IN THE COMPETITION APPEAL TRIBUNAL

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

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Tuesday 4th 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.

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Tuesday, 4th April 2023

(10.30 am)

Submissions by MR BOWSHER KC (cont.)

MR TIDSWELL: Mr Bowsher, good morning.

MR BOWSHER: Good morning. So in a few minutes this morning I was hoping to tie a few threads together under the general context of timetable, by which particularly I have in mind the timetable of what would be the timetable for our proceedings and how that would fit with the Umbrella Proceedings, recognising the range of practical problems and issues about the extent to which in one way or another findings in the Umbrella Proceedings might bind us. I am not wanting to go here into the various different layers. We talked a little about it yesterday, about the legal and practical ways in which we might find ourselves bound by what had happened in the Umbrella Proceedings.

We did look at it briefly yesterday, but as it's a letter which not all the Tribunal will be familiar with, it is probably worth going back to the letter of 5th December 2022 at page 6397 in D. Sorry. It even has a tab on. Tab 179 I think.

MR TIDSWELL: Yes.

MR BOWSHER: You, sir, will be familiar with this letter, but the other members of the panel will not be or may not be. This was the letter written to the parties in the Umbrella Proceedings and ourselves following a CMC that took place last November in the Umbrella Proceedings. We were not made a party to the Umbrella Proceedings, not least because, as we had said in correspondence, it didn't seem to us it was open to the Tribunal to make us a party without -- prior to certification in some form, but it sets out -- it is the precursor to what became the order that was drawn up on 13th January, and it is probably more useful to look at it here, because there is narrative here which doesn't get into the rather briefer order of 13th January.

It is the narrative as to what the Tribunal sees as the programme for the Umbrella Proceedings going forward. I think we can ignore the Volvo limitation point. It is not a point we are taking. That's a trial which is happening later this month in the Umbrella Proceedings.

The programme is on the following page, 6398, and it falls into four parts: an evidential hearing, which we have discussed, to take place in May, as said there to deal with evidential points relating to pass-on. The parties in the Merricks collective proceedings shall participate in the evidential hearing and the process leading up to that hearing for specifying exactly what evidence they intend to adduce to demonstrate their respective cases on pass-on. The content of and process before this evidential hearing is the subject of the Tribunal's further thoughts below.

We have been kept in the loop of some of the correspondence for that hearing, although we have not been the addressee of any of the orders, but we will come back to that in a moment.

Then there is the six-week liability trial, which is called Trial 1, taking place in early 2024, which is anticipated -- that is followed by Trial 2 in October or November 2024, which is to deal with pass-on, both acquirer and merchant pass-on. So the evidential hearing is a preliminary to Trial 2 taking place at the back end of next year, and to some degree until the evidential hearing has produced an outcome, the framework for that trial will presumably not be fully set. Then Trial 3 leaves everything else over.

What is in Trial 1? They are defined by reference to the issues which I will come to in a moment. I have made clear it is Article 101(1), not 101(3). So at the moment 101(3), exemption issues are for Trial 3. So the Tribunal is not going to get to exemption presumably until 2025 now the way things are structured in this and in the order. I think that may have more to do with the way the Merricks proceedings were

going rather than anything else. There is a practical logic rather than necessarily an intellectual logic.

The Trial 2 issues are excluded, so pass-on. Article 102 is excluded. Then importantly, because it is relevant to some of the points we were discussing yesterday about non-EU parties, non-UK Irish MIFs unless it's substance such as Italy provided there is consensus -- sorry. What is excluded is non-UK/Irish MIFs unless of substance, such as Italy, provided there is a consensus among the parties that their inclusion would be desirable and possible within the time estimate. In any event no more than two shall be heard at Trial 1. The parties are directed to liaise and reach agreement as to which, if any, of the non-UK/Irish MIFs stated in issue 6 -- I will come back to that -- should be included in Trial 1. The parties are to update the Tribunal as to their agreement and so forth.

So essentially all the discussion about non-UK MIFs which we had yesterday in our proceedings is back-to-back with what's going on in the Umbrella Proceedings. There was left open the possibility that one or two non-UK jurisdictions will be brought into Trial 1, but, as you can see, it is only a possibility and, as it were, the default position is that non-UK jurisdictions become presumably part of Trial 3, which at the moment is entirely unprogrammed.

The Tribunal then on page 6398 in part 2, and I don't think we need to go through it, then leads off with its views as to how trial 2 might be dealt with. It is headed "Thoughts in relation to the evidential hearing", but that's the launch point for Trial 2, which is the pass-on hearing. It is clearly just the Tribunal indicating some of the practical problems about the way in which different findings will bind our cases and how that might be dealt with and identifying problems with, for example, sampling, expert-led. These are three options, but they are not the exhaustive options.

That, of course, is the process to which we have sought to contribute by putting in

our pass-on proposals, which were the subject of the application yesterday.

Worth just then taking it a little step further to see what is actually involved in these issues. If we go to 6186, which I think is in file C, we have the list of issues which is, as it were, the agenda, as we can see, for the discussion around issues at the November CMC.

MR TIDSWELL: The number was?

MR BOWSHER: 6186. This is not quite the entire document in the sense that there are one or two other documents which comment on this document, but this is the agenda that when the reference to issues in the letter we were just looking at is a reference to this list, and this, in our submission, is plainly the blueprint for dealing with the issues in the Umbrella Proceedings, and it is that which we have sought to integrate ourselves with.

Sorry. I am not sure if I laboured the point when we were there, but in the letter we were just looking at, and as reflected in the order of the Tribunal, the issues for Trial 1 are 1 to 5 and 7 to 13 and then there is the reference to issue 6, which we will see in a moment, which is the non-EU.

We can see what is -- I was not proposing to read it all out, but you can see what its structure is. Issue 1 on 6186 is relative competitive dynamics and market definition. There's a description of the issues in column 2, which is quite lengthy. It is done by reference -- you can see it is done by reference to a number of different sets of pleadings in the Umbrella Proceedings, but without reading all of that out, issue 1 is a reasonably comprehensive description of the issue about the operation, as it says in the heading, the competitive dynamics of market definition of the acquirer market.

Then column 3 identifies method of determination. This is the same structure for all of these issues. You have set out a menu of the material which is going to be put forward and the recurring theme in all of these issues is economist evidence, maybe

payment systems evidence, factual evidence, and the reference is largely from issuers and acquirers, factual evidence from a representative sample of the claimants on the "Must take" point only. I don't think I need to go over that now. Then some documentary disclosure.

We see issue 2 is page 6186, point 4. At this point one ends up dealing with slightly different versions of the issues for Visa and Mastercard. Under issue two -- I think we can just use the heading as a shorthand. Whether there is a relative agreement or concerted practice or decision of an associated undertakings in respect of the overcharge. There is nuance to that and it is an over-simplification, but that's plainly part of the Article 101(1) issue.

Then 6168.8, issue 3, post IFR. It seems to us unlikely that's very relevant to our claim for reasons which we went over yesterday, but I don't need to go into that.

Then there's issue 4, which deals with interregional MIFs, which raises a specific issue. Can the claims in relation to interregional MIFs be materially distinguished from the essential factual basis of ... You will recognise that point. That's our primary -- that's a re-casting of our primary case and the evidence there under the method of determination is again economist evidence, factual evidence from the defendants, documentary disclosure from the defendants and then I think at the last moment someone has added in some evidence from the claimants about the operation of merchant service agreements, but that is -- then there's further material, but if there is -- if it is to be distinguished, was it possible – did the interregional MIFs have the effect of restricting competition on any relevant market. Again similar evidence source. I don't want to laboriously go through it. It becomes fairly obvious, the logic, as you go through. This is the same mapping of the Article 101 issues with some one or two obvious changes.

That takes us through to issue 5, which is commercial cards. It is a similar sort of

narrative for that.

Issue 6 is at 6186.21. That is the non-UK/Irish domestic MIFs which is sort of half in, half out in the way I have shown you in the letter.

Then the other issues for trial are 7 to 13. Again for each of these there is already a method of determination laid down in the list of issues.

In a number of places there is legal argument added to the list but generally speaking for all of these the core material is legal argument, economist expert evidence, sometimes payment services evidence, factual witness evidence from the issuers and sometimes the acquirers, some disclosure and in one or two specific cases some material from the claimants, but plainly and not surprisingly, as we discussed yesterday, the starting point is material from the defendants.

So that is what we have in mind when looking at how we might try to catch up with the Umbrella Proceedings, if I can put it that way. What we said in our reply when seeking to set out our plan for taking the case forward and reconciling with the Umbrella Proceedings, that is in the Core Bundle. Unless there are any questions about that, I was not going to go through each and every one of the remaining issues, which are specific points.

MR TIDSWELL: No. We can look at the issues later ourselves.

MR BOWSHER: I mean, it is --

MR TIDSWELL: I think it would be helpful to go -- I don't know whether you are going to take us to the reply, but I think the question of how you are actually going to do this is --

MR BOWSHER: That is what I am going to do. Exactly. Unless there is anything specific on that list of issues about that, I don't think there is anything -- I was going to go to the reply. We have it in the Core Bundle at tab 37. That was our reply. So this is the reply to the CPO responses.

MR TIDSWELL: Yes.

MR BOWSHER: That's the document that was put in -- I can't remember what the date would have been. 13th March, something like that, about three weeks after the CPO responses were filed.

MR TIDSWELL: Which paragraph?

MR BOWSHER: The heading starts at page 910. There is quite a lot of preliminary material about how the claims relate to each other, which I would reiterate without wishing to re-read that now. I was going to jump straight to the timetable issues, which start at paragraph 50 on page 915. They come with some context beforehand.

It is said the complaint in short is:

"This is because the timetable for the collective proceedings and that for the Umbrella Proceedings do not align, as in the latter two trials are already listed. Visa contend that to avoid inefficiencies the Tribunal will very likely jointly case manage these proceedings and the Umbrella Proceedings, but that would be problematic, as the collective proceedings parties" --

MR TIDSWELL: We have had the opportunity to read that. No need to read it to us.

MR BOWSHER: Sorry.

MR TIDSWELL: Just a couple of points on this. There are a couple points here. One is the question you are addressing which is: is it practically feasible for you to catch up? Obviously you will say what you are going to say about that, but in some ways we are more -- just stepping back from that a little bit there is a first question, which is how do you actually plan to run this case, because what's not apparent to us after the discussion yesterday and the reliance that has been placed on these Umbrella Proceedings in particular is what steps you are going to take independent of the Umbrella Proceedings that are required and necessary in order for you to

progress the case.

In other words, you could be saying to us on the articulation of the issues that you have just been through much better than mirror the questions of liability in this case in these proceedings. Are you anticipating doing anything else other than tucking into the Umbrella Proceedings? If the answer to that is "yes", what is that and how are you identifying those things and articulating them to us, because if one goes back to your litigation plan, it doesn't do that. I appreciate that that was thought of a long time ago. If the world has changed, which it arguably has, I think we are left in some uncertainty as to what your plan actually is.

Just to take an example on that, just so we are clear where you are coming from, we spent a bit of time talking about acquirer pass-on. We have seen material in Appendix B of Mr von Hinten-Reed's second or third report I think. Clearly there is a lot of work to be done. The other involves approaching the acquirer and asking for information and so on. You talked a bit about that yesterday and made some submissions on it. Clearly that is very similar, if not identical, to an exercise that has to be carried out in the Umbrella Proceedings. If it is to be carried out in the Umbrella Proceedings, who is going to do it, are you going to do it and no-one else is ever going to do it again because of the way you have done it, or is there going to be some coordination with the Umbrella Proceedings so that it is done between the two, or is it just going to be done in the Umbrella Proceedings and are you going to wait to catch up with it. Catch up is the wrong word. You are tagging behind it is perhaps a better way of putting it. That's the sort of question we have in mind. At the moment there is not a great deal of clarity for reasons which might be quite reasonable as far as the litigation plan goes. There is not a lot of clarity about how you see these proceedings going forward.

MR BOWSHER: Let me come to pass-on. I think pass-on is the practically difficult

one. It is practically difficult simply because of chronology rather than anything else, because the evidential hearing is soon. Let me deal with pass-on in a moment.

In terms of other aspects of the claim, plainly there would be -- if we were certified, there would then have to be directions as to pleading out the case and the next step would presumably be defences and so on and so forth. We would -- I am not going to pre-empt now when that might reasonably be done, but we would assume, and we can't think of any reason why this is not a fair assumption for both us and the Tribunal to make, that at the very least on the liability questions, so all the Trial 1, Trial 2 and probably also Article 101(3) questions, which are for Trial 3 sometime in 2025, whatever the points that are raised in the pleadings will be the same as or map across with some mutatis mutandis sort of point from the Umbrella Proceedings. It will be very interesting if something new crops up.

If we were certified, we would propose from the day of certification to proceed on that assumption. Obviously there might have to be some mid-course correction if a defence came in a couple of months later with a new issue. We would have to come back and deal with it, but we can't anticipate everything.

There is we would suggest more than enough by way of a blueprint here for Trial 1 for us to get on board with that.

MR TIDSWELL: There being a list of issues.

MR BOWSHER: The list of issues. Frankly this is an agenda for trial. There might -- we might want to say we wish it was a little bit different, but we are prepared to work with that list of issues and have that as the agenda for trial as it is in the Umbrella Proceedings and work on that basis. Insofar as we need to give some further disclosure, we will seek to do that, but, as we can see, that in a sense is not really the burden of the problem, because all of that work -- nearly all of the work in terms of preparation of documents, the production of disclosure and so on and so

forth in the Trial 1 stage comes from the defendants. We have seen that from the list. So we would live with that agenda.

No doubt applications can be made and people can point out things that we should be producing, but that does not seem to us to be a real problem, and that is what we say in -- we have set out in that, I am sure more elegantly in paragraph 52 of our reply on page 916.

MR TIDSWELL: So you would anticipate being active in the Umbrella Proceedings if certified and if permitted to join them?

MR BOWSHER: Yes.

MR TIDSWELL: You would anticipate being active in those proceedings in the same way as the other claimant groups would be.

MR BOWSHER: Yes.

MR TIDSWELL: But you wouldn't be pursuing, for example, any of items 1 to 5 or 7 to 13 independently of those proceedings.

MR BOWSHER: No.

MR TIDSWELL: You would be tucking in.

MR BOWSHER: And no doubt seeking to arrange with the other claimants appropriate, you know, arrangements as to who bears the burden of running that issue, you know, the usual sorts of --

MR TIDSWELL: Yes, avoiding duplication by the parties.

MR BOWSHER: Duplication avoidance case management which are done in these cases.

Issue 6 I think we can -- issue 6 is a common issue, not in that sense. Issue 6 is a problem in the umbrella proceedings and it obviously has a reflection in our case.

MR TIDSWELL: At the moment that has --

MR BOWSHER: Put away until 2025.

MR TIDSWELL: Put down the timetable and you would have to follow I think --

MR BOWSHER: We would have to follow that.

MR TIDSWELL: You are not going to be able to turn up and say "We want to deal with all these things in the proceedings now".

MR BOWSHER: Yes. We wouldn't be trying to bring it forward. We might seek to join a discussion as to whether or not one or two markets should be brought into Trial 1.

MR TIDSWELL: Additional to the ones that are already --

MR BOWSHER: No. They are not yet identified.

MR TIDSWELL: I think that has been resolved, that I believe we have decided --

MR BOWSHER: I have not seen that direction online. It has not been sent to us I think.

MR TIDSWELL: I think this has been resolved. I can check that and let you know.

MR BOWSHER: I am sure the wisdom of others will be appropriate and we will just have to live with that. There wouldn't be any point in us trying to -- unless it was -- we would have to look at that, but I don't imagine that we would be wanting to -- we would not be wanting to disrupt Trial 1 by saying "Let's take on Germany" with some huge new task.

MR TIDSWELL: Yes. Further out -- I think the example of acquirer pass-on is quite instructive, because actually if there were no other proceedings and you were coming to us and saying "This is how we want to deal with acquirer pass-on", it would make a lot of sense to start that process now of seeking third party disclosure, if that is what you sought to do, because you would otherwise -- you might find that was not possible or indeed it was not possible in the way you felt, and that would have a significant bearing on the way the claim unfolds. We might be saying to you "Yes, you can proceed but you have to get on with that".

Clearly we are not going to be saying that in circumstances where that is plainly going to be a subject to be dealt with, however it is going to be dealt with in the Umbrella Proceedings. So there the question becomes do you again accept that you are tucking in on that or are you going to try to row your own boat on that?

MR BOWSHER: The ideal situation, and this puts huge pressure on this panel, the Tribunal, would be that in one way or another we were enabled to participate in the May hearing on the basis of the pass-on proposals that we have submitted. Now we have not had -- where the evidential hearing stands, as I understand it, and everyone else in the room probably knows better than me where they stand, but my understanding is that the claimants submitted their proposals presumably on the 13th -- would it have been the 13th -- it was a couple of weeks ago anyway. We have submitted ours in the hope that they could be a contribution to that hearing. The defendants have not yet produced their counter-proposals, but are about to do so I believe, but we have not seen them. For whatever reason, and not a criticism, we have not seen any of this material. There would be counter proposals from the defendants. There is then supposed to be a period of discussion and liaison leading up to provision of written submissions I think some time in the early/middle May with a hearing on 20 something of May.

I hesitate to start computing all sorts of back-ups. That puts a huge pressure on this panel to take a certification decision quickly if it were able to do and we were able to simply tuck in that hearing, we would be content to participate, make our proposals about acquirer pass-on and merchant pass-on and accommodate ourselves as part of whatever the output of that hearing was. I think you will understand that those instructing me would be a little less happy to do so if we were unrepresented and unavailable -- unable to make any representations at that hearing, because we might find a point where we are, to be blunt, Mr von Hinten-Reed, or those instructing me

are forced into a route which we just think is a wrong route in dealing with our claim.

MR TIDSWELL: That is a subject for another day. I think the whole point of the Umbrella Proceedings is to avoid the satellite determination of these issues.

MR BOWSHER: Exactly.

MR TIDSWELL: So I think if you were to take that position, I can't understand what you are saying about if you are not part of the design, then you are not sure you want to live in the house, but it may be that that does have quite a significant impact on the timetabling in your case, because it may well be that the Tribunal more broadly, not this panel, but the Tribunal more broadly, says that's how they are going to allocate the resources, but that's perhaps not an issue for today.

MR BOWSHER: There are all sorts of practical resourcing reasons. I mean, it makes no sense for our purposes to try to do this twice and then to try to persuade the Tribunal in 2026 to come up with a view on acquirer pass-on which is flatly contrary to the view it reached in 2024. That's obviously not forensically, practically or financially what we would want to be doing.

MR TIDSWELL: No, I understand that. So I think you are reserving the position about being involved on the design, which is understandable, but broadly speaking you are saying where you can, you would want to be part of the Umbrella Proceedings for the resolution of issues that are common between those and these proceedings.

MR BOWSHER: Yes, and the same would apply for 101(3). I am not quite sure why they are so far down the track, but at the moment they seem to be off to 2025. In terms of the blueprint for dealing with them -- we discussed this yesterday -- there is a blueprint -- we didn't take you to it, but as you will all know, there is a set of issues in there which sets out the blueprint for 101(3). That appears to be the blueprint for the issues that are currently being run. When I say currently being run, I think over

the years the defendants have run, I think it would be fair to say dozens of exemption arguments, most of which are not still run. Which ones are the favourites either when we get a defence, or in 2025, 2026, we will just have to see and we will have to deal with them on their merits, but in broad principle we would -- if it is the ones that are in the list of issues we will deal with them broadly in the same way.

MR TIDSWELL: That's helpful. One other question for later today. The litigation budgets.

MR BOWSHER: Yes.

MR TIDSWELL: At the moment I think we are given four separate budgets for each of the actions.

MR BOWSHER: Yes.

MR TIDSWELL: Each of the budgets is for about £19 million.

MR BOWSHER: Yes.

MR TIDSWELL: That seems on any basis for the four sets of actions an awful lot of money, but presumably if you are adopting the approach you are suggesting where an awful lot of the work's being shared, those budgets will look quite different, won't they?

MR BOWSHER: Very different, as so often in these cases. Well, it is always a tricky one, isn't it, when you get into these questions about budgeting?

MR TIDSWELL: It seems somewhat unlikely that you could justify spending £40 million when you are participating in the Umbrella Proceedings for almost --

MR BOWSHER: I hear something being said behind me and I have a feeling it might be relevant to what you are asking me.

MR TIDSWELL: Yes, of course.

MR BOWSHER: Could I just check so I don't -- so that I tell you the right thing?

MR TIDSWELL: Yes.

MR BOWSHER: We can provide a note on this so we get it absolutely right, but I am told that there are, in fact, three budgets, one for opt-in and two for opt-out. The total is £34 million.

MR TIDSWELL: Total for three?

MR BOWSHER: For three. If it is an issue which you want us to clarify, we can --

MR TIDSWELL: I think it would be helpful. In a way what's more helpful as an indication of -- if we are now really running a different litigation plan, which is what I think you are telling us.

MR BOWSHER: Yes.

MR TIDSWELL: Which is for all the reasons you have explained and we don't need to get into why -- we may need to get into why and wherefore, but for present purposes we don't -- I think it would be helpful to know if you think the budget is going to be materially different, and I appreciate I don't want people to be re-working it now and trying to give us something before tomorrow, but it would certainly be helpful to us to have some indication of whether that budget is still viewed as being correct and a clear articulation of what it currently is in total over the four proceedings and an indication as to whether or not you intend to revise it.

MR BOWSHER: Can I just check. I was about to make an offer, but can I just check before I make that?

MR TIDSWELL: Yes, of course.

MR BOWSHER: What I was going to propose is that those instructing me write into the Tribunal before the week-end. They have heard the questions and are trying to clarify it. Would that be helpful?

MR TIDSWELL: I think it would certainly be helpful to have clarification on what the budget absolutely is by the time we finish the hearing. So if you can tell us the answer to that.

MR BOWSHER: The answer to that is £34 million at the moment. I can tell you that now. If there's anything -- maybe we don't need to write in --

MR TIDSWELL: Why don't we -- I am sure there is going to be plenty said about it. Why don't we come back to it. I am just conscious of the time.

MR BOWSHER: I said only 15 minutes and I have gone too far. I have gone right into my time. If there are points you want to raise with me --

MR TIDSWELL: I have nothing else at the moment unless you want to say anything else about the timetable point.

MR BOWSHER: In short, we say there's a blueprint and we are keen to do what we can to avoid wasting time and money so far as we can. That's the shorthand.

MR TIDSWELL: Good. Thank you very much.

Submissions by MS TOLANEY KC

MS TOLANEY: Sir, just to pick up on one point. You were right that it has already been ruled in the Umbrella Proceedings that no non-UK/Irish MIFs will be in the trial in 2024.

MR TIDSWELL: Yes. I think we debated with the idea of Italians but decided it was too difficult.

MS TOLANEY: Just standing back you have had a lot of information in the last day or so. It is necessary for the Tribunal to look at what the objective of collective proceedings actually is. It is to provide a vehicle for redress for those who cannot bring claims themselves. That's what the Supreme Court said in Merricks and the purpose of the regime as set out in that case was to enable small businesses and consumers to bring their claims.

The point is that rather than requiring individual consumers to bring their own claims, a regime was put in place to permit claims to be advanced collectively by

an authorised representative on behalf of a class.

So you immediately see it is a matter of case management and common sense. First of all, in order for claims to be advanced collectively there needs to be a clearly defined class with a commonality of issues.

Second, there is no doubt that the collective proceedings regime is burdensome. It gives rise to additional administrative burdens, and substantial, as you have just heard, litigation costs. The proceedings require a PCR and they require the Tribunal to case manage a large number of claims, which takes up significant time of the Tribunal. Again you can see that all considered in the minority judgment in the Merricks case, a Supreme Court decision.

The other point I think, sir, you had in mind is that collective proceedings also impose a burden on the members of the proposed class. For example, it takes away the freedom of individuals to bring their own claims, requiring them to notify the PCR of their intention to opt in or opt out, as the case may be, and also restricts their ability to settle claims.

So in light of all of that there has to be very good reason for the regime to be imposed and the Tribunal needs to be satisfied that it is appropriate to do so. That's the suitability question in a nutshell, and it involves a multi-factorial assessment.

So just turning then to the factors to which the Tribunal must have regard. First of all, the Tribunal must be clear about the nature and the scope of the class itself, and that includes questions of whether the class is clearly defined. Can those within the class identify whether they fall within the class definition? How wide is the class and how diverse is the class? Those are all questions that need to be considered.

The second factor for the Tribunal is how in practice will it be possible to ensure that the claims would be advanced and heard in an efficient manner? In order to satisfy that crucial requirement, the PCR must put forward developed and realistic

proposals for how it proposes to make the claim good and what directions the Tribunal will have to make to ensure an effective trial at some point in the future and that is the methodology requirement and I am going to come back to that, but in a nutshell it has to be a workable methodology which doesn't defer practical questions about how collectively the issues are to be determined.

That's a very important point, that the Tribunal has to be satisfied before certifying proceedings as collective proceedings, how exactly they are going to work in practice. It has been quite clear from the submissions we have heard that we are nowhere near that. In fact, the proposals have continually evolved over the last day, even in the last 15 minutes.

The methodology requirement, just to cover this off, doesn't limit itself to quantum issues, but it does extend to all issues, including liability. We heard yesterday for the first time -- this was not in the written document before the Tribunal -- my learned friend's suggestion that there is a difference between method and methodology. Just to give you an example, that was in Day 1 of the transcript, page 72, line 10, to page 72, line 20. What in a nutshell my learned friend said was:

"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 cases by the defendants are really saying this method won't work. Methodology and method are not the same."

He tried to suggest that something in general terms is a methodology and something more granular would be a method.

Now I will come on to show you that that is absolutely not what the authorities say, and there is a passage in the McLaren decision at paragraph 76 that says in terms that methodology is a method. So that rather undermines the point made, and it seemed to be the hook of justifying the absence of a proper proposal or methodology to this Tribunal.

I think, sir, you have already picked up from all the authorities that the methodology needs to be sufficiently credible and plausible to offer a realistic prospect of establishing liability, causation of loss and quantum on a class wide basis.

The third factor the Tribunal has to have regard to is to be satisfied that collective proceedings are relatively preferable to individual proceedings. Part of that assessment will include whether a collective proceedings order is necessary and appropriate, including whether it's beneficial to the class itself.

So if, as is the case here, many of the proposed claimants are sophisticated and well resourced, many have already brought and resolved individual claims, and a CPO could undermine those other cases, including the Umbrella Proceedings and the case management decisions made there -- you heard one of the submissions made that there was going to be an attempt to try to introduce different jurisdictions in those proceedings by way of an example. That could be the type of application that gets made. All of those points need to be taken into account.

The fourth factor is that the Tribunal will need to be confident in particular in relation to opt-out claims that the claims are suitable for an aggregate award of damages. Those are all the factors that will go into the assessment.

The Tribunal, of course, also needs to be satisfied on the separate question of authorisation, so that even if a collective proceedings Order would otherwise be appropriate and all of those hurdles have been overcome, is the proposed class representative a suitable person to take control of claims belonging to third parties? That's particularly important for opt-out claims, where many of the class members will not know that the claim is being brought on their behalf.

Now all of those points fall within the PCR's remit and the burden is on them to satisfy this Tribunal that right now the Tribunal with its role as gatekeeper can be satisfied that collective proceedings are not only sensible but appropriate, beneficial,

realistic and practical.

I accept that that doesn't require the PCR to satisfy the Tribunal as to the merits of its claims, but as the Tribunal said in the Meta case at paragraph 38(3):

"It is entirely right and proper that the Tribunal be satisfied that the proposed class representative knows how it is proposed to make the claim good, or to put the point another way, what directions the Tribunal will either immediately or in due course have to make so as to ensure an effective trial at some point in the future."

Now, sir, in this case we say it's clear that an order should not be made and that, in fact, this case is a far more extreme example than the cases of Meta or FX in which certification was refused for reasons I will develop. I will also put a marker down at this stage that the application impermissibly ignores the decisions in the Dune case. That's a binding decision of the Court of Appeal.

With that introduction can I outline the structure of my submissions and then I will come on to develop those?

MR TIDSWELL: Yes.

MS TOLANEY: First of all, I am going to summarise why the application should be refused and the defects in it. I am going to take a little bit more time than one would ordinarily do on a summary simply because Mr Kennelly and I have split the points. So by the time I get to the back end of the points, you may have forgotten what they were. So I will summarise it in detail. I will then briefly deal with the legal principles relevant to certification of a collective action and then I will turn to methodology, which will be the main point I am going to develop. I will briefly deal only with commonality.

Mr Kennelly will then add any Visa specific points to those topics before addressing the Tribunal on the factors other than methodology and commonality relevant to the assessment of suitability.

Then, time permitting, I will come back briefly to address the position on the aggregate award of damages and strength of claims on the opt out proceedings and authorisation. Those last two points are covered in detail in the written submissions. So we may have to see how we manage our time between us but certainly methodology and suitability we will focus on between us.

Can I start by looking at the class definition which is absolutely central to the application? If we go to the Core Bundle at tab 6, please, this is the Mastercard opt-in claim form. If one goes to Annex 13 of that, which is at page 110, I will just let you read that and then I want to show you the opt out class definition as well.

The opt-out class definition we can see in the Visa document, which is in the Core Bundle at tab 15, page 350, this is the opt-out one at Annex 13. Again, you can read at paragraph 2 the opt-out class definition. That's page 350, tab 15 of the Core Bundle.

MR TIDSWELL: Yes.

MS TOLANEY: So three points on the class definition. First of all, in both cases the proposed classes are very wide and diverse and these points are addressed just so you have the reference in Mastercard's CPO response at paragraphs 2.9 to 2.12 and that's in the Core Bundle which is at tab 29, if you want that to hand.

So looking at the width and diversity, we can break that down. First of all, the classes are not limited to any sector. So the proposed class in each case will include claimants from all sectors operating in many product and geographical markets. That's the second factor that's not limited by geographical location. The opt in claim includes merchants who have paid commercial and interregional MIFs in respect of transactions which occurred in the UK or the EU before 1st January 2021. That's obviously very relevant to some of the submissions that have been made in the Umbrella Proceedings. The classes are also not limited by size. Within the

scope of each class, subject to the £100 million threshold, there will be a huge variety of the size of the merchants captured within each class and that matters because the extent to which each merchant paid commercial or interregional MIFs will depend on the type of transactions they were entering into, and that will depend at the very least on the sector where they are located, what their size is and so on. So in turn that's going to have a bearing on commonality, because the more diverse the class, the harder it is to justify collective proceedings.

Take an example. The diverse team in the class will mean that pass-on cannot realistically be approached using sectoral averages. That point is made in our CPO response at paragraph 4.72.

Just to take this head on, none of these problems can be cured by the wielding of the broad axe, because the more diverse and disparate the data available, the less easy it is simply to make assumptions. All of these issues have to be grappled with when you come to look at the methodology proposed which I will develop.

MR TIDSWELL: The geographical point -- am I right in saying the geographical point is that both of them, both the opt in and opt out specify the transaction has to occur in the UK or in the case of the opt in, the EU? That's where the terminal is, but your point is that the merchant could be based anywhere. So an example of that would be a French retailer who had a shop on King's Road or something like that, I suppose. So, in fact, it is not limited to anything at all, is it?

MS TOLANEY: It is not limited. Indeed, I think my learned friend recognised that yesterday. I will come on to show you that concession, that he recognises is going to go broader, which is one of the reasons why there was a submission made that perhaps we could add in some more jurisdictions into the Umbrella Proceedings, because otherwise none of that aspect of the claim is going to be determined even on his own proposal.

MR TIDSWELL: If we stick it -- perhaps you had better come to this. I don't want to take this out of turn. If we are dealing with the opt-out claim -- so forget about the merchants in the EU in the opt in proceedings -- are you saying that you could have, let's take a Canadian retailer who has a shop on King's Road and therefore uses a terminal. So you are saying the merchant is actually based somewhere else and the transaction is here and therefore has jurisdiction and is then covered by the class. Then does that give rise to issues about the Canadian market in other respects, because the acquirer market that is being dealt is still the UK one?

MS TOLANEY: That's right.

MR TIDSWELL: That is a different issue from the opt-in case where the merchant is in Italy and the terminal is in Italy. Yes.

MS TOLANEY: Exactly.

MR TIDSWELL: That is helpful.

MS TOLANEY: You can see the breadth of the opt-in claim. It hasn't been grappled with at all in the submissions you have heard, bar for one throw away comment yesterday, which I'll come to.

MR TIDSWELL: Yes.

MS TOLANEY: I said there were three points on the class. The second point is that the proposed classes are not comprised of consumers. So it's very different from the Merricks case considered by the Supreme Court. In respect of the opt-in claim the class is entirely made up of large merchants including some of the largest and most sophisticated merchants in the world, many of whom have already brought or settled claims.

This is all set out in our CPO response at paragraph 4.8 to 4.19, and just to remind you -- I will just give you quickly the figures -- Mr von Hinten-Reed stated in his opt in report 1 that there might be some 70 potential class members in the airline, car hire

and hotel sectors. That was the table we looked at briefly yesterday, Table 4.1.

MR TIDSWELL: Yes.

MS TOLANEY: Now Dr Niels' analysis shows that of those potential class members from those sectors, 38 corporate groups can be identified based on other data. 7 have turnover lower than 1 billion. 19 have turnover between 1 billion and 5 billion. 12 groups have turnover of above 5 billion. So these are plainly not the kind of small businesses or consumers for whose benefit the collective proceedings regime was established. Similarly, in the opt out class Dr Niels has estimated that the class will include a smaller number of larger enterprises which are likely to constitute a majority of the claims value.

The third factor on the classes is that the estimated value and the number of the class in both actions is undoubtedly overstated. Again this wasn't properly grappled with in my learned friend's submissions and that is because of the extent of litigation and settlement. The relevant evidence is summarised in our CPO response at paragraphs 4.5 to 4.10 for opt-in and 5.5 for opt-out.

So taking the opt-in claim first, the PCRs estimated the value of the opt-in claim to be £256 million and that was considering only the three sectors they have alighted on, hotel, airline, car rental and that's in Mr von Hinten-Reed's first report at paragraph 94. However, his second report now accepts that it is possible that he has overestimated the number of merchants in the class and the value of the claim for the three specific sectors that he identified. That's in paragraph 15 of his second report.

Now Mastercard's position is that the claims value is undoubtedly overstated, because no account has been taken of the large number of claims that have already been brought and settled and the detail is set out in our response and the references I have given. That is all in addition to the other problems with Mr von Hinten-Reed's

approach, for example, assuming 100% merchant acquirer pass-on and 0% merchant pass-on.

Indeed, Mastercard's expert evidence is that of the potential 70 class members, between 49% to 61% of the total number have settled or are in mitigation already. These merchants account for 74% to 85% of the total transaction volumes. In the three sectors Mr von Hinten-Reed has identified, the extent of prior settlement and litigation is very significant. So 61 airlines have settled, two are still litigating. 42 car rental undertakings brought and settled claims, one is still litigating, and 25 hotel firms have settled claims.

Now the skeleton argument served by my learned friend said nothing about Mastercard's expert evidence, and in the submissions yesterday there is not a great deal of engagement with these points. I just flag that because these are not reply points, because this is a positive case that is being run by the PCRs as to the benefits of these proceedings based on the value and numbers involved and they are simply wrong.

My learned friend focused on I think lower numbers in respect of the Visa litigation, but he has to justify the applications against Mastercard.

So turning now to the opt-out claim, the PCRs estimated the value of the claim to be circa £225 million. That was in Mr von Hinten-Reed's opt out report number 1, and again it was overestimated because no account was taken of the numbers who had already settled or brought litigation and the exact number can be seen in the unredacted version of the CPO response served by Mastercard at 5.31. Just so you have it, that's in the main bundle and that's Volume C, on page 3978.

There's a dispute, as you know, potentially in relation to one settlement agreement as to the scope of the settlement agreement, and we don't need to determine that -- that's common ground -- today, but it doesn't really help my learned friend, because

whatever points he takes on disputing the scope, he accepts that a certain number of claims, the ones that predate the settlement agreement, have been settled, and he accepts that a person with a validly settled claim is barred from relitigating that claim. That's in their skeleton argument at paragraph 72, but that immediately, (a) undermines the estimates that have been put forward and (b) highlights the problem that there is no clear mechanism to ensure that such an abuse of process does not come about in the proposals put forward.

So turning then to the application in light of that wide class definition, the five fundamental defects with the application are summarised in our skeleton argument at paragraph 1.6. The first and frankly fatal defect is that the PCRs simply do not advance a workable methodology in respect of even the most critical aspects of the claims and, as you know, the original application and the expert evidence of Mr von Hinten-Reed failed to address some of the key points. It dealt only with three sectors. It dealt only with the UK. It made no proposals to determine infringement and instead assumed that MIFs are entirely unlawful. It assumed 100% acquirer pass-on and made no proposal to assess it. It assumed 0% merchant pass-on and made no proposal to assess it. And it ignored all other issues as to quantum other than I think two sentences on simple interest.

Then after the reply we have had two further reports, but the methodology remains unworkable. So on infringement, and I am just going to quickly outline what the points are and then I will develop them.

MR TIDSWELL: Yes.

MS TOLANEY: On infringement the PCRs now essentially say they intend to rely on findings in other cases and they point to the reasoning in Sainsbury's and of the European Commission, but ignore that the Tribunal and the Court of Appeal in the Dune case have made it clear that a claimant cannot simply read across those

findings about consumer MIFs to the MIFs in issue in these proceedings.

What's required, looking at the Court of Appeal decision, is that the claimant has to demonstrate on the facts that the same conclusions apply. So the Court of Appeal's decision makes this plain that a methodology on the facts would be needed at this stage before collective proceedings could be ordered.

The PCRs then fall back on the umbrella merchant proceedings and say that infringement will be determined in those proceedings, and I know that Mr Kennelly is going to develop that particular area, but in a nutshell, sir, that's not a substitute for methodology in these proceedings to determine the issues in these proceedings. You can't ask for proceedings to be certified by pointing at another set of proceedings and saying essentially one day the relevant point might be determined in those proceedings, or at least bits of the relevant point, because that's the essential submission.

Just standing back, it would be incredibly dangerous for this Tribunal to rely on other proceedings in respect of central issues forming a central part of the case here, because we have no idea of how infringement is going to be determined in the umbrella case. We don't know whether the claimants in the Umbrella Proceedings will ultimately put forward a workable methodology. That question has not even been dealt with. What we do know is that next year's trial will deal only with infringement in the UK. We have covered this. There is no proposal at all as to how infringement will be dealt with in other markets by my learned friend, and those markets form part of this claim, as we have just discussed, and it doesn't also allow for the possibility that the Umbrella Proceedings may or may not settle. So relying on that as a point of certification -- it is different if one was relying on it to say here is a claim I am going to bring and I will wait to see what happens, but this is a collective proceedings application.

We then look at the further defects, because even if --

DR BISHOP: Can I just ask a question? It occurred to me that the Umbrella Proceedings might settle or could settle, given the large number of people involved. The concept is that all of these people involved in the Umbrella Proceedings would agree with the current schemes on the other side and everyone would reach an agreement on the points at issue in the Umbrella Proceedings. Is that the concept?

MS TOLANEY: That's obviously a possibility. So in various examples just in High Court litigation there have been many group litigation order cases, take the RBS litigation, which had just as many claimants, just as much value and that did settle. I have no reason to believe either way what might happen in the Umbrella Proceedings. I am simply saying that hypothetically one cannot pin a methodology on what might happen in other proceedings, because what might happen in those proceedings may never happen. It is inherently uncertain.

DR BISHOP: Okay. Thank you.

MS TOLANEY: Even if you were prepared to give the benefit of the doubt on infringement, there remain, however, fundamental gaps in the assessment of damages in any event. So acquirer pass-on is indispensable to the PCRs case on infringement, causation and quantum. What we have, and I will show you this in more detail, on acquirer pass-on is a wish list of documents and evidence. It is based on an obviously ill-conceived idea that the third-party acquirers will willingly provide very extensive disclosure and evidence about something commercially very sensitive, for example, their internal pricing methods. No thought has gone into, we would say, how that could possibly work. I will show you that there is no budget for it in the estimates that have been put forward. So it is not a developed proposal as to how evidence will be acquired.

The reply and the reply reports make clear that this methodology was proposed only for the UK, but then my learned friend on his feet yesterday simply said that the same approach could be taken for obtaining disclosure from foreign acquirers, but without explaining how that would happen, and he finally fell back on saying that we can just assume, for example, that Italy is the same as the UK, but there's no basis for that assumption.

You then turn to merchant pass-on and we have the third report of Mr von Hinten-Reed. We have only had a short time to consider that, but there are two glaring flaws in the evidence already.

The first is that it expressly declines to put forward any methodology for assessing the extent or level of surcharging, and surcharging is critical because prima facie it is likely to mean there is 100% pass-on and surcharging is widespread for transactions to which these MIFs apply. So it's a pretty large defect.

Even for other forms of pass-on the methodology would involve extensive gathering of evidence from class members and there is no explanation as to how that could work for the opt-out class, which comprises as many as 1 million merchants.

Then even putting the acquirer pass-on and the merchant pass-on defects to one side, there is then no methodology at all put forward for a host of other points that Mastercard has made plain will be in issue.

So, for example, the extent to which the MIFs prevented transactions from being diverted to other forms of payment that would be more expensive for merchants; secondly, the extent to which the MIFs delivered other benefits to merchants; thirdly, the need to account for settlements; and, fourthly, the need to take account of the possibility that the MIF was exempt at some positive level and how that would affect damages.

Now for all of these points all Mr von Hinten-Reed says is that he will account for it,

but he does not explain how. Then there are real problems in assessing the value of commerce for the opt out claim.

So just on methodology alone you have a whole host of defects that means these applications simply cannot proceed, but there are more defects, if the Tribunal needs to go beyond that, because the second defect is that there are only limited common issues. I don't need to spend a lot of time on this at the moment, but you take that from the width and diversity of the class and the fact that they will have very different operational mechanisms in different sectors with different percentages of transactions, and there will be a vast difference on the issue of pass-on, with also difference between those class members operating in the range of different national markets, potentially all 30 countries in the opt-in claim, and that might have an impact on infringement, because it will be looking at each national market separately.

There is no doubt that the PCRs are aware of this, because that's no doubt why they have only honed-in on three sectors without really explaining their position. There's also the problem of the variation in the size of the merchants, and it is difficult to see how issues such as causation and quantification of loss of diverse merchants could be resolved in a single trial.

We say that is why -- it goes hand in hand with the methodology -- is why no methodology has been put forward, because it can't be because it would be too difficult and complicated to do that for all of the diverse interests involved.

The third defect is that the claims are not suitable for collective proceedings. I have obviously identified two reasons already, the lack of a workable methodology and the lack of commonality, but there are also other relevant factors which strongly militate against ordering collective proceedings.

First of all, in value terms the opt-in claim would be brought entirely on behalf of the

large and sophisticated merchants I have already mentioned. They are not the intended beneficiaries of the collective proceedings regime. The opt-out class also includes many merchants who are of large scale, well placed to bring proceedings themselves and that's underlined by the fact that many of those merchants have brought and resolved individual proceedings already, and indeed the existence of the Umbrella Proceedings demonstrates the availability and suitability of individual proceedings, and no doubt the Tribunal have in mind that the proposals for these proceedings could well disrupt the progress of the Umbrella Proceedings which would be desirable. Mr Kennelly will say a bit more about that.

The second issue under the heading of suitability is that there are real problems with the identifiability of the class and the class definition. The PCR's approach is reliant on the merchants knowing or having the information to determine whether they accepted transactions to which commercial or interregional MIFs applied, and my learned friend tried to suggest that the class members would know the answer to this with his example of the West End hairdresser, but there is no evidence to answer the point in Mastercard's CPO response that the vast majority of merchants, circa 95%, are on blended merchant service agreements and so may not be told what kind of MIF are incurred on the transactions at their businesses.

That's why Mr von Hinten-Reed's suggested approach is to instruct opt-in class members to write to their acquirers. That's in the PCR reply at paragraph 86, but it is not clear to us how the members of the class could be instructed to do anything. No solution at all was offered for the opt-out class. It was suggested by my learned friend on his feet -- this is Day 1, page 103, lines 7 to 13 -- that the PCRs could resolve the issue by sampling the class, although without any suggestion of how that would be realistic or proportionate.

The fatal point in any event, of course, is that the issue is not what merchants on

average do. The issue is to ascertain whether or not the merchant is a member of the class.

The fourth defect relates to the suitability of the opt-out claim in particular. There are two sub points to be made. The first is that the opt-out claim seeks to combine the claims of merchants whose numbers are unknown but who are said to be more than one million and seeks an aggregate award on behalf of those class members, but the claim is not suitable for an aggregate award of damages, because there is no workable methodology to resolve the issues that would be needed to be decided or to arrive at a reliable estimate of the award of damages, given the diversity of the class.

The second point is on the opt-out claim is that the claim is very weak and that is a factor under 79(3) that the Tribunal might take into account.

Then the fifth and final defect is that the PCRs should not be authorised in any event because there are serious issues about the independence of the PCRs from their lawyers and funders and the PCR's expertise is limited to the travel and hospitality sectors and the claims go far beyond that.

So that is a road map of all the reasons why the claims cannot be certified. What I am going to do after the transcript break is to briefly look at some of the legal principles and then go straight to methodology.

MR TIDSWELL: Can I just ask you quickly before we take the break about funding? There were some points made about funding and there has been some response to that. Are either of you going to say anything further about that at this stage?

MS TOLANEY: Yes. We will come back to that later under that topic.

MR TIDSWELL: We'll start again at midday.

(Short break)

MR TIDSWELL: Yes.

MS TOLANEY: So just turning briefly to the legal principles, they are set out in our CPO response in part 3 and addressed at section 2 of our skeleton argument. The Tribunal already has very clearly stated that there are two conditions for a CPO to be made. First of all is the authorisation condition and the second is the eligibility condition.

In relation to the eligibility condition the Tribunal has to be satisfied that the proceedings raise same, similar or related issues of fact or law, the commonality issue, and that they are suitable to be brought in collective proceedings.

On commonality I just refer you to the Gutmann case, and I am going to come back to that, which outlined the points to be taken in.

Then suitability we cover in our CPO response at paragraphs 3.8 to 3.12, and in particular there are seven factors for the Tribunal to consider pursuant to rule 79(2). We say the first six are relevant here. The seventh on ADR not particularly. Those are the questions the Tribunal will need to have regard to.

The Merricks case is just worth mentioning. There are three points to highlight from the Merricks case.

First of all, a point I have made, which is that the purpose of the collective proceedings regime is to enable small businesses and consumers more easily to bring claims.

The second point comes from paragraph 56 of the judgment, that suitability is to be understood in a relative sense, proceedings being more suitable relatively to be brought in collective proceedings than individually.

Thirdly, at paragraph 64, that suitability involves a single multi-factoral balancing exercise, in which too much compartmentalisation may obscure the true task.

So moving then to methodology, the structure of my submissions on this topic is going to be to start with the legal principles, which I will spend a bit of time on, then

to take you through the PCR's methodology and gaps and flaws in it. I am going to do so in respect of both the opt-in and opt-out claims together. Then I will make some concluding points on the consequences of the flaws and what that means for certification.

So starting with the legal principles on methodology, we address these in our CPO response at paragraphs 3.13 to 3.17 and our skeleton at paragraphs 2.2 to 2.5. Essentially the authorities make it clear that in order to allow the Tribunal to assess commonality and suitability conditions, a proposed class representative must, and it is mandatory, must put forward a methodology for determining the issues in this case. It has to be a methodology for determining all the issues which will be determined in the proceedings for which certification is sought. The PCR cannot pick or choose or seek to hive off issues. I will come back to that.

So could we have a look at the Gutmann case, a Court of Appeal decision, which is in Authorities Bundle B, tab 13?

MR TIDSWELL: Bundle B.

MS TOLANEY: It is the Authorities Bundle.

DR BISHOP: Can you give us a page?

MR TIDSWELL: 476.

MS TOLANEY: So the case concerned two proposed opt-out collective proceedings seeking aggregate damages for the failure of two sets of train operating companies for the abuse of their dominant position in failing to make boundary fares sufficiently available or to make them aware -- make a general awareness about it. In this case the CAT made a CPO certifying the action and the decision was upheld on appeal.

If we go to paragraph 24, which is at page 484 -- and the case is at 476 -- can I ask you to read paragraph 24:

"So to enable the CAT to form a judgment on commonality and suitability the class

representative is required to put forward a methodology setting out how the issues that they have identified will be determined or answered at trial."

You read the paragraph.

Then if we go to paragraph 46 in the same report at page 495, can I ask you to read that paragraph and then I'll make some points on it? There are three requirements. There must be a plausible methodology which offers a realistic prospect of establishing loss on a class wide basis. It must be grounded in the facts of the case, not theoretical and hypothetical, and there must be some evidence of the availability of data.

So you can have a methodology that would be fantastic if the right data was available, but if it's not available, then the methodology is not helpful or sensible. So there needs to be actual evidence that is available.

The Court of Appeal also made a number of observations about the Microsoft test at paragraphs 52 to 63. I will not take you through the passage, but I would like you to have a look at paragraph 56, please, on page 498.

So this makes the point that if there is an issue to be determined there must be a workable methodology to determine it and there must be available information and data to implement that methodology.

While we have this case open can I just deal with one point raised by the PCRs, which is the broad axe principle? The PCRs say that because the Tribunal has a broad axe it can fill gaps and plug lacunae in the methodology, including on issues of liability. If you would please read paragraphs 58 and 59.

So there are two points to be made. The first is that the reference to well-established judicial practice of using forensic skills is a simple point and well-known, but what the paragraphs are not saying is that the claimants don't need to prove their case, and they're not saying that the PCRs don't need to have

a methodology to show how they will prove their case. There's a difference between using forensic skills with sufficient data and information and actually creating the data.

The second point is that it's obvious that, given that the Court of Appeal held just a few paragraphs earlier in the same judgment that methodology is a critical document, the methodology must be workable and there must be evidence that there will be data available to implement it. The broad axe can't be a substitute for any of that. What the broad axe does is allows a court or Tribunal to proceed where there's a lack of precise data but not simply to make up the case, and the broad axe can't be the answer to bringing a claim on behalf of a very large and diverse group with little or no commonality and insufficient methodology to implement a collective proceedings order.

Now the importance of methodology can't be understated, and this has been underscored by the recent decisions of the Tribunal in Meta and FX. I will come on to show you that, but before I do can I just show you one more judgment of the Court of Appeal that's subsequent to Gutmann, which is the judgment in the McLaren case?

MR TIDSWELL: Yes.

MS TOLANEY: That is at tab 16.1, I think. I will just check where it has gone in. It is at page 876.1.

So the CAT made a CPO certifying proposed collective proceedings on behalf of consumers who had bought new motor vehicles which had been carried by the applicants and who had provided deep sea carriage of new motor vehicles. These were follow on damages claims following a Commission decision.

One of the issues was whether the consumers were charged separately for delivery of the vehicles, which is called silo pricing, or whether it was within the overall price.

In paragraph 18 of the decision some helpful dicta on methodology is set out. The passage I rely on is:

"A key point to bear in mind is that there can be no bright line distinction between methodology and data. The two are closely linked. In particular, the methodology chosen will be informed by the likely availability of data to which it can be applied."

Then it says:

"If it appears that the data that would be required to apply a particular methodology will not be available or will not be available without disproportionate cost, it would not meet the Microsoft test. A lack of data may, therefore, mean that a theoretically preferable methodology cannot be selected in practice."

There's a reference in the second paragraph at the end to:

"Some gaps in data may ultimately turn out to be unbridgeable."

If you go on in this decision to paragraph 76 -- I am being told it is in the CAT decision at tab 14 rather than cited in this.

MR TIDSWELL: You want us to go back to the CAT decision?

MS TOLANEY: Please, at tab 14. Page 550. Thank you.

MR TIDSWELL: Yes.

MS TOLANEY: This is the passage I had in mind when I mentioned at the outset:

"The methodology is no more than a method."

So just to show you that while we are looking at this case, the attempt to say there is some distinction between methodology and method is not borne out by the language used in the authorities or the proper analysis.

Could we then go back to Authorities Bundle Volume B, please -- it is at tab 17 -- to look at the Meta decision? This is the CAT decision. In this case the CAT was considering proposed opt out collective proceedings against Meta for abuse of dominant position on behalf of consumers who held Facebook accounts. You can

see that at paragraphs 6 to 8 at page 884. The nature of the claim is set out at paragraph 19, page 888.

Now the CAT considered that the methodology put forward was inadequate, because in essence the counterfactual advanced was directed to the calculation of Meta's profit, not the claimants' losses, but the key point was that the lack of a realistic method to calculate loss was fatal to the application.

One of the forms of abuse alleged, as you have seen from the summary in paragraph 19, was the unfair trading conditions abuse. The effect of that abuse alleged was going to be specific to each class member. So the case was not suitable for collective proceedings at all. You see that picked up in paragraph 32 at subparagraph (2). That's page 899.

Then if we go to paragraph 51, which is on page 916, please, to 52, this addresses the unfair price abuse allegation. The CAT was also clear that it was necessary for the PCR to demonstrate methodology to work out whether there had been abuse of dominant position. You see here it is said that the purpose of the enquiry at trial is to work out the extent to which the price actually charged by Meta is abusive.

So by analogy here to those two points, the lack of commonality and the lack of a methodology on infringement we would say is comparable to what was looked at in Meta. In Meta the CAT refused to certify the proceedings but stayed them for six months in order to give the PCR time to evaluate its methodology. You see that at paragraph 58, which is page 920, but in that case it was obvious why that would be done, because there was a real concern about access to justice given the nature of the proposed claimant, and they were a proposed class of consumers estimated to be 45 million individuals. You see that at paragraph 8.

Now there are six important points that come from this judgment. The first is the need for a workable methodology is not just about the assessment of damages. As

in Gutmann, where the Court of Appeal said the methodology must identify the issues in the case, in Meta the Tribunal confirmed that this is the correct approach. The reference to that is paragraph 36 at page 901.

If one looks at paragraph 38.2 the CAT highlighted why the PCR's intentions as to the future conduct of litigation are scrutinised by the Tribunal.

MR TIDSWELL: Yes.

MS TOLANEY: At paragraph 38.3 the Tribunal confirmed that the requirements put forward and methodology applies to all issues and not quantum.

In particular I would refer you to the passage at 903 halfway down the paragraph:

"However, it is entirely right and proper that the Tribunal be satisfied that the proposed class representative knows how it is proposed to make the claim good."

You see the last sentence:

"The test should not be regarded as limited to issues of quantum."

The second point to take from this judgment is the Tribunal's gatekeeper role and the need to ensure there is in place a blueprint for the parties and the Tribunal about the way ahead at trial. You see that at paragraph 40, subparagraph (2). That starts at page 903.

Now can I just pause there and I will come back to the other four points? Can I just use the moment to address three key themes of my learned friend's submissions, having in mind what the Tribunal said?

First, there was the repeated suggestion that the PCR should not face any greater hurdle than any individual claimant would face. This came up multiple times, but by way of example, Day 1, page 92, lines 16 to 24 was one example. That submission we say is hopeless in light of the guidance given in Meta. The Tribunal explains why there needs to be greater scrutiny, and that's not about putting obstacles in the way of redress or justice. It's about ensuring that the unique framework of collective

proceedings, which is when somebody is allowed to litigate on behalf of other people without their involvement, sometimes without their knowledge, can't be done unless the Tribunal knows that there is a clear and workable plan.

The second theme that came out was the suggestion that methodology is a low bar. For many of the points I am going to address you on the level of the bar may not matter, because my submission is that there is no methodology at all. The submission that the methodology sets a low bar is wrong. The test is about having a workable methodology in order to satisfy the Tribunal before the Tribunal certifies collective proceedings.

It's a real requirement. In Gutmann it is said to be a critical document. In Meta it was said that the Tribunal will scrutinise the proposals, given its heavy responsibility as a gatekeeper.

The third theme that came out of the submissions was that based on the low bar submission was this rather unusual distinction between method and methodology that was developed at some length. Now at no point did my learned friend actually explain where he drew the line between method and methodology, and as a matter of natural language there's not a distinction, because if you look at the first definition of it, methodology is a system of methods used. It is an interchangeable term. There was no single decision to which the Tribunal was taken showing that distinction. On the contrary, you have seen the McLaren case where the distinction is not made, but using that distinction, my learned friend seemed to be trying to water down what was required by way of methodology at this stage, and he seemed to be saying that it was enough that his expert says he will address a factual issue rather than saying how he's going to do it and putting the methodology forward.

When you look at that submission in the context of this case, and I am going to come on to show you other passages, you can see how far off the mark it really is,

because it really isn't a workable plan.

Can I then go back to the Meta decision for the third point, which is particularly apposite in light of what I have just said? You have two particular misapprehensions by class representatives identified, and this emerges from paragraph 40(3) in the judgment at page 904. First of all, the St. Augustine fallacy that a PCR cannot just assume evidence will emerge on disclosure. I will let you read that first bullet point. That's obviously particularly pertinent here. Then the second one is the "Not my problem" fallacy in subparagraph (2) that the PCR can't ignore issues that may arise from the defence. These must be addressed at the certification stage. Here the Tribunal was looking at the case for a two-sided market in Meta. Interchange fees, of course, operate in a two-sided market also.

So the repeated themes of my learned friend's submissions were, (1) it is all going to come out on disclosure (I don't know quite how I am going to get that) and (2) we will wait to see what is pleaded in the defence, are points expressly dealt with by the Tribunal and rejected as appropriate ways to proceed.

It should also be pointed out that many of the points to which my learned friend was alluding, as I will show you, were actually points that were obviously going to be taken. They were not surprises. So acquirer pass-on, for example, it was pretty clear it was going to be taken, and merchant pass-on and similarly the points on infringement but none of them were properly addressed in the first report and we say are still not addressed properly.

The fourth point to take away from the Meta case is the impact of the inconsistencies in the PCR's evidence.

If we look at paragraph 49, and that's at page 916, here the CAT held that there was sufficient mismatches, inconsistencies and deficiencies between the experts' report, because what had happened was the first report had been put forward and then

a second one that didn't seem to justify the first one but put forward something new. Again it is a feature of this case. The first report simply didn't address key issues. Then there are belated attempts to do so.

But the other point is that the expert reports are inconsistent with and do not correlate with the claim advanced in the claim form, and that's obviously the three sectors point being the best example. In the expert evidence when the claim is not so restricted, similarly only restricting the expert evidence to the UK when the opt-in claim is not so restricted.

The fifth point from the Meta case is that the expert must clearly set out in the report the legal basis for contending a particular loss is caused by the infringement that has been pleaded.

You see that at paragraph 55(1) at page 919 -- sorry -- 56(1).

MR TIDSWELL: Yes.

MS TOLANEY: Of course, that just hasn't been done, for example, with acquirer pass-on and merchant pass-on.

The sixth point is that Meta also shows the fallacy of the PCR's reliance on the broad axe, because in Meta the unworkable methodology precluded certification. The existence of a broad axe did not cure the application of its defects.

So turning then from the case law --

MR TIDSWELL: Just before you do, I am slightly nervous about where the dividing line is between you and Mr Kennelly and I don't want to transgress that, but the question about -- I think it is a question for you about what the case law permits in circumstances where Mr Bowsher is saying "Oh, there is a methodology". He might not have put it quite like, this but just bear with me. "There is a methodology which is set out in the list of issues which is in another proceedings which we know is going to progress", subject to your points about whether it will or not. That's what he is

saying. Do you say that the case law precludes having a methodology that takes that sort of form? If one -- because I think Mr Bowsher is saying "Look this is -- if you are purposive about this, what we are trying to do is to make sure that there is a road map, a blueprint so the case can go to trial and the issues be resolved. It is very clear there is a list of issues which largely mirror those which are in this case and, of course, there are going to be differences. Just put the differences aside for a minute and let's concentrate on the bits that are common". So do you say that he is precluded from running at that point because the case law requires him to replicate in these proceedings, and if so -- this is probably a point for Mr Kennelly -- how does he do that knowing that some of this is going to be decided elsewhere?

MS TOLANEY: The starting point is this is not about whether or not individuals are able to bring their claims. So that's why we are in the regime of looking at the certification of the methodology because it is about collective proceedings. In order to have the certification, you need to show how each of the relevant issues will be determined at trial of the proceedings that you are seeking to certify. So by definition you would expect the detailed methodology to show that that wasn't dependent on some future piece of litigation. It would be brought into these proceedings by way of an expert report, and every single decision you see has the expert in the proceedings explaining how it's going to be determined at trial.

MR TIDSWELL: These are quite unusual circumstances, aren't they, because I don't think we have any other Umbrella Proceedings, and actually the message that has been going to the PCR is "If you don't get on board the bus for the Umbrella Proceedings, you are going to have to wait for the next one, which might be a very long time". In other words you will go to the back of the queue for judicial recourse.

If Mr Bowsher is being told "There's a great deal of pressure on you to have your issues resolved in these common ubiquitous issues proceedings", he doesn't have

much choice, does he, but to say -- he cannot have them in these proceedings unless he decides he is going to flow against the tide and do something different. Does he have a choice to do that and if he doesn't have a choice, is there any purpose to be gained by him setting them out in these proceedings?

MS TOLANEY: The next question which I think arises is can you read across methodology from one to the next, because essentially that's what he would have to satisfy you of before he can even get off the ground. I suggest that he can't do that and I don't think there's any authority that allows that, but against myself let's say he is entitled to look at methodology elsewhere hypothetically, he would have to show you, first of all, before -- bearing in mind that, sir, this is about the Tribunal certifying today or tomorrow -- these proceedings at this point in time, knowing how the issues in this case are going to be determined at trial.

So what he would have to show you is, first of all that there was an overlap on the relevant issue, which is infringement, a complete overlap. That's his first problem, because there is not a complete overlap. There is very far from an overlap, because obviously, as we have said, those claims only deal with the UK. The claim here is dealing with other markets, and it can't be assumed they will be the same. So that is the first problem.

The second problem is that he can't actually tell you what is going to be the overlap in methodology, because while the Umbrella Proceedings raise the question of whether the commercial interregional MIFs are an infringement of competition and there's a plan to determine that in relation to the UK in 2024, there has been no consideration of how the claimants will try to make that case good, because it's individual claims.

MR TIDSWELL: So because they have not been forced to produce a methodology --

MS TOLANEY: No, there is no methodology.

MR TIDSWELL: Because it is not --

MS TOLANEY: That in a way shows the fallacy, because if there was a methodology his expert could have run with it. It is because there is not a methodology he can't reproduce it here, so he's had to do something else, which he's failed to do.

MR TIDSWELL: If for argument's sake we all expect that these proceedings will be tucked into the Umbrella Proceedings and so at some stage -- and I appreciate there may be arguments about that, but let's assume for present purposes that's the case -- so at some stage Mr Bowsher is going to be sitting with a differently constituted Tribunal but all of you no doubt in relation to let's say trial 2, and he says, "Well, I have got no idea at the moment what the methodology going to be there, because it is out of my hands. I have no control over that". You say he still has to have a go at it himself here.

MS TOLANEY: He does, the reason being -- there are three reasons, one as a matter of principle and two as a result of looking at the facts of this claim. As a matter of principle the Tribunal cannot certify on the hypothesis that there may be a methodology produced in another set of proceedings, because that's not the test for certification. The Tribunal actually has to be satisfied what the methodology is for the determination at trial in these proceedings. So that would result in an immediate dismissal, and at most you would say, "Well, come back if you ever get there", but you couldn't certify at this stage.

The second point is you would have to be satisfied that there is a complete overlap, as I said, in scope of what would be determined. I have already shown you that the claim form shows that there isn't an overlap because of the difference in geographic scope.

MR TIDSWELL: Or, of course, he could produce a methodology for the bits that

didn't overlap.

MS TOLANEY: That's right.

MR TIDSWELL: He could fill the gap.

MS TOLANEY: That's right. Obviously there is no expert evidence about anything other than the UK. So there is literally no methodology.

The third point is that the issue about the MIFs in the Umbrella Proceedings goes way beyond the commercial and interregional MIFs here.

So again it's not entirely clear -- and I am sure Mr Kennelly will have more to say than me about this -- that you could read across in any event.

MR TIDSWELL: Well, yes. I am sure that is something we will come to.

MS TOLANEY: That's right.

MR TIDSWELL: Maybe we will park that point and come back to it.

MS TOLANEY: So I suppose in a sense what I am saying is, first of all, you can't say "Look at those other proceedings. There might be a methodology there that I can use at trial" -- that is as high as this submission could go -- "in relation to bits of my claim".

MR TIDSWELL: There is the potential for some artificiality here, isn't there, because if this hearing was happening in a different order from the current sequence so that the May hearing on the architecture of Trial 2 happened first and he knew what the answer was, then actually he would be able to turn up and say, "Here's the methodology at least for pass-on, because I am going to adopt that and tuck in behind it". If that were the case, would you take a different approach?

MS TOLANEY: That wouldn't be because he was adopting a different methodology from another set of proceedings. It was because his expert was putting forward that methodology as his preferred course. It would be credible methodology, because it had been determined elsewhere potentially.

MR TIDSWELL: So you say effectively the act of adoption means -- of course, he doesn't have to adopt it. As he says, he might decide not to, particularly because he was not involved with the architecture, but if he does turn up and say, "I'm now committed to that and I'm accepting I'm going to be bound by it", you would say that adopts to adoption of the methodology and that is the feature that ticks the box rather than the fact that someone else has decided it?

MS TOLANEY: Exactly. To put the point another way, sir, which flows from your question, if you get to that trial and the PCR doesn't like the methodology, what happens then? They come back and say, "Actually I know we said we were going to adopt that methodology, but we are not now".

MR TIDSWELL: I think the Umbrella Proceedings regime is designed to avoid that happening, because you have to either submit to it or you don't. If you are in, you are in and you are bound. If you are out, obviously you take your chances as to how it goes.

MS TOLANEY: But that is the point. If they are going to submit to those proceedings, why do we need these?

MR TIDSWELL: Of course, we don't know at the moment whether they are going to submit to them. That's entirely, fair, yes.

MS TOLANEY: So the points go that if something can be decided suitably in a binding way that my learned friend can rely on, then he doesn't need these proceedings. There doesn't need to be very expensive collective proceedings, because these proceedings can't get off the ground unless he can establish infringement. So it's not just one issue. It's the premise of the entire claim. So he doesn't need these proceedings and the Tribunal certainly could not certify it.

If he says, "Actually we need these proceedings and I want to adopt the methodology from the other proceedings", then all the points come into play. First of

all, you cannot just point to another set of proceedings that are ongoing and say, "I will have what they are having but I don't know what it is yet", because the Tribunal can't fulfil if I call it the Meta, Microsoft test on that basis. The test requires you to know now how this is going to be determined and the Tribunal could not say now based on the Umbrella Proceedings how the claim in these proceedings would be determined even on the overlapped issues, to the extent there are any, and certainly on the rest and potentially bulk of the claim where there is no overlap.

MR TIDSWELL: Yes.

MS TOLANEY: The May hearing, of course, is only to determine or decide what is happening on pass-on. There are lots of other points.

MR TIDSWELL: Yes, of course, and in a way if you were to accept -- you may not -- that the collective proceedings have a raison d'être because they allow a finding of infringement which otherwise would be much narrower to be restricted to a whole lot of claimants, that logic applies probably much more to the questions of infringement than it does to damages, because, of course, you are into a completely different regime, as we see with the participation of Merricks in the parallel Umbrella proceedings, which is relatively narrow compared with the other parallel Umbrella proceedings participants.

MS TOLANEY: That's right, and, of course, the parallel proceedings actually show why this is completely unnecessary, because claims can be brought on an individual basis. So --

MR TIDSWELL: Well, I am not sure that -- that's perhaps where we depart on this, because I think that the existence of the collective proceedings delivers a benefit to a much wider group of claimants as a matter of practicability at least than individual proceedings bring.

MS TOLANEY: I suppose therein lies the question if indeed it does, because, of

course, then the question does remain as to how each of the individual claimants in these proceedings would have their benefit assessed.

MR TIDSWELL: Absolutely, subject to all the points about whether or not it should be certified as being suitable. I understand.

MS TOLANEY: Yes. So I think my answer is as a matter of principle I don't think you can point to a set of proceedings and say that's the methodology, because I suppose the best way of putting it is if it was choate enough to know what it was, you wouldn't need to point at the other set of proceedings. You would just have your expert reports setting out that methodology.

MR TIDSWELL: That's helpful.

MS TOLANEY: It is simply because it is inchoate that he can't do that and he is pointing.

MR TIDSWELL: That is helpful. Thank you.

MS TOLANEY: So turning then to the methodology that has been put forward and what should have been done, the PCR should have advanced a methodology in relation to infringement, acquirer pass-on as it relates to causation and quantum, merchant pass-on, whether without the MIFs transactions would be diverted on to other methods of payments that are more costly for merchants, the benefits enjoyed by merchants from MIFs, the calculation of added commerce for the opt out claim. So six different topics should have been covered by a workable, realistic methodology. I just highlight as well that there is also a failure to put forward methodology on exemptions and settlements, which is an issue we have raised.

So starting with the evidence originally adduced by the PCRs -- and, of course, again standing back, this is their application made at the time they saw fit on the basis of the evidence they wanted the Tribunal to look at in applying the test, and at this stage we say no methodology, let alone a workable one, was put forward for a vast

amount of the claim.

So Mr von Hinten-Reed's first report didn't actually address the entirety of the pleaded claim. We set out all the problems with it in our CPO response at paragraph 4.22, but just to pick up on it, as I said, it deals with only three economic sectors and only with the UK.

It also, however, included only an estimate of the theoretical value of the claim based upon some very strong and we say obviously wrong assumptions on controversial issues that it was obvious needed to be proven.

Can I just show you that? If we go to the first report, which is in the Core Bundle at page 189, you will see at paragraph 5 of that report what he has been instructed to do. Over the page you see one bullet point up, just above the last bullet point on page 190 there's a paragraph that starts:

"On the assumption that ..."

MR TIDSWELL: Yes.

MS TOLANEY: So you see the first problem is that he has been instructed to assume 100% acquirer pass-on, and he wasn't even instructed to put forward a methodology for assessing acquirer pass-on. He was also instructed to assume that the MIF was entirely unlawful.

If we then go to page 218, please --

MR TIDSWELL: Sorry. Before we jump there, on the point about the estimate, so Mr Bowsher says the estimate serves a limited purpose, and he accepts he has to give one, but he says that's for framing the cost benefit analysis and doesn't have to be precise, and once you look at this, of course, it is recognised there are some things that might go down, but there are some things that might go up, and actually I think he's effectively saying it is too difficult and probably disproportionate to make it more precise. You're saying the estimate has a more significant function, or are you

saying that he's wrong about the ups and the downs or both?

MS TOLANEY: Well, can we just look at what he says about the estimates? That's where I was going, page 218.

MR TIDSWELL: That would be very helpful. Yes.

MS TOLANEY: Because there's estimates and there's estimates I think is my answer to you.

"In the previous section I provided some desk-based preliminary estimates" -- you see the word "preliminary" has been introduced -- "of the overcharge at sector and aggregate level. They are therefore indicative."

Then he says candidly:

"They are not appropriate for determining the actual level of the overcharge."

In a way it doesn't really matter what Mr Bowsher said about the hypothesis of what's the level of estimate. He hasn't really got one.

MR TIDSWELL: Exactly. That's really helpful. Just to rephrase my question, there may be two things going on here. One is the provision of an estimate which gives us a reference point for cost benefit and so on, but you're also saying that this exercise of identifying how many merchants, what their claim might be goes beyond that and goes into questions of -- here he identifies the actual overcharge itself. Would you also say -- I think you also say it goes to things like identification of the class. Is that correct?

MS TOLANEY: It does. Also what we say here is -- I mean, he is obliged to have an estimate. What you see is he sets out an estimate, but then here at the back end literally says they are desk-based preliminary estimates, not an estimate at all, but a guess. He candidly accepts that you can't actually use them for actually determining what he is saying he is determining.

Then the next passage is:

"Hence during the proceedings I will require a method to determine the actual level of overcharge for each claimant."

Well, that's what he's -- I mean, it says it all really. He has not got a method. He has not actually got an estimate. Anything he has put forward he is disavowing as completely useless.

Just to pause there, that's the entirety of the methodology in this report. What it sets out is the obvious truth that the overcharge is the difference between the actual rate and the lawful rate. So it is not a methodology at all, as he says.

In this first report nothing is put forward to address infringement, acquirer pass-on, merchant pass-on, and the opt-out expert report has the equivalent omissions, and we address those in our CPO response in paragraph 5.9 to 5.10.

So that's what was served. I really would urge you to unpick page 218, because, as I said, there are low bars and low bars. This is not even getting off the ground.

Now that was the evidence that was served in the application. I am going to then take you through the evidence that has been served subsequently, but in essence it still only deals with the position in the UK, still only deals with three economic sectors and still contains fatally huge gaps.

I would just simply make the point, if one was to get to the question of authorisation, that it isn't filling anybody with confidence that this was the basis of the application, and of course, one does have to look at the expertise and sophistication of the PCR, because this was never an appropriate basis to bring an application for certification.

Can I just make three other points before I then turn to infringement? So the first point is that it was a refrain in my learned friend's submissions yesterday that if there are issues of lacunae, they can be addressed later, but you can't just leave it for another day when there is no methodology. This isn't a question of lacunae and gaps. It's clear from that passage that there isn't, in fact, a methodology, and it's

a variation on the St Augustine fallacy.

Secondly, although the PCRs, as I say, have tried to fill the gaps in further evidence, they have not done so and so one can't take the Meta approach of assuming that the gaps could be filled.

Indeed, as I will come on to show you, I think my learned friend almost candidly accepted that they had done the best they can for now. Certainly they have had three attempts.

Indeed, that's why my learned friend was driven to his two points over there's a difference of method and methodology, which, as I have said, doesn't exist, or alternatively saying "We need to wait for the defences", which again does not work as a matter of law, because he had to come up with what it was that could change -- and the third point is obviously disclosure, which I will come on to -- but that's why he was driven to those submissions, because, absent that, he can't fill the gaps.

The third point is obviously the authorisation point I have already made, whether this inspires confidence.

Can I then turn to infringement? It was explored at length in exchanges between the Tribunal and my learned friend yesterday, and this was at Day 1, page 26 onwards of the transcript, and can I just quickly before the break just show you what the PCRs' pleaded claim on infringement actually is?

MR TIDSWELL: Yes.

MS TOLANEY: The claim is clearly a breach of statutory duty for an infringement of Article 101, but you can see it in the opt-in claim form. If we look at page 79 of the opt in claim form ...

MR TIDSWELL: 79 of the bundle or the internal one?

MS TOLANEY: I think it's 79 of the bundle. I'll just check. Yes, it is.

MR TIDSWELL: 101. Yes, that's the statutory framework.

MS TOLANEY: That's right. It is the statutory framework relied upon, paragraphs 215 and 216. You then come to the pleaded case at paragraph 223, which is at page 82.

MR TIDSWELL: Yes.

MS TOLANEY: The key passage is:

"It established an effective minimum price ...",

which is four lines down.

MR TIDSWELL: Yes.

MS TOLANEY: So that's the allegation which the PCRs need to prove in order to establish an infringement, and that's what the workable methodology for establishing the allegation should have focused on.

The issue was explored by you, sir, with my learned friend and boiled down to two points and this was at page 25 of yesterday's transcript. First, he expounded what was described as the primary case, which was put in different ways, but in essence he says that the PCRs will argue that the same factual analysis in respect of consumer MIFs can be read across and applied to the MIFs in these proceedings, and the words "same factual analysis" were the exact words used at page 27, line 1 of yesterday's transcript.

That reveals, in fact, what my learned friend needs to do, because if you're saying that it all depends on the facts, which is what he's saying, then you obviously need to look at the facts of this case and the methodology for doing so.

The second point is that my learned friend's position was that they will seek to establish an infringement on the facts anyway, so the two points slightly collapse into one. That's where he pointed to the Umbrella Proceedings as the mechanism for doing so.

I will come on to this after the break, but the first of those points is met by the

fundamental problem that the Tribunal and the Court of Appeal have already said you can't just read across, ant the second point is met by the points I have made on the Umbrella Proceedings and why that doesn't provide the answer to this claim as it is pleaded.

MR TIDSWELL: It seemed to be collapsed into one question, because if you work it through, ultimately you still end up with a dispute about whether the facts in the cases that have been decided are the facts that you decide these on.

MS TOLANEY: That's right.

MR TIDSWELL: So it doesn't the matter how you approach it. You are still arguing the same thing, aren't you?

MS TOLANEY: That's right, although there seemed to be an attempt certainly in the expert's approach to just say, "It has been found there is an infringement and I can therefore proceed on the basis that you read across directly and therefore I assume there was an infringement because of the read across".

Now that's the way the expert has gone about it and it seemed to be the way it was being advanced yesterday as the primary case, but there then became the concession that I have just mentioned at page 27 that you still needed a factual analysis, none of which is recognised in the expert report, and then you are into this question of how do you prove the facts and is there a shortcut through the Umbrella Proceedings, to which the answer is no.

MR TIDSWELL: Yes. How are you doing for time?

MS TOLANEY: Hopefully --

MR TIDSWELL: Are you on track?

MS TOLANEY: I hope so. I can't be sure.

MR TIDSWELL: I am just asking because we will break for lunch and I wondered whether you wanted any time back, but if you think you are on time --

MS TOLANEY: I will take some time back, if I may, so I don't risk cutting into Mr Kennelly's time.

MR TIDSWELL: Mr Kennelly is obviously keen on that.

MS TOLANEY: Yes.

MR TIDSWELL: Would you like us to start 15 minutes early?

MS TOLANEY: If you are happy to do so, sir, I would be very grateful.

MR TIDSWELL: So we will rise and start again at 1.45.

MS TOLANEY: Thank you.

(1.01 pm)

(Lunch break)

(1.45 pm)

MS TOLANEY: Good afternoon. I was dealing with the read across case and the starting point is the Supreme Court decision in the Sainsbury's case in Volume C at tab 73, page 3629. The relevant paragraph is at page 3657, paragraph 93. The Supreme Court held that where six essential facts are established it was bound to follow the CJEU and hold that there is a restriction of competition.

If you could read those six facts, but with a particular focus on (ii) and (vi) please.

MR TIDSWELL: (ii) and (vi)?

MS TOLANEY: (ii) and (vi).

MR TIDSWELL: I am sorry. The trouble is with things not in the Authorities Bundle we are having to --

MS TOLANEY: I can just read it.

MR TIDSWELL: Why don't you read the paragraph.

MS TOLANEY: "The essential factual basis upon which the Court of Justice held that there was a restriction on competition is mirrored in these appeals. Those facts include that (i), the MIF is determined by a collective agreement between

undertakings, (ii)", and this is a significant one, "it has the effect of setting a minimum price floor for the MSC; (iii), the non-negotiable MIF element of the MSC is set by collective agreement rather than by competition; (iv), the counterfactual is no default MIF with settlement at par and that is a prohibition on ex post pricing; (v), in the counterfactual there would ultimately be no bilaterally agreed interchange fees and, (vi) in the counterfactual the whole of the MSC would be determined by competition and the MSC would be lower."

The Supreme Court then revisited the point as a matter of first principles and held that it would have found that the consumer MIFs restricted competition in any event because -- and I will just give you the references -- paragraph 99, on the facts as found the effect of the collective agreement to set the MIF is to fix a minimum price floor for the MSC. It is a reservation price.

Paragraph 103:

"There is a clear contrast in terms of competition between the real world in which the MIF sets a minimum or reservation price for the MSC and the counterfactual world in which there is no MIF but settlement at par. In other words, instead of the MSC being to a large extent determined by a collective agreement, it is fully determined by competition and is significantly lower."

So basically the binding effect of the CJEU and Supreme Court's own reasoning depends on showing that the relevant MIF acts as a price floor for the MSC and in the absence of the MIF the charge would be significantly lower. So those are the two things that have to be established as a matter of fact.

That immediately shows the fallacy of the read across argument, because where a decision is based on particular factual findings you can't read it across to different facts. What the PCRs would have to show is that the same factual findings applied to the commercial and interregional MIFs. That's where the Dune case is significant,

because the Tribunal and the Court of Appeal held in the Dune case that the reasoning of the Supreme Court in relation to consumer MIFs can only apply to commercial and interregional MIFs if the claimants can make good each of those six essential facts, including in particular that the MIFs were a floor to the MSC and that the MSCs would have been significantly lower absent the MIF, and the Tribunal and the Court of Appeal in Dune said those things could only be established by looking at the evidence at trial.

It is also right to be said that the Supreme Court's judgment shows why my learned friend was wrong yesterday to try and rely on the statement from the Court of Appeal in the Sainsbury's case at paragraph 157, and that was at the transcript page 108, line 2. He said it would be remarkable if the same scheme were always in breach of 101 in one member state but not another. This is in the attempt to gloss over the UK and EEA state.

That was the view of the Court of Appeal but the Supreme Court has made it clear that a claimant has to make its case good on the facts and establish each of the six essential facts which the Supreme Court identified.

MR TIDSWELL: Yes. So you could -- if you imagine how this might play out in practice, it is probably going to be necessary for the Proposed Defendants to identify which of these points they take and why they say the facts are different for there to be a fully developed methodology about how to deal with them. There is some force in Mr Bowsher's point about that, isn't there?

MS TOLANEY: Well, yes and no, because it is clear what has to be established. So the methodology needs to look at the issue, which is whether or not there was -- the MIFs were a floor and whether they would have been significantly lower.

What they do know already is a lot of what we are saying. You can see that, and I will show you the Dune case, because that case came out before this application

was made.

MR TIDSWELL: Yes.

MS TOLANEY: It shows the sort of issue and evidence, because in the Dune case there was expert evidence. So they were not dependent on our defence to know what the issue is.

MR TIDSWELL: Forgive me. It is probably the way I put it. I did not mean to put it quite like that and perhaps I did. I suppose I am saying until -- there is a conundrum that until it's clear exactly which of these you are saying is different and why it is different, it becomes hard to fully understand the implications of that and therefore has to be done. I absolutely take your point that anybody who is observing what has happened knows not only what the six issues are, but also knows what the factual basis of them historically has been, in other words, how they have been determined so far and to the extent they have been challenged, whether or not that has been successful. That has been different in some particular case.

Are you saying that in order to develop a methodology in those circumstances, the circumstances we find ourselves, the PCR needs to have a go at each of those trying to work out whether they think there's any difference in the factual position before actually you have told them whether or not there is? Does that make sense?

MS TOLANEY: Yes, because the point is here it is not necessarily each of those things. Here there's a particular emphasis on the two to six.

MR TIDSWELL: Yes.

MS TOLANEY: They know they have to have a method for how to establish the position and they have to show how they are going to establish the different level of overcharge. It is exactly as I showed you in the report. You have to have a methodology and the expert, Mr von Hinten-Reed, accepted that there would have to be a methodology for how he was going to do it, and that's the point that they have

to prove their case on infringement. I mean, the way the question has been put is almost as if we would have to give details of everything so they can prove their case on infringement.

MR TIDSWELL: Again I am sure it is the way I have put it. What I mean is it is hard for them to prove the absence of difference, if I can put it that way. If they turn up and say "We think the facts are the same" and therefore if that happened to be true then, of course, there would be no methodology required, because it has all been established and done.

MS TOLANEY: But they are accepting -- there are two points. One is they are accepting, or there may be some difference if you look at that passage in Mr von Hinten-Reed's first statement.

MR TIDSWELL: I think you have told them there is going to be some difference. Carry on.

MS TOLANEY: Secondly, he has to have a methodology for establishing that. That's not dependent on us providing the exact facts.

MR TIDSWELL: No.

MS TOLANEY: He has to have a methodology. That's where I think you then come to a next stage -- which was I think said in both Gutmann and Meta -- that the methodology may well evolve once you have more information about some of the specifics. There has to be room for manoeuvre I think was the way it was put, but it has to exist.

MR TIDSWELL: There has to be something there. He has to do the best he can in the circumstances, which may actually be relatively light if the assessment that's made is that there is going to be relatively little difference.

MS TOLANEY: And of course again -- I am sorry to labour the point -- if you served individual proceedings, you would serve your claim and the defence would come

back and then you would work out how you are going to analyse all the issues towards trial, disclosure and so on and so forth. By bringing a collective proceedings action you are saying at this point that you know what the issues are and how they are going to be determined so that they can usefully be determined across the board. You are taking on that burden of saying "This is how it is going to happen," and that's the test because of all the factors of collective proceedings I have already been through, the burden, the cost, the regime, the lack of freedom. So it is not right to almost compare it to an individual case and say you wouldn't have to do this if you did that, because you have taken on the burden of trying to pull in this regime.

MR TIDSWELL: I certainly wasn't doing that. I think you identified the point I was trying to make, which is that this might have to be iterative.

MS TOLANEY: Yes.

MR TIDSWELL: But then you come back to the question of what is it that is put in play and why have you done that and what should the proportionate response be from the PCRs' expert. What is good enough in the circumstances?

MS TOLANEY: That's right. What I have shown you in the authorities is there is actually quite a clear statement about what is good enough, because in Gutmann it was made very plain you had to have a credible, critical document that explained how all of the issues were going to be determined at trial. That means practically how they are going to be determined so the Tribunal can see it as a clear road map. That was then endorsed in Meta, where it was not clear how the issues were going to be determined at trial and the methodology was not good enough.

If it would assist, I can also show you the McLaren case.

MR TIDSWELL: I was just thinking about that, where you effectively have a variant, where there is competing methodologies and the Court of Appeal says "You have to get a grip on it" and Meta says in hindsight "Maybe it would have been better not to

certify it".

MS TOLANEY: That's right, and what you can see in the McLaren case is they were way ahead of what was here and they still had their problems. In a way the McLaren case -- I can show you it now if that would help -- it does actually demonstrate what is lacking here perhaps.

MR TIDSWELL: Yes.

MS TOLANEY: I think that's at tab 14 of the Authorities Bundle.

MR TIDSWELL: Are you on the Tribunal or the Court of Appeal?

MS TOLANEY: It is tab 14. I am just going to --

MR TIDSWELL: In that case the Tribunal.

MS TOLANEY: -- find which report that is. Yes, this is the Tribunal decision. You are obviously familiar with this. This was a follow-on damages claim for the Maritime Car Carriers cartel. The European Commission had found that there was a cartel in the pricing services for deep sea carriage, as I said. If you look at paragraph 8, you can see what the expert evidence filed by McLaren was. This is page 530. There are two industry experts, Mr Goth and Mr Whitehorn, and economic evidence. The key issue for certification was whether there was a methodology for showing that any overcharge in the price of the deep sea carrier services was passed-on to consumers who purchased new vehicles. There is quite a stark contrast, as I say, between the proposals there and here.

So if you go to what the Tribunal said about what it would need to find, that's at paragraph 70. That's page 548.

MR TIDSWELL: Yes.

MS TOLANEY: You see the reference to the Microsoft judgment, paragraph 118. Then if we go to paragraph 74, page 549, that's the passage I have shown you already and the Court of Appeal's decision I think.

MR TIDSWELL: Yes.

MS TOLANEY: Then if we go to the end of the section in paragraph 76, that was the passage about method/methodology. Then the kind of methodology that had been proposed on the key question of pass-on, there's a lengthy section from paragraph 77 through to paragraph 94. I can quickly navigate the detail of that.

At paragraph 77 it was said that the first stage was to calculate the overcharge. What you see is five lines down:

"Mr Robinson proposes to identify a control period."

If you read down to:

"Mr Robinson anticipates that this will enable him to calculate an aggregate overcharge."

MR TIDSWELL: Yes.

MS TOLANEY: So here is an example.

You then have paragraph 78 with reference to the data being available from the Society of Motor Manufacturers and Traders. So there is accessible data. Then at paragraph 79 the Tribunal turns to the question of pass-on and what follows there is then a summary of McLaren's proposed methodology.

At 80 to 82 you see a description of the pricing for motor vehicles and a description of the recommended delivery charges.

Importantly at paragraph 83, which is on page 552, there was expert evidence from industry experts that increases in vehicle carrier or other distribution costs are typically reflected in an increase in the delivery charge at the earliest opportunity.

What you see is a proposal as to how you are going to assess the overcharge with a control group. You then have available data. You then have detail as to how this is going to be done with expert evidence showing the basis for some of the points being made. Then you have at paragraphs 84 and 85 a description of what

McLaren's expert economist proposed to do in order to quantify the overcharge passed-on. You see he is saying:

"Mr Robinson proposes to apply this evidence in the following way."

There's a detailed description of quite how many steps would be taken.

Then at paragraphs 86 to 91 there is an explanation of the methodology by reference to examples.

So what you have seen so far is the explanation of the pricing mechanisms by which the overcharging could have been passed-on, two industry experts addressing pass-on and a method for quantification.

Then you can see even with all of that, the Tribunal turned to the challenges to the methodology and they start examining it at paragraph 95. That's page 555. There were three criticisms made. The first was that the expert was proposing to measure pass through into delivery charges, not into the price overall. The second was that the expert was looking at changes in the delivery charge over time and not looking at a clean period untainted by the cartel. The third was it was said that the industry expert's assertions were very extreme.

These are quite granular challenges that you would expect to be resolved at trial rather than necessarily at the certification stage and that is what the Tribunal held ultimately and that finding was upheld by the Court of Appeal.

You can see even then there were reservations but here this is the type of material that was already available. Our complaints need to be put in the context of the difference between this case and our case. Our complaints are not that the methodology is questionable. Here what they were saying was actually what they should have done was A rather than B and refine it. Our point is there is no methodology. To the extent that some methodology seems to be being put forward in a belated way, which I will come on to, it ignores key issues or is totally

unworkable, because there is no data.

If you look, for example, at paragraph 96 of the judgment at page 556, the Tribunal found that McLaren's expert had sought to ensure that price increases unrelated to the cartel were not included in the calculation, and importantly that he had addressed the availability of data. So, in fact, there was a justifiable response to the criticisms and based on how he would get the data, whereas the experts here have just not addressed the availability. I am going to show you what Mr von Hinten-Reed says about it.

Paragraph 97 the Tribunal makes the point that their role is not to determine what is the best methodology, it is not a relative exercise, but to assess the one that has been put forward by the applicant. So here there is a debate on whether it could be refined, as I said, and the Tribunal said "That's not really for you. Let's see if it works. Is it credible?" Paragraph 96, for example, is an example of why it was credible, because Mr Robinson had thought through how he was going to make it good.

But just turning that point around in a sense to the question you asked me, sir, it is not for the Tribunal to see how the methodology could actually be improved by us providing information or the acquirers being asked to provide confidential information or third-party disclosure applications for which no application has even been formulated. That is not the point here, because it is not for the Tribunal to look down the road and say "Could they do it better, differently, maybe?" It is a look at what's there, and if you apply that same approach what's there is so thin as to not be a methodology, if one could even call that, but certainly not to certify it.

Then at paragraph 100 -- this is on page 557 -- they say that -- what they say is it does pass the test.

"The first and second challenges raise issues that are properly ones for trial" -- and

that's really whether it was right to take that period, right to take that approach on the pricing -- "and in particular the grounding of the methodology and the evidence of the industry experts means it is not purely theoretical or hypothetical. Mr Robinson has also carefully considered the likely availability of the factual data to allow the methodology to be applied. What Lord Briggs described as the low threshold of some bases in fact for the commonality requirement, being in this context the issue to whether and to what extent there was pass-on to the class is in our view met. The methodology offers a realistic prospect of establishing loss on a class wide basis."

So that shows with respect to the position put forward here, the contrast, and even this was considered to be passing the low threshold. It obviously wasn't considered to clear it by a lot, but you can see there is a world of difference between where we are in this case when we are saying there is no methodology that deals with this rather than it could have been done differently. So that's the McLaren case.

Can I then show you where I was going to go with the Dune case?

MR TIDSWELL: Yes.

MS TOLANEY: Which shows you why there can't be a read across and why the issue was known about as well. That's in the Authorities Bundle at tab 7, please, and it is the decision of the CAT in this case. The Dune litigation is about a range of different MIFs, including commercial and interregional MIFs, and the core of the reasoning, as I have said, is you can't assume that the commercial and interregional MIFs act as a floor and you can't assume that they are passed-on. That means you have to investigate the facts and determine whether those two essential facts are made out.

You see the Tribunal dealing with interregional MIFs in paragraph 61 onwards.

MR TIDSWELL: You have not given the reference.

MS TOLANEY: It is Authorities Bundle B, tab 7 and it is page 269.

MR TIDSWELL: What paragraph?

MS TOLANEY: Paragraph 61. It is page 296. I think I gave you a wrong reference. Yes, 296, not 269. This is where you see the heading "Interregional MIFs". At paragraph 63 the evidence is summarised. Then you see, paragraph 64, Dr Niels setting out here what the position is.

In answer to your question, sir, as to how would they know, you can see they knew from this very, very clearly what we were disputing and this decision was issued well before the certification application. Then the key rulings are at paragraphs 67 and 68, which are pages 298 to 299. So they are saying in terms of the interregional MIF does not fall within this finding. It is finding 2, which is the passage I showed you. You also see the differences identified in paragraph 68:

"Interregional MIFs affect only a minority of transactions and different proportions as between different merchants and different sectors of commercial."

So you can see immediately some of the issues being recognised here about the diversity of the class being put forward in this case and the problems that may acquire. The position is manifestly different from domestic and EEA MIFs.

Then if we go over the page to 300, if you can read paragraphs 71 and 72.

MR TIDSWELL: 72 is point 6. Is that right?

MS TOLANEY: That's right. I am sorry. 68 was point 6. 72 is other market --

MR TIDSWELL: I am sorry. You are quite right. I see. Of course. Yes.

MS TOLANEY: So it is quite clear from this judgment -- I know it obviously went up to the Court of Appeal as well -- that one cannot read across is the first point. So any suggestion of reading across does not really fly, given this judgment and the Court of Appeal's judgment.

Secondly, it is very clear what the dispute is from this judgment and so the suggestion one has to wait for any further information to identify the issue and

methodology is not made out.

Now it may be that my learned friend is saying that he disputes the Tribunal's reasoning and that he does intend to show that the MIFs constitute a price floor and have an appreciable effect on the MSCs, but those are evidential questions and that means he has to have a methodology for how he is going to try to make good those contentions.

The same conclusion you can see is reached in relation to the commercial position, commercial MIFs, and that's at paragraph 77. That's page 301. So again we have the price floor point and the effect on the MSC point which has to be explored at trial.

MR TIDSWELL: Yes.

MS TOLANEY: So what's clear is that my learned friend can't wait for a defence in order to be able to formulate his methodology, first of all, because the case law is clear that that's not open to him as an approach, because you have to show that there's a methodology on all the issues that will arise. That's Meta. Secondly, on a number of issues, including infringement, it's the claimant, here the PCR, which bears the burden of proof. So it's not about what we will say. They need to have a methodology for how they are going to prove their case, which is slightly different from what you were putting to me earlier, sir, which is actually working out what we say and their response to it. At this stage they have to prove their positive case in the light of what has been already said. So they have quite a lot of indication about what's coming and they need to factor that in.

In any case, even if one waited for a defence here, it is not clear what more would be said than what they already know. So all of that demonstrates that the read across argument does not get off the ground and the waiting for the defence argument does not get off the ground.

I don't need to take you I think to the Court of Appeal decision, because it simply

upholds the Tribunal's approach on interregional MIFs and there was no appeal on commercial MIFs.

MR TIDSWELL: Yes.

MS TOLANEY: I said earlier that I thought ultimately the read across case, although it was mounted for quite a long time in skeletons and submissions, ultimately there did appear to be a concession that there would have to be a factual investigation. So you could not just read across and carry on without the factual investigation. You can actually see that from the second expert report served by the PCRs.

If I can just show you that. It is in Core Bundle at tab 41. It is page 971. The relevant passage starts at paragraph 70, which starts at page 986. Here it is said there are methods for assessing restriction of competition by effect, and if one goes to paragraph 72, which is page 987, he says:

"Therefore, I will assess in my expert evidence whether the relevant MIFs have had an adverse impact on the MSC."

Then he repeats that point at paragraph 77. He then breaks it down in paragraph 78 and says:

"The charge would have been lower in the counterfactual if, first, the relevant MIFs constitute a common cost floor under the MSC and the interchange fees would have been lower in the counterfactual and, secondly, there are no off-setting changes to the scheme's systems which would cause the charge to be higher in the counterfactual."

We follow it through. Over the page at paragraph 79, he goes on to consider the implications of the Sainsbury's judgment and sets out the six essential facts identified in Sainsbury's at paragraph 80 of his report.

He then says at paragraph 81:

"In addition to the effect analysis, I would assess whether the facts in these

proceedings mirror the ones above", but, as we have seen, the essential facts include that the MIFs acted as a cost floor and the MSCs would have been lower in the absence of the MIFs.

So we come back to in a circle the same fundamental factual questions and we come back to the same fundamental problem, which is that there's no methodology for assessing those factual questions.

Sir, I think it is also important to draw out that yesterday you were debating with my learned friend about whether he had to put forward a methodology for his secondary case. In fact, I don't think there is a primary or a secondary case, because I think they both have to be collapsed into the facts, but the reality is that if there is a secondary case, and there is a distinction between the read across and the factual investigation, the secondary case does need to be addressed at this stage. The reference for that is the Gutmann Court of Appeal decision, paragraph 56. That's page 498 of the Authorities Bundle. I don't think you need to turn it up, but that is the authority for the proposition that you can't say "I am going to address the primary and the secondary can be dealt with as it comes along".

MR TIDSWELL: It is not entirely clear what was the primary and secondary by the time you get to this when you read 79 and 81 together.

MS TOLANEY: No, it is not clear.

MR TIDSWELL: It is not clear.

MS TOLANEY: That is another problem here, that it is not a straightforwardly set out case that the Tribunal can be confident that you know how it is going to be run when one can't even ascertain what the primary and secondary cases are.

The alternative argument, as I said, was that infringement was already being considered in the Umbrella Proceedings. I have already addressed you to some degree on why that doesn't provide a get out of jail card.

I should mention, having dealt with infringement in the submissions I made to you, that obviously the Umbrella Proceedings don't solve the methodological problems on causation and quantum. Acquirer pass-on will be determined for the merchants in the Umbrella Proceedings, but the acquirer pass-on questions in these proceedings will be for different merchants. In the opt out claim the question of acquirer pass-on arises across around 1 million merchants over the entire economy. It's a completely different proposition from determining acquirer pass-on for the individual merchants in the Umbrella Proceedings, and in the opt out claim the PCR's position quite rightly is that the damages must be assessed individually, but then they have to be assessed individually. It wouldn't help them what is happening in the Umbrella Proceedings.

MR TIDSWELL: To the extent that -- so we know that it is 95% of the merchants have entered contracts. I don't think there has been any real discussions on that issue in the Umbrella Proceedings yet. No doubt there may be in a month's time, but we may end up with exactly the same problem in both proceedings, which is how do you deal with acquirer pass-on when you have a blended contract, and if there have to be some robust assumptions made about that, then they may well be useful in both situations. When you say they're different, they may -- I absolutely understand why you say they're different, but the solution may end up being more or less the same. I am not saying it will, but it may do.

MS TOLANEY: Sir, there may be some points of principle in any decision that considers a similar issue but that's not the same as saying what's the methodology for a class action across a class. That's the first point.

The second point is if you are going to rely on the Umbrella Proceedings as the answer to the methodology, you have to be very sure that the very same issue will be determined, not just aspects of it, and that it will be determined in a definitive way

that requires you not to have a methodology here. I am not saying it is acceptable. I am just showing you the fallacies in it.

MR TIDSWELL: I understand that. I have to confess my question is probably prompted as much putting my head sitting on the Umbrella Proceedings Tribunal as it is in these proceedings because the whole point of those proceedings is to try and resolve as much as possible of the issues which might be said to be generic, and if they are generic, to take an example, and this may not be something your clients accept, but certainly as a starting point we have the Merricks claim as part of that hearing because it is hoped there may be some generic issues that apply across both their collective action and the individual proceedings and thereby claims.

I suppose the point I am making is that -- it is a challenge to your point I think, that it necessarily needs to be different in all respects if that is what you are saying.

MS TOLANEY: I think my point is that I think if there's a possibility of apples and oranges, there may be something that's -- they may be both fruit, but it doesn't mean one is going to necessarily inform the other. There you have pass-on of all MIFs being looked at, for example, as opposed to pass-on of just these types of MIFs.

MR TIDSWELL: Yes. Understood, yes.

MS TOLANEY: You have an individual approach as opposed to a collective approach. That's not to say, and I don't think this has to be my target, that nothing in the Umbrella Proceedings could be helpful to claims in collective proceedings if that were the case, because obviously any decision would be relevant to another set of proceedings, but that is as far as it goes.

MR TIDSWELL: No, of course. We are talking about methodology. There may be some methodology in those proceedings. I am tempted to use the fruit analogy, but I am going to keep away from it. There may be some methodologies that are useful in those proceedings that could be of use in these, but I accept there will obviously

be points or it won't or might not be appropriate because of the fundamental differences in them.

MS TOLANEY: Yes, it is a bit like me saying here is the Dune case. There is a finding. It is obviously relevant to these proceedings. It doesn't mean then that these proceedings could carry on, on the basis one could wait to see what happened there and determine it. That's essentially what they are saying and that is why it doesn't work.

MR TIDSWELL: Yes.

MS TOLANEY: Then you also have the problem in relation to merchant pass-on, similar points. The Umbrella Proceedings are concerned with a much wider set of MIFs, and so in the Umbrella Proceedings you will be starting with the pass-on of a much larger amount to begin with, which might affect the analysis, and because the claimants are active participants in those proceedings, there can be disclosure and evidence in relation to issues like surcharging, although in those proceedings that might be of very limited relevance, because the claims are predominantly in relation to consumer MIFs. There may be some degree of sampling, but it's still an evidence-based process.

So you can't avoid the problems of a lack of methodology by pointing at another set of proceedings, still less one -- and this is for Mr Kennelly -- an inchoate one. It is at a very early stage and it is not clear at the moment how things will develop in that set of proceedings in any event.

Can I then turn to acquirer pass-on for the next topic? That obviously arises in relation to infringement but it also arises in relation to causation and quantum.

MR TIDSWELL: Yes.

MS TOLANEY: I am going to focus on causation and quantum in particular, because acquirer pass-on for these purposes raises particular issues about commonality and

very different issues from those which will be considered by the Tribunal in the Umbrella Proceedings. That's why I will focus on them.

The causation question is even if there's an infringement the question arises whether the merchants who are members of the class have suffered any loss and the quantum of loss is also critical.

The PCRs, first of all, will have to establish that there's a claim at all for which they have the burden, and particularly on acquirer pass-on they have to show that there is, in fact, loss.

So can we look at what methodology is put forward as regards acquirer pass-on? This is again in the same report that I think you have open. The starting point is that the proposals are only made in respect of the UK. So there's no expert evidence as to a methodology for acquirer pass-on other than for the UK.

Now my learned friend accepted yesterday that there might be differences in different acquirer markets and that's Day 1, page 96, lines 11 to 14. He then tried to say that the same methodology could be applied to foreign markets, but no explanation was given as to how the Tribunal could order an acquiring bank in another country to disclose documents. He then talked about foreign acquirers being our affiliates. That was at Day 1, page 11, lines 12 to 18. That's not correct. They are entirely separate businesses, and Mastercard has no control over them and no entitlement to their data, particularly about their internal price setting processes.

I think the final proposition was that my learned friend said that the Tribunal could apply its broad axe by pretending that Italy is the UK, but that's utterly impermissible.

So you see the first problem. The expert report doesn't even have a methodology for a recognised part of the claim where it is recognised that there may be differences between acquirer markets and one needs to have a methodology as to how one is

going to determine it.

We can look at the proposed methodology in the report, which is at appendix B, paragraph 156. That is on page 1010.

MR TIDSWELL: Yes.

MS TOLANEY: What you see at paragraph 156 at the bottom is that there are 100 acquirers in the UK market.

If we then go on to page 1014, if you could read paragraphs 173 to 177, with an emphasis on the conclusion at 177.

MR TIDSWELL: Yes.

MS TOLANEY: The next section, section B.3.3.2 is on public reports. It is apparent that Mr von Hinten-Reed does not think much of these reports. Whilst it is correct to note that they are only part of the evidential picture, they are actually quite relevant.

So if one could look in the Authorities Bundle -- I think it is the last tab -- at the payment systems regulator guidance. This is at 988, and if one goes to paragraph 3.64 please, which is page 1019. This is the point that almost all merchants have merchant service agreements with the acquirers that are referred to as blended contracts.

MR TIDSWELL: Yes.

MS TOLANEY: Regardless of the fact that the different transactions attract different MIFs and about 95%, as I think you mentioned, sir, are on blended contracts.

There was one point in my learned friend's submissions yesterday where he suggested that the defendants must know which merchants accepted different types of transactions, hence we must have known when we set the blended MIFs. That was Day 1, page 51, lines 5 to 11, but there are no blended MIFs. It is blended MSCs and the MSCs are set by the acquirers and Mastercard has no knowledge of those acquiring rates. Blended contracts are to be distinguished from a different

type of contract referred to as IC++, which is where the relevant MSC for a transaction is mechanically calculated by taking the relevant MIF and adding on agreed additional costs, and these contracts are only typically entered into by the largest merchants.

At paragraph 5.33 you can see some of the relevance of that point. That's at page 1061. This was a summary of the PSR's findings on acquirer pass-on. These findings were made following a significant reduction in consumer MIFs that were made following EU wide legislation that came into effect in December 2015. Consumer MIFs were subjected to caps that were much lower than the MIFs that had been applied before. So the PSR was essentially assessing whether that reduction in MIFs paid by acquiring banks actually resulted in a reduction in the charge paid by the merchants, and the results of this study are for the vast majority of merchants, namely that there was no pass through, and that essentially therefore MSCs did not reduce despite consumer MIFs falling substantially.

So the first bullet deals with merchants on contracts referred to as IC++and it finds a high pass-on but the vast majority of merchants are not on IC++. They are on blended contracts. So it's the second bullet on page 1062 that I would invite you to read.

MR TIDSWELL: Sorry. Page?

MS TOLANEY: 1062. It is the second bullet. At the top of the page:

"For the largest merchants."

I said the second bullet because the first one was on 1061. So it is the top bullet.

DR BISHOP: I see. Thank you.

MS TOLANEY: You see:

"The statistics suggest the interchange fee margin has increased a little, indicating no pass through. The interchange fee savings for this group were also very small."

Then if you move to the third bullet, the last passage, that:

"Merchants with an annual card turnover" between the figures stated "on average receive little or no pass through of the IFR savings."

So those are the conclusions that the UK payments systems regulator reached having carried out an extensive investigation with access to data from all relevant parties, and the PCRs therefore are going to have to show that either that conclusion is wrong or at least there would have been pass-on of reductions in the commercial and interregional MIFs, which is a pretty uphill struggle.

It is also important to note that this report was about the reduction of consumer MIFs, which were a much larger proportion of the MIFs paid by merchants overall than other commercial interregional MIFs. The statistic is in paragraph 2.5 of our CPO response:

"If a reduction of the consumer MIFs that applied to the majority of transactions was not passed through into lower MSCs, then economic theory suggests that a reduction in a MIF which applied to only a small proportion of transaction is even less likely to be passed through."

So we may see now why it is that Mr von Hinten-Reed does not propose to rely upon these reports.

So can we have a look at what he does propose to do instead? We saw earlier that he says that evidence and disclosure from acquirers is essential. We see that point made again at paragraph 190 of his second report, page 1016. That's tab 41 of the Core Bundle.

If we then go to page 1017 at B4, the heading is "Step by step description of the method to assess acquirer pass-on".

The first step over the page, B4.1 is disclosure request but, in fact, it goes much further than that. At paragraph 205 you see him saying what type of information he

needs and at paragraph 206 he refers to the fact that the most relevant evidence will be in the hands of the acquirers themselves. Paragraph 208, how acquiring margins are set will be crucially important. Paragraph 209, how headline rates are determined will shed light on everything.

Then you get to paragraph 210:

"I consider an appropriate method of collecting relevant information to be through the production of pricing statements by acquirers. In my experience this type of method can provide useful information."

So just pausing there, what that means is that the acquirers who are not party to these proceedings are expected to come along and provide witness statements for use in a trial. That's the hypothesis there.

Mr von Hinten-Reed wants them to explain how they set their margins and their headline rates, so their most commercially sensitive information.

With that introduction, he then sets out at paragraph 211 the sort of questions that he wants them to address, albeit this is not a finalised list he says. It's quite a long list.

MR TIDSWELL: When you say a witness statement, he doesn't actually say witness statement, does he? I mean, he is quite clearly asking for more than just documentary disclosure.

MS TOLANEY: Well, he is and you can see that from the list of the questions.

MR TIDSWELL: Yes. Some of it is about strategy in relation to approach --

MS TOLANEY: So he is asking for documents and no doubt evidence that explains the documents or goes beyond the documents. You can see that from the passage.

MR TIDSWELL: And Mr Bowsher referred us to the rules and the provisions of rule 53.

MS TOLANEY: I am going to come on to that, because we say there is no scope for that. There are specific rules on third-party disclosure that I don't think you were

taken to.

So what he's saying there as well as in paragraph 212, if we just finish this section, is:

"In addition to the pricing statements I will also acquire access to certain specific documents and data. I expect the submissions by acquirers to the PSR report on the market for card acquiring services to be highly relevant."

Just pausing there, although he says specific documents and data, the only thing he identifies here are the submissions by acquirers. So it also not actually any specific class of documents or documents in fact identified, which, just anticipating your question, sir, is going to be relevant to any exercise of any power by the Tribunal, as I will show you.

In paragraph 213 he then says how the data would need to be broken down for him into monthly type of transaction, card type, segment and so on.

Then paragraph 214, over the page, you see a request for a random sample of merchants for each contract type. Then if you read 215:

"In addition, additional rounds of disclosure may be necessary in light of information from the pricing statements."

Then paragraph 216 notes that the acquiring market is heavily concentrated amongst five large acquirers.

Now Mr von Hinten-Reed accepted, as I showed you, that there are 100 acquirers in the market, but he is proposing to obtain disclosure from just a sample either of the top five or from the top two.

Now this is the end of the step-by-step section and it's hard to imagine a more unrealistic wish list of information, because it doesn't begin to grapple with the fundamental problem that all of the information he says he needs is in the hands of third parties, who may be very reluctant to give what is highly confidential and

commercially sensitive information. He says it needs to be produced in these proceedings in which the acquirer's counterparties, the card schemes and indirectly the merchants, are involved.

It is not explained in any way here and neither did my learned friend apart from a reference to general case management powers, which I will come on to, it has not been explained how all of this is going to be acquired. It is obviously quite a massive and costly process when you look at paragraph 215 when he talks about additional rounds, in the plural, of disclosure beyond all of the information he has set out.

Can I just give you some examples? First of all, it's not clear how pricing statements would be obtained from third parties. The Tribunal does have the power to order disclosure of documents from third parties, as you will know all too well, but it's a very closely confined power, and it is unclear how one would obtain a pricing statement from an acquirer given that they are not going to volunteer commercial information, still less all of the five big acquirers.

As I have said, although he refers to them as pricing statements, it looks like what's really meant is witness statements with attendance at trial for cross-examination.

Now the problem with that is that there's no provision for this exercise and it's a pretty enormous exercise by the scale of it, because you are obtaining information, disclosure and evidence, there is no provision for it in the litigation plan.

In fact, the litigation plan says -- I can give you the reference for it. This is at Hearing Bundle Volume C, tab 30, page 716 at paragraph 6.11. It says that:

"The PCR does not presently intend to make any applications for disclosures by third parties."

MR TIDSWELL: Yes.

MS TOLANEY: The cost budget, which is the annex to that plan at page 732 of C30, has no provision for third-party disclosure in the budget.

The default position, including under rule 63, as the Tribunal will be aware, is that costs of a third party who is ordered to give disclosure are to be paid by the party that has sought it. Disclosure of this magnitude costs well into the millions. So it would blow a huge hole in the budget, which I think had changed again today, both to pay the third parties' costs and then to review the material, but it is not factored in at all.

Then, leaving aside the pricing statements, you have the disclosure of existing documents, and again the Tribunal has the power in rule 63 to order third party disclosure, but that's discretionary, and the third party must have an opportunity to be heard on any application if they wish.

Now I think you were shown some general case management powers, rule 53, but it's actually 63 that deals with third party disclosure, and this will be very familiar to you.

"The application has to be supported by evidence and the Tribunal will only make an order where the documents of which disclosure is sought are likely to support the case of the applicant or adversely effect" and so on. "Where disclosure is necessary in order to dispose of the claim and" crucially, "an order under this rule shall specify the documents or the classes of documents which the Respondents must disclose."

There's a specificity requirement, as we know.

So when one looks back at Mr von Hinten-Reed's statement that he will require specific documents and data but he only gives one example, that's plainly nowhere close to what would be ordered by the Tribunal under the powers, even assuming that there was a budget for such an application.

The additional rounds of disclosure reference would be hopeless under these powers, and also Mr von Hinten-Reed is not actually even in a position to say whether the documents he is seeking will support or be adverse to the case.

So it is all very unformulated. In the Tribunal's Guide to Proceedings, which for your reference -- again I doubt you will need to turn it up -- it is in the Authorities Bundle at tab 18, page 943 and it is paragraph 5.90. It talks about the third party disclosure rule 63.

"The Tribunal is only likely to order disclosure of clearly defined documents or a very limited category of documents and it will have regard to the fact that the person from whom the disclosure is sought is not involved in the proceedings."

Then it refers to the typical costs order. So the indication is that the Tribunal would only order clearly defined documents or a limited category of documents and nothing like, therefore, the wide ranging material that Mr von Hinten-Reed says is required in order for him to produce his methodology.

MR TIDSWELL: What about rule 53?

MS TOLANEY: Well, rule 53 provides a general description of the Tribunal's management powers, just like rule 3.1 the CPR does, but you then have all the provisions then on disclosure which are specific.

MR TIDSWELL: The curious thing about -- I have to confess this was not something I had focused on before -- the curious thing about rule 53 is sub (3)(c), in which I noticed:

"The Tribunal on its own initiative ..."

MS TOLANEY: If I can just turn it up.

MR TIDSWELL: I am afraid I have a loose copy, so I don't know where it is in the bundle.

MS TOLANEY: I think it is Volume A, tab 2.

Sorry. I keep knocking the microphone. I have not got the copy but Mr Cook has helpfully put it on screen. The point is that paragraph refers to asking --

MR TIDSWELL: The curiosity is under sub (3) it talks about:

"The Tribunal of its own initiative."

Then it says:

"Asks that parties or third parties information or particulars."

Now Mr Bowsher I think relied on that provision particularly to say that we could ask for information as opposed to, I think he was drawing the distinction between the disclosure that was set out -- the disclosure regime set out in 63. It came as something of a surprise to me to see that provision there at all in those terms, but also that it was on the Tribunal's initiative rather than on the application of the parties.

MS TOLANEY: I think the Tribunal, just like any aspect of any division of the High Court, would have the power if it needed its own clarity on an issue to be able to ask for that, but that's a world away from the experts for the party seeking certification saying he requires information and that it will somehow be produced to him.

MR TIDSWELL: Yes. So you would say that if it was intended that there should be a regime for effectively requiring witness statements to be provided by third parties, then it would say so in the rules substantively.

MS TOLANEY: It would. Also one has to read this together with the general powers of case management, which are pretty wide ranging, but would be presumably limited to an exercise of real necessity for the Tribunal, and then the specific guidance on disclosure whereby a party would be applying for third party disclosure and/or evidence under other provisions, where a test has to be satisfied.

Now here it can't possibly be said that in order for a methodology to be provided at a certification stage or any stage, the Tribunal would of its own initiative, I assume wielding its broad axe, as the case is put, start asking acquirers to hand over their confidential information, and they might just say "No".

MR TIDSWELL: So you are not saying it, that it is something in principle that can't

be done. You are saying in these circumstances it is the wrong thing to do and the fact that the rules don't make it an easy thing to do to support that.

MS TOLANEY: I think I put my points in this order. First of all, as a matter of principle it is clear that the Tribunal will have broad case management powers, but that any powers in rule 53 have to be read in conjunction with the specific rules on disclosure and evidence.

MR TIDSWELL: Yes.

MS TOLANEY: And wouldn't be used to override clear established law as to third party disclosure. So what's in this provision is something much narrower and different to third party disclosure applications. That is as a matter of principle.

One might see an example where a Tribunal saw a particular narrow point that it wanted even in the writing of a judgment, an award, a particular piece of information and sought clarity from the parties in that circumstance, for example, or something else, which is a world apart from asking third parties to produce disclosure for use in proceedings.

The second point is that even if that rule had any relevance, it certainly doesn't have any application to the facts at hand, because here you need to have a formulated methodology showing that data is available, and the only basis upon which it is said it might be available is from acquirers, which by definition would bring in the acquirer somehow being compelled to or volunteering, which seems unlikely, all of this information. As it is unlikely they would volunteer it even if the Tribunal asked, what we are really talking about is third party disclosure applications, for which there is (a) no budget, (b) no likelihood of it ever being granted on the terms sought and (c), even if I am wrong on all of that, that wouldn't actually show that the data was available. The highest that it might be put is that the data might be available if there was going to be a high likelihood of a successful third party disclosure application,

but it is not the same as one saw in the McLaren case where the data is available.

One the other points here is that the data that is actually sought is not really identified anyway beyond the pricing statements. So that's another reason why you can't actually determine the data would be available even if there were these applications, because the data needed has not been specified.

So the whole thing has clearly not been thought out, which goes to authorisation, but it also shows it simply does not meet the test as to there being established methodologies with data available, and you saw that in both the Gutmann and Meta cases, and therefore it is fatal.

It also, just by way of completeness, doesn't even, taken at its highest, address the position about beyond the UK, and you have that point.

Shall I just show you the alternative data sources section before the transcript break, which is also in Hearing Bundle, Volume B3?

MR TIDSWELL: Yes.

MS TOLANEY: This is at page 1022 of Mr von Hinten-Reed's second report, and the heading is at B.5.3, above paragraph 238. The relevant page is 1022 for the section. Sorry. Mr Cook had one further point.

MR TIDSWELL: Yes, I am sorry.

MS TOLANEY: Mr Cook had one further point on the rule which is the heading in subparagraph (2):

"The Tribunal may give directions for disclosure." Paragraph (3) is:

"May also of its own initiative". So it is within a framework. I am being told with great emphasis that the difference is on ask. I think you have that point.

MR TIDSWELL: Yes.

MS TOLANEY: So the relevant paragraphs are 242 and 241. So 242, the alternative proposal set out in 238 to 242 depends on obtaining the pricing

statements.

MR TIDSWELL: Sorry. Just explain that point.

MS TOLANEY: Here he says:

"In case the CAT considers third party disclosure is disproportionate other potential sources could be used."

MR TIDSWELL: So he has not got pricing statements.

MS TOLANEY: Then he says he doesn't know much about what access can be had to data, particularly he does not have -- he thinks that Visa doesn't have much involvement in the acquirer-merchants relationship, and he doesn't know if Visa has access to information. So he has a problem here, because he says:

"They are alternative sources. Mastercard might have some information. Visa, I don't think they do."

He then in 242 goes back to the availability of the pricing statements and saying that therefore he could do that instead with Visa.

MR TIDSWELL: I see. So you are saying that he is effectively saying -- he is saying "I might make enough progress with these pricing statements not to need too much further data". I see.

MS TOLANEY: It doesn't really make sense because he is saying this seems to be an alternative to the pricing statement section and yet it is rolled back in.

MR TIDSWELL: Yes.

MS TOLANEY: He then says in 244 that he doesn't really know too much about Mastercard's data and says:

"I do not possess enough information to make a judgment on full data availability at this point."

Then in paragraph 245 he accepts that these alternatives would be at best proxies, because the evidence on acquirer pass-on is exclusively in the hands of the

acquirers. So we go round in a complete circle, despite the heading.

Shall I just finish this topic, sir, before we break?

MR TIDSWELL: Yes.

MS TOLANEY: The final point I think about acquirer pass-on and the opt in claim is that the PCRs say that loss to merchants should be calculated individually, and that's in the claim format paragraph 103 and the litigation plan paragraph 8.3. This means it is necessary to show for each individual merchant in the opt in class both the fact and the extent of the pass-on so that the individual merchant through the merchant service charges paid to the acquirer. So it wouldn't be good enough to assess acquirer pass-on in the aggregate. You would need to try to ascertain for an individual class member that its acquirer actually passed the MIFs on to it, but Mr von Hinten-Reed isn't proposing to look at acquirer pass-on in that way, because he wants to look at two acquirers out of 100, or five out of 100, and as there's no methodology for non-UK transactions, we don't even know how he plans to do that.

MR TIDSWELL: I thought he was proposing that he would -- on the basis that most of the opt in claimants were going to be IC+ and IC++, that he would ask them to ask for statements. Have I got that wrong?

MS TOLANEY: Well, he is saying that in relation to some of them. He is also talking about sampling two or five out of the 100, because they are the biggest.

MR TIDSWELL: Because presumably not all of the opt in class will be on + or ++ contracts.

MS TOLANEY: That's right.

MR TIDSWELL: So some will be on the blended agreements.

MS TOLANEY: That's right. Again you see the problem.

MR TIDSWELL: Yes, I see. So that suggests a hybrid approach that where he can he asks them to ask the acquirer but where he can't do that, he has to go through

some process of averaging.

MS TOLANEY: That's right, and it doesn't really work when you are having to look at the individual claim.

MR TIDSWELL: Yes. Well, that is a broad axe point, isn't it? If he was able to demonstrate some data that gave some basis for believing there was an average, for example, across a group that might have some of the characteristics -- just say you could demonstrate -- that's where you would say that would be good enough. Broad axe could fill the gap --

MS TOLANEY: I don't think one would, because they are not talking about doing this. It is their case that the loss has to be calculated individually, not in aggregate. What you are talking about, sir, is the way of doing the aggregate calculation and then splitting it across, certainly not an individual calculation.

MR TIDSWELL: No, it is not an individual calculation. It's a way of reaching an individual number based on an average.

MS TOLANEY: That's right, but that is not an individual calculation.

MR TIDSWELL: No, it is not an individual calculation.

MS TOLANEY: That's right, and that's what needs to be done and what they say they accept needs to be done.

MR TIDSWELL: So this is in the inconsistency box you would say.

MS TOLANEY: Exactly, and also the absence of a methodology.

MR TIDSWELL: Yes.

MS TOLANEY: Is that a convenient time for the break?

MR TIDSWELL: Shall we take a break? 3.15.

(Short break)

MR TIDSWELL: Yes.

MS TOLANEY: Turning then and going on to merchant pass-on, which is another

respect in which the proposed methodology is inadequate for ascertaining whether and to what extent merchants in the class have actually suffered loss. Now the claims, as we have seen, are in tort for breach of statutory duty, so the compensatory principle applies. So even if the PCRs can show that there was an infringement and that the acquiring banks did pass-on the overcharge to class members through a higher charge, that is not the end of the matter, because if a merchant paid an overcharge to its acquiring bank that then passed-on some or all of the overcharge to its customers, it will not have incurred any loss to that extent and so compensatory damages will not be ordered.

Now one important form of merchant pass-on is surcharging and the Tribunal might recall from some years ago that some types of purchases with a credit card attracted a surcharge, for example, when buying air tickets online. People may remember having that type of charge, paying a few percent of the value of the transaction on top of the price of the ticket. Surcharging for transactions using the consumer payment card for domestic and inter EEA cross border transactions has been prohibited since 2015, but it is permitted for transactions to which the MIFs at issue in this case apply and there is publicly available information, which we referred to in our CPO response, and that is at paragraphs 4.58 and 4.59, that surcharging for commercial card and interregional transactions has remained widespread. So it's clearly something that should be factored in.

In addition, that is only one means by which an overcharge can be passed-on. A merchant could, for example, simply increase the price of their products generally. What therefore is needed is a methodology that engages with the point about merchant pass-on.

Now, as you know from yesterday, there is no methodology on merchant pass-on in the report served with the claim form and there was no methodology on merchant

pass-on in the second von Hinten-Reed report served on 15th March, the day after the reply. The report that was served in other proceedings on 21st March has not been with either Mastercard or Visa for very long, as we said yesterday. All we can do at the moment is give you the headline points as to why it's inadequate. If for any reason the Tribunal thought that it was not inadequate, then Mastercard and Visa would like the opportunity to reply to it if that became relevant, but we think it isn't because by the time you get to this stage we say that you shouldn't actually even be in the realms of certification, and even if one looks at this report one can immediately see the methodology is again inadequate.

So could we have a look at that third report? It is not in the bundles I think.

MR TIDSWELL: I think it did go into a bundle somewhere. I think it went into the core bundle right at the end.

MS TOLANEY: I will see if there is a reference. I have got it in --

MR TIDSWELL: We think it is page 1113.

MS TOLANEY: I am being told it is in the Core Bundle at tab 43. Thank you. I will have to use the paragraph numbers or internal pagination. I don't have a numbered copy. So it is at section 5, which internally starts at 18, paragraph 88. This is headed "Method for assessing fact and extent of merchant pass-on".

MR TIDSWELL: Yes.

MS TOLANEY: What you see in paragraph 89 is the fact that there are broadly four ways in which pass-on might occur. The first is surcharging. The second is some form of cost-based pricing. The third is where the cost is passed-on as a result of the merchants' budgetary processes. The fourth is through setting prices by reference to competitor prices.

Then at paragraph 90:

"I would expect all these ways are used to some degree by some or all merchants."

So there's a recognition here that any methodology would have to engage with all four, because it's recognised that it will be used to some degree by some or all merchants.

Now the methodology proposed, however, if one goes to paragraph 92, is nothing. So, for example, if a firm surcharges, then the surcharge rate will determine the pass-on rate. So what we have is the truism that if there was surcharging, then the amount by which they have surcharged will determine the pass-on rate, but no attempt to engage with how that's going to be determined and how he would identify which merchants surcharged or how they surcharged. If the claims were brought on an individual basis, then the merchant bringing the claim could say whether it's surcharged and give disclosure and evidence about it, but this is a collective action and they are effectively saying there's no way they can fill that evidential gap. This is the third attempt to addressing the point.

There are then two other forms of pass-on for which there is a purported methodology and that's at paragraph 96. So the proposed method he says consists of four stages, that he conducts a survey that explores the sampled merchants' approaches towards pricing and budgeting; then, secondly, he identifies key factors and he will group respondents based on commonalities and then select a subset of respondents to provide more information; thirdly, he will pinpoint categories of documents that are most likely to contain evidence, and a yet further sub-set will be selected to provide disclosure; and then, fourth, all of the stage 3 claimants that were subject to targeted disclosure will also be asked to produce witness statements.

Now Mr von Hinten-Reed is only proposing this methodology for two types of merchant pass-on: budgetary and cost-based pricing. So he is not proposing it for surcharging where there is no methodology at all, but even in relation to those two types of pass-on there would be fundamental problems with this methodology.

Can I start with the opt-out claim? The opt-out claim could extend to more than 1 million merchants. So even composing a representative sample would be extremely complex and open to disputes, but notably Mr von Hinten-Reed says he will need to collect information disclosure and witness evidence from a selection of them and that's obviously not how opt-out claims work. That's apparent when you look at paragraph 62 of the Court of Appeal decision in Gutmann.

Just to save you turning it up:

"The logic behind an opt-out order is that the representatives of the class will not have contact with class members at any point prior to distribution and in an aggregate damages case not only is the CAT given the task of considering individual evidence but the probative value of evidence from a small handful of carefully selected consumers out of millions might be strictly limited."

So those points apply here with great force. First of are all, how is Mr von Hinten-Reed even going to conduct a survey at the first stage of his four stages? Is he proposing to survey all 1 million merchants? Even surveying 10% would be 100,000 merchants. 1% would be 10,000. If it's a survey of only a sample, how is that sample chosen? There is nothing in the report about that. There's no provision in the cost budget for it either. A grand total of zero is allowed for the costs of disclosure by Mr von Hinten-Reed and CEG Europe, but this is a very expensive process that has been proposed. It doesn't appear to have been thought out.

For the opt-in class the sample and survey approach that he proposes also wouldn't work because the PCR's position is that loss for merchants in the opt-in class will be addressed on an individual basis, and that takes me back to the debate we had earlier I think, sir, that pass-on needs to be considered in respect of each merchant individually and this method is not directed to how the case is pleaded and how the litigation plan is drawn up. That's paragraph 103 and 8.3 of the claim form and the

litigation plan respectively.

So drawing the points together, the crucial issue of merchant pass-on which has been known about from the outset and is obviously a very important issue in these collective proceedings, as put together, is addressed only in this final late report, and even in that report where it was known that this was going to be scrutinised, no methodology at all for surcharging has been put forward, despite surcharging being widespread for these MIFs. No workable methodology for assessing other forms of pass-on has been put forward, and no provision for any of it has been made in the cost budgets.

The next issue is on other payment methods, which is addressed in our CPO response in paragraphs 4.65 and 5.25 and our skeleton at paragraphs 3.30 and 4.8. The issue is while the proposed proceedings complain about the MIFs, there are benefits, of course, that merchants may receive as a result of the MIFs, or put another way, if the MIFs are reduced to zero or are significantly low in number, that may result in the merchants ultimately bearing higher costs for processing payments or losing business altogether.

Can I take you now to the expert report on this just to show you how it arises? If we go to Dr Niels' report, which is in B3, page 31, or tab 31. I will just check.

MR TIDSWELL: It is 640 of the Core Bundle I think.

MS TOLANEY: Thank you. I think I have the underlying reference rather than the core reference. It is paragraph 3.49 at 679, please.

You see in Dr Niels' report that he deals with switching to other payment methods and the basic point is that if Mastercard's MIFs are reduced to zero or a low level, then issuing banks would lose the revenue that they had earned from interchange. The issuers would then have an incentive to consider alternatives and one alternative is to provide the customers with other forms of payment cards that are

more profitable for the issuers, such as AmEx, which bring in higher revenues. Another alternative would be to charge higher fees, and that might lead customers to switch to other forms of payment.

As he concludes in paragraph 3.49:

"As a consequence of lower MIFs in Mr von Hinten-Reed's counterfactual, Mastercard may have lost market share to other card schemes through issuers and/or cardholder switching."

He then deals at paragraph 3.50 with issuers switching -- I will let you read that -- and also consumer switching.

Then at 3.51:

"Transactions may not have taken place at all or may have taken place with other payment methods."

Then at 3.52 he deals with the fact that the transactions not taking place at all obviously represents a loss to merchants, but even if the transaction still takes place it may be on a form of payment that is more expensive for the merchant.

So the upshot is that these are dynamics in the counterfactual that would need to be investigated, and they would offset any overcharge borne by the merchants and the methodology should address them.

There is also the question of other benefits to merchants of MIFs and the point that if MIFs had been reduced to zero, this may have resulted in the functionality of the credit cards being changed, which would disadvantage merchants. Dr Niels deals with that at paragraphs 3.53 to 3.54. That's at page 681 of his report.

The point being made here is that if MIFs were to be reduced issuers would have less revenue and could no longer meet the cost of, for example, guaranteeing payments made using a card, which is obviously of great benefit to merchants.

Now Mr von Hinten-Reed's position was he didn't address this at all in the primary

report. The reply report acknowledged that this was something that needed to be taken into account, but there wasn't anything beyond acknowledging it, seeking to address it. The reference to his report -- there is no need to turn it up -- is paragraphs 92 to 94 in his second report, which is at tab 41 at page 990. So he doesn't actually put forward a methodology.

Then there is a point that's specific to the opt-out claim concerning the value of commerce to which any estimate of the overcharge borne by merchants would need to be applied. If you look at Mr von Hinten-Reed's second report at section 7.6, which is page 995, this is another point that has only been addressed in his reply, and if you look at paragraph 130, the first bullet:

"I will estimate the overcharge through the total amount of relevant interchange fee payments by the claimants in the opt-out class."

Then we see at 7.6.11 how he says he would do that. If we read paragraph 133, you see as a first step and what he says he would do, but the difficultly is the second stage:

"Ascertaining the share of the payments that are collected from the claimants with an annual turnover of less than £100 million."

You see what he says about how he would do this at 135 to 136, where he just asserts that, having received data on total interchange fee payments, he will adjust the payments to limit the value to opt out claimants.

Now there is no clarity here as to how the adjustment is to be made and how we would know what value of interchange fee payments relates to transactions by merchants with a turnover below 100 million.

He flags two possibilities at paragraph 136. In the first bullet he refers to Visa data. So we can put that to one side. He then refers to Mastercard data on key merchants, which he says would include total card transaction volume, presumably

for those merchants, but there is simply no basis for the suggestion that Mastercard's data on key merchants would allow anyone to calculate what share of the overall amount of transactions on commercial and interregional MIFs was with the merchants with a turnover below 100 million.

If we just look at what Dr Niels says about Mastercard's key merchants' data, that's quite helpful. That's at page 741 of the same bundle. I would invite you to read that and in particular the sentence that starts:

"I understand that the concept of key merchant ..."

It is A2.11 and it is the middle sentence.

So just taking a step back, Mastercard does not have contractual relationships with the merchants. It deals with the banks that are members of the scheme. Mastercard does not have turnover data for merchants that accept payments on its cards. The information would only be held by the merchants. This key merchant data is a narrow set of data. It just deals with the largest merchants and it requires manual mapping of IDs. There is no indication that this data includes the turnover data of those merchants and it is difficult to see why it would. So it is impossible to see how one gets from that data about the largest merchants to being able to estimate the proportion of commercial and interregional MIFs overall that were incurred on transactions at merchants below 100 million in turnover.

So that attempt at methodology is hopeless on examination. If we then go back to Mr von Hinten-Reed's second report at paragraph 136 on page 996, you see the second bullet. This is the alternative method, which he says would lead to a lower precision of estimation and this method would, it is said, use publicly available data such as ONS data but this data is aggregated as he says. So on an aggregated basis it has some data about the numbers of business in the economy of different turnover levels, but it is not suggested that this data would be on the amount of MIFs

paid on transactions conducted by the relevant merchants. So it is not clear that this data would help at all.

He says in elliptical terms that he could distribute the interchange fee payments, but doesn't explain how he proposes to do it. So that's an important point, but it's not a blueprint. It's essentially a black box that the Tribunal is being asked to accept will somehow work with no real explanation as to how.

Now I accept that the estimation may well be difficult, but it results from the PCR's decision to use a turnover threshold, which drives this enormous complexity and difficulty for which they have not put forward any methodology or solution.

Then I think just wrapping up on the methodology, there are a number of further issues on methodology that are addressed in our written submissions. If I could just give you some references. There's an issue on the exemptible level of the MIFs. This issue arises because an agreement that prima facie restricts competition may nevertheless be eligible for an exemption if it is shown to produce efficiencies that benefit the consumers. So if the MIFs here could have been eligible for an exemption at any level, that would reduce the level of the overcharge and damages.

Now Mr von Hinten-Reed accepts this in principle, but he has no methodology for dealing with, and you can see that at page 989 of his report. Cast your eye over 94 to -- 84 to 91. For the opt out class any assessment of quantum would need to exclude the value of any claims that have been settled. Again this is accepted in principle by Mr von Hinten-Reed, but without any methodologies for doing so. The references for that are paragraphs 39 and 140 of his expert report.

MR TIDSWELL: The second one or the first one?

MS TOLANEY: The second one.

MR TIDSWELL: Yes.

MS TOLANEY: Our CPO response and Dr Niels' report explain there is a risk of bias in the estimation of aggregate damages sought. This point is simply ignored in the reply and the accompanying evidence. For references it is Mastercard skeleton at paragraph 4.1 and our CPO response at paragraphs 5.27 to 5.30.

Can I just address a point that I touched on which is in case the Tribunal is thinking about the Meta approach of allowing a further period to correct the methodology, in light of the way this has developed, and I have spent some time today showing you what are fatal flaws in the methodology put forward with no real recognition of how it could be corrected or complete absence of methodology even in the third report, recognising, for example, the issue of surcharging, but no methodology, recognising the points I've made. This is not a comparable case in which there's any reason to believe that further time would fix things, and indeed the Tribunal has given the indulgence of allowing the third report in, which is not quite the same as the Meta case, and that report doesn't fix even the problems with merchant pass-on or any of the holes that had been identified in other respects.

Moreover, on acquirer pass-on the position is that Mr von Hinten-Reed says he needs a lot of evidence in disclosure and for the reasons I said this appears to be a wish list for all sorts of reasons, and more time won't change that.

So it seems that in case that is in the Tribunal's mind, that would not be a realistic solution, nor is it sensible, given that in Meta there were real reasons to believe (a) that it might be fixable and (b) they were consumers. So the actual class itself was comprised of individuals for whom the class action might be as a starting point of benefit, whereas here there are even doubts about that. So that was all I was going to say on methodology.

MR TIDSWELL: Yes. Just on that last point there is some parallel, isn't there? There is a great wash of merchants who sit probably outside the three sectors who

have got relatively small claims, if they have them, of course, and are analogous perhaps and certainly fall within the small retailers category. I absolutely take the point about the availability of the individual proceedings for those where that's a realistic alternative, but it is not really, is it, for that group? There's a substantial number of claimants. Maybe, as you say, that's part of the problems here. There is a substantial number of potential claimants or class members.

MS TOLANEY: That is why I was saying it is another reason it is not comparable to Meta. First of all, they are all consumers. You are right, sir, there may be a mix of range of types of merchants in the pool, but what you can first of all be sure about is that the class as defined is not comprised of only the type of merchants that you are alluding to, which is the first problem.

So in Meta you have the consumers and the value was about I think 45 million. That seemed to be accepted of who was in the class and what the value was.

Here the diversity and width of a class and identifiability, which are points we will come on to, distinguish that. The value at the moment is completely overstated, and a lot of the claims have already been brought individually or settled, again by contrast to Meta.

So you have all these problems that even before you get to the absence of proper methodology would militate against certification. So two points flow. One is here the methodology is so bad and on its face doesn't appear to be fixable, given what the expert actually says he needs. So more time is not going to help. Two, there have been far more indulgences in the time period and number of reports than in Meta, again showing perhaps it just can't be fixed. Three, the class as a whole, and that's what you are being asked to certify, not some narrower class, not people being picked out of the class, but the class that's being put forward as opt-out, opt-in as a whole, are classes that are not comparable to Meta and, in fact, there may be real

complications with, and so allowing more time is not going to fix it because one is not going to be able to use methodology ever for the scale of this class and the diversity of it.

MR TIDSWELL: Yes. More time to fix it -- I am not suggesting this is what we are thinking at all -- I am just exploring the possibility -- the more time to fix it might be to change the composition of the classes as well, mightn't it? So it may be that if part of the problem is there is just too many people in this class and it is too broad and there are too many things in it, then a narrower focus proceeding might have -- some of the problems you have identified come from the nature of the breadth of the class, don't they?

MS TOLANEY: And diversity.

MR TIDSWELL: Yes.

MS TOLANEY: That's right, the only approach would be to reject this application and it would have to be a completely fresh application. One cannot just completely amend the class at this point. The application is made and the claim pleaded.

MR TIDSWELL: I think that's what I am asking. You say we can't do that.

MS TOLANEY: No. There are two reasons. One is this is a collective proceedings application for the classes that have been put forward for the claims that have been put forward, and the methodology has been put forward for those classes. If you are going to change the composition of the class, then it would be a different -- potentially different claim, different methodology, and also completely different value, and, therefore, presumably different litigation plan and funding and costs. So it isn't as simple as just simply saying "We will take these people". I am not saying there couldn't be a class, but it would be a completely different application.

MR TIDSWELL: Yes. I am sure that's right. I mean, does the fact that it might look quite different mean we can't do it?

MS TOLANEY: Well, it wouldn't be this application. I think there would be a basic question about first of all fairness, because it would be a different application is the starting point and not the one that we have been facing and there is no application to amend. So it is not something that's before the Tribunal, if you like, which is the first problem. The second problem is even if it was, should it be allowed at this stage, because this entire hearing has been targeted at the application made. Thirdly, even then, you wouldn't be able to certify because you would have no application with all the requirements required by the rules, because you would have to have a PCR for the relevant class and the relevant claim, a funding plan, a litigation plan, plus methodology.

MR TIDSWELL: I suppose one assumes that the exercise of sending them away to fix things would involve fixing all those things. I think if you stand right back from it and think about it in policy terms, if you accept -- and I appreciate your clients might not accept this -- if you accept that there is a group of potential claimants here who are probably not going to get recourse in any other way and you have a structure that has been set up and you say it has lots and lots of defects, but if the choice is between -- and if we were to say "No", that may well mean that there was never any recourse granted to that group for all sorts of practical reasons, not least because the funders no doubt would not be enormously impressed by the outcome. So if you go back to Merricks and the idea of trying to provide a remedy for that group, then if there was a way to do that through the perpetuation of the current proceedings but solving the problems you've got, then that might be something we would think about. I am not saying we are, but I just want to explore the point with you. In those circumstances you would effectively be asking the PCRs to rewrite large parts of their case and applying for permission again, including probably amending their claim.

Are you saying that -- I appreciate you don't think that is a good idea. It is clear to me you are not encouraging us to do that, but are you saying we can't do that?

MS TOLANEY: I think I am saying that, sir. I am always reluctant to say the Tribunal can't do things, because I do appreciate --

MR TIDSWELL: It is better to know.

MS TOLANEY: I do appreciate that the Tribunal does have wide case management powers, but case management you are managing a case and a claim that has been made. Just standing back here, you are not managing something in the ether of a potential claim here. You are managing the claims that have been made and determining here whether those claims are suitable for collective determination under a specific regime. That's the application and that is where the case management powers of managing that claim come in.

What you are positing is whether actually this claim is abandoned and this collective proceedings application is withdrawn, abandoned, dismissed essentially, and that scope is given for some entirely new application with a new class, new claim and new methodology to be put forward. That isn't time to fix it. That's time to make a new application, but it would be quite wrong to keep this one alive, because this is to be dismissed, and what happens next is a matter for an application but you can't amend -- I mean, put it this way. If one looks at the rules in rule 79 as to what is happening on an authorisation, what you're seeking to do is to determine whether the claims -- and that means you are looking at a pleaded claim -- is eligible for inclusion in collective proceedings. This is section 47(b)(6) if they raise the same or similar issues of fact, common issues, and if they are suitable to be brought in collective proceedings.

Rule 79 of the CAT rules makes further provision in respect of the eligibility condition and that's providing that:

"The Tribunal may certify claims as eligible if satisfied that they are brought on behalf of an identifiable class of persons, raise common issues and are suitable as collective proceedings."

So this application is about the Tribunal being presented with something concrete, which it has been, and asking the question of certification. Now on the hypothesis being posited, you are not being presented with anything, a claim brought on behalf of an identifiable class of persons, because the whole point is everything would have to be rewritten and amended to find an identifiable class of persons. It would then have to be presented what the common issues were and what the methodology was. So you are asking for an entirely new application.

MR TIDSWELL: Yes.

MS TOLANEY: That's why I am saying I don't think you have power to do it in the way of Meta because it is not about this application. This application has to be dismissed.

MR TIDSWELL: As you say on the hypothesis of the principle being accepted by the Tribunal and therefore it being such a fundamental attack on the application that it can't stand. That's basically what you are saying.

MS TOLANEY: That's right. That's what I am saying. Why I am saying it, sir -- I will just quickly address you on the common issues before I sit down. Sorry. I have just lost my train of thought. What I was saying was that you are trying to look at -- the whole reason why it can't be a Meta fix is because as well as there being no methodology, which is the point I was on on certification, there's no answer even on what the class is.

MR TIDSWELL: Yes. I understand what you are saying.

MS TOLANEY: I think that's the fundamental problem. It is not just about methodology. I mean, my point on Meta does refer to and rely on the problems with

the methodology not being fixable.

MR TIDSWELL: Yes.

MS TOLANEY: But it is actually more fundamental than that, which is Meta was just about fixing methodology. Here what you are talking about is actually rewriting the entire class.

MR TIDSWELL: I see. Actually you can imagine a circumstance in which a class might be rewritten a little, and indeed we see cases where classes are amended and various things, including in some of these cases.

MS TOLANEY: That's right.

MR TIDSWELL: But you are saying you reach a point where actually it is something else. It's a different beast. It's not a --

MS TOLANEY: It would have to be, because one of the points I am just going to turn to now is our second objection, before I hand over to Mr Kennelly on the other suitability factors.

The second objection is that here, because of the width and diversity of the class and the sectoral, geographical product, size, variation points, it is very difficult to see how you would ever have a commonality of issues. This goes hand in hand with the methodology criticisms, because that is one of the reasons why there's no workable methodology, because you have such differences, and that's one of the reasons why the methodology covering only three sectors isn't good enough, because obviously the class is defined much more widely, taking the obvious example.

So just looking at one of the things that was said yesterday, the PCRs previously argued in their skeleton at paragraph 41 that damages -- the question of how best to determine pass-on, exemption and countervailing benefits are common issues and they relied on the fact that acquirer merchant pass-on are being treated in the Umbrella Proceedings as matters that can be determined in that way, but, for

example, even my learned friend yesterday conceded that merchant pass-on is only in part a common issue. That was yesterday's transcript, Day 1, page 6, lines 12 to 13. As regards the opt-in claim, he accepted that damages would have to be individualised. In that sense at the end point it can't be a common issue. That's Day 1, page 7, lines 8 to 9.

So you have already got concessions that issues that were held out as common issues aren't really and I have already shown you on the various other points that were said to be common issues what the difficulties are and that no methodology has been put forward and why relying on the Umbrella Proceedings doesn't help.

It is also unclear, for example, when we are on the fixing point, as to how it would ever be possible for the PCRs, given their approach, to put forward a case on either each of the national markets they say are covered by the class, because they haven't done so, and, secondly, on the variation in the merchants class, because again they haven't done so.

For example, we made the point in our CPO response at paragraph 4.56 that you could not calculate a sectoral average of merchant pass-on for hotels and then apply it, for example, to department stores or builders' merchants. That's a point that has just not been grappled with by way of example.

So all of these points have been taken and yet not engaged with, presumably because it is recognised, as per some of the concessions, that the width of the class and diversity is a massive problem. Hence the expert report only addressing three sectors. That's why I said it is not a fix. It is a complete rip up and start again if that's what was going to be done, but that's not something that can be directed or, if you like, authorised off the back of an application for a completely different certification of a completely different set of proceedings.

Can I refer you, sir, just to some of the points made in our CPO response at

paragraph 540 to 541 about moving the threshold up and down and so on? I will come back to some of that when I deal with the opt-out claim, but the point being that here, putting it colloquially, the tail can't wag the dog. At the end of the day this is an application for a specific class for the specific set of funding facts and expert material, and what I think you are suggesting is not tinkering around the edges but something very radical that would certainly require a fresh application, if that's permitted.

So I think it's now for Mr Kennelly to address you on suitability and then, time permitting, you will have me back but not for very long I hope.

MR TIDSWELL: Yes. Thank you very much.

Mr Kennelly.

Submissions by MR KENNELLY KC

MR KENNELLY: Sir, I see the time. I am in the Tribunal's hands. I am a little concerned about my own time and, before the Tribunal considers how late you sit this evening, I would ask you to start at 10 o'clock tomorrow, if that's possible. I have quite a lot of ground to cover on suitability and leave time for my learned friend to reply. I am in the Tribunal's hands as to how you wish to organise the time.

MR TIDSWELL: I am afraid I can't sit past 4.30 today.

DR BISHOP: I can sit at 10.00 tomorrow.

MR TIDSWELL: We are happy to start at 10 o'clock tomorrow morning, if that is convenient to counsel. I am grateful.

MR KENNELLY: I will begin now, if I may, and carry on until 4.30.

MR TIDSWELL: Yes.

MR KENNELLY: Before I begin to respond to the PCR's application on suitability, I wish just to take up the fairness point that my learned friend Ms Tolaney made,

because we need to be clear as to which application we are facing on the scheme side.

Now we have an application lodged in June 2022 which the Tribunal will see was made after it was clear that the existing individual claims would be managed together, and so the PCR lodged a claim form and a litigation plan and a proposed litigation budget all based on the work which was proposed to be done. They did not say then that their plan was to, to use my learned friend's expression, hitch their wagon to the individual proceedings or tuck in behind them. On the contrary, we see in the evidence of Mr von Hinten-Reed and their pleadings the very extensive work which they propose to do.

This is not something which was done just in 2022 and may be forgiven perhaps for not understanding how things have developed on the Umbrella Proceedings side. Mr von Hinten-Reed's third report, which is the one that applies to Visa, was lodged on 15th March 2023, less than a month ago. At that stage the PCR's case was still that they proposed to do very detailed, and we would say onerous work for the purposes of the proposed collective proceedings.

That was the application we were facing, and presumably that went some way to justify the approximately £40 million litigation budget which they have advanced. It is much more than £34 million, as I will show you in due course.

So it is with some concern that we see that today my learned friend Mr Bowsher suggests that all the PCR wants to do is tuck in behind the Umbrella Proceedings. He said that his new plan would be to avoid any duplication, but, to be clear, since the Umbrella Proceedings are so far advanced, especially for Trial 1, and, as we said in our skeleton, the experts for Trial 1 are already in discussions, and they are already dealing with the list of issues that they need to address and the work they need to do together, not duplicating may mean doing very little at all for the purpose

of Trial 1, and that was not the proposal. Certainly it couldn't possibly justify the litigation proposed in the application, the litigation plan and litigation budget, but more importantly on the substance, putting the fairness issues to one side, if the proposal is at least for Trial 1, and possibly Trial 2, to do nothing or very little, it begs the question: what is the point of the proposed collective proceedings?

The point it might be said against me is that at least it sweeps in the class of proposed class members who have not for whatever reason come forward or will not come forward in the individual claims, a point I think made by the Chairman to my learned friends.

To that we make the following response. It cannot be enough to say that the CPO could cover more claimants than would sue if individual proceedings were practicable for them. If that fact arises, that cannot of itself be enough to justify certification, the simple fact that the collective proceeding would cover more claimants than would sue if individual proceedings were practicable, economical and so forth for those merchants.

That would render we say the relative suitability test meaningless. If someone can sue practicably -- and that is the point I need to address you on later -- if there is no obstacle to them suing, if there is no inadequacy in the process available to that merchant, but he chooses not to, that fact cannot be sufficient to justify the ordering of a collective proceeding.

The Tribunal needs, we say, to find some reason why the collective proceeding is more suitable as a procedure for these claims, and that is the requirement inherent in the relative suitability test, in the rules and in the Supreme Court in Merricks. It cannot be simply that by definition the collective proceeding will cover more merchants than any individual proceeding, because, to be clear, in every case a collective proceeding, an opt out collective proceeding, will cover more potential

claimants than any sort of individual proceedings, however easy it is to bring an individual claim. So something more is required and that something more is the relative suitability test. It requires the Tribunal to compare the Umbrella Proceedings and the proposed collective proceedings and ask whether the Umbrella Proceedings provide adequate access to justice for the proposed class members.

To that the key consideration is that the issues in these claims have for more than a decade been extensively and successfully litigated by the very merchants for whom this CPO is sought, and for more than a decade this litigation has been very well promoted and published by retailer interest groups and by lawyers and funders. The current state of play, as the Tribunal has seen, is that thousands of these claims which would be covered by the collective proceedings are already being pursued on an individual basis in the Umbrella Proceedings.

My learned friend Mr Bowsher accepted that all the claims which the PCR seeks to bring may be raised in the Umbrella Proceedings, and it is still open to all of these potential class members to join the Umbrella Proceedings, and that is what makes this case unlike any other collective proceedings application that has come before the Tribunal. In this case we must compare the proposed collective proceedings with the existing mass litigation in the Tribunal, and this Tribunal has case managed thousands of individual claims for over a year in a carefully tailored and successful process.

The Supreme Court held in Merricks that the purpose of the collective proceedings regime, as my learned friend Ms Tolaney showed you, was to provide access to justice for the vindication of private rights where the ordinary forms of individual civil claim had proved inadequate for that purpose. So in asking whether these Umbrella Proceedings are a more suitable vehicle for the merchants' claims than the proposed collective proceedings, the Tribunal must ask if the Umbrella Proceedings are

adequate to deliver justice for merchants. Are they realistic, to paraphrase the Chairman's remark, for the great wash of merchants who may have claims? Where is the evidence, we ask, that the umbrella proceedings are inadequate to deliver access to justice for merchants in either the opt in or opt out classes? All the evidence points the other way.

Thousands of merchants, small merchants, have jointed Umbrella Proceedings, and the reason for that is because this Tribunal has created a low-cost vehicle for the claims of merchants in general and small merchants in particular. When merchants have not joined Umbrella Proceedings, there is no evidence to suggest it's because bringing a claim in the Umbrella Proceedings would be too complex or too risky or too costly. The most the PCR can say is that there is or might be a large group of potential class members who for some unknown reason have not yet sued and whose claims would be vindicated by the collective proceedings.

But I repeat the point I made. If that were enough, the simple fact that there are lots of potential class members who have not already sued, if that fact was enough to justify certification, the relative suitability test would be rendered nugatory.

A further indication as to the proper approach lies in the rules themselves. You have seen that the suitability test in the Tribunal's rules directs you expressly to consider existing proceedings, making claims of the same or similar nature, and you are asked to have regard to that precisely because such existing claims shed light on relative suitability, and the Umbrella Proceedings are such existing proceedings. They are about -- and the Tribunal has fashioned them in this way -- delivering timely justice to the parties who have worked hard to get them ready for trial.

There's a further point. Forcing the collective proceedings into those trials will inevitably delay them, disrupt them and increase the costs for the parties. There's no doubt about that and I'll come to that later in my submissions.

So, with that brief introduction, I will turn to the background to the Umbrella Proceedings themselves. I need to examine the Umbrella Proceedings in detail to see if they are, as my learned friend claims in the claim form, impractical and uneconomic for the purposes of small merchants' claims.

As the Tribunal knows, you have been actively grappling with how to case manage these individual cases since February 2021 and that culminated in March 2022 with your ruling on case management. This is an important ruling and I will take it, if I may, quite carefully.

It is in the hearing bundle, not the Core Bundle. I think, sir, for this you will need to go --

MR TIDSWELL: I have a problem in that my laptop has ceased to work. I think you should keep going, because I'm familiar with the ruling and the other Tribunal members will be able to pull it up so I can look over their shoulders.

MR KENNELLY: It is in the Hearing Bundle at B2, 16.

MR TIDSWELL: Yes.

MR KENNELLY: Obviously the Chairman will be familiar with it, because he was in the constitution.

If I begin at paragraph 4 on page 105, which is just summarising at that stage the number of claimants in the separate claims. There are approximately 1,000 claims referred to in paragraph 4 and in paragraph 5 a reference made to a further approximately 1,800 claims. So over 2,000 merchants were already before the Tribunal or were shortly about to be before the Tribunal in March 2022.

The Tribunal then summarises the procedure leading up to that second CMC. It notes in paragraph 7 on page 106 that, turning over the page:

"The Tribunal then considered whether there should be a sampling process, whether the Tribunal should order the selection of a manageable number of claimants whose

claims would proceed as sample claims."

In paragraph 8 the Tribunal notes:

"There was disagreement between the parties as to how those sample merchants could be chosen. There was disagreement as to what would be a representative sample and disagreement as to how merchants not within the sample or the lead group could be asked to provide information."

Now that's relevant, because the PCR, as you have seen in Mr von Hinten-Reed's evidence, returns to this sampling idea, which was not the Tribunal's preference in this ruling, because you see in this ruling, after hearing detailed arguments, a different approach was preferred. That is clear from paragraph 10.

The Tribunal makes the suggestions which we are about to go to for the following reasons. It notes at paragraph 10(1):

"The scope of the claims has significantly expanded."

"The sampling exercise" -- this is sub (2) -- "is very far from agreed."

Over the page, sub (3):

"The Tribunal has experience of multi-claimant experience where it has seen how sampling has worked or not worked."

Then the relevance of these factors to the future case management is addressed in paragraph 11:

"There's a number of features of these proceedings which we consider require careful consideration in determining the correct way to move forward. There is a very large number of claimants already participating and an immediate prospect of another large group joining within the next few months.

(2). There is considerable variance in the nature of the enterprises within the current claimant group. They range from large, international corporates, such as hotel groups, to independent store owners."

Just pausing there -- you will see this in Mr Holt's evidence -- in March 2022, as the Chairman will recall, there were already several hundred very small merchants included in individual proceedings.

"(3). A considerable range of sectors is represented by the group.

(4). The liability issues are complex and will likely require disclosure, factual and expert evidence. Similarly the quantum issues are complex, requiring extensive disclosure, factual and expert evidence.

(6). It is common ground that many of the liability issues will be common and, given joint management of the collective proceedings, can be determined in a way that resolves those issues for all parties" -- "collective proceedings" with a small C.

There is less agreement on the extent to which quantum issues give rise to common issues, and the Tribunal would recognise that as something that has to be addressed later.

Then sampling is addressed in sub (8):

"Sampling would reduce the number of claims proceeding to an evidential hearing. The disclosure process is likely to result in substantial volumes of documentation being provided from a potentially wider group than lead claimants and that is going to be a considerable exercise."

Then over the page to 12. The Tribunal says, bearing those points in mind, they want to explore is there:

"... scope for case management procedures which reduce or limit the time and costs involved in disclosure"

and this:

"... bind as many claimants as possible to the outcome and common issues."

The Tribunal will see all through this we have an echo of the advantages which the PCR claims can only be obtained from collective proceedings, and we say not so.

The same issues are addressed in the Tribunal's ruling here.

"... and to investigate whether a series of trials and grouped issues might be preferable to trials of lead claimants."

Then at paragraph 14 the Tribunal's preferred approach to case management, and these are the objectives that the Tribunal seeks to achieve. Three lines down:

"The broad key objectives which the process adopted should meet appear to us to be: a just and expeditious determination of the claims at a proportionate cost in accordance with the Tribunal's governing principles, but relitigation is to be avoided or at least restricted in relation to similar claims or issues brought by current claimants, and that future claimants should as far as appropriate and possible also be bound by decisions in relation to similar claims or issues or at least very strongly assisted towards the resolution of their claims."

These are the objectives which the Umbrella Proceedings seem to secure.

Then at 15:

"We are particularly conscious", two lines down, "that the current claimants should not be unfairly delayed in the progress of their claims simply to enable other claimants to catch up procedurally."

We would echo that point in the context of the CPO application.

"16. The preliminary view of the Tribunal is there are potential benefits to the overall process if additional claimants whose claims are likely to be transferred to the Tribunal in the near future can be included in the present process. Potential benefits include having a larger number of claimants having issues in common. The wider pool" -- this is important -- "of claimants may also include some claimants with helpful data resources, which benefit the wider group."

I will come back to that. Unlike the collective proceedings, in the Umbrella Proceedings we have thousands of claimants, a built in claimant group available to

provide disclosure and data where appropriate.

Over the page at 18 and then 20:

"A significant number of claims already subject to the Tribunal's jurisdiction create an opportunity to dispose of those and other claims using the Tribunal's flexible powers of case management and specialist experience in the most efficient way possible.

20. Some aspects of quantum may be viewed as generic or category generic."

There is a reference to the need for further resolution of pass-on questions.

Then paragraph 21. My learned friend Mr Bowsher took you to this. Here the Tribunal notes the problem with binding a broad number of parties:

"The outcome of a trial is usually only binding on the actual parties to a trial. We acknowledge that it's anticipated that the outcomes in the proposed sampling process may result in decisions which have persuasive authority. However, given the significant number and variety of current and potential claimants and the range and complexity of the issues involved, we are concerned the risk of relitigating similar or identical issues and non-lead claims is unacceptably high."

Then the Tribunal discussed whether the abuse of process doctrine might fix this, but at 24 the Tribunal said:

"Abuse of process may be appropriately relied upon, but it is an exceptional remedy and it is not going to be the solution."

Now Mr Bowsher stopped there. He skipped the rest of the ruling and said that was why collective proceedings were more suitable than individual proceedings, because collective proceedings avoid the problem the Tribunal has identified, but he skipped the Tribunal's own solution to the problems they just described.

We see that from paragraph 25. The Tribunal there says:

"We would prefer that there was a degree of certainty introduced into the case management of these claims whereby the greatest number of current and future

parties are bound by determination of all issues which can sensibly be identified as common between claims.

26. We intend to put in place a process with a detailed identification of the issues in the cases before us and for their management in a generic way across a wide pool of claimants. This process will allow for and encourage members who are not currently claimants before the Tribunal to have time to join in, allowing them to participate in the process of identifying generic issues for collective resolution."

That is the table that you have seen that the parties have been filling in since March last year.

In 27, again about minimising costs for small claimants, the Tribunal is going to be flexible about hearings, using technology for virtual hearings to allow participation of claimants who wish to have representation that is separate and don't want the costs of attending.

Then this at 28. This is a very important paragraph, because it is the Tribunal's bespoke solution to the concerns that the PCR says arise in individual claims:

"If a claimant for no doubt perfectly sound and sensible reasons wishes to obtain the benefit of a jointly case managed process but to have its claim stayed, we consider that the stay ought more or less automatically to be granted subject to two continuing obligations. In the first place, the stay claim would continue to be bound by decisions on the issues common to that claim in accordance with joint case management. In the second place the claimant whose claim is stayed would remain potentially liable to provide information or disclosure."

So, pausing there, the Tribunal has fashioned a situation, which became the Umbrella Proceedings, where a small merchant can copy the pleadings of the existing claimants, apply for a stay that will be issued automatically and do nothing except possibly contribute data and disclosure, which should always be done in

a focused and proportionate way -- and we can come back to that tomorrow -- and do nothing more than take the benefit of the judgments obtained in the Umbrella Proceedings, which is how many the individual cases are now managed.

The Tribunal then carries on at paragraphs 32 and 33. I am nearly finished with this. This will be the last point I make before we rise. 32. The order sets out in the middle of 32:

"The timetable for identification of the issues with explanations of the parties' respective approaches to establishing their position on each issue."

Each and every issue has been identified and, as you have seen from the table, the parties are required and have set out how they propose with precision to address with disclosure and evidence, factual and economic, each and every sub-issue in the Umbrella Proceedings.

33. The Tribunal sets out exactly how much specificity it wants, which has been enormously beneficial in the Umbrella Proceedings and has again reduced the costs that would arise for any claimant who manages to join the Umbrella Proceedings and piggy-back on these advantages.

Then 37, the closing observations.

"We see an opportunity to manage these proceedings in a way that recognises their particular characteristics and brings efficient and proportionate outcomes across a wide range of complex claims for the benefit of both claimants and defendants. We are not satisfied that a sampling approach to identify lead claimants is the correct approach. We have instead directed an approach by which the Tribunal will seek to resolve as many generic issues as possible across the whole set of claims, binding as many parties as possible to its outcomes and reducing the potential for relitigation in relation to those issues. This will require close case supervision on a joint case management basis with early identification of issues and means of proof of those

with the involvement of experts, and thereby the Tribunal will control the process of disclosure and bring focus to the factual and expert evidence, thereby critically for small merchants reducing costs and time, with respect."

Tomorrow I will show you one additional document where the Tribunal ruled on Mastercard's application for permission to appeal from this ruling, which again highlights the fact that it's a misnomer to describe the Umbrella Proceedings as individual proceedings. It is not a comparison between individual proceedings in the traditional sense and the collective proceedings. What we have in the Umbrella Proceedings is a carefully crafted, bespoke solution to the problems that the PCR claims can only be resolved in the collective proceedings, and that is the comparison which we ask the Tribunal to make, but I will finish there. Thank you for the extra time.

MR TIDSWELL: Thank you very much. We will start again at 10 o'clock tomorrow morning.

(4.32 pm)

(Court adjourned until 10.00 am

on Wednesday, 5th April 2023)