IN THE COMPETITION APPEAL TRIBUNAL

Case Nos: 1441/7/7/22-1444/7/7/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Monday 3rd April 2023

Before:
Ben Tidswell
Dr Catherine Bell CB
Dr William Bishop
(Sitting as a Tribunal in England and Wales)

BETWEEN:

Proposed Class Representatives

Commercial and Interregional Card Claims I Limited
&
Commercial and Interregional Card Claims II Limited
(CICC I & II)

V

Proposed Defendants

Mastercard Incorporated & Others
&
Visa Inc. & Others

A P P E A R AN C E S

Michael Bowsher KC, Derek Spitz & Conor McCarthy (Instructed by Harcus Parker Limited) on behalf of CICC I & II.
Sonia Tolaney KC, Matthew Cook KC Hugo Leith & Veena Srirangam (Instructed by Freshfields Bruckhaus Deringer LLP and Jones Day) on behalf of the Mastercard parties.
Brian Kennelly KC, Isabel Buchanan & Daniel Piccinin KC (Instructed by Linklaters LLP) on behalf of Visa Inc.

Digital Transcription by Epiq Europe Ltd
Lower Ground 20 Furnival Street London EC4A 1JS
Tel No: 020 7404 1400 Fax No: 020 7404 1424
Email: ukclient@epiqglobal.co.uk

Monday, 3rd April 2023

(10.30 am)

MR TIDSWELL: Good morning, Mr Bowsher. I need to do the live stream warning first, because an official recording is being made and an authorised transcript will be produced, but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual of the proceedings. Breach of the provision is punishable as a contempt of court.

Good morning, everyone. Good morning, Mr Bowsher.

DISCUSSION OF HOUSEKEEPING MATTERS

MR BOWSHER: Good morning. May I start by doing appearances?

MR TIDSWELL: Yes.

MR BOWSHER: I appear today for the prospective class representatives with Derek Spitz and Conor McCarthy. Mastercard is represented by Sonia Tolaney, King's Counsel, and Matthew Cook, King's Counsel, with Veena Srirangam and Hugo Leith. Visa is represented today by Brian Kennelly, King's Counsel, Daniel Piccinin, King's Counsel, and with them Isabel Buchanan. I think I have got everyone on the list. If I have missed someone, I apologise.

I don't know whether the Tribunal has formed a view as to how you would like to see this hearing go forward. I have had tentative discussions with my learned friends for Mastercard and Visa about programming. I didn't try to settle on a final agreement, but we agreed a split of time. I would aim to try to make my submissions today in one day. Whether I quite manage to squeeze them into one day or not depends on a number of variables. That would then leave a day and a half for my learned friends to divide between them, and then I would reply in the half day left, so that we get basically a day and a half each. Quite how that works out may depend a little bit on

what points are settled on as more important or not.

MR TIDSWELL: Is that satisfactory to everybody else?

MS TOLANEY: Yes.

MR TIDSWELL: Thank you. That sounds sensible. The only bit of housekeeping I thought we did need to deal with is the question of Mr von Hinten-Reed's report, the document that was produced on 21st March, which I think remains of uncertain status. I wonder whether we should be dealing with that before we get into the gist of things.

MR BOWSHER: We could deal with that now or I could deal with it at the time when it sorts of fits neatly into my submissions. The point I am going to make on it is a very short point, which is simply that there exists a different methodology for dealing with merchant pass-on, which has been put forward on our side, yes, on 21st March, but it exists. It corresponds with but is different from any of the other proposals I think which were ventilated by the Tribunal in the Umbrella Proceedings. I think there is the Tribunal's letter of 5th December. Whether you wish to make that the subject of a final order now or simply see how that issue develops, as it were, and decide at the time whether or not you want to admit it formally. I was not proposing to open the document at length and go through it, unless my learned friends wanted to really get stuck into the detail of it.

MR TIDSWELL: First of all, we have not looked at it. There is a copy sitting on the desk out there, but we have not actually looked into it. I saw it was quite substantial. If you wanted us to pay any attention to it, we would need to read it, of course, before -- it would be helpful for us to have had a chance to read it before then. Of course there is plenty of time and breaks for us to do that, but we would need some notice of that. I think it may depend a little bit on the position taken by the Proposed Defendants, because I anticipate that there may be some things that are said about

it. Indeed, I think Visa already say something about it in their skeleton.

My guess is that there's going to be some contention about whether it plugs what's said to be a gap in the methodology, in which case it seems to me inevitable we are going to have to look at it, and if we are going to have to look at it, we need to decide whether or not it is admissible before we do that. I am not sure we can avoid that, but if you think that's not necessary -- maybe it is something that the Proposed Defendants are able to help us with at the moment.

MS TOLANEY: Sir, our position is that we say it is too late. It is prejudicial for us to have to deal with the report. It is the third attempt. It has been served incredibly late before this hearing. It is a chunky report that will take time to go through. So our primary stance is that it should not be admitted. Two attempts have been made. If it is not good enough yet, then that ends it. It is anyway only on one discrete point in any event.

If you are minded to admit it, then we will make submissions on it as best we can. Obviously, we don't have an expert report rebutting it, given the time, and we will have to do what we can in the time available, because we do say, in a nutshell, that it wouldn't plug the gap in any event.

MR TIDSWELL: I think that answers my question about if it were to be treated as available, and if it were to be admitted, then you would have things to say about it, which would mean we need to be familiar with it.

MS TOLANEY: Absolutely right.

MR TIDSWELL: I have a feeling we are now straying into actually whether it should be admitted or not. I don't want to forestall anything you want to say about that, but there is a practical point here, I think, for the Proposed Defendants. I think the logic goes like this. If you were right that it created a methodology problem -- there was a methodology problem and it wasn't fixed by this document, then one of the options

open to us might well be to say it needs to be fixed before we certify it. In order for that to happen, then, of course the methodology would be fixed and we would be back here arguing about whether we had fixed it or not. It does seem helpful, if you are all here, and if you are able to make submissions about it to try to at least deal with it to that extent.

Having said that, I do absolutely take the point that you need to be in a position to deal with it. So if you have not had enough time to deal with it, then it may be it needs to be dealt with in a different way. There is a practical point in all of this, as well as the point of principle, which I completely understand.

Mr Kennelly, do you have anything you want to add.

MR KENNELLY: Just to be clear, since you referred to Visa's submissions, our position, the same as Mastercard's, is that they should not be allowed to rely on it. If, contrary to our primary submission, they were allowed to rely on it, then we would make submission about it and that's what we propose do at this hearing.

What would be inappropriate, we submit, is that they should be given another chance to improve their methodology, to supplement or change what they put in in Mr von Hinten-Reed's most recent statement. They have had several opportunities to do that and they shouldn't be given another one. To the extent the Tribunal wants to postpone the discussion of this issue, it would only be for the schemes, if we were to have time to look at it, but it wouldn't be an opportunity for the PCRs to put in a further report or to supplement the report they have.

MR TIDSWELL: Mr Bowsher, I think that means that we do need to deal with it and deal with it sooner rather than later. It is your application. It is a slightly odd order, because we have been round the houses once already. If you wanted to say anything else --

MR BOWSHER: It is helpful to deal with it that way. For good order, in terms of

housekeeping, there is one other point which is the finalisation of the order following on from the Tribunal's letter on Friday regarding disclosure of the Settlement Agreements, which I don't think may need to be a big point, but I think that is probably still on the not quite yet sewn up list.

MR TIDSWELL: Shall we deal with that at the same time?

MR BOWSHER: I will deal with it now. I don't want to take up a huge amount of time. I can make my application briefly regarding what I am calling the pass-on proposals. That's the document which was produced on 21st March. This is not a case where we have been producing versions of this document and we have had a number of different goes at it. This is the first document which addresses merchant pass-on on our side. It is the first time we have put that document in.

The starting point for that is that the merchant pass-on issue is an issue which is only in part a common issue. I mean, there may be common issues when we come on to it in an hour or two's time and talk about what the common issues are. There may be common issues about what the correct approach should be to dealing with merchant pass-on, but at a certain point it breaks down into an issue which will have to be dealt with by reference to groups of merchants and it is not one of the issues which we put forward as being one of the core common issues.

I think the way we have put it in our claim form is there are issues of substantial commonality. In other words, the methodology questions as to how you would deal with this would be common, but the methods, how you actually deal with any group of merchants, less so. It is not --

MR TIDSWELL: Do you make that submission in relation to the opt out and opt in, because obviously in relation to opt in, I understand there is a point at which you say there needs to be an individual assessment of damages, but in relation to the opt out case, are you saying it is not -- the point may be a different point, might it not,

I suppose, because part of the point of the argument in the Umbrella Action, which is going to be ventilated in May, is quite how far one does go and how far it is a common issue before you have to break out.

MR BOWSHER: Exactly. There is a danger of whatever it is, angels dancing on heads of pins and so on, about what is or is not a common issue. At some point in the opt out claim, there will have to be a process by which the merchant pass-on issue is dealt with in reaching a conclusion as to what the aggregate award will be. Obviously in the opt in, where it is not aggregated, it would have to be individualised. In that sense, at the end point it can't be a common issue. In the opt out, it plainly is a common issue up in the sense that there must be a process which can be applied, whether it is by categories of merchants or whatever. A number of different versions have been put forward.

I don't know if it is helpful to start -- I have had this problem before. The Tribunal helpfully started this debate with its letter on 5th December 2022 at Volume D, tab 179, page 6397.

MR TIDSWELL: I should have told you we have the Core Bundle in hard copy and everything else in electronic. That is not in the Core Bundle, is it?

MR BOWSHER: That's not in the Core Bundle. I was about to promise I would stay in the Core Bundle but --

MR TIDSWELL: I appreciate you might not be able to do that. So you know, it might take us a little bit of time to find things because they are enormous. 6397 did you say?

MR BOWSHER: 6397.

MR TIDSWELL: 5th December from the Tribunal. If we are looking at the right thing, this is a letter in the Umbrella Action.

MR BOWSHER: A letter in the Umbrella Action, exactly. It is a letter which you may

be familiar with but the other members of the panel may not yet be familiar with. I am not proposing to read it all out. It is to do with proposals. We can ignore the first part because it is all to do with the Volvo limitation. It is setting out a programme for the Umbrella Proceedings, 6397, and part 2, at the bottom of 6398, thoughts in relation to the evidential hearing.

The thoughts are the Tribunal's thoughts about methods which might be used to address the merchant pass-on issue in the Umbrella Proceedings. This followed on some very long discussion at a CMC, which we did attend in the Umbrella Proceedings when there was discussion about, you know, some umbrella payments were going to have -- the famous 400 witness statements and so on and so forth. So we ended up with different processes. That's the Tribunal's starting point.

Taking account of that, we wrote to yourself I think as the only member of the panel in this case at Volume D, tab 215, page 6563.

MR TIDSWELL: Give me that number again.

MR BOWSHER: 6563.

MR TIDSWELL: May I just make the observation that if parties are writing to the Tribunal, they should write to the Registrar rather than to the chair. I think it is probably the right approach.

MR BOWSHER: Yes. This was a short letter referring to the two sets of proceedings. Paragraph 3, on the second page:

"Pursuant to paragraphs 3 and 5 of the order". This is the directions order in the Umbrella Proceedings. A hearing of the evidential issues concerning pass-on will take place in May. I have not taken you to the order but there was in the meantime an order setting up the evidential hearing. There was to be a hearing in May 2023 concerning pass.-on, the pass-on evidential hearing, and the parties to the Umbrella Proceedings and the *Merricks* proceedings are to liaise with one another to agree

further directions, because, of course, similar issues might arise in the *Merricks* proceedings.

We then note in paragraph 4 that we are not in the proceedings, but plainly the subject of discussion is a matter of interest to us, the merchant pass-on issue. So we propose to submit what we describe as our high level proposals on pass-on issues in our proceedings by 4.00 pm on 13th March.

MR TIDSWELL: Yes. Perhaps we can shortcut this a little bit, Mr Bowsher, because I don't think the issue -- the issue here is not so much about what's going on with this process. I think it is understood there was a process by which you decided you wished to participate in this way and that's all understood. So we understand why Mr von Hinten-Reed's document comes into existence. The question is why it is being deployed in that way and not within the timetable in the way in which these proceedings required, which was due to be served with any reply evidence, if it was to be deployed by way of a reply, why it wasn't served as reply evidence on 14th March.

That's the complaint that's made against you. It is not about whether or not you -- all of this is I think uncontroversial. The controversial bit is there was a timetable for your client to respond and it didn't do so. To put it at its lowest, it is somewhat unusual for it to be seeking to use documents filed in other proceedings and brought back in these proceedings in some sort of loop. That doesn't feel like a particularly compliant approach as far as the process is concerned. That's the complaint I think.

MR BOWSHER: I apologise if we have been at cross-purposes. The approach that was taken is perhaps as we have summarised in our skeleton and I don't think I need to take you to it now, but it is the point we make, that as regards pass-on our position is in a sense rather simple. It is self-evident that there is a methodology to be found, but that that methodology is controversial.

Perhaps there is a distinction to be drawn between methodology and method. They are not the same thing. It is hotly debated as to how to take forward the actual process of establishing the pass-on issues both as acquirer pass-on and merchant pass-on.

Our position, simply put, has been that is a topic in the Umbrella Proceedings. We were invited to participate as a spectator, as it were, in the Umbrella Proceedings. Plainly, if we were going to be bound by it either as a matter of res judicata or effectively bound by anything that was done in terms of the methodology or method for dealing with merchant pass-on at that hearing, the appropriate way of developing the methodology was for the purposes of that hearing.

MR TIDSWELL: Sorry to interrupt up. Are you saying if you knew that it was a difficult issue about which there was great contention, which is I think absolutely right, and you knew that there was going to be a hearing to sort all that out, then there was no -- I think you are saying there was not much utility in you venturing a view on what the methodology might be, knowing it was very likely the Tribunal was going to decide to do it a different way. Is that the essence?

MR BOWSHER: At the methodological level, if one is going to be punctilious about it, the methodology is a matter of controversy. We will put forward a proposal and the Tribunal will decide.

MR TIDSWELL: Well, I am not sure that is -- you see, I don't think that is -- that is a bit different from what I was putting back to you, because I think it is one thing to say -- and no doubt there will be lots of discussion about whether it is an appropriate thing to say, but it is one thing to say "we are going to wait to see what the Tribunal decides on these parallel proceedings, because they will actually fix the problem of what the methodology might be". That's one thing. But that is not what you are doing. What you are doing is that plus turning up with a report that was

filed in some other proceedings, not having filed a report in these proceedings, and purporting to rely on it, notwithstanding that it falls outside the timetable and actually lands just as the skeletons are being done. That's the problem with it. That's the reason why my response to it was I am not going to admit it because it should have been filed on 14th March.

Really I think the question that we need to understand from you is why it wasn't filed on 14th March, and, if there is some good reason for that, why we should be letting it in now and why the Proposed Defendants don't suffer prejudice.

MR BOWSHER: The short answer to that is that there has been a great deal to do between -- as anticipated, and I don't want to sound -- there is a risk that this sounds -- well, it does sound like -- I will say it anyway.

We knew there would be a lot to do, as we highlighted I think at the CMC in this matter, when we asked for some prior indications as to what the nature of the reaction was going to be to our CPO application.

The Tribunal was not with us on that day. In the end we had three weeks to turn around our reply to all of the CPO responses. We had discussed and -- I mean, there's a danger that I get into privileged discussion.

MR TIDSWELL: I don't want to encourage it.

MR BOWSHER: It just takes time.

MR TIDSWELL: That's very helpful and straightforward of you, if I may say so. It is preferable to the alternative obvious conclusion that the approach has been to game the system. It could be said on one view you have just tried to avoid the deadline on 14th March and bought some extra time by using this rather circuitous route. I think what you have said to us is actually more attractive, albeit --

MR BOWSHER: It is not terribly attractive but it is the reality of litigation. The 13th or 14th January date was probably a date -- I can probably say this. It was

probably a date that I said that is the date we should aim for. We aimed for it -- sorry. 14th March was the date we aimed for. We didn't yet have the CPO responses at that time, but it seemed a time which would give enough time before the hearing.

Now, it took longer, obviously, and it is very -- I don't need -- well, I will say it -- to say something doesn't need to be said and then say it is absurd.

For experts to put pen to paper and commit themselves to something like this is an important step. For Mr von Hinten-Reed to be prepared to say this, this is the right way forward, particularly because there is a lot of detail in that proposal. It goes, I submit, far beyond methodology, in terms of a method that he is prepared to put his name to, and say "this is an appropriate way forward". It just took longer. In a sense, all I am asking for is eight extra days for the submission of that proposal.

It has not allowed a great deal of time for discussion, but that was still 14th March. That was over two weeks ago. It is only 70 pages long. I think the substance part is only 50 pages. It's a method, not a statement of lots of substantive findings that needs to be unpacked. So I would submit there is not a huge amount of prejudice in the Tribunal admitting it today simply for the purpose of identifying our proposal as a method for dealing with merchant and acquirer pass-on. That's all we are seeking to do. We are not saying "This is the answer. The answer is 10 or 42 or whatever". We are simply saying this is our proposal as a method. It is a distinct, we say, contribution to the discussion initiated by the Tribunal in the Umbrella Proceedings. The methodology is that which the Tribunal will set out. Whether we are bound by it or we will adapt ourselves to it, in reality, that's the train we have to adapt ourselves to.

MR TIDSWELL: Yes, thank you.

MR BOWSHER: I don't think -- is that helpful? I am taking up time, but it is

important.

MR TIDSWELL: Absolutely, it is. Thank you.

Ms Tolaney.

MS TOLANEY: Thank you, sir. Three points. The first thing is that the burden is on the PCR to satisfy the Tribunal that certification is appropriate, and that requires, as you know, demonstration of commonality of issues and methodology for the Tribunal to be so satisfied.

Here, pass-on was obviously a central issue. That should have been identified in August 2021 when the relevant corporations were incorporated, and certainly by June 2022 when the applications were made.

The second point is timing. Having failed to serve and identify the relevant material in June 2022 and thereafter, this report wasn't even part of the second round of expert attempted reports served by my learned friend's clients. It was then said that there would be high level proposals on this topic, which somehow got missed. That was to be done on 14th March. Then, as we know, it was served late and it is 70 pages. It's not high-level proposals.

I think the third point is enough is enough, that this timing and this approach risks derailing this hearing. This is a three-day hearing. It is at my learned friend's clients' request, knowing what they have to satisfy the Tribunal of. They have had indulgence already. Now we are in a situation where prejudice may well be caused to my clients and Mr Kennelly's clients, because we have no expert report, nor could one have been produced in response, and it requires the Tribunal to do yet more reading, and it risks actually taking this hearing over the time estimate.

All of this, if I can just remind you, sir, was set out in our letter of 24th March. With respect to my learned friend, I don't think his submissions have really answered what was in my instructing solicitors' letter, and that is at page 7664.24 of the Bundle.

MR TIDSWELL: Do you want us to turn that up?

MS TOLANEY: Yes, please. 7664.24.

MR TIDSWELL: Yes.

MS TOLANEY: The reason I make that point and show it to you is that as at 24 March this was all there for my learned friend to have engaged with in his submissions.

MR TIDSWELL: Just as a practical matter, the practical question is whether you are in a position to deal with it in the course of this hearing. It comes down largely to whether you are able to -- and in the context in which it arises, which is you say there is no proper methodology and indeed you have just explained why you say it should have been done from the beginning and has not been done. There is now something which is said to be the methodology. In order for that argument to be dealt with properly, actually one might want to look at this document, but clearly not in circumstances where you don't feel you can deal with it.

Now, it is not something which I expect you would have been given permission to file a report in response to, because it came in in reply evidence. You may well say "that's precisely the sort of evidence we should be entitled to respond to".

MS TOLANEY: Exactly, because it should have been part of the original case.

MR TIDSWELL: It should be part of the original case, but on the assumption that if it had turned up, as indeed a bunch of material on acquirer pass-on turned up on 14th or 15th March, and the reality was I think the idea that you would I think be standing here saying "we have not had an opportunity to respond to it", that would be an entirely fair thing, but I don't think we would be in the position of giving you another round of expert reports on it, so the real question is whether you are able to make those observations about it now, in the context of the discussion about methodology. That I think is the question.

MS TOLANEY: The answer, sir, is yes and no. The starting point is this should have formed part of the evidence on the basis on which the application was made.

MR TIDSWELL: We have that point, yes.

MS TOLANEY: So obviously we would have had a chance to reply, I submit. I can make high level comments on it, because, number one, it only deals with a very small part of the claim in one sense. It is an issue, and obviously the rest of the application stands or fails, as we have said, with the defects we have identified. This one we would have to look at separately.

I can make some high-level comments on it, but the way I would put it, sir, is that if you are persuaded by the high-level observations that it is inadequate, then that ends the point and certification won't be granted.

If you thought there might be something in the report, then we must be given an opportunity properly to respond to it before you were to grant certification.

MR TIDSWELL: Well, there is an intermediate position, isn't there, which is that we might indicate that we wouldn't grant certification until we are satisfied that the problem is fixed. That's the Meta approach, if you like.

MS TOLANEY: That's right, except we would resist that for the reasons Mr Kennelly has said, that you have to draw a line, and this is the third attempt. What we would resist is that the timing of this report effectively gives an opportunity for a fourth report, and that shouldn't be permitted. This should be the basis on which the application should be made. We say it shouldn't be admitted at all, but if it were to be admitted, it needs to be admitted on the basis that there is nothing further. There has been three attempts.

Then, if you, sir, are satisfied on the basis of our submissions and Visa's submissions that certification shouldn't be granted on that basis, that's the end of it.

If you think that we should have the opportunity to respond more fully to this third

report, then you would have to adjourn it just for the purposes of our response. What we say is that in itself is unsatisfactory, in circumstances where this hearing has been listed and dealt with and indulgences have already been given.

So we think it would be cleaner now not to permit it, but we are obviously in the Tribunal's hands.

MR TIDSWELL: Yes. Thank you.

Mr Kennelly.

MR KENNELLY: On behalf of Visa, we adopt what Ms Tolaney said and the submissions she made about the possible solution suggested by the Tribunal.

If I may just supplement very briefly what she just said to you. It really goes to the point that this is quite seriously inappropriate on the part of the PCRs. It is not just a matter of a few days' extension, because the pass-on methodology really ought to have been included with the claim form in June 2022. The claim form itself acknowledges that merchant pass-on is one of the common issues that they say justifies certification. I am sure I don't need to take you back to the claim form itself. They are absolutely clear that it required analysis, but the claim form contained no such analysis, and neither did the evidence which accompanied it.

Mr von Hinten-Reed, as the Tribunal will have seen from the judgment, was one of the experts in the Sainsbury's case. He was very familiar with the issues. There was no doubt in the PCRs' mind this was something they had to address, even if it wasn't possible to address it in June 2022. They had nearly a year to serve methodology until they served their reply in March 2023. Even then, notwithstanding the timetable set by this Tribunal, they failed to do so and ultimately served a report late in other proceedings.

In cases like this, the certification stage is, as the Tribunal knows well, a vital gatekeeper function. The methodology is extremely important for the Tribunal to

exercise that gatekeeper function, and the approach that the PCR has taken consciously is simply to not bother giving you methodology analysis for merchant pass-on in these proceedings but to serve a report late in other proceedings.

In our respectful submission, that's absolutely the wrong way to go about it and shouldn't simply be treated like an ordinary application for an extension of time.

The final point as to prejudice, we are in the same position as Mastercard and Ms Tolaney. We can deal with it on a high level, and if the Tribunal is with us, that may be sufficient. If that's not sufficient, then it is for us to have more time to address it, not for the PCRs to improve their expert methodology and to be given the indulgence that the PCR was given in Meta.

MR TIDSWELL: Yes. Thank you.

Mr Bowsher, anything you want to add?

MR BOWSHER: Sir, just to reiterate this isn't a situation where we have put in a number of different versions of this version. This is the first report on pass-on.

MR TIDSWELL: But I think that's --

MR BOWSHER: That's Mr Kennelly's point. Indeed, as matters have developed, the position that we took -- and I think you will find the way the claim form -- I was just looking at it -- the way the claim form puts it is there are issues of substantial commonality. I have been careful when we started to shade what is and is not common in this issue will be something to be developed. We were conscious when the claim form went in that these matters are the subject of an ongoing debate. It was necessary to see what the Tribunal was going to decide in the Umbrella Proceedings, because whether we were formally or informally bound by what happened there, that was going to affect the material available and the process the Tribunal was going to take.

MR TIDSWELL: That might justify a position that said "we are not going to advance

a methodology", but I think you are trying to have your cake and eat it. I think you are trying to say "we want to take that position, but also we want to put in a report that is going to provide some methodological basis".

So I think if you were saying to me the former, which is "we are going to rely on where the Tribunal gets to on this", presumably you would not need to rely on this document, because actually that would be good, if that was enough, but I think you are trying to do that and at the same time say "but also we have got this document which sets out the methodology which fills the gap."

MR BOWSHER: Because we are trying to contribute to the debate which will affect us, indeed.

MR TIDSWELL: I quite understand why you might want them in those proceedings, but in these proceedings it is said you have got a methodological gap. Your answer seems to me, at least at one level, "well, that's not surprising, because no-one knows the answer, but we'll find out and that is good enough".

But then you are trying to supplement that with a document that seeks to fill the gap on its own terms.

MR BOWSHER: We did try to make clear, when we explained what we were delivering, we were delivering it for the purposes of the May hearing to make plain. We are trying not to have our cake and eat it. We see the May hearing as the point at which the material that affects how we deal with pass-on will be substantially affected by the May hearing, whether we are bound --

MR TIDSWELL: If that's the narrowness of the point you are taking, then the answer would be that you don't need to rely on the report. If you need to rely on the report and its contents beyond that point, then we are into the issues that have been raised. So I think I do need to ask you to go one way or the other on this. Either you want us to look at the report and accept any submissions you might make about whether it

fills the methodological gap which is going to be argued by the Proposed Defendants, or you say "The simple answer to that is it is all going to be sorted out in due course, so don't worry about it". It is up to you which of those you run, but I do think you have to commit to one or the other, if one can put it that way.

In other words, if you are going to rely on the report for anything other than its existence in the May proceedings, you want to rely on it for its contents in these proceedings, then you've got to overcome the points that have been made against you, and I think you need to tell us which way you're going on that.

MR BOWSHER: Our position is that we're not proposing to go into the detail of the report. We rely upon it because it exists, because what we are asking for, in terms of methodology, is that we be in a position to make a contribution for the May hearing, that is our contribution to it, and that that be the methodology going forward, that that will drive the methodology going forward in these claims.

MR TIDSWELL: So when it is said against you later on in this hearing, which I am sure it will be, that you don't have a methodology in relation to merchant pass-on, you are not planning to open up the report and say: "Look, this is what Mr von Hinten-Reed says is the answer to that". That is not going to happen in this hearing?

MR BOWSHER: With respect, there plainly is a methodology. We are not going to go through the detail and say whether or not our process is better than their process and unpick its detail.

MR TIDSWELL: The argument would be whether it is adequate, whether we are satisfied that on the face of it, it is an adequate methodology, bearing in mind the test that is set out in the case. We are not talking about proving it. We are just talking about it being credible or plausible I think is the expression that's used. So are you going to ask us to look at the report and decide whether there is a credible methodology being advanced in that report for the purposes of this certification

hearing? That's the sharp end of the question. Because if you are, then it does need to be admitted in these proceedings as a document which should have been filed on 14th March.

MR BOWSHER: As a matter of safety, I have to ask that it is admitted. It is not our primary position. Our primary position is that it is in and of itself a plausible methodology, and our methodology is that we contribute to the May hearing. I take your point that the Tribunal are saying this involves a degree of cake-ism.

MR TIDSWELL: I am not trying to be difficult about it, Mr Bowsher. There is a point here about compliance with the timetable, and that is very plain and we have dealt with that. I understand what you say about that. This is quite a different issue, which is that there is said that there's a gap in the methodology and, as we know, gaps in methodology are a basis for the Tribunal not to certify. The question is what's your answer to that? For us obviously, as a Tribunal, we need to decide whether we are going to accept what appears to be your primary submission, "Don't worry because it is going to be sorted out later". No observations about whether that's a good or bad argument for present purposes. That's certainly a good answer. Whether it is good enough is another question. If you are then going to seek to argue, by reference to the detail -- if you are putting forward a positive methodology in this hearing, we need to know about that.

MR BOWSHER: I am not putting forward a positive methodology in this hearing --

MR TIDSWELL: In relation to merchant pass-on.

MR BOWSHER: In relation to merchant pass-on. My only concern is if the attack is "Well, you haven't dealt with this, that or the other", I may need to get into the detail, and that's the only reason why I am havering on this.

MR TIDSWELL: What do you mean by -- isn't that the same thing?

MR BOWSHER: Because we will say we have dealt with the problem of merchant

pass-on and how that is going to be dealt with. We have put forward a proposal. The proposal is --

MR TIDSWELL: Not in these proceedings you haven't. Not in these proceedings. As the current position is at the moment, there is nothing in these proceedings that explains how you are going to deal with merchant pass-on. So are you intending to supplement that by reference to the report?

MR BOWSHER: Then for the purpose of these proceedings I have to say I would ask for it to be admitted in these proceedings, albeit that all I am asking for the methodology is that the Umbrella Proceedings deals with the matter and we deal with it -- and that's the way I tie the two together. That, with respect, is not cake-ism. That is saying "Look, there is a methodology". That's what we have always said. The methodology is it is absurd to have two separate proceedings dealing with the same point. Obviously they are going to end up dealing --

MR TIDSWELL: I understand that point.

MR BOWSHER: So that is the methodology and we have put forward a more than plausible, we would say a convincing approach to deal with that. That's all I need to say.

MR TIDSWELL: All right. Thank you. We will rise just for a few minutes, because I think we need to consider this and come back in a few minutes with an answer.

(Short break)

MR TIDSWELL: Yes. I am sorry we have taken a bit of time, because we have not found this straightforward. That is because it is not just a question of the impact of missing a timetable. It does seem to us to have quite significant ramifications for the way the hearing is conducted, let alone the question of whether certification is granted or not.

The simple background to it is that the reply from the PCR was due on 14th March.

The expert report dealing with merchant pass on which we are considering was provided on 21st March. That was provided in another set of proceedings to which the PCR is not in fact yet a party. That whole process has been highly unsatisfactory. Quite apart from the failure to observe the timetable, it creates a difficulty of real uncertainty about the status of the report and its contents for the purposes of these certification proceedings.

It is not just a question of timing but a question of prejudice, and the ability of the proposed defendants to respond, particularly given as they say nothing about merchant pass on was included in the original claim form documentation.

That also causes potential difficulties for the Tribunal in understanding precisely the significance of the report.

The primary case advanced by Mr Bowsher KCis that the question of merchant pass on will be sorted out in the umbrella proceedings. As a result, there is no need to get into detailed methodology on that subject at this hearing. We understand that submission, but it appears that the PCR still wishes to be able to defend points made about the content of the merchant pass on report as they are raised. Therefore the question of admissibility goes beyond just the fact of the report.

After careful consideration and mindful of the difficulties that this creates for the proposed defendants and the risk of prejudice, we have decided to admit the report on the following basis: first, that it is primarily being deployed for Mr Bowsher's first argument, which is that the Umbrella Proceedings will sort out the merchant pass on issue, to put it in short form. Secondly, to the extent that the report is deployed by Mr Bowsher for argument 2, which is the actual question of adequacy of methodology, we recognise that the proposed defendants will not have fully formulated their response and so to the extent those points are raised, and we permit them, we will consider them in that light. In other words, it becomes

a question of weight as to our consideration of the adequacy of the points that have been made in the body of the pass on report, bearing in mind the ability of the proposed defendants to respond to it.

That is not a situation that we are particularly happy with, and it is not one we would want to see replicated. The timetable is there for a very good reason and the Tribunal expects it to be complied with, but in this case, for the reasons I have given, we have decided that the report should be admitted for those purposes.

MR TIDSWELL: Mr Bowsher.

MR BOWSHER: I am very much obliged to the Tribunal and sorry for the time it has taken and all those points are very well noted indeed. Thank you very much indeed.

MR TIDSWELL: Thank you. We have taken a lot of time. Unless the transcript writers object, we will try to run through to 1 o'clock.

MR BOWSHER: No doubt a message can be sent through to us if we need to stop.

We have dealt with timetable. The order from Friday, I think we can just deal with that fairly swiftly. You will recall there has been an issue about the terms of certain settlement agreements entered into with some of the individual claimants.

MR TIDSWELL: This was mostly on the Visa side. The Mastercard side was straightforward --

MR BOWSHER: It is both I think. There is one agreement in particular. There is a witness statement from Freshfields, for Mastercard, which deals with the substance of an agreement. All I was going to say is there is a question about whether or not a settlement agreement which we understand -- I think I can say this in open court -- would apply to over 300 potential class members, whether it does or does not cover the subject matter of these prospective claims. I would propose that that is not an issue for determination as part of this application. What we would say is that the point is not as cut and dried as it was presented to us. That's as far as

I propose to deal with the matter.

You have the argument set out in writing in the skeleton arguments. If it is thought necessary for us to get into the guts of that argument, we can do so, but I suspect that Mastercard may want us to go into camera if we do so. Is that right?

MR TIDSWELL: The order was made and we left it to the parties to draw it up. This is not a dispute about what goes into the order. It is just a practical point about the conduct of the hearing?

MR BOWSHER: Indeed, the conduct of the hearing. There was a question about the drafting, how broad it needed to be.

MR TIDSWELL: It is a definitional point. It wasn't entirely obvious to me why we couldn't talk about some of those things at an abstract level without getting into -- I can't see any basis on which we should be going into camera to talk about any of those, but obviously open to persuasion if that is absolutely necessary. It seems to me the argument is about fairly standard wording and contract of clauses. I can't see why that would give rise to confidential --

MR BOWSHER: If I say that's not my problem, that's not what I mean. We're not supposed to say "not my problem".

MR TIDSWELL: We need to sort it out. Can it be sorted out now or over lunch? What's the best time to deal with it?

MS TOLANEY: I think lunch time is fine. In a nutshell, if we are talking about the one settlement agreement, there is no need to go into camera about that, but it is if we get into any wider areas that have not been resolved, we would need to go into camera. We don't see any reason why we should, given what has just been said.

The second point is it was -- certainly in my learned friend's skeleton argument at paragraph 72 and our skeleton argument at paragraph 3.8, common ground that the scope of any settlement agreement is not an issue for this hearing. So although it

may be a point of contractual construction, it is not one that should occupy you.

MR TIDSWELL: You are not asking us to decide.

MS TOLANEY: If it did, we would certainly not finish in three days.

MR TIDSWELL: Given that there is a degree of uncertainty which we are not being asked to resolve about the contracts, and what implications that has for things like the calculation of the aggregate damages and so on.

MS TOLANEY: That's right. I think the simple point is the existence of those agreements certainly must be common ground and has an impact on the quantum that has been stated, but one does not need to go I think further than that.

I am just being told if we are discussing the detail of even the one agreement rather than its existence, which I don't think we need to, then we would wish to have the opportunity to go into camera.

MR TIDSWELL: Yes. Okay. Let's see how -- why don't we see how that runs. If anybody feels like -- perhaps you could have a conversation amongst each other just how you plan to get into it, but if anybody feels we are in dangerous territory, then be it would helpful if you alert us at the earliest possible opportunity, because we don't want to say anything -- we are particularly conscious about not saying anything we shouldn't. So please don't hesitate to raise it if it looks like it is going to be a problem.

MS TOLANEY: Thank you, sir.

MR TIDSWELL: Thank you.

MR BOWSHER: If that becomes a problem of methodology, I can tell you now the methodology is at least a one-hour hearing to argue about the terms of that agreement. So that's the methodology for any future issue around the terms of that settlement. Not for today.

MR TIDSWELL: Yes. Thank you.

MR BOWSHER: One other preliminary point, in making these submissions, almost any point I make can be made with much the same vigour, although perhaps with a little shift in detail, as regards either Mastercard or Visa. If I fix on one rather than the other, it is not necessarily meant to focus on one rather than the other. There are one or two specific points but I am not singling one out as against the other. I think more or less everything applies as regards both.

MR TIDSWELL: Yes. I take it that where there's a significant difference between opt-out and opt-in, which I understand, you will signpost those quite clearly.

SUBMISSIONS BY MR BOWSHER

MR BOWSHER: That we may have to come back to.

So the claims of the prospective representatives and the claimants in the Umbrella Proceedings all contend that the defendants have embarked upon anti-competitive activity regarding the merchant interchange fees. That we all say has caused many thousands of merchants very substantial damage in having to overpay multilateral interchange fees through the MSCs.

I will come back to the overall scale of that in a moment, but that is simply as an order of magnitude a claim measured in, as we know, hundreds of millions on the measurement we have put forward. A large number of merchants who have suffered in these losses will be UK-based.

We contend that the relevant rules of the Visa and Mastercard schemes and the MIFs established under them stem from an anti-competitive agreement, concerted practice or decision of an association of undertakings, and that the MIFs (multilateral interchange fees) in effect prefix a price floor for the MSC, restricting price competition in the acquiring market.

These claims are limited to the interregional MIFs and the commercial card MIFs.

Interregional MIFs, as you will know from our skeleton, apply to consumer card interregional transactions between merchants located in the EEA and those outside the EEA. That's the way the definition of the rules deals with it. The commercial card MIF applies to those transactions done by way of commercial card.

We have set out the detail of that in more detail in our skeleton. Large parts of what I am going to say will track in our skeleton with more detail and some of the references as we go.

Our primary case, as you know, is that the measure of damages corresponds to the level of MIF actually made, because there is no positive level of MIF that the Proposed Defendants could lawfully have set; alternatively that damages are the difference between the MIF paid and any lawful level that Visa and Mastercard established they would have set consistent with section 9 of the Competition Act or Article 101 of the TFEU. Then we get into the exemption issues.

Opt in proceedings relate to merchants who paid interregional or commercial card MIFs where the transaction occurred in the EU, including the UK prior to 1st January 2021, or in the UK on or after 1st January 2021, that being obviously Brexit day.

The class does not include merchants with an average turnover of less than £100 million per annum between 2016 and 2019, and the detailed definition of the class is at Annex 13 to the claim forms. There is an Annex 13 to each of the claim forms, but obviously there is basically two versions, one for opt-in and one for opt-out.

The opt-out proceedings relate to the same MIFs where the transaction occurred in the UK, and UK only, during the claim period and where the class member's average turnover did not exceed £100 million per annum. The claim is from 1st June 2016 to the date of judgment.

These are ongoing losses which, if we are right, are caused by ongoing

infringements. As I said, these claims are confined to UK transactions.

We have summarised our case in more detail in paragraph 31 of our skeleton argument. I don't know that I need to necessarily take you through all of that. It is in paragraph 31. I don't know if it is helpful. It is page 2.9, if that's any help in the Core Bundle.

MR TIDSWELL: You can assume we have looked at it.

MR BOWSHER: Exactly. I am not going to read huge chunks of the skeleton, but it is important to emphasise that the primary case, albeit that the matters are not res judicata, that the essential factual basis of the various cases, both Commission decisions and judicial decisions, in Mastercard, Sainsbury's and so forth apply to the MIFs in issue here. So decisions regarding those MIFs which are not the MIFs under consideration in this claim, we say that the same factual analysis can be transferred across. That's our first point, the first way we run the case.

As an alternative we develop a separate methodology.

MR TIDSWELL: To what extent is that position now adjusted as a result of the summary judgment applications in *Dune*, so where the argument was run that there was a read across that justified summary judgment? Does that push you to your alternative case?

MR BOWSHER: All that says is we are not going to get summary judgment on our primary position. I mean, I don't read the ***Dune*** summary judgment decision as saying that our read across analysis is unarguable, just that it needs to be argued out.

MR TIDSWELL: Yes. So you say it's possible that at a trial you could substantiate the point by I suppose rebutting the evidence from the Proposed Defendants that there was a difference?

MR BOWSHER: They will no doubt come forward with points. They will no doubt try

to come forward with a case that says these MIFs are completely different from the other MIFs.

MR TIDSWELL: Yes.

MR BOWSHER: We will just have to meet that case. It's very different -- obviously we have to try to anticipate it but there is a limit to us anticipating that case, but yes.

MR TIDSWELL: It is quite relevant to the methodology point, isn't it, and indeed potentially other things, because to the extent that in your primary case your methodology is largely -- you see this in Mr von Hinten-Reed's report at various stages -- this has been sorted out already and we know what the answer is, as you say, primary case being it is 100% of the MIFs is the damages.

The question really I think is if -- to the extent you meant earlier in that primary case you are not putting forward a methodology on anything other than what has been dealt with. So you would say your alternative case -- when we are talking about methodology in relation to some of these things you would say --

MR BOWSHER: That's our secondary case.

MR TIDSWELL: A methodology for a secondary case.

MR BOWSHER: Yes.

MR TIDSWELL: Would you say it makes any difference, from the point of view of the Tribunal looking at the methodology? How does the Tribunal deal with a situation where there's a primary case and we obviously can't form a view on that, for reasons you'd advance you would say, a secondary case which you may or may not have to run, to what extent do you need to -- what does that tell us about the extent to which the methodology needs to be fleshed out, in relation to the --

MR BOWSHER: We have done that. I should explain. What I am --

MR TIDSWELL: I am jumping ahead. I am sorry. It is unhelpful.

MR BOWSHER: What I was just about to come to is to see how I was going to try to

sketch out -- I am happy to take this in whatever order suits the Tribunal. I was going to give a short explanation as to why these claims matter and to deal briefly with the estimation of value of those claims, very briefly, which, of course, is not estimating the amount of damages. It is estimating the values, two different things.

Then there are a number of points made against us about the relationship between these claims and the umbrella claims, which might loosely be summed up with the umbrella claims are the be all and end all. These claims add nothing, and/or complications between the two claims.

There is a whole cluster of those points, which I propose to deal with thereafter, because I just need to get through them.

I was then going to deal with the law on the analytical starting point for a methodology and then what I thought would be helpful would be just to walk through logically from the beginning to the end, how we see the methodology work, drawing on the materials we have got and how that methodology works through. Getting there, that step X and Y, I don't know where it is, we will say 101 secondary case, we will deal with it in this case, as we have said in our report.

MR TIDSWELL: That's helpful. I am very happy for you to carry on as you say.

MR BOWSHER: At the end, there is a cluster of what in my head I call authorisation issues, which are about a whole range of things, and I will probably by that point be gabbling extremely fast and it will be a hold on to your hats point by the time we reach that in my submissions.

MR TIDSWELL: Yes.

MR BOWSHER: I skipped that introduction out as part of the housekeeping.

As you know, we have put forward our reports, Mr von Hinten-Reed's reports and their annexes. They describe a detailed method for assessing these matters. In short, at the outset, we say that these claims have substantial value. Mr von

Hinten-Reed has put forward values in his first report for the likely overall value by reference to the three core sectors. You have the references in our skeleton.

Now things can be said about that, because they are not the only merchants, but what one can see from the statistics which he has put forward is that this is the largest cluster -- the largest groups of claimants. So it is likely to be that this is at least a pretty good starting point and you are not -- it is going to give you a sense of the order of magnitude of the claim and trying to identify all of other traders in all of the other possible sectors, just for the purposes of estimating the value of the claim seems rather superfluous, as they could be in almost any part of the economy when it comes to these sorts of MIFs.

What we also now see from the response from the defendants, and particularly Nils1, paragraph 5.27, that some merchants have already brought claims based on interregional and commercial MIFs, but on the basis of the material from I think Holt1, paragraph 6B, those claimants account for about 15 per cent of the relevant MIF payments during the period for which data is available.

Now, there is a lot of debate one can have about which one, but if I was simply to say however the numbers go up or down, we are talking about a claim value of approximately 200 million, that doesn't seem to be wildly out.

MR TIDSWELL: Would it take you out of your way to have a quick look at some of the numbers in Mr von Hinten-Reed's first report -- I think it is paragraph 72 -- so I am clear how it all fits together. It may not be the best way to do it.

MR BOWSHER: Tab 13, page 211, I think. Is that going to be the right place? His preliminary estimates of overcharge.

MR TIDSWELL: Yes. I think I was looking -- there is a table at paragraph 72.

MR BOWSHER: There is a series of tables.

MR TIDSWELL: The questions I have are really about numbers, so I understood

what the population looked like. I appreciate you may --

MR BOWSHER: I may --

MR TIDSWELL: If you tell me this is getting too detailed, then --

MR BOWSHER: It won't be getting too detailed. It may be getting too detailed for me.

MR TIDSWELL: If it is more helpful to give me a bit of paper, that's fine, so I can understand. I think if are looking at the opt-out case, is it being said here that -- now we are just looking at the three sectors, so just looking at these three sectors, is the 70 the pool of likely potential UK-based class claimants in the opt-out case? So broadly speaking are we talking about -- I appreciate there may be people in the EEA or EEC -- EU.

MR BOWSHER: Are you talking?

MR TIDSWELL: Paragraph 72. Page 210 of the Core Bundle.

MR BOWSHER: Table 4-1 under 72.

MR TIDSWELL: Yes.

MR BOWSHER: Got you.

MR TIDSWELL: It is my fault for not explaining. I am looking at paragraph 70. Does that represent a best guess of UK-based opt in claimants in those three sectors?

MR BOWSHER: Yes. At that time, although I think there is an indication elsewhere that other traders may have come in. Of course, that is just in those three sectors.

MR TIDSWELL: Yes. I am just trying to get a sense of the relative size of these and how they fit together. Broadly speaking we are talking about the range of 50 to 1,500 claimants and that's before you get into EU based claimants who might join, and I presume we have no information --

MR BOWSHER: Which might take that number up. If you take out settlements --

MR TIDSWELL: You have all the ups and downs.

MR BOWSHER: If you assume the purported settlers have settled, that number may go down by 20, 30 or 40.

MR TIDSWELL: I understand. I think we are certainly told later in the report I think that in terms of the value that attaches to those, it is weighted around the airlines and the rental cars, but nonetheless still a significant proportion for hotel, so still weighting for that. The number to the left of that, the 13,520, is that an indication of how many opt-out claimants there might be in that class?

MR BOWSHER: In those three classes, yes.

MR TIDSWELL: In those three sectors. So one assumes, once you get outside these three sectors, there is a very, very large number of potential claimants in the opt out case, is that right because they were mentioned in millions somewhere?

MR BOWSHER: Indeed. What I think the analysis shows is that if we think about interregional and commercial cards, the likelihood is that the preponderance of that expenditure will be in those sectors.

MR TIDSWELL: Yes. So one would expect the weighting, if one is looking at the whole of UK -- let's just say to keep it UK for now -- the whole of UK merchants, one would expect quite a significant weighting of value of claims in the three classes in these three sectors, but that's not to say there aren't a very large number of people outside those sectors who would have much smaller claims across the whole economy.

MR BOWSHER: Self-evidently, the example in my own head I shared with my team, the West End hairdresser, self-evidently there will be West End hairdressers who get well into this because they will be taking a lot of interregional cards. They are not necessarily cumulatively coming anywhere close to scheduled passenger air transport as a sectorial weight, but in terms of number, for all I know, there may be

quite a few of them. That's just picking one obvious service provider.

MR TIDSWELL: I'm not going to mention any region and suggest tourists don't go there, but if you went somewhere else out of London where tourists don't go, there might be very few and the interregional MIFs might be greatly reduced to a very small number indeed.

MR BOWSHER: Who knows. You will get clusters of all sort of funny things around Stonehenge, no doubt.

MR TIDSWELL: That is helpful. As you say, Mr Holt suggests that some 15% of the -- how does that 15% relate to these numbers here?

MR BOWSHER: Sorry?

MR TIDSWELL: Sorry.

MR BOWSHER: Can I park that? I can't quite remember how the 15% -- I can't remember how the 15% balances out.

MR TIDSWELL: I think the 15% were the ones subject to settlement, so one would suggest that -- I can't remember whether that was by number or by value. It doesn't matter.

MR BOWSHER: The reference for that statistic is Core Bundle B3, tab 35, page 860. If we pull that up --

MR TIDSWELL: Let's not do it now. I am conscious of time. That has been helpful. Thank you.

MR BOWSHER: This is all obviously with the purpose of estimating the likely value of a claim which has to be done by a pre-requisite of bringing a claim. That is not for the purposes of valuing the damages. The method that's used here is not what we are saying -- this is not how we are necessarily saying we would be assessing the damages. It is in order to give the Tribunal a better than guess as to what this claim is actually worth.

Just to go back to it, it is obvious when you look at those graphs which look at other sectors, there may be lots and lots of other sectors affected, but we can get a pretty good first approximation by the method that has been used to give us an idea as to what this claim was worth. If I said a couple of hundred million pounds, that he is a good starting point. Now there may be pluses or minuses to be done to that.

Some of the attack to that I would suggest is really based on something of a misapprehension. To start attacking that on the Meta methodology analysis is not really to the point. This is not about the Meta methodology. It is about giving the Tribunal an idea of the scale of the claim.

As Mr von Hinten-Reed himself says in his second report at page 979 -- I don't think we need turn it up, but it is tab 41, page 979 -- he says:

"I agree that my estimates did not take into account settlement, but such data was not available to me. That said, it would not appear based on the Gunnar Niels' analysis that any adjustment for settlement would make a change in the estimate of the magnitude required to change my conclusion that finding the claim forward remain valid."

He makes a similar observation, tab 41, page 1048 about Mr Holt's analysis of the MIF data.

MR TIDSWELL: I think you are saying that the methodology doesn't -- in order to satisfy us about the claim being suitable for an award of damages, you are saying you don't have to work out what the damages are going to be, but you say there will have to be some methodology to get to that point, but in relation to this you are saying, I think, that this is an important step in the process in understanding things like I suppose the relativity of legal cost to the --

MR BOWSHER: Proportionality.

MR TIDSWELL: Proportionality.

MR BOWSHER: It is a statutory requirement that we provide that estimate. That is what we are doing. Self-evidently, the process by the time we have been through a trial one would hope there would be a much better approach than just trusting in ONS and -- I might say something flippant. I shouldn't. Trusting in ONS statistics as the basis of an aggregate award does not seem like a very sensible starting point.

MR TIDSWELL: Not least because on the basis of your claim it is much broader than that. You have the EU claim --

MR BOWSHER: I have given an illustration why it would be disproportionate in the circumstances, given this is such a strongly weighted claim around particular sectors.

MR TIDSWELL: Yes.

MR BOWSHER: Can I turn then to these claims and the umbrella claims? This is sometimes framed by the Proposed Defendants as somehow these are alternatives or we are trying to supplant them. We are not. We say that these collective claims are important in principle as a means of delivering justice and ensuring the enforcement of competition law norms for the benefit of the economy and consumers more broadly.

These collective claims are not promoted as an alternative or substitute for the individual umbrella claims. They are complementary. Perhaps in some respects or as regards some specific claims they might be competitive in that there might be a claimant who is wondering which way should I go, so it is competitive in that sense, but there are reasons why one claimant would choose to go down one route or another, costs, risks, availability of full compensation, as opposed to an aggregate award. There are a number of differences involved. We deal with this in our skeleton at paragraph 53. So the Umbrella Proceedings are no more a complete substitute or alternative for these proceedings -- these claims than the other way

round, and, as we have already pointed out, even just looking at the numbers, taking it at its highest, the number of claimants who have been put forward by the defendants as having existing claims, only a minority of merchants likely to be covered have yet actually brought a claim.

Nothing we say that has been said up to now by Visa or Mastercard has any implications for the basic point that there are a very large number of smaller merchants who have not made claims, are not part of larger corporate entities and for whatever reasons, resources, risk appetite, commercial incentives, have not chosen to make their own claim.

This is a point which is developed by Mr von Hinten-Reed in his second report, tab 41, paras 62 to 63. On any view, he says there are likely to be a large number of remaining potential claimants.

Taken together -- again skeleton 56, 57, these proceedings will enable collective resolutions, collective umbrella, these proceedings will enable resolution of all issues and final determination of practically all the interchange litigation for the interregional and corporate card MIF. We anticipate this will ensure that the benefits of justice and compensation are not limited to a narrow slice of the merchant class.

It will ensure that compensation for losses caused by the defendants can be calculated across the whole class of those who have suffered damage and then broadly and fairly spread. There is a real benefit to these proceedings.

In that context, it is worth reflecting for a moment about the weight of some of the material put to us. There's a great deal of material put to us about settlements. In short, it is worth noting that in general terms the claimants' positive position to this application is that these claims are being settled.

Regardless of the merits or otherwise for disposal, these are claims for exactly these categories of MIF, and the end point for the Tribunal, for the defendants and perhaps

also the Tribunal, appears to be settlement. If settlement with individuals is fine and for those individual claimants may lead to a fuller compensatory award, one may ask rhetorically may it not also be appropriate for those other claimants and for the state of the economy for there to be a fuller, broader, aggregate award that reflects the real damage caused, we say, by the anti-competitive behaviour.

That highlights features, not to say advantages of this procedure, because they enable settlement across the board for the benefit of everyone concerned: the Tribunal, the defendants and all those who have suffered, even if they were not aware they had suffered damage as a result of this activity.

Now, there are a number of specific costs made by the defendants. I am turning next to the additional costs of the collective claim. So it is still in this general space of collective versus umbrella.

As I say, versus is wrong because we say we are a team, complementary, not versus. Specific comment is made that these proceedings create some inappropriate burden, but one needs to understand that from a correct understanding of the law.

For that purpose it is worth just pulling out the FX decision, which is in the Authorities Bundle at tab 15, which I am hoping is in Volume 2 of your Authorities Bundle.

MR TIDSWELL: Yes.

MR BOWSHER: I was not proposing to open all of these cases in the conventional way, explaining what they are all about if they are MIF cases, I am presuming they are cases that don't need to be opened laboriously. If the Tribunal would like me to go through the background of any of these cases, I can do so.

All I wanted to look at was a particular passage at page 695 in this report. It starts between B and C. It is the passage where the Tribunal says:

"Rather, we consider that Rule 79 (b) obliges us to consider the benefits and disbenefits of continuing the proceedings in an altogether more open textured and

broader framework. In short, we consider that in a very broadbrush way, we must ensure whether there are adverse effects (costs) in allowing these proceedings to continue. In short, costs do not refer to the financial costs being incurred by the funders and by their contingently instructed lawyers. It refers to the disbenefits in an altogether broader framework."

That is simply, we would say, encouragement from -- I was about to say a differently constituted -- I couldn't remember who was in that Tribunal -- a differently constituted Tribunal to look at the matter in a broad manner. It is not just about the costs of this claim as opposed to the costs of that claim. It's a broader question about the purpose of this sort of litigation and the costs and benefits more broadly.

So, for example, when Mastercard in its response says that legal fees expended in these proceedings must be critically compared to the incremental cost that would be incurred through the members of the opt-in class joining the Umbrella Proceedings or Visa saying the cost of bringing claims on an individual basis is likely to be more cost effective than these collective proceedings, certainly in an opt-in claim that is something which claimants necessarily are going to have to make that choice. When it comes to that opt-in choice, they will have to make exactly that choice and decide for themselves. But that doesn't mean the opt-in claim doesn't serve a benefit. For those that have that choice, they have the choice of going down the opt-in route, which has a different cost position, different risk position. It enables them to be protected differently.

Of course, the opt-out is a different situation altogether, but in my submission there is no real question of incremental cost there. The real question is are these proceedings worthwhile in a broader sense for the purposes of vindicating the objectives of the regime?

MR TIDSWELL: In that analysis -- I expect you are going to come to this, don't feel

you need to jump to it, but there is a question, isn't there, about the relationship with the Umbrella Proceedings and how, from a judicial resource point of view, the whole lot is best dealt with, which I think probably ties into the question of the collective proceedings interaction with those proceedings, whether it is not only desirous to do so but whether it is practical to catch up and so on. So there is all of that. Does that fall under this category as well?

MR BOWSHER: To the extent that I was going to have the temerity to tell the court how to manage itself, I was going to put that at the end.

MR TIDSWELL: I am happy for you to come to it. I am just thinking about it from an analytical framework point of view. If one is looking at it in a broad-brush way, what the adverse effects are and the disbenefits of a broader framework. I am not saying there are disbenefits. There is the whole analysis of how does one best deal with the landscape of the MIF claims, and in there, there are two things I think which pop up immediately. One is how do these proceedings fit in with the Umbrella Proceedings and then there's a further point about the possibility of further collective proceedings for other categories of MIFs and where they fit in.

Now, I am not saying any of these things are sort of necessarily bars to certification of these proceedings, but the question is are they all within this envelope of things to think about?

MR BOWSHER: I'll come on to other MIFs.

MR TIDSWELL: Yes.

MR BOWSHER: Maybe just a short headline which I will come on to. Our primary position is certainly as regards these claims it is still possible for these claims to join with the umbrella proceedings. The defendants say there is no way you can be ready. We stand ready to appear at the evidential hearing in May and to make a contribution to it and to live with what comes out of that, in terms of methods of

proof and so on and so forth.

MR TIDSWELL: If one jumps ahead to Trial 1, which is early next year, and the question of catching up, I mean, it is possible that catching up may be an imperfect exercise for some of this. I am not asking you to express a concluded view on that. It may be you are going to come to it.

MR BOWSHER: The view we have taken in our skeleton -- I was going to come on to it but I will deal with that. Our view is we can catch up. The Proposed Defendants don't agree. Trial 1 is broadly speaking liability issues.

MR TIDSWELL: Yes.

MR BOWSHER: Those are issues where, for example, the disclosure is not going to be a heavy burden for the defendants. There may be other parts of the case which will be a heavy burden for the defendants -- the claimants -- sorry -- but on liability the issues of that disclosure and all of that material, that task will primarily fall on the defendants, and we understand that process is underway, not surprisingly. We would expect to be able to catch up with a trial a year away, not comfortably, but that would be our plan.

MR TIDSWELL: I think probably underlying -- the reason for raising it with you now, there is a question of degree, isn't it, of catching up, because obviously if one joins after it has started, then you are not part of the architecture of it, and that's certainly the case in relation to lots of things so far. At the other extreme end of the spectrum, there are plenty of claimants in the umbrella action who have decided they want to stay in the proceedings and they are sitting back and waiting. I am not suggesting there is any suggestion you would want to do that. There is a spectrum of different involvement that you could take which might depend on the circumstances.

Is there sort of a view on how -- I appreciate this is a difficult question possibly, as I ask it, and not a particularly helpful question. Is there a view as to the degree of

involvement you need to have in order to be able to participate, if that makes sense? In other words, turning up at Trial 1 and being able to make submissions is quite different from being able to put in expert evidence.

MR BOWSHER: Our primary position is Trial 1 -- I can't remember the date for it -- is broadly speaking a year away.

MR TIDSWELL: February, yes.

MR BOWSHER: No-one would be prejudiced if we were to fully participate. What full participation means will probably involve a discussion between ourselves and the other claimants, and one can well imagine on the liability issues it might very well be that that involves agreeing that the Humphries Kerstetter team -- that we split up different issues or whatever. I would not expect that it involves us duplicating anything on liability, certainly not.

MR TIDSWELL: That's helpful. That is probably as much as I can expect you to deal with.

MR BOWSHER: I can't think on things like objectivity or objective justification, sorry, or exemption why there would be -- we wouldn't be introducing a new issue. They are all issues that would have to be driven by the defendants. Exemption issues would have to be driven by of the defendants saying -- I don't have to spell it out. We will come on to that.

MR TIDSWELL: Yes. That is very helpful.

MR BOWSHER: It obviously gets more complicated once you start getting into 2025 and Trial 2, because then you start getting into claimant-specific issues but, in principle, they are going to be the same categories of issues. They are going to be the same common issues. It is just a question of how they are organised. Whether that means we participate in Trial 3 in the same way as everyone else, we will come on to.

MR TIDSWELL: Yes. Thank you.

MR BOWSHER: But Trial 1, I think, is fairly simple.

MR TIDSWELL: Yes.

MR BOWSHER: I am sorry. Where did I get to there?

In our reply we said -- our response at paragraph 42, page -- Core Bundle, tab 37, page 913. Individual cost to each of the claimants in the Umbrella Proceedings will be greater than these funded proceedings. So the cumulative costs of the Umbrella Proceedings, the relevant matter to consider is not some sort of cost draftsman's comparisons of costs of this. It is the costs and benefits of continuing the collective proceedings, rather than whether all parties' combined costs in the Umbrella Proceedings will be less than those in these proceedings. That will be impossible to assess today. As to the cost of the proceedings more generally, these are we say reasonable, considering their size and complexity.

There are then some issues taken -- again we are still in the umbrella versus collective, the interface issues -- issues about carving up the different claims.

Various points are made which seek to suggest there is some unnecessary confusion that flows from the bringing of these claims for interregional and commercial MIFs. With respect, these need to be treated with some real circumspection. It is probably useful just to remind oneself why -- this is taking it slightly out of order, but it is useful to deal with it at some point, so now is as good as any -- what is it about the interregional and commercial MIFs that makes them different from other MIFs. That flows from the IFR, the Regulation. I am sure you have been taken to this before, so I can probably take it fairly swiftly, but it is in the Core Bundle at tab 23, page 492.

MR TIDSWELL: Yes.

MR BOWSHER: This was the EU regulation on interchange Visa card-based

payment transactions, which in Chapter 2 at page 495, Article 345 regulates interchange fees for certain debit and credit card transactions.

You will be familiar with this in the consumer claim field, that the pre and post IFR situation matters because the level of the MIF is regulated by this regulation. But these two categories of MIF are not regulated -- and it is done differently for the different categories. If you go to page 492, Article 1.

MR TIDSWELL: Yes.

MR BOWSHER: And you can see this takes out of the scope of this regulation payments -- well, it does it the other way round. It lays down the scope for card-based payment transactions carried out within the union where both the payment service provider, the payment payer's service provider and the payee's service provider are located within the union. It defines the scope in such a way as to take interregional card payments out of the scope of the regulation.

MR TIDSWELL: Yes.

MR BOWSHER: If you turn the page to the top of page 493, in Article 1.3, Chapter 2, which was the -- I didn't take you to that. Chapter 2 is the part of the regulation which regulates fee levels. There are other bits of it. That does not apply to transactions with commercial cards.

So these two types of MIF fall out of the fee regulatory part of this fee regulation system. Hence why they are different. The reason why I wanted just for you to understand that now, because one of the points which is made is that claimants might be confused about what they are claiming for because, as you will recall from discussion or you may recall, the MIF is charged by acquirers to claimants in different ways, depending on the nature of the contract they have with their acquirer.

For some claimants it will be clear to them, because of the nature of their contract, what sort of MIF they are paying, but some will pay a MIF which is referred to

differently, but in my own head I call it 'blended'. A blended MIF is one of the terms. So it will not be transparent to them what they are actually paying.

It is said that this is somehow going to be hugely problematic and Mastercard in its skeleton at 4.17 seems to suggest that this is a substantial problem. It is probably worth just picking up the criticism made, because I do need to address it and then demonstrate that it is not based on a correct understanding of the correspondence.

This is paragraph 4.17, page 4.22 of the Core Bundle. This is Mastercard, sir. The observation is made, which I have just stated, that it is difficult for people to understand what their MIF is. Reliance is placed on correspondence from existing claimants by reference to a letter from Scott + Scott to the Tribunal. Unfortunately that quotation from that letter is a misquotation. It is rather a significant misquotation when one goes back to the letter. As you can see, it is Volume C, tab 117. If you are using hard copy, it is in file 4, I believe. No, it is not. Sorry. It is page 6184.

MR TIDSWELL: Yes.

MR BOWSHER: Which is going to be file -- I should have stuck with the soft copy, shouldn't I.

MR TIDSWELL: It is in here.

MR BOWSHER: 6184. I hope that is the right letter when we get there. Yes. The quotation purports to be drawn from paragraph 2.5. As it is quoted in Mastercard's Skeleton, it seems to be making some general proposition, but that, as you can see, is not what the letter says. All that Scott + Scott, who are, as you know, solicitors for one group of individual claimants, say is that these proceedings could only resolve that part of their clients' claims that relate to interregional and commercial MIFs. Well, yes, but, with respect, that is a rather narrower point than appears to be being made.

MR TIDSWELL: I am sorry, Mr Bowsher. I am getting a bit lost now. I think the

letter first makes the statement in 2.3, doesn't it?

MR BOWSHER: Sorry?

MR TIDSWELL: In 2.3 of the letter it says:

"The proposed collective proceedings will therefore only resolve a small proportion of the SSU claimants' claims."

That is where they have -- I don't know whether the quote in 4.17 is designed --

MR BOWSHER: At the bottom they make it plain they are only referring to their claimants' claims.

MR TIDSWELL: I understand that. I am not quite sure -- what is the further point that you --

MR BOWSHER: All I am saying is all the individual claimants' solicitors are making is yes, if they were being forced into the collective proceedings, these collective proceedings would only deal with a part of their claim, because for those who have a broader claim, they have a broader claim.

MR TIDSWELL: Yes.

MR BOWSHER: That's self-evident.

MR TIDSWELL: But maybe I am misunderstanding what Mastercard are saying in 4.17. Isn't that what Mastercard are saying in 4.17?

MR BOWSHER: I thought they were trying to make a broader point that the reason why -- because claimants could not know --

MR TIDSWELL: There is a different point. There is a bit about identification of class, where it is said, isn't it -- I don't know whether it is this part of the Skeleton or not. Maybe this is somewhere else. I thought there was a point about identification of a class which -- it is actually 4.29, I thought.

MR BOWSHER: Sorry. I just turned my page.

MR TIDSWELL: If you are on a blended contract, you don't know whether you are in

a class or not. I think -- wherever it is, they certainly do say that, don't they?

MR BOWSHER: They do say that.

MR TIDSWELL: Your point is they are not getting any help from Scott + Scott.

MR BOWSHER: They are not getting any help from Scott + Scott. They are simply saying that as regards Scott + Scott claims, the PCR's claims wouldn't deal with all of their claims. Well, that's true.

MR TIDSWELL: Yes, but do you accept that the blended contracts makes this more difficult for a merchant --

MR BOWSHER: I will come on to that.

MR TIDSWELL: Yes.

MR BOWSHER: A claim only is carved up, and this flows really from section 47B itself, from the way the regime is set up -- it is only carved up to the extent a claimant chooses to do so. An opt-in claimant chooses to bring two separate claims. Then that is what the opt-in claimant chooses to do, or opt out.

MR TIDSWELL: Yes. So I think, as I understood the blended contract point, the merchant does not actually know whether or not --

MR BOWSHER: Sorry. That was the second -- that was the carving.

The second point is awareness. That is the question about the relationship between different possible claims arising out of the fact that some claimants will have paid blended MIFs. That's the second point, which is a distinct point I think.

MR TIDSWELL: Yes.

MR BOWSHER: Because the MIF will include some regulated and unregulated MIFs, but we make a number of points on this in our skeleton. I am not going to read it out. Skeleton, paragraph 59.

Firstly, that's highly unlikely to be relevant to the opt-in claims, given the scale of the claimants. I think it is generally accepted those will have acquirer contracts where it

is transparent. Frankly, even if they do pay a blended fee, for whatever reason, given the scale of those sorts of claim amounts, you would expect them to have some awareness where they are getting their payments from. If you are a 100 million-pound turn over business, you will know that X% of your business is coming from outside the EEA and may be able to make appropriate inferences.

As regards opt-out claims, first, a claimant in the opt-out class might not know precisely what they have paid, but they are receiving aggregated damages which, if anything, is the tool for a purely compensatory award. Just because it is difficult to get to what the specific amount is does not mean they should not be entitled to that remedy.

From the claimants' perspective, firstly in terms of what they actually know, claimants will be aware that they have been receiving payments from the sorts of entities that will be paying by commercial or interregional cards. I mean, you know, given my West End hairdresser, it will be obvious to someone that is the way their business is being run. There may be some people who are completely unaware, eg the cake stall near Stonehenge, but broadly speaking most of them will be aware.

Even if they are not, in our submission, it is really a pretty poor excuse to say this claim should not proceed, because at some point the defendants must have had enough information to establish the blended fee. They did not presumably -- if they were going to produce this blended fee, they must have had some notion of what they were charging, what their costs were and how the fee was going to be set. They must have had their own internal idea of what -- so it is pretty bold to say that an overcharge was put forward on a blended basis, buried within this blended basis, whose overall amount must have been understood by the defendants but was somehow chopped up and recorded in such a way that no victim of the overcharge would be able to identify it.

Now, it is simply not implausible to think that victims won't be able to know that they are likely claimants, but to say this is not a proper claim because claimants won't be able to know they were claimants, in our submission, is a pretty poor excuse for defending these claims.

On the contrary, that is why an aggregate award, with a PCR whose responsibility will be to distribute that aggregate award fairly and to search out and distribute the award properly is exactly the right course to use the material that comes forward in the litigation to say: "Well, you may not have been aware, but this is what you are paying and this is at least an award. It may not be fully compensatory, but it is part of that aggregate award."

If anything, it is an argument for this claim rather than against, because these are exactly the sorts of claimants who will not be enabled to bring their own separate claim.

MR TIDSWELL: I think we are right to take the point, aren't we, there is the question of if you can't work it out yourself, then how do you make an election, if you have an election, which -- this ability to opt out or not opt in. I think the point -- there's also a further point there, isn't there, which I think, unless I have got this wrong, is as much about whether we can work out whether someone is a member of a class as whether the class member can. I think the point being made is not just could the class member work it out but is there some mechanism whereby we are going to be able to work out whether a merchant -- someone selling sausage rolls in a cafe in Bournemouth has actually got a claim based on commercial cards -- in this case presumably not commercial cards, interregional MIFs, maybe/maybe not, but how -- because the only people who know the answer to that I think might be -- in a blended contract might be the acquirer. So do you need to find that out from the acquirer in order to work out who the class is? I think that's the point about identification of the

class. I may have that wrong. I don't want to represent it to be the position.

MR BOWSHER: There are powers to get information from the acquirers --

MR TIDSWELL: I think they are different sides of the same point, but they are the different questions I think.

MR BOWSHER: Certainly, but, yes, it is -- let's work from the bottom. The completely unaware claimant. I didn't know that I had received a payment. As we know, only one payment gets you into the opt-out class. "I didn't know that once in 2017 I had one payment from the US on a US card". Okay. Now, we don't know how affected the merchant is -- there are lots of things said by Visa and Mastercard about the quality of the data and so on and so forth. We don't yet know how good the data will be and how far we will be able to drill down. We certainly don't know that now, but it might become revealed that those really small claimants do actually -- who they are and what the value of their claim might be. That is probably the ultimate extreme for the very, very smallest claimants.

Acquirers will have some information. There may be debates about the quality or otherwise of that information, and the Tribunal has the ability to get that information. In the middle there will be lots of small traders who are very well aware -- I will maybe stick with my West End hairdresser until I am told it is a bad example, who may be very well aware that he had a whole load of American clients on a Friday evening when they flew in, and will know that was part of his business and therefore he probably has no idea what the amount of that MIF is, because it's a blended MIF, but he will know that he's a claimant and he will know that that is something that can be taken forward.

It's really not possible, without surveying the entire class, but it seems likely that most people will fall into one or other of those categories. Why is that confusing? Why is that not exactly what this claim is for, this claim procedure is for?

MR TIDSWELL: Coming back to the two questions, is there a capacity for someone not to be able to make an election and obviously that is, as you say certainly dealt with by the potential claimant's own knowledge.

Second question I think we probably need to unpack a little. I am sure we will hear more about it. Are we able to certify a claim without clarity about the way in which not just the rule by which I identify the class but the way in which you go about deciding whether someone has passed the rule, meets the rule, and that I think you are saying is largely going to depend on either -- I think you are saying is either going to depend on obvious evidence that they will have in their hands or the acquirer will have. I think that's what you are saying.

MR BOWSHER: Yes. I hesitate to get -- there is a difference between methodology and method here. The gory detail of how you actually go and find out whether a particular person was or wasn't a claimant will depend on the quality of the data and so on and so forth, which we are not able to do.

MR TIDSWELL: Just to be clear, what we are not doing here is working out who we are precisely paying the money to. I am not suggesting --

MR BOWSHER: What we can say as a methodology, as an approach, is the opt-out class certainly will include lots of these claimants who will be aware -- they will be aware of the claim or not, depending on whether they read their media -- the media material or not. They will be able to know that they have -- they are part of that claim by way of opt-out if they don't -- they will know that is a choice and they will be able to take advice if they want to.

MR TIDSWELL: Sorry to interrupt. You are on the first point. I am on the second point.

MR BOWSHER: Sorry.

MR TIDSWELL: Which is how do we -- I don't think this is so much a question of the

knowledge of the prospective claimant. It is how do we work out what -- the practical way of working out what this class actually is. If you set a rule that says they must have received a payment, then how do you actually go about applying the rule not in detail but as a methodology? How do you work out in practice. You think about the train cases and discussions of the train cases and some of the selections that have been made in the train cases about on whose basis the claims are made, because you have access to data about people who use trains and who has a railcard and all that sort of thing.

Here the point I think that's being made is there is some obscurity that comes from the existence of the blended contracts that means it is not immediately obvious at face value who would fall into that. You may say part of the answer there is someone may know perfectly well they are. That's only a partial answer to the problem of how do you apply -- what is the methodology to apply the rule to work out what the class looks like.

MR BOWSHER: The short methodology is that the person -- you have already highlighted it -- the acquirers were the people who charged the fee.

MR TIDSWELL: So the acquirers will presumably have it somewhere.

MR BOWSHER: The acquirers at one point knew. They may have lost the records. The acquirers must have had the material to charge the fee. Either the acquirers or the acquirers with the defendant, depending on how that arrangement was done and how the blended fee was set and so on and so forth, either just the acquirers knew or the acquirers and the defendants must have known. Unless they were picking a fee at random, they must have taken a sensible business decision which said the way we are going to charge this blended MIF to traders of this type is this.

MR TIDSWELL: Yes.

MR BOWSHER: So someone will have known. The whole point is it wasn't the

claimants. But it is not as transparent as buying a ticket on the train. That's the difficulty, that one can't get into that degree of transparency, because all there would have been is the bill from the acquirer.

MR TIDSWELL: Yes.

MR BOWSHER: Which may not be very transparent.

MR TIDSWELL: Yes.

MR BOWSHER: But that doesn't mean -- if the records don't exist, well, that doesn't mean there wasn't a methodology. It just means the methodology will have to be adapted and that's when -- I am trying to avoid talking about the broad axe, because I find the broad axe uncomfortable -- I am not quite sure what it means -- that's when the broad axe starts having to come out a little bit.

MR TIDSWELL: I think the broad axe is helpful if the data is incomplete, so the methodology looks like it is going to fail because there is not sufficient data, but there is enough data for the Tribunal, applying common sense and other approaches.

MR BOWSHER: There are six or seven acquirers to --

MR TIDSWELL: You are able to --

MR BOWSHER: Part of the pass-on proposal that we make is that we don't necessarily look at all the acquirers, that we focus on a couple of the larger acquirers for the purpose of pass-on.

MR TIDSWELL: You are going to come on to talk about that approach. I am conscious I have taken you out of your way. I suspect you have a bit on that to come on the acquirer.

MR BOWSHER: Let's just check. Right.

MR TIDSWELL: I don't want to rush you on to it. Just a marker. I would like to spend some time looking at that question of what it is we are going to be asking the acquirers for and how we go about doing that at some stage.

MR BOWSHER: Okay. Sir, can I just then run through -- I think that probably deals with most of the interface points, save we will inevitably end up coming back to some of them when we walk through the claim.

I wanted just to summarise what we say is the correct approach to these proceedings -- to looking at the methodology for these proceedings and the criteria for certification as a prelude for taking that walk through.

I can perhaps take as read section 47A, which confers the right to bring collective proceedings. 47B, which sets out a number of important provisions about the way in which those proceedings continue, only with permission of the Tribunal, the eligibility and authorisation conditions set out, and the 47B (6) condition which explains the commonality requirement. It says:

"Claims are eligible for inclusion in collective proceedings only if the Tribunal considers that they raise the same, similar or related issues of fact or law and are suitable to be brought in collective proceedings."

As we know, there's a rapidly growing case law on what this means, but it is clear that the definition of commonality does not require that the issues are identical, but simply that they raise the same or similar related issues of fact or law, such that they are suitable to be brought collectively.

MR TIDSWELL: Can I just pause there for a minute? Just thinking about this question, I think you have made the point about common questions as opposed to common answers somewhere.

MR BOWSHER: Yes.

MR TIDSWELL: When you are thinking about your opt-in case and the non-UK potential members of that, so do you say that -- are you saying that the issues are common? If one gets into -- I think somewhere you've acknowledged that if you're looking at a Polish merchant, then the Polish acquiring market is going to be the right

market context. So are you saying if you ask yourself the question about acquirer pass-on, just to take an example, that is a common issue as between that merchant and, say, a merchant in the UK, notwithstanding the different markets?

MR BOWSHER: I am saying that we can't yet tell that.

MR TIDSWELL: Yes.

MR BOWSHER: I think the sequence goes like this. There were, as you know, EU decisions, albeit not for these particular MIFs. That goes back to the primary read across. If our primary read across was right, then -- to these MIFs from the existing decisions, then all those decisions would be common as between all markets.

MR TIDSWELL: Actually, that is why I chose acquirer pass-on. I appreciate that appears in a number of places in the story, but if you just take it in its own right, at that stage -- I don't think any of the decisions have dealt with this, have they, not in a way that --

MR BOWSHER: I am going to get myself into trouble here -- it is not contested.

MR TIDSWELL: We will both get into trouble. Let's just assume it is something that you have to --

MR BOWSHER: Our starting point would be that acquirer pass-on is in principle the same for all those markets for which we have opt in claimants.

MR TIDSWELL: You would say it raises the same question?

MR BOWSHER: It raises the same question.

MR TIDSWELL: The answer may be different because there may be local variations.

MR BOWSHER: Exactly. It may well be pleaded out in the defence that in Italy the acquirer agreements all say this, whatever this is.

MR TIDSWELL: Does that translate it from a common issue to -- there is no question, is there, at what stage --

MR BOWSHER: It simply becomes two common issues or two related common issues. I don't know what this is. It rather depends what the nature of the variation is. It may very well be that the APO point can be dealt with as UK and Italian together with a sort of variant wrinkle, if I can put it that way, or it is that there is now a common issue for the UK and a common issue for Italy. It is still a common issue. It is just how many sub-issues it has will depend on the way it is pleaded back to us, but it was a common issue to start with and it remains a common issue.

The same might be said for exemption. We would say a lot of the exemption issues start at being more or less the same. They would start at being common issues. They might become divided up on a market basis, depending how it is pleaded out.

MR TIDSWELL: I think that's exactly the question I am really driving at. I think it is being said against you that the moment you start bringing in the possibility of 30 other jurisdictions in which you have to conduct a whole series of different assessments about different steps, at that stage you are stretching common issues a long way, and that actually that's quite different from looking at a set of UK based merchants and the common issues there. I think that's what is being put.

MR BOWSHER: They are still common issues. What was the APO, you know, the method of getting at the APO, what was it and so on will be the same. It will be under the same sort of agreement, and those will be common issues in any market. It may be that what actually happened with different acquirers under their agreements, it is possible ends up dividing into different segments.

MR TIDSWELL: So you say the issue that matters is the issue of has there been acquirer pass-on, not has there been acquirer pass-on in Italy?

MR BOWSHER: You will not know that -- they may know that -- we will not know that until that's pleaded out. As arose I think in the case management conference in the Umbrella Proceedings, which I know not all the Tribunal was part of, there was

deliberate discussion -- Mr Justice Roth I think was raising the point "What do we do about Italy?" The question of how you case manage those issues becomes a question of exactly that, case management. It will become a question of is the situation regarding the Italian claimant -- the Italian aspect of the claims so large and so different that it needs to be hived off to a separate trial or is it just half a day's variant on the main point?

MR TIDSWELL: Yes.

MR BOWSHER: I can't possibly tell you that. I don't think there is material before the Tribunal that tells you that at all.

The same might be true for a number of the stages of the analysis. When I come on in a moment to the walk-through, there is a sort of overarching point to be made. At any one of these points it might be that in the defence it comes back and says, "Didn't you know we dealt with things differently in Dorset?" Well, no, we didn't, but we will have to deal with that. It doesn't stop it being a common issue. Ireland will obviously become particularly interesting, because you have the issue of the cross -- issues across the border.

MR TIDSWELL: Yes.

MR BOWSHER: I think I was on --

MR TIDSWELL: We can run a bit past --

MR BOWSHER: I think I can take 47B fairly quickly, because it is not as if you haven't read it before. I think the point I wanted to emphasise, 47B(12) identifies the effect of a judgment in collective proceedings.

"Where the Tribunal gives a judgment or makes an order in collective proceedings, the judgment or order is binding on all represented persons except as otherwise specified."

This is a critical distinction between these and individual proceedings. It is obvious

but it is critical and it goes to the value and benefit of these proceedings.

As I have said already, it enables a line to be drawn under these claims whether by settlement or by judgment. It is actually to the defendants' benefit to enable this all to be wrapped up.

47C empowers the Tribunal to adopt a different approach to the assessment of damages and quantum than would be permissible in an individual claim. As you will know, that is how the Tribunal is permitted to adopt an aggregated approach to issues of damages. That again is one of the particular benefits, particularly in the opt-out claim where there are all of these difficulties which -- we will not identify all of them in this hearing, but you, sir, have already identified many of them, to which the short answer is, "Well, that doesn't mean claimants shouldn't be compensated". Identifying the full compensatory award is going to be difficult. That's why an aggregate award is the right approach. I don't have to keep on saying that. There is a danger I do say it anyway.

There is then the eligibility condition, which, as you know, elaborates on the need for -- set out in rule 79(1), which you have in the bundle. The rules are there. The question then becomes whether or not there are common issues and whether or not the claim is suitable, in particular under 79 (2) where the collective proceedings are an appropriate means for the fair and efficient resolution of the common issues and the costs and benefits of continuing the collective proceedings.

You will be aware also of the issues under the authorisation condition, which perhaps we can come back to when we deal with that.

The principles in the case law I wanted to look at briefly, because the starting point is we say the decision of the Supreme Court in Merricks. That is the starting point of any analysis here. There does have to be some comparison between collective and individual proceedings. Lord Briggs explained that in Merricks, but that does not

mean that one supplants the other. There can be a comparison, but it is not a comparison that means necessarily we will do that but not that.

There might very well be a situation, and this we would say is a paradigm of that, where they can sit well together and, as we have said, are complimentary.

But it is also necessary to have regard, as Lord Briggs said in Merricks, to the purpose and function of the proceedings when carrying out that analysis, and for that purpose it's probably -- it is worth pulling out Merricks itself, which is in the Authorities Bundle at tab 5, paragraph 45.

I can't quite tell the time. I've got a certain parallax on the clock here, so I am not quite sure --

MR TIDSWELL: It's just before. So if you want to finish this point, feel free to keep going.

MR BOWSHER: I have a little bit further to go on Merricks -- before I embark on Meta.

MR TIDSWELL: I am conscious we interrupted you quite a lot this morning. Would it be helpful for you to have a little time back? We could start a bit early before 2 o'clock, if that's helpful.

MR BOWSHER: If would be -- if you're available -- if that's --

MR TIDSWELL: Shall we rise now and come back at 1.45 and then give you a bit of time back?

MR BOWSHER: Thank you very much indeed. Thank you.

(1.00 pm)

(Lunch break)

(1.45 pm)

MR TIDSWELL: Mr Bowsher.

MR BOWSHER: Thank you very much. I may edge a little bit into tomorrow morning. That may eat into my Wednesday quota a little bit, but we will try to make progress as we can this afternoon.

MR TIDSWELL: I will try to stop interrupting.

MR BOWSHER: No, no. Interventions are always useful to know what I should be talking about. I was going to talk a little bit about the law before a walk through the cases, if I can put it that way. Some of this, of course, is very well-known but the headline point here is both the defendants hang their hat on the very recent decision of the Tribunal in Meta. So that establishes a threshold.

We say, in short Meta, is fine as far as it goes in the circumstances of that case, but the test for this Tribunal in this case starts with the Supreme Court in Merricks and the Court of Appeal in Gutmann and one or two other relevant materials. Meta fits into that context.

Perhaps we could pull up Meta. It is in Authorities Bundle at tab 5. There is a risk of saying it is all relevant. I am not going to read it all.

MR TIDSWELL: This is Merricks you are in?

MR BOWSHER: Did I say Merricks?

MR TIDSWELL: You said Meta. That's fine.

MR BOWSHER: Merricks, tab 5, Supreme Court. Can we start at paragraph 45? I am in the context of the overarching question of suitability of the case. I have jumped over the point from paragraph 56 about this being a comparison point. We have dealt with that before lunch fairly swiftly.

"In assessing suitability, it is obviously necessary to keep in mind both the distinct purpose and function of the collective proceedings regime as well as the distinct procedural benefits it offers by comparison with individual claims."

Lord Briggs makes this point at paragraph 45 of Merricks. I will perhaps not read all

of that.

In Merricks and in other cases the courts have identified a number of distinct functions served by the regime. Lord Briggs deals with the underlying function and benefits of collective proceedings citing, with approval, the now well-known observations of Chief Justice McLachlin in *Hollick v Toronto*. He quotes them out.

Perhaps the key point, going back to paragraph 45, for these purposes is he says:

"Collective proceedings are a special form" -- it is the fifth line on the bottom of 159 -- "of civil procedure for the vindication of private rights designed to provide access to justice for that purpose, where the ordinary forms of individual civil claim have proved inadequate for the purpose."

Then, jumping a few lines:

"It follows that it should not lightly be assumed that the collective process imposes restrictions upon claimants as a class which the law and rules of procedure for individual claims would not impose."

When one is looking at the comparison here, one is not -- as I said, it is not necessarily the case that they are strict alternatives. It might be, as we say here, the situation where for some individuals they can vindicate their rights, but it is a large class for whom the collective action is obviously an appropriate tool.

Indeed, the very fact that on the measure of the numbers that we have seen and we have already touched on, the value of the existing individual claims is even at the level where we have been able to deal with it in our claim form and in the evidence, only a small fraction of the total possible claim, illustrates why if one is looking at the loss to the economy, the loss to merchants generally, there is an advantage for a class of merchant to be able to bring this claim, either on an opt in or opt out basis.

The defendants submit that in the present context these individual proceedings are procedurally preferable, but we say that's a bold claim, given the proliferation of

individual claims for commercial and interregional MIFs before the Tribunal, and the procedural, practical and evidential difficulties which this has already given rise to.

In fact, given the fact that there are obviously, from the evidence, a large number of claimants who have not yet brought their claims, collective proceedings bring a number of advantages. They alleviate the risk of proliferation of a multiplicity of individual claims in respect of the same or related issues now and in the future, and that's a point which picks up Lord Briggs in Merricks again in paragraph 57, where he says:

"The pursuit of a multitude of individually assessed claims for damages, which is always possible in individual claims under the ordinary civil procedure is both burdensome for the court and usually disproportionate for the parties."

That's, of course, something which the Tribunal is already grappling with in the Umbrella Proceedings, and that's only with the relatively small number of claimants in the Umbrella Proceedings compared with the likely total class of merchants.

The defendants rely on the Umbrella Proceedings as being, as it were, the answer to why you don't need any collective proceedings here, but, with respect, that doesn't really stack up.

As the Tribunal has itself identified in the recent decision in Dune, there are principled legal limitations to the ability of the Tribunal to deal with individual claims.

The relevant Dune decision, which is the case management decision, is at tab -- no, it is not. It is not in the Authorities volume. It is in B2, tab 16. It is page 100 in the main bundle.

Obviously you, sir, will be familiar with all this, but not the whole Tribunal.

"The outcome of a trial is usually only binding on the party to that trial."

That comes from paragraph 21 of this decision.

"Although in a multi-claimant process the final decision in one of the lead claimants

may preclude a non-lead claimant subsequently proceeding with their own claim, even this is subject to principled limitations, as explained by the Tribunal. For example, it couldn't bind future claimants", and the Tribunal goes on to look at that in paragraph 24, which is on page 117, where it deals with abuse of process specifically.

Jumping down to "however", which is now on the third line:

"However, it is an exceptional remedy" -- this is abuse of process. Maybe I would need to read that whole paragraph to get the context.

"Abuse of process may be appropriately relied upon following decision in any lead cases to prevent non-lead claimants or defendants from seeking to re-litigate common issues determined in those lead cases. However, it is an exceptional remedy. One party's reliance on an abuse of process argument is likely to invite a response that different legal or factual issues are involved in the subsequent case or that new evidence is available and ought to be heard. It is also likely to be of less or quite possibly no application in respect of claimants who are not currently part of the pool from whom the sample claims are taken.

By contrast, these collective proceedings, the collective proceedings regime provide a means of dealing with prospective future claims, rather than merely reacting to existing claims as they arise."

In other words, the collective proceedings don't just address the claims currently before the proceedings as with the Umbrella Proceeding direction. They deal comprehensively with claims now and for the future. Therefore, they provide finality and certainty regarding claims within the scope, avoiding the inevitable risk in individual proceedings of future claimants trying to distinguish their claim from extant claims, in the manner already identified by the Tribunal.

So while the Umbrella Proceedings direction is obviously an important procedural

innovation, designed to deal with a problem that has arisen with regard to those claims, it is not the answer which somehow says that it supplants the prospective collective proceeding regime. On the contrary, the advantages of the collective proceedings regime remain.

Secondly, and crucially, certification allows for assessment of damages on an aggregate basis. I have talked about that already. The aggregate basis of award obviously provides an advantage in a case such as this, where there are a very large number of claimants. This is again an advantage specifically referred to by Lord Briggs in paragraph 57 of the judgment at page 164, Lord Briggs in Merricks, paragraph 57, page 164.

Picking up from the second sentence:

"The pursuit of a multitude of individually assessed claims for damages, which is all that is possible in individual claims under the ordinary civil procedure, is both burdensome for the court and usually disproportionate for the parties. Individually assessed damages may also be pursued in collective proceedings, but the alternative aggregate basis radically dissolves those disadvantages both form the court and for all the parties."

The rest of 57 and 58 deals with that in more detail and talks about the relative approaches to be taken.

This point has been developed by the Court of Appeal in Gutmann and that is in the Authorities Bundle at tab 13. Again, I think I can leap ahead to paragraph 25 without necessarily opening the case for the moment. It is the last six or seven lines where the Court of Appeal has identified the advantage of using a top-down aggregate award for certain categories of claim.

We would say all of that applies here. The practical problems and the methods to be involved in what pieces of paper or records or digital records need to be obtained are

obviously different from one case to the next, but the fact that it is possible to provide an award which goes some way on an aggregate basis to compensate claimants for the substantial losses that had been caused to the group over all is an important advantage.

This kind of top down approach relying on different and more streamlined evidence than is required to resolve individual claims offers a greatly more efficient means of resolving quantum. It is obviously a specific advantage which Parliament has intended to provide for and intended that this Tribunal should wield.

In terms of relative suitability of collective versus individual claims, and I will not repeat myself, but you know how we put that in terms of relative suitability, we say these collective proceedings are consistent with and advance each of the objectives of the collective proceedings regime in a way which is simply not replicated by the constellation of individual proceedings. These proceedings mitigate the time and cost burdens imposed on courts and parties by the proliferation of a multiplicity of claims arising from the same or related issues. In particular, they provide a way of addressing prospective future claims.

Second, they facilitate access to justice for the very large number of merchants which have not yet brought claims for these categories of MIFs.

There seems to be no dispute on the numbers, that the large majority of UK merchants at least have not yet brought claims in respect of the commercial or interregional MIFs. The very purpose of the regime is to give those potential claimants access to justice.

Third, through the procedural advantages of the collective proceedings, including aggregate damages and so on and so forth, attenuation and the consequential alleviation of some of the evidential problems, the Tribunal has greater flexibility in reaching the end point for the proceedings.

Fourth, there's greater procedural flexibility, as recognised in Merricks.

Fifth, this has benefits for the court and all the parties in pursuing judicial economy, enabling all of the claims to be brought together and, finally, and perhaps most importantly, collective proceedings serve the interests of justice by ensuring that if the claimants' case on liability is made out, that the defendants pay a full, appropriate compensation reflecting the harm unlawfully caused to all merchants, not just those with the wherewithal or the whim or whatever it is or motivation to bring their own individual proceedings.

Turning then to -- I have already made the point, taken you to the passage from Lord Briggs saying that -- no, I haven't. Sorry. Go back to tab 5. I had skipped that point.

In drawing the threads together, it is relevant to have regard to paragraphs 70 and 71 from Merricks as well. It is page 167 in the Authorities Bundle. Under the heading of "relative suitability" Lord Briggs says:

"In considering the forensic difficulties faced by claimants in Merricks, as regards the merchant pass-on issue", so this may be specifically relevant here, "the Supreme Court has said this:

'If those evidential difficulties regarding the pass-on question would have been insufficient to deny a trial to an individual claimant who could show an arguable case to have suffered some loss, they should not in principle have been sufficient to lead to a denial of certification for collective proceedings."

I probably should read that again, because it is important.

A number of criticisms are made of the methodology put forward on behalf of the prospective claimants' representatives, and we will go through those, but it is important to bear in mind that there is not any greater forensic burden on the claimants in putting toward a methodology. Maybe it is important to have regard to the distinction. It is not the method. It is not "Who will we get these documents

from?" It is in principle is it a pleaded case that will follow through logically to the correct outcome? Yes, merchant pass-on is an issue that will have to be dealt with. It will create evidential difficulties. How those are to be resolved will be difficulties to be resolved by the Tribunal, as they would in any case, but the burden should not be any higher on the representatives than on any individual claimant.

MR TIDSWELL: That seems to be quite difficult to reconcile with the Microsoft test. The whole point of the Microsoft test is it gets applied in collective proceedings, not in individual proceedings. I am not sure -- if you are suggesting that paragraph 71 effectively prohibits the Tribunal from applying the Microsoft test to find a credible methodology, because an individual claimant is not put to that test, then I think that's a bit problematic. I mean, we now seem to be coming to methodology, and maybe we need to -- you are going to follow it through, but is that what you are suggesting, because, as I understand it, there is no question that in collective proceedings a prospective class representative needs to meet the Microsoft test, and that, of course, doesn't apply in any other case which you might issue.

MR BOWSHER: My starting point would be the Microsoft test is only law here because the Supreme Court in Merricks says it is.

MR TIDSWELL: Well, quite, but it would pretty odd, wouldn't it, if Merricks introduced it and said "that's the test" and then said you don't apply it because individuals don't have to face it. That is my challenge to you I think.

MR BOWSHER: Maybe I can come back to it. My concern is I suppose it depends a bit what one means by the Microsoft test. Clearly the Microsoft test is not intended to apply unduly onerous conditions on a class representative, so that if in principle the claim could be pursued by an individual claimant, then it ought also to be one that the class representative can pursue.

MR TIDSWELL: I don't think that's quite what the Microsoft test cases say, is it?

I mean, I think that invitation is inconsistent both with what I understand Microsoft itself to be saying and indeed the Court of Appeal in Gutmann, and the Tribunal in a variety of cases, and the Court of Appeal in McLaren. I am not quite sure where we are going with this.

Are you going to be running an argument that says Meta and Gutmann are wrong in requiring a credible methodology, the blueprint to be put forward, because the rationale for that, as I understand it, coming from Microsoft, is that this is not individual proceedings, and, in fact, your client is representing a whole lot of class members whose interests are protected by making sure that a claim is not started in their name or for their benefit which can't then be completed properly. That's probably a very poorly put rationale, but as I understand the rationale that comes out of those line of cases, its inherent in the collective proceedings regime that you have that test, and that doesn't appear anywhere else. I don't know whether you are challenging that or not.

MR BOWSHER: I don't think I am challenging it. I am saying it is not a high bar. One gets that from Merricks itself. If you go back to Merricks, where it refers to Microsoft and, of course, also the Hollick v Toronto case.

If we go back to paragraph 39, which is where the court deals directly with Microsoft. Can I start:

"For present purposes ..."

If you go down to the middle of that page, it is around F. Just at the end it says:

"For present purposes, there are two relevant conclusions."

I take that to be Lord Briggs trying to draw together the Microsoft test:

"The first is that the threshold test for establishing that the pleadings disclosed a cause of action was the equivalent of the strike out test in English civil procedure. The second was that the threshold for the establishment of the other conditions of

certification was that there should be some basis in fact for a conclusion that the requirement was met. This low threshold derived from the Supreme Court's earlier decision in the Hollick case was not a merits test applied to the claim itself. Rather, the question was whether the applicant could show there was some factual basis for thinking that the procedural requirements for a class action were certified, so that the action was not doomed to failure at the merit stage, by reason of a failure of one or more of those requirements."

There is then the quotation from Mr Justice Rothstein, down in paragraph 40, where he quotes Mr Justice Rothstein, who says:

"In my view, the expert methodology must be sufficiently credible and plausible to establish some basis in fact for the commonality requirement. This means that the methodology must offer a realistic prospect of establishing loss on a class-wide basis, so that if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class. The methodology cannot be purely theoretical and hypothetical", and so on and so forth.

Then 41:

"Subsequent reported decisions in Canada have fortified this low threshold."

We may be vigorously agreeing that that is the test. It is a low threshold. If one tries to interpret that by saying "Look at this point. This doesn't work because of this", that's not the right approach. The question is do we have a plausible methodology which would lead us to an outcome. The answer is, we say, yes.

MR TIDSWELL: Yes. If we are agreed that -- if your challenge is not to the way in which it has unfolded in McLaren, Gutmann and Meta, but you are just reminding us that it starts as a low threshold, then I am sure there can be discussion, and I have no doubt the Proposed Defendants will have something to say about it and if there's

a point to be decided, we will decide it.

I think you are just saying that, aren't you, whether it is a question of reminding us of that.

MR BOWSHER: I think so. I was going to come on to Gutmann and what Gutmann says about Microsoft. It is worth just taking a moment to flesh that out.

MR TIDSWELL: I don't want to cut you short on any of this, but in terms of focusing on the things that are in issue, I mean, it seems to me you are accepting there needs to be a plausible methodology. As I understood it, you were saying that was conditioned partly by the nature of this case by reference to previous cases and what's already underway in the Umbrella Proceedings. So that has a relevance to how you do that, but I don't think you were suggesting you don't have to do it. I think actually what's being said against you is you have not done it at all in a number of respects, which no doubt you disagree with.

I think that's where the dispute is. I am not sure whether this is about how high or low the threshold is. It may turn out to be -- and I don't want to dissuade you from making your points, but ...

MR BOWSHER: Let me move on. Where I propose to go next is Gutmann. I think it is important for us to lay down the marker.

MR TIDSWELL: I absolutely understand. I am not trying to hurry you.

MR BOWSHER: No, absolutely. The point is that the defendants take this principle and by selectively quoting Meta, in particular, they in our submission seek to set and seek to encourage the Tribunal to apply an unduly high bar.

All I am doing is encouraging you to go back to the source materials, not Meta, but go back to the appellate decisions and say "what is the real starting point here?"

MR TIDSWELL: That's entirely fair. What I am saying to you is in all of that don't miss the anterior point to that, which is not about the high bar at all (inaudible).

Obviously you will do it in your own way but I don't want to find we have not had a chance to explore that with you.

MR BOWSHER: Fine. So on Gutmann in tab 13 of the Authorities Bundle, there was further discussion by the Court of Appeal of the Microsoft test. It set out from paragraph 52 onwards, a long passage about what it all means, from 52 to 63. Rather than read it out, I was just going to try to summarise the key points.

Firstly, not a statutory test. No magic to it. Broad discretion on the court or Tribunal. That is paragraph 53.

The test is counterfactual and quintessentially hypothetical. For this reason, I will use assumptions. The fact that it is hypothetical is not a fair criticism, although some factual basis for assumptions and models will be expected. Paragraph 54.

The methodology is subject to a certification assessment prior to disclosure, and so is always necessarily provisional and might requirement refinements and further work carried out after disclosure, once one understands more clearly what is involved, in terms of the evidence and so forth.

At the certification stage, all that might be possible is for the class representative to advance a methodology identifying what might be done following disclosure.

At certification, and I should emphasise that -- maybe there is a tension between that proposition from the Court of Appeal and some of the observations in Meta, but I think they just need to be interpreted consistently together.

At certification stage, the methodology must identify issues, not the answers. Judges are expected to use their intuition and common sense. So if it's obvious where a case is going to go, if something is missing, which is self-evident, then one doesn't need to say the case has failed. Some points in the case can be self-evident or open to judicial intuition or common sense.

Then we start getting into the breadth of the Acts around paragraph 58 and 59,

which we have already discussed.

Then at 60 we get into the question of practicable justiciability. We are still in the realms of talking about the axe, what can and can't be done.

61 reiterates this point I have already made, that the threshold is not onerous, not least because it has to be formulated in advance of disclosure, although that does not mean that it is toothless, and that the character will not scrutinise the methodology.

63. In a top-down exercise, more deductions are made upon the basis that some of the class will have suffered only small losses and there is therefore no requirement for a methodology to address this. That may be an important point here. It may very well be that, going back to the discussion we were having before lunch, there may very well be some claimants which are just very, very small. That's, as it were, of the nature of the proceedings, and obviously, in calculating the aggregate award and in designing a distribution system, one will try to find a way that gets as far down through the claimant class as possible. But the fact that there are some claimants that will be hard to reach is not in itself a bar. If anything, it rather illustrates why collective proceedings are appropriate.

So when we look at Meta, the defendants place considerable reliance on the Tribunal's decision in (inaudible), which we have in the Authorities Bundle at tab 17.

As you will know, the claims in Meta were novel, standalone claims, raising inherently complex issues of liability and the need for a rather unconventional methodology for evaluation of loss. Very different we would say from this claim. After all, this is a claim which has been rehearsed in a number of different jurisdictions and a number of different places. The outlines of this claim are pretty clear.

The novelty in that case did perhaps call for a slightly more intensive review in what

was a case novel in so many ways other than this case, which is another stage in a saga going on maybe up to 20 years, over a number of decisions which have worked through a number of the problems along the way.

While there were a number of problems raised with the methodology in Meta, none of that, in our submission, should detract from the starting point here, that the methodology we put forward is only required to be sufficiently credible or plausible to establish some basis, in fact, for the commonality requirement but, more broadly perhaps, for suitability.

The criticisms based on Meta have to be seen --

MR TIDSWELL: Sorry to interrupt. Are you saying its relevance is limited to those things? Aren't we looking at methodology in a broader context? Actually, maybe we should be looking at Meta on this, but certainly Meta seems to suggest that the methodology is the blueprint for the case more generally, not just applied to the question of suitability, and indeed actually it comes from --

MR BOWSHER: It is the suitability of the entire case to run pursuant to collective proceedings.

MR TIDSWELL: Yes, I see.

MR BOWSHER: (over speaking) distinction without a difference.

MR TIDSWELL: I misunderstood you.

MR BOWSHER: Similar points were made by the Tribunal supporting what we have just said about the Stellantis decision in the Trucks claim about the need for -- this is a relatively low threshold.

It is important. I don't want to spend too long on the words but the word is "methodology", not "method". A lot of the criticisms that are made in some of the cases by defendants are really saying "This method won't work". Methodology and method are not the same. Just saying "This method is wrong, this method won't

work", the word used is "methodology", which is at a higher level. It is about the overall scheme by which you will deliver something, not "will this or that work?"

If we come up with a view as to how something will be done in general terms, that is a methodology. Will the acquirers have this, that or the other document available to them and will or will it not deliver the information that's available? That's about methods and the ability of the methods to work on the day. There is actually a high-level threshold of the test worked into the word "methodology".

MR TIDSWELL: So the methodology might make some assumptions about the availability of data?

MR BOWSHER: Yes.

MR TIDSWELL: If those assumptions were plainly wrong, how would that affect the methodology? Are you saying that is not a methodology point?

MR BOWSHER: That would come down to judicial common sense, wouldn't it?

MR TIDSWELL: Yes.

MR BOWSHER: If they are based on absurd assumptions, then you would not -- I can only think of completely -- I was about to say something. I will say it anyway. If I were wanting to test whether or not the moon was made of cheese by eating a lot of cheese, you would rightly say, even if I thought what you were trying to prove made any sense, the methodology you have adopted is so palpably absurd, it doesn't make any sense. That's just not a methodology we are going to run it.

MR TIDSWELL: To take an example in this case, if you are looking at acquirer pass-on, if your methodology is you are going to go and ask the merchants for the data -- I am not saying this is but just hypothetically, your methodology is this, what are you going to do, in an opt-out case that might be both practically difficult and also, because of the blend of contracts impossible so it might be a completely invalid methodology, whereas you are saying, alternatively, if you say "We are going to go

and ask the acquirers for the data", you are saying that may prove to have some difficulties with it. It may not be entirely straightforward. There may be gaps in that data. Nonetheless, that's a methodology, and we don't need to worry too much about how executable it is.

MR BOWSHER: It is a methodology which is plausible. It will obviously have to be reviewed as a matter of case management, as a matter of substance perhaps, in the light of what comes back, but none of that stops it being a plausible methodology. It just means it's a sensible first way forward.

Taking acquirer pass-on, which we will come on to in a moment, acquirers on their own or acquirers and the issuers, they will have a lot of this data or will have had it at some point. If none of it exists now, but it used to exist, that may start leading to -- the correct answer at that point would not be this was not a plausible or coherent methodology. The answer would be now this is time for the broad axe. That is a question, which is far, far down the road. It's a perfectly sense way forward.

For example -- I will come on to it. Can we do the four examples?

MR TIDSWELL: It may be is easier to look at -- can I ask you one other thing. It may be you fell this is easier to deal with as an example as well. A point of principle, I think this morning you made a submission that for a lot of these there may well be a primary case, which is that you are going to rely on existing decisions or other reference points which you say establish your case, and therefore establishes the methodology, in other words, the methodology is to rely on something else, and that I think is expressed both historically in relation to, for example, the decision in Sainsbury's, just to take an example, but also, prospectively, in relation to the Umbrella Proceedings because of the expectation that they will resolve the question of pass-on, for example.

My question is what do you say your responsibility is to put forward a methodology,

given that's your primary case, in those cases where that is your position, but you recognise there is a contest on that and it has been made plain to you that's not accepted? What is your responsibility to put forward your alternative, if you are pleading an alternative case, to support that with a methodology? Do you accept you have to produce a methodology for the alternative case just as much as if it was your primary case, or do you say there's a different bar that applies to that?

MR BOWSHER: Well, we have to put forward a methodology, yes, but it's a pretty low bar, because it is simply, we would say, do what we did before. As you know, Mr von Hinten-Reed was for the claimant in Sainsbury's. That's maybe not the crux of the matter. The crux of the matter is that these matters have been dealt with in cases again and again. Just taking 101(1), the process of establishing whether or not issuers acted in breach of 101 (1) in setting MIFs in Europe over the last 20 years is not a new topic.

MR TIDSWELL: But there are new arguments that are additional to the resolved questions. Just to pick a couple of them, one is the nature of these MIFs which it is said -- I express no view on this -- may have some different characteristics from an economic point of view, and then you might look at them in a different way.

Another example of something that has changed is the IFR. Again, that's said and I express no view on this, but in those circumstances the whole question of what the counterfactual MIF might be is in play.

Now, those are clearly things that require more than just assertion. They are going to require some degree of economic and possibly factual evidence as well. If those are necessarily engaged by your alternative case, the question is what degree of methodology you are expected to show. I don't think you can say it's a low bar, because -- I mean, I fully accept what you say about Merricks and so on. That's not an answer to my question I don't think. My question is do you accept you have to do

it to whatever the bar is, or are you saying there is some different approach that should be taken because it is an alternative case and because you have got the benefit of all these other things which are helpful if not binding or not determinative?

MR BOWSHER: There plainly has to be a methodology but it is a very low bar. Just taking the examples you have just given, at the time of the claim form I don't think -- I am not sure -- I will turn it the other way round. Some of the points you just mentioned come into play only as a result of some of the issues raised in the individual proceedings. I am not sure they have been brought forward. The IFR, for example, we would say, our starting point for the IFR will be "So what? How could that be relevant?"

Until we see some sensible pleading back on some of these points, as to why our primary case is wrong, it is difficult for us to come back with anything much more detailed by way of our methodology, other than to say that a methodology has been applied before. If you come back with other factual factors, which show that it is not anti-competitive, we will have to deal with them, but it is difficult to identify what -- there is a real problem that we should not be put to having to meet points which are, at best, only speculative at the moment.

MR TIDSWELL: Yes. So you would say -- so there is maybe a sorting to be done between points which are very obviously in play and points which you have yet to see articulated, as you understand I am doing. In relation to the very obvious in play, if I can press you a bit on those, I understand you say you can't be expected to guess what is going to be raised, some things are very obviously going to be raised, because they have been raised before and they are well charted. Lots of these things are well charted. I am not making a timing point. I understand things have evolved and there may be points of time at which some of this is more apparent than others, but if we now know that there are issues about some of these things, what is

your position on your obligation to state the methodology? That's the question, in this alternative case. You don't accept that you have to proceed in this way but it is plain the point is going to be taken. Therefore you have pleaded the alternative case. Let's say you have pleaded the alternative case, do you have to support that with a methodology and, if so, is the standard different from --

MR BOWSHER: The standard must be very low at that point.

MR TIDSWELL: So lower than it would be if it was just your normal methodology?

MR BOWSHER: Yes, because take, for example -- the points may rise -- let's take one which might be -- you have thrown one out, which is --

MR TIDSWELL: By all means take it in the course of the examples if you want to do it that way.

MR BOWSHER: It is difficult to deal with it in the abstract.

MR TIDSWELL: I think you have given me your answer. You see the point I am getting at. Firstly, I want to understand if you accept you do have to produce a methodology. I absolutely take the point about things you shouldn't be expected to second-guess, but if it plain -- you are accepting you have to produce a methodology but you are saying that we should be even more forgiving than normal about the difficulties of expressing that clearly. That's the point. That's the practical position.

MR BOWSHER: Take, for example -- why would the findings that have been made on consumer MIF not applicable to interregional and commercial? Just take two. One, IFR changes the landscape. Well, for reasons I have shown you already, I think our starting point will be no, it doesn't. Until someone explains how the IFR changes the landscape for the MIFs we are claiming on --

MR TIDSWELL: Because they are not the subject of the IFR.

MR BOWSHER: Because they were not the subject of the IFR, it is a bit difficult for us to get to grips with it. Our methodology will be we will consider how that might

have had the effects on competition, when someone can explain how that would work.

MR TIDSWELL: You would say that is in the category that requires --

MR BOWSHER: That requires a lot of thought. I am not saying we will not think about it.

MR TIDSWELL: No, I understand.

MR BOWSHER: The second point, if I can dignify it with a bit more seriousness, they are very small, relatively to the overall MIF, and therefore not material to competition or somehow the effects are not material.

Now, our methodology can really be at this stage little more than we will go through the process that has been done before, as was done in our primary case, to establish whether there was or wasn't an effect on competition, because the material -- if we are going to come back and say it has no effect on competition, because they are so small, that will require some explanation, we would suggest, on the part of defendants, as to why these MIFs were so small, such as to have no effect on competition. I don't know how that argument is going to be put in detail, whether Mr von Hinten-Reed will start throwing things at me, because I am not getting it right, but until that is properly framed, it is very difficult for us to do anything more than say we will deal with that in the way we would deal with any case about anti-competitive effect.

MR TIDSWELL: So if it is plain when the Proposed Defendants put in their response that they contest the question of infringement and, for example, it is obvious that the question of the exceptions are going to come and the question of the exemptible level is going to be relevant, does that engage an obligation on your part to produce a methodology?

MR BOWSHER: Yes, because we have said and Mr von Hinten-Reed has said,

jumping ahead in my submissions he will carry out an anti-competitive effects analysis in response to any case that is advanced. I think one reference is in von Hinten-Reed 2, which is Core Bundle tab 41, page 987. He says he will assess whether the relevant MIFs restricted competition in the acquiring market by raising the level of the MSC. He discusses that a bit further in his report.

MR TIDSWELL: Is that a methodology? I appreciate he may say "I am not in a position to do that", but that in itself is not a methodology. It is a statement of intent.

MR BOWSHER: This comes back to not placing bars in front of this claimant which wouldn't be in front of an individual claimant. It is conceptually very difficult for us to say how we are going to evaluate points about restrictive effect on competition, when the points that the defendants have made -- we don't have any data to support. All we have is speculative observation. We don't know what backs them up. In my submission, he goes on and says in his third report, he will consider whether the MSC would have been lower in the counterfactual, by considering whether the MIFs constitute a common cost flow, whether there are offsetting changes to the scheme system and so on and so forth. That's what has happened in the previous cases. It is a methodology --

MR TIDSWELL: I am not sure it is a methodology. I think it is a recognition that there needs to be one. I am not expressing a view at this stage as to whether he needs to do more than that, but it seems to me a methodology would require you to apply the facts of this case and to say "In order to do that I am going to need access to the following data or following information", even in the most general terms.

It seems to me a methodology needs to do more than just state the problem, doesn't it?

MR BOWSHER: Let me just put a tag in that. If we go to the Core Bundle B4, 41.

MR TIDSWELL: We are in the Core Bundle, are we?

MR BOWSHER: We are in the Core. I think that's the easiest place to put it.

MR TIDSWELL: This is Mr von Hinten-Reed's first?

MR BOWSHER: It is his first. I am not going to read it all out. It deals with this at paragraphs 70 to 83. Paragraphs 70 to 83 on page 986 and following.

MR TIDSWELL: Exactly, yes.

MR BOWSHER: I think that's the part you had in mind. He describes the summary of his approach in 77 and 78, and then says, turning over the page:

"Implications of the Supreme Court judgment" -- obviously he is referring to Sainsbury's at 79, and summarises what was found there, and says:

"In addition, therefore, to the effects analysis, I would assess whether the facts in these proceedings mirror the ones above."

MR TIDSWELL: I am sorry. I think I am in the wrong place. Are you -- so this is --

MR BOWSHER: Paragraph 70.

MR TIDSWELL: Which tab?

MR BOWSHER: Tab 41.

MR TIDSWELL: Tab 41. So this is not his first report.

MR BOWSHER: No, this is his second report.

MR TIDSWELL: I am sorry, my fault.

MR BOWSHER: Sorry. Tab 41.

MR TIDSWELL: What tab is it? I am sorry. What tab?

MR BOWSHER: Tab 41, page 986.

MR TIDSWELL: Yes. Thank you. I am sorry about that.

MR BOWSHER: No, not at all. The passage on 101 (1) is 986 to 989.

MR TIDSWELL: Yes.

MR BOWSHER: He starts by, as you say, describing the problem and summarises

the approach he will take.

MR TIDSWELL: Yes.

MR BOWSHER: We would say, given our current state of understanding, that is a summary of what will need to be done. He then turns to the implications of the judgment and notes that --

MR TIDSWELL: You may not need to do that.

MR BOWSHER: You may not need to do that and identifies, as it were, effectively another way of doing by looking at the 2020 judgment and seeing how the facts different from that, from the facts as found there, and seeing whether or not that leads to finding --

MR TIDSWELL: Yes. So the question I think -- this is not intended to express any view on the right answer, but it seems to me there is a difference between what he has done here and him explaining what actually that is going to involve as a matter of practicability. What is actually going to need to be done in order to examine those differences? So, for example, what information is he likely to need and from whom is he going to need it? I think that's the question I'm asking you. To what extent -- once you get into this question of methodology -- is it permissible to describe it here, as he has done, effectively in outline by saying: "This is the problem we need to attack and so this is at a high level what I would do". Or does he then need to go on, as I think the Proposed Defendants will say, to explain what that means in practice, in terms of the material he is going to need and the parties he needs to get it from, because you can read this as saying "I appreciate there may be an issue here that needs to be addressed, and effectively it has been done before and so I would do it again". That may be entirely fair and reasonable. It is relatively cursory.

MR BOWSHER: You have perhaps focused back on a point which maybe I took as read as I was going through the authorities, but I should just re-emphasise, that

when one -- if we go back to -- right back to Rothstein in Hollick and Merricks, the focus there, as Mr Rothstein puts it in the passage quoted in Merricks:

"The expert methodology must be sufficiently credible or plausible ..."

MR TIDSWELL: Can you give me the reference?

MR BOWSHER: Sorry. Hang on.

MR TIDSWELL: It is tab 5, isn't it? Which paragraph is it?

MR BOWSHER: It is quoted under paragraph 40.

MR TIDSWELL: Yes. I have got that. Yes. Yes.

MR BOWSHER: "The expert methodology put forward in support of the claimant ..." Do you have that passage?

MR TIDSWELL: I do, yes.

MR BOWSHER: "In my view the expert methodology must be sufficiently credible or plausible to establish some basis in fact on the commonality requirement. This means that the methodology must offer a realistic prospect of establishing loss on a class wide basis, so that if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class. The methodology cannot be purely theoretical or hypothetical but must be grounded on the facts of the particular case in question."

MR TIDSWELL: Then the last sentence.

MR BOWSHER: "There must be some evidence of the available of the data for which the methodology is to be provided."

MR TIDSWELL: I think that is really the point I am making. It may be it is answered by the way in which this is put. Clearly your primary case, and you have explained that, is that you are going to rely on the Sainsbury's case and the findings that are in it. (Inaudible). That is as I understand the case. So it may be that part of the answer here is to the extent we have to deal with the alternative, we are going to say

we are going to do the same thing as was done in the Sainsbury's case, but I think that's going to be a bone of contention. I have to make sure where you are on that.

MR BOWSHER: It is useful to go back to the authorities. Right at the beginning, when one looks at the Microsoft test, its focus is on the damages methodology. What it is focused on there is the plausibility of the means of compensating the class.

MR TIDSWELL: We have moved passed that, haven't we? Rightly or wrongly, we are no longer at least as far as Meta goes, we are no longer in just that world. I think there is some support in Gutmann as well. As it applies according to Meta, as I understand it, it applies to the methodology for the whole case, not just the damages.

MR BOWSHER: Hence why I took you back, and maybe I didn't make it clear enough why I took you back to the starting point of this.

MR TIDSWELL: No, I understood it, but it comes back to the question are you challenging Meta? Are you actually saying it has gone too far or are you just reminding us that we shouldn't --

MR BOWSHER: It has gone too far -- if you apply the same threshold to all questions during the case, then that goes too far, and unnecessarily so. The methodology starts by being, in the case law, a methodology focused on damages and a means of compensating. It depends, of course, what the liability event is. In Meta, of course, the liability event is what it is. I don't need to go into that. We don't have the jurisdiction in this jurisdiction. But if we were in Canada, we might be dealing with a class action where the starting point was perhaps rather simpler. The starting point might be there had been -- I don't know -- an explosion, which caused damage to hundreds of thousands of people.

Now, this is where judicial intuition and common sense comes in. You wouldn't necessarily need a methodology to deal with that, other than perhaps if there might

be a question of whose negligence was it. You might say the simple answer will be there will have to be a report from a professional to decide whether it was or wasn't negligent. There is not much more to it than that. This case is more akin to that. This is a restriction on competition which has been debated again and again and again. Findings have been made and yet again the defendants are saying "Ah, well, maybe it is not quite the same here".

MR TIDSWELL: If you were to have to open up -- if Mr von Hinten-Reed would have to do what he suggests in 81, then you are back into all of it, aren't you? You have opened the lid on it all again. The question is at this stage do you need to say what that would involve, or is it sufficient to say "That's all been done before and we don't need to do it again"?

MR BOWSHER: It has either all been done before or it is effectively the same as what the individual defendants are going to be doing in trial one. The methodology is in that sense rather simple. It has either all been done before or it is already being done, albeit that in our case we have not had it pleaded out, so we don't know what points we have to deal with it.

MR TIDSWELL: I understand that. So just thinking about the consequences of the Umbrella Proceedings, so if you are saying it is going to be done there, then does that absolve you from having to produce a methodology of your own? I think that is very much on point with -- I don't know what we call the report we talked about this morning. I suppose it is number 4, the pass-on report you call it. With that, you are effectively saying: "Look, there is no point in us spending a whole lot of time worrying about a methodology now. We know it is going to be sorted out later. We are not being absent on the point, because we have done something, but actually the methodology is we are going to adopt what comes out of that hearing". That basically -- is that the --

MR BOWSHER: That's a good starting point for out secondary case, yes, but what Mr von Hinten-Reed recognises is there's a great deal more complexity to the primary and the secondary and the relationship between the two of them.

MR TIDSWELL: Yes. Is there a primary case in relation to that because there is no existing --

MR BOWSHER: Primary case, our primary case, not the individual --

MR TIDSWELL: In relation to merchant pass-on.

MR BOWSHER: In relation to merchant pass-on. No doubt there will be points pleaded back to us about why the interregional and commercial MIFs are different, which we don't yet have.

MR TIDSWELL: Remind me. Your primary case on merchant pass-on is what?

MR BOWSHER: Sorry, I meant primary case on liability. These are important points. That's exactly where I was going to go. I can probably skip over a few points.

That is why the case law focuses on the methodology for damages because that is what's distinctive about these proceedings. That's what the filter has to focus on, is the damages methodology.

Now, it may be the Tribunal also wants to check that the proceedings are not unmanageable in a broader sense, that it is plausible and suitable in that way, that we are not asking the Tribunal to do something absurd, but we are not asking the Tribunal to do anything absurd. We are simply saying yet again this issue of the infringement of 101 (1) comes before the Tribunal. It has been done before and we propose to rely upon that. If necessary, we will deal with whatever is thrown back at us, as to why that doesn't quite work, and in any event, as part of that methodology, there is an ongoing enquiry which we would like effectively to hitch our wagon to.

MR TIDSWELL: Yes.

MR BOWSHER: It is frankly disproportionate for us to do any more than to try to second guess what is happening in those proceedings, when that is exactly what is happening in those proceedings. We would say, in those circumstances, that is using your judicial intuition and common sense more than enough. Just common sense, in our submission.

I was going to start going through the claim in general terms and trying to pick off some of these points. I have I suspect quite a few of them we have picked off along the way so far, but we will see how we go.

There are several issues of complexity in these proceedings. The essential parameters of the interchange litigation, though, are no longer novel.

Plainly, the defendants intend to raise a lot of new detail, much of which we are not yet privy to. It may be known in the individual claims. We are not yet privy to it. But these proceedings do in that sense follow the well-trodden path, and the issues that arise have been litigated in our courts, and you will be familiar with the decisions before Mr Justice Barling, Mr Justice Popplewell, Mr Justice Phillips and so on and so forth, and elsewhere.

There is a plausible method of dealing with these claims that meets the high-level methodology test. It has been done. It has been tested and produced results in the form of a substantial award in the Sainsbury's litigation. There is by now far greater clarity about how to advance proceedings in relation to interchange losses than in many of the more novel collective proceedings before the Tribunal.

Similar claims are being run. That plainly also demonstrates the plausibility of the approach.

We say we have, therefore, articulated sufficient methodology in the three reports of Mr von Hinten-Reed, supplemented by the pass-on proposals that we were referring to this morning.

In those circumstances, we say the real core question is not whether there is a suitable method but whether there are sufficient common issues or issues that require questions for adjudication that are sufficiently similar or related to justify certification, and that question of commonality refers to the question rather than the answer. You have that point. We dealt with that in some detail in our skeleton. I am not going to go over it again, but from paragraphs 41 to 48, we go into that in some detail in our skeleton. We identify a number of the issues in more detail. I will obviously touch on them going through.

For liability, we say the common issues are whether the relevant rules and relevant MIFs are decisions or concerted practices. That is just a question of fact. There will have to be some debate. Whether there's an anti-competitive effect. Whether the MIFs set a common floor on the merchant service charge. We were talking about how we propose to deal with that just now. Whether the MIFs are objectively necessary for the survival of the particular card scheme. Again, similarly, the methodology has been done. It will depend on what we are told has become necessary, but in our submission the methodology exists.

As was noted by the Tribunal in *Dune*, in the summary judgment decision, many of these issues will be common to most, if not all, the claimants.

Similarly, on exemption, there will be several common issues. Whether the MIFs are causally connected. How to quantify the extent of the benefit. Whether for each benefit so established Visa and Mastercard can show that merchants received a fair share. Indispensability and so on and so forth.

On all of those it is, frankly, almost impossible for us to anticipate how those are going to be dealt with until they are set out, other than to note, as Mr von Hinten-Reed has dealt with in his report, that it is a topic we will have to deal with.

Then we have talked a bit about quantum, for which purpose issues will include

assessment of acquirer pass-on, how to determine the existence and measure the extent of any kind of countervailing benefits, and then the proper approach to resolving questions of merchant pass-on or MPO, as opposed to actual measurements of MPO for each merchant.

If we are dealing with the claim, just walking through the claim, one of the first issues will obviously be the extent to which the factual basis of the Supreme Court's decision in Sainsbury's is applicable to these MIFs or whether a separate effects analysis will be required. That has not been finally determined by the Tribunal, but it was said and it was said by the Tribunal in *Dune*, in the summary judgment -- have I got that right -- the issue could not be decided on the summary judgment application. Do you want me to take you to that?

MR TIDSWELL: I think it would be quite helpful because I do think there's -- I am not sure -- you can look at it two ways, can't you? You can say because it was decided there needed to be a trial of the issue, that means that it hadn't been decided or I think, as you would put it, the alternative is it just means it hasn't been decided that it has been decided, and therefore it needs to be investigated properly at trial. I am not entirely sure those two are reconcilable.

MR BOWSHER: The decision is at tab 7 of the Authorities Bundle, page 269. Have I got the right one? Yes, I do. sorry. I just paused because I always turn up the wrong one.

MR TIDSWELL: I don't think you need to get too much into the detail. I think it would be interesting to find the bit where --

MR BOWSHER: It is the passage 69 to 71.

MR TIDSWELL: Yes.

MR BOWSHER: Whether or not that is a question of, as it were, strict res judicata or simply saying that on the facts -- we would obviously put it in more than one way.

We would say that it is binding. Alternatively, there is no reasonable basis on the facts for departing from the previous findings. So it might be a legal or a factual proposition that the previous decisions effectively apply here.

We would submit that all the Tribunal is saying there is that it is not capable of summary determination, as a matter for examination at trial. Maybe I am misreading what was intended.

MR TIDSWELL: Yes. I suppose -- maybe the answer to my question is this. What is contemplated by this is that in order to resolve the question, whatever it is, there's going to have to be a trial, and as a result of that it's going to be necessary to examine the differences, the scope, if you like, for difference between these MIFs and other MIFs that are the subject of decisions, and if that's going to happen, it doesn't really matter what the question is. There is still going to have to be some investigation into it. Once you enter that territory, you are having a trial with evidence and so on, don't you then need to articulate what it is that needs to be looked at and how you are going to look at it?

MR BOWSHER: Well, I mean, Dune and others are going to either say -- or say both of them -- the facts are -- the same factual findings prevail on the basis of the facts that exist.

MR TIDSWELL: Despite all the evidence you have given, (inaudible) actually cuts across what has already been decided, and therefore I am happy to rely on what has been decided.

MR BOWSHER: Or paragraph 72. Visa and Mastercard come up with a separate package of facts, which say there are different competitive conditions and we will have to analyse those.

MR TIDSWELL: You say that's fine, they can do that if they want to, but it is not your job to prove --

MR BOWSHER: It is not my job if they come forward and put their case on different competitive conditions --

MR TIDSWELL: -- yes.

MR BOWSHER: We are entitled to start with saying if it has not been decided finally as a matter of law, it has been pretty rigorously analysed as a matter of fact, and the starting point would be, absent some dramatic change in the competitive conditions, it would be hard to see why that finding would not translate across.

I can't imagine the Tribunal is simply going to allow the case simply to be run sort of reproving the case de novo, as if none of these cases had ever happened before. That would not reflect any experience one has had of this Tribunal in the last 20 years.

So it is plainly going to start from the existing understanding of the way that MIFs in general have worked, and then look to see whether there's any real difference put forward by the defendants to try to displace that. To put forward a methodology that tries to work around that or second guess that is disproportionate at this stage.

It is open to Visa and Mastercard to contend at trial that there are material differences between EEA and UK MIFs and interregional and commercial card MIFs, but, as the Tribunal observed in that decision of Dune, at paragraph 62, the interregional MIFs have been consistently higher than domestic. We know there's a history of commitments decisions relating to those MIFs. So the factual context, regardless of any analysis, would lead one to think that -- to say it's a heavy burden the defendants are going to have to meet to displace that.

I sense a point coming my way. I am reminded in the 2007 Commission decision there was -- we can dig out the reference for you -- there's a decision, if not a decisive finding, but a decision by the Commission that the MIF was restrictive back in 2007, but again it is a starting point.

MR TIDSWELL: When you say the MIF, you mean the consumer --

MR BOWSHER: No, commercial MIF. Sorry. I have not got the reference to hand, but we will dig that out.

MR TIDSWELL: So there may be a difference between the commercial cards --

MR BOWSHER: There may be --

MR TIDSWELL: No, no. There may be a difference in that respect between interregional MIFs and the commercial card MIFs.

MR BOWSHER: There might be, yes.

MR TIDSWELL: Thank you.

MR BOWSHER: Sorry. Where had I got to?

MR TIDSWELL: Is that a convenient moment to take a short break for the transcribers. Shall we just keep it strictly to ten minutes. We will be back at 3.15.

(Short break)

MR TIDSWELL: Mr Bowsher.

MR BOWSHER: Just the last point I was making about the Commission decision, you can actually pick it up from the Dune judgment at tab 7, the summary judgment at paragraph 73, on page 300. It actually explains better than I did the point. Paragraph 73 of Dune:

"The Commission ... examine the position regarding MIFs for commercial cards. Its conclusion that Mastercard MIF gave rise to a restriction of competition and was not objectively necessary applies to all Mastercard intra EEA MIFs, not just consumer MIFs. However in the discussion of the remedy, the Commission expressly excluded commercial MIFs, on the basis that it had not yet analysed its investigation of possibly efficiencies."

MR TIDSWELL: It reached a conclusion but it didn't apply a penalty.

MR BOWSHER: It didn't do anything with it. Can I take two steps back, in the hope

I can leap forward more quickly, as it were. Just a little bit about where we are on methodology and what is or is not required. So just for the moment going back to Merricks and the passage 45, 47 in Merricks in Lord Briggs, you can see that at page 159-160 of the Authorities Bundle. You can see that the Supreme Court there is, of course, focused quite properly on the need for there to be a damages methodology, because it's obviously looking at what is different about these claims. You can pick it up in 47:

A claimant can establish -- I am paraphrasing -- a claimant can establish an entitlement to liability. The question which you come on to in the following paragraphs is what do you do with that if you have lots of claimants who establish liability? The focus is on the damages methodology. So that's where the starting point is on the damages methodology.

Now, how that has been taken forward is perhaps a little broader and Gutmann is perhaps useful on that. This may be the passage you had in mind when I was charging through the judgment at page 499 in the same bundle, paragraph 60.

"Canadian case law suggests that when a decision is taken as to the methodology proposed, the CAT is seeking in broad terms to determine whether that meant methodology will advance the resolution of the issues at trial and enable the court to determine the issue. These propositions were endorsed by the CAT judgment", etc, etc.

"We agree that a central consideration when scrutinising a methodology under the Microsoft test is to decide whether it is workable at trial, but always bearing in mind that the CAT has the power to wield its broad axe and work in a relatively rough and ready way", etc "with assumptions on common sense intuitions that it can permit or even require adjustments to the methodology prior to and at trial."

The reference to the broad axe obviously tells us that we are focused on the

damages methodology, because that's the point which causes the specific difficulty. That is the thing about collective proceedings that is likely to be difficult. It is how do you award collective damages for a broad class?

Now, if one is dealing with a case such as this, necessarily the intensity of assessment of the methodology, the blueprint, has to be a variable to take account of, firstly, the purpose of the proceeding, but also the nature of the issue and the important factor that barriers should not be put in front of claimants that wouldn't be in front of an individual claimant.

Now, the issues about liability would apply in exactly the same way to an individual claimant as to hundreds of claimants, as we know they do. So there's no reason in principle why the claimants' expert should have to come up with anything more elaborate than it would for an individual and would not do so at this stage.

Now, what we are trying to do is trying to put forward, and have done in Mr von Hinten-Reed's reports is a blueprint for the proceedings which sets out a methodology. It looks back obviously at the long history in this case, but we are not dealing with something novel which will need, as in Meta, a new way of thinking about the nature of the liability or something like that. This is nearer to a product liability case, or something where there is a relatively straightforward liability issue. It has been decided. It will be decided again. The means of so doing is not something which, given sensible judicial intuition, need be a significant or any hurdle for us to get over.

We have set out a common-sense approach to it, but it would be disproportionate at this stage for us to have to elaborate out all the methods that we would apply to points which may or may not be taken in our case. We don't know what's going to be taken. It is important that we are not required to set out all the methods. We are not required, in our submission, particularly when it comes to a point like this, which

is not about the damages methodology, it is about a point of liability, as I say, which would arise in any individual case. No more than an individual would be required to set out at the beginning of her case all of the data that she would have to rely upon to start the case. Then again, here we are not required to set out all the data methods and so forth. What we are required to set out is a methodology and these are different things. That we say we have done, and we have done on all of these liability tests, and that's what I'm trying to take you through now, and hence why I took a moment to pause and take two steps back before continuing the narrative, if I may.

MR TIDSWELL: Yes.

MR BOWSHER: So still on 101 (1). We have looked at the questions, and plainly Visa and Mastercard's experts have views they want to put forward. To some degree these questions remain open. Perhaps we don't need to get to the bottom of what is or is not open following Dune. There is clearly a considerable degree to which the existing findings, as I have just seen in Dune, can be read across. That comes from both paragraphs 70 and 71 in the Dune judgment, because they are plainly going to be treated as -- I have the wrong page It is on paragraph 74. Having just taken you to 73, which dealt with the decision, the Tribunal has gone on and said that:

"Plainly the Tribunal is going to take these points into account."

That's in paragraph 74.

MR TIDSWELL: Sorry. You are back in Dune again, are you?

MR BOWSHER: Dune, yes.

MR TIDSWELL: At 74.

MR BOWSHER: It starts:

"The claimants accept ..."

Then goes on:

"They were considered views and the Commission were entitled to take them into account."

MR TIDSWELL: Yes.

MR BOWSHER: In terms of how it is that we and Mr von Hinten-Reed propose the case will go forward on liability, it is fairly straightforward. The Tribunal will not be coming to these issues de novo. It will be whatever the precise status of this body of decisions, it will be taking that body of decisions forward and applying them together with whatever other points the defendants choose to put forward, and they will do so in parallel or at the same time as the points which they raise in the individual claims regarding interregional and commercial MIFs.

That, applying common sense and intuition, in our submission, is no more than any court would normally expect would be a sensible blueprint. It is not absurd or facetious. It's a sensible way forward to see this case forward.

Again, to identify what data would be required or to get down into the weeds of any particular method is premature when we don't yet have a pleaded out case as to what the points are that we are going to be taking.

So this broad framework is, we say, sufficient to meet the needs of the overarching methodology, because certainly at this stage of the analysis it's a relative light, common sense analysis. Each of the issues relevant to the question of the infringement, the decision, the agreement, the concerted practice, the effect on competition, the relevant counterfactual, objective necessities, ancillary restraints, they are all going to be determined in the same way for the individual claimants as they would be in these proceedings. They are presumably the matters on which the defendants are already engaged in defending the Umbrella Proceedings, and in those circumstances we say we have more than adequately met whatever the

Microsoft requirement is in that regard.

As regards exemption, exemption, of course, might have two levels, because it might be both a defence and it might go to quantum as well, but much the same we would say can be said about exemption as on 101 (1). If they are to avoid liability for infringing 101 by reference to the individual -- by reference to exemption, Visa and Mastercard will have to show that interregional and commercial card MIFs are exempt from prohibition because they satisfy the four cumulative requirements for exemption. They are in the Authorities Bundle. You don't have to be taken to them.

Again, perhaps even more so, until the case is set out as to what it is these particular advantages are, it is not incumbent on us as a claimant to try to analyse the relevant efficiencies and so on and so forth. Those are matters quintessentially for the defendants and defendants' burden of proof. Mr von Hinten-Reed in both his second and third reports has set out how he will deal with 101 (3) requirements and countervailing benefits, to the extent that those points can cross over, of course, into the exemption issue.

Again, the point I have already made applies again. The fees either will or will be not be exemptible. If there is a question which we will go on to about whether or not there is an exemptible level of MIF, which may be the point which is then taken, that the real level of damages is not by reference to zero, which, of course, is our primary pleaded position, but by reference to some other point, then again, that point will have to be developed. We can't anticipate every possible exemptible level. All we can say is that the exemption process, or trying that exemption process, just as any of the individual claimants would try it, will lead to a determination as to what an exemptible level might be. That exemptible level will be the same for all purposes.

It might be different for different markets, perhaps, but it will be a common question

and will be the same in the UK and the UK acquirer market. It might differ in different acquirer markets, but our starting point would be that it would be the same everywhere.

Of course, it is already into our secondary or territory case, because our first case is there is no exemptible MIF.

The critical enquiry of that point is into the causal relationship between the restriction of competition, the relevant MIFs, and the purported benefits the restriction is said to generate. The magnitude of any such benefit will have to be assessed, and Visa and Mastercard will have to demonstrate that merchants obtained a fair share of the benefits.

As I say, we have set out our pleading on that point in our claim form, in the Core Bundle. We have identified in the litigation plan disclosure that will be required as to the level of the relevant MIFs and certain documents, documents submitted to competition authorities and so on and so forth, and studies that go to the benefit of any of those MIFs. That is a first level. We have set that out in the litigation plan, but that's probably very much a first line of disclosure. It depends how that point is taken further.

Those documents would presumably only exist if there had been notifications or discussions with regulators about exemptible MIFs. If we start getting into more granular discussion, we will have to see what points are being raised.

This goes back to Sainsbury's itself, where the Supreme Court explained that establishing the necessary causal connection between the restriction of competition and the purported benefit involves two stages. First, that the default MIFs in each case incentivised the issuers to take steps they would not otherwise have taken and, secondly, that the steps taken did indeed, whatever the benefit is. In Sainsbury's, it is increased card usage, increased the efficiencies of transactions, which would have

been card transactions anyway.

Of course, that will all depend on a whole range of issues about the extent of issue of pass through, the extent of the transactions. All we can common-sensically say at this stage is when that case is pleaded, we will deal with it in the way that any individual claimant would deal with it. It would be disproportionate simply to map out how one tries to anticipate an exemption defence now, how one maps out the response to an exemption defence now when you don't know what it is that is going to be said.

It is not as if these points have not been looked at in previous cases. The claims have been made before a number of courts at a number of different times. I think there are probably -- for accuracy there are probably two occasions when an exemption might have been on the cards. There's an occasion in 2002 when I think the Commission granted an exemption in Visa's favour. It is referred to in our opt-in claim form, but that has not been followed since, and that's certainly the early history of all of this.

Mr Justice Popplewell did find that if the MIFs had infringed 101, they would have qualified for exemption, but as his judgment was overturned and the matter was remitted back to the CAT, to this Tribunal, to consider the exemption issue, I don't think that point has ever reached a final decision. It was left with the CAT and I don't think it has ever been taken to a final decision.

These points have been tried again and again and, as I say, with the exception that I have identified, the Commission 2002 decision, they have not succeeded. It is possible that the defendants are going to run the same defences that have failed before, but we can't know that, and it is unreasonable to expect us to assume or guess further whether or not they are going to run all the same defences before or run a new, better case and deal with it as and when it comes. I mean, it would be

impractical and disproportionate and contrary to the explicit requirement not to impose unnecessary burdens on us which would not apply to an individual claimant to require us to anticipate in our claim form every possible benefit that might be claimed by way of an exemption, which it is not for us to prove.

Of course, in any event, all of this is going to be dealt with in the Umbrella Proceedings anyway in identical terms to the way it would arise in this case. I mean, insofar as the Umbrella Proceedings incorporate interregional and corporate card MIF claims, the same points will arise there in exactly the same terms, because there will be no difference between the issues as between us and them.

So that then, in my submission, leads one to acquirer pass-on, which is a little more complicated, because that had not been put in issue in previous proceedings by Visa or Mastercard, and in our claim form we had noted that, and accordingly pleaded that that was not an issue that we were going to address, because it had not been one that had been raised before.

Now, we are told that is not now the case and they have indicated in their response this year that they do intend to put acquirer pass-on in issue.

So we have produced a detailed scheme, and it is, I emphasise, a detailed scheme, to assess acquirer pass-on. That is in Mr von Hinten-Reed's second report, Core Bundle, tab 41, page 1010. It is Appendix B to his second report. It comes up in a couple other places as well because it is also attached to the pass-on proposals and it is also appendix B to the other report.

We are now into damages. We are now into that part where Mr von Hinten-Reed had squarely taken on the burden of demonstrating how we have a plausible methodology for taking forward an analysis of the quantification of loss.

In passing we note that the APO is almost certainly a common issue. It is either a common issue across Europe or it's a common issue on a national market basis. It

is dealt with by Mr von Hinten-Reed in the UK market in the first instance in his report. That is a methodological approach. The same methodological approach could simply be translated to any other national market as appropriate or as needed, but this is the methodology for dealing with acquirer pass-on.

The method is clearly plausible. The largest -- I wasn't proposing to read all of it. I was going to just paraphrase. The largest five acquirers represent nearly 90% of the volume and value of card transactions in the UK. That comes from paragraph 167, page 1013. The largest two represent the vast majority of volume and value, and they are obviously the most promising source of data necessary to carry out the exercise.

In order to assess APO, Mr von Hinten-Reed intends to review public reports indicating the level of acquirer pass-on. He highlights that in paragraph 178. He has considered the 2021 report of the Payment Systems Regulator ('PSR'), which suggests that acquirers may not have fully passed-on interchange fee savings following the IFR to merchants. This is a point that has been made. The question will be, that pass-on, does that behaviour apply to acquirer pass-on as well? There will obviously be an investigation which will have to be done.

He notes a variety of criticisms have been levelled at the report and that indeed Visa has said that any conclusions should be made with caution. That's paragraph 180.

He considers a 2020 study on the effect of the IFR, which he says found that the MIF savings were offset by increases in acquirer scheme fees. That's at paragraph 184. And that acquiring margins increased following the IFR with higher increases for credit than for debit card transactions. That's paragraph 185.

Having reviewed that literature, he then notes at paragraph 197, and this is in the summary -- having looked at all of that, he summarises the position at 197 and says that that material is not enough, the starting point.

He then describes in section B4, on 1017 and onwards, a process of disclosure from third party acquirers by means of targeted disclosure requests focused on the two largest. He explains how he would estimate pass-on rates based on this information for different types of acquirer merchant contracts. He identifies alternative data sources that are less precise but can still be used if the preferred data is unavailable. That is at paragraph 203.

Visa says that this is flawed because it rests entirely on third party disclosure, or goes beyond disclosure, or that it is unclear how CAT will order foreign acquirers to produce documents or information.

We say that these criticisms are misconceived, at a number of levels.

First, it is wrong to say the method rests entirely on third party disclosure. One only has to go through the process to see that it starts with other data, and other alternative sources of evidence are identified, specifically in B5.3. That's the whole section on B5.3. The extent to which -- the weight of those alternative sources of data may depend on what can be obtained from the acquirer. Yes, that requires information from Visa and Mastercard, but that may be a source of information that is available to serve as proxies.

It goes back to a point I made at the beginning. These MIFs were set by the acquirers or the acquirers and the issuers. They must have known what they were doing at the time. There must have been records as to how acquirer pass-on was dealt with, and if they haven't kept them, well, that may be a point at which the Tribunal has to wield a broad axe, but we are a long way short of that. There's a long sequence of data points and investigations which we have set out as to how to get to an approximation as to what the amount of acquirer pass-on actually is.

It is also worth noting that a significant part of this disclosure is probably also disclosure that has already been submitted to the payment systems regulator. We

can see the payments systems regulator has been investigating some of these matters. It is a matter of speculation as to what the PSR does or doesn't know, but it must know quite a bit of this.

These are very much problems of method rather than methodology. I am not suggesting that they are easy, but they are not -- none of these are criticisms -- none of the criticisms made here suggest that we haven't got a methodology that is relevant here.

In terms of what can or cannot be obtained by simple request or through the Tribunal, of course, the Tribunal, as you know, acts with its wide case management powers, set out in rule 4, but, more specifically, the relevant procedural part of these -- hang on. I have got this in the wrong place.

The relevant part of the rules is part 5. Part 5 expressly incorporates part 4 and within part 4 of the rules there are a number of provisions which would give the Tribunal power to seek exactly the sort of information that Mr von Hinten-Reed has been indicating in the methodology we have just been looking at.

I don't know if yours has been updated. If you have the updated Authorities Bundle, which includes the whole of part 4 of the rules, it is page 46.12. Otherwise it is rule 53, case management directions.

MR TIDSWELL: You are on 53?

MR BOWSHER: I am on 53.

MR TIDSWELL: I don't think I have got that. Hang on. Maybe we have.

MR BOWSHER: Well, I can just tell you what they were --

MR TIDSWELL: I mean, we are obviously very familiar with them. So you keep going.

MR BOWSHER: This is part 4, rule 74, which is within part 5 covers collective proceedings. It incorporates part 4 with some amendments. One of the parts which

is incorporated without amendment is rule 53, which includes, as you know, a long list of powers.

"53.1. The Tribunal may at any time on request of a party give such directions as it thinks fit to secure the proceedings are dealt with justly at a proportion of cost."

Those include 52 (l):

"Disclosure and production by a party or third party of documents or classes of documents."

(p):

"Hearing a person who is not a party where it is proposed to make an order affecting that party."

53 (3):

"The Tribunal may of its own initiative put questions to the parties, invite parties to make submissions, ask parties or third parties for information or particulars."

56, that deals with summoning witnesses, which is obviously the next stage on.

Now one would hope one does not need to go as far as invoking the Tribunal's powers, but one would have thought that a starting point might well be to simply ask claimants opt-in or opt-out, simply to write to their acquirers and say "What information do you have? What did you do?" They may or may not respond. You know, that would be part of the normal process. That might be a first stage.

If we don't get anything through that process, we may have to go directly to the acquirers in the way that Mr von Hinten-Reed identifies.

MR TIDSWELL: In the opt-out case that's going to be more difficult, isn't it? In the opt-in case I can see absolutely. How do you ask -- how does that work in the opt-out case? You have hundreds of thousands of claimants. Are you going to ask them all to write to their acquirers?

MR BOWSHER: You could do if you wanted to get -- or you could do the sort of

approach set out in the merchant pass-on proposal, where we do it on a sampling basis. We might ask a few to write. We don't need to go down -- as I say, there are a number of routes to this. We would have to decide what was more proportionate. Mr von Hinten-Reed has set out a method which does not require that. It almost goes sort of straight to the Tribunal and says: "Well, let's go straight to the acquirers and say 'give us this information'". It may be there are prior steps to be taken simply through commercial channels.

MR TIDSWELL: So you say we have the powers to make the order, and subject to you making the case, then there is no reason why we shouldn't be able to get -- but there may be other ways of doing it that don't require us to invoke that power.

MR BOWSHER: There is not hundreds of different acquirer pass-ons. We don't need hundreds of questions from hundreds of claimants to identify the acquirer pass-on. It may be that it is different for each of the six or seven acquirers, and maybe they have run things differently for different segments of the market. Who knows?

MR TIDSWELL: You are much more likely to be getting into policy settings and commercial approach from the acquirers, aren't you, rather than individual decisions about merchants --

MR BOWSHER: Exactly.

MR TIDSWELL: -- about how they set their contracts up and what the implications are -- there must be evidence of what happened, as we see from the PSR report.

MR BOWSHER: Which is why we are simply saying it is not a question of 1,000 letters from 1,000 claimants. It may be simply some correspondence produces the information. That may be naive, but that's a first step. It is not as if that's the last step.

As regards foreign acquirers, the next objection, that's obviously relevant only to the opt-in claim. It may be necessary to explore with Visa and Mastercard how far they

are able to go in obtaining data from European acquirers who are members of their schemes. In any event, that's a question which really -- the proportionality and need for that material and the most effective way forward would become clear once the book had been closed as to which EU merchants were in the opt-in scheme and which markets were affected, and once one knew about what was being said about whether those acquirer markets were genuinely different.

Those would plainly be common issues managed, much as they are in the individual claims, by reference to which markets can sensibly be the subject of investigation.

If necessary, if no other route can be taken, it may be necessary to use, for example, UK acquirer pass-on as a proxy for a foreign acquirer pass-on, and then apply some appropriate broad axe discount.

Even by saying that I am assuming there is some need to make those sorts of refinements. We don't even know that yet. We don't know on the case we are dealing with, on the pleadings, whether those sorts of refinements need to be gone into.

The method which is set out by Mr von Hinten-Reed -- I have not sought to read it. We do rely upon it. It is quite a few pages long. It runs up to page 1026.

MR TIDSWELL: We have read it.

MR BOWSHER: It is intended to generate pass-on estimates for different types of acquirer merchant contracts, including standard pricing, the IC+, IC++ and so forth.

Specifically, as regards the opt out class, Mr von Hinten-Reed will estimate a weighted average pass-on rate, representative of the entire opt out class, by calculating the share of total card payments. He dealt with that also on page 1022 at paragraph 235.

It is noteworthy that the same need to determine the same APO again arises in the Umbrella Proceedings and will form part of the subject matter of Trial 2 in those

proceedings.

Potential complexities have not -- regarding to APO -- have not served to deprive those claimants of the right to bring those claims. It is the same Merricks point again. The methodology exists.

Turning then to the quantification of damages -- APO is part of that.

Once it is established that there has been an unlawful overcharge, the extent of that overcharge will have to be assessed. The class representatives will need to quantify the losses in relation to both opt-in and opt-out classes. Obviously, compensatory for one, aggregate for the other.

In essence, the quantification of loss involves determining in the first instance the volume and value of the relevant MIF transactions for each class, and this would have to be discounted to take account of any acquirer pass-on that is less than 100%, any exemptible benefits, any countervailing benefits which are now pleaded, which would have to be -- if they didn't qualify for exemption but were still said to be valuable countervailing benefits, they would have to be pleaded, demonstrated to be causally connected to the actual MIFs, and then somehow valued.

Then the level of merchant pass-on. Then, of course, there is taxation and interest.

With respect to the opt in class, the method is fairly simple and summarised by Mr von Hinten-Reed from paragraphs 98 through to 128 in his second report. So that's B4, 41, page 990. He starts with opt-in damage estimation at page 990. He discusses how the overcharge is going to be dealt with, again in some detail. He plugs in -- obviously the acquirer pass-on point refers to the passage we already dealt with.

He assesses the total amount of relevant interchange fee payments by opt-in claimants, the value of transactions subject to the MIFs, exemptible MIFs, takes the APO estimate and considers mitigation issues such as merchant pass-on, interest

and tax.

MR TIDSWELL: Much of this is done on an individual claimant basis, is it?

MR BOWSHER: For opt-in, yes, because it is a compensatory award, so it would end up being on an individual basis.

MR TIDSWELL: Some of it could affect the debate on private proceedings and some of it could be done more generally.

MR BOWSHER: Some of this will be adapted to the opt-out, which is why we have been careful not to say that all of these matters are common issues, even in the opt-out claim, because there will obviously have to be -- they will be common issues in the sense there will obviously have to be approaches taken on a broad-brush, to enable an aggregate award to be created, and the methodology will not be that dissimilar. But it is of the nature of an aggregate award that it is just that. It is aggregate. It will go through the same intellectual process, but it won't be possible to do all of this individualised analysis that is done for the opt-in, obviously. Whether that is a common issue or an issue of substantial commonality will depend. There will be different steps along the way. Some will be more common than others, but that is the damages method. That is delivering the damages methodology. That reflects the justice of the situation.

Again, there's a lot of material in there about where the data comes from, seeking data -- I am not sure any of that really helps.

We then turn to merchant pass-on. As you know, I can probably take this point -- we have discussed this in some detail. Our starting point -- well, I have probably said all that needs to be said about merchant -- you know our position on merchant pass-on.

MR TIDSWELL: Yes, I think that is clear. You are welcome to add to it.

MR BOWSHER: The Tribunal is going to deal with it. We have sought to make a serious methodological contribution to it with the pass-on proposals in those

proceedings. We accept that where there is a matter of law or a matter of practice, we are likely to be to some degree or entirely bound by the outcome of that. I am being cagey about that because I don't know what involvement we would have and how it would be framed, but we are plainly not going to ignore the outcome of that hearing.

The methodology, in the first instance, for resolving the MPO is what the Tribunal decides it is. That's not an incoherent or non-plausible methodology in the perhaps rather odd circumstances of this case.

I am not sure that there's much to add on countervailing benefits that I have not already covered.

In the opt-in, it would lead to individualised compensatory awards for -- sorry. I have skipped over tax and interest, but I have assumed they will be dealt with presumably on an individualised basis, but given that the number of claimants involved, even if it is 400, it is not a number that is going to be incapable of being dealt with on an individualised basis. That will lead to individualised compensatory awards in the opt-in claims, and in the opt-out claim there will then be an aggregate award which will then have to be distributed. There is then the separate problem of distribution.

The non-UK -- what I have not dealt with, which, of course, does not arise in the opt-out claims, is the non-UK markets. We have touched on it on and off along the way. We say that as regards non-UK markets and claimants falling within the opt-in class, our starting point is that Sainsbury's in the Court of Appeal at paragraph 157 -- that is in the main bundle, Volume C1, tab 72.

MR TIDSWELL: Is there a reason why things have ended up in the main bundle or the Authorities Bundle?

MR BOWSHER: I will answer that in a moment when I have got my head out of the box.

MR TIDSWELL: Yes.

MR BOWSHER: Volume C1, tab 72. It is in Volume C2. It is my fault. The answer to that is simply that these were decisions which were attached to the claim form as part of our -- the reason why they are in the main bundle is they were there -- every single claim form had attached to them the suite of decisions that we relied upon as the decisional group on the basis which founded our primary case. They have been taken out and so they're only in the main bundle once. A view was taken that they're in once already, so we didn't need to put them in -- I agree with you it is --

MR TIDSWELL: That's entirely sensible.

MR BOWSHER: It was sort of sensible at the time but it is also vexing when you are looking for it.

MR TIDSWELL: That's a perfectly good explanation.

MR BOWSHER: 3570. They are therefore the decisions that go to liability. They are not the decision about the Microsoft test. They are the past decisional history, as it were.

Paragraph 157, page 3570, the Court of Appeal said:

"It would be remarkable if the same scheme rule requiring the payment of MIFs in default of the agreement of bilateral interchange fees were held to be in breach of article 101 in one Member State but not in breach of it in another Member State, whatever the factual or expert evidence might have been as to what might have happened in the postulated counterfactual."

Do I need to go on? I think I do because there is a bit more elaboration in the paragraph. That's our starting point, that as a matter of common sense, in our primary case or our secondary case, if there was a 101 restriction in one member state, it would be likely to have applied across the board.

If we have gone to the trouble and cost to make the claim proportionate of setting up

this opt-in claim in this jurisdiction, which is capable of bringing other claimants into it in the opt-in claimants, it seems sensible and proportionate to do that here, because at least as a starting point, as the Court of Appeal has said, it seems likely that the same liability finding would apply across the board.

MR TIDSWELL: Yes. Certainly there is a reference to liability. It rather depends on particularly on the acquiring market, doesn't it? One can envisage it might be different in different markets across Europe. I am now speaking in a very uninformed basis because I know nothing about it.

MR BOWSHER: I have never been an acquirer. I don't know. I am sure we will be told if there is any difference.

MR TIDSWELL: If the Court of Appeal were intending to suggest there might not be differences between acquirer markets, I would be interested to know on what basis they reached their conclusion, because I don't think it was addressed in this case.

MR BOWSHER: No, the acquirer market was not addressed in this case. You are absolutely right.

MR TIDSWELL: I am not saying it is different.

MR BOWSHER: You are absolutely right. The acquirer -- that really is genuinely unknown, at least from our perspective. We don't know -- in terms of methodology, if the argument -- again, the starting point is, having set up this claim with all of the backing behind it, procedural, financial, etc, etc, it seems appropriate to make that vehicle available to those for whom this would indicate a likelihood or at least be in the same starting point position as all the UK claimants.

MR TIDSWELL: Yes. So there's clearly a practical commercial driver, which is you (overspeaking) By doing that you also risk expanding the complication of the proceedings, but I think you are saying -- your working thesis is not going to be that much more complicated, and if it is, we will deal with it.

MR BOWSHER: It is a complication which is already in the Umbrella Proceedings.

MR TIDSWELL: It is, yes.

MR BOWSHER: As you, sir, know. Your colleagues have been spared that.

MR TIDSWELL: Yes, and it is a complication.

MR BOWSHER: The complication already exists. So we are not creating a new complication. I think in the Umbrella Proceedings there was a lot of discussion about Italy and Ireland and somewhere else. I can't remember.

From a methodological point of view, whatever the problem is, it will be the same methodology in each jurisdiction. It might be there is a different regulator and different -- acquirers are acquirers. There are regulators for payment systems everywhere. The methodology applies mutatis mutandis. So the methodology which has been put forward by Mr von Hinten-Reed in a UK context is available to be adapted. If at the end of the book build there simply are not any claimants wanting to avail themselves of it, then it becomes a non-problem. If there are, it will probably be sensible at that point to look also at how the Umbrella Proceedings is managing claims in other jurisdictions and see how that is best dealt with.

We may then get into situations about whether or not claimants do want to opt in or out, but I am getting way ahead of myself about what an Italian claimant, faced with the possibility of bringing a claim in this jurisdiction, might or might not want to do, but in principle there's no reason, in our submission, why the same methodological availability should not be available in the collective route as it is in the umbrella.

MR TIDSWELL: Perhaps subject to one point, and it is a point we dealt with already, so I don't want to revisit it, but the question of whether some of the jurisdiction we have here would be available in relation to, say, an Italian acquirer.

MR BOWSHER: That is true. I touched on that already. It may be if there were an APO, a view would have to be taken as to whether it was appropriate for an Italian

acquirer, if there were no other information available, and Visa could not even obtain information from its Italian affiliate, that we were still left in a position that all the Tribunal could do was apply its broad axe by pretending the UK, in a very post Brexit sort of way, that the UK is, in fact, Italy or Italy is the UK, and there is no material difference, or whatever. We are not there yet.

As I say, there is nothing new about that methodologically, that is not already in play either in these proceedings or the Umbrella Proceedings.

The same problems would apply just as -- those problems would cut both ways. Not only would problems for us in obtaining information about acquirers bite on acquirer pass-on, it would also affect Visa and Mastercard's ability to put forward material to make good an exemption defence they wanted to make.

Now, one assumes that if they want to make an exemption defence about the operation of Visa in Italy, that Visa is able to get that material. Again, I am making a gross assumption which I am not in a position to make good, other than as a common sense assumption.

So that was what I called at the start the walk through the case. There is a sensible arc to getting to an end point in the opt-in and opt-out claims. A lot of it is difficult, but it is all a plausible route to meeting the goal and purpose of this regime, given that these are claims -- well, I have already made the merits point. These are claims that are being settled right, left and centre, and it seems odd that, in fact, the bulk of merchants who may have been affected by this conduct are at the moment left either having to take on the risk of an individual claim or not participating.

The collective action is an obvious route to enable the full range of merchants in the UK and to some extent beyond to take advantage of that.

Now, some other points are taken against us, and I think I then move into the miscellaneous section. I don't know how -- I was going to bash on until I was told to

stop.

MR TIDSWELL: Yes, please.

MR BOWSHER: There is a sort of screeching of brakes. We are moving into a different set of topics here around the PCR, the authorisation of the PCRs, those sorts of points.

There is adverse comment made about the nature of the PCRs, their appointment, the way they were established, their relationship and so on and so forth. Some of it is we say frankly speculative. All of it we say is without real merit.

Can I deal with it fairly shortly? In FX the CAT, in Authorities Bundle tab 15, paragraph 269, noted that it is likely to be -- where is it? It is somewhere -- it is the second sentence in 269 where the CAT is identifying this question about the existence or pre-existence of a PCR, whether or not one would expect a claim representative to be someone who had some sort of pre-existing involvement in the matter or not.

It is a bit hard to read. You have to take a running jump of it:

"Neither PCR was a member of the class or classes they seek to represent. No question of conflict of interest as such therefore arises. We do consider that it is necessary to bear in mind, as we have found above, that the PCRs in this case came after the event. In other words, although the two PCRs are the formal applicants, the only reason that they are applicants is because they were approached by the lawyers that they now instruct. That is an inversion of the usual process whereby lawyers are instructed by clients, not vice versa. However, it is we anticipate likely to be a hallmark of collective proceedings in this jurisdiction."

It is not a point for criticism. It is likely to be, as the Tribunal said, a hallmark of proceedings in this jurisdiction that one will be finding class representatives who are approached by the lawyers that they instructed in order to take on this important role,

and it is an important role.

In FX the authorisation condition was met with no real hesitation for PCRs there, which were incorporated, created specifically for that application.

Whether or not someone is a pre-existing body might be relevant to the authorisation condition, but the Tribunal should be wary of putting too much weight on it. The fact that a PCR is not a pre-existing body or that in this case Mr Allen has come in to fulfil the client role at a later stage, rather than the other way round, none of that is a reason not to authorise.

Indeed, it is quite normal and does not give rise, we say, to any reason not to authorise our PCRs.

All that is said thereafter, in our submission, about the position of either the PCRs or Mr Allen is really purely speculative. This is a case in which a claim is being brought which occupies a space across a number of sectors of the economy, and it is not surprising that there's no single body that represents all of them.

To get at that, it is actually worth looking at some of the evidence on the book building process, which not only demonstrates the appetite for these claims but also the sorts of trade organisations who are interested, but just by looking at who they are, you can see why no one of them would be the right person to bring this claim.

So if you take in Core Bundle B2 tabs 24 and 25, you have Mr Ross's two statements, third and fourth statements, which address the book build process. His third at tab 24, page 507, covers the book build process from page 510, which is relevant more generally just to demonstrate the sorts of entities -- how the process has been dealt with.

If one then turns to paragraph 32, page 517, you can see the trade organisations which were then specifically prepared to be named as trade organisations supporting the claim: UK Hospitality, UK Inbound Tourism Alliance and Advantage Travel

Partnership. To that can be added in the next statement on page 521 ABTA, the trade association for UK travel agents. You get that at page 521, paragraph 6.

So there is trade association support from exactly the sectors you would expect there to be support from, but one only has to look at them to see -- many of those are household names. There is no way anyone of those would come anywhere near covering the full range of merchants in the different sectors that we are talking about in this case.

I don't know that -- I am sure that those instructing me have thought about this a great deal, but it is not obvious that there would be anyone who would be that interested party. They might be in a more specific sectoral claim such as, picking one at random, trucks, where it is more obvious there might be someone who has, as it were, a specific sectoral interest. That's not the nature of this case.

So in the absence of such a body, it is not surprising that the claim has been set up in the way that it has, so that there can be corporate representatives bringing the four claims, with Mr Allen actually giving the client oversight in the way described in the claim form and the supporting evidence. I am not sure that there's a great deal more to be said on that, but no doubt we will wait to see what comes back.

The next -- sorry. I've tried to think of what the logical order was for these points. I could not quite work it out. I apologise. They are miscellaneous.

The next is settlements. A lot has been said about settlements and how they affect the claim. I don't need to get into the debate which has existed about what the scope of the settlements are. As I said at the outset, yes, there have been settlements. Indeed, that shows why one would expect a collective action to be a worthwhile thing for the economy in general and for these defendants, because why should not merchants who have suffered this loss be able to participate in a tool which enables them all to participate in that settlement?

You will know that there has been a lot of correspondence with the Tribunal about settlements and disclosure of this, that and the other. If there's a question about methodology, I think we've stumbled on one. I am not sure what more needs to be said about settlements, other than if there has been a settlement, the defendants will know it and be able to tell us and we can deal with it. I think that is the judicial common sense methodology. If it is more complicated than that, we will find out, but, I mean, I am not quite sure what else we are supposed to do with settlements other than be told there is a settlement. If there has to be a debate about whether they have or have not settled, we will have to have that argument at some point. In my submission there is not really a lot else to be said about settlements.

The existence of the settlements certainly comes nowhere near to undermining the claim. You will remember the figure which I have quoted probably too times already. Mr Holt says the existing claimants are those which with it has settled account for 15% of the relevant MIF during the period for which data is available. Mastercard says it has reached settlement with 700 claimant merchants.

Parking that point, we will have to -- but those settlements can be addressed and adjustments made appropriately. I mean, in the opt-in case it is sort of obvious how you deal with it. In the opt-out case one would have thought there would simply be a numerical -- depending on how one actually ends up applying the aggregate award, one simply identifies who has settled, what the settlements have been and presumably taking it out of the aggregate award.

Visa in its skeleton complains about publicity that has been given by those instructing me regarding other possible CPO claims which have not yet been made. It may be that rather than wasting too much time now there's a limit to how far I can take it, not least because I am not instructed on that matter. So if there are questions to be made, they can no doubt be put through me to those instructing me

and I can deal with them appropriately, but the factual situation was set out in a letter to the Tribunal last week, I think on Friday, 30th March -- Thursday I think.

I haven't touched on it in Mr Ross's evidence, but he describes how the book build was dealt with in these claims. The media plan comes first. You talk to the media. You reach out. You try to find out what the level of interest is. You reach out to the potential claimants.

The second phase involves taking that forward. The fact that those instructing me have publicised the prospect of this claim is not improper. On the contrary, it's a perfectly sensible and necessary part of the process. These things take the time they do. You don't start engaging in court proceedings, for example, until those instructing me are in a position to do so with funding in place and so on and so forth. I mean, I am not sure -- I don't want to go too far, but in my submission there is really nothing to those criticisms. Those instructing me have done something that is perfectly sensible.

Now it is true that those claims obviously would correspond to other parts of the individual claims. Maybe in an ideal world it would have been great if they had been brought a year and a half ago, but they have not been.

MR TIDSWELL: Well, from the Tribunal's point of view I think it may not be the only issue of importance, but it certainly is an issue, because we have talked a little bit about how these proceedings might fit into the Umbrella Proceedings , and obviously there are some challenges to that and they have been expressed by the Proposed Defendants.

If you walk forward and assume that there's another set of proceedings that get launched in a similar format to this, and then, of course, we have to go through the same process in relation to certification, it does become more difficult to see how they can fit in with the Umbrella Proceedings.

Now that may not be -- you may say that's not your problem in relation to these proceedings, and no doubt that will be said by the other side as well. Maybe the best thing is to see how that develops, but, I mean, it does -- I think there are some practical issues that flow from that whatever the answer is.

MR BOWSHER: I am sure it would be easier if they had, as I said only semi-flippantly, started a year and a half ago, but they haven't -- you know, things can't -- they haven't been.

MR TIDSWELL: Yes.

MR BOWSHER: That's not in itself improper or -- the fact that that process is ongoing should in no way cut across the merits or otherwise of this application. There is no reason in principle why that should cut across it. On the contrary, that claim will have to live or die on its own merits in the particular conditions that it has to deal with.

I was going to review some of the practical issues around timetable and disruption, because I think it is quite important. I know that was very much in the Tribunal's mind. That probably might take me longer than two minutes. If I took up a short time in the morning, would that --

MR TIDSWELL: Well, as long as --

MR BOWSHER: I have indicated to my learned friends that I will be eating into my own time by so doing.

MR TIDSWELL: If you have an agreement on that, then, of course, we're happy for you to --

MR BOWSHER: I won't be long. I think it probably deserves a bit of a run up --

MR TIDSWELL: So there is that point and there are some points about funding. I wonder whether, given what has been said on the evidence -- you have produced some extra material on that. At the moment I am not sure we have any visibility on

what the Proposed Defendants say about that. So it might be easiest for them to -- unless there is anything you particularly want to -- you don't need to run through what has been produced, because we have that, and obviously if you want to say anything else about it, please do, but I expect it is one of those things whether it is better to see what they have to say about it rather than anything else.

Is there anything else on your list?

MR BOWSHER: I have talked about Mr Allen's position. I rather wrapped that up into talking about the claimants as well, didn't I? So I don't think I need to -- there were some separate points about his position as opposed to the --

MR TIDSWELL: Yes. I think we have picked up what has been said about that on his witness statement and indeed others as well. So really just if you have got --

MR BOWSHER: It would probably be sensible in doing that that I just take account of what has been said today and that what I have written down here still makes sense after today's discussion. I think it probably does, but it would be worth taking more than -- I am guessing it is going to take more than a minute by the time the Tribunal want to ask me about it.

MR TIDSWELL: Well, let's do that in the morning. So we'll start again at 10.30.

MR BOWSHER: Thank you.

MR TIDSWELL: Thank you.

(4.29 pm)

(Court adjourned until 10.30 am

on Tuesday, 4th April 2023)