IN THE COMPETITION APPEAL TRIBUNAL

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

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Wednesday 5th 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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Wednesday, 5th April 2023

(10.30 am)

Submissions by MR KENNELLY (cont.)

MR TIDSWELL: Mr Kennelly, good morning.

MR KENNELLY: Good morning. Sir, just to be clear, I am still developing my positive case on the virtues of the Umbrella Proceedings and its proper characterisation. For that could I ask you to go to the Tribunal's ruling on permission to appeal, which is in the Hearing Bundle B, 174. It begins at page 174 and page 182 is the short passage that I wish to cite. Paragraph 23.

MR TIDSWELL: Yes.

MR KENNELLY: At the bottom of sub (1) you will see the Tribunal's own characterisation of the March 2022 ruling I took you to yesterday. That ruling -- the judgment was concerning itself with the fundamentals of how the individual cases now within the Umbrella Proceedings should be tried.

Then at (2), and this is important for the proper characterisation of the individual claims in the Umbrella Proceedings:

"They are complex and substantial, many hundreds and possibly thousands of individual claims are being dealt with together, along with common issues arising in the collective proceedings brought by the Merricks class representative. It is, of course, true that each claim is an individual one, but that is to distort reality. The cases cannot be viewed singly. Instead, the Tribunal is faced with mass litigation, which must be case managed as such, recognising the constraints and the resources of the Tribunal and the interests of swift and efficient justice for all parties involved."

Following the March 2022 ruling, the Tribunal made the Umbrella Proceedings

Practice Direction, prompted indeed by these interchange cases, although of much wider application. So that allows the common issues to be determined without any doubt across thousands of claims. An Umbrella Proceedings order was made in July last year.

My short point here is that this has worked. There has been significant progress made in those individual claims within the Umbrella Proceedings. My learned friend, Mr Bowsher, took you to the table which was ordered by the Tribunal in March 2022 and that has been progressed. It is now over 300 pages long, including, as the Tribunal ordered, a precise articulation by the parties of the manner in which all of the issues and sub-issues are to be determined.

Pursuant to that, the Tribunal made the order on 23rd December 2022 for the future progress of the case. I know this is familiar to the Tribunal. I will just take you to it briefly, if I may. That is in the Hearing Bundle again, again in B, page 188. This is important not just to show you that progress has been made but also the imminent nature of these next steps, which goes to the disruption point that I'll come to later in my submissions.

You see on page 190 the Pass on Evidential Hearing which would finally determine the methodologies to be applied in the pass on trial. That's next month.

Then, over the page, page 191, a six-week trial of liability, trial 1, in the first quarter of 2024 to deal with all Article 101 (1) liability issues.

Then trial 2 at paragraph 9, a 7 week trial to address all issues relating to acquirer and retailer and pass on.

But, as I will explain later, acquirer pass on arises also in relation to 101 (1).

MR TIDSWELL: Yes.

MR KENNELLY: I turn then, if I may, to the nature of the claimants in the Umbrella Proceedings, because the PCR says that the Umbrella Proceedings are inadequate

to provide justice for merchants in general, and smaller merchants in particular, referring in particular to the significant costs involved that would deter small merchants.

For that Visa has adduced evidence from Ms. Williams. That's in the Core Bundle at tab 34. Could I ask the Tribunal to take that up. Tab 34 of the Core Bundle, page 808. That's where it begins. If we go to page 816, she deals with points relating to access to justice.

Paragraph 29 on page 816. Ms. Williams summarises some very important background facts when one considers whether the Umbrella Proceedings, in substance, provide access to justice for claimants, for merchants and small merchants in particular:

"900 merchant groups have so far brought interchange related claims comprising over 4500 corporate entities, many of whom are settled. Over 610 merchant groups, comprising over 2500 individual claimants, currently have proceedings against Visa and all but one now form part of the Umbrella Proceedings."

Then this, and this is significant:

"Over 30 law firms have already been involved in representing different individual claimants."

That's a very important fact in relation to considering whether smaller merchants and merchants in general have access to justice. Are solicitors prepared to represent them in these cases? There is obviously no shortage of representation.

Then you go to page 832, paragraph 39. The merchants may still join the Umbrella Proceedings. It is still open to join.

MR TIDSWELL: Sorry. What page?

MR KENNELLY: Page 832, paragraph 39.

MR TIDSWELL: Yes.

MR KENNELLY: The door is not closed. Merchants may still join the Umbrella Proceedings. There is no direction when the cut-off point will come when it is too late to join trial 1, but it must be possible at least to join until the beginning of trial 1. So there is still at least a year for other merchants to join the Umbrella Proceedings.

MR TIDSWELL: If you are thinking about the friction, and I appreciate there's a degree of speculation that is necessary for us, because we don't know what a particular merchant might or might not think, but one can imagine that there are different points of friction, aren't there, that might arise for a merchant that don't arise in relation to the collective proceedings? One of them is the necessity to spend money, their own money, as opposed to the funding that comes to the collective proceeding. I think you said yesterday that it would be open to them to effectively copy a claim form and so actually the cost may be very low, indeed possibly nothing at all, beyond the filing fee. I suppose if they are filing here, then that is even easier. There is I suppose sort of -- I don't know whether you would characterise it as -- inertia may be too judgmental a term, because if the claim was quite small, as indeed it might be for quite a lot of these merchants, if the claim is for interregional and commercial cards, the proportion of MIFs, if the case was made out and subject to all the points you would make about various things, might end really being quite a small claim, a small number of pounds or even possibly less for an individual merchant.

Actually, there is just an individual economic point about whether you would spend the time to do that to recover that money. Let's say it was £20. You would not necessarily take an hour out to go and do these things, or five hours. If somebody offered you £20, you might go on the website and register and take it. So there is that sort of friction as well.

Then I suppose there is a point about judicial resource here, which is largely I think

about the practicalities. If you think about the Umbrella Proceedings that you are suggesting that merchants can and indeed are filing, every single one of those has to be treated by the Tribunal as a separate claim as a matter of law, and, of course, that does have some consequences for the operation of the Tribunal. Once they get brought into the proceedings, then, of course, that ceases to be the case for the reasons you have advanced.

I wondered if there was anything you wish to say about those sort of points of friction that I think still seem to exist between the collective proceedings and a merchant joining the Umbrella Proceedings, notwithstanding the points you have made?

MR KENNELLY: Can I take those in reverse order?

MR TIDSWELL: Yes, of course.

MR KENNELLY: The question of judicial resource first. It is true that in the Umbrella Proceedings each individual claim has to be registered as a separate claim, but as far as their separate treatment is concerned, that should really be the end of it. From then on the whole point of Umbrella Proceedings, the way that the Tribunal has structured it, is that from then on each individual claim will receive no further individual considerations, so from the Tribunal's perspective the Umbrella Proceedings are created, in fact, deliberately created, to minimise the strain on judicial resource in the Tribunal.

By contrast, as I will show you when I come to the particular demands on the Tribunal which Mr von Hinten-Reed outlines in his reports, the currently proposed collective proceedings will place a far greater burden on the Tribunal's resources, because of the way in which they plan to prove their case. I will come to that.

So there's no question that the currently framed collective proceeding will place a greater burden on judicial resources, because of the way in which Mr von Hinten-Reed proposes to deal with subjects like merchant pass on.

The first of the Tribunal's points is this question of very small value claims and inertia. The Umbrella Proceedings are created in order to minimise costs and complexity for smaller merchants. The filing fee ought to be the only fee that's incurred for the very reasons the Tribunal has suggested, that once a smaller merchant is interested in doing so, they can copy an existing claim, and from then on incur no costs at all, because of the way in which they can get an automatic stay and take the benefit of any judgments that follow.

Inertia, of itself, cannot be enough to satisfy the relative suitability test. There's nothing in the case law to suggest that if -- in fact, it would be contrary to the statutory criteria -- if individual claimants have a cost effective, swift and efficient access to justice, which, in our submission, they have through the Umbrella Proceedings, which is adequate, more than adequate we would say, for the purposes of accessing justice, the fact that they choose not to exercise that, because of inertia, that cannot be enough to show that collective proceedings are more suitable, because that will be the case in every case. It will always be easier to sit and wait rather than take the step to file a claim.

The real problem with this issue, what to do about the great wash, as the Tribunal calls them, is the lack of evidence in relation to materiality, because if this is the reason -- if this is the main reason why the Tribunal decides to certify, the concern about the small merchants who, despite all of the advantages of the Umbrella Proceedings, choose not to use it, then it is important to ask what is the materiality of that group of merchants? What is the value of that part of the claim? It is striking how little evidence there is on this question from the PCR.

Since the Tribunal has asked me the question, may I show you some references. I was going to address you on this.

MR TIDSWELL: I don't want to take you out of order, but if it is helpful now ...

MR KENNELLY: Since you asked the question, I will deal with it now, if I may.

MR TIDSWELL: Yes.

MR KENNELLY: The question is what is it worth? What is the materiality of this great wash component? Could we look first at Mr von Hinten-Reed's third report? That's core volume, tab 42. This has some data taken from the PSR report, page 1106. This is an overview of share of card transactions. We are looking here at total card payments on page 1106 in table B.5-1.

"Overview of share of card transactions by different merchant size bands."

You will see there that merchants with card turnover of less than £380,000 make up 94% of all merchants accepting cards, but just 6.5% of transaction value.

Now, if we go up to 1 million, and then you add the proportion of merchants, 93.7% and 4.1%, so up to 1 million, we have nearly 98% of merchants, a huge percentage of the merchant body, and just over 10% of transaction value, but that's 10% of total card payments, not 10% of interregional and commercial. There's no evidence before you on the share of interregional and commercial transactions for these smaller merchants. It is not something Visa can do, as you have seen from Mr Holt's evidence.

The share of interregional and commercial transactions for these very small merchants has to be lower than the share of total card payments. Just think of the merchants. The merchants we are thinking about here, without wanting to offend any particular town, one can think of towns in this country where tourists may be less common. There may be corner shops in those towns. Market stalls, very, very small merchants. The share of interregional and commercial transactions is going to be tiny for those merchants.

A good way of looking at that is we know that these MIFs, these particular interregional and commercial card MIFs are concentrated with airlines, hotels and

car rental companies. Very few of them will have turnover of less than a million pounds. None at all in airline for example. It is impossible to conceive of one with such a small turnover. They are not included in this set.

So it will be a tiny, tiny fraction of the overall claim value indeed, even assuming 100% acquirer pass on.

My point here is the PCRs have put no evidence forward at all that this great wash adds up to anything material. In fact, we know that outside those three sectors of airlines, hotels and car rental, interregional and commercial MIFs are close to zero percent of all transactions across all turnover sizes.

We see that again in Mr von Hinten-Reed's evidence.

MR TIDSWELL: Before you have leave this -- that's very helpful -- I am trying to work out is it possible to work out if you were to take the first line listed under £380,000 turnover, is it possible to work out what the average value of the fee would be? The transaction volume is the transaction itself we are talking about. When we talk about transaction volume, we are talking about the purchase that has been made.

MR KENNELLY: Yes.

MR TIDSWELL: The transaction here does not refer to the interchange fee or indeed the merchant service fee.

MR KENNELLY: No.

MR TIDSWELL: You can't get from this to the estimate of what an average MIF might be for a merchant in that category. That's right, isn't it?

MR KENNELLY: Yes.

MR TIDSWELL: Not from this alone. Maybe from other material we have, but ...

MR KENNELLY: Yes, but you can certainly see that if the total transaction value is 6.5%, the share for these kinds of tiny merchants, market stalls in small towns, the

share of commercial card MIFs and interregional MIFs may well be zero.

MR TIDSWELL: Yes.

MR KENNELLY: Very likely to be zero or close to zero.

MR TIDSWELL: In which case you are into the class definition point that we ...

MR KENNELLY: Among other problems, yes. That's all assuming 100% acquirer pass on.

MR TIDSWELL: Of course, yes.

MR KENNELLY: Let's go back to Mr von Hinten-Reed's first report in the opt out application. That's in Core Bundle 1, page 438. It is tab 22, page 438. I will be coming back to this report later when we look at car rental, hotels and airlines in particular, but just sticking with the point that I am making on the likelihood that this great wash component really is potentially immaterial for the purpose of interregional and commercial card MIFs.

He is dealing here with commercial payment cards transactions share by sector. So here he is focusing on where commercial card MIFs are incurred. We see obviously the hotels and car rental attract 30%. Then we get into other sectors, clothing, retail. Then we are close to 0%.

DR BISHOP: Which page are you on?

MR KENNELLY: Forgive me, Sir. Page 438.

DR BISHOP: Thank you very much.

MR KENNELLY: So we can exclude the hotel, car rental and airlines, because none of those are going to have a turnover of less than £1 million, recalling the evidence we saw from Mr von Hinten-Reed's third statement. Let's look at the other categories.

Let's look at the retail. Close to zero. Restaurants again, 5%. Supermarkets. Supermarkets will have a turnover -- may well have a turnover of more than

£1 million, but even there we are down to very close to zero.

So for the merchants that are in the great wash, the less than £1 million turnover or even less than that, the percentage of commercial card payments will be even lower than what we see here, lower than supermarkets. So very, very close or at zero per cent.

That's before you take into account acquirer pass on, because these small merchants will all be on blended MSCs. So where is the evidence to think that a blended rate for a merchant with less than £1 million turnover would be any lower if the interregional and commercial card MIF was set at zero, when these commercial card and interregional MIF transactions amount to let's say 0.1% of its card transactions? That is fanciful. I appreciate there is a limit to what the Tribunal can establish at certification stage, but to invoke Mr Bowsher's suggestion to exercise judicial common sense, that is a fanciful proposition.

Certainly, there is nothing from the PCR, no evidence at all, to suggest otherwise.

Now we know the PSR, the regulator, found little or no acquirer pass on for domestic consumer MIFs for merchants with less than £50 million turnover. A domestic consumer is a much bigger proportion of the MIFs paid by merchants. Even for merchants with less than £50 million turnover, the PSR found little or no acquirer pass on.

So where, we ask, is the realistic basis for finding material acquirer pass on for commercial and interregional MIFs for merchants earning less than £1 million turnover? It is inconceivable.

Really, and this is my short point on materiality, where does that leave us on suitability, because I maintain my main point, which is that even the smallest merchants can obtain proper access to justice through the Umbrella Proceedings.

I will make the point, and I am coming to it, that introducing the collective

proceedings into the Umbrella Proceedings, these collective proceedings, will be highly disruptive to the Umbrella Proceedings.

But, more importantly, for the smaller merchants, and I will develop the point, splitting their claims between Umbrella Proceedings, where they have their domestic consumer MIF claims, and forcing the interregional and commercial card MIFs into collective proceedings makes it harder for smaller merchants in particular to settle.

So there are really serious downsides, and I will come to this, with certifying these collective proceedings. So we have to ask if the reason for certifying them is just concern about the great wash, where is the evidence that it is material? There is no plausible basis for saying that there's a realistic incidence, realistic likelihood of acquirer pass on of more than zero per cent for these merchants.

So if you certify based on what you have before you, it may ultimately be the case that there will be no evidence before the Tribunal that there was any material effect on this great wash sub-class. So the disruption and all the detriment the Tribunal will suffer will be for nothing. That's our concern when we look at the materiality of this issue.

There is a separate point that ties into the point that Ms Tolaney was making on methodology. The idea that this great wash can be tucked in behind the individual claims in the Umbrella Proceedings does not work from the perspective of the methodology, because these merchant stalls selling necklaces or corner shops in remote places, when one comes to look at causation and quantum for those types of merchants, for those very small ones, that's not just something that can be mixed up with the causation and quantum issues that are before the court in the Umbrella Proceedings. You can't simply assume that the methodology for those will be the same. If that is the basis for the collective proceedings certification, there needs to be a particular causation and quantum methodology for that group and we don't have

that from the PCRs.

MR TIDSWELL: The point is probably strongest on the questions of liability, isn't it, on infringement, where it may be that the read across is the greatest. Undoubtedly, with an opt out case, the further you get down the chain towards causation and quantum, the more likely it is there are going to be different things that arise. I think that's true.

MR KENNELLY: That is definitely correct, Sir, if I may so, but on acquirer pass on, which arises at the liability stage also, there are important difference, which I have outlined.

So that's the very long answer to your question.

MR TIDSWELL: That's helpful. Just one other question of clarification. I think you are clearly making this point in the context of the relative assessment of the two opportunities for claimants to claim. I think it's important to record that if we were starting from scratch, then one wouldn't necessarily adopt the Umbrella Proceedings as the best way to deal with thousands and thousands of merchant claims. I don't think you are saying that, though. I think you are saying obviously we have those. That is a given that has happened. The question is when they exist, what is the relative assessment then? I don't think you are saying just as a matter of principle the Umbrella Proceedings are a better way of dealing with this than collective proceedings, though, are you?

MR KENNELLY: Well, I'm certainly saying that even if one were starting from scratch, the Umbrella Proceedings, as currently formulated, are definitely better than these proposed collective proceedings --

MR TIDSWELL: Because of the defects you have identified.

MR KENNELLY: Precisely.

MR TIDSWELL: Yes. I understand that's a fair way of putting it, given your position.

Certainly, the Tribunal's view I think would be that the Umbrella Proceedings are a response. You see it in the judgments you have taken us to -- are a response to a difficult practical challenge, and they are far from ideal, and there are some compromises and difficulties that come with them, and indeed, no doubt, some that we have yet to encounter and will have to overcome, and in many ways the collective proceedings regime is to avoid all those problems if the case is a suitable case in order for certification. Perhaps nothing more needs to be said than that. If we disagree about that, you probably ought to say so, but I don't think you would do.

MR KENNELLY: Except to say that the Tribunal says that the Umbrella Proceedings may encounter difficulties, but what's important to see -- and this is why I am taking you to so much of this Umbrella Proceedings material, is that we have had them now, in substance, for a year and they have worked. It is not as if we can say the truth is -- and this has happened in other cases before the Tribunal -- it happened in Trucks, for example, where one encountered real problems and one has to fashion something different. The Umbrella Proceedings in the interchange case have worked really well. Parties have cooperated. Thousands of claimants are included. It has been efficient and relatively rapid. To disrupt that, to derail it, for this proposed collective proceeding, would be a real shame, in my submission.

MR TIDSWELL: It's helpful to have those observations. It is pleasing to hear, and I am sure they may be useful in some other context now they are recorded on the transcript, Mr Kennelly.

MR KENNELLY: I stand by that. That's not an opportunistic comment. That is a consensus view on both sides of the Umbrella Proceedings.

Going back to Ms. Williams' evidence then and access to justice -- sorry, back in the Core Bundle, tab 34. She was about to address publicity. Paragraph 41. How all these small merchants know about it. This is obviously relevant to access to justice.

Are merchants aware? Paragraph 41. I will skip through this quickly, because it is not contested. There has been extensive marketing activities and public reporting of the interchange related proceedings against Visa, not least by the law firms themselves, Humphries Kerstetter, Scott + Scott, Stephenson Harwood. Skip through the pages. There was reference to extensive press coverage and marketing by litigation funders, because some of the individual proceedings are funded, media outlets, intermediaries and so forth.

That brings us then to funding arrangements, page 838. Paragraph 43. Ms. Williams notes that:

"The claimant law firms are offering claimants alternative methods of funding their claims against Visa."

She notes that:

"The claims issued by Humphries Kerstetter under the Umbrella Proceedings are funded by Therium Capital Management" and we have noticed from public statements by Stephenson Harwood that they appear to have funding in place also.

You see that at 43.2.

Now, the PCR says "Well, the defendants can't show that external funding has been secured by the majority of the claimants in the Umbrella Proceedings", but, of course it is for the PCR to satisfy the Tribunal that collective proceedings are more suitable than individual proceedings within the Umbrella Proceedings order. The burden is not on the defendants, and for good reason, because there is a real limit to what we can ascertain about the financial dealings of claimants or potential class members.

In the Umbrella Proceedings, for example, there is no obligation for the claimants to tell us anything about their funding arrangements.

We do know, as we say here, there is some funding available, and to answer the PCR's point, and it is more important, one way or another over 2,000 merchants,

thousands of smaller customer merchants, have made claims.

In our view, it is likely many or most of them have funding, but one way or another they have managed to bring claims, and not just large merchants. We see that at page 848 of Ms. Williams' statement. At the very top of that page she notes that:

"While larger merchants within the Umbrella Proceedings seek damages in multi-millions of pounds, the vast majority of merchants in the Umbrella Proceedings have lower value individual claims."

Then she refers to one claimant group, Chichester Festival Theatre, and 16 other individual entities represented by Humphries Kerstetter, obviously with funding very recently issued a claim against certain Visa entities.

We see claimants, type of claimants and total MIFs claims. Chichester Festival Theatre is a good example. Total MIFs claimed, £60,000. Interregional MIFs claimed, £2,000. Other similar small merchants listed below. Nottingham Rehab Limited, interregional MIFs claimed £1,000. These are typical of the vast majority of claimants in the Umbrella Proceedings.

Although it is not for us to show that Umbrella Proceedings are more suitable, we have evidence that merchants of all sizes have succeeded in accessing justice.

As I said a moment ago, that's not surprising, because that's the very thing that the Tribunal intended to secure and did secure in the Umbrella Proceedings.

Set against that we ask: what evidence has the PCR gathered that merchants have been unable to access justice through individual proceedings? There is nothing from the PCR.

We make a further point. The fact that the Umbrella Proceedings covers all MIFs, whereas the proposed collective proceedings covers interregional and commercial card MIFs only, actually makes the Umbrella Proceedings more suitable for small merchants. That's for two reasons.

The first is about settlement, to secure settlement. Of course, securing settlement is a very important element of access to justice. The problem with the collective proceedings, it is very difficult for a smaller merchant to know if he's in the opt out class or not, because he pays a blended MSC to his acquirer. The fact that merchants will not know if they are incurring interregional or commercial card MIFs will lead to an inadvertent bifurcation of the merchants' claims, because a smaller merchant generally won't know if he's incurring interregional or commercial card MIFs, because it will be such a tiny fraction -- maybe nothing at all, but tiny. So he will be very likely be caught by the opt out collective proceeding if certified. He won't opt out in time. And then when he wants to join the Umbrella Proceedings for his much bigger domestic MIF claim, he will be barred from bringing in his interregional and commercial card claims into the Umbrella Proceedings. So he is forced into two proceedings running on different timetables, but for the purpose of settlement, which is really serious, he can settle out of the Umbrella Proceedings if he wants. He can cash out early, but he is stuck for part of his claim in the collective proceeding. That is a major disadvantage of the collective proceeding. An individual claimant in the Umbrella Proceedings can decide when he wants his money. He can cash out when he wants to. There may be a discount, but that's his choice.

In the collective proceeding, a class member does not have that flexibility. As the Tribunal knows well, collective settlement is a major undertaking that has yet to be attempted in the Tribunal, but it requires on any view further overall assessment by the Tribunal, potentially with further separate economic evidence.

Now, in answer to that first point, Mr Bowsher said that it is easy for a merchant to know if he incurs interregional and commercial card MIFs.

Two points to answer that. He says most will be aware. He refers to the West End hairdresser. Of course, there is absolutely no evidence to support the claim that

most smaller merchants will know if they incur interregional or commercial card MIFs. We are not saying that nobody will know that, but our point is that many or most smaller merchants will not know. They are not all hairdressers beside Claridge's.

The second point is the schemes will know. The answer to that is just no, that's wrong. Our evidence is crystal clear. Mr von Hinten-Reed does not really challenge it. Mr Holt explains that only acquirers can really answer that question.

There is a second reason why the Umbrella Proceedings are more suitable for merchants and it links to what I have just been saying. Whoever has an interregional or commercial card MIF claim will very likely have a domestic consumer MIF claim, and that will always, for a smaller merchant, be a much larger component. It makes sense to bring these claims together. The great thing about the Umbrella Proceedings is that merchants can pick from a menu of claims as they please. If they want to pursue domestic but not interregional MIFs, they can. If, in the unlikely event they want to pursue interregional but not domestic, again they can. If they want to pursue all of them, they can do so. The merchants can make that choice. They make that selection from the menu, rather than having it made for them inadvertently by the PCR.

If I may address further this question of small merchants.

MR TIDSWELL: Your first point about settlement does not actually depend on knowledge, though, does it? I think you are making the point that even if they do know that they might have interregional and commercial cards claim, they are still forced under a bifurcation if they want to pursue both claims?

MR KENNELLY: Well, if they knew they had commercial card interregional MIFs and they decided to opt out --

MR TIDSWELL: I see. Yes, I see. So they would need to take that positive step to

opt out. Yes.

MR KENNELLY: They would have to know about these proceedings, that there was an opt out option, the deadline for the opt out option, and if they opted out on time, the market stall selling necklaces or whatever, they will positively have to opt out, and then they have all their claims together in the Umbrella Proceedings if they wanted to use that route.

MR TIDSWELL: We are probably not talking about a market stall. We are probably talking about somebody in the table at 848. There is something called Parcel2Go.com, which has an overall claim of £1 million of which £41,000 is -- commercial cards -- sorry. That is interregional MIFs I think.

MR KENNELLY: I agree. In reality, we are talking about a slightly larger business, but still a small one.

MR TIDSWELL: Yes, but your point is -- so Mr Bowsher's point addresses the -- has to go to the question of opt out in order to make any difference.

MR KENNELLY: Yes.

MR TIDSWELL: Otherwise you are still in the same position as you have advanced.

MR KENNELLY: Then they are stuck. That's the very bifurcation and duplication of proceedings which the Tribunal has deprecated.

MR TIDSWELL: Yes, that's helpful.

MR KENNELLY: Going to Mr Holt at tab 35 of the Core Bundle, page 855. Page 865, please. It begins at 855 and I would ask you to go to page 865. This shows the participation of small merchants in the Umbrella Proceedings. Paragraph 18 deals with active claims.

Now, I say right away that he was only able to identify turnover information in relation to 1249 of the 2359 merchants in litigation against Visa. So he is using a sub-set of the merchants who are suing Visa, but of those he notes that -- this is about three

lines down, 77% of them have a turnover under 100 million. So they are obviously most in the opt out class, the vast majority. Then this:

"There are 298, 23.9% of claimants whose average annual turnover didn't exceed £5 million."

So 24% had a turnover less than £5 million. You have my point that they are all covered by the Umbrella Proceedings in respect of their interregional and commercial card MIF claims. That distribution is then displayed in figure 2 on page 865.

MR TIDSWELL: Yes.

MR KENNELLY: In paragraph 25 he notes the vast majority are in the opt out class. The vast majority, in fact, are well, well below that threshold. Small merchants are participating vigorously in the Umbrella Proceedings.

Mr Holt then addresses a further additional point the PCR makes, which is that not enough merchants overall are in the Umbrella Proceedings. Mr Bowsher said this a few times. When you look at interregional and commercial card revenue specifically, only 15% of that revenue is claimed in the current Umbrella Proceedings. So not all those who have claims are suing.

Now, a point here is that 15% is very much a lower band. It's not the central estimate of a true figure. As Mr Holt explains, the problem is with trying to use Visa data to strip out active and settled claims, and he deals with that at 2.2.1, page 867. Go to that next, please.

Paragraph 30. This is why there is a real problem with the Visa data and why that 15% is a minimum.

Visa doesn't record a unique identifier against each merchant but records MIFs paid under the name of the merchant which is submitted by the merchant or the acquirer. So each entry may be captured under a different name. So Sainsbury's a single

merchant company, will have multiple sub-entities with potentially different names.

Visa engages in a manual matching exercise.

You see that at 31.

But that is highly imperfect.

Paragraph 32 explains, halfway down 32:

Different Wetherspoon's pubs use their individual pub names, and if that is the case, they wouldn't be matched to Wetherspoon's by Visa's team. There would be different names matched to different MIF payments.

The result of that, paragraph 33: "MIF payments not associated with Existing Claimants are aggregated under a "No current claim" category broken down by "No Current Claim Grouped: Visa Identification Available", and "No Current Claim Grouped: No Visa Identification."

That second group accounts for approximately 51% of relevant MIF payments over the period 2016 to 2022.

So for that "No Visa Identification" where we can't tell whether the payment was associated with an existing claimant or not is half of all MIF payments. That's particularly problematic for hotels. He explains this at 34. He says:

First, "this approach means that the MIF payments associated with each existing claimant, where we can show it [that's the 15%] has to be a lower band. It is likely that certain sub-entities were not captured. The exercise is particularly imperfect for sectors that are fragmented", like hotels, which are obviously very important for interregional and commercial card MIF, because those are often distributed across multiple outlets using different brand names.

An example of that at 35, the Edwardian group, a privately owned hotel group, which is suing us. We know from its accounts it has revenues of about £198 million. But according to our data it received total Visa card payments of in the same time

£364,000, 0.2% of its annual turnover. That's obviously wrong, but it shows the problems with Visa's internal matching of MIF payments against groups, especially ones that incur interregional and commercial card MIFs far more than others, like hotels.

He says at 34, as I said, 15% is a lower band. We don't know what the true figure is. It is more probative, in my submission, to look at the core sectors where interregional and commercial card MIFs are most often paid.

For that, just to show this is common ground, could we go to the PCR expert evidence? If you could keep Holt open and then just go to the PCR's evidence on this, which is Mr von Hinten-Reed's statement at tab 22, page 437. In paragraph 30 he is identifying sectors with high concentration of commercial payment card and interregional transactions.

We see at figure 3.1 on 438 -- we saw this before -- the preponderance of commercial payment card and interregional transactions in the hotel and car rental sectors. There is obviously a massive difference between those and the other categories. So Mr von Hinten-Reed says, based on evidence from a specialist payment card consultancy and the ONS, that the sectors where these payments are concentrated are car rental, hotels and airlines. Those commercial payment cards.

Then we go to interregional transactions, paragraph 34. We go to figure 3.2 over the page, 439. Again we see something very similar. Interregional MIFs are incurred by hotels and car rental companies and airlines, he says at paragraph 36 to a far, far greater extent than the others. The others nearly zero, except for restaurants, which are only 5%.

So we go back to Holt with that in mind. Page 869. To what extent are merchants from those sectors where interregional and commercial card MIF actually arise, to what extent are those sectors in the Umbrella Proceedings?

In paragraph 38, about four lines down, table 1.

"The data suggests that Existing Claimants account for approximately 35% of the total UK interregional consumer and commercial card MIFs paid during this period across these three sectors. 67 and 81% of the total relevant MIF payment in the airlines and auto rental sectors."

Those in the claim were settled. For hotels the percentage is much lower, 12%, but for the reasons I have explained that's very likely to be an underestimate, because of the problems with Visa's data in matching hotel companies with MIF payments. So again, there is nothing from the PCR to gainsay this. That appears to be a real underestimate.

So of the sectors where these MIFs actually arise, very significant percentages are participating in the Umbrella Proceedings.

MR TIDSWELL: I am probably being a bit slow. Just so I understand exactly what he is doing here, he's taking what Mr von Hinten-Reed says about proportion generally in those sectors and then he is applying that proportion to reach a conclusion about the number of existing claimants who have interregional and commercial card MIF payments. Is that right?

MR KENNELLY: No. He is asking of people who have settled or are suing Visa --

MR TIDSWELL: Yes.

MR KENNELLY: -- of the categories that have paid these MIFs.

MR TIDSWELL: Yes.

MR KENNELLY: -- to Visa, what percentage of those categories are in or have settled the Visa claims? That may be what you said to me, Sir.

MR TIDSWELL: I think my question was particularly how he is using the data from Mr von Hinten-Reed. I think he's using the establishment of a proportion of interregional card transactions by share. Take that as an example. He is taking

a proportion in the car rental sector, how much of that -- how much interregional transactions are accounted for by the car sector and then he is applying that to existing claimants to work -- to the car rental companies. Is that what he is doing?

MR KENNELLY: I don't follow. All he is taking from Mr von Hinten-Reed is the fact that these are the sectors where these MIFs are paid.

MR TIDSWELL: Yes.

MR KENNELLY: Far more often than in other sectors. So he asks Visa, of the existing or settled claimants, how many of them who paid payments to you have settled or assumed? Then he gets those figures.

MR TIDSWELL: How many people in those sectors have settled.

MR KENNELLY: Yes.

MR TIDSWELL: That's fine. That's helpful, yes.

MR KENNELLY: It shows that where these MIFs are incurred more than 0% , or just over 0%, which is really concentrated into these sectors, with a very significant participation in the Umbrella Proceedings.

MR TIDSWELL: Yes.

MR KENNELLY: That is our positive case on what we say is the relative superiority of the Umbrella Proceedings.

What does the PCR say about the relative superiority of the proposed collective proceedings over the Umbrella Proceedings? In our submission, the PCR just ignores the features of the Umbrella Proceedings and pretends that the alternative to the collective proceedings is a mass of individual claims all run independently. We see that in the opt out claim form in the Core Bundle, tab 14. Please go to that, page 247.

DR BELL: Sorry. Which page?

MR KENNELLY: 247. 247 is where it begins. If you go, please, to 263,

paragraph 47. So the PCR here says -- this claim form was issued in June 2022, so three months after the Tribunal ruling in March, when it was clear how the individual claims would be run.

Paragraph 47:

"As explained in the litigation plan […], typically the costs of pursuing claims individually would be uneconomical or prohibitively risky, given the likely damages obtainable."

I should say before I get into the text there are two points that are being made. First, an individual claim wouldn't be worth much, because the interregional MIFs and commercial card MIFs were a small part of the MSC and, secondly, the costs and risks of suing individually would be prohibitive. I will take the first half of that paragraph. He says:

"Suing" would be uneconomical or prohibitively risky. The litigation plan illustrates the point by referring to a hypothetical merchant with a £100 million turnover, paying a 1.5% MIF. His maximum claim value would be about £9 million. However, in these proposed proceedings, the substantial majority will inevitably have much lower turnover and the commercial and interregional MIFs apply to a small proportion of a merchant's payment card transactions."

Now you have my point that the advantage of the Umbrella Proceedings is that the merchants can sue, if they choose, for all of the MIFs, not only these MIFs that make up a smaller proportion but also the domestic and consumer MIFs that make up a much more substantial share.

Then we read from the lower hole punch. He says:

"The effect of this is that the large majority of members of the proposed class will (at the very most) be entitled to damages much lower than £9 million. This must be set against", and these are the features he says of the Umbrella Proceedings, "(i) the

adverse costs the claimants will face litigating individually, (ii) the substantial costs of bringing a standalone claim; and (iii) the large amount of management time, and resource, required to engage in long and complex proceedings (involving individual disclosure, witness evidence and so forth). In this context ordinary proceedings will be impractical and uneconomic for most members."

It is striking that the PCR completely ignores the features of the Umbrella Proceedings, the features which were outlined in March of the same year, because the PCR would have known in drafting this that a new claimant, as the Tribunal said, could adopt the pleadings of the old, obtain an automatic stay, and do nothing else except take advantage of the work of the existing claimant at minimal cost to management time.

MR TIDSWELL: What about the adverse costs point? I probably should have added that to my list of frictions, shouldn't I?

MR KENNELLY: On any view, adverse costs will be shared across thousands of claimants, many of whom have much broader shoulders than very small merchants. ATE cover can be sought, if necessary, and, in our submission, for the same reasons that we give in relation to funding, there is no reason why ATE cover couldn't be given, if necessary. It is given for far weaker claims than we see here.

The question of costs is ultimately a matter for the Tribunal. So the Tribunal will be astute in the event of the resolution of the case to ensure they were not imposed unfairly on very small merchants which had contributed almost nothing to the costs of the overall proceedings, if all they had done was paid a filing fee, copied someone else's claim form and then contributed nothing more to the case.

DR BISHOP: All this is true, but you know the effect of uncertainty. A merchant simply does not know what is going to happen. Yes, we can look at it and say there are various mechanisms to make sure that a small merchant does not suffer, but

really there is a worry about a potential bill coming through instead of a bounty.

MR KENNELLY: Indeed.

DR BISHOP: Have you any answer to that point? Is there anything they can do?

MR KENNELLY: Well, three answers. The first is that in our submission in a case like this the solicitors who do know what they are doing and are less intimidated could secure ATE cover for costs, which is extremely common and granted on a regular basis for consumer actions claiming very small sums brought on a mass basis. That's the first point. The solicitors in the PCR case are very familiar with how to do that.

The second point is that, in fact, the merchants should be more concerned about the costs they will incur by being in the opt out class in these collective proceedings, if certified, because of the demands which the PCR intends to impose on them, which are greater than the demands that will be imposed on them in the Umbrella Proceedings.

I am going to come to that now, because at the very end of paragraph 47 the suggestion that in the Umbrella Proceedings there will be more individual disclosure, witness evidence and so forth, than will be asked of the merchants in the collective proceedings. In fact, in relation to issues like exemption under Article 101(3) and countervailing benefits, there is going to have to be disclosure and evidence from merchants. The PCR has just refused to engage with that reality.

But as regards merchant pass on, as I will show you, Mr von Hinten-Reed is proposing more onerous disclosure and evidential burdens on opt out class members than is proposed certainly on the Visa side in the Umbrella Proceedings. They are not just hitching their wagon to the Umbrella Proceedings. In this application for merchant pass on, they are proposing to do far more and impose more onerous burdens on claimants.

Before I get into the detail of that, there's a prior point of principle. This is not to answer, Sir, your question, but a background point, which is to the extent that data and disclosure will be needed from claimants, and we say very little disclosure will be needed from merchants, but Mr von Hinten-Reed is proposing to obtain a great deal. To the extent that's an issue, in the Umbrella Proceedings we have a built in group of thousands of claimants available to do so. There is no such certainty with the collective proceeding.

Now I will deal with exemption first and what merchants need to produce there, because we know that an issue in relation to exemption and interchange are the benefits which card usage brings for merchants. This has been part of the scheme's arguments from the very beginning of these cases.

We say a major benefit of cards for merchants is saving the costs of handling cash. That is we say greater value than the cost of the MIFs in question. That needs to be assessed, the cost of cash for merchants. You can see what merchants need to produce in the Umbrella Proceedings from the table. This is what the claimants in the Umbrella Proceedings accept has to be produced.

Can I ask you to go to that in Hearing Bundle C, page 4458? This is column 3. So we are not looking at the precise detail of how much this is going to be determined, but just what the claimants' experts accept has to be produced. Page 4505, please, paragraph 14.3. You see there what the claimants need to produce. 14.3 their method of determination, and there is a reference to "Factual witness evidence from appropriate individuals of the claimants" and "Documentary and data disclosure from the claimants", for example, in relation to the costs of cash.

Even if benefits are not enough for exemption, absent the MIFs, it will still be necessary to ask, to the extent merchants are worse off without MIFs, that is relevant to assessing damages. We see that also in terms of what documents and disclosure

the claimants must produce of the same table, paragraphs 24, 26 and 27 on page 4525, 4526, 4527, 4528, 4529.

I am showing you this just to show that the claimants will need to produce evidence and disclosure in relation to this question of countervailing benefits.

You go, finally, to surcharging, that's page 4530.

Now, in the Umbrella Proceedings the parties addressed these issues and made proposals about how to address them in disclosure and evidence. But what has the PCR done to allow the collective proceedings to be compared with the Umbrella Proceedings on this question? How is this data and disclosure and evidence going to be gathered?

Now, the PCR accepts they have to be addressed. They have that in their skeleton. There is no need to turn it up. You have seen it. Paragraph 37 of their skeleton accepts that these questions of exemption and countervailing benefits have to be addressed but, as Ms Tolaney showed you, they advanced absolutely no methodology in relation to them at all. Zero. They just ignored the need for disclosure and evidence.

Then we come to merchant pass on and this comes back to answer the question put to me a moment ago, because the PCR's expert here says extensive production will be needed from class members. So let's look at what Mr von Hinten-Reed proposes. We say there are obvious flaws in this approach. We say it is wrong in principle and it is disproportionate. It imposes a greater burden. One talks about putting fear into merchants. This should put some fear into them.

I will show you first what we say is the proper approach, the approach which we are adopting in the Umbrella Proceedings. We have that in the pass on judgment of the Tribunal. That is in the Hearing Bundle, B2, page 142. It begins at 142. I would ask you to go, please, to page 171. This is dealing with how merchant pass on should

be addressed. We rely on this.

The Tribunal say at paragraph 61 that they need to get a clear direction of how we intend to deal with the pass on defence.

Paragraph 61(1).

"We note that Visa, in contrast to Mastercard, in substance proposes to demonstrate pass on by the use of econometric evidence and relying on existing studies of pass on rates. We consider that approach to be, prima facie, the correct one to adopt. Mastercard […] also wishes to rely on disclosure from the Umbrella Interchange Fee Claimants. Given the sheer number of claimants, that will involve sampling."

Then at (3):

"We propose to make an order refusing Mastercard permission to rely on specific fact evidence to make good its pass on defence. Given the evidential difficulties described, we are entirely sceptical that the pass on defence can be established by claimant specific evidence adduced from a sample of many thousands of claimants and we consider such an approach would be a disproportionate and frankly hopeless way of deciding the question of pass on. That said, the Tribunal would be entirely sympathetic to some form of tightly controlled, expert lead, disclosure, provided that is was focused, cost-effective and proportionate." It might be a survey or questionnaire, but it has to be the Tribunal said extremely tight and narrow.

Over the page, page 183, (3):

"There was ample material before the Tribunal to indicate that any close analysis of an individual retailer's approach to managing the costs represented by the alleged unlawful overcharge (the "MIF") was likely to be unproductive in most cases."

The idea that you ask each individual merchant: "Did you pass this on or not? Did you make individual decisions to deal with the commercial card or interregional MIF?"

That's obviously a pointless exercise. They say:

"Finally, we are sympathetic to expert led and focused disclosure."

That is Umbrella Proceedings.

Now let's contrast what Mr von Hinten-Reed is proposing for merchants in the collective proceedings. Let's go to his most recent report, tab 43 of the Core Bundle. Page 4 to 5. Under paragraph 10, at the very end of page 4, he says:

"Merchant [i.e. claimants] specific, qualitative evidence will be needed to assess whether [i] costs were driving revenue [via prices] or vice versa and [ii] whether changes in the MSC caused offsetting changes in other costs."

Over the page.

MR TIDSWELL: Is this paragraph 10?

MR KENNELLY: It is paragraph 10, Sir. It is the very bottom of the page. I skipped all of paragraph 10. It is the last bit. I am going over the page to page 5. Mr von Hinten-Reed says for the PCR -- and this is not some ill thought out report produced at the beginning of the process. This was served a number of weeks ago.

"Of critical importance when assessing the fact of pass on and depending on the nature of the causal link from the identified pass on mechanism, it may be necessary for the assessment of the extent of the pass on."

So witness statements from class members of the fact of pass on and the extent of pass on:

"There are challenges involved in the collection of relevant merchant evidence"

He accepts those, and he goes on to explain how he goes on to deal with those challenges.

Go, please, to page 17.

DR BELL: We can't see the numbers. It has been over printed.

MR KENNELLY: I am sorry. I will need some help, because I have this --

MR TIDSWELL: Which paragraph, is it?

MR KENNELLY: It is paragraph 83 on page 17.

MR TIDSWELL: So that's 1130.

MR KENNELLY: I apologise.

MR TIDSWELL: You have given us the paragraph numbers, we will manage.

MR KENNELLY: Paragraph 83:

"Merchant evidence is likely to be of critical importance when assessing the fact of pass on and", three lines down, "the extent of pass on."

Now I am on paragraph 95. He is addressing how he will obtain merchant evidence.

"Ideally, one would simply ask merchants what they did [or would have done], but the small magnitude of the MSC is likely to lead to incomplete answers."

Then he has this proposed method at paragraph 96. He wants to conduct, first bullet point:

"A survey that explores the sampled merchants approaches towards pricing and budgeting. A sample of merchants will cover a wide range of merchants across different sectors."

Second bullet. I will skip through this in view of the time. He wants a sub-set of that group to provide further information.

Third, a further sub-set will be test claimants, who will provide disclosure, targeted disclosure.

Last bullet. A further subset will produce witness statements and they will be cross-examined on the question of merchant pass on.

Then he goes on to explain how that's going to work, what will the survey entail. We have that from paragraph 109. So here we are dealing with the first stage, the very wide survey which will capture a wide range of merchants across different sectors, information on how merchants manage and monitor different types of costs. 109.

110, the relationship between costs and price, how class members regard that.

111, how prices are set within the business. He is going to survey class members, smaller merchants, who will have to answer a survey on how price was set within their business.

112, information on the business's decision to a change in different costs. A very detailed survey is intended by Mr von Hinten-Reed.

I move on then to how he is going to find these merchants, because, of course, this is an opt out case. The whole point is that merchants don't have to do anything at this stage.

He notes at paragraph 120, second line:

"In the current proceedings, my sampling frame will be made of merchants that have registered to the opt out class."

They an option to register. But look at the size of the sample he has in mind. Paragraph 124. He says:

"A larger sample size will be suitable."

He is not giving a final sample size but he expects a sample size of 1,000 respondents "gives me a healthily margin."

So he is looking to get that information from 1000 class members. There is nothing in the Umbrella Proceedings along those lines, certainly from the merchants, and as far as I understand -- so far from the schemes.

In paragraph 137 he deals with how a smaller subset will give extensive disclosure and witness evidence. We see that from paragraph 156. This is the disclosure. Paragraph 156. Again very detailed disclosure is going to be demanded of this smaller group of class members. Bearing in mind all the while our concern is with the great wash of very small merchants. That's the Tribunal's concern I think. That massive survey and this heavy disclosure burden is being imposed on smaller

merchants.

Then witness statements. We have that at paragraph 162. He wants witnesses to be produced. The number might be 10 or 20. In other evidence -- I will come back to this -- he explains that this will be the senior management or managers of the businesses, who will have to answer the survey and give disclosure. A subset will have to produce witness statements.

I ask, rhetorically, where will the PCR find these merchants who have not already taken the initiative to join the Umbrella Proceedings, the kind of merchants who will be prepared to do all of this work?

Why would anyone sign up to the register if this was the threatened burden to be imposed on them for what on any view would be tiny recoveries, if anything?

The whole claimed advantage of the collective proceeding over the Umbrella Proceedings is that the class members would have less to do. But here, if you sign up, you are very likely to have to do a detailed survey and you may end up even having to make a witness statement and be cross-examined.

So we ask where does the PCR get its confidence that 1,000 class members will sign up to the register in this opt out claim. So we look to the PCR's evidence and Mr Ross's statement. That's in the Core Bundle, tab 24. This describes his interaction with potential class members in the opt out application. Tab 24. It begins at page 507. I would ask the Tribunal to go to page 511.

First of all, in paragraph 15 he describes his interaction with the potential opt in class members. I will come back to this when I deal with opt in. I am skipping down to the bottom of the paragraph where he describes his interaction with potential opt out claimants.

MR TIDSWELL: Which paragraph?

MR KENNELLY: Paragraph 15. It is the last four lines. Mr Ross says:

"It is fair to say at this pre-certification stage the level of interaction with potential opt out claimants has been significantly less than with opt in claimants. This approach is intentional. It is reasonable, proportional and practical at this stage in the proceedings."

Then at paragraph 29, same statement, page 516, paragraph 29, Mr Ross says, three lines down:

"We and the Proposed Class Representatives are not seeking to book build at this stage in respect of the opt out class. Furthermore, the process of reaching out to potential opt out merchants can be dealt with more efficiently through publicity and awareness after certification. We have, therefore, not directly contacted any of the potential opt out claimants that have registered their details on a claim website."

MR TIDSWELL: Does he tell us anywhere how many have registered? Do we have that information?

MR KENNELLY: I didn't see that. somebody may tell me if it is there.

MR TIDSWELL: I don't recall seeing it either.

MR KENNELLY: I actually looked for it and could not find it.

So the hope that 1,000 class members will sign up to fill out that very detailed survey and then give potentially massive disclosure and witness evidence is pure speculation. The Tribunal has seen that even in the opt in class members, which have been assiduously quoted, and that's what Mr Ross describes, they have millions to gain, only 55 of them have even expressed an interest in opting in.

We have more detail as to what they propose to do with opt out class members in their litigation plan. Could I ask you to go to that, please? Hearing Bundle C, tab 63, page 2596. You saw Mr von Hinten-Reed refers back to the litigation plan. Page 2596. Paragraph 6.17, test claimants extracted from the class members.

"Test Claimants will be agreed by the parties and approved."

"6.18. Test Claimants will be asked to provide details of a CEO and/or CFO or other board level person."

If the Tribunal will recall, this is the litigation plan for the opt out -- sorry. I will make sure I am at the right one.

DR BISHOP: It is the opt out claim.

MR TIDSWELL: It is the Visa opt out, isn't it?

MR KENNELLY: Yes.

"Some of the test claimants in the opt out class may not have a formal corporate structure."

No surprise.

"In such cases a senior representative" -- yes, it is opt out -- "with the requisite knowledge of the financial management processes will be asked to give the witness statement."

It is one litigation plan across them all, but this is the position: managers in these small businesses having to give statements. I appreciate that's going to be a small number. The bigger burden, to come to the point made earlier about deterring class members or frightening them, the survey and the disclosure is completely unprincipled and disproportionate.

I have made the point that in the Umbrella Proceedings, by contrast, the Tribunal's stated preference is not to have detailed disclosure and witness statements from merchants, and we respectfully agree. That's why I said at the very beginning of my submission that we are facing the application as made. That is, in fairness to us, the application we should be expected to address, not something which is being developed by Mr Bowsher, my learned friend, on his feet, without anything to support it. In fairness to us, we have to address the application, not least because the evidence in support of it was filed only weeks ago, supporting the approach which

the PCR has outlined from the very beginning.

MR TIDSWELL: Is that a convenient moment to take a short break?

MR KENNELLY: I am grateful.

MR TIDSWELL: Shall we take 15 minutes and resume again at 11.35?

(Short break)

MR TIDSWELL: Mr Kennelly.

MR KENNELLY: Thank you, Sir. I am turning in the context of the submissions I am making to opt in. My point here is that the proposed collective proceedings are completely unnecessary for businesses with turnover of more than £100 million per annum. A fortiori, the Umbrella Proceedings provides ample access to justice for them. If a company with a turnover of more than £1 million per annum wants to vindicate their rights, the Umbrella Proceedings are ideal for them. There is no need to have the proposed collective proceedings for the opt in class.

We have some insight into that from Mr Ross's third statement. That's in the Core Bundle, tab 24. Go, please, to page 511. This is the paragraph we saw before. I was referring to paragraph 15 in relation to opt out, but now I am looking at the beginning of paragraph 15 on the question of opt in.

He makes the point at the beginning of paragraph 15 that in his experience claimants wish to undertake their own due diligence. Pausing there, that just shows it is perfectly possible for them, having done that, to go to the Umbrella Proceedings:

"In particular, so far as regards the viability and merits of the claims. This position is understandable, given that opt in claimants are typically sophisticated businesses."

The type of businesses that can make full use of the Umbrella Proceedings and for whom the Umbrella Proceedings are more than adequate vehicles for their claims, I would submit.

Then if you go, please, to paragraph 24 of Mr Ross, page 514. At this stage, bottom

of paragraph 24, he notes that:

"12 merchants have registered their intention" -- this is four lines from the bottom of paragraph 24 -- "to join the opt in claims, subject to certification."

The Tribunal will recall this statement was made in November 2022. So even in November 2022 hundreds of very large companies with turnover of more than £100 million had already sued and settled or continued to sue Visa and Mastercard in the Umbrella Proceedings, but even by November 22, they had only managed to rustle up interest from 12. Then he says:

"The average annual turnover of the potential opt in claimants that have expressed interest in joining the opt in claims regimes ..."

He doesn't explain what expressing interest means. That could be extremely vague. It could be clicking a link. He doesn't explain how far that goes. But look at their turnovers. The turnover ranges from about £130 million per annum to 6 billion pounds per annum.

In our submission, the collective proceeding regime was not designed for companies with an annual turnover of £6 billion even on the opt in basis.

A company with a turnover of £6 billion does not need the PCR's guidance or even the PCR's funders. We say it would make a mockery of the regime, designed primarily, as the PCR itself acknowledge, to ensure the claim are prosecuted, quoting from Merricks, "that would otherwise not be brought because a class member would find it too costly on its own". That cannot apply to a company with a turnover of £6 billion. A company like that, if it wishes to sue Visa, really should spend its own money on lawyers and economists and take responsibility for its own claim.

It is telling how little interest there is from potential claimants, even with turnover of more than £100 million in the opt in collective proceedings, I would submit because

the Umbrella Proceedings is there to absorb the interest from those kinds of merchants.

We see where Mr Ross has got to most recently in his fifth statement. That is in the Core Bundle behind tab 40, page 963. That's where it begins. If you go, please, to paragraph 13 on page 965, he confirms that as of March 2023, a further nine merchants expressed interest in the opt in claims and one has declined. The total number of interested merchants according to Mr Ross is now only 55.

Even if that were the total number, I would say it demonstrates the lack of necessity -- the lack of appropriateness even for an opt in claim where the Umbrella Proceedings are there for small and large merchants.

We have a separate point in relation to that figure of 55, because, as we said in our skeleton, on our investigation, 22 of those have, in fact, settled with Visa. The information that supports that submission is confidential. I will just give the references. The Tribunal can check those at your leisure, the references that show how many have settled of that 55, because we obtained the identities, following the order of the Tribunal, is Hearing Bundle D, page 7575 and Hearing Bundle D, page 7609. To support the point we are making about associated companies, that definition in the settlement agreements is in Hearing Bundle C, page 5748.

On that basis we estimate -- I appreciate this estimate is difficult in view of the very small numbers we are looking at -- it may be that around 50% of the opt in class, 50% of the opt in class may well have settled with Visa and Mastercard already.

What is absolutely clear is that there is absolutely no problem with access to justice for those types of class members, potential class members.

That's really all I have to say on suitability for opt in.

In conclusion then on those materials, now we are doing the comparative exercise, what do the collective proceedings add to the Umbrella Proceedings? You have my

point that all of the claims in the collective proceedings can be brought in the Umbrella Proceedings except, we say, the Umbrella Proceedings do the job better. I understand the Tribunal's concern about friction. You have my point about the materiality problem with this great wash of smaller merchants, but even in relation to those the Tribunal refers to the filing fee. Of course, where a single claim form is issued in the High Court, in these Umbrella Proceedings cases, the solicitors inevitably have a schedule of hundreds, if not more, merchants. A single filing fee is paid for the claim form. One must not exaggerate the cost, even the minimal costs in the Umbrella Proceedings. A single filing fee is paid for all of those hundreds or more merchants on the schedule and what happened in the Umbrella Proceedings is merchants are added to the claim form, usually by consent, and the costs for that are either nothing or extremely low for adding merchants.

MR TIDSWELL: Yes. I suppose what we don't know, and actually I really don't think -- I suspect that none of us should speculate. I don't think we have any evidence about that. We don't actually know how that works. We don't know, for example, if I am a hotel and turn up and ask one of those firms to put me on the list, I don't know what the economic consequences of that are. Do I have to pay them fees, for example, a consultation fee for my first meeting. Whatever it is, we don't know the answer to that.

MR KENNELLY: We would say why do we not know the answer? Who could have given us the answer? PCR. If the great wash of merchants is the concern, the PCR ought to have explained why joining the Umbrella Proceedings was onerous, even where a filing fee was shared among hundreds or thousands of claimants and ATE insurance was available or not available. We simply don't know, but we on the defendant's side have produced evidence that there is funding and ATE available, although we can't say how many, because we could not get that information, and we

can tell you that a single filing fee is paid for a claim form. That we can tell you from our knowledge. It is not that each claimant pays a separate filing fee, not at all.

In relation to the substance of how the cases are run, in the Umbrella Proceedings you have my point that the claimants are in the case. There are thousands of merchants available to produce data and disclosure and evidence that will be necessary on the questions of exemption for sure and countervailing benefits.

If you accept what Mr von Hinten-Reed says about what's needed for merchant pass on, which we don't accept, but on his own case, that cries out for thousands of merchants to be involved, which is inconceivable in the proposed opt out collective proceeding.

What is absolutely clear from the application as the PCR presents it to you is that they are not simply hitching their wagon to the Umbrella Proceedings with minimum cost and inconvenience, because we see the costs that are put forward on behalf of the PCR in the litigation plan.

May we go to that, because we disagree with my learned friend Mr Bowsher's calculations? It is in the Hearing Bundle C, tab 63, page 2610. The budgets are on page 2612. Sorry. 2610 is the Mastercard/Visa opt in claim. I am afraid I struggle with this one, but my eyesight is terrible. You will forgive me --

MR TIDSWELL: We have the benefit of having it on screen. So it is easy to blow it up.

MR KENNELLY: The point to make --

MR TIDSWELL: Just to be clear, and this is perhaps a point I missed when I put the point to Mr Bowsher, this is for both opt in claims. That's the budget for both.

MR KENNELLY: Yes.

MR TIDSWELL: I see.

MR KENNELLY: You see the figure for total funded claim in the far right-hand box.

The figure here, £18.3 million for the opt in claim, that is the funded claim. That is not the figure reflecting total costs. The total costs that are proposed by the PCR for the opt in claim are the totals in the row above total funding. The bottom row is the funded elements. You need to look at the total excluding VAT, which is the fourth row from the bottom. I am not asking the Tribunal to add all that up now. You can check this when you do your deliberations. But it adds up to approximately £24 million, not £18 million. £18 million is the funded element.

MR TIDSWELL: Just help me with that. What you are saying is the number in the bottom right-hand corner excludes the deferred funding under the professional advisers' agreements.

MR KENNELLY: We are looking at what is to the total cost of this.

MR TIDSWELL: So the total excluding VAT, which includes VAT insurance, doesn't it, which we don't -- yes, we do have a number for that, or do we? Well, anyway the point you are making is it is not £18.3 million. It is more than that.

MR KENNELLY: Yes. Similarly, for the Mastercard opt out claim, which is on page 2612, and the Visa opt out claim on 2614, the relevant figure is not total funded amount. Again, it's the fourth row from the bottom, total excluding VAT for Mastercard and for Visa. Each involves the lawyers and economists' incurred costs of over £9 million. £9.13 million. So it adds up to about £40 million.

MR TIDSWELL: This is not a question for you at all. It is probably a question for Mr Bowsher. Presumably the experts are not on a deferred fee basis?

MR KENNELLY: I don't know that answer off the top of my head.

MR TIDSWELL: You mentioned them then. I wondered if you had any reason for mentioning them.

MR KENNELLY: No. Just because I see them on the left-hand column.

MR TIDSWELL: That's fine.

MR KENNELLY: What's clear is the total costs on this proposal are over £40 million. We ask where does the money go? For that I would ask the Tribunal to turn to our response to the CPO application in the Core Bundle tab 32, paragraph 45. The point is made at 45, second line:

"The costs of the proposed collective proceedings are vast", the budgets. The opt in claim totals about £24 million. The Visa opt out claim is £9 million. Same for Mastercard.

We say a substantial portion of those budgets goes to lawyers, over £15 million in the opt in and £5 million in each of Visa and Mastercard, with success fees obviously of 100% on top of that.

The funders stand to gain 32% of the proceeds in the opt out claim, although it is obviously capped at the amount of the undistributed damages award if the claim succeeds.

MR TIDSWELL: I struggled to find the funders' return on to the document we have. After a while it seemed to lead to something called a party deed --

MR KENNELLY: The reason I took you to the response was I struggled to find that figure. So I am taking you to this, because -- it's not been gainsaid. This figure has not been disputed.

MR TIDSWELL: I would find it helpful to know where that comes from.

MR KENNELLY: Somebody will give me the reference.

MR TIDSWELL: At some stage, yes.

MR KENNELLY: Again, I am not arguing about shillings and pence here. My point is there's a vast proposed cost to be incurred. That could all be avoided and saved if these merchants joined the Umbrella Proceedings. It also flies in the face of my learned friend's submission that what the PCR is, in fact, proposing is something very slimmed down that could tuck in behind the Umbrella Proceedings. That is not

what we see here in the litigation budgets proposed, which is the application we came to the Tribunal to face.

He also made the point that somehow when one looks at costs and benefits in the Merricks test, the costs to be incurred by lawyers and economists are somehow not relevant. I fail to really understand that submission, but if the Tribunal is troubled by it, I'll give you two references. I am not going to go to this. The Tribunal's own guide, paragraph 6.37, and the case in Gutmann, authorities 6, page 259 and 260, paragraphs 166 and 171.

I move on, if I may, then to my next point, which is the disruption that these proposed collective proceedings will cause to the Umbrella Proceedings.

It seems to be common ground that if they are certified they have to be case managed with the Umbrella Proceedings, otherwise there will be a risk of inconsistent judgments, which the Tribunal will always seek to avoid, but the Umbrella Proceedings are way ahead. There is no way that these proposed collective proceedings will be ready for the pass on hearing next month or the first and second trials in 2024.

Now, Mr Bowsher made submissions on his feet about what's possible, submissions made for the very first time in his skeleton and oral submissions, but let's see what they contemplated in the claim forms, which is perhaps a more honest reflection of what they actually believed in June of last year, because they proposed a timetable annexed to their opt out litigation plan.

We see that in the Hearing Bundle C, tab 63, page 2627. The Tribunal will see the certification hearing that we are now in is referenced on page 2628.

"Time is needed to collect Test claimants" according to this plan.

We see that disclosure is proposed in the collective proceedings, over the page, after the trial 1 takes place, trial 1 in the Umbrella Proceedings in

February/March 2024. The PCR proposed a trial in February to March 2025 on the issues relating to liability and quantum for test claimants.

That's already an ambitious timetable, in view of what the Tribunal has seen in other collective proceeding cases.

My learned friend, Mr Bowsher, says they can move faster, but that's just not realistic. Again, this is a question the Tribunal can determine using judicial common sense, based on the materials before you.

I will refer for this purpose just to the trial of liability, trial 1, due to begin in the first quarter of 2024. My learned friend Mr Bowsher focused on this also. He said that this trial is just about liability, so the defendants will be doing all of the work. The PCR can tuck in behind the claimants in the Umbrella Proceedings.

That's not correct, because to show that the interregional and commercial card MIFs infringe, the class members and even acquirers will need to produce disclosure on the PCR's approach.

Let's recall the questions that Mr von Hinten-Reed acknowledges have to be addressed at the infringement stage. For that we see his statement in the Core Bundle behind tab 42, his third report in the Visa case. We looked at this with Ms Tolaney in detail but you probably marked up the Mastercard version. Now I am taking you to the identical Visa version. If you will indulge me, that is a function of my own preparation, if the Tribunal is happy to do it that way.

MR TIDSWELL: Yes, of course.

MR KENNELLY: I would ask you to go to page 1067. Article 101 (1) is the infringement question. It is addressed in section 6.2 of Mr von Hinten-Reed's report. He addressed the framework for assessing restriction of competition by effect.

One goes over the page to page 1068, section 6.2.2. At paragraph 166 he addresses - the question has to be asked - So he is asking whether the relevant

MIFs have had restrictive effects on competition on the acquiring market. He will consider whether they have an adverse impact on the MSC, and therefore whether the MSC would have been lower in the counterfactual.

My point here is to ask if the MSC would have been lower in the counterfactual, it is necessary to look at acquirer pass on. You can't assess whether the MSC would have been lower in the counterfactual without addressing acquirer pass on.

166. He asks whether the relevant MIFs will constitute a common cost floor under the MSC, and again would they have been lower in the counterfactual.

Then at 6.2.2.1 he sets out the implications of the Supreme Court judgment. Again that addresses in subparagraph (vi) whether the MSC would have been lower in the counterfactual.

He then addresses acquirer pass on head on in 6.2.2. Again, that is under the infringement of competition law section of his report. He says:

"As for merchant pass on, there needs to be an assessment of pass on from the acquirer to merchants. The interchange fee is the largest component in the cost to acquirers in providing their services."

In appendix B he outlines my specific method for estimating acquirer pass on. We note that he then goes on to deal with things after liability has been determined at trial, but acquirer pass on is squarely an issue in asking whether the MSC would have been lower in the counterfactual.

So then we ask what does he propose for this infringement question? We see that in his appendix B, which you have already seen for Mastercard. I will take you to appendix B in the report for Visa. That begins at page 1091 in the same bundle. That is where it begins. Then you go to page 1095 to see the role of acquirer evidence in assessing pass on.

Paragraph 265, the identical paragraph you looked at with Ms Tolaney in

paragraph 177 of the Mastercard report. He says:

"In order for the merchants to establish the fact and magnitude of acquirer pass on, the most relevant categories of evidence will be held by the acquirers themselves, which can only be accessed by third party disclosure."

You looked at this in the context of methodology. It obviously has a separate implication when one asks how will this be done in time for a trial in Q1, 2024.

Go, please, to page 1099, where he explains the disclosure request that he asks the Tribunal to order for production of pricing statements by acquirers. You see that at paragraph 298, because what's clear is that it is not just disclosure that the acquirers will have to produce, but witness evidence. The questionnaire and the evidence that will be sought from the acquirers goes, as Ms Tolaney said, to the most sensitive commercial information the acquirers will have, and the long list of things he will want in the acquirers are set out over the page on page 1100.

We ask how long realistically will this process take? Can it be done in time for the expert reports due in October of this year for trial 1 on liability? The questions that -- if the PCR were certified today, the questions that needs to be formulated for the acquirers, the parties will debate them and the Tribunal ultimately have to rule. Then the acquirers will be contacted and undoubtedly they will resist some or all of this. There will be a contested hearing, an order will be made, and even assuming the PCR gets everything it wants, time will be given to the acquirers to produce that information and evidence.

In our submission, it is impossible for that to be done in five months, even if they were certified today. That is in circumstances where the PCR's stated case before you -- and Mr Bowsher said it even yesterday and the day before yesterday that the PCR intends to engage fully in trials 1 and 2. That's precisely what Mr von Hinten-Reed contemplates in this report.

So trial 1 would be derailed if this collective proceeding is certified.

MR TIDSWELL: It is a possibility that he will not be permitted to do those things if he is not in a position to do it without delaying the trial, so it doesn't necessarily follow that will happen. I take all the points you are saying. I think I put to Mr Bowsher and I think he accepted that there may be an election for him to make as to whether he wants to tuck in. If he doesn't tuck in, then obviously he has to row his own boat, and if he does that, then that's going to have some consequences for when and how that is dealt with, but it probably isn't going to be in the Umbrella Proceedings.

So it may be that the point takes you to the same position, which is that actually he is not going to be able to participate properly in trial 1. I don't think it necessarily follows that the Umbrella Proceedings would be derailed.

MR KENNELLY: If this collective proceeding, as proposed to you, is certified then it will derail trial 1. You, Sir, are positing a situation where a different proposal is ultimately certified and that's very, very important from the perspective of procedural fairness towards the schemes, but also your gatekeeper role, because what's absolutely clear from the Court of Appeal in *Gutmann* and *McLaren* is that in deciding whether or not to certify, your gatekeeper role is critical. How are you supposed to do that when the material before you is said now not to reflect the collective proceeding which Mr Bowsher intends to pursue?

MR TIDSWELL: Yes. This was the point we debated at some length yesterday about what the frame of reference is and what flexibility there is to decide to certify something with some other condition or whatever it is. So I absolutely take the point. We traversed that. We don't need to do it again.

MR KENNELLY: Okay.

MR TIDSWELL: I mean, feel free to --

MR KENNELLY: It is so important I will repeat myself, if you will indulge me. This is fundamental. One can see on the Tribunal's side perhaps the thought that a different collective proceeding might be certifiable, even if this one isn't, but in order for you to exercise your gatekeeper function properly and in order for us as a matter of procedural fairness to address and respond to it, you need to have a claim form and factual and economic evidence that accurately reflects the collective proceedings which they seek ultimately to pursue alongside the Umbrella Proceedings.

One thing is absolutely clear. You don't have that, because what Mr Bowsher was suggesting yesterday in no way reflects what they have actually pleaded and put before you as recently as three weeks ago. That is a real concern, both from our perspective as a matter of procedural fairness, but also from your ability properly to exercise your gatekeeper function.

That's not a theoretical concern. When one asks what is the methodology to show how the great wash of smaller merchants will be addressed by the proposed collective proceedings, the issues we were discussing earlier today, that cries out for a particular methodology for all the reasons we have discussed.

The fact is it's highly unlikely acquirer pass on will make any difference for these, but the idea there is going to be 100% acquirer pass on is fantastical, in view of the evidence before you.

There are fundamental problems with the methodology in relation to the great wash of smaller merchants and there is nothing from the PCR before you to address that. That just demonstrates the more fundamental problem, which is that in order for you to exercise your gatekeeper function you have to have an application and evidence that properly reflect the collective proceeding which they will ultimately pursue with the Umbrella Proceedings, and you haven't got that.

The very final point I had to make in relation to suitability is the overall point about

the approach of the PCR in relation to tucking in behind the Umbrella Proceedings, and the weight that that should be given and the unsatisfactory way in which it has been presented to you.

As the Tribunal raised with my learned friend, Mr Bowsher, we now hear of a yet further collective proceeding application -- we are told it is not yet funded -- from Harcus Parker. That could be launched at any time. We are given no detail about that at all.

In circumstances where we are about to go to trial in the Umbrella Proceedings, that shows, in our submission, a total disregard for the orderly resolution of these issues, and the vast amount of money and time that the thousands of claimants and their representatives have spent in the Umbrella Proceedings, along with defendants and the Tribunal and the Tribunal staff, to bring the Umbrella Proceedings to trial. That's most unsatisfactory, and that also ought to inform your suitability assessment in asking whether Umbrella Proceedings are more suitable for (inaudible) in these cases than the collective proceeding as proposed by the PCR.

I am asked to make two further points. The first is to give you a reference for the funder percentage. Just the references. The first reference is Mr Allen's statement for the PCR, paragraph 63. The bundle reference is C, tab 63, page 2508. The underlying document to support that is C, tab 41, page 1650.

My final point, again to give the Tribunal some more reassurance on this question of friction, because we can see it troubles you, and this problem of -- it was a point made to me by (inaudible) as well -- will class members be deterred from joining Umbrella Proceedings? The fear of incurring costs, will that deter them?

Can I ask you then to look at one final document on this point? It is actually in Ms. Williams' witness statement in tab 34 of the Core Bundle, page 838, paragraph 41.2.8. This refers to a press report quoting from marketing from

Stephenson Harwood, which, as we know, is one of the solicitors representing claimants in the Umbrella Proceedings.

In the Irish Times an Irish retailer, Musgrave, is joining legal action. Musgrave is a reasonably large cash and carry wholesaler. It stated there will be no upfront costs for joining the claim or costs if the claim is not successful in achieving a settlement. However, all parties to the class action -- that's what it is called, even though it is the Umbrella Proceedings -- will pay fees in line with those agreed with both CMSPI, the payment specialists, who are doing some marketing, and Stephenson Harwood, the law firm, in the event of a successful claim.

Now, I have told you that the Humphries Kerstetter claims are funded. This is in addition to that. This is from Stephenson Harwood. Again, this was the best we can do on the defendants' side, because we have no way of knowing what's going on behind this. It is for the PCRs, in my submission, to investigate this question. If there is no funding and no ATE insurance available, it is for them to tell you. What we see is it is available even for smaller merchants.

Mr Piccinin says to me, the PCR could have talked to merchants in the opt out class that had chosen not to join the Umbrella Proceedings because of cost and they have not done that, not with a single potential class member. We can't do that, because, as the Tribunal knows, we discussed that with the chair in a separate case. We are not allowed to correspond with them, but they can and they chose not to.

Those are my submissions, unless I can be of any further assistance.

MR TIDSWELL: Thank you very much.

Submissions by MS TOLANEY (cont.)

MS TOLANEY: I have very little left, because Mr Kennelly has helpfully covered most of the submissions. I thought it might be sensible on our side just to

summarise where we are and then to say something very briefly about one or two points that were raised with me.

I think, having heard all the submissions, the Tribunal, we respectfully submit, must have reached the view that these claims simply cannot be certified, and the claims have to be looked at, as Mr Kennelly said, in the form in which they have been submitted on this application. That is the only thing the Tribunal can consistently consider. You've heard that none of the requirements are met, let alone all of them. Therefore, the claims are simply not eligible for certification, pursuant to the relevant rules.

It is important just to emphasise one point that I think came out of our debate yesterday, which is that the Tribunal itself has to be satisfied -- that's the way the rules are framed -- that these proceedings are credible, workable, manageable, and in order to get to that conclusion, there are the various requirements that are set down in the legislation.

But it is important to emphasise the Tribunal's role in this, because, as was said in the Meta case, it goes beyond the usual case management requirements and powers that the Tribunal has, but rather, as was said in that case, the gatekeeper role here is very important, and it's important for two reasons.

It's important, first of all, because the classes of individuals for whom these proceedings or any collective proceedings would be brought must have their interests protected. It is very easy to have the expression "access to justice" as being a very compelling expression, particularly when one thinks about consumers, and these are not consumers, or claimants with smaller losses. But access to justice also has to be, as Mr Kennelly has explained, giving individuals or parties the ability to not be brought into -- and this is particularly true of the opt out claim -- proceedings that are set off running on their behalf with burdens and potential costs

and all sorts of other issues taking away their freedom to bring a claim if they wish to bring a claim. That is actually preventing access to justice.

The Tribunal has to therefore undertake, if you get to that stage, and of course we say you don't, because there are problems before one gets there, but if you get to that stage, you actually do have to assess the cost benefit analysis of whether this is suitable for collective proceedings.

Nobody is saying that individuals can't bring their claims. These are not statute-barred claims. That's irrelevant. What we are saying is that these claims are simply not suitable for determination within the regime that's being put forward.

The second reason why the Tribunal has to give thought to this is for this court's credibility and this jurisdiction's credibility. Again, it is an unusual regime that has been introduced with the Tribunal as the gatekeeper, precisely to avoid setting off running massive proceedings that ultimately are a waste of court time, resources and money, because they were simply unworkable and unmanageable.

The whole point of these tests is to ensure that that doesn't happen, because there's analysis at an early stage to prevent the train leaving the station, if ultimately it is just going to crash.

So what we would say is, having that background in mind, one then turns to the defects I outlined at the beginning of my submissions, and you have heard how it has developed, but it is worth emphasising that this claim or these claims would fail at the very first hurdle, because there is simply no workable methodology for them to be determined.

The position can be put as high as the expert evidence not advancing any credible methodology to establish the claim. That's why I said at the outset of my submissions this is a far more extreme case than the Meta case, because here there is no credible methodology at all to establish whether there has even been

an infringement. In fact, the case on infringement wasn't clear. The reason I'm going over that is it's important to have in mind that that point has pretty much been conceded by the PCRs because of the collapse of the primary read across case into an acceptance that either there has to be a factual investigation or a misguided attempt to point to the inchoate and unknown methodology in other proceedings dealing with other issues.

My learned friend accepted on Day 1, page 95 of the transcript, lines 3 to 5, that what had been put forward was a relative, light, common sense analysis. At various stages in his submissions he actually recognised that the methodology did not engage with what needed to be established, and it doesn't. That's on the very first and fundamental point.

You then obviously have my points, and I won't go over them, on the fact there is no methodology to address the crucial issues of acquirer pass on and merchant pass on, which is fatal to issues not only of liability but also of causation and loss.

The methodology advanced is in any case inconsistent with the class definition and the claim forms, being limited to three sectors and only to the UK, in any event. That is also fatal, because no proposals have been put forward as to how to fix it. It is not said it can be fixed in any credible way.

So just on that one point the Tribunal cannot be remotely satisfied as to how the issues in these collective proceedings will be determined and that's before one turns to the second defect, which was the lack of commonality, due to the size, diversity and variation within the classes. In fact, there is even an issue about who falls within the classes, as defined.

So again the Tribunal cannot be satisfied that there are common issues within the meaning of section 47B(6) of the Act. Crucially, the PCRs have identified no credible way of determining the issues on a credible basis.

The third defect is that the claims are not suitable for collective determination in any event, for all the reasons developed by Mr Kennelly this morning. The strap line that really came out of his submissions was that collective proceedings wouldn't be beneficial to the classes caught in any event. That particularly applies to the opt out class, which takes me then to the fourth defect, and the Tribunal will have in mind that the opt out claim is particularly unsuitable for collective determination, because it's not suitable for an aggregated award of damages. No proper methodology has been put forward. The Tribunal must have regard to the strength or lack of strength of the claim which is relevant under Rule 79(3).

Given that there was no proper case on infringement, and for all the other reasons I have identified about acquirer pass on, merchant pass on, those points are particularly striking when one considers the strength of the claim of the opt out claim. Indeed, I put it so far as to say that the Tribunal actually must be astute to protect that class from the burden of these proceedings for likely no gain at all, and that's a very important point.

MR TIDSWELL: Just on your point about (inaudible) proceedings, just so I understand what you are saying there, are you saying that because there is before us the question of opt in and opt out and where that line should be and whether either or both should be certified, we then just automatically get into the question of merits, because otherwise we wouldn't be looking at the merits, would we? If there was no opt in option, then we wouldn't actually get into the merits.

MS TOLANEY: You are not looking at the merits so much as under Rule 79(3), because of the opt out class, whether the claims are sufficiently strong to justify an opt out class, and that's because obviously they have no choice, and not necessarily any knowledge. That's the FX case. I am not putting it on the basis of the line between the two, because the PCR's position is actually that the classes are

defined --

MR TIDSWELL: So it is the same point put a slightly different way, isn't it? Inherently, there is the question as to whether people who have been put in the opt out class should, in fact, be forced to be put in the opt out class.

MS TOLANEY: That's right.

MR TIDSWELL: Is that because you say that an opt in alternative would be a better alternative?

MS TOLANEY: It isn't.

MR TIDSWELL: You are not arguing that.

MS TOLANEY: I am saying within the structure of my submissions you would not certify either, but I think there was some concern expressed yesterday about the opt out class, and, of course, the way our submissions have been presented and is consistent with case law is that you would look at these tests for both opt in/opt out classes, but with the opt out class you would have particular regard to two further questions, which are, one, is it suitable for the aggregate award of damages? Has a methodology been put forward? Two, are the claims particularly weak, because forcing people to bring claims essentially that are particularly weak is egregious. Here we say that the claims are particularly weak and that may be a relevant factor when you are thinking about the opt out class.

MR TIDSWELL: Yes. I am just wondering whether that is a legitimate thing. It may not matter terribly in the scheme of your argument that it feels a little bit like a backdoor way of bringing merits back into every opt out case. For example, in any particular case, if it is not being argued that a case should be brought as an opt in, not an opt out, then it seems to me that the merits -- you don't get into that enquiry. It is only if you are expressing the view that there might be a viable alternative as an opt in case that might be preferable that you would then get into enquiry into merits.

That's certainly how I understand it. If you have a different view on that or want to develop it, I am very happy to hear it, but that's certainly what my understanding is of the regime.

MS TOLANEY: Sir, I don't think I need to dwell on it, because I think the reality is that you don't get there, but I think I was really picking up on the questions that were put yesterday as to whether there was a concern about the opt out class in particular and, if I can put it another way, when the Tribunal has seen that both the opt in and opt out claims are very weak, because at the moment there is no proper analysis even of infringement, let alone the other points, it would be particularly concerning to put those in the opt out class into the framework of being or pursuing claims with those defects. I just put it like that.

MR TIDSWELL: Yes.

MS TOLANEY: The final point I wanted to address was authorisation very briefly. I am not going to spend a lot of time on that. It is covered in our submissions for both Mastercard and Visa. You have the point that without any disrespect, the way in which this case has been brought with the paucity, if I can put it that way, of expert evidence at the start, the major gaps in the expert evidence continuing, and the issues potentially over organisation, timing and so on of the service of late reports does give real concern for how this is being managed.

You have my points on the experience of the relevant individuals. I am not going to labour that point, because ultimately I don't think we even get there, but it is a concern.

Again, that's really for the benefit of the people whose claims are being brought, more than it is the other side, and it is something that the Tribunal would want, I think, to have some reassurance on, and I don't think it's there for the reasons we have set out in our submissions.

Can I just follow up then, Sir, finally on one point, which was "Can the class composition be changed?" It may be that you are satisfied from the exchange yesterday and I don't need to labour that point. The only thing I was going to say to you was that the rules do make it very clear, for example, Rule 47(B)(5) that:

"The Tribunal may make a CPO only..."

So the language of "only" and then "if (a) and (b) follow", which are that the claims are eligible and you are happy to authorise, demonstrates in my submission that when you look at what's happening, the Tribunal is given the power to make a collective proceedings order only if various things occur.

You then look at what a collective proceedings claim form shall contain, and that is Rule 75(3), which is the collective proceedings shall contain a description of the proposed class, and then there are issues as to whether a proper plan has been put forward by the PCR, including the estimate and details of arrangement costs, fees and disbursements, and the litigation plan is to be sufficiently detailed and comprehensive to correspond to the nature of the particular case. That's in the CAT Guide at 6.30.

So what you see from that is you have to have a fully formed proposal, and that is what you authorise or you don't authorise. In Meta, there was not a question about the class. It was just the methodology, and they were given an opportunity to fix the methodology. Here, this is a root and branches problem and, therefore, we say there's no scope here for the Tribunal to authorise either the CPO on different terms or to adjourn it so that it can be amended so radically.

It would be a fresh application with a fresh class drawn up, presumably a different claim potentially, depending on how it was formed. It may not be for every different market. It may be then -- and it would be that the estimate and details of the arrangement and the plan would also have to change. It may have funding

implications.

So this is not something that could be done on the hoof or adjourned to allow time for, because it is a new application.

MR TIDSWELL: Am I right in thinking that is a submission really about the extremity of the position here rather than the principle, because if, for example, to take a completely different case, you had a CPO where there was a question about -- let's say there's a question about the dissolution of companies and in the course of certification hearing that became a problem because the methodology could not deal with it and so it was decided the only way the claimant could proceed was if dissolved companies were removed from the definition of the class.

Now, in those circumstances would you be saying that something relatively immaterial like that wasn't open, as it is open, for example, in relation to the methodology, to send the class representatives away and come back with a revised class to fix that problem, because, I mean, I take the point that you are saying at a certain point that becomes an unrealistic, unfair and dangerous proposal. I understand the point about extremity, but as a matter of principle you are not saying that is the case, are you, or are you?

MS TOLANEY: I am not saying that's the case, because I think in the McLaren case there was a discussion about amendment over deceased persons.

MR TIDSWELL: Yes. That popped up in Merricks as well I think.

MS TOLANEY: The terminology used was a clarificatory amendment. So there are ways of clarifying, if I can put it that way, the class of removing a minor element, for example.

MR TIDSWELL: So the test is really a matter of judgment as to when the changes cease to be clarificatory and become so fundamental that it is not the right thing to do.

MS TOLANEY: That's right. I put it slightly differently, Sir. The starting point is that the Tribunal has to be satisfied that a CPO can and should be made. That means you have to stand back and look at what the claim is, what the methodology is, and all the points that I have outlined, suitability. It is only when you're satisfied that, if you think that the order should be made but there needs to be a clarification on, for example, a minor aspect of the class, that you can then do that, and that may be consistent as well with I think rule -- I will check the Rule -- 38, I think it may be, that it has some power in it to vary a collective proceedings order, but that pre-supposes that you will already be satisfied that the order should be made.

MR TIDSWELL: Yes, or at least you have enough to be confident that the thing you have identified can be readily fixed.

MS TOLANEY: That's right.

MR TIDSWELL: Which really takes you back to being clarificatory.

MS TOLANEY: That's right. I think one of the examples in the rules is there can be the removal of somebody who is a child.

MR TIDSWELL: Yes.

MS TOLANEY: So that's the type of scenario where you can identify a person or specific class, and presumably a small specific class, and that could be a clarificatory amendment, because they were unwittingly, if you like, caught within the description, whereas here there's nothing unwitting about this. It is just so diverse that one does not really know who is in it at all.

MR TIDSWELL: Yes.

MS TOLANEY: I didn't have anything further, unless you had any questions.

MR TIDSWELL: Thank you very much. Mr Bowsher.

Reply by MR BOWSHER

MR BOWSHER: Can I start by just making a few trailing points which will come up perhaps again and again. They are not sort of specific points of substance, but they respond to points which have been made at a number of points during my learned friends' submissions.

The first is really about the chronology of these proceedings. It is easier just to deal with this once rather than to keep coming back to it. A number of points have been -- various points/suggestions were made that the claim form when it was issued should have taken into account the Umbrella Proceedings, and it has been put in slightly different ways. I think it is important to have in mind the chronology as to where matters were at different points.

There was the March hearing, of course, in the Umbrella Proceedings -- the March judgment -- sorry, not in the Umbrella Proceedings. There was the March judgment which we have seen, but there were no Umbrella Proceedings. There was not even any Umbrella Direction in existence at the time of the March 2022 judgment, which talked about the way in which those cases might be managed.

MR TIDSWELL: Can you remind us when the Umbrella Proceedings order was made?

MR BOWSHER: I can give the dates now.

MR TIDSWELL: Would you? That's helpful.

MR BOWSHER: The claim forms in this case were issued on 1st June. Because of the Jubilee holiday and the way in which they were delivered electronically to the Tribunal, they actually took effect on 6th June 2022, which was the next working day, as it were. As it happens, later that day, on 6th June, the Umbrella Practice Direction was produced. There had been no prior draft or anything else in circulation before then.

So at the time the claim form was filed there was no Umbrella Practice Direction and

there certainly was no order, because the order was made somewhat later anyway. 4th July. I knew there was in July.

So the existence of the Umbrella Proceedings simply was not something that could be taken into account in the claim form. Comments regarding the litigation plan, which you were taken to this morning, self-evidently did not take account of the Umbrella Proceedings, because at the time they were filed there were no Umbrella Proceedings to take account of. There had been the hearing in March -- sorry. The hearing was before March. There had been the judgment in March, which talked about management of individual proceedings, but there was no completed form from the Tribunal as to where that was actually going to go. All one had was the judgment. There was nothing else to work on.

So when the claim form was filed, we were simply having to work -- not against nothing, but there was nothing to refer to directly.

Now, there was then the CMC in the Umbrella Proceedings last year in November, and the process which had been ongoing between March and then was, of course, the process which we were not involved in, leading to the creation of the list of issues and the various tables and supplementary documents. That's the process that was initiated in March and went on during last year, as we understand it. The Tribunal then commented on that or looked at that at the CMC. It commented on it in the 5th December 2022 letter, which appears to be the sort of preliminary written analysis of what was going to come in the order, which didn't come until, of course, 13th January this year. It wasn't actually drawn up. I think it was made on 23rd December last year but was actually drawn up -- it didn't turn up in a drawn up form until 13th January this year.

MR TIDSWELL: Am I right in recalling you attended the November CMC?

MR BOWSHER: You are absolutely right. We were at the November CMC. I will

come on to this. Obviously, it is only of relevance to you, Sir, in terms of having a memory of it, but it is just worth -- I am reminded we were not strictly speaking a party, but we were present.

MR TIDSWELL: You were there contingently.

MR BOWSHER: We were there and we spoke on the second day, I think it would be right.

MR TIDSWELL: Yes.

MR BOWSHER: The pass on judgment in the Umbrella Proceedings was handed down on 6th July and that is in the Hearing Bundle volume B, tab 20. It starts at page 142. You, Sir, were part of the panel on that.

MR TIDSWELL: Yes.

MR BOWSHER: That obviously also fed into the process of preparing the evidence in addition to the March judgment, which was the first CMC judgment. This judgment obviously also fed into the consideration of the evidence. The discussion in November around how the evidence was to be dealt with was obviously very much informed by what was said in the last paragraph of that judgment, and for that purpose it is worth pulling up.

MR TIDSWELL: What's the reference again?

MR BOWSHER: It is Hearing Bundle, tab 20, page 142.

MR TIDSWELL: Do you know which volume it is in?

MR BOWSHER: First volume.

MR TIDSWELL: It is not in the core bundle, is it?

MR BOWSHER: I think it is B2, 20, page 142.

MR TIDSWELL: Yes, that's right, yes. 6th July 2022.

MR BOWSHER: We will come on to this when we come on to MPO, but I thought it was easier to try to get the timetables straight in one's head about where these

events actually fitted together. In July 2022, the Tribunal gave what it described as a direction as to how it intended to determine the pass on defence. That becomes relevant when we come to the methodology we have put forward. It is at paragraph 61, starting at page 171.

MR TIDSWELL: We looked at this. Mr Kennelly took us to it just now I think.

MR BOWSHER: At the risk of slight parody, but only slightly, you will remember in November there was one version of how to deal with pass on involved hundreds of witness statements, and another involved a much more pure expert econometric driven process. There are variants of this discussion.

The crucial point here, at page 172 in sub (5) of paragraph 61 is that this we say is exactly what we are trying to do. You may wish to read the whole context of this, but the point that our methodology goes to is sub (5).

"We are not going to preclude the Umbrella Interchange Fee Claimants from adducing any evidence they might wish to produce in support of their claim that the overcharge was not passed on. We are, as we have said, confident that the claimant specific evidence will not take the resolution of pass on defence any further, but if we are wrong on this point, this will be demonstrated by the evidence that the Umbrella Interchange Fee Claimants adduce."

What we have sought to do in our pass on proposals was to take that and find a way of putting forward a proportionate amount of evidence that would address the question as to whether -- our proposition that the overcharge was not passed on by merchants. We are trying to do exactly what is provided for here.

I am just trying to illustrate there is a point at which what we are doing and what is provided for in the Umbrella Proceedings does match up, but it obviously comes out of the Tribunal's concern that there should not be hundreds of witness statements from different merchants, but that we find a way of getting down in the method we

have come up with, say 10 or 20 witness statements, which would be a representative sample of evidence to show what would or wouldn't have happened. That, of course, was one of the pressure points in the discussion that took up a great deal of time at the CMC. A lot has been said about we should have done this and should have catered for that. This is what we have been trying to do, but after the claim form was put in.

MR TIDSWELL: The point doesn't just stop I think at the claim form, does it? It is brought right up to the reply, and indeed the submissions this week. So the question I think is whether what has been said here and is happening here is fully reflected -- one question is whether it's fully reflected in what you have done. I am not sure that's the question that has been focused on. It is the other way round I think. The question that has been put fairly and squarely back to you is whether you have any methodology in these proceedings and whether any reference to the Umbrella Proceedings for a methodology helps you, because there is not one there either. So I am not sure how that point fits into that.

MR BOWSHER: I wanted to give the chronological context, but when we come to it -- our short point is yes, we do have that methodology. We have a pass on methodology which we have put before the Tribunal. We discussed it on Monday. That is available. That is the methodology which we say is a sensible, plausible methodology. It is exactly the methodology which is contemplated by the Tribunal in that judgment, but it's not one which was in play at the time of the claim form.

MR TIDSWELL: Yes, but I am not sure that really is the point that is being put to you. I mean, the point about the claim form, and I appreciate it may be part of the point put to you, I think the more substantive point that has been put is when you put the claim form in, there were things that made it plain that a methodology was required, so I think it is said, for example, the payment system regulator had

produced its report. It was clear there was evidence -- and I think that was in November' 21, there was evidence that acquirer pass-on was something you would need to address as a methodology. I think that's an example.

Another example I think is the Dune judgments in the Tribunal and Court of Appeal which make it plain that the so-called read across argument -- I am sure you are going to come to all these.

MR BOWSHER: I am going to come to these.

MR TIDSWELL: In terms of timing, unless I misunderstood the points made against you, it may well be that people are saying you should have taken more account of the Umbrella Proceedings and should have dealt with them in a different way in the litigation plan, and so on, but I think those are points that might be described as more forensic points.

I think the substance points that are been made about timing is that you had plenty of notice of things that your expert could and should have taken account of right from the beginning, and actually they have still not been addressed satisfactorily. That's what has been said. I am not venturing any view as to whether or not they are correct. The substantive points about timing I think are more about those things than they are about the Umbrella Proceedings, unless I misunderstood what has been said --

MR BOWSHER: I want to deal with the chronological points, so we don't keep on coming back to them, because they are liable to keep tripping one up. That's why they wouldn't, for example, be in the litigation plan --

MR TIDSWELL: I understand the point about the litigation plan.

MR BOWSHER: The other point which is again -- I wanted to make these points by way of preliminary because otherwise they are points where one has to keep on sort of repeating again and again, if I don't make them as an overarching point.

It is important to have in mind, when looking at the values of these claims and the significance of these claims to the different claimants, to bear in mind the very substantial difference between the charges involved for commercial and interregional, as opposed to the consumer charges. We will come back to this when we look at the various comments made about the cross-section of claimants and how claimants would react to these, what is suitable for a particular claimant.

If you take the Core Bundle, tab 13 --

MR TIDSWELL: Mr Bowsher, I am sorry to be difficult. We don't have anything identified as the Core Bundle. I am so sorry. We do. The Core Bundle. You mean the main Core Bundle?

MR BOWSHER: The main Core Bundle. It is Core Bundle B, 13, page 196.

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

MR BOWSHER: Mr von Hinten-Reed's report.

MR TIDSWELL: Thank you.

MR BOWSHER: It is just to pick up some numbers which have been referred to previously, but just to make clear about the comparison. For commercial payment we are talking about charges -- minimum -- you can see what they are. The average is 1.56% or 1.58%. For interregional the average is 1.85% or 1.75%. That is to be compared with the consumer charge, which post December 2015 is an order of magnitude -- almost an order of magnitude smaller. It is on the previous page, 195, paragraph 20, 0.2% or 0.3%.

MR TIDSWELL: Yes.

MR BOWSHER: Again because I don't want to have to keep repeating myself when I get down to make my main submissions --

MR TIDSWELL: There is a higher MIF for the (inaudible).

MR BOWSHER: Substantially higher MIF.

MR TIDSWELL: Materially higher.

MR BOWSHER: Yes. In terms of if we're talking about claim values for an individual claimant, whether it is the cake stall near Stonehenge or the West End hairdresser, the driver -- if they are paying any interregional or commercial MIF, that drives a much bigger claim proportionally quite quickly, because there's a much higher charge.

MR TIDSWELL: Yes. Obviously it is a function of the size of the claim and the volume as well, isn't it, so it depends on the mix?

MR BOWSHER: Exactly. There are all those things, but it is just important to have those numbers in mind when we are talking about the value of the claim.

MR TIDSWELL: Yes.

MR BOWSHER: And the significance of the claim to an individual claimant. So it's important to have in one's mind, yes, perhaps it is -- we are talking about -- yes, for the opt out suitability is particularly driven by the interests of SMEs and micro businesses. It might very well be that for those small businesses for whom this is, we would say, exactly the right vehicle -- it may be that their sales are only a modest percentage of their overall sales, but plainly it's going to be -- a very substantially inflated part of their MSC bill is going to be driven by the interregional and commercial rate when one looks at those figures.

MR TIDSWELL: Depending on the mix.

MR BOWSHER: Depending on the mix.

MR TIDSWELL: But you can envisage a situation where if they did have a very high mix of interregional and commercial, then that effect would arise from the size of the MIF rate.

MR BOWSHER: Yes. In any event I wanted to make those preliminary points, because otherwise I would keep on having to repeat myself. They are more sort of

clerical, but important clarificatory points.

So we have here a case which is unusual in a number of ways. One crucial respect in which it is unusual is so many of the issues have been litigated for so long over so many years. The defendants have produced a number of different versions of defences and the defences they run today are not necessarily the defences they've run previously.

The issues have been litigated, and in our submission whatever one may say about the technical viability of our primary case on liability, and I am not going to go into that again, it is hard to see how this can be described as a weak case. This is a case which on liability has been found again and again in different fact situations. There may be a whole range of fresh defences thrown at us as to why there is no liability in this case, but the starting point is this is a case which has been upheld on liability again and again in different contexts. That is not to say that we will not have to look at whatever it is that is thrown up again.

So it is simply not the case that this can be put into the category of a novel case which might be thought to be perhaps weak. No. This is a case which is self-evidently a strong case based on years of experience of establishing anti-competitive behaviour in these markets.

The difficulty has been in this and other cases to establish what was lost by whom and finding an appropriate means of dealing with the damages.

Now that may be because it is genuinely hard and partly because difficulties were placed in the way of achieving that. We say that again, in facing those difficulties, the collective proceedings we propose are exactly the right and suitable vehicle.

Second, this is an unusual situation. I think it is the first situation which this Tribunal has had to deal with where the claims do relate closely to individual claims which have been gathered together. I think this is the first time the Tribunal has had to deal

with this issue about what I will call the Umbrella claims -- that is what it is called here -- and the collective claim.

MR TIDSWELL: Yes.

MR BOWSHER: Even though in this case certainly in terms of numbers of claimants on any view the existing number of claimants -- the total number of past and existing claimants, i.e. settled and active claimants, represents a very small minority of the likely range of claimants in the collective actions, and I'll come back to the numbers on that.

We say that -- a lot of Mr Kennelly's submissions today and yesterday were to focus on the suitability or relative suitability of these collective actions, but we would suggest that if one is going to look at that, one needs to take account of the correct frame of reference in looking at any comparison. Mr Kennelly's submissions have frequently adopted the wrong frame of reference for that comparison.

It is simplistic and wrong to say that the Umbrella Proceedings exist. Therefore, they demonstrate that there is no need for these collective proceedings. That is the wrong frame of reference. All that means is that for some claimants the Umbrella Proceedings have proved to be an appropriate way forward for them.

There is nothing to be inferred from that that the large number of merchants who have not brought litigation in respect of commercial or interregional MIFs are somehow -- have their needs met by the possibility that the Umbrella Proceedings exist.

MR TIDSWELL: Just on that point I think what's being said -- it was put in a number of different ways, but I think this is perhaps one of them, that if you -- ordinarily in a collective proceedings certification you would be comparing the benefits and advantages of the collective proceedings and disadvantages with bringing individual claims, and that assessment would be in relation to those claims being brought

individually and singly, if I can put it that way, and I think it's being said that there'd be -- you would anticipate a difference between those two, which is why collective proceedings exist, but where you have got a regime like the Umbrella Proceedings at the lowest point -- I think probably Mr Kennelly would put this and he certainly put it higher as well -- at the very least the gap is narrow between those two if you compare the two of them, the advantages and disadvantages. The gap has been reduced by the Umbrella Proceedings, because it has effectively some characteristics of the collective proceedings. In fact, Mr Kennelly said it has characteristics which would be better. That is how he puts his case higher. That basic point is the way in which he -- that's the foundation of the point, which is there has to be a comparison. In this case it is not a comparison in the ordinary way, because there is this other creature which is quite a lot closer to collective proceedings than ordinary proceedings would be. I don't think I am misstating at least one part of that.

MR BOWSHER: We would say that would be the wrong way of framing the comparison.

MR TIDSWELL: Do you accept there has to be a consideration of the relevant advantages and disadvantages?

MR BOWSHER: Yes, but -- I don't think I have got an answer.

MR TIDSWELL: You have got something to say on it.

MR BOWSHER: Can I leave the Tribunal in suspense until 2 o'clock on that, because the answer to that takes a moment to spell out.

MR TIDSWELL: Yes, of course. I am just conscious -- I think we are probably back on schedule to the extent we were not on schedule. I think the allotted time you originally indicated you had had was this afternoon. Do you think that's going to give you enough time? We don't want to sit later than 4.30.

MR BOWSHER: I hope not.

MR TIDSWELL: I was going to offer you if you wanted to start a little earlier than 2.00, but, given that you are replying, you may prefer to have the time to prepare. It is up to you which you would like to do.

MR BOWSHER: Maybe start at 1.45, if that's possible.

MR TIDSWELL: If that makes it more likely or certain you will finish by 4.30, then let's do that.

(1.03 pm)

(Lunch break)

(1.45 pm)

MR TIDSWELL: Mr Bowsher, before you get going can I raise one housekeeping point, which is really for everybody. At one stage I think we were expecting an order in relation to the Settlement Agreement redaction exercise. It may be that is still underway. I think we talked about it on Monday and it had not appeared. I am asked to remind the parties we have not seen that. Maybe it is felt to be unnecessary now. Perhaps it is on its way. We are keen not to lose that piece of paper.

MR BOWSHER: It is good you mention that.

MR TIDSWELL: Someone will pick it up.

MR BOWSHER: I am sure we can pick it up after 4 o'clock.

MR TIDSWELL: No need for an answer today. If you don't need it, someone can let us know.

MR BOWSHER: I am sure I should know where we have reached on that but I don't.

MR TIDSWELL: Thank you.

MR BOWSHER: So neither of the defendants have really called into question the

basic proposition that only a small proportion, indeed, a very small proportion, of merchants affected by commercial and interregional MIFs have brought proceedings and that a very substantial proportion of the value of commerce is left unaffected, unaddressed by existing proceedings and settlements.

This morning my learned friend sought to say it is not as bad as all that because maybe Mr Holt's evidence as to the scope of the proceedings may, in fact, be an underestimate, because Visa's own data is not that good. With respect, to rely upon the failures of Visa's own data to try to suggest that, in fact, the scope of existing proceedings and settlements might be greater is not a strong starting point.

I am not going to spend time going into data management issues about how one might do a decent job of identifying which Dog & Duck is not a Wetherspoon's. I would suggest that one simply starts with the evidence that we have from Mr Holt and Dr Niels. You have the references. I can give them to you again, but you know them well. The very substantial part of the available claim both in terms of numbers of merchants and value of commerce has not been dealt with either by ongoing proceedings or settlements.

We can get that in a number of different ways, but perhaps a simple way is to look at the numbers of settlements and ongoing proceedings which we can get out of the evidence.

The Visa settlement data comes out of the Core Bundle. I will give you the reference and numbers without necessarily calling it up now. Core Bundle B3, tab 34, page 840, and Mastercard details comes from the CPO Hearing Bundle, volume C3, tab 91, page 4175.

As of that evidence, the number of settlements I think for Visa was said to be 541 for UK, 1,183 for non-UK, leaving 2,804 active claimants.

For Mastercard, it was said to be 710 UK and non-UK settlements, leaving 1666 to

2000 active claims. I don't know how far those active claims overlap. Presumably a large number of those are overlapping claims. One can play around with those numbers.

I should mention, of course, that we strongly contend that at least as regards a significant category of the Mastercard settlements our contention would that be that they don't cover the subject matter of our proposed claim. You know our point on that and I am not going to go back over that again.

On any view, we would say that it seems that the category of individual claims might be comparing, say, 4,000 or 5,000 individual claims at tops.

Yesterday my learned friend, Ms Tolaney, used a number of times the number of 1 million possible traders, which may be a fair number. Let's just try to sort of chop it down and say out of 1 million maybe only a quarter of that are really viable claimants. We still have a quarter of a million potential claimants, 250,000. One just has to do the rudimentary comparisons of 4,000 individual claims as a solution to a problem which is likely to have affected 250,000 plus claimants in the UK alone.

The claimants who are most affected are almost certainly the sorts of small businesses, micro businesses, with which this Tribunal should be particularly concerned, but even as regards the very much larger businesses that haven't brought proceedings, there will be reasons why they haven't done that. Risk aversion. They may be large businesses, but have a relatively small exposure to the subject matter of this claim. There's a whole range of reasons why businesses won't have brought the claims, which I will come on to in more detail, but in short the number of claimants who either have extant claims or have settled claims is in the small number of percentage points of the likely class of potential claimants.

The starting point for what I want to consider is the word from section 47B(6), the word "suitable". That's the statutory phrase, the statutory word that we have to meet.

We know that Rule 79(2) develops what the Tribunal may wish to take into account when deciding whether or not this claim is suitable for adoption of the collective proceedings.

The introduction of the idea that this is a question of relative suitability comes from the Canadian antecedents to this regime, which were discussed by the Supreme Court in Merricks.

It is worth for this purpose just going back to Merricks, which is in the Authorities Bundle 1, page 163, paragraph 56. I don't think this was a paragraph we have been to before. Apologies if we have, but I don't remember going to this before.

This is where Lord Briggs is looking at this question. What is the meaning of the word "suitable" in section 47B. He refers back to the British Columbia legislation which formed the basis of the Microsoft claim and notes that the question raised in the British Columbia legislation is that it is preferable. So he frames this, as he puts it -- it is the sentence that starts:

"The British Columbia CPA solves this conundrum" -- the conundrum is what is relative suitability -- "by using the word preferrable instead of suitable, a word plainly asking the question preferable to what."

It is from there that he generates the notion of relative suitability.

He goes on to say after that the words in British Columbia and the United Kingdom are different. Then he says, at J:

"But a reflection upon the central purpose of the collective proceedings structure, which has substantially the same purpose in the United Kingdom as in British Colombia, suggests that 'suitable to be brought in collective proceedings' has the second of those meanings."

In other words, it is the relative, preferable point.

"This is because collective proceedings have been made available as an alternative

to individual claims, where their procedure may be supposed to deal adequately with, or replace, aspects of the individual claim procedure which have been shown to make it unsuitable for the obtaining of redress at the individual consumer level for unlawful anti-competitive behaviour."

We would say first, in the context of this case, there is no reason why the same should not apply to the individual merchant level in the same way that it does for the consumer level.

The comparison is not framed around the narrow perspective of any one individual claimant. One doesn't look just at a viable choice between the Umbrella Proceedings claims and this collective action. That's not the nature of the suitability comparison that is to be made. The question is not whether the Umbrella Proceedings or collective or individual or collective proceedings is preferable for any particular individual or that particular individual.

The question is whether it is unsuitable for the obtaining of redress at, we would say, the individual merchant level. That is the whole class. It is about serving the purpose. It makes sense, given the overall context and purpose of this regime. One would not judge it simply by the interests and perspective of one particular individual, but the interests of recovery for the whole of the individual merchant class, everyone at that level.

That we submit is the right way of looking at it. The fact that there may be individuals who are prepared to bring such claims, whether on their own or through an Umbrella process, where the Tribunal has crafted procedure to make it easier for them doesn't answer the question as to what to do with the situation where there's a loss of hundreds of millions of pounds and how the whole class of merchants at that level of the economy should be adequately compensated, so that one addresses not just the interests of those who bring the Umbrella Proceedings, and manage to

avail themselves of that opportunity, but so that one meets the broader purpose of the regime.

That obviously involves the Tribunal taking into account not just the interests of any one particular claimant, hypothetical or otherwise, but for the wider interests of society, the economy, access to justice and so forth.

MR TIDSWELL: So the point I put to you before lunch, that comes up quite neatly here, doesn't it, because if you look at what Lord Briggs says about collective proceedings at the end of 56, collective proceedings being available to deal adequately with or replace aspect of the individual claim procedure which have been shown to make it unsuitable, so saying that collective proceedings can fill a gap where individual claims might not be able to achieve the same thing, I think the point I was putting to you before lunch is it's being argued that the Umbrella Proceedings are different from an individual claim procedure. There are attributes of them that mean that they are at least closer, if not better than, as is put, the collective proceedings. I don't think the point you have made directly challenges that point, does it?

MR BOWSHER: Well, I submit it does, in the sense that Umbrella Proceedings are simply a way of -- to use your phrase from this morning, it perhaps reduces the friction for an individual claimant, but they are still -- I will come on to more detail in a moment, but the question is whether or not to pursue the purposes of the regime under the Act, under section 47B, it is preferable that there be such a collective proceeding as a vehicle to enable the merchants at that level of the economy to have the opportunity to be compensated.

MR TIDSWELL: It has to be a comparative exercise at some level. You accept that?

MR BOWSHER: Yes.

MR TIDSWELL: What is the comparison with? Are you saying the comparison here is notionally with a situation that's not present, because the situation that is present actually is not the normal situation where, in order to get redress, a merchant has to go and issue individual proceedings, which will be dealt with individually, which is what I think paragraph 56 contemplates in the comparison, and, of course, one assumes that quite often when you ask that question about the relative benefits and detriment of the two processes, then the collective proceedings are going to be seen to be quite beneficial. I am not saying that's not the case here, but the question is what are you looking at? What is the comparator? Is the comparator something which is better than just turning up and having to find your own individual proceedings because there was a structure there which you couldn't participate in.

MR BOWSHER: The perspective is simply, on the one hand, the Tribunal has bent over backwards to try to make it as easy as possible, in the way it has been described, it is for individuals to bring their claims, and that has produced a number, 4,000, 5,000, 6,000, and that is to be compared, and those were --

MR TIDSWELL: That is the comparator.

MR BOWSHER: It is. 4,000, 5,000, 6,000 as against a quarter of a million.

MR TIDSWELL: I don't think that the point I am putting to you stops you making the point about friction and the reasons why there might -- all I am saying is that what has been put to you is this is not the vanilla situation you might find in paragraph 56, because the comparator happens to be something a bit different.

Now, you can make all the arguments, of course, about why it is different and how significant, therefore, it is, but I just want to be clear that you are not suggesting that there's anything wrong with the argument that the comparator is the Umbrella Proceedings and the benefits --

MR BOWSHER: I am not going to try and compare it with something that doesn't

exist -- with the role that doesn't exist. The Tribunal has created an alternative and our short point is that alternative may or may not be fine for those who have chosen to adopt it. It does not, however, meet the goals of this regime and it is not the suitable route for doing so.

MR TIDSWELL: Yes. They might be better than the ordinary comparator, which is the ordinary proceedings, but you say that still does not make this as good when you come on to --

MR BOWSHER: I will adopt your heading of friction in a few minutes. In short, the proof of the pudding -- I will say it anyway -- the proof of the pudding is in the eating. The Tribunal has tried to help them and we have simply got to a point where the comparison is still a couple of orders of magnitude out between, on the one hand, the number of individual claimants who have brought their claims within that vehicle and the number that Ms Tolaney was referring to yesterday.

MR TIDSWELL: Just to be clear, I think it is the same point I was trying to make to Mr Kennelly. The Tribunal has not done that because it was trying to replicate the proceedings. It has done it because it was faced with a situation which we need to manage. That's the purpose of the Umbrella Proceedings.

MR BOWSHER: Otherwise the Tribunal would have been faced with thousands of trials. It was trying to find a way of dealing with orderly management of the individual claims.

Now, we would say yes, fine, as far as it goes, but it doesn't meet the goal and it does not change the suitability equation when you look at the broader question: Does the merchant level of the economy obtain redress --

MR TIDSWELL: Yes.

MR BOWSHER: -- through settlement or trial.

Yesterday I think Dr Bishop raised the prospect that the Umbrella Proceedings might

settle in totality or maybe only in part. That in a sense almost makes things better for the few thousand who are in, but it highlights the problem that a vehicle has been created for a relatively very small number of merchants who are able to settle out, to use Mr Kennelly's phrase, cash out, because they chose to get in the class, but it leaves the bulk of that sector of the economy uncompensated, and it really leaves open an opportunity for the defendants to try and bring an end to this problem that we would say they have created for themselves by cashing out with a relatively small self-selecting group.

The regime was put in place, we suggest, to ensure that defendants who had got themselves into a situation where they should be compensating a class of people, should be compensating the class of people or entities. That's why the regime exists, and to enable them to, as Mr Kennelly says, cash out on both sides for a very small fraction, only a couple of per cent of the total number of merchants is not what was intended.

MR TIDSWELL: Are you suggesting by that a scenario where, if that happened, and Mastercard or Visa settle all of the claims in the Umbrella Proceedings, that somehow that would prevent claimants from continuing to file proceedings against them?

MR BOWSHER: No.

MR TIDSWELL: You were not making an estoppel point.

MR BOWSHER: I am not making an estoppel point.

MR TIDSWELL: But practically the vehicle has gone by that stage, hasn't it?

MR BOWSHER: I was going to come on to this. Without getting too deep into the mechanics of the Umbrella Proceedings, and I wouldn't claim to have anything near full knowledge of that, but my understanding is that if you have a partial settlement of the Umbrella Proceedings, such adverse cost risks or exposure to costs of ATE,

which will include payment of premiums at different stage, depending which group you are in, there will be a number of different variants. There will be costs and frictions involved along the way, particularly around costs risks, which you either have as a costs risk or you will meet by having ATE, which you will have to pay for at different stages. If you are one of 4,000, that risk may be whatever it is. That risk is going to get considerably greater if you are part of a dwindling band left in the Umbrella Proceedings having to run the Umbrella Proceedings on your own part with a relatively small group.

So it may be that it makes sense as part of whatever thousand it is at the moment, still a relatively small number of thousands in the broader scheme, but if it gets down to -- the risk could become quite -- could change quite significantly.

Now your point is well, but other people can come in and join. But the risk profile varies is the short point. I am not going to spend more time on it. The short way of looking at it is if the Umbrella Proceedings are settled in their entirety, then someone is going to have to go through the whole process of setting up ATE policies and paying for all of that from scratch, which will be a very substantial burden.

If they are able to join an existing group which has not yet extinguished itself, then maybe, but there will still -- the exposures and liabilities and cost risks and so forth will very much depend on what the risk profile is for that existing group. I don't think I need to -- there is a danger I go further than I know about, but that is our understanding anyway.

MR TIDSWELL: Yes.

MR BOWSHER: Can I just pause for one moment?

Turning then to what you have addressed as the friction question, when looking at why merchants may or may not join the Umbrella Proceedings, it is relevant to look at the constrictions and limitations on that process, because if one is trying to ensure

that the purposes of the regime are served, it is not just enough to say "well, a merchant can always join the Umbrella Proceedings". If it were as simple as saying a merchant can join tomorrow and there is no friction and there's no issue, it is their own fault if they don't join, that might be different, but that's simply not the case here.

There are a number of serious reasons which a merchant is entitled to take into account and should properly take into account when deciding whether to join this procedure, even the kind of streamlined procedure that the Tribunal has sought to put into place.

The suggestion was made that in an individual claimant can simply copy the proceedings of an extant claimant, invoke the Umbrella Proceedings and then have their claim stayed and take the benefit of any judgment in these proceedings.

In our submission, that submission ignores the reality facing a number of merchants. For all sorts of reasons which we have talked about before, the majority of the claimants will probably have relatively small claims. We were shown the table this morning with some claims going down to £10,000. These were merchants whom you could expect to have quite large claims.

In our own evidence, in the main Bundle -- I will give you the reference -- volume C, page 720, paragraph 8.3. I don't think we need necessarily to pull it out, but there are various calculations put into the litigation plan that show how self-evidentially a very large trader could still have a very large claim or relatively small claim, even based on 1.5% MIF. A small claim might have a claim for £90,000 or very much smaller. I mean, it is self-evident. The range is broad.

Even larger merchants might find they are faced with a claim with a relatively small value, and may decide for a whole range of reasons that's not a claim where they want to take on the risk and cost of putting in the claim.

It is not the case that they can simply copy the pleadings, because they will still have to put in an assessment of their own individual loss as part of that pleading. So they may be able to copy part of it, but they can't copy all of it. For reasons which we've heard, that isn't necessarily straightforward. Will it be worth it? Do I even know the questions that will arise with a large number of claimants? It is suggested perhaps the majority.

Secondly, many merchants, especially smaller merchants, may simply have given no thought to their exposure to commercial or interregional MIFs, let alone the idea of bringing a claim in respect of those charges.

Mr Kennelly's points on relative suitability ignore the important issue that much greater knowledge and awareness of the exposure to losses is needed, in order to take on the cost, the time expenditure, the resource in instructing lawyers and experts just in order to find out: "Is this something we should be involved in? What do we need to do in order to work out what our own loss is? Do we need to engage economists, for example, to find out what our own individual loss is?", which is likely to be a requirement? Unless the loss is self-evident from business records, it is likely they are going to have to do some sort of analysis in order to get through the sorts of difficulties that has been discussed.

Any business initiating individual proceedings faces a cost risk. That cost risk is both uncertain and potentially significant in the case, even of the Umbrella Proceedings. There is no such risk in the context of the collective proceedings because of the way Parliament has created the system. That is a very important difference.

Obviously, the cost risk can be addressed -- I have talked already about ATE policies. ATE policies have a cost. You have to pay premiums. There are not that many providers. It is not as if ATE coverage is something you are going to be able to go and get from any insurance broker. It may well be you can go to law firms who

are able to access ATE coverages for you. It is not cheap, and costs at different stages of the process. If you don't have that cover, you are subject to obvious adverse cost risks.

The very fact that that risk exists -- perhaps sometimes businesses are conditioned to be aware of those risks and maybe treat them as -- I would not say exaggerated but as important risks. That conditioning is something that is built into particularly smaller businesses to know that it is something they have to deal with that. So that cost risk is an important part of any prospective claimant's thinking.

So even adopting Mr Kennelly's proposed streamlined approach, at a minimum, a claimant would have to instruct solicitors, possibly counsel, to advise on the scope and structure of its claim, to decide can we just fold ourselves into an existing claim, obtain expert economic evidence or at least some sort of financial evidence and input to enable the losses to be individualised, and gather individual evidence internally available, because the claim will be a non-aggregated claim.

That, of course, has been part of the problem which the series of judgments we were looking at just before the break have been trying to address. How the Tribunal is going to deal with the gathering of evidence in a few hundred individual, non-aggregated claims without having to hear witness evidence from each and every one of the claimants.

As the Supreme Court pointed out in Merricks, this is all that is possible in individual proceedings and the Umbrella Proceedings doesn't offer any solution, because they don't have aggregated damages. The Umbrella Proceedings simply accumulates together the mass of that problem with the individual proceedings, but it doesn't solve the problem of dealing with hundreds of individual claims.

None of this we say is cheap or easy. We don't have the details of, for example, ATE costs that people might pay. That is quintessentially confidential material.

Even the ATE costs in this case are redacted in the bundle. I can show you where our ATE costs appear, which is a different point altogether. I hesitate to invite you to exercise judicial notice on this point, but ATE premiums are not cheap in any circumstances.

On top of all of this costs risk, the hypothetical business faces a degree of litigation risk. I have touched on that already. One aspect of that, if you go into the Umbrella Proceedings thinking you are part of a group of whatever, and you are covered, and then the group dwindles, your own risk and either your cost risk or your exposure to the risks of the ATE cover may also change. It's not a fixed and static vehicle that you're joining. It is potentially burdensome and from a small business's point of view potentially worrisome undertaking.

Just joining those existing group claims is not within the gift of the Tribunal or the department. Therefore it requires the claimants in question to get over a series of, to use your phrase, frictional impediments, but they are not just friction. They are serious business reasons, exactly the sorts of things that someone with a small claim, the £5,000 to £10,000 claim, or whatever, would face and would find serious, and even a claimant with a much larger claim might have particular reasons why it does not want to be seen to be bringing the claim. We all know different claimants have different drivers.

Next, there are important principled legal limitations on individual proceedings. The key one, of course, is the lack of availability of the aggregate award, which I have already touched on. That, of course, leads into the fact that it is that ability to ensure that either an aggregate award is made or in the case of our opt in claim that all those existing claimants can be dealt with together and then benefit from an individualised judgment ensures that the whole class of merchants at that level of the economy can benefit from this collective vehicle.

Only in that way will the losses which we say are being inflicted on this part of the economy be recovered in the way that they should be.

We say yes, Umbrella Proceedings served an important function, not least to save the Tribunal from -- I am not suggesting self-interest but obviously a sensible thing for the Tribunal to find some way to bring order to what was coming through the door, as it were, but in no sense do they negate the comparative utility, the comparative advantage of collective proceedings in meeting the goals of the collective action, the collective proceedings regime. That's the relative part of suitability.

Turning then to some of the methodology questions, much has been said about the need for methodology, blueprint for trial and so on and so forth. We have looked already at some of the authorities, so I don't propose to do that again. Often the authorities refer to methodology being expert-led, and so on and so forth, and often that is going to be the case, but there is no legal requirement that the methodology be expert-led. Indeed, common sense suggests that in some cases there are points which will not require expertise.

What is required is a methodology that takes one to the final outcome. There is nothing in the statute, nothing in the case law that says that the blueprint for trial may not amount, for example, to following the same course as was taken in an earlier case, which is part of what we've been following. Indeed, it is sensible and indeed might be thought to be recommended and proportionate that the methodology might also be to adopt as a blueprint that which is already being adopted in a directly parallel claim, in the circumstances such as we find ourselves here.

One can imagine if we turned up saying "No, we intend to do something completely different. We have a far better methodology, which will involve a completely different process and we are going to ignore what the Tribunal is doing in the Umbrella

Proceedings", we would have been met with all sorts of arguments, maybe up to and including abuse of process, but certainly that it was not a proportionate and sensible use of the Tribunal's time.

It is plainly sensible and proportionate that where there exists a blueprint, that blueprint be the one that we seek to adopt as far as is sensible and proportionate.

MR TIDSWELL: So I am clear on that, starting with the earlier case, and I think you are referring to Sainsbury's and the outcome of the Supreme Court's deliberation, are you saying that amounts to a blueprint, notwithstanding the points that are made about I think it is items 2 and 6 in the list of things that the Supreme Court said were necessary in order to read across from the European Commission decision? So are you saying that the blueprint arises -- I suppose the short point is are you saying the blueprint arises notwithstanding that you may not be in the same position as the case that the blueprint is produced in?

MR BOWSHER: I am saying yes, you use an existing blueprint. It may be you have to adapt it, according to the nature of the case you have.

MR TIDSWELL: Does the methodology requirement then require you to produce the blueprint for the adaptation? That is the real question here, isn't it? You are saying, and it is obviously contested, and we are not deciding that here, but you are saying that Sainsbury's allows you to assume that there are certain things proved or determined in relation to liability. You don't need to prove them again. Now, that's clearly in dispute, plainly in dispute, and has been for some time. The question is, in relation to the hearings where it's in dispute, which are particularly those items 2 and 6 on the list of items, and we can look at the paragraph if it is helpful, but are you saying that knowing that those are in dispute, the blueprint has to be adapted and, if so, have you done that, and, if so, where is it, or are you saying you don't have to do it? I think you've put this as a point of -- I think you have answered the same

question in a different way previously, which is that it's for them to advance the case, but what has been said against that is that the case has been very plainly advanced, not least in the summary judgment application in June. So if they are right about that, and let's just assume for argument's sake that they are, are you still saying that you have a blueprint here which is adequate?

MR BOWSHER: Yes, because this is not a question of -- this is not a sort of formula question of 100 points that may turn up between now and judgment. Have you identified how to deal with each and every one of them? The question is: is this suitable for proceeding as a collective proceeding? That is a judgment which the Tribunal has to make. If our starting blueprint is to apply that which was applied in an earlier case, that is a valid starting blueprint.

MR TIDSWELL: Sorry to interrupt. Maybe we are at cross-purposes. When you are talking about the blueprint applied in another case, do you mean the methodology that was applied in the case or the outcome of it? If you are saying the way in which they approached the determination of those issues gives you a methodology which you can replicate here, it seems to me that's quite different from what I had understood you to be saying, that those points are actually resolved by that case and you don't need to get into the question of resolving them again. Just to be absolutely clear about the question, if you are saying you are going to adopt the methodology, for example, that was used in Sainsbury's, where do we see that articulated in your case?

MR BOWSHER: Well, this is where the evolution over time matters. The short point is we put it both ways, in that in pleading our claim we said that we were going to rely upon the Sainsbury's findings as our primary case. Then we set out the alternative. Plainly, our blueprint at that point was to adopt -- not just say Sainsbury's is right as to outcome, but also that those are the points which methodologically one needs to

address.

MR TIDSWELL: But that's not a methodology, is it? That is just a list of the issues that there needs to be a methodology for. So we know those things have to be done. The methodology is about how they are done.

MR BOWSHER: This is why we are dealing with a moving target here, because what has become clear, as I was explaining before the break and why it is important to see how we were putting the claim form in in this point where the Umbrella Proceedings did not yet exist but, as it were, they were emerging, if I can put it that way.

MR TIDSWELL: This is not an Umbrella Proceedings point. This is a Dune point. The Dune summary judgment was determined in the CAT. Unless I have my dates wrong, it was determined in the CAT quite some time before the proceedings went in. We can find it if it is helpful to find the judgment, but my recollection is it is November 2021.

MR BOWSHER: Yes.

MR TIDSWELL: In that judgment, as we saw yesterday, these points of the application of the Supreme Court's decision in Sainsbury's to the question of interregional and commercial MIFs is plainly argued by the Proposed Defendants, so I don't think you can say you weren't put on notice that it was a point that was live. It is the very replica of the point that I think you are anticipating and indeed are trying to deal with now. It is plain in November 2021. So I don't think there's a timing point here, is there?

MR BOWSHER: Let me try to answer it. We set out our case as we pleaded by relying upon Sainsbury's. That is our primary position. We say if that's wrong, we will have to deal with it with a secondary case. What then occurs in the months that follow our claim form is that the process for dealing with exactly those points in the

Umbrella Proceedings is fleshed out in a way that is transparent to us, and what we have been able to put forward now in our reply and subsequently is that insofar as we need to go beyond our first case, the sensible and proportionate blueprint is, as I've put it, to adopt the same course as has been taken in the Umbrella Proceedings.

MR TIDSWELL: Turning to that, which is I think the second of your points, what has been said against you is that is not a blueprint. There is nothing in the Umbrella Proceedings that at the moment could be said to be a blueprint that would be sufficient for a methodology in a collective proceeding.

MR BOWSHER: I am not sure what a blueprint --

MR TIDSWELL: It is a methodology. Perhaps I shortcut that. Perhaps it is unhelpful to refer to blueprint. I am sorry if that is not helpful.

The point that is being made is that the list of issues and the formulation of the list of issues in the Dune proceedings and the material that surrounds that process to date does not amount to a methodology which, if you had put that in your proceedings as the methodology, would have passed the test. It is not a methodology. It is a list of issues is the short point. That is I think what is being said against you. Therefore, for you to point to another proceedings to say "there's my methodology" fails because it is not actually a methodology.

MR BOWSHER: With respect, I would suggest -- whatever it is, the table of the list of issues with all the other material -- as you know, there are hundreds of pages of other material that go with it -- just the list of issues itself is many tens of pages long. For each of them, there is an explanation as to what evidence will be required going to which point. They spell out the issues in some detail, with pleading references, with references to the factual evidence, and that is, I would suggest, a methodology for dealing with an issue.

We can go through it, but if you take an issue and say here is an issue as described

in the list of issues, this is the evidence we will hear or the submissions that we will hear, that is a method for dealing with issue 1.

MR TIDSWELL: Yes. I am not inviting a forensic analysis of it, just to be clear. I think I have your answer, but to make sure I understand it, you are saying that the activity that is being undertaken in the Umbrella Proceedings is sufficient to constitute a methodology in its own right, and therefore for you to adopt it is a reasonable and sufficient thing to do to meet the requirement in this case. That's the position.

MR BOWSHER: The test is perhaps simply the short practical test. Given that this is an actively -- given the Umbrella Proceedings are being actively case managed, the Tribunal would not allow a trial to proceed if it were not an adequate methodology, because --

MR TIDSWELL: I am not sure that's right, is it, because it is not a collective proceeding. So there is no need for -- that's precisely the point that has been made I think, that because it is not a collective proceeding, there is no methodology. I understand you are saying it has reached the point where it is sufficient to treat it as a methodology. Also, equally, I don't think you can say that because at some stage there is going to be a methodology, you don't need to produce one yet.

MR BOWSHER: I would say two things. Firstly, there is no statutory definition of method and methodology. I stand by my starting point. Despite what may have been said in one or two places, these are different words. I am not going to dwell on it now. There is no definition as to what a methodology is. Prima facie, whether you call it a methodology or a blueprint for trial, it is that which gets a complicated case into a position where the Tribunal is content that it is going to be able to actually reach a decision on that issue at trial.

MR TIDSWELL: I think that is a definition of it. I think it is, as expressed in various

cases, a sufficient explanation of how the case is going to be managed in order to be confident that it can be properly tried.

MR BOWSHER: Whatever we did or did not put forward in the claim form, we have to face the reality of where we are now, which is the notion that we in these proceedings would persuade this Tribunal to run, let's say, issue 1 -- let's say trial 1, 1 to 5 and 7 to 13. The idea that we would persuade this Tribunal to run trial 1 according to a different methodology or different plan than is already set out in that trial would be met with a number of rather strong submissions back.

MR TIDSWELL: I think, with respect, that is a different point. It is one that I am not unsympathetic to. I can absolutely see the dilemma you are faced with if you have got all these proceedings in which all these people are doing the very thing that you are being asked to describe, and yet you still have the responsibility to describe that. I see the difficulty that comes from that. I think I am trying to, if I may, just be really clear about where it is you say the methodology is, because it seems to me there are three places it could be. One is you've said it could be in cases decided earlier, and we've explored whether you mean by that just the outcome of the case or the methodology that lead to the outcome.

One is that you've said it could be in some other proceedings, and we have explored the possibility and you've given me an answer on your position on what the status of the work product in that proceeding is and whether it amounts to a methodology.

Then the third place it could be, of course, is in the material that has been produced by your expert and, as you say, elsewhere in the litigation plan and other documents that allows us to understand -- I am going to use the word blueprint, because I feel it is a proxy for that definition we talked about before -- allows us to understand what the blueprint for trial is.

I am putting these points to you because they have been put by -- I am not

expressing any view on them. I want to be absolutely clear about where you say the various bits are. Of course, if they were right about point 1 and point 2, in other words, that you aren't able to rely on the existing case, because you haven't developed the methodology beyond the existing case which needs to be done -- that's what they say -- and you can't rely on this because it is not a methodology in the Umbrella Proceedings, it is not in the chronology, then the weight all falls on the material that you have put forward. So that is the logic of the case that's being advanced against you.

I don't want to find that we leave here without a clear understanding of both where you say you can pick it up from and the reasons for that and actually where you think you have met the requirement by reference to those things.

MR BOWSHER: We say that we met it first off in the claim form as matters stood then, by reference to the existing case law and spelling it out then.

If we failed in that, we would say that as matters have has turned out, any failure there is a matter of formality, because matters have been overtaken by events. We have subsequently set out the blueprint for trial in our reply, perhaps elaborated in the skeleton, but our reply, together with the three reports from Mr von Hinten-Reed that deal with specific issues of methodology, blueprint, what you will.

In that reply, inevitably, and this is the way we have sought to develop it, I hope with sufficient clarity at this hearing, we have sought to recognise that events have overtaken our claim, in the sense that the Umbrella Proceedings have moved forward. They have become a much more developed and concrete blueprint in those claims than certainly we were aware of on 1st June. I don't know quite where the list of issues was on that day. Recognising that matters have moved on, the sensible approach to that has been to adopt the process taken -- I am being pointed to something.

MR TIDSWELL: Of course. Of course.

MR BOWSHER: We seek to -- I have used the phrase tuck in behind, to reflect the reality that that is the process we are going to have to adopt.

MR TIDSWELL: There is a difficulty with that. I will articulate the difficulty we have with that. If we are not clear where you tuck in behind and adopt, assuming that your argument about the methodology being sufficient in the Umbrella Proceedings, or where you are running your own methodology -- it is not entirely clear to us at the moment. At the moment we have the position where you take the three -- if you take the three areas which are again advanced as causing difficulty on methodology, the main ones -- there are others as well -- the main ones are infringement.

Now, it is said that Mr von Hinten-Reed as not really addressed or nowhere in your case is there a proper articulation of the methodology in relation to infringement. That's putting aside the point of acquirer pass on, which we will come to separately, the more general question of infringement and the points that need to be dealt with. There is then the question of acquirer pass on. It appears that you are put forward a very detailed methodology. That is criticised as being too ambitious. So the criticism is not that you haven't got a methodology, it might have been at one stage, but now it's a very ambitious methodology, and actually said to be potentially inconsistent with the Umbrella Proceedings.

MR BOWSHER: You mean merchant pass on?

MR TIDSWELL: Acquirer pass on, I am sorry. In relation to merchant pass on, equally, you have again put forward a detailed methodology and again the question arises as to what's the relationship between that and what you say the methodology in the Umbrella Proceedings is. I just want to -- in a sense, any clarity you can give us about how that all fits together would be helpful.

MR BOWSHER: Walking back to the beginning of the case, as set out in the claim

form, in adopting the original suite of cases as substantively and methodologically our starting point, we included the Sainsbury's decision in the CAT, which set out in detail the analysis that was then adopted by the CAT in Sainsbury's. It is in the Hearing Bundle.

MR TIDSWELL: I understand what is in the case. Can you show me where that arises in your claim form? We are not talking -- I don't think anyone is suggesting that there was not a methodology in Sainsbury's that was followed. Clearly there was. We know that. What we are concerned with is whether and where you have identified, you know, for example, that as a methodology which you intend to adopt. I don't think I have seen anything anywhere suggesting that you have adopted the methodology from that case, but I may be wrong. Maybe you can point me to that. You clearly rely on the case and its outcome, including in the Supreme Court, for the outcome and the argument that you're going to read across from the outcome, but I think there's a distinction between what was decided in the case and your reliance on that, and what the methodology was to arrive at that and the extent to which you adopt that. They're quite different things, or it seems to me they are quite different things. You may disagree.

MR BOWSHER: If one goes to the claim form --

MR TIDSWELL: Yes.

MR BOWSHER: It we take it in the Core Bundle and we take the opt in claim form at tab 5, that's Mastercard opt in, we in our submission set out there by reference to the existing body of case law the sequence of logical steps. It starts at page 82 in the bundle under the heading "Breach of statutory duty".

MR TIDSWELL: Yes.

MR BOWSHER: It starts under the heading "Relevant markets". We walk through, firstly -- we start with the relevant market definition and set out the material -- we

refer to previous decisions in identifying matters that we would rely upon. In our submission, self-evidently, if one is relying upon them for substance, one is also saying that is the intellectual process we are inviting the Tribunal to look at.

We then go through the sequence of liability questions, decision, agreement, and we explain, as one would in any pleading, but with rather more length and by reference to the prior case law, how it is that we say we would be seeking to show that. We put those forward as factual propositions to be proved either by adoption and reference substantively to those previous decisions or by adopting the factual scheme which is set out. So that, for example, in 236 -- pages 86 to 87 -- we set out a series of points which we say identify the factual indistinguishability of the situations.

MR TIDSWELL: Yes.

MR BOWSHER: Not only are those substantive points, but we also say those are the points which have to be addressed to conceptually achieve the finding of liabilities.

MR TIDSWELL: Yes, but that's not a methodology, though, is it? In 237, I think you plead your alternative case.

MR BOWSHER: In the following paragraphs we set out how in that alternative we would seek to make good the points. On each of those it's as much a question of evidence and submission whether or not those points are made good, but that is at that point the blueprint we are seeking to make good.

MR TIDSWELL: On that basis, one begins to wonder why Mr von Hinten-Reed didn't deal with this in his first report. He says nothing about it. If that's where the methodology is normally to be found, wouldn't you expect him to have picked this up and dealt with it?

MR BOWSHER: Well, Sir, with respect, any pleading serves as an agenda for trial.

That is the phrase used in cases under the CPR. They set an agenda or a blueprint for trial, if you will. This is the process which was set out at that point. As is clear, we had set out our primary position, which was to rely upon that set out in the earlier decisions. It is not for me to engage with what may have happened internally on the instructions or otherwise with Mr von Hinten-Reed. That would not be appropriate.

MR TIDSWELL: I asked the question because it seems to me that what you're saying -- I think what you're saying is there is a recognition here in the claim form that there are a number of things that would need to be dealt with by way of methodology for infringement, and you're relying on these for that. I think you have been telling us previously that actually you were not in a position necessarily to identify those points, because of the Dune judgment not being apparent. Put that aside for the minute. It is curious -- it has to be said it is curious that in those circumstances the approach taken by Mr von Hinten-Reed is actually to say simply "I have been instructed that it will be as argued in your primary case and not to engage with the secondary case at all".

One need not get into that. It would be wrong to get into the question of what his instructions were, other than what he says when he says "I have been instructed". One takes that at face value and we need to go no further.

MR BOWSHER: I will go back a couple of points there. Firstly, Dune -- I have made this point. Yes, obviously those points that were floated in resisting the summary judgment application in June were known to be issues. To the extent appropriate, they have been identified in the claim form and taken forward accordingly. No, they are not backed up in Mr von Hinten-Reed's report. In my submission, they don't need to be. This goes back to where I started on Monday. There is nothing in the statute, there is nothing indeed in the rules that says all the methodology has to be in an expert report.

A lot of the case law talks about the expert methodology, and I developed this on Monday. A lot of it talks about the expert methodology, because typically the barrier to setting up a collective action is the difficulty with quantification, and that is typically dealt with by an expert. But that does not mean that each and every element of the methodology is set out in an expert's report. It is in the claim form as part of that methodology.

Now, it may be that the Tribunal thinks there should have been more or less or whatever, but we would say, as things have turned out, that has, in fact, become at best a formal deficiency, because matters have been overtaken by the fact that there is now, in fact, a blueprint for a trial, which is obviously the sensible way forward, and certainly on trial 1.

MR TIDSWELL: On the subject of infringement because of the Umbrella Proceedings?

MR BOWSHER: Yes.

MR TIDSWELL: It is not addressed anywhere else in the collective proceedings though, is it? I think it is said there is nowhere else in the collective proceedings that you deal with infringement.

MR BOWSHER: No.

MR TIDSWELL: We are talking here about a counterfactual point. That is what the infringement point is. What would the counterfactual have been?

MR BOWSHER: You also asked me about the acquirer pass on and the merchant pass on.

MR TIDSWELL: Yes.

MR BOWSHER: The acquirer pass on, one of the difficulties we have there is I am not sure in the current list of issues, at least the one that's in the bundle -- there may be others that we are not aware of. I am not sure where acquirer pass on falls.

MR TIDSWELL: It is a very good question and I am anxious not to explore it here, because it is not a matter for these proceedings, but it is a point that occurred to me as well, and may need to be considered further, but it will fall out --

MR BOWSHER: I need to make this point --

MR TIDSWELL: The point is there appears to be nothing in trial 1 that deals with acquirer pass on. That does appear to be the case I agree with you.

MR BOWSHER: The next point I was going to is the 5th December letter, which I have taken you to at least twice now, the Tribunal's December letter, refers to the May hearing as dealing with matters of pass on.

MR TIDSWELL: Yes.

MR BOWSHER: Our reading the words, and understanding it as reading the words, was that must include acquirer pass on. There being no other plan for dealing with acquirer pass on, that is addressed in the second and third reports of Mr von Hinten-Reed, because there is not an Umbrella blueprint that we are aware of for us to follow on. It may well be what we have said about acquirer pass on ends up being adapted or overtaken by events as to what does or does not happen about acquirer pass on. We hear today that there's now the suggestion that acquirer pass on is going to become part of the counterfactual analysis in trial 1. I am not sure where one sees that in the agenda in the list of issues.

MR TIDSWELL: Acquirer pass on is certainly in the list of issues.

MR BOWSHER: Okay. I am not sure where.

MR TIDSWELL: We can have a look at it if it is helpful but I would be very surprised if it wasn't. It has been well flagged as an issue that the defendants intend to take in the Umbrella Proceedings.

MR BOWSHER: Yes, but not for trial 1.

MR TIDSWELL: I didn't think I had understood your point about the blueprint to be

referrable to particular trials. I thought you were saying that the list of issues and the exercise that has been carried out amounts to a blueprint, and acquirer pass on is in that document. So it is plainly going to be dealt with in the Umbrella Proceedings at some stage. Whether at the moment it is in the right place is a matter that we don't need to concern ourselves with here. It is plainly going to have to be dealt with either in trial 1, 2 or 3, if those proceedings are going to deal with all the matters in the list of issues.

MR BOWSHER: It may be we are at cross-purposes. All I am saying is it didn't appear to us to be -- the premise of what I have been saying is the blueprint for trial 1 is in the list of issues. That does not include acquirer pass on, so we put forward a proposal for acquirer pass on, because there is no other blueprint we can rely upon there.

As regards the pass on proposals, what was clear to us was that certainly as regards merchant pass on, that was something that was going to be dealt with in the May hearing, and hence the pass on proposals and so on and so forth.

So in terms of a blueprint going forward, we've sought to put forward the blueprint for those elements as they are apparent. Where it is clear it is set up in the list of issues, we have not sought to supplant it. Where it is plainly uncertain, we have sought to make the contribution as to how we see it going forward. It may be we are told "No, it is going to be done a different way". Just because one has a pre-conceived notion about how to do it, which I will come on to, which we will seek to urge upon the Tribunal, does not mean that we won't have to live with an alternative, if that's what it is.

MR TIDSWELL: I am conscious I have probably taken you out of your way and eaten into your time.

MR BOWSHER: No, no, it is important. In short, whatever the formal failures there

may or may not be, we say we set out a blueprint to trial at the outset. If and insofar as deficiencies are found in it, we say that the key deficiencies are matters which are cured by what has happened thereafter.

Indeed, as matters have turned out, quite sensibly, we are able to adopt the blueprint which exist in the parallel proceedings.

MR TIDSWELL: Yes.

MR BOWSHER: I am just checking. In our discussion I may have covered the next couple of pages. I want to make sure I don't say the same things again.

MR TIDSWELL: Yes, of course.

MR BOWSHER: Let me just make these further points which do go to the same point, but they are more detailed points.

Insofar as it is suggested that we can't advance a case that the essential factual basis in the Sainsbury's Supreme Court judgment applies to these MIFs without dealing with the facts surrounding those MIFs, that's not, we say, a fundamental obstacle to these claims progressing.

First, the Commissioner's decision in which the interregional MIFs were capped for five and a half years was a response to the prima facie view that these MIFs infringed competition, and the Commissioner's 2007 decision found that all MIFs, including the commercial card MIFs, infringed competition, as we showed on Monday.

That's again a starting point for the substantive proposition that we can rely upon that. It would be a surprising result where those decisions reflect the fact that there is a serious issue to be tried as to whether these MIFs restrict competition and where this Tribunal has itself concluded that these proceedings raise a serious issue to be tried, if certification were refused because the precise analysis of the extent to which those facts can be mapped on to these facts has not yet been spelled out. That's

both a substantive and methodological point.

The blueprint can't be -- in my submission, one should not be unduly demanding of the blueprint. If the blueprint is we are going to following the methodological approach taken before, necessarily that will involve adaptation as we go along, but in our submission, insofar as there are changes, given that, in our submission, it must be an uphill battle to show that those changes are material, that is not a reason to refuse certification.

The relevant information regarding those differences will either be in the defendants' knowledge and possession, and so amenable to disclosure, or could be accessed from acquirers by third party disclosure. A failure to produce that information can lead to adverse inferences and so forth. Whatever it is that the defendants may have foreshadowed in Dune, it will be for them to try to make those points good. Ultimately, they have to put flesh on those arguments before we are in any position to try and elucidate, as it were, what our counter proposition is going to be.

There will have to be an exchange of expert evidence that responds to such points, and no doubt Mr Niels and Mr Holt will have to put forward in their preliminary reports whatever it is they are going to reply on to make good those points that have been previously floated. At the moment they are just points that have been floated and only dealt with by the Tribunal at the level of "these may be points which we can't immediately dismiss". That is all they amount to. The bifurcation of the claim into two classes does not change the nature of the enquiry in that regard at all.

It is also important to note our understanding, at least from the reading of the CAT decision in Dune, at paragraph 70, that the defendants' experts have not contended that these MIFs do not restrict competition, but what they have said is this was a matter that requires further investigation. That I think is the highest that it was put by the CAT at that stage, and simply saying it is not something anyone has put

forward as a positive point at the time, simply that it was not a point which could be dealt with so clearly to meet the summary judgment test, and that comes from paragraph 70 of the Dune CAT decision, which is in Authorities B7, 299.

The judgment of the CAT itself says:

"We should emphasise that we are not saying that the interregional MIFs did not and do not restrict competition within Article 101. Indeed, we do not understand either Mr Holt or Dr Niels to have arrived at that conclusion. Their view is that this requires further information and analysis."

So when one is talking about how far we were supposed to anticipate these points, these are not points that even in that decision were being put forward, as it were, as formal points of defence which are being sought to be made good on the basis of evidence and submission. They were arguments to look at as sufficiently credible to rebut a summary judgment application.

Now, I am not saying that doesn't mean they don't have to be dealt with at some time, but if the proposition is that our application fails because these points were not addressed at the very outset, it's important the Tribunal has in mind what that amounts to. That amounts to saying that some points which were raised by experts as possible theories which might or might not turn out to be valid need necessarily to be addressed. That's quite a strong basis for rejecting the certification of a claim which, in our submission, so clearly otherwise ought to be certified.

There are then some self-evident points. This sort of anti-competitive effect analysis is not novel. As I was saying a moment ago, it is exactly the methodology, exactly the route that was adopted by this Tribunal in Sainsbury's in the CAT decision, which we attach to our claim. It is in the Hearing Bundle C1, 71, page 3302. The CAT walks through the process in paragraphs 105 to 125.

Now, we relied upon that substantively in our claim, but also self-evidently, if we are

relying on the conclusion, we are relying on the method by which one reached the conclusion.

So we say there has been a methodology put forward, albeit that this is based on prior experience, just as one expects in many cases. There are some things which are -- you don't go and reinvent the wheel. We are simply saying "This is the conclusion that has been found before. This is how it is done". It is not complex. All that has been put forward is maybe there are some other things that might be relevant to displace what would otherwise be the normal conclusion. One might ask rhetorically why methodologically would we engage in a huge and potentially unnecessary process.

Now we see that the claimants in the Umbrella Proceedings are having to run both the argument that the essential factual basis of the Sainsbury's judgment applies to these MIFs and in any event that they do restrict competition. That is reflected in list of issues, issue 4, which we are in a sense forced to adopt as part of our broader analysis, that the right way forward is to take on board the full methodology, if you will, that is being adopted for trial 1.

Likewise, issue 4 is interregional; issue 5 is commercial. Broadly speaking, the same issue is split into two separate issues.

That is the methodology which is being put forward. If one compares that methodology in the list of issues, it is self-evidently modelled on exactly the same methodology that was used by this Tribunal in the Sainsbury's decision, appended to our claim form, which you find -- as I say, we have been to before.

Moving to pass on, and, as I said, there are two categories of pass on, and we have already talked a little bit about how pass on -- would now be -- we can pause for five minutes.

MR TIDSWELL: We will make it as short as we can. Hopefully it will give the

shorthand writers time to recover, but we will come back at 3.15.

(Short break)

MR TIDSWELL: Yes, Mr Bowsher.

MR BOWSHER: So I was going to move on to pass on.

MR TIDSWELL: Yes.

MR BOWSHER: Moving to pass on, we move from what we say are matters of formality, translating across the lessons of the Sainsbury's litigation into what are plainly matters of substance, where there are what I might call ongoing blueprint problems which we have been trying to match on to.

It is probably worth, for this purpose, going back to that 5th December letter, which I know you have been to more than once, but it is important because it is about setting up the methodology in the Umbrella Proceedings. It is in the Hearing Bundle. It is page 6398. I am sorry. I can't now remember -- that's D. I can't remember which D it is.

MR TIDSWELL: That's fine. 6398 in D.

MR BOWSHER: The letter actually starts at 6397. All I need to point out, this is the basis upon which we have been operating. Firstly, the list of issues does not include acquirer pass on in trial 1. Items 4, on 6398, makes plain from the first two lines that acquirer and merchant pass on are for trial 2. That's in item 4. Therefore, by necessary reading backwards, when the discussion is in paragraph 2 about the evidential hearing, the reference to pass on must be a reference to both acquirer and merchant pass on.

MR TIDSWELL: Yes.

MR BOWSHER: We have heard today there is an issue about whether or not APO should be in trial 1. I am not going to engage with the substance of it. I am not

saying it is right or wrong as a matter of principle. It is a question of case management. We have been dealing with this as a basis for case management. If APO is moving into a different hearing, that may be something to be looked at, but in principle, it seemed to us, in terms of us being able to take the approach of adapting our proceedings as far as possible to correspond with the Umbrella Proceedings, an appropriate way forward was to work out how we could catch up with trial 1. I have dealt with that. I am not going to talk about that again. And then how we could catch up with trial 2. The way of dealing with that was to address acquirer and merchant pass on.

You will recall acquirer pass on is a little bit different, because in our originally pleaded case we adopted the original assumption that acquirer pass on was not an issue, because it had not been relied upon in Merricks, but we were disabused of that, so we produced the acquirer pass on plan.

That is what I now turn to address, that proposal. It is suggested that what we have put forward is not credible or workable. You, Sir, have already sort of anticipated one of the points I was going to make. On the one hand, it is suggested that it is not enough. On the other hand, it is suggested that it is far too much. It may very well be that this is a matter that is going to have to be resolved in May or some other point as to what is, in fact, the approach to acquirer pass on, taken forward. But in our submission our methodology is certainly a plausible methodology. It goes far beyond that.

If there are points of detail that need to be amended or adjusted in it, that can be dealt with as a matter of case management, but to say it's not a plausible methodology for dealing with acquirer pass on simply fails self-evidently.

The starting point seems to be agreed, that the most relevant evidence will be in the hands of acquirers themselves. To some extent the defendants have jumped on that

and said "there may be problems in getting the most relevant evidence". This becomes a question of the law of evidence. It may well be that those who have the best evidence, it is going to be hard to make them cough it up, in which case we may have to go to the second. Obviously, the methodology starts by addressing how do you get at the most relevant evidence? No-one seems to doubt that that is the starting point.

The defendants' response seems to be a council of doom, that that won't work and can't possibly happen. None of that means that it is not plausible to say let's start by seeing if we can get the most plausible evidence, what must be the best evidence. If we can't get that, we may have to go down to second levels, and again, in terms of a plausible methodology, how many alternatives does one have to put forward. The APO methodology, we suggest, is more than plausible. It is a sensible way forward.

Now, what is said? It is said the acquirers will not be likely to cooperate. The Tribunal's hands are tied because, faced with the refusal to cooperate, it has no power to require any information to be provided, even where the acquirers are UK businesses. That's true, it seems to be suggested, even if the Tribunal were to accept that there was essential information, not just best, but essential information in the hands of acquirers, and the Tribunal needed it, that the Tribunal would not want to do or would not be able to do anything about it, and that acquirers would simply be able to refuse, with impunity, to provide any of that information. She says on that basis that's not plausible.

In our submission, that's simply without merit. It may be a position which the defendants might find a convenient position to adopt, if it were adopted, because it might have consequences for their ultimate liability, but it is not in our submission realistic.

We say this pessimism is unjustified. Even if the information is commercially

sensitive, of course, the starting point would be that it would be protected with normal robust protections.

It seems to be agreed that the Tribunal has the power to make a reasoned request for information of third parties. Faced with such a request by the Tribunal, it is surely not implausible -- the test to be applied -- for the PCR to think that major UK-based financial institutions would do their best to assist the justice system. It was often mentioned in submissions where we were talking about 100 acquirers but, as you know, our methodology does not focus on 100 acquirers. It focuses on the five largest, which account for 50% or 70% of the market, and the top two account for more than a half. So we don't have to go for 100. We can settle for a much smaller number.

It seems implausible that the request, accompanied by appropriate protection, assurances of confidentiality, would be met by a blanket refusal. Even if there were a refusal by acquirers to respond, the defendants appear to accept that the Tribunal has the power to order third party disclosure of documents, consistent with Rule 63, and a document is defined broadly in Rule 2 as "anything in which information of any description is recorded in whatever form".

There may be a problem in second guessing what are the correct documents to be asked for, but in our submission, at the very least, if a focused, reasonable request for information is refused, that can plainly be followed up with an appropriate request for disclosure of documents.

Even if it is right that acquirers refuse to cooperate, it cannot be right, in our submission, that a power to ask for something under Rule 53 is simply toothless. We know that the Tribunal has power from Rule 51 to make directions to secure proceedings are dealt with justly. Of course, it can, if necessary, summons witnesses. If necessary, it could summons witnesses in the old-fashioned way that

the High Court used to summons people to a hearing to explain what their documents are or are not. It seems extreme. The very fact I put it that way does seem rather extreme, but that is I would suggest why a UK financial institution is likely in the end to want to accommodate itself to the Tribunal's requests, rather than undergo the humiliation of having one of its officers or managers, or whatever, brought to the Tribunal to answer questions about what it does or doesn't have. That comes directly under Article 56:

"The Tribunal may summons people to attend as witnesses to answer questions or produce documents."

One would certainly hope one gets nowhere near that, but the idea that this power to seek information from acquirers is completely toothless is, in our submission, way off the mark.

In those circumstances, the criticisms about the unworkability of the methodology simply fall away. It is workable and a way forward.

Now, it may be that other information is required from the defendants and so on and so forth, but given the fact that it seems to be generally accepted that the starting point is the acquirer's information, as a first draft methodology, in our submission, it is an appropriate way forward and more than enough to meet the requirement.

I should mention, of course, that Merricks -- I don't know what is in this, but there must presumably be a Merricks APO methodology in their claim, but I don't know what is in it. It may be that the answer is that theirs is better than ours. I don't need to get into that sort of comparative analysis. I have no means of doing it, and I don't have to do that. It may be that the Tribunal has a better idea, but again I don't have to get into that.

So we say acquirer pass on is simply not an issue. We have dealt with that.

At least for the moment, on the basis of the material that we knew when I stood up

on Monday morning, in terms of disruption, I tried to be clear that we did see there was a practical problem in us getting to the May hearing to participate in those discussions. I think I said it puts an unfair burden on this panel, but that's the only practical problem. As long as we can engage with the discussion about what turns out to be the route to deal with APO, or the outcome of that is something that we can work with in our proceedings, there is no disruption issue. At least on the basis of this letter, it is all for trial 2.

It may be there is some other wrinkle here I am not aware of. It sounds like there might be. That is not something that we can or should be required to deal with, at least as things currently stand now. If it turns out we are certified and we need to adjust our procedures accordingly, no doubt we will do what we can, but I can't really fence against a problem that I don't know about.

That then moves on to merchant pass on. There are two objections raised or principal objections. For opt out claimants it is asked how does one determine MPO for budgetary and cost based pricing. Surveying a sample of opt out claimants, it is said, will not work because the whole point is that we don't have contact with class members prior to distribution. Secondly, it is said there is no methodology for identifying which merchants would surcharge and how they would surcharge. I will come on to those various points. We say all of those are not real objections.

The pass on proposals are in the Core Bundle. It is perhaps worth pulling them up. They are at tab 43 in the Core Bundle, page 1135, if you are using pagination.

The target population for any sampling procedure is the members of the opt out class. That's specified in paragraph 118. That is we submit a reasonable way forward. I don't think we have spelt it out in the report, but part of the media plan and the plan described in the litigation plan involves potential claimants registering on the website. So it is not that we don't have engagement with them. People do sign up.

We do have their details. Engaging with merchants who have registered and for whom we have that contact information is a perfectly proper starting point, and that's paragraph 120. No doubt advice and assistance will have to be obtained. There's obviously some additional expertise about survey design, and so on and so forth, to make sure we have a copper bottomed approach to all of that, but that's already covered in the report.

Just to remind you, this is exactly the sort of process which was anticipated in the Dune judgment that I took you to this morning, the judgment in March, where the Tribunal said that it would not stop the claimants from putting forward just this sort of evidence to show that the charge was not passed on. This is exactly the evidence contemplated on that last paragraph of the Dune judgment that I referred to just before the lunch break. Do I need to take you to that? I think you probably still recall that.

MR TIDSWELL: Yes.

MR BOWSHER: It is not the case, for example, that we are somehow prevented from dealing with our class. Also, there's nothing that stops us from doing so as necessary and on a proportionate basis, given the huge number of potential claimants.

Talking about a sampling process with 1,000 odd is not an unfair or inappropriate process. Contact with a sample of the claimant class is exactly what one might contemplate, having regard to the statement by the Court of Appeal in Gutmann. In the Authorities Bundle it is -- I always get the wrong one. Why I do always do the wrong one. Thank you. Apologies. It is underneath tab 13. Gutmann, Court of Appeal, paragraph 62, page 500, under the heading "Calling members of the class".

"The appellants criticised the class representative for not being prepared to put up class members as witnesses to support the methodology. This is misplaced. The

logic behind an opt out order is that the representatives of the class will not have contact with the class members at any point."

MR TIDSWELL: We have had this before. I don't think we need to read it.

MR BOWSHER: What I wanted to point out here is there's a reference to not contacting -- the last few lines.

MR TIDSWELL: Yes.

MR BOWSHER: "The class representative is not prohibited from looking to the class representative."

That must be a typo. The class representative wouldn't be looking to himself. That must be the class representative is not prevented from looking to the class. Otherwise the sentence makes no sense.

DR BISHOP: Where are we? Which paragraph?

MR BOWSHER: Paragraph 62, last four lines. The class representative would not be asking himself for a survey. It is that sentence I wanted to get at, to make clear that it must mean the class representative must be talking to the class about a survey, otherwise it is a nonsensical statement.

So we are doing what is referred to. It is common sense. As a method, it is intended to learn what is currently not known, to what extent one can simply treat the class as a class. What are the differences about how MPO and surcharge are dealt with, because the surcharge is explicitly dealt with, and you will see there are references in the proposals to asking questions about surcharge as well. So surcharge will be covered in that same sampling process. It is designed at the moment to lead to 10 to 20 witness statements, as a means of ensuring there is evidence the Tribunal can give and that can be shown to be relevant representative evidence.

It may well be that, confronted with reality, the number has to go up or down, but the point is to avoid the 400 witness statements that was causing the Tribunal so much

difficulty in the November CMC, in the Umbrella Proceedings. We recognise that obviously 400 or half a million witness statements would be impossible. This is plainly the sensible framework taking the matter forward.

It seems to us self-evident, therefore, and we submit that what has been put forward by Mr von Hinten-Reed is a serious and plausible methodology. If there are refinements, these no doubt will be dealt with as the matter develops.

I then had only a couple of other points to wrap up. Various points have been made -- questions raised and points made about funding. You have the references to the funding in the litigation plan. Of course, that funding plan will have been submitted to the funders some significant time before 1st June 2022. These things do not get signed off in a moment.

MR TIDSWELL: When you say the funding plan, you mean the litigation plan or the budget?

MR BOWSHER: The budget attached to the litigation plan. It is in the CPO Hearing Bundle C, pages 732, 734 and 736.

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

MR BOWSHER: It is probably sensible. Volume B2, is it?

MR TIDSWELL: I think it is volume C, isn't it? Isn't it attached to Mr Allen's ...

MR BOWSHER: Yes.

MR TIDSWELL: I think it is attached to Mr Allen's statement.

MR BOWSHER: Is it B1? I have it as C, 732, 734 and 736.

MR TIDSWELL: Yes.

MR BOWSHER: The numbers you have in green, those are funded numbers. That is you have a budget of expenditure of two times the £7.1 million and one times £18.3 million.

MR TIDSWELL: So when is the total funded? I think the point that was being made

is that the actual costs are greater than the total funded because the total funded doesn't include conditional fee arrangement.

MR BOWSHER: The uplift is not in there.

MR TIDSWELL: Yes, exactly, the uplift.

MR BOWSHER: The uplift is not in there.

MR TIDSWELL: So the total costs are greater than £18.3 million.

MR BOWSHER: In the event of success, but not in the event of failure. That's the budget without an uplift.

MR TIDSWELL: I think the point -- well, the context in which it came up, as far as I was concerned, was the overall cost of the proceedings. I think the conversation we were having was if you were tucking in, and actually not doing an awful lot of things that didn't need to be done, because they were going to be done in the Umbrella Proceedings, or at least being involved in a way that responsibility could be shared and so on, it did seem like a very large number. I think I got the number wrong, because I assumed it was 4 x 20, but whatever it is, it is still a very large number for what's effectively being one of four or five teams pursuing these points through the Umbrella Proceedings, if that's what you were doing.

MR BOWSHER: Well, the total is £32.7 million.

MR TIDSWELL: Ignoring the success fee. £40 million.

MR BOWSHER: 32.7 is the total funding.

MR TIDSWELL: That's still a pretty big number, isn't it?

MR BOWSHER: Usually when one starts bandying figures around in Tribunal, one has both sides' figures. We don't know what the comparable figure are on the other side.

MR TIDSWELL: I think the point is not so much -- I think the point is, on your own position, these budgets have been prepared in anticipation of running the case

without participating in the Umbrella Proceedings, because you say you didn't know they existed when you did this. So my question is, if that's the case, surely if you are participating in the Umbrella Proceedings, these budgets are going to be less. That's the point I was making.

MR BOWSHER: Simply, there will be reductions and additions to make, plainly. One would expect, once certified there will have to be a review of this budget to see what can be taken out by making savings with the Umbrella Proceedings. Obviously, one would anticipate making savings by participating in the Umbrella Proceedings. It may be that because other issues are now to be dealt with, which were not originally planned for, some costs may have to go up. But, yes, plainly one would expect that by associating this claim with the Umbrella Proceedings claims, that would lead to a material reduction -- that in itself would lead to a reduction in the fee.

MR TIDSWELL: Yes.

MR BOWSHER: I hesitate to say how much.

MR TIDSWELL: I am not asking you to do that. I appreciate that's an exercise of detail. Really, I think I understand that was at least contemplated.

MR BOWSHER: Everything will have to be updated. Obviously, these things get updated in all litigation, one would expect. Well, again, the number is what it is, but in terms of the sorts of numbers that are often mentioned in this Tribunal for competition litigation --

MR TIDSWELL: But not when you are one of five or six parties that are pursuing the same agenda. I think your point would have more force if you were doing everything yourself. My understanding of your position is you are not going to be doing that.

MR BOWSHER: No.

MR TIDSWELL: Therefore, one would assume it would be materially less, as you

say. I think that's as far as we can take the point, isn't it?

MR BOWSHER: The only other question I was going to address was one or two concerns that have been raised. Some issues have been raised about class definition and whether or not someone is or is not within the definition. It may well be that there are some people who qualify within the definitions and are unaware of it and have had one purchase or whatever. There is built into the litigation plan a class screening process. So inevitably part of that process will be to try to establish that people are properly in or out of the class.

MR TIDSWELL: Can we look at that. We are in the litigation plan anyway, so we can ...

MR BOWSHER: I am not sure -- sorry. I did not give myself the reference to it. Can I come back to that. I think it is in the amended litigation plan. It was added. I don't have the page reference to it.

MR TIDSWELL: I am not sure we have the amended litigation plan. I may be wrong about that. I am not aware it has been amended, but it may have been.

While you are waiting for that, I think the point here, as I understand the point that has been put to you, it is actually going to be impossible to have a screening process because in relation to very large numbers of merchants on blended contracts, blended merchants Settlement Agreements, you are not going to be able to find out whether they have or have not ever paid commercial or interregional MIFs. That's the point that's put. The way that connects then is if you go back to how you see it, and you see it in Rule 79(1)(A), which requires the proceedings to be brought on behalf of the (inaudible) class of persons, and you see it again in 2(E):

"Whether it is possible to determine in respect of any person whether that person is or not a member of the class."

So I think the argument being put is that actually you have got, in what I probably

unwisely call the great wash, an awful lot of people who are on blended contracts, and there is no practical way of finding out whether they have ever made those payments. Of course, we know that in the three sectors that have been identified, the likelihood is very high, but we also know and we have had plenty of examples of people on market stalls and shops across the country, we also know in lots of those places there may well be every prospect that they have not had or never had a commercial card payment or an interregional card payment. So that's the challenge I think.

MR BOWSHER: It is a challenge. The screening process -- let me give you the reference. It is C4, tab 109, page 6019.

MR TIDSWELL: 6019. So where has this document come from?

MR BOWSHER: It is an attachment to --

MR TIDSWELL: Mr Ross's fifth statement. I think we were not encouraged to read the exhibit to Mr Ross's fifth statement. I am sorry if we haven't got them.

MR BOWSHER: I probably should have --

MR TIDSWELL: Why don't you take us through it.

MR BOWSHER: Have I got that? Let me just check.

MR TIDSWELL: So this seems to be about settlement agreements. I think this is possibly about something else, isn't it? It is clearly a separate point about whether people have settled or not, but that's quite a different point I think. Actually, I think the blended contracts point is a more fundamental point, because it goes -- the question is how can you actually get to the bottom of that problem and therefore how can the class be -- how can we be satisfied that it is possible to determine in respect of a merchant somewhere or other whether they are a member of the class?

MR BOWSHER: It is entitled "Dealing with Settlement", but it covers all categories of objection.

MR TIDSWELL: Yes. So you would say it deals -- just walk us through how you would do it then?

MR BOWSHER: If you just want to read it. I think it is self-explanatory.

MR TIDSWELL: Yes, of course.

MR BOWSHER: I am not sure my explanation would be any better than its own words.

MR TIDSWELL: As we go, step 1 seems to be about the opt in proceedings.

MS TOLANEY: Sorry, I think we have not got it. That may be because it is confidential to Visa.

MR TIDSWELL: I wouldn't have thought it was confidential. What we might do, in terms of time how much more time do you need?

MR BOWSHER: Not a great deal more time.

MR TIDSWELL: What we might do, I think it would be helpful if we rise. If we rise, I am not sure we have a copy of this in the retiring room. To will give you an opportunity to have a look at it, let's do that. Let's rise. We will rise and come back at 4 o'clock. The last thing I want to do is cut you short on time.

MR BOWSHER: No, that's fine.

MR TIDSWELL: We will deal with it then if that gives you enough time. I appreciate it is not much, but it is only one page and we have only just seen it.

MS TOLANEY: That is fine. Thank you.

(Short break)

MR TIDSWELL: Mr Bowsher.

MR BOWSHER: I wasn't going to say very much more about it. It is a process for screening, if available. Your point goes to a slightly different point, which is the substantive point rather than the procedural point, I apprehend, which is not is there a process for challenging or otherwise someone being within the class, but is it an

existential question --

MR TIDSWELL: It is not existential. I think it is a very clear requirement under 79, which is you can't have a class without being able to identify who is in it. Clearly, if you look at some of the other collective proceedings, you think -- Dr Bishop and I are involved in Kent v Apple, where obviously you know someone is in the class -- and Mr Kennelly as well -- you know someone is in the class because they've got an account, so there is no question about that, and actually they can find it out, and the defendant can find it out and none of it is very difficult. Now here it seems to me that you've got a problem that arises from the blended contracts, in which it is said, for 95% of the people who are in your opt out class -- I think this is both an opt in and opt out point, but let's focus on opt out for the moment -- 95% of them are unable to determine from their blended contract whether they ever made a payment which is an interregional MIF or commercial MIF. If you think of the examples we have had, it is not unreasonable to postulate that there may well be people like that running micro businesses or whatever.

The point that arises is if they can't work it out and we are told that Visa and Mastercard can't work it out, how is anybody going to be able to define the class?

MR BOWSHER: Can we go to the definition.

MR TIDSWELL: Of the class?

MR BOWSHER: Yes, and start there.

MR TIDSWELL: Yes, of course.

MR BOWSHER: The sensible place to start is at Core Bundle 1, tab 15, page 350, which is the definition of the opt out class, which is the problem you identified.

MR TIDSWELL: Tell me again.

MR BOWSHER: Tab 15, 350.

DR BISHOP: Core Bundle.

MR BOWSHER: Yes.

MR TIDSWELL: Yes.

MR BOWSHER: It bears reading:

"All merchants who paid an MSC (including a Multilateral Interchange Fee) in respect of one or more Inter-regional Transactions and/or Commercial Card Transactions."

MR TIDSWELL: Yes.

MR BOWSHER: Leave aside the rest. That is objectively knowable, even by the claimant. They may not know now. They may not remember.

MR TIDSWELL: How are they going to know? If they have a blended contract, there will be no indication in their contractual documentation. There will be no accounting for an interregional or commercial card MIF in their contractual documentation, because it doesn't matter to them, or indeed to the acquirer, how many or indeed if any of them -- they just pay a fee which is set by reference to whatever the acquirer has decided to set, as I understand it. If I have got that wrong, I am sure someone will tell me, but that's my understanding of how it works.

MR BOWSHER: This might be true of a number of consumer claims as well. The person who has made one small purchase is able to know that they have made this. I mean, the merchant who made one sale on the basis of an interregional card, in theory, will know --

MR TIDSWELL: How will they know?

MR BOWSHER: Because they took an American credit card. They will know this came with an American or Chinese bank.

MR TIDSWELL: If you imagine you have merchants all over the country, many of whom have nothing to do with the travel sector or any particular tourist sector, and we must have a huge number of merchants in that category, because we know that 95% sit outside those categories. Are you saying that -- if I am a market trader

sitting in Farnham, and I am selling vegetables, are you saying that the test for whether or not --

MR BOWSHER: Not the only test.

MR TIDSWELL: Well, are you saying that as an element of the test that they remember and -- what, are prepared to testify to that?

MR BOWSHER: That is the test. The method --

MR TIDSWELL: Let's not get into a semantic argument. If that's not how they are going to work it out, is there some other way in which they are going to work it out?

MR BOWSHER: There are a number of ways in think they would know. Let us suppose you are large enough so you would know you are getting a lot of trade with interregional cards or --

MR TIDSWELL: That's not the proposition I am putting to. I am talking about people who are not large enough and are not in the tourist facing industry. It is the micro businesses you are talking about. If there is no other way of knowing, how are you going to know, is the question.

MR BOWSHER: The short answer is, as is referred to in our APO methodology for other purposes, you simply ask the acquirer. The acquirer will know.

MR TIDSWELL: So how are you going to do that? Do you --

MR BOWSHER: If you have a machine, you have a contract with either a payment facilitator or an acquirer, and you ask them.

MR TIDSWELL: Is there any evidence before us that the acquirer has records in relation to blended contracts which will enable them to identify whether or not a merchant has ever paid interregional or commercial card.

MR BOWSHER: No, because that again was not something that acquirers -- they will have --

MR TIDSWELL: I am asking as a matter of principle. Has anybody been able to

establish on the evidence before us that that is information and data that is available.

MR BOWSHER: You don't have evidence before you. In principle, you would ask the acquirer. Unless they are frivolously charging for these transactions, they must have had records that traders, even the very smallest traders, have made those sales.

MR TIDSWELL: Let's say you talked about 250,000 people as being a reasonably proxy. So we get 250,000 people who register to join the opt out claim. Is the suggestion that you write to the acquirers with a list of 250,000 people and say "Can you please tell us if these people have paid an interchange fee in the last six years". Is that the methodology?

MR BOWSHER: On the registration -- sorry. I am being whispered at. Sorry. I had better listen.

MR TIDSWELL: Yes, of course.

MR BOWSHER: I am reminded that the first step is to ask the merchant: "Do you deal with businesses, as on the business card". I am taking two steps back. You start by asking a merchant -- now take a £1,000 claim, which is very much at the smaller end -- if we work that up, £1,000, even at the IR rate, ends up being a source of business that's worth about let's say £200,000 over the five or six years.

Most merchants will know if £200,000 has been going on business that they have given to a corporate client or to Americans. They will know that that is a consumer segment. That's a £1,000 claim.

Now, your example. We will be asking when people register, have they made sales that are with interregional or commercial card. Now, if it is the person who once sold one shirt to a Chinese tourist, then they can register and they can say "Yes, I once made a credit card sale to a Chinese tourist for a tee-shirt". Then, yes, they plainly do qualify. If it is uncertain, the second level will be to go back to the acquirer and

say: "Have I, the merchant, ever paid a merchant service charge in respect of either of these transactions".

Now, you do not have the material before you as to whether or not the acquirer does or doesn't have that information, but in principle the acquirer has been charging a fee on the basis of those transactions, so business common sense would suggest they must have or have had that information.

MR TIDSWELL: I am not sure that follows. I think the whole point of having a blended contract is you don't have to do that. It doesn't matter as between the acquirer and merchant what the mix is, because the acquirer has ascertained an amount for the merchant service charge which is sufficient on average to cover that position. No doubt that's because actually the exercise of identifying the individual MIFs for hundreds of thousands of small traders is probably quite onerous in accounting for it, and they only therefore do it for the largest ones.

MR BOWSHER: The definition is put in -- the merchant is put in the driving seat of this definition, as it were. It is perfectly knowable to a merchant whether they do or do not fall within that class. Like all of us, we might have forgotten. We might have forgotten we bought replica kit, or we might have forgotten we did that, but I as a merchant will know that I typically once a year at Christmas I get a good purchase on a corporate card. I will know these things and be able to say "Yes, I have paid that". That's what happens. I may not now have all the details, but it is a knowable fact. It's not an unknowable fact.

MR TIDSWELL: Just coming back to the question of methodology, is there anywhere that we could find an explanation of that methodology in the papers in front of us? I think the answer to that is no, because I think we have been told there is no methodology for this in the case, but just to make sure -- give you the opportunity to deal with that point.

MR BOWSHER: I don't think so. I am sure if that were a problem, I am sure we could set it out more fully, but certainly that's my understanding as to the way it does work. It is explained to some extent in the litigation plan that we are asking opt out claimants to register with the relevant information. I am not sure it goes quite as far as the methodological extreme.

MR TIDSWELL: I don't think it does, because I think the point you are making is that the mechanism for determining whether or not a person is a member of the class is by asking them if they recall purchasing things from obviously international visitors or presumably people with commercial cards.

MR BOWSHER: Yes.

MR TIDSWELL: Which presumably you can't do on the basis of -- you can't actually do it on the basis of football shirts or accents. It probably has to be on the basis "I remember the card that was used and it was very obvious to me that it was". That's the only verifiable basis, isn't it?

MR BOWSHER: Yes.

MR TIDSWELL: You may or may not have guessed I am not originally from this country and I have a little bit of a kiwi accent. If I walk into a market small in Farnham, are they going to assume I am from New Zealand. The only way of really knowing that is by looking at the card itself.

MR BOWSHER: It becomes confusing when I use a Bank of Ireland card here, it is an English Bank of Ireland card or is it an Irish Bank of Ireland card? How would you know. Generally speaking, it is knowable to a trader. I mean, it only becomes a problem for the very smallest claim, which is --

MR TIDSWELL: I don't think that's right actually. I think that's not the way the point is being put. This is not a distribution of damages point. This is about certification and the need for there to be identifiable class. In other words, you have to be

absolutely clear that it is possible to work out who is in and who is out at the start. It doesn't matter how small it is. As you say, if they have done one transaction, then it seems to me they are in.

MR BOWSHER: If it is logically identifiable, some people may be mistaken about whether they were or were not in. They may be mistaken about what card they accepted. But it's a logically identifiable class, and if there's a question, then that can be verified, pursuant to the contract which the trader has with the acquirer to whom it paid the MSC.

MR TIDSWELL: That's helpful, thank you.

MR BOWSHER: As I say, quite quickly, once you get a claim above a certain level, it will be very, very obvious. It only becomes an issue for someone who has very, very small claims, who won't be in a position to know because that's part of their own business plan, but in principle it's verifiable either by their own recollection and their own records and evidence, or because they can ask the acquirer.

MR TIDSWELL: I think we saw attached to -- actually, I think in Ms Williams' first statement there is a table, isn't there? We can probably find it, if it is helpful, but it is quite interesting if you look at that, a selection of merchants. I think it was the Chichester Theatre selection. I can't remember what paragraph it was. It is quite interesting to look at that mixture of large and small claimants in the Umbrella Proceedings, and a table of where they had claimed different things. What was striking about it was that quite a lot of claimants with quite large claims were not making any claims for interregional MIFs, as I recall it. I don't know whether that accords with your recollection. We can pull it up if it is helpful. I am sure someone can give us the reference to it.

MR BOWSHER: I remember the table you mean. I am not sure what one gets --

MR TIDSWELL: I think just the proposition that you put to me, that you would

expect a larger merchant to have more interregional -- you were putting to me you would expect a larger merchant to have more interregional MIF transactions, and I think I did not necessarily support that.

MR BOWSHER: I think that contradicts what I have already said, some larger merchants will have hardly any – it is a much more complicated question. Some small will have a lot and some large have very little.

MR TIDSWELL: Depending on where their customers are.

MR BOWSHER: Exactly. It is a much more nuanced point. My point is simply if you are paying £5 or £10 or £20,000, if you extrapolate that up, you will know that you have actually got a business slice worth quite a few hundred thousand because of the way the charge works. Of course, you are incentivised. If you are contemplating a claim, you have certainly an incentive, because we have seen the relative charge. If you become aware of the possibility of claiming for MIF, you have a substantial incentive, even the smallest trader who becomes aware, has a substantial incentive to work out which category they are in, because we have seen the relative figures. The IR corporate MIF claim is substantially more valuable. So it is not something that anyone is going to be indifferent to.

MR TIDSWELL: That is depending on how many transactions they have made. We are in danger of going round in circles. I am conscious of the time.

MR BOWSHER: I am nearly finished.

MR TIDSWELL: I have once again taken you off course.

MR BOWSHER: I think we may have covered almost everything I was going to cover.

Can I just check. We have gone around a little bit and I just want to make sure in case there is something ...

MR TIDSWELL: I have taken you out of your course, so please do.

MR BOWSHER: All I was going to say at the end is at various points there have been issues about -- it has probably been apparent to the Tribunal matters have moved on in ways that even we weren't aware of, for example, around issue 6 in the list of issues, which is not in trial 1, and what is going to happen to that. I think the short point is we have made plain that we have said that on these proceedings we can and intend to be ready to participate in the Umbrella Proceedings, and even if APO becomes an issue for trial 1, then we will need to prepare for that in the way that everyone else does.

The swing or the roundabout of that is that we will also have to look and see what has happened on, for example, issue 6, and it may be that we need to -- I am reluctant to say we need to amend our claim or whatever about non-EU claims, because I don't know what has happened to those claims. We will have to look at what is economical and proportionate in dealing with those claims, once one knows what has happened to that part of the Umbrella Proceedings, and we simply don't. But in short our intention, as matters stand, is to adopt the most economic and proportionate matter, in the hope that we can make what I describe as a material improvement on the budget which we looked at, so that this becomes a highly efficient, economic way of meeting the needs of the regime and the merchant class that has suffered as a result of the activity, which is the subject of this claim, and to do that we will seek to do -- as far as we are aware we are ready. We don't know what other obstacles there are. As far as any obstacles that we are aware of, regarding the Umbrella Proceedings, we are ready to confront them and participate as far as possible, because that seems to us to be the practical and efficient way forward to ensure that the quarter of a million, one million, whoever it is claimants are able to achieve justice through judgment or settlement.

I don't think there is anything more I can really say at this stage. There is clearly

a degree of uncertainty in that last submission, because I am addressing things that we don't know about.

MR TIDSWELL: It is inherent, isn't it? I think, as I said earlier, we are sympathetic to some of the difficulties that that parallel regime creates. So thank you. That is helpful. Before you sit down I, am just checking if there is anything else. Thank you. I think in that case -- sorry, Mr Bowsher.

MR BOWSHER: No, no.

MR TIDSWELL: I think we are done. Thank you very much to everybody involved. I see an awful lot of people in the courtroom and no doubt a number online as well who have been working hard for the preparation of the hearing. We are very, very grateful for all the effort you have put in. I expect a few late nights as well. Thank you very much. It has been a very interesting hearing. Lots of complex and interesting issues. So no surprise I am sure that we will take those away and reserve our decision. Thank you very much.

(4.25 pm)

(Hearing concluded)