see that the questionnaire, properly framed, could be an enormously powerful tool in informing the process. Where I struggle is why you are moving from that straight to a disclosure sampling basis, followed by witness evidence out of that same sample, in circumstances where one is likely to get a far better quality of information from the expert, rather than from the sample, where you may get someone who is a perfectly competent grocer but who is not actually a very good witness? I imagine, without any disrespect to grocers, that may be a problem that one has. What one is looking for is the best factual information. And what we are pressing you on, I think, is: why is an industry expert, simply because there may be divergence within the industry, not the person to provide the answer?

MS TOLANEY: Sir, what I am struggling with is: if it is the industry expert providing the evidence as to what happens, then that is not factual evidence; it is expert evidence. I do not know where the ...

MR JUSTICE MARCUS SMITH: No, it is opinion evidence.

MS TOLANEY: But I do not see what the sample then adds because the industry expert would be not - if he is not gathering the underlying information, and is just giving his opinion, if he does that based on a sample, surely he or she would want ...

MR JUSTICE MARCUS SMITH: Do not get me wrong. I am saying that the sample should be just that. I am not suggesting that it is a great idea. I am suggesting that

one obtains the information that is needed by the expert, the industry expert, in order to answer the Tribunal's questions. Now, it may well be that the industry expert says, "In order to provide you, Tribunal, with the answer to your particular point, I need to see the following stuff" and one would then say to the relevant persons in the claimant group, "Here's a questionnaire" or, "Here's a request for you to produce this particular thing so that the expert can be informed." But you would have it expert-led rather than sample-led, and that is, I think, the big difference that we are very helpfully articulating now.

MS TOLANEY: And would on this approach, sir, the Defendants see everything that the expert saw and the disclosure that ...

MR JUSTICE ROTH: I mean, it would be, would it not, in the normal way, that the expert would draw, first of all, from any published information about the grouping/the sector/whatever it is - there are certain areas where there is quite a lot available, there are other areas where there is virtually nothing, and there are a lot in between. So, they would draw on that and they would cite it and you would be able to look at it. If they then said, "We needed to make inquiries, and this is what we've done and these were the answers that we got/we are relying on (discussions we've had with A, B and C)", you would see the notes of those discussions.

MS TOLANEY: All of the experts say that they would want - on this topic, they would want factual information.

MR JUSTICE MARCUS SMITH: Ms Tolaney, if your problem is, "Would all the parties not calling that particular expert see the unused material that the expert had obtained?" - well, yes, I cannot see any problem with that; there is no privilege or confidentiality question. So, if you had - and I am sure we would not have - an industry expert that was highly selective in picking materials that only supported his or her opinion and ditched the rest, well, heaven help an expert on cross-examination, that is all I would

say, because the material, I cannot see any good reason for not ensuring it was available to the cross-examining parties.

MS TOLANEY: Yes. Sir, I will come back on this after the break because, as you know, we object strongly to just having an expert to cross-examine on factual material, but let me take away what you have said over the break and come back to you.

MR JUSTICE MARCUS SMITH: That is very helpful and I appreciate that we are throwing a lot at you. There is one more point that fits in with this, and I apologise for taking up time before the break on this. Let's suppose that you are right and within an industry that to the outsider appears homogeneous in the relevant ways - for instance, one might say, take the supermarket sector, they all price in exactly the same way. Let's suppose that you are right and that is an assumption that is simply wrong, and the industry expert will say, "Well, frankly, they price in all sorts of different ways, and this is how they do it ..." It is going to be very hard to produce, if that is the evidence, a generic pass-on rate for the sector. You are not going to be able to say, "Well, for each and every supermarket the pass-on rate is X." That would just be papering over the differences. What one might be able to do is say, "If you can show that you generally priced in this sort of way, and the alternative pricing was that, and there is a percentage", then one has got a means of, after the event, ensuring that a pass-on rate is calculable. Now, at that point one is, as it were, turning the testing of where one falls in the categorization process, one is converting that from an ex-ante approach, which is your approach, to say, "Well, we need to be assured that everyone falls in the right categories" into an ex-post approach, where you are saying, "Well, we have now worked out what matters in terms of pass-on. The following factors are highly significant, these ones are not." One might even have aspirational rates as to how each factor affected the overall outcome. That may be over-engineering it. But one then, after one knows what the factors are, one has a process by which people

say, “Well, I fall within these factors, the pass-on rate is therefore X rather than Y.” Now, that moves things much more into what one might call an exceptions or a mediation process, but at least one is doing it in an informed way. The trouble I have got with the sampling thing is that you do not know why you are sampling a particular person because you have not got the outcome from when you are doing the sampling, and the industry expert, as I see it, is a way of unpacking these differences, which Dr Niels says may exist. Of course, if he is wrong and they do not exist, things become easier, but we fully accept that he is a respected expert and we have got to take on board the difficulties that he is articulating because, if he is right and they do exist, we need to have a means of resolving them. So, I leave that as a sort of final thought on process and we will rise, unless you want to push back right-away?

MS TOLANEY: I will come back on all three points.

MR JUSTICE MARCUS SMITH: I am grateful. We will rise for 10 minutes, until 10 past.

(12.01)

(A short adjournment)

(12.17)

MR JUSTICE MARCUS SMITH: Ms Tolaney.

MS TOLANEY: Thank you, sir. I have had a chance to regroup. Can I just go back on one point that you made, sir? You were referring to Sainsbury’s, and I was not, of course, involved in that case, but I think the witness that you had in mind was Mr Mike Coupe.

MR JUSTICE MARCUS SMITH: It was.

MS TOLANEY: Now, he, of course, was a factual witness.

MR JUSTICE MARCUS SMITH: Yes, of course.

MS TOLANEY: And he had - and there were, I gather, 60,000 documents disclosed

in that case, and he was tested quite extensively in the usual way on the basis of factual evidence. And that type of witness may be very helpful because he could, I gather, speak to not just the business of Sainsbury's but more extensively, but that was from his position as a factual witness, not an industry expert.

MR JUSTICE MARCUS SMITH: Ms Tolaney, of course, that is absolutely right and I remember Mr Coupe's evidence very well. What I was putting to you, just to be clear, is: why one could not have a retired Mr Coupe from, let us say, Tescos or Waitrose or Sainsbury's saying, "This is how supermarkets do it. I've spent my career in retail, I know how it's done"? And to the extent that documentation assists and is needed for the expert to render his or her opinion, well, yes, that would be under consideration for provision, but one would not be saying to each sample party independent of the expert, "Well, just give us everything about your pricing documentation for someone to read through and cross-examine you on." It would go, to the extent needed, to inform the expert. So, I was using Mr Coupe as someone who I felt - and, of course, he was not asked about this - but I felt would be able to give a very clear insight into how the supermarket sector operated generally. Now, you cannot test for that, but I would be surprised if there were not a retired executive from a supermarket and from other areas of industry who could not give exceedingly cogent and more cogent evidence about how a sector operated, including differences within it, than going to the sampling process where you get, well, whoever you get.

MS TOLANEY: Sir, I think the points I would make in response are: first of all, whether or not there is an equivalent of a Mike Coupe in an industry expert way - it was possible to test that evidence through the material, in the usual way, of disclosure and cross-examination, and that we maintain is very important both on a basic fairness level and for the process. So, disclosure, we say, is required and it is not just an opinion piece; it has got to be underpinned to the facts of this case. But the second point is ...

MR JUSTICE ROTH: I mean, it would be materials that the expert has relied on or considered. It is not disclosure of his - because he is not from his own personal company ...

MS TOLANEY: Indeed.

MR JUSTICE ROTH: ... and he may be an academic from a business school who has studied the particular sector all of his or her career, or it may be someone, as the President said, who is retired and can say, “Well, of course, not only do I know how my company has priced, but we watched our competitors very carefully and we looked at how they priced and I and I am drawing on that experience” and if there is any published material he will refer to it and if there is any private material he or she will disclose it. But there is not a sort of general disclosure.

MS TOLANEY: But that, sir, begs the question because one of the whole points in this case is that there are not direct published papers on point, so everybody is talking about using a proxy, and the biggest question for that is, then: what is the proxy? Now, if you are talking about ...

MR JUSTICE ROTH: Sorry to interrupt you but there are published papers, but they do not deal with that point. But there certainly are in certain industries quite a lot of that.

MS TOLANEY: Yes, but not on these charges.

MR JUSTICE ROTH: About the industry pricing.

MS TOLANEY: Yes, but not on these charges, and one of the points about this is that all the experts are saying they would want to know the facts of how the individual merchant priced.

MR JUSTICE MARCUS SMITH: When you say the expert, you mean the economist expert?

MS TOLANEY: The economist experts, they are all saying that, that they would want

to know how it was priced. So, that is the first point, that it is not very clear to me what the body of evidence would be, what the grouping of documents would be for the expert and how comfortable it would be for the parties to challenge it. The second point is that it is unclear whether the Tribunal's proposal is that each party has their own group of experts per sector, or whether these are court appointed experts, because, obviously, it has got to be possible to test the case. On the Claimants' proposal, they are appointing their own experts and we are appointing ours. That is a lot of experts because we are talking about experts per sector or group. The third point is that, as Dr Niels says, his opinion is that you cannot actually look at it by sector; you need to try and group. And that is why the survey is actually very important. So, our suggestion to the Tribunal would be - and I understand that the Tribunal's concern here is that you do not want 50 witnesses of fact, either in number or who have no useful evidence to give, so I understand that is my target here ...

MR JUSTICE ROTH: That is one concern but the other concern is, I have to say, how the samples - you have got your groupings - but then how the samples are drawn from each group? Because it is fine to say, "The experts will agree." Well, experience tells one that they will not and we will get a lot of disagreement about who should be the two or three individual claimants from each grouping, to use the neutral word, for whom the detailed factual evidence should be provided.

MS TOLANEY: So, can I just take both of those targets? The first thing is that our position is that we cannot go by sector, we should do the survey. The second stage is to meet the Tribunal's concern: is the most sensible thing to see how the groups come out? Quickly, I am not suggesting a delay. Because what I would say is that - there are two questions here. One is: if it is done by grouping, are there - or even sector, it does not matter - are there actually, is there actually the retired Mike Coupe, to take your example, can that person be found or are we talking about each party

getting their own experts to opine in this way? And what is the body of documentation? Is there going to be any disclosure from the Claimants put forward to all the experts? How is it going to be done? Now, that may be more obvious once you have got the groups because it may be more possible to see, because what you might find is that there is in fact a Mike Coupe within the groups. There may be some of the Claimants' senior factual witnesses who are actually best placed to speak in the way that Mike Coupe did. And that assessment may not be possible until you have seen the grouping and the results of the survey. What I would say to Mr Justice Roth's point is that it is possible - and one does it in test cases all the time - to agree either the range of factual scenarios, or different parties pick which test case. So, applying that approach, you could take the position that the Claimants' expert picks a person in the sample, a representative sample, and the Defendants do, too. And then you avoid the disagreement, because undoubtedly each party or side, however one groups it, would pick the person they thought was appropriate. And you would get then your range, and you would limit it to two or three, and then you would get the range and then you would be able to distil it down to see what the actual points of disagreement were, and if there was in fact any need for cross-examination at all because it might be possible to agree what the range was. So, what I would suggest to you, and I appreciate the management of this has been going on for a while, but we are trying to find - it does not feel like a short-cut - a short-cut through having evidence from every single Claimant and expert evidence, and I would suggest that the survey is the starting point, that very quickly one makes the decision on grouping and sees whether it is right that there is a grouping point or whether it is a sector point, and one very quickly then decides whether, through the Claimants, maybe the Claimants' own stance as to whether there is a Mike Coupe in the relevant sectors or whether we are into experts, but with an agreement on the body of material to be used. Because what the

Defendants are concerned about is that there was a proposal from the Claimants at one stage that there was no cross-examination of either the underlying or even of some of the experts, and we have to be in a position where we can test the evidence against us, we have to be in that position, and we do not have the material. So, that is what we are trying to achieve on our side as well. And the other option, as I say, after one sees the grouping, is to take the test case approach, which is to have the three, let's say hypothetically, the three picked from each group and then the range of disagreement is limited. And one would then have to look at whether it is - and you will hear at that stage management of the trial - really necessary to cross-examine all those witnesses or what the key points are, and that is a separate exercise, but it can be very sensibly managed. The spectre of 40 factual witnesses to be cross-examined is a spectre and I do not think it is a real risk. Sir, those would be my answers on those points. Can I turn, unless there are further questions on that ...

MR JUSTICE MARCUS SMITH: No, please do.

MR TIDSWELL: I think you suggested a little earlier that you might be looking for some connection between, some factual connection between these charges, the MIFs, and pricing, and I just was not sure whether that was being advanced as a reason for going into the sampling? I think we have all proceeded, as I have understood it, on the basis that it is very unlikely that businesses will have made pricing decisions by particular reference to these costs, and I just wanted to understand whether you were challenging that and saying that that was underlying some of Dr Niels' approach?

MS TOLANEY: Sir, we are not challenging that. It is more, I think, the way that the pricing and processes - the processes and business practices. So, I think the point was being made, and it is best put in Dr Niels' report at paragraphs 320 to 322, which is page 350, and the point is within the concept of a merchant-specific assessment rather than a sector assessment, and he gives the example of hotels, and he says at

322, “Merchant claimants’ treatment of MSCs and their budgeting and pricing strategy could vary between some competitors in the market ...” and the last sentence, “The treatment of MSCs and the merchant pricing strategies would be expected to effect the pass-on rate.” So, that is the way it is put.

MR TIDSWELL: Yes, and that came out of a question from Mr Justice Roth, or an observation, about what academic or other literature there might be about the way that particular sectors or groups, whatever it is, operated. So, are you saying that there obviously might be variations, and so therefore the variations ought to be taken into account? And one of those variations might be the treatment of costs, treated as overheads, or the variable costs, in a particular organisation? And so you are saying that that might emerge from this? But you are not saying that you are expecting to find lots of evidence about particular lines of cost that link into the price?

MS TOLANEY: No, but I am saying two things. One is that - and I think you have made the point, sir - within a sector, if it is not obvious, that everybody paid the same way. But, two, that somebody, “Industry experts” just may not have visibility over how individual merchants were operating. On the other hand, they might, and in the supermarket context there might be an obvious example of how everybody operated. In other sectors, such as hotels you might be hard-pressed to get one person who could speak to the operation of a very large hotel, to a provincial B&B. The difficulty, if I may say, with the Tribunal’s proposal in the ether, in a way, without knowing whether one can do it is it is dependent on that person existing and being able to be identified, whereas Dr Niels’ proposal takes what is there and uses it. We know there will be people there, it is just picking the right people and I understand that that process may not be straightforward but I have suggested one way through it, whereas picking people out of the ether who might be the right people, and it is only suggested at the moment we necessarily have them, is the uncertainty over the industry expert

approach.

MR JUSTICE MARCUS SMITH: That is really why I think if you were to do this you probably do start with a sector because the chances are there are going to be people with expertise in that sector and then, as you say, there may be, it depends how you draw your sectors, but there may well be quite large variations but of course that is where your survey is useful because it will give you data to understand the composition of the sector and it may well be that, as you say, it is necessary for the expert to gather further information - perhaps directly from that sub-set or segment - but I think… so if you – it may not matter if you go to your groupings first and then another sector and apply groupings as a lens, or if you go to sectors first and apply groupings as a lens, you are probably going to end up doing the same thing ultimately.

MS TOLANEY: That's right, it may be that the grouping exercise will flush it out and would be helpful, whether or not one takes it to an analysis on a sectoral basis. I think all the Claimants' economic experts recognise that there are sectoral differences. It is only Mr Coombs' approach that doesn't account for differences between the Claimants and the sector.

MR JUSTICE MARCUS SMITH: It is implicit in references to differences within the sector, that there are a number of reasonable ways in which one can conduct one's business within the sector. In other words you can reasonably adopt one pricing strategy or another, for example. To what extent is this exercise focused on what actually happened as opposed to what was within the reasonable range of options for a person in a given sector?

MS TOLANEY: That is one of the points I was making earlier, sir, that your role will be to find in each case what the actual loss or gain is, which means you are looking at what actually happens and the problem with an industry expert ---

MR JUSTICE MARCUS SMITH: I understand the point, I just want to test it. Let's

take one Claimant who has conducted themselves in terms of how they have run their business in a manner that is unreasonable in the sense that they have essentially either made far less profit or actually made a loss when, had they done things differently, they would have made more money or less of a loss. Is the proper measure of what was passed on how they do it or how they should have done it, in terms of the questions that we are answering? You are saying it is the “is” and not the ...

MR TOLANEY: The counter-factual, sir, is what they would have done, I understand that, but how they set their – how their policies were ...

MR JUSTICE MARCUS SMITH: Yes, the counter-factual in this case is unlikely to be very different from the actuality because the charge is so small, so I don’t think you need worry about that part. What I am more interested in is a situation where you have got an incompetently run business and how that plays in the mitigation defence that is being articulated because I am not sure when one is talking mitigation one is necessarily talking in all cases about how things in fact were right.

MS TOLANEY: I understand that, sir. I think the way the test was put by the Supreme Court, which presupposes that you would look at what the merchant had actually done. I do see that there may be arguments on a mitigation case that they should have done something different, but you still need to know what they actually did.

MR JUSTICE MARCUS SMITH: It seems to me that the Supreme Court’s articulation works if one accepts that there is a hidden assumption that what they did was reasonable. What I am suggesting is that that is in fact the hidden assumption in the reasons in court and in the points you are putting to us, that it is the “is” that matters. I fully accept that if you have got a range of reasonable options, then the “is” is likely to be determinative, but I am just testing that proposition.

MS TOLANEY: I understand that and I understand that there scope to look at what is reasonable. I wonder whether, though, in this case it really matters, because I wonder

whether you have to know what people did before you have even got to the question of what was reasonable given the nature of what we are discussing. I suppose what I am saying is I don't think you can short-circuit the question of what factually happened by moving straight to the question of what should have happened. I think you would have to know the first to get to the second.

MR JUSTICE MARCUS SMITH: Thank you.

MS TOLANEY: Sir, can I just cover off some of the points that I ought to cover, I know the debate has gone quite far down where I am going to end but nevertheless I will go back to it. I just wanted to deal with the Visa Merricks' proposals to the extent I need to. Those proposals, as we said, obviously dispense with factual evidence at all and we say that that is not appropriate and the reason for that is that the assumptions put forward by Visa are ones that you can't rely on safely at this stage because the proxies put forward would be hotly disputed. We suggest that trying to simply take public studies and discerning from that with no factual evidence at all would be unfair and dangerous and we say will lead to real problems when it comes to trial and we think it is not an appropriate approach. You have already been addressed on that by my learned friend Mr Moser and I adopt those submissions, those are some of the problems, and I would also refer you to Mr Holt's report. I think we touched on this yesterday, it is paragraph 21(a), Bundle 1, Tab 15, page 224. What you see here is him explaining how he will decide how much weight to place on each public study of pass-on he identifies and you can see that his key concern is that identifying whether the type of costing study is sufficiently different from the nature of the charges here in issue in one or more aspects, for example: fixed versus variable costs, firm specific versus industry-wide and so on. He concludes that "…for studies that examine the pass-on rates of a different type of costs that differs in one or more of the above ways from MSCs, I would consider either putting less or no weight on those studies when

deriving a sectoral average pass-on rate or using the estimated pass-on rates from those studies as an upper or lower bound".. We don't take issue with the theoretical points made because in general we agree that general variable costs are passed on more than fixed costs, and in general industry-wide costs are passed on more than firm specific costs, but the problem is that there is going to be disagreement about how those conclusions apply to the charges here because it depends on how the merchants treat MSCs and that is exactly what the Claimants' evidence describes. We say that that's why you need factual evidence, however it is deployed. We say the same problem arises with Mr Merrick's proposed approach, which you see in Bundle 1, Tab 12 at page 190, and that is at paragraph 3.16. So, he proposes using measures of purchase price inflation as proxies for the charges, but that begs the obvious question as to whether MSCs are passed-on in the same way as the input costs in those industries, which again depends on how they are treated by the merchants. They may be, but you just can't assume that they do without any factual basis --

MR JUSTICE MARCUS SMITH: But how does one test that in the individual case, given that MSCs are such a small part of the business?

MS TOLANEY: Well, clearly information we are trying to gather.

MR JUSTICE MARCUS SMITH: Well, yes, but how will that information help? If you are talking about something which is small when the merchant in question will be focused, quite rightly, on the larger costs, why is one not extrapolating whether one looks at the sample, whether one looks at the expert? At the end of the day, you don't know because you can't see it in the way one can on the acquirer pass-on, you don't know how this has happened because it is a tiny part of even a small business.

MS TOLANEY: I understand that but it is a tiny part of a particular business.

MR JUSTICE MARCUS SMITH: Yes.

MS TOLANEY: And that is affected by the various points Dr Niels has outlined in

terms of the individual claimants' business practices. What you can see in Mr Coombs' approach is, first of all, there is no attempt to make any central distinction at all. He, I think, is the only expert that doesn't even accept there is a central distinction and he simply --

MR JUSTICE ROTH: I thought he does, at 3.18?

MS TOLANEY: He accepts but he says that you apply his approach across the board within the same sector. He doesn't try and distinguish --

MR JUSTICE ROTH: Within the sector, yes?

MS TOLANEY: That's right.

MR JUSTICE ROTH: But he does it?

MS TOLANEY: Yes, between sectors he does, but not within the sectors.

MR JUSTICE ROTH: I see, sorry, I misunderstood you.

MS TOLANEY: That's right, whereas others, the other experts accept, as I have given examples, hotels and so on, that there will be distinctions, he simply just tries to read across everything because one of the problems we are just extrapolating with no information is that you are going to have to take it at a very high level. What we are saying is that there is no need for that to happen here, when you have a cross-section of retailers before you, there is no need to proceed on the basis of assumptions from public studies when you have the factual evidence you could have before the court.

MR JUSTICE MARCUS SMITH: That's my difficulty because I mean, let's suppose we have in the witness box a merchant and we have had full disclosure from the merchant and we look through it and we try and work out where there is specific consideration of the interchange fee as a cost and how it is recovered and behold we find that actually there is no such consideration because it is so small, they are worried about things like the rent and the cost of goods coming in, and things like that, but they are not worried about interchange fee because it is too small. So, we don't have any

help from the disclosure, except by way of analogy with how other bigger costs are dealt with by that particular merchant. So we then cross-examine this merchant and say, well, it is very puzzling that we don't have any specific consideration of interchange fees. He says, well, actually it is not that puzzling because we have got bigger fish to fry and you say, well, how do you treat them? How did you specifically consider the interchange fee charge that you paid on each transaction? What do you think? He will say, well, (or she will say) we actually looked at the bigger fish we had to fry because there are other costs. So, how does one, if that's right, how does one get an answer from a merchant who has given full disclosure, who is in the witness box, as to how in fact they dealt with the overcharge that we are talking about here? What useful evidence can that merchant give beyond a process of reasoning by analogy from other larger costs?

MS TOLANEY: Well, I think there are two points to make here, one is that it is assumed that the merchants can't give evidence as to how it was treated, and we don't accept that because they may have a whole cost pricing way of doing things. Secondly, taking --

MR JUSTICE MARCUS SMITH: Sorry, are you talking cost plus here?

MS TOLANEY: I am.

MR JUSTICE MARCUS SMITH: Right.

MS TOLANEY: But the second thing is, take, for example, the draft statement of Mr Whitehorn that is in the bundle, so the Merchant Claimants say that, for example, Mr Whitehorn says merchants' services charges are treated completely differently by automated dealers from core input costs and they are treated as overhead costs. So that is relevant evidence that you wouldn't get from Mr Coombs' approach because he is saying they are not treated as input costs in that industry and Coombs assumes they are.

MR JUSTICE MARCUS SMITH: But we are back to the industry expert versus --

MS TOLANEY: I am just dealing -- yes, I am dealing with Mr Merrick's proposal --

MR JUSTICE MARCUS SMITH: No, no, what I am trying to understand is what the factual witness, who is not an expert, brings to the party in terms of their disclosure and in terms of their live testimony, in understanding how the interchange fee is dealt with, other than by looking at the general practices of that particular business in terms of how they deal with costs.

MS TOLANEY: Right. So, sir, I think the point is that you have to look at the business, as you say, the individual business, as to how they treat, whether they treat costs from their business practices, so you look at their business practices as to whether it is likely that they are treating MIFs as variable, rather than another way. But you are looking at the business practices and/or maybe more specific cost processes of the individual merchant business. Now, what the target I'm just meeting at the moment is, what you can't do is assume, as Mr Coombs does, that they are all to be treated as input costs.

MR JUSTICE MARCUS SMITH: Yes.

MS TOLANEY: I was giving you an example to show why that's wrong. To answer your question, well, what evidence are you trying to get? The answer is, I think, and the claimants set this out as well, is that when you have information about how the business pricing and practices work of each business, you will be able to see more fairly how these costs are treated within the business. That is the evidence. If you are asking me, is there a document that says, this is how they are to be treated, I don't know the answer to that and there may be, but I don't think you would need that document, you would extrapolate from their own business practices, what you wouldn't be doing is just reading across and saying they are all to be treated as input costs.

MR JUSTICE ROTH: They will be looking at how the business pricing, how it treats

changes in costs, how often it increases its prices relative to proper changes in costs generally and inferring from that how, in practice, MSCs were dealt with, albeit not consciously as a decision in saying, we have got to deal with this 0.5% increase in the MSC.

MS TOLANEY: That's right. I think all the Claimants, who obviously are in the position of knowing this, are assuming that each business will have got its own practice and it would be relevant, and what you can't do is assume either that all MSCs are treated in a particular way, which is the Coombs approach, or to suggest that all sectors (or all hotels) treat them in the same way, and that is the whole target of Mr Niels' approach.

MR JUSTICE ROTH: Or potentially the industry expert.

MS TOLANEY: Or potentially, yes.

MR JUSTICE ROTH: Various variations, but you are dealing with Mr Coombs' approach?

MS TOLANEY: That's right. I am giving you one example as to why that would be a dangerous approach, even on the evidence that you have at the moment, before you.

MR JUSTICE ROTH: He is not proposing industry experts at all.

MS TOLANEY: No. The other problems with the approach taken by Mr Merricks - and I think it is important to have a health warning about it, because it is a different action, and there are three further points to be made. The first is there is a difference between the kind of pass-on being measured for the Merchant Umbrella Claims as opposed to the Merricks collective action. For the Merchant Claimants, the purpose of the exercise is for the Tribunal to form a conclusion on pass-on rates for the Merchant Claimants based on categories of homogeneous claimants. In the Merricks action, the subject of the analysis is the pass-on rate for the economy as a whole, and those two things are different. Here, the Merchant Claimants are not representative

of the entire economy. There are some sectors that are not represented at all, and for other sectors the relevant Merchant Claimants are unlikely to be representatives of the entire sector. So, that is one distinction. The second problem with the approach is that there is a difference between the claim periods in the two sets of actions. The Merricks claim period runs from 1992 to 2010. Subject to the result of the Volvo hearing the merchant claims period runs from broadly speaking 2013 onwards and there are differences between the two periods. The payment market and retail markets have undergone significant changes, so conclusions drawn from one period may well not apply to the other. The third flaw in the approach identified is that there are differences between the types of MIFs at issue. The Merricks claim is limited to EEA and UK consumer MIFs, but the merchant claims involve commercial card MIFs, inter-regional MIFs and most obviously MIFs from a large number of different European countries, and so you cannot assume there will be a read-across between them. So, I just wanted to put that marker down, that obviously the Merricks approach cannot necessarily be an approach that one adopts in these proceedings without giving due regard to the differences between the actions.

MR JUSTICE MARCUS SMITH: That is a very helpful peg to hang the question that probably we should put to Mr Beltrami as well. He will deal with it in reply. Do I infer from what you have been saying that you would be opposed to the Umbrella Proceedings regime extending to the Merricks class action? That is a point which we have had significant debate upon in the past. We have not resolved it and it is something that we will need to resolve in the course of this hearing. So, the sense I got was that you are saying that the Merricks and the Merchant Claimants' claims are sufficiently different not to suggest that the Trial 2 cast list include the Merricks class representatives. Have I got that right?

MS TOLANEY: I am just checking, sir.

MR JUSTICE MARCUS SMITH: Of course.

MS TOLANEY: (After a pause) We are checking on that, sir. We can come back on it.

MR JUSTICE MARCUS SMITH: Yes, of course. Do take your time.

MS TOLANEY: Can I give you one example of --

MR JUSTICE MARCUS SMITH: Yes. I mean, do not answer before lunch.

MS TOLANEY: Yes.

MR JUSTICE MARCUS SMITH: Let us put that aside.

MS TOLANEY: I had not realised the time.

MR JUSTICE MARCUS SMITH: Do not answer immediately at 2 o'clock if you want to take further time.

MS TOLANEY: Thank you.

MR JUSTICE MARCUS SMITH: I think Mr Beltrami's position is that they want the Merricks class representative out. That was certainly Ms Smith's position last time. I do not know whether that has changed.

MS TOLANEY: I will come back on that. Sorry, do you want to answer the question?

MR BELTRAMI: No. I will come back on that as well.

MR JUSTICE MARCUS SMITH: I am very grateful.

MS TOLANEY: But what I was going to say to you in terms of the approach that is being advocated by Mr Merricks in this hearing is to give you an example, one of the criticisms made by Mr Merricks is that Dr Niels' proposal cannot be used for the Merricks proceedings because merchants do not have records stretching back to the mid-1990s. So they are suggesting that in these proceedings a methodology should be adopted that takes account of that. Now, we say that just approaches things from the wrong direction because Mr Merricks faces obvious difficulties in being able to prove merchant pass-on to consumer for a claim period that goes back 30 years,

because of the absence of records and document retention policies and so on, and he has the burden of proof on that issue. It may well be that he is unable to discharge that burden. Now, the claims from the merchants relate to a more recent period from 2010 onwards where there is document and information, and in so far as they want to rely on that material and are permitted to do so, the Tribunal cannot allow Mr Merricks' stance to derail the proceedings when there are documents available if it is considered appropriate.

MR JUSTICE MARCUS SMITH: Well, that is an entirely fair point, but can I repackage it and ask it in a slightly different way? Let us assume we are simply trying the Merricks' case and it is not infecting the Merchant Claimants' position, and let us assume that you are right, there are no factual records which exist to enable the sort of sampling process that you want to have applied in the merchant claims apply to the Merricks' class, presumably one then has to move on to a question of whether the claim fails *in limine* at that stage. But surely one must ask before that whether one can fill the factual void by evidence along the lines of what Mr Ridyard put in Trucks 1, namely that as a matter of economic logic the charge moves down to the person who ultimately pays it, and that if there is an economist who can credibly articulate that, then the burden of proof is satisfied and it is a question of whether you can produce either factual or economic evidence in rebuttal of that. Or are you saying that actually an economist saying this would not be sufficient even to discharge arguably the burden of proof that vests in an indirect claimant such as the Merricks' class?

MS TOLANEY: I think I am saying that.

MR JUSTICE MARCUS SMITH: You are saying that. Okay.

MS TOLANEY: The point for this hearing is what I have shown you is that you can see an obvious flaw just looking at one point on Mr Coomb's approach, the input cost, and one cannot allow that approach, particularly when you can see all the difficulties

and differences in position, and why Mr Merricks may be putting that approach to infect the Merchant Claimant proceedings where there is a very different documentary base and should be looked at on its own terms. So, I just put that health warning down.

MR JUSTICE ROTH: Well, as I understand it Mr Coombs does for sectors where there is no public data.

MS TOLANEY: That is right.

MR JUSTICE ROTH: He uses sampling and he wants disclosure --

MS TOLANEY: That is right.

MR JUSTICE ROTH: -- from merchants, although Merricks is a collective action where the merchants are not party to it.

MS TOLANEY: That is right, sir, and that is one of the ironies of their position.

MR JUSTICE MARCUS SMITH: Is that a convenient moment?

MS TOLANEY: It is. Thank you.

MS DEMETRIOU: Sir, can I just raise one procedural point, given that you have asked Mr Beltrami and Ms Tolaney to come back at 2.00 in relation to the participation of Mr Merricks' claim.

MR JUSTICE MARCUS SMITH: Yes, of course.

MS DEMETRIOU: Understandably, Ms Tolaney has, in fairness, made the points that she has just made in her skeleton argument and so I was alive to those points, but nobody in their skeleton argument has said that Mr Merricks' claim should not participate in Trial 2, and that is understandable because of course the Tribunal has already ordered that it should and so that order has been made and that is perhaps why nobody – I was not expecting that particular issue to be re-opened. Of course, there is a question, sir, as you say, as to whether or not we should be designated as part of the Umbrella Proceedings, which is a slightly different question, but the Tribunal did order that the parties in the Merricks collective proceedings shall participate in

Trial 2. Sir, as I understand it nobody has sought to reopen that in their skeletons.

MR JUSTICE ROTH: I think there is a difference between your participation and ability to cross-examine and so on and make submissions, and actually resolving the Merricks' pass-on question in Trial 2, which is a substantive matter.

MS DEMETRIOU: Well, sir, there may be and we can make submissions about that. I do not want to do it given the time now, but I just did want to point out for everyone's benefit that there is that order.

MR JUSTICE MARCUS SMITH: Ms Demetriou, I think it is very helpful that you have raised this, but the reason I am raising it now is because last time we had these parties before us, I was in the process of doing an *ex tempore* judgment which was taking the participation of Merricks, I think, in an umbrella form, as more or less read, and I was surprised by the extent and push back that we received from Ms Smith, and so we expressly parked the question of the Umbrella Proceedings as a matter to be addressed. Now, it does, I think, significantly affect your position within Trial 2, in the sense that - I am afraid my memory fails as to what we have and have not ordered, but I am sure, if it matters, I will be reminded - but if there are no Umbrella Proceedings, or you are put at issue regarding pass-on, then Merricks is significantly detachable from Trial 2. I appreciate that there was a question of how quickly Merricks would come on, but it does seem to us that we are going to have to, at this hearing, grasp the Umbrella Proceedings ubiquitous matter question first and then we may have to think about, assuming it is answered in the negative and there is not a new matter, how Merricks would fit into a trial whose very configuration we are talking about. So, of course, if we ordered that you participate in Trial 2, then that order stands, but if we were to have a situation where we concluded that there was no ubiquitous matter arising between Merricks and the other issues, and seven weeks, or six weeks, or however long we ordered for Trial 2, was only just enough to deal with the non-

Merricks questions, then, obviously, the question of detachment would arise in those circumstances because there would have been a material change in terms of triability. But if it is a question of the ubiquitous matter, then we would have to think about, in terms of management, adding time on rather than detaching in order to deal with the issue. So, I do think the Umbrella Proceedings question is the fundamental one and it then affects, in a manner that is harder to predict, the configuration of Trial 2. So, I would not want you to be under any illusions that you can bank on an order regarding participation without the Umbrella Proceedings question being resolved as answering this particular question because there is an interrelationship between the two questions, and at the end of the day, it is managing the issues that are before the court that matters.

MS DEMETRIOU: Sir, I understand that and, of course, we would be prepared to make submissions on that point. I just wanted to raise it.

MR JUSTICE MARCUS SMITH: No, that is very helpful, but I think the key question is the point which triggered my question about Umbrella Proceedings, which is Ms Tolaney's point that, actually, you are so different in terms of the way in which the issue arises that you are just not a ubiquitious matter at all and, if we were to have you present at Trial 2, it would be effectively conducting two trials together, where there were really no synergies, and potentially a disadvantage to Ms Tolaney in that you would be infecting what on her case is a perfectly nicely triable set of factual issues which are better tried in your absence than in your presence. So, that is the way the question falls, and that is why, I think, the participation question is reasonably contingent on but affected by the ubiquitious matter question.

MS DEMETRIOU: Sir, yes, I understand that and, of course, I will address that in our submissions once I have heard what my learned friend has got to say.

MR JUSTICE MARCUS SMITH: Indeed, and Ms Tolaney has very helpfully provided

the peg for raising this interesting question, and we know where Ms Tolaney stands and we will hear Mr Beltrami at the end because we - and I am sure it is our fault - did not have it front and centre in our minds when we heard from him.

MR JUSTICE ROTH: And to help us on that, Ms Tolaney, you made the point that the merchant codes do not represent the entire economy. I appreciate that you are saying the sector approach is not the appropriate one, but parking that for a moment, it would help at least me in getting a handle on this - because I have no idea what the answer is - if you can indicate what are the sectors of the economy, major sectors, that are not covered by the merchant codes?

MS TOLANEY: Of course, we will do that.

MR JUSTICE MARCUS SMITH: In other words, what sectors are missing? That would be very helpful. Ms Tolaney, we have taken you significantly out of your way, but it has been very helpful from our point of view, if not yours. How are you doing on timing?

MS TOLANEY: I think I would be grateful for a 2 o'clock start, just to make sure that I get through.

MR JUSTICE MARCUS SMITH: We will certainly start at 2, yes.

MS TOLANEY: Thank you.

MR JUSTICE MARCUS SMITH: I think we will only be able to run until about 4.25 today; I have other commitments after court. But we can certainly, if the parties are amenable, start earlier tomorrow. I will check with my colleagues, if that is not speaking out of turn, but we will start again at 2 o'clock.

MS TOLANEY: Thank you.

MR JUSTICE MARCUS SMITH: Thank you.

(13.09)

(The short adjournment)

(14.05)

MS TOLANEY: Before the break I was laying out what our position was on Merricks joining beyond participation, and our strong position is that we do not think they should be part of these proceedings for reasons that I think were debated and the trial should not be combined. We think it is combining two very different trials and it is already challenging enough with this one and I think it risks unfairness, either because, as I gave you the examples, Mr Merricks' approach risks derailing the approach that should be taken or where it suits Mr Merrick, as Mr Justice Roth pointed out, he wants the sampling benefit when it suits him, which, of course, wouldn't be appropriate otherwise.

In terms of the sectors you asked which are not represented, we are obviously doing the best we can at the moment but examples are healthcare, trains and utilities, and there are a number of sectors where coverage is minimal or thin on the ground and not representative as well, so we say there is a difference.

I have obviously given you the various differences in claim period, documentary records and so on. There are also two other factors raised by the Merricks team, and I won't dwell on them, I will just flag them, that we say are wrong but also would have to be sorted out within these proceedings pretty quickly, which is, one, that they suggest that it is not necessary to consider each MIF separately but rather try and lump them all together, but that is not the right approach, as the Court of Appeal has already found in June, and that is in the authorities bundle at Tab 13, Volume 4, page 1012, paragraph 56 of the judgment of Flaux LJ. The second point which we flagged

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MR JUSTICE MARCUS SMITH: Was the Chancellor talking about MIFs needed to be put in in the pass-on context?

MS TOLANEY: The relevant passage reads, "It cannot simply be assumed without

evidence that appreciably lower figures would have been agreed if the MIFs applicable to inter-regional transactions which make up only a relatively minor part of merchant transactions compared to domestic and intra-EEA transactions had been lower" and it was in the context of acquirer pass-on.

MR JUSTICE MARCUS SMITH: Okay.

MS TOLANEY: The second point which we had flagged in our skeleton is that the approach taken by Mr Merricks in the expert report of Mr Coombs is to treat the position as – the question of whether there had been increases in the MIFs rather than the correct counter-factual which is whether there would have been a reduction in the MIFs and we flagged that in our skeleton argument, and we say that he approaches it trying to see what the increase was in the MIF and that is also the wrong approach. These are ---

MR JUSTICE ROTH: That is not a reason why they shouldn't take part.

MS TOLANEY: No, I have just ---

MR JUSTICE ROTH: It is something the Tribunal might have to resolve.

MS TOLANEY: Indeed, that is what I was saying, sir, that these aren't reasons for them not to take part but they are things that would have to be dealt with quite swiftly in these proceedings if they are going to be in them, and so I just flag them at the same time for reasons of convenience. I have taken it out of the skeleton.

MR JUSTICE ROTH: Can I just ask you – I am sorry to interrupt.

MS TOLANEY: Of course.

MR JUSTICE ROTH: You said the merchant claims were for 2013 onwards, if I have got that correct, I think we were told, but it maybe that Mr Moser and Mr Beltrami can help us, that actually some of them go back to 2006.

MS TOLANEY: I did say 2013, you are quite right, and I will be corrected if I am wrong about that.

MR JUSTICE ROTH: There are a number of claims going back rather earlier.

MR MOSER(?): Both of us deny that. I don't know. It certainly wasn't me.

MR JUSTICE ROTH: I am not saying you said it. I am making the point that some are actually going back earlier. There may be mistaken claims, I don't know, but they certainly don't go back to 1997, but they go back to 2006/2007.

MR MOSER: We can look into that.

MR JUSTICE MARCUS SMITH: I think rather than waste time now, if the parties could just provide us with a single, perhaps quite large piece of paper which sets out sectors included where known and the time period of claims for both Merricks and merchant claims, assuming, without speaking out of turn, assuming that the limitation period stays as it is, in other words assuming that *Volvo* goes against the parties who are seeking to extend the limitation period, we can obviously compute what the difference would be if it goes differently, then we will have an idea of how these sets of proceedings mesh just as we have got an uncontroversial understanding of what is in and what is out. Obviously we don't need sectors for the Merricks' class action because we don't know and we all assume they are all in.

MS TOLANEY: We will do that, sir.

MR JUSTICE MARCUS SMITH: Thank you.

MS TOLANEY: The second point I want to go over, and I don't want to go too much over old ground, but I think one of the points that you put to me before lunch was the point that Merchant Service Charges are too small to see from disclosures so what's the point of the evidence? I answered that, but just putting it a bit more fully, I think the point you are making, sir, comes from the suggestions in the evidence that it is not possible to identify the pass-on rate for those charges using economic tricks and that is not possible because those charges are small and largely won't have changed, so their effectively drowned out when you are just looking at it in that way.

MR JUSTICE MARCUS SMITH: Certainly I have that point that in terms of a regression you are going to have to proxy the MIF by reference to something bigger and then either on a wing and a prayer or some peculiar statistical quirk translate what happens to the bigger cost into the smaller, so, yes, I have that, but my point was actually not being made in the context of econometric analysis, I have that, but in the context of what one would get if one had a physical disclosure from the sampled claimant and that sampled claimant in the witness box being asked about MIFs and what I was suggesting – please do tell me if I am wrong – was that actually one would get a rather similar answer to the regression analysis answer from the witness. they would say, “Well, we’ve got bigger fish to fry, the MIF would be treated with bigger costs and we wouldn’t really specifically trouble ourselves about that”, so that is what I was putting.

MS TOLANEY: I think we do think that is wrong – not necessarily from the answer from the witness, but from the disclosure because, while these charges are small, merchants face many small costs and depending on the industry they actually may represent a significant part of the profit margin, Merchant Service Charges, so what you may well see - and we believe you will see in certain cases - is that the budgeting process within individual merchants is detailed and includes specific entries for a number of smaller costs, including specific provision for Merchant Service Charges, and that the total cost stack, which includes those charges, is used in determining prices, and that would show pass-on because in the counter-factual the costs stack would have been different; or the alternative, as you might see, that prices are determined based on input costs and the merchant targets are a margin which is not calculated in a way which takes any specific account of costs, like Merchant Service Charges, and that would indicate there was no pass-on because the target margin would have been the same in any event. We believe that disclosure will reveal that

and it is one of the reasons why the Claimants are all pressing on it and saying that it is relevant, and it is why we are saying it.

MR TIDSWELL: (Microphone interference) That means you need to know what the pricing approach was because, of course, if you are pricing at purchase cost plus then of course the best way for costs plus would be that item's cost - apart from the verification, which may be the point you are making. Does it actually help you beyond knowing that that is the pricing approach?

MS TOLANEY: We think it would help on verification, as you say, and secondly it might do - depending on the level of detail and the differences between merchants and approach, it might do.

MR TIDSWELL: It does seem quite – I take the point about the profit margin but it does seem quite unlikely that in any substantial business that the costs of this (inaudible) is going to make any particular difference by anyone who can say anything sensible about it. It was why I am putting that to you, because is anyone going to be paying any specific attention to this line item in the costs stack? And it just seems to me to be inherently unlikely anyone would ever do that in a (inaudible) business.

MS TOLANEY: I think there are two points, the first thing is: is it in the costs stack? Is there a line item that is dealt with which may be relevant to disclosure? There may be a separate question as to whether there is relevant evidence on it.

MR TIDSWELL: There would have to be in a price stack, if you are talking – unless you are (inaudible) to costs stack being excluded, so if you are looking at overheads, those are variable costs or ---

MS TOLANEY: Exactly, but it is going to flow from that debate is our point, and it is also going to help because within different sectors you may have different treatment, so it will also show that you are talking about an industry expert, that there is not one approach per sector, for example, because this would demonstrate it very clearly.

MR TIDSWELL: Yes, but then you may be back to a difficulty in determining which of the targets you identify through your survey (inaudible) because if you are going to allocate your group on the basis of whether it was fixed or variable costs, you then have a potential conflict with someone who has got their costs plus and someone who works on dynamic pricing? It is difficult to see where it actually sits. It is going in a line item somewhere. It is difficult to find much more than being told what the pricing approach was, that is how it seems to me.

MS TOLANEY: I think what I was saying was I have given you samples of where it may be in the evidence. You have also got, as I say, the witness evidence before the Tribunal showing that, precisely showing that the approach is to treat it in one way in one sector and those are examples. It is the only material we have at the moment to show you that you can't just make assumptions because -– and the assumptions that are being pressed on you may not be the right assumptions, which is why you would expect to know as a matter of fact, so far as you can, what actually happened. And the Claimants are saying the same thing, so it is an unusual situation where the people who have got the information are saying they want to provide it and they want to put it forward because they think it is relevant and we on the Defendants' side (not all of us) agree, so what we are saying is: don't exclude it because it seems to be quite onerous to get the information, because we say that the information is going to be useful whether or not it is processed by or put forward by factual evidence or in some other way.

MR TIDSWELL: So what we are really talking about is the different levels to which you go and aside from Visa, and even not completely Visa, everybody accepts, I think, that you go beyond the completely generic and you ---

MS TOLANEY: That's right.

MR TIDSWELL: I think the real debate is in relation to your position, whether you go

even further and then for claimant-specific - and I appreciate that everybody at some stage seems to want to meet and be claimant-specific - but in the broader sense, you are definitely inviting that argument as much, if not more than most to disclose ---

MS TOLANEY: I am not sure I am. I think Mr Beltrami client is suggesting there is disclosure and investigation into each claimant but it is just collated in a particular way, it was an example.

MR TIDSWELL: I was going to say, I think whatever extent it goes to there is a difference about the central mediation of an expert, isn't there and the argument ...

MS TOLANEY: Yes, that is the difference, and I think on my approach I was trying to get less than perhaps the claimants were offering.

MR TIDSWELL: Yes.

MS TOLANEY: It is just how it is put forward, and the difference between us is we didn't agree to the collation by an expert, particularly one we can't cross-examine, which was the proposal. We are saying it should actually be done within, as factual evidence, the way it should be. And what I was going to put forward as well, just buttoning up on that, is that taking the Mike Coupe example, in a sense the Tribunal's proposal could be that instead of having a current Mike Coupe you try and search for one that might exist to 'firm up' Mike Coupe but who doesn't have the specific knowledge and is doing his best rather than somebody who is in situ, that is the danger of that approach. What is not clear at the moment is: if we are going down an industry expert route, is it going to be an industry expert for each party in each sector or something different? Which, when we talk about quantum of witnesses, then the same problem may arise on quantity of witnesses.

What I think I was going to suggest to the Tribunal in terms of how it could be taken forward in a pragmatic way would be a series of directions along the following lines, - and I just put these out again as a starting point - that a survey is agreed between the

parties' experts within a week of this hearing ending, so Friday week. That means: everybody will have it for ten days; that we write to the Tribunal on the papers by the following week, 9 June on this timetable, if there is a disagreement; a period is allowed for the Tribunal, - whatever the Tribunal thinks it wants to resolve that disagreement and I appreciate if it is a large one it may take time, but hypothetically, and it may be ambitious - allowing a week, until 16 June; and, assuming there was either agreement or a resolution of a disagreement, two weeks later one could send out the surveys and get the responses. That is the same period as Visa has allowed for a survey in relation to Trial 1, and, of course, the nature of the survey is going to be apparent already so one could line up the relevant person to deal with it, I assume, so it won't just be limited to two weeks. On that timetable it will take one to 30 June. You then ask the experts to do their grouping based upon the information individually, and they are given a two week period, or however long one thinks for that, and then a further week to meet and resolve disagreements. If there is an immediate disagreement on approach, one could have, subject to the Tribunal, a hearing at the end of July to resolve it. If there is nothing that is terribly urgent one would then go into August and early September to determine: how many groups, what they are, is it sensible to have a representative from a group? Is it sensible to have an expert? How would it be dealt with? And the parties could make their proposals insofar as there is disagreement, and come back to the Tribunal in mid-September. That is a possible way forward that would allow the testing of how the evidence should be deployed, what information one is getting, a bit more granularity on the Claimants and who they are and what they are doing without taking up a huge amount of time and allowing the Tribunal to make an informed decision then about the way forward, which is well in advance of the next steps. That is a suggestion; the Tribunal may have already reached the conclusion that that is too complicated and want to go a different route, but what we would say is our essential

point is there has got to be factual evidence and the factual evidence has to be capable of being tested however it is deployed.

MR JUSTICE ROTH: Just so I understand, (leave aside the dates which are not for discussion now) but this is the first stage effectively of the Niels proposal, so you do the survey and you are saying 'wait until you get the results of that before deciding if I can deal with the next stage, whether it should be by industry expert or sampling or whatever' - that is your proposal?

MS TOLANEY: That's right, and it would also allow the parties the time to refine what they think because it may be possible, having had the debate today, that in certain groups/sectors, there is an obvious industry expert whereas in others you would have to have a factual representative, and the Claimants may be better placed to answer that in the first place as well. I think in this scenario what we are all trying to do is to get the material we need to determine the case and hopefully cooperate in that process.

Unless there are any further questions on that can I turn to the exceptions process?

MR JUSTICE ROTH: Yes, of course.

MS TOLANEY: As I think has been foreshadowed by others, we do have very serious concerns about the suggested exceptions process as suggested, I think, by some of the Claimants, and we have two concerns. The first concern is that an exceptions process could, if not tightly controlled, undermine the entire case management approach that we are debating because the whole purpose of adopting a process of sectoral averaging or grouping averaging is to keep pass-on within manageable and proportionate limits, and obviously the advantage of that is lost if we then have a whole series of not just mini-trials, but proper trials following on. The second concern is that there is a real risk of unfairness to Mastercard if essentially anybody who wants more can have another go, the 'two bites of the cherry' point, and our concern is that a broad

brush to pass-on, which we are having to engage in up to a point, necessarily is going to result in some form of average rates which by definition may be too high for some Claimants and too low for others but that is the process we are in. The problem is that what we can't is those who think they will do better being in these proceedings and those who think they might do better outside staying outside because that is just a one-way bet for the Claimants and it is unfair to Mastercard.

In terms of how we deal with it, at the moment the candidates for this, (the really major candidates) seem to be Primark and Ocado, and at the moment it is not very clear why they shouldn't participate in these proceedings, and a proper explanation hasn't, with respect, we say, been put forward because if they envisage having a wholly separate trial that is surely going to be quite costly, so the cost savings can't be the only consideration, and they can obviously participate only in certain parts of the trial - if necessary, with limited attendance - but it is sensible that they are bound rather than a whole exceptions process being created for them.

The suggestion also was that we could trigger the exceptions process therefore it wasn't imbalanced. But that is not obvious at all. It is said that by the end of Trial 2 we will know a bit more but it is not clear to us how we are going to have the relevant information in the timescale we would need it to be able to trigger the exceptions process, and we certainly wouldn't want to be flooding the court with trials of our own volition.

MR JUSTICE MARCUS SMITH: Ms Tolaney, you may be coming to it - in which case tell me to await the answer. It does seem to me that although an equivalent approach to exceptions is to commend itself, the reality for the schemes is that either they are sufficiently unhappy with the pass-on result in Trial 2 that they appeal it or if they are unhappy and can't appeal it or happy they are not really going to be able to use the exceptions process, not because of information or mismatch (I am a bit sceptical about

that and whether we end up with sufficient information to make it) but just because the Tribunal is simply not aware of an industrial scale of exceptions from the schemes.

MS TOLANEY: That is why I said there are two reasons, one is if it came earlier we wouldn't have the information and the second is after the trial is completed there is not going to be any appetite, if ability, to re-open effectively the debate to have more trials, so it is an asymmetric provision at the moment but the reality of it ...

MR JUSTICE MARCUS SMITH: Just to assist, in terms of the way we frame the exceptions process, would you be pushing back very hard if we made it explicitly asymmetric and said actually the outcome is final so far as the schemes are concerned and all we are really talking about are the requirements are easily satisfied in terms of a claimant challenging the outcome.

MS TOLANEY: We would push back.

MR JUSTICE MARCUS SMITH: You would push back, okay.

MS TOLANEY: Just because an asymmetric process is unfair, we understand the reality of it, that we are unlikely, I think, to overload the process but we have to have – if there is going to be an exceptions process that we have the ability, properly advised, to trigger it if we need to.

MR JUSTICE MARCUS SMITH: I see. Where I was going on this was one could then start to think what would act as an appropriate filter for a claimants' challenge in the sense that if one is talking about a mismatch between the individual case and the generic case, that is something which is really a Claimant issue and not a scheme issue, that sort of mismatch. One can then start talking about limits that one could try to impose to ensure that only worthy exceptional cases are dealt with. If, on the other hand, one has a purely symmetric approach, that sort of avenue to controlling the source where exceptions come from would meet exactly the same problem that you have articulated, namely it would be unfair to impose restrictions on the Claimant class

that were not present in relation to the scheme. What I am really articulating is a reflection of the fact that the reality of the case is that the Claimants are all individuals, individual parties who are technically speaking party only to one claim, whereas Mastercard and Visa are, of course, Defendants and common to all, so it rather, to my mind, implies that asymmetry is actually the right way to go and not unfair because we would be treating differing cases differently and not different cases similarly. That is where I am coming from but of course if it is a position that you are suggesting that what is sauce for the goose is sauce for the gander and there needs to be equivalence between the schemes and the claimants, then that would affect, as it were, the gateway criteria equally.

(14.30)

MS TOLANEY: Well, sir, I was going to suggest gateway criteria anyway. I find the position, you know, as we go back to think there should be an exceptions process but if that's not the Tribunal's preference, then it has to be genuinely exceptional and therefore we say constraints should be put in place. What I was going to suggest originally was that any party seeking to be excepted from the averaging should make a notification to that effect within four weeks of the Tribunal's ruling, following this hearing. Now, if you are going, or attracted by the proposals on grouping in a survey, then I can see that that notification should come after the grouping because having regard to Primark's position that the sampling process may, or rather the grouping process may capture, for example, their client, but what we say is there should be a short time period for somebody to raise the exceptions process. It has been said already by Primark and Ocado that they think they would fall into that category and we should know before the trial, if they're saying they are not going to participate, whether there are particular features of the business they are relying on in taking that stance, which are significantly different from their competitors, and there is no reason to delay

that because presumably the position they are already taking has been informed by that type of analysis. It is also vital for us to know whether they should be included in the averaging process or not, which I think was the point being made this morning, if they are included affects the averaging and then claim that they are not --

MR JUSTICE MARCUS SMITH: Don't assume that the outcome of Trial 2 will be an averaging process.

MS TOLANEY: No.

MR JUSTICE MARCUS SMITH: It may not.

MS TOLANEY: I understand that, but it is one option.

MR JUSTICE MARCUS SMITH: Certainly, and it may be the only option but it has certain unattractive features which might suggest different approaches to determining a large number of claims.

MS TOLANEY: I accept that. But if I put it more neutrally, that their position may impact or risk impacting the Tribunal's assessment of the relevant pass-on rate for others, let's say, and then they are going to say in fact they should be treated differently but without having disclosed why originally, that seems to us dangerous for the whole process we are undergoing and unfair. So, we had a timing suggestion, we also had a threshold point which I think is what you had in mind, sir, when you mentioned this, that a party wishing to be excepted should have to demonstrate to the Tribunal's satisfaction that there genuinely are features of this business which are significantly different to other companies in the same sector or grouping, with the likely result that they will have a materially different pass-on rate, and they should do that by a short witness statement. That should therefore control the quantity of claimants seeking to do that.

MR JUSTICE MARCUS SMITH: So if you know early on that you are in the wrong category, or you say you are in the wrong category, you, at that point, have an

obligation to notify?

MS TOLANEY: That's right.

MR JUSTICE MARCUS SMITH: Two questions: how does that work in the context of those who are stayed and, secondly, how does that work in the context of the schemes?

MS TOLANEY: So, in the context of those who are stayed, we suggest that actually for this purpose they should have to deal with it because otherwise it is just delaying things off and it is limited participation, but it makes the case management of these proceedings sensible. In relation to the schemes, what we say at the moment is, it is something that - you are right, it seems unlikely that we would be making an application in that respect, but I don't think there is a need for an asymmetric process, we can have the right to do it, but obviously this is naturally a more Claimant-focused position.

MR JUSTICE MARCUS SMITH: Let us suppose there is disagreement as to categorisation, and let us suppose that it needs to be dealt with by the Tribunal ruling on matters at some point, sooner rather than later, and let us suppose that the outcome of that ruling is one that Mastercard are unhappy with or Visa are unhappy with, you would then have a situation where the exceptions process would be triggered. One might have, as regards a large number of claimants, an exceptions process triggered, and suppose we have classified 1500 parties wrongly, the schemes ideas, would you then hit the exceptions button on all 1500, and say, well, we don't like this, we want to, we need to get these after the event, is that how it is going to work?

MS TOLANEY: I don't think so, sir. I think the first thing is to actually - again, if I may take this in stages, which is to ascertain - and that is one of the points of our process -, ascertain how many people that it actually applies to. At the moment we know about Ocado and Primark, but I'm not aware of any others at the moment. So this may be a spectre that is not --

MR JUSTICE MARCUS SMITH: No, I mean Ocado and Primark are assisting us in identifying the problem of the Claimants who have a great deal of skill in the game because their claims are large --

MS TOLANEY: Yes.

MR JUSTICE MARCUS SMITH: -- and in any other case they would be saying to some courts that they are entitled to a trial of their own. What I am interested in is the situation where one has got a large number of Claimants who are in monetary terms less engaged, it is worth their while participating and instructing solicitors and having counsel here, but they are not really up for a separate trial. They end up being very happy with the way they have been categorised, according to the scheme, but as things happen the schemes are not. So, they don't accept the exceptions process, my question is what is Mastercard or what is Visa going to do in that situation where they don't like the categorisation and want liberty to challenge?

MS TOLANEY: Sir, that is, I'm just trying to tell you, that's you having made a ruling because you say, I think we'd then be in appeal territory and that the exceptions process we are positing is one that is quite short now.

MR JUSTICE MARCUS SMITH: As I understood what you are saying - I may have got it wrong - you are suggesting that at that point in time where there is a clear categorisation that you are put into a sector or a group, you said, I think, that the four week process should begin from that point where you know that you are in the right or the wrong sector?

MS TOLANEY: It can, is what I said.

MR JUSTICE MARCUS SMITH: You are putting it as --

MS TOLANEY: Yes, and that was for the Claimants' benefit, rather than ours.

MR JUSTICE MARCUS SMITH: Well, yes, but you want symmetry, don't you?

MS TOLANEY: I think all we are saying is if there is a process, then it shouldn't be

predetermined now that it is asymmetrical, although I accept that pragmatically it is going to be a more of a Claimant-driven process.

MR JUSTICE MARCUS SMITH: Well, you see that's what I am testing, because we do understand the Claimant-driven process and there are ways and means of controlling that exceptions approach because a lot of the Claimants will not be up for considerable additional costs that might be involved in an exceptions process (Ocado, Primark notably the exceptions), but that does not pertain, so far as the schemes are concerned, if there is quite a general unhappiness with the categorisation. Now, I appreciate we are talking theory here because no one has done the categorisation.

MS TOLANEY: That's right, sir.

MR JUSTICE MARCUS SMITH: But it doesn't, as it seems to me, inevitably follow that if Visa and Mastercard are unhappy with the way things have been categorised, that that automatically falls into appeal territory, it may do but if it doesn't, you have then got the question of whether the exceptions process can be invoked on a really rather considerable industrial scale, thereby effectively defeating the whole process. Now, it may be that we can say, let's not worry about this now, it won't happen. I am something of a pessimist in this regard and I do think that if we don't address what may be a theoretical, certainly a hypothetical issue now, then we may reap the whirlwind later in the form of a rather difficult to manage process that we have embedded in what you are proposing.

MS TOLANEY: Well, I think there are two points. The first is if we are unhappy with the categorisation, it may be that we have to argue about the categorisation but it is not obvious that that unhappiness would lead to any triggering of exceptions and certainly not on that scale.

MR JUSTICE MARCUS SMITH: Assuming that there is such unhappiness that it can't be agreed, that the Tribunal needs to rule, which is one of the points that you were

articulating in your process?

MS TOLANEY: That's right and that would not, though, be on an exceptions process, that would be on categorisation.

MR JUSTICE MARCUS SMITH: Right.

MS TOLANEY: So, that's the first answer. The second answer is, in the process on exceptions that I was outlining, I had included a threshold criteria and the Tribunal would have, therefore, to be satisfied before Visa or Mastercard --

MR JUSTICE MARCUS SMITH: What's the threshold?

MS TOLANEY: The threshold would be that we would have to demonstrate, to the Tribunal's satisfaction, why the features of the business meant the same test as the Claimants, that it had to be treated differently.

MR JUSTICE MARCUS SMITH: Yes, thank you.

MS TOLANEY: But you see already that it is unlikely that that will be something that will be on our turf, and I understand that. Sir, I think that there is a solution and I think it is also, I would hope, an unlikely risk. On the other hand, the risk of an unconstrained exceptions process is a genuine risk, for all the reasons I have outlined. You asked, I think, three questions yesterday about the exceptions process, which were, I think, first of all, the possibility of a mediations --

MR JUSTICE MARCUS SMITH: Yes.

MS TOLANEY: -- a mediation process. I think, like all the other parties who have responded to this, we are open to alternative ways of resolving any dispute, but the reality is that if the parties are ready to resolve their entire case, they will do so anyway. If the mediation was just to resolve pass-on before all the other issues, it is difficult to see how it would work and it is very difficult to see how we would have the information at this stage, it can be encouraged but I would agree with the submissions made, I think by Ocado, that we don't see it as a fruitful first step of an order. The second point

is the asymmetric point, which I have already addressed, and the third issue was in relation to costs in respect of inactive claimants, that obviously depends on how the exceptions regime is structured. But our point is that we wouldn't want somebody who had had the opportunity to participate in Trial 2 to be able to sit on their hands and then insist on a separate trial, to their advantage, and then claim the costs of that, they would have to bear their additional costs if they could have brought the point sooner.

MR JUSTICE ROTH: I don't quite understand your response on mediation, it can be said that the commercial parties, if their employers want to settle, they will settle, you never need a mediation, that would be the end of mediation, all the experience has shown that it does help parties settle. Secondly, it would be the same: they'd go with the same, as it were, evidence explaining their position, though no doubt it would be deployed in a more developed way if they came back for a short trial before the Tribunal. But it would mean that they are compelled to go through a similar preliminary process, which in general experience mediation shows quite often, or always, achieves a satisfactory result.

MS TOLANEY: I think our position would be as Ocado's, which is: the Tribunal may very well think it is sensible to encourage that process to have happened before the parties come to court, but we would - we resist an order to that effect.

MR JUSTICE ROTH: That there could be costs consequently --

MS TOLANEY: Indeed.

MR JUSTICE ROTH: -- if one party refused.

MS TOLANEY: We understand that.

MR JUSTICE ROTH: -- we should do so.

MS TOLANEY: That's right, and I understand that. If the Tribunal so advise, we just -- I think our points were that there is quite a lot to resolve with the parties, between parties, and it may be impossible to mediate just one aspect of it satisfactorily.

MR JUSTICE ROTH: That can be in the light of the Trial 2 judgment --

MS TOLANEY: I understand that.

MR JUSTICE ROTH: -- explaining how pass through, if dealt with: what are the relevant factors, what it should be in certain circumstances and they'd really be saying, 'we are different', or 'this case is different'.

MS TOLANEY: It could be. But one would hope that, in a way, looking if the Trial 2 judgment was certainly clear for people to make that conclusion, I'm not sure you would need a mediation anyway, because it would result in the parties probably recognising that commercially. I think what we are grappling with is where perhaps it isn't so clear and the parties are hotly in dispute, whether a mediation then would be the answer, and I am a touch sceptical of that. Can I turn then to acquirer pass-on briefly? I am conscious of the time. I don't have much to add on the methodology and, sir, we have covered that. The real question here is about the information that both parties have and what, who should provide it. Now, we received a letter over the weekend from Mr Beltrami's clients and that's in the bundle at page 250. We have --

MR JUSTICE ROTH: Which bundle?

MS TOLANEY: The supplemental bundle. We have responded by letter, which is not in the bundle, so please may I pass copies to you? The essential- I won't, I am conscious of the time, sir - and the essential -- I'm not going to try and go through them, I just want you to have the documents.

MR JUSTICE MARCUS SMITH: No, it is very helpful.

MS TOLANEY: I think, as Mr Beltrami said, we are in discussions about it. But the essential point which was raised for the first time was that it was said that the claimants do not have information on the MSCs that they paid in this context, and we were a bit surprised to receive that out of the blue this far into the proceedings. But, also, we think it is wrong because we are not talking about them having to provide their

complete records, but just a small number of sample Claimants doing so and that the whole point of a blended MSC is that the headline rate should be readily apparent from the merchant acquirer contracts. So, their charges that the Claimant paid, which they must have some record of, they must have some periodic invoicing or statements setting out the amount they were being charged and some explanation of the overall charge which could be tied back into the agreed blended rate in the merchant contract, and, as we pointed out in our letter (and perhaps when the Tribunal has a moment, particularly to pages 2 and 3 of our letter), their own expert, Mr Martin, indicates in his reports that the claimants have substantial volumes of data available for those Claimants, the SSU claimants, so there is no reason that wouldn't apply to all the complaints. If they haven't retained the records, they can get them from the acquirers. I notice that Mr Beltrami didn't push back on that particularly. So, it does seem to us that they actually do have the data about the charges they paid, we do not, and in any case it would be very difficult for us to go through any records we do have for the reasons we have set out in our skeleton where, for example, you have a single legal entity with multiple brands or multiple stores and each brand or stores may have its own coded entry, we won't automatically be grouping all of them under the name of the relevant legal entity which brought the claim, so we need the coding data from the Claimants to match entries to the legal entries. So, the process of us extracting is going to be quite complicated and it won't be comprehensive because it won't include transactions which are not rooted through the Mastercard clearinghouse. So, there is also the point that the data is held in different formats, in different places, so the result of this is that while Mastercard does have some data, and if ordered can provide data for particular Claimants, it is an arduous, expensive and highly labour intensive process that will require input from the Claimants and previous experience shows it will be criticised by the Claimants for providing incomplete data. Whereas, they

actually do have the data or access to the data pretty readily available and if there are gaps, then we can look to try and fill them.

MR JUSTICE MARCUS SMITH: So, we are only talking about blended rates here --

MS TOLANEY: We are.

MR JUSTICE MARCUS SMITH: Not 'MIF plus' or 'plus plus'?

MS TOLANEY: We are.

MR JUSTICE MARCUS SMITH: Okay. So that's 25% of the class by value and if 50% by volume.

MS TOLANEY: That's right. So, he said 50, Mr Beltrami said 50% of his clients have costs plus acquiring contracts and that they represent perhaps 75% of the claims.

MR JUSTICE MARCUS SMITH: 75%.

MS TOLANEY: But that's obviously only one Claimant group.

MR JUSTICE MARCUS SMITH: Well, hopefully, that reads across, but we will -- so we are talking about the blended rates. Now, those blended rates, are they rates that vary per merchant in the sense that it is a different rate for different merchants?

MS TOLANEY: We assume so.

MR JUSTICE MARCUS SMITH: Right.

MS TOLANEY: We have never seen them, this is the point.

MR JUSTICE MARCUS SMITH: So, are you wanting the blended rates over time of each claimant?

MS TOLANEY: We are back to the sampling point, sir. We want samples, so we don't think it is so onerous.

MR JUSTICE MARCUS SMITH: Right.

MS TOLANEY: What I suggest, subject to the Tribunal and Mr Beltrami's position, because it was addressed very briefly by him, is that we have set out our position in

correspondence. We have not had a response to this letter. I don't know if we are going to get one and whether there is pushback on what we are suggesting. Our stance is, as we have said, that we don't have immediate access to the data they are seeking, whereas we believe they do. If there are gaps, of course we will try and fill it but at the moment it doesn't seem sensible.

MR JUSTICE MARCUS SMITH: What I am trying to get a feel for, and of course I am speaking without having read the letter you have just handed up, and I confess I can't quite remember what Mr Beltrami's client said in the letter that was in the bundle, but you would like a schedule of sampled blended rates, enough of a sample to be representative over time, okay. So, we can debate what would be a representative sample, but are we talking 100 or 200?

MS TOLANEY: We don't think even that much, sir.

MR JUSTICE MARCUS SMITH: Even that.

MS TOLANEY: So, we don't think it is a particularly onerous task.

MR JUSTICE MARCUS SMITH: Right. So --

MS TOLANEY: There is only one acquirer market, so that's why we don't think it is going to be such an extensive task. I mean, one option, sir, is that we put some more detail around what we want.

MR JUSTICE MARCUS SMITH: No, of course. The reason I am raising it now - and I do apologise for taking up time, but I do want to get a sense of whether this can't be dealt with really quite quickly. So let's suppose we have got a sample of blended rates from a representative sample over time, if one sets those blended rates against the 'MIF plus', the 'MIF plus, plus' rates that prevailed over the same time, and one sees an absolute correlation between the changes in the blended rates and the changes in the MIF rates, doesn't that answer the question about acquirer pass-on rather straightforwardly?

MS TOLANEY: It may do, if I can put it that way. We would need to see the information, I think, sir, before we could --

MR JUSTICE MARCUS SMITH: Okay. So, if we were to try and facilitate the production of a schedule like this in very short order, is there any prospect of simplifying Trial 2 by killing acquirer pass-on much sooner, so that we have that imponderable out of the way well before Trial 2?

MS TOLANEY: I don't know the answer to that, sir. I'd like, I hope so, but I don't know the answer.

MR JUSTICE MARCUS SMITH: You could only give the answer with the schedule. But, I mean, is the suggestion so silly that you can say there is no prospect of this happening and that is the case with a number of questions here, or is it something that is worth exploring? In which case we would read the letters that we have had with that in mind?

MS TOLANEY: I think it is worth exploring it. If I can take instructions on that?

MR JUSTICE MARCUS SMITH: Well, we will leave it to the following correspondents but I have planted the thought in the minds of those before us and it does seem to me that rather than chase uphill and down dale over experts that will be called at Trial 2, if we can deal with this as a separate issue quickly, that has a certain attraction, both in getting rid of an issue and in providing a degree of baselining for the argument about a merchant pass-on because the experts will at least know what it is that is being passed on, rather than existing in a vacuum in not knowing what the outcome of acquirer pass-on would be when they are debating merchant pass-on. So, it does seem to me that there might be some benefit in doing it that way, but it may not be possible.

MS TOLANEY: I can certainly see the attraction sir, I don't know if it is possible. I am told it is something we are looking at for Trial 1 as well.

MR JUSTICE MARCUS SMITH: I am grateful.

MS TOLANEY: Sir, I think those are, and I am on time, those are my submissions, unless I can assist you further?

MR JUSTICE ROTH: What I am wondering is, in your skeleton argument, Ms Tolaney you stress the importance of the 'threshold legal issue', as you put it, about acquirer pass-on or the counterfactual, whether it is counterfactual or not, and you say this is really important to deal with to determine how the parties approach pass-on. I think the expert refers to it as well. Is that something you continue to say is significant, that we need to consider? That is paragraphs 4-8 of your skeleton.

(15.00)

MS TOLANEY: I think, sir, the answer is: it really depends on whether Mr Merricks is in this case or not because it is relevant to that.

MR JUSTICE MARCUS SMITH: I think you can proceed on the basis that Mr Merricks is not.

MS TOLANEY: I understand that. So, on that basis, then yes - unless it becomes not necessary.

MR JUSTICE ROTH: And that is to do with the reliance on the PSR report.

MS TOLANEY: That is right.

MR JUSTICE ROTH: Do you say this is a point that is only taken on Mr Merricks' approach to acquirer pass-on, not by any of the Merchant Claimants?

MS TOLANEY: That is my understanding.

MR JUSTICE ROTH: Right.

MR BELTRAMI: No. I am afraid that is wrong.

COUNSEL: We consider the point to be taken to be wrong as well.

MR JUSTICE MARCUS SMITH: Yes. I thought you might.

MS TOLANEY: We thought it was only Mr Merrick.

MR JUSTICE ROTH: Do you want to say anything more about it? If that is the submission and you do not want to add to it orally, I do not want to push you to do so.

MS TOLANEY: I think the matter is covered in our skeleton. I am not sure I can add to it at the moment, so it is there.

MR JUSTICE MARCUS SMITH: That is very helpful. We felt, given that it was on our radar, we ought to make sure that you had the opportunity at least to address us orally, but thank you very much, Ms Tolaney. We are very grateful. Mr Rabinowitz.

MR RABINOWITZ: Thank you. The Tribunal will, of course have well in mind that at least as regards merchant pass-on, this hearing is essentially a sequel to the hearing that took place exactly a year ago on 23 and 24th May 2022. That hearing itself had been listed to – and I quote – "determine the precise method whereby the pass-on issue is to be determined." The need for such early consideration of these issues, identified I think in March 2022, arises not least from the nature of these proceedings involving, as the Tribunal knows, claims being brought by some 840 claimant groups comprising more than 3,000 different claimant entities – in fact the exact number is 3,070 – with around 30 claimant groups waiting in the wings in various divisions of the High Court. Those claims have been brought against the two card schemes as well, of course, as the separate claims being brought by the Merricks claimants, which may or may not be part of these proceedings. To state the obvious, these proceedings are unlike, for example, the earlier Sainsbury's proceedings, or indeed the Trucks proceedings brought by BT and Royal Mail which resulted in the Tribunal judgment very recently. It presents very different challenges and in our respectful submission it calls for a very different approach. Maybe that is to state the obvious, but it does have implications for what this Tribunal does going forward. It was exactly these matters or these issues that were very much to the fore when the President first canvassed this in March 2022 and indeed in the course of the hearing exactly a year ago, which

resulted in the first pass-on judgment. Whilst I do not ask the Tribunal to go back to that pass-on judgment it did, we respectfully submit, make a number of important findings and decisions after the Tribunal had heard – most of the Tribunal had heard very detailed submissions on exactly the same issue as you are hearing now. Among other things, the Tribunal rejected the Merchant Claimants' contention that there remained any legal issue to be clarified concerning the test for pass-on following the decision of the Supreme Court in Sainsbury's. It found that legal causation in relation to a retail business seeking to recover its costs was straightforward, indeed a "no-brainer" in the language of the Tribunal. It rejected the contention made by the Merchant Claimants that a pass-on defence requires the defendant to show that the claimants made any decision to pass on the overcharge, and importantly for present purposes it indicated its view that demonstrating pass-on by use of econometric evidence and by relying on existing studies of pass-on rates was prima facie the correct approach to adopt. Now, I am not standing here saying you are bound by anything or indeed that it was more than a prima facie indication, but that is where we were a year ago. That clear indication of the appropriate approach was further articulated by the Tribunal when, in the same part of its judgment on that occasion, the Tribunal rejected MasterCard's suggestion that reliance should be placed upon specific factual evidence to make good its pass-on defence. The Tribunal expressed scepticism that – and again I quote – "The pass-on defence can be established by claimant-specific evidence adduced from a sample of many thousands of claimants." Groundhog day, in my respectful submission, because we are back with that submission. The Tribunal also made clear that it regarded any such approach as in its words being a "disproportionate and, frankly hopeless way of deciding the question of pass-on", not least, I might add, because of the problem identified by the President, and indeed the Tribunal, of the fact that the charge is so small that if you are going to

get documents, they are not going to show MIF anywhere or they are very unlikely to show the MIF anywhere, which really raised the question: what would be the point of getting evidence from these people which effectively showed nothing and advanced the case not at all one way or the other. Now, it is against that background that the Tribunal is having to deal with the submissions made both by the Merchant Claimants and indeed – in include both sets of claimants and indeed Ocado and Primark, I do not want to leave anyone out – and indeed MasterCard who in a sense reprise the last submissions and try them again. Some of these submissions involve solutions which are dressed up in different clothes, for example the interposition of an expert between factual evidence and the Tribunal. Some of them are, with respect, nakedly the same as before. In our respectful submission none of these approaches comes anywhere near rebutting the prima facie indication that the Tribunal arrived at and provided on the last occasion where it said that demonstrating pass-on by use of economic evidence and by relying on existing studies of pass-on rates was the correct approach to adopt. I am not standing here – as I say, I am not saying you are bound by anything you said and I am not saying that bells and whistles, and indeed important bells and whistles, might not be added to our approach. What we do, however, reject is either of the approaches put forward by either the Merchant Claimants or indeed MasterCard. Both of those approaches, in our respectful submission, will either produce a trial which is disproportionate, and indeed spends a lot of time looking at facts which go nowhere and do not assist the Tribunal or, in order to deal with the disproportionality, it will produce an approach which is unfair, and I will develop those submissions in more detail now. Can I just perhaps just say this about those proposals, dealing first with the merchants' proposals, first on merchant pass-on – I will deal with acquirer pass-on later. We submit that the claimants have not submitted, nor indeed has MasterCard – have not demonstrated that claimant-specific factual

evidence going to how claimants set their prices or how internally they accounted for MSCs in their internal accounting or indeed budgeting processes, as distinct from data, on for example prices and costs needed for econometric analysis will be probative. As a consequence we will be inviting the Tribunal to refuse admission of that evidence. For closely related reasons, we will invite the Tribunal to refuse the claimants' permission to rely upon industry and pricing expert evidence at least in the form envisaged by the claimants. Now, I appreciate that a further proposal has come forth from the Tribunal involving the use of industry experts. I am happy to say something about that now or later, but in our respectful submission although one understands why the Tribunal wants this evidence, again we do, with respect, question what it is going to relate to; whether that will be probative in the sense of advancing either party's case in any relevant respect; and how many experts one is going to have. The Tribunal will bear in mind that according to the Merchant Claimants there are 38 different sectors. If we have, say, three different party groups, two or three (it does not really matter – maybe we will be lumped with – MasterCard maybe we will be lumped with Merricks – but if it is 38 times two or three you are dealing with either 80 experts or 120 experts. How many experts are we going to deal with? What are they actually going to say? Where are these experts going to be found? What are the sectors that the Merchant Claimants have identified? I think it is in the Turbulence report, page 119, is the pawn-broker industry, and I mean "pawn" as in pawning shop brokers! (Laughter) Is there such a thing as an expert in that industry? If there is, no doubt it will be working for the pawn broker claimant who is involved. That raises a question as to where these experts are going to be found? How are they going to be independent? There is an equality of arms problem here. The claimants, no doubt because they have parties on their side who act in these industries, may have an employee working in some way in that sector who may be able to give relevant

evidence – maybe about their own business, maybe about other people in that industry. With respect, even that is doubtful. Where are we going to find an expert who is independent or is not in some way tied to someone in that industry? It does, with respect, raise all sort of problems. I am not saying we reject it outright, but in our respectful submission the Tribunal needs to be very cautious about going down that route because it has practical implications and indeed potentially fairness implications. Indeed, in our respectful submission, when you look at what they will actually be able to tell you, it will not help. I can see Roth J looking a little bit quizzical about that and I appreciate why.

MR JUSTICE ROTH: You picked, you know, an example, no doubt chosen quite carefully, where it seems somewhat absurd. I am still struggling to understand how a pawnbroking transaction is paid for by credit card, but no doubt someone can explain that. But there will be major sectors which account for a much bigger area, and indeed we have got some experts here already.

MR RABINOWITZ: There will be.

MR JUSTICE ROTH: Local authorities, which is a large number of claimants, like the automotive industry, petrol stations and so on where clearly you will be able to get industry experts, and there should be no problem with both sides getting an industry expert.

MR RABINOWITZ: Can I invite the Tribunal to go to page 119 of volume 1?

MR JUSTICE MARCUS SMITH: Sorry, which bundle?

MR RABINOWITZ: It is volume 1, tab 6, page 119.

MR JUSTICE ROTH: That is the list.

MR RABINOWITZ: That is the list. And the one I had in mind appears --

MR JUSTICE ROTH: And you are assuming that we would, you know, accept that there should be-- 39 I think they say, not 38.

MR RABINOWITZ: 39. The trouble with proceeding on any other assumption, other than an expert per sector, i.e. break down the sectors, is if it is not sector-based how is the expert going to be dealing with anything which can remotely be expected to be homogenous? How could the expert possibly be expected to talk about not only his particular firm, but indeed other firms in the industry? That is not where the problems end and in a sense I am dealing with the Tribunal's submission rather than -- It is not your submission; it is a proposal and I understand how you get to it.

MR TIDSWELL: Is there a way of dealing with the point that is being made? So, if you take some of the sectors – take hotels where you have got, as Dr Niels says, this great spread of different entities in there, and therefore some different pricing practices and different approaches to thing. How do we get that context? How are we going to get that simply from economists, and if so what is their factual basis going to be for it?

MR RABINOWITZ: As the Tribunal will have picked up – my understanding, as I understand it, the Tribunal understand, expect or maybe anticipate that these experts will be talking about pricing practices or how people in the industry set price, and there may be an expectation that that will be homogeneous across the industry or not homogeneous or a mix of various things. Our primary submission, of course, as the Tribunal knows, is that price setting mechanisms tell you nothing in the end about whether there has been pass-on or not. You could have a costs plus price mechanism, and then you know there will be a pass-on. You could have a dynamic price mechanism – that is the one to say: we have got things we need to get rid of, therefore we price in a particular way, but that is also consistent with there being pass-on because everyone always has regard to the cost position. You could have something which is entirely dependent on what competitors do, or indeed a combination of costs plus competitors, like Sainsbury's, for example, perhaps looking at margins of what they have told the market to expect, but again they will have an eye on costs. So none

of them, looking at what the price setting mechanism is, is going to actually tell you whether or not there has been pass-on because they are all consistent with pass-on. So, our primary point in relation to price-setting, and this goes to claimant-specific evidence about pass-on as well, is it is not particularly probative. It is not really going to get you to where you want to go. Let me develop that for a moment because again there may be an assumption. It was not an assumption made by Mr Beltrami's clients and I do not understand it to be an assumption made by Ms Tolaney's clients, there may be an assumption that one can do this without disclosure, or indeed without cross-examination, but in our respectful submission, if that is the assumption then we would respectfully suggest that it is misplaced. Let us take from an industry where it is not just debt recovery on pawnbroking services, or whatever it is. Let us take alcohol sales or let us take bars and brewers. So, someone stands up – Mr Smith says: "I used to work for a particular bar. This is the way in which we set prices and I happen to know, because I spoke to my mate Mr Jones, or I happen to know because I once had a conversation with someone, that at least three other bars or brewers do it in the same way". Now, we are not going to accept that. We may have an expert who says: "well, that may be what Mr Smith and Mr Jones say, but I have spoken to Mr Cohen and Mr Segal, who operate in a very different part of the bar sector, and they say something entirely different. I want to see disclosure. How do I test what their expert is saying? I want to see disclosure and I want to cross-examine, and it is not going to be narrow disclosure because we will want documents around price setting". They may say: "it is a price set in a particular way". We want to see whether that is always the case. Do they ever react to competitors? Do they ever raise their prices even if they are dynamic, because competitors are doing it? Do they drop prices because their competitors are doing it? In our respectful submission, none of this is going to advance the question or at least the answer to the question in a way which justifies the candle.

Now, let me be clear. If we were in a Sainsbury's case, if we were in a BT and Royal Mail case, then one can quite understand that in a sense the Tribunal will say: If someone wants to try and make a case in a particular way, let them try. No problem. It will be a seven-week case rather than a six-week case. We are not in that world. We are in an entirely different world. We are in a world where, in our respectful submission, the Tribunal has to be, with respect, ruthless about allowing expert approaches or indeed approaches which rely on particular evidence from particular claimants, or indeed sample approaches, which run the risk of creating an unmanageable trial, indeed a trial which is disproportionate because although this evidence may have some probative value -- people may think it is of some use to look at price setting -- that probative value simply does not justify what it will do to the case management of the trial. I am not saying anything which the Supreme Court has not already said. The Tribunal will recall that the Supreme Court – this is at paragraph 217 and following, and we can go to it – having dealt with the legal point and the causation point, they then had to deal with the submission as to whether you had to prove pass-on precisely. The Tribunal will recall the Supreme Court saying: you can deal with pass-on by way of estimates. It does not have to be precise. That is not a betrayal of the compensatory principle. You have heard a lot about the compensatory principle from people who want to say: oh, you have to get right down to the – I do not know whether they are saying the last penny, but the only way you can do it is looking at our evidence. With respect, that is inconsistent with what the Supreme Court has said. They have said you can use evidence which gets you to an estimate, and case management and proportionality can play a key role or an important role in how you approach this, and that is all we are submitting. If the evidence is not sufficiently probative, then the Tribunal can, for case management reasons, say: we are not going to go down that route. In our respectful submission, the danger with

industry expert evidence is that it risks becoming disproportionate because I do not know how you deal with 38 sectors. Maybe they are slightly less, but even if they are less, you are still going to be dealing with experts numbering in the many tens who may or may not be independent, where there may or may not be issues of equality of arms, which will most certainly produce huge quantities of disclosure requests which will most certainly involve very substantial cross-examination and which in the end, in our respectful submission, will advance if not a jot, then not a lot of jots, in terms of being able to get to the answer you would like to get to. In a sense that is my broad submission generally, but it also relates to the Tribunal's point about industry experts.

MR JUSTICE MARCUS SMITH: Mr Rabinowitz, that is very helpful as a hatchet job, as it were, on the suggestions that others have made, but shifting from the negative to the positive – you explain how it should not be done; is the way you say it should be done really articulated in a single sentence that Mr Ridyard in Trucks 1 was right?

MR RABINOWITZ: Indeed. I was going to say exactly that. One of the reasons I made the point earlier about this is in a sense a re-run of what we had on 23 May/24 May a year ago, is there was a discussion in the course of that hearing as to whether there really was this big distinction between the way economists see pass-on and the way lawyers see pass-on. In our respectful submission, there is no such distinction. There is a question of what the law wants to impose by way of what you have to prove, but pass-on is pass-on. Yes, to make it manageable and make it capable of being dealt with by courts, various Tribunals and courts over the years have said: well, you have to show this, you have to show that. The point which emerged on the last occasion, and indeed I think it was the President and Mr Tidswell was involved in this as well, is you want neither over-compensation, nor under-compensation. Where you have direct and indirect parties claiming, the risk-- Of course, what the consumers, what the Merchant Claimants want is to make it as difficult as possible to prove pass-

on, no doubt because -- I am going to make an economic point without any evidence, save that it makes sense. Merchants pass on costs. To the extent that they are able to, they pass on costs. The great likelihood is that some part of the costs involved in the MIF have been passed on. What the merchants would like, in my respectful submission, because they pass it on to consumers – someone else is bearing the cost. You have to show that there is deliberate consideration of this point, which will of course make it near impossible to show that it had been passed on to consumers because the merchants would like to keep more of the damages and the consumers would get nothing. Whatever method one adopts in terms of what you require to prove pass-on has to be alive to the fact that you do not want to over-compensate the merchants. I am not saying you should under-compensate them either, but you do not want to over-compensate them and the harder you make it to establish pass-on the more likely it is that you are going to over-compensate them. Particularly with the Merricks parties here, they can say their own piece very well. But their gain is their loss. We are in the middle here. Now, to be clear, I am not suggesting that Trucks was wrongly decided on the facts, but the facts of Trucks was very different to the facts of the facts of this case. Trucks was not dealing with an ad valorem cost. What we are dealing with here is something where as soon as you sell a product there is a charge relating to that product. One can quite see, as the Supreme Court said, in a sense it is a no-brainer.

MR JUSTICE ROTH: As soon as you sell it on card payment.

MR RABINOWITZ: I beg your pardon?

MR JUSTICE ROTH: Only when it is paid for by card.

MR RABINOWITZ: Only when it is paid for by card.

MR JUSTICE ROTH: The proportions to which people have made their total transactions paid by card may vary by sector.

MR RABINOWITZ: Well, they may. If it is a small proportion of transactions by card, the considerations of whether to spread a cost across all purchases may vary. So there will be considerations.

MR RABINOWITZ: I do not for a moment doubt that or disagree with what, Roth J, you are saying. What I am saying is that the legal causation thing is a no-brainer. We still have to establish factual causation, but it is a very different case to Trucks when, since you have a direct cost which is being imposed, which will be certainly passed on if it is on a card. I say, "will be passed on", whether or not it is passed on is a question of fact, but there is a direct relationship between the card, the use of the card and the MIF charge and what the consumer is paying. That is obviously not the position in relation to – you will know better than me – the Trucks cases where somebody is buying a truck, but that is not their business. Their business and what they are charging for is something very different, and one can quite see why, in a case like that, it is a very much more complicated position, but we are not in that world. I am not sure how I got into this, but I need to get myself out of it quickly.

MR JUSTICE MARCUS SMITH: We were asking how far you were endorsing the proposition that Mr Ridyard was right.

MR RABINOWITZ: And we would respectfully submit that his approach was right.

MR JUSTICE MARCUS SMITH: Just coming on from that, Mr Moser, I think, put the point very well that the reason this hearing is so hard-fought and so significant is because the route by which we determine the issues are to be decided is likely to have an enormously significant effect on outcome, and that is probably the most unusual and most significant factor in this case in that if we go down the non-expert, prove it by factual evidence and disclosure route, leaving on one side the management question, ignoring those, one gets to a situation where it is unlikely that one is going to be able to prove that pass-on goes down to the ultimate consumer. On the other

hand, if one takes the economists' approach, then the economists are saying obviously if you have incurred a cost you seek to recover it by way of the revenue you obtain through selling your products, because if you cannot do that, you are going to go out of business. And so it ends precisely where the factual evidence does not necessarily show it. It ends in a different claimant's hands, and it is squaring that circle that is the problem. My question to you is – I quite accept you are saying it is the economists that ought to be assisting us more on these factual questions, but is it the case that Mr Ridyard is right to the extent that it is always essentially everything being passed down, or is it the case that it is not so. If so, what factors render it less likely that there is 100 per cent pass-on but something less, and what evidence do we need to understand those factors as they apply to the vast range of different parties that we have claiming in these proceedings?

MR JUSTICE ROTH: Mr Holt does not say, as the economist, that there is always pass-on. He reflects on the industry conditions, and that is what took one to the industry expert --

MR RABINOWITZ: Exactly.

MR JUSTICE ROTH: -- to deal with those conditions.

MR RABINOWITZ: Exactly. He does not always say there will always be 100 per cent pass-on or indeed that there will always be a pass-on. Mr Holt, and I think in this regard he is in line with an approach with that identified by the Commission in its communication – its guidance to the national courts as to how to estimate over-charge – Mr Holt effectively identifies criteria which are almost exactly those that the Commission itself has identified. First, what is the nature of the cost? Is it fixed or variable? Now those are facts because one of the points I need to address is the way in which the debate has been presented to you thus far by those sitting to my left is that on the one hand you have the people who are interested in the facts. On the other

hand you have the people who are only interest in the theory, us and them. We are a fact-free zone. I was going to say a fat-free zone, but that does not work! (Laughter) We are a fact-free zone on this side. They are the fact people. With respect, that is a complete mischaracterisation. Mr Holt relies, and says he has to look at and identify facts. What is the nature of the cost that is involved here? Is it a variable cost, a marginal cost or is it a fixed cost, because that has a very important consequence for whether MIFs are going to be – whether there is going to be pass-on and indeed generally in relation to MIFs. Secondly, what is the nature of demand in the market in which you are operating, i.e. the sector?

Is it an elastic demand? Related to that is, how competitive is the sector? In other words, if everyone is going to have to cut costs when other people cut costs and be able to raise costs when other people raise costs, that is a fact. It is a sector-wide fact but it obviously reflects the people in that sector. We are not a fact-free zone. And fourth (I think it is fourth), in this particular case you are dealing with transparent costs. Everyone knows that there is this cost. They may not think about it but they know it is there and, again, that is going to be a factor. Now, I said that Mr Holt largely relies on what is said by the Commission in its document. Can I invite you to go to bundle 7 of the authorities, tab 25 and if I can invite you first to go to page 2258, just to introduce the Tribunal to this - the Tribunal, I imagine, will be fairly familiar with this. "Introduction. Purpose, scope and structure ..." - if the Tribunal has that? Bundle 7, tab 25, at page 2258. Paragraph 1, if we are there: "These guidelines intend to provide national courts, judges and other stakeholders in damages actions for infringements of Article 101 and 102 of the Treaty ... [etc.] with practical guidance on how to estimate the passing on of overcharges. In particular, they set out economic principles, methods and terminology concerning passing on, inter alia, by reference to a number

of examples. Further, these guidelines are designed to help determine the sources of relevant evidence, whether a disclosure request is proportionate in assessing the statements of the parties in passing on, and any economic expert opinion that may be presented to the court." If I can then invite the Tribunal to go to page 2282? Sorry, that is a wrong reference. 2288: "Annex 1. Economic theory. This annex explains in more detail the insights from economic theory relevant in the context of estimating passing on. As described in paragraph 49 above, different factors may affect the degree of passing on, such as the nature of input costs subject to an overcharge, the nature of the product demand faced by the direct or indirect consumer, the nature and intensity of competitive interaction between the firms in the market, whether direct or indirect, cost cuttings are active, and other elements such as the share of components and various inputs affected by the overcharge or the time horizon of the infringement." Now, I was not going to take the Tribunal through the detail of this, but the Tribunal may wish to glance at what is said below which really just develops those four points. Paragraph 8.2 deals with input costs, "Is it marginal/is it fixed?" 8.3, "Characteristics of demand and links to prices. What is the nature of the demand? What is the nature of the slope?" 8.4 is something about a firm's pricing decision and the Tribunal may just want to glance at that: "A firm will adjust prices only where this will increase profits, according to economic theory. However, in order to achieve a higher price, a firm will usually have to accept reduced sales." I am not sure that really helps, that is economic theory - " ... whether passing on or overcharges by a given purchaser vis-a-vis own customers typically differs depending on whether the purchaser's competitors are also affected by the overcharge or not. When a single purchaser is impacted by the overcharge, the passing on will necessarily be firm-specific. By contrast, if all purchasers at a given level of the supply chain are impacted by the overcharge, they may consider passing on rates for each but also the industry-wide passing on."

Effectively, Mr Holt has used this as a blueprint for the approach that he has adopted and, although, as I say, we are characterised as fact-free and heterodox in our approach, our approach is not heterodox at all, at least not when you look at what the Commission in this document, by way of the guidelines, said might be an appropriate approach. And then the Tribunal may want to have a look at 8.6, but there is nothing in that that I particularly wanted to show you.

MR JUSTICE ROTH: 8.6 deals with price adjustment costs.

MR RABINOWITZ: Price adjustment costs, over time, yes, and that might be relevant in a particular case where maybe a business was opening another business, or maybe a particular product was only available for a period of time.

MR JUSTICE ROTH: No, I think it concerns where there is a very small increase in marginal costs, where it is not profitable to pass it on, and if one looks at the prices, that is why early on, right at the beginning, section 4.1 on page 2273, it deals with information needed when quantifying the passing on effects, and the Commission discusses the potential use of qualitative as well as quantitative evidence, such as internal documents, pricing strategy and so on. So, yes, there is a big wealth of economic theory, and I think no-one is suggesting, or certainly persuasively suggesting that the broader economic factors that Mr Holt identifies are irrelevant, but to say they are necessarily therefore rendered otiose - qualitative evidence of the firm's pricing strategy, that is certainly not what it is saying. They say that qualitative evidence can inform the theory. It was helpful to be taken to that, Mr Rabinowitz, because it is a very useful document prepared for courts facing indeed what we face, although not the particular problem of having so many cases to deal with at once.

MR RABINOWITZ: Can I just address the 4.1 qualitative pricing?

MR JUSTICE MARCUS SMITH: I am reminded that we probably ought to take a shorthandwriter break. We will rise for five minutes, but a number of the points that

you raised, for instance the nature of the demand in the market, do suggest that one cannot answer that question simply by reference to an economist's understanding alone; he or she is going to require some help. And the question is: where does that help come from?

MR RABINOWITZ: I understand that. To some extent, that is the reason that Mr Holt wants to analyze public data and studies on particular markets, because that information will come from public sources. He has already identified 42 different public papers addressing particular sectors, I think there are five where he has not found a paper, and from those papers he will also be able to extrapolate, for example, what affects pass-on in particular industries and whether this applies to the industries with which he is concerned. He has identified 14 industries and I think he says on four or five he has not got enough data.

MR JUSTICE ROTH: 38?

MR RABINOWITZ: No, he is not saying that. Of course, we only say here 14 sectors rather than 38, and one of the problems with the splintering, in a sense, of sectors - in a way, and I do not mean this pejoratively, but it is self-serving. If you splinter sectors so that almost every claimant is in a different sector, inevitably you are going to be driven down a path which says you need claimant-specific evidence. So, yes, we could say there are 90 sectors and then say we all need to produce our documents, but that produces unworkability and, in our respectful submission - and I am not saying 14 is the exactly right number, and indeed I think Mr Coombs has got a slightly different number, but, in our respectful submission, that is broadly the right approach. Do not take too narrow sectors. Plainly, there can be a debate about sub-sectors, and indeed this allows for the possibility of sub-sectors, but do not allow the fragmentation of them into 88 or 39 or whatever it is.

MR JUSTICE MARCUS SMITH: Thank you very much, Mr Rabinowitz. We will

resume in five minutes.

(15.40)

(A short adjournment)

(16.04)

MS DEMETRIOU: Sir, Mr Rabinowitz has kindly indicated that he does not mind me, with your permission, just raising a short practical point.

MR JUSTICE MARCUS SMITH: Of course.

MS DEMETRIOU: Thank you. So, it would be extremely helpful if, before the Tribunal rises this afternoon, Mr Beltrami and anyone else who wants to take a position on Mr Merricks' participation in Trial 2 expressed their position and briefly why they take that position because, as I say, nothing has been canvased by anyone in their position papers or in their skeleton arguments, and I will need to make submissions tomorrow on the point, and I would like to know in advance of making those submissions what everyone's position is. So, if that is acceptable? Obviously, Ms Tolaney has already indicated Mastercard's position. As I understood - I was not at the last hearing, as you know - but I think Ms Smith's position was that she opposed an umbrella proceedings order in respect of merchant pass-on but did not oppose the same for acquirer pass-on, and so it would be good to know, for example, whether their position has changed.

MR JUSTICE MARCUS SMITH: Ms Demetriou, I think the position was that no-one particularly minded you being in, but there were a number of people who minded very much that there was an umbrella proceedings order in relation to you. But, as I explained earlier, the position is related; if one has got an unmanageable trial and you are the reason it is unmanageable, then the answer to the umbrella proceedings order could be quite important. But your point is well made. Are we able to do a quick roll call in terms of where the parties stand?

MR BELTRAMI: I was not aware I was going to be bounced into this quite so quickly.

My clients had opposed the umbrella proceedings order application and my instructions have not changed. I shall make submissions on it, but I cannot do it right now. There is a skeleton in the bundle from the previous hearing in which the same points arose.

MR JUSTICE MARCUS SMITH: I think, Mr Beltrami, that is enough for our purposes, because, Ms Demetriou, Ms Smith certainly did address us quite extensively but helpfully on this, and I think you can glean from what she said the nature of the opposition, but I think it is important that you know that there will be opposition.

MS DEMETRIOU: Sir, yes. Obviously, if there is some other substantive point that Mr Beltrami wants to make, it would be very helpful if he could indicate it overnight so that I could address it, because certainly it is not something that can just be raised for the first time in reply.

MR JUSTICE MARCUS SMITH: That is fair enough.

MR MOSER: To the extent you want a roll call, I thought I would join in. We think the point is not entirely unexplored because, in preparation for this hearing, you may or may not have noticed, and if you are lucky you did not notice, a slight spat over the wording of the list of disagreements, where we had put them at the beginning, that since the Merricks' claimants are not part of the umbrella proceedings, we are not sure why they are commenting on this, that or the other, and then there was an exchange and really we left it pragmatically. The situation, as we understand it, is that there was an application - I also was not at the previous hearing - and that application was stayed. And, as far as we are aware, there has been no application to unstay.

MR JUSTICE MARCUS SMITH: Our understanding, or at least my understanding, was that this was an issue for this hearing, and it is obviously necessary that we do that because it fundamentally affects the shape. So, we are going to decide it, and the real question is: what the ranks of opponents to Ms Demetriou's position are so

that she can ready herself for that?

MR MOSER: Indeed, and as the arguments take shape, one can see how Merricks' participation could be more problematic than perhaps anticipated. Ms Tolaney made the point about different time periods. There might be an overlap for some, but certainly we do not go back to the '90s, and if it were proposed, for instance, that the umbrella claimants had to give disclosure in the Merricks' proceedings going back to the '90s, that would be an extraordinary burden and entirely derail what is going on in the umbrella proceedings. So, one can see that there are real issues.

MR JUSTICE MARCUS SMITH: Indeed, because that is one of the differences, I anticipate, between trying together, where questions of disclosure will be detached and dealt with in the two actions separately. There might well be common exchanges of disclosed material but they will not be in an over-extensive form. Whereas, if one labels something a ubiquitous matter, then one might - the whole point of having a ubiquitous matter declared is that one is deciding the point as one issue. So, there are questions, and we have well in mind the points that might be an issue on this. And, Ms Demetriou, I think one of the things you will need to focus on is, if you were in fully, that is to say as a ubiquitous matter, what you would be seeking, if anything, going beyond what the disclosure would be if the two trials were separate but heard together.

MS DEMETRIOU: Yes, I understand.

MR JUSTICE MARCUS SMITH: So, that is something, if we are having overnight exchanges, it might be worth identifying whether, for instance, if you were seeking an umbrella order to embrace the Merricks' claim, that you were saying, "Well, it's a ubiquitous matter, we're going to have disclosure from the merchants, to the extent disclosure is ordered anyway, going back to the year dot."

MS DEMETRIOU: Thank you.

MR JUSTICE MARCUS SMITH: We are not going to ask ...

MR MOSER: Along with Ms Tolaney, we strongly oppose ubiquity.

MR JUSTICE MARCUS SMITH: I understand. We are not going to ask Primark and Ocado to join the roll call. Mr Rabinowitz, I take it that you are on the other side of the equation, or are you ...

MR RABINOWITZ: We are awaiting instructions, so I do not think I can commit either way, we had better just get instructions.

MR JUSTICE MARCUS SMITH: No, of course. Thank you, Mr Rabinowitz, that is very helpful. Ms Demetriou, does that assuage your concerns at least to an extent?

MS DEMETRIOU: It does. Thank you very much.

MR JUSTICE MARCUS SMITH: I do not think we can go any further in any event. Mr Rabinowitz.

MR RABINOWITZ: Can I, before I move on to a different topic, just say a little bit more, first about the industry expert proposal and, secondly, about the Commission guidelines? Just on paragraph 4.1, which the Tribunal has referred me to, on page 2273, so we are still in volume 7, and this obviously does say, when talking about general aspects, “Data and information needed when quantifying the passing on effects.” Just looking at paragraph 76, “The court may have to consider ...” - and I emphasize the word “may” - “... evidence of both qualitative and quantitative nature. Qualitative evidence, such as internal documents and pricing strategy, contracts and reporting, may be analyzed in the context of economic theory, they may also give information on when there is evidence of a link between the downstream pricing and the upstream overcharge that results in the infringement.” And you will see there, in line with the first sentence, a reference to footnote 69, which refers to boxes 9 and 10, and I am going to take you to that in a moment. The first point I would make just about this is that it is certainly the case that there will be some cases where, by virtue of the context in which the passing on issue - boxes 9 and 10, which you will find on page

2280, and if the Tribunal glances at those examples which are said to depend on qualitative evidence, what is striking by its absence is any suggestion that anyone is looking at price setting mechanisms or internal accounts or the sort of material that my learned friends for the Merchant Claimants, in particular, but Ms Tolaney as well for Mastercard, say is relevant. So, first, not only is, it must be right that there will be cases, depending on the nature of the pass-on charge which is being debated, that you will need to see qualitative evidence, but, secondly, when you look at what they mean by qualitative evidence, it is nothing of the sort, as my learned friends have suggested they need. Can I then, before I pass on, because I am only trying to introduce our position, just say this about the idea of having industry experts? We do not per se object to industry experts. Our objection is to the content of the industry expert reports, that is to say our objection is to industry expert reports that seek, in relation to any industries, be it debt collecting and pawn broking industries or supermarkets, purport to give apparently expert evidence on price setting mechanisms and attitudes to pricing across the whole industry. First, because, for the reasons I have given, it will lead to disproportion and, secondly, because, in our respectful submission, if it is probative, it is only very marginally probative and is not worth the candle. That is not to say that there will be some evidence which can be provided by an industry expert which is more general in nature. For example, it may be about the competitive dynamic of an industry, it may be at that level really proper industry expert evidence which does not depend, as my learned friend for the Merchant Claimants, Mr Beltrami, suggests, does not depend on claimant-specific evidence. That sort of evidence may assist and will not lead, in our respectful submission, to the kind of concerns we have about disproportionality. So, I just wanted to clarify that.

MR JUSTICE MARCUS SMITH: Mr Rabinowitz, I am just trying to work out how one delineates where one needs additional non-economic expert material and where one

does not. Can I test your reaction to this sort of proposal: let's suppose we take the line you are advocating and get each party's economist to articulate the various factors that are relevant to determining pass-on, get early agreement on that and then get the economists to work out, in relation to each of those agreed lists of factors, what elements or variables cause the pass-on in relation to those factors to move up or down. So, the economists seek to do that and they can rely on published material and material that is available to them in order to inform their opinions. If there comes a point in time where the economists identify a point that is material to their opinion which lies outwith their expertise, at that point one needs to work out how that gap is filled because the expert cannot and the expert has also said it needs to be. Is it at that point in time that one says, "Well, it may be that either a questionnaire to the claimants or an articulation of the point on which a particular industry expert, say, needs to opine", that is then captured and one goes out into the market and obtains the necessary number of experts to opine on this point so that the matter can be resolved, but resolved in a controlled way?

MR RABINOWITZ: Can I answer that - and I think it is an answer to your question - in the following way. In terms of the factors which will affect pass-on, Mr Holt has actually sought to identify them. So, we have done what you have asked us to do, we have done our homework, we have returned our homework and you can give it an A or a minus B or whatever, it does not matter, but Mr Holt has actually gone away and said, "These are the things and they are in regard to what the Commission guidelines say, or they are going to affect pass-on, particularly in circumstances where it is the nature of the charge. Is it variable? What is the nature of the market? Is it competitive?" and the like. You have seen it in his report.

MR JUSTICE ROTH: He has not done it in full.

MR RABINOWITZ: No, he has not done it in full.

MR JUSTICE ROTH: He said “among” and he gave some examples. He said he could do more.

MR RABINOWITZ: He could do more and he says he has not done it in full. Holt 7 is a progression from Holt 5, it can no doubt be progressed further. We have come here with our proposal to the Commission. Now, Mr Holt has already accepted that there are gaps, and in a sense he has done what the President has asked me should be done. He said, “There is no public study or relevant data in relation to certain industries. I will need help because, even when I have regard to the factors which the Commission has said will affect pass-on, I don’t know what they are for particular, sectors I don’t know what the position is in local council, I don’t know what the position is in education, I don’t know what the position is in B to B. There are also areas where there is no report from which I can derive anything at all. I don’t know the facts there. I will need ...” - and he says - “ ... I will need ...” - my learned friend tried to make something of this and I do not understand why - “ ... I will need an industry expert to assist here, and indeed I may need data, not qualitative documentation, but data from the claimants to help in relation to these limited areas.” So, he is by no means saying, “I have all the answers.” In fact, he is saying exactly the opposite. He is saying, “This is an approach which is proportionate, which will hit the things you need to have hit but it doesn’t take me as far as I need to be taken and there are gaps, and my proposal ...” says Mr Holt and me through him, or him through me - “ ... is to go down this route, there are gaps, this is how I propose they will be filled.” And I do not think he is saying either that, “This is the only area where there are gaps.” Mr Economides has identified the possibility that there may be sectors within sectors, maybe debt recovery and pawn broking is a sector which requires a specific report, maybe it becomes accepted that that is a different sector. Of course, the situation is not final here, but, in our respectful submission, what ought to be final after this is that the Tribunal should have a very

clear idea and tell the parties what the right approach to it is. And there really are extreme positions here and to some extent Mastercard is perhaps the most extreme, maybe not, but the extreme positions are: “Get a lot of claimant data, claimant-specific data and do not let us cross-examine on it.” Mastercard are less extreme in the sense that, “We don’t get it from everyone, we just get sample claimant data but get them to be cross-examined.” And my learned friend’s proposal is, “Don’t let them be cross-examined, let a pricing expert be cross-examined.” And what do they want claimant data on? Something which, in our respectful submission, for reasons I have already submitted, is not really going to move the dial very much. So, those are in a sense all of the proposals there and we are the only ones who in a sense are in line with what the Commission has said is capable of being done in this way. So, we are not saying it is a final package, but it is a final approach, it is an identifiable approach and in a sense it tessellates, as my clerk would say, with what the President has said; it identifies where there may be gaps and then the experts say - and my learned friend’s experts can also say, “Well, I’m not happy with that report as being sufficient to cover hotels because hotels are different. We need more industry expert evidence there.” It can be dealt with. Someone may say, “Well, because it’s dynamic in one part of the hotel industry and not in another part of the industry, we need to break down that sector into two. We need a report on something.” Okay, that is fine. What matters is what that report is going to be on. And the proposal that I am making in terms of what will be covered by that report will not generate disclosure, or, if it does, it will generate very limited disclosure. It may generate requests for data, as Mr Holt has indicated, but we are not going to have huge requests for disclosure, which is an inevitability, in my respectful submission, of all my learned friends’ approaches. Does that answer your question? I hope it does because I have tried.

MR JUSTICE MARCUS SMITH: It answers most of it.

MR RABINOWITZ: Okay.

MR JUSTICE MARCUS SMITH: The bit that I'd like further assistance on is how, as a matter of procedural practicality, one is going to articulate the areas that we need. I mean, are you envisaging a first cut report that is exchanged between all the parties containing essentially as far as the expert can go, but articulating the bits where help is needed and what help is needed? One then goes out, gets the help, and one then completes the report or some other process by which one articulates what the gaps are.

MR RABINOWITZ: I am, to some extent, speaking on the hoof here, but just responding to the President's point, which I understand, if the Tribunal says that it is disinclined to go for claimant-specific disclosure and that in general terms there should be in fact be an expert-led approach in the real sense of the word, econometric experts following what the guidelines for the Commission say can be done, you have all seen what Mr Holt says, no one says he is right, we are not prejudging that, you may have different views about sectors, you may have different views about gaps, there ought to be a discussion, you have seen what Mr Holt says, there ought to be a discussion between experts, you ought to be able to resolve the sector issue, at least try and resolve it, you ought to be able to resolve where there are gaps which need to be filled, I am not going down, say the Tribunal, the route of claimant-specific evidence with all that it entails, please be back here in a month with any disagreements. In my respectful submission that ought to be, and indeed there is a CMC in July, maybe that's a bit soon but it ought to be achievable in the short term. Then no one can be worrying, no one need worry about massive disclosure, and actually we can move fairly rapidly to a trial. Because the parameters of what the trial will be involving will be clear, and I'm not saying there will be no disputes, plainly the econometric experts, there will be disputes, there will be a need for some industry expert, there will be some

data requests, but we will be at least, all be moving the same direction with clarity.

MR JUSTICE ROTH: I mean, he does acknowledge that to fill the gaps, (a) there might be a need for industry experts and (b) there might indeed, he says, for some settling of claimants.

MR RABINOWITZ: Exactly, but he is talking about data.

MR JUSTICE ROTH: About data, yes.

MR RABINOWITZ: So, as I say, he is definitely not saying he has all the answers to all the issues, he is acknowledging there are gaps and he has proposals as to how those gaps can be filled, as I say where there may be reasonable disagreements if he is right about the sectors, if he is right about the gaps, because there may be more gaps, people can disagree about where you need industry experts, evidence whether there is sub-sectors and the like but it is a workable, in a sense we are dealing in an imperfect world and I think we all accept that, and it is an imperfect world in which we have to produce a result which is not unfair, but which at least follows a guideline in terms of how you might achieve a fair result fairly. Mr Holt, in my respectful submission, is the only one has come up with a proposal which achieves that, that's to say proportionate in terms of the time it will take of the Tribunal and the cost it will take to the parties. Bindingness, I haven't touched on bindingness yet, the President, indeed the Tribunal, were very concerned about the point about bindingness, how do you produce an outcome, an output, as an economist might say, at the end of this day with a judgment which has the most binding effect on the most number of people? You certainly don't do it with a claimant sample. The more you rely on claimant-specific evidence, the more you are going to be into Ashmore territory, rather than bindingness. Indeed, that was one of the factors that I understood motivated the Tribunal on the last occasion. If you can produce something which is sector-related by reference to evidence which is not, which does not depend upon particular

claimants, but is generalised and applies to the industries in which they are in, in our respectful submission you are most likely to produce something which is binding, in the sense that no one can say, well they may try, but it will be difficult for them to say, this doesn't relate to us; it does relate to them. My learned friends hold up the spectre of everyone saying, well, it's not claimant-specific, therefore I am not bound by it, with respect that is to completely miss the point. It would be binding on them precisely because it isn't claimant-specific but it relates to sectors in which they are all part, the Tribunal having decided that that is how it is going to decide these matters and, as the Supreme Court said, paragraph -- 221, that is a perfectly, case management matters here and can count and you are perfectly entitled, I think the Court of Appeal may have said the same in Meta, you are entitled to say, this is the way we are going to decide it and they will be bound by it and no one can say, I'm sorry, that's not about me. Of course we are relying on an exceptions process, this was, as the Tribunal suggested this, we, with respect entirely agree with the exception process, but one needs to be clear that this a process for exceptional cases which is to say you can't say, no one can say, but it's not my data, you didn't use it in my documents, I'm not bound by it, there has to be a gateway, there have to be criteria and they have to be clearly drawn. Now when do you draw them? In our respectful submission, not until you have had Trial 2, I'm sorry for my learned friends for Ocado and Primark, they may have to make a decision about whether they need to participate or fully participate now, but there is no other way to decide what the criteria should be, other than to know what mattered to the Tribunal in making its decision. If the Tribunal were making its decision, as we would respectfully suggest is likely to be the position, produce an outcome which says these are the sector passing-on rates, these are the factors which led us to the view that this is the right passing-on rates, if someone can come and say those factors have literally nothing to do with my specific case because I am such an outlier in that sector.

If they are, one can identify other things that you should build in as safeguards, that is a proper exceptional case. They won't be, there shouldn't be that many of them because if there are too many of them, the experts won't have done their job properly. But if the experts do their job properly, which is to identify sectors properly and to do the econometric analysis properly and the Tribunal produces a sort of judgment that we would anticipate being produced, where the factors which have gone into deciding what rates apply to what sectors are identified, that's the point in which you can very clearly say, if you can show that none of these apply to you, or maybe less than one, and indeed you say that, because one of the other things you would want to build into this, this isn't a trivial difference, you are materially substantially different to those factors, then we may listen to you as an exceptional case, that's the way you produce exceptional cases, but otherwise people will be bound. My learned friend's proposals, particularly the Mastercard proposals, lacks that benefit. There are too many people being able to say, I wasn't in the sample, I am different. You said that what mattered was that what Sainsbury's did with their costs, whether there was a cost step or not, that's not me. In our respectful submission, that is a recipe for disaster. Anyway, as I say, my learned friend's problem is that you may have very few exceptions but that is because you will, if you are going to have a fair trial, it will be a seven month trial, not a seven week trial on their proposal, just because disclosure and the need for cross-examination if we are getting documents from everyone and looking at everyone's price setting approaches, that is where that will lead. Because you certainly, with respect to my learned friends, you cannot stop people testing the evidence, that would be grossly unfair. I know that the Tribunal has this point, if people, as they anticipate, if experts are actually there to deliver a fact-based expert report, first one needs the documents by reference to which they came to this conclusion and, secondly, one ought to be entitled to test that and that will take time.

So, I think, as I understand it, we have to stop now and --

MR JUSTICE MARCUS SMITH: If you reach a convenient moment.

MR RABINOWITZ: Any time.

MR JUSTICE MARCUS SMITH: Thank you very much, Mr Rabinowitz. We are likely to have a full day tomorrow, aren't we?

MR RABINOWITZ: Not from me, but Ms Demetriou has to follow me obviously.

MR JUSTICE MARCUS SMITH: Well, we will start at 10.00 and again, I am afraid, there will have to be a 4.30 finish. I will see if I can buy an extra quarter of an hour but I am not sure I can. But we will start at 10 o'clock, I don't think it's, I am reluctant to start sooner. So, 10 o'clock tomorrow morning.

(16.32)

(Adjourned to Thursday 25 May 2023)