THE COMPETITION APPEAL TRIBUNAL 20TH ANNIVERSARY CONFERENCE

"CAT@20"

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EVIDENCE AND COMPETITION LITIGATION

[1] President of the UK Competition Appeal Tribunal. All views are my own. I would like to thank Anna Brennan, one of the referendaires at the Tribunal, for her assistance in framing my views. I bear sole responsibility for all errors and any infelicities.

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A. INTRODUCTION

1. If, a year ago, you had told me that I would be enthused, fascinated and troubled about evidence and competition litigation, I would have said that many other matters would hold a higher claim on my attention. However, a lot of recent litigation and emergent case law has caused me to think more deeply on this subject. My sense that this is not only an interesting topic, but also one that holds at least part of the key to two "holy grails" of competition litigation.

2. The first "holy grail" is the need, of growing importance, to at least slow the steady increase in litigation costs over time. Ideally, we would reverse the trend, and see reducing litigation costs. That is why I called this a "holy grail". The reference is, of course, to the Arthurian quest for the holy grail. These quests had certain characteristics. They were worthy; but (unless one happened to be the perfect knight, a Sir Galahad) they were doomed to fail. It is in that spirit that I approach question of controlling costs through an understanding of the evidence that we deploy to resolve competition disputes. I want to be clear that I am approaching this area with an appropriate degree of pessimism.

3. The second "holy grail" is the need, also of growing importance, as competition litigation increases in volume and significance, for greater consistency of outcome and (which is not the same thing) greater predictability of outcome. Again, I am going to approach this quest to understand evidence with a view to making outcomes both more consistent and more predictable with an appropriate degree of pessimism.

4. This paper has six sections (Sections A to E, with a concluding Section F, which draws together the threads), but really falls into two parts. Sections B to D are – even for the lawyer – quite theoretical, and I must apologise in advance for this. But they are a necessary prelude to Section E – by far the longest section – which considers various aspects of evidence in competition cases through or using this theoretical lens. So the paper as a whole seeks to achieve some kind of balance between the theoretical and the practical.

B. WHAT DO WE MEAN BY EVIDENCE?

(1) Evidence is not inherent, but made

5. These days we are often presented with the fruits of an "evidence-based" inquiry. Or, when we are asked to provide an assessment of something or someone (as in a judicial reference or an application for "silk", to identify two cases where this request is regularly made of me) we are told that the assessment must be "evidence-based". The trouble that I have with such requests is that I have no idea what this means. I do not think that this is my fault but rather constitutes a failure (on the part of the person making the request) to appreciate that evidence is something that needs to be defined, and is not self-evident.

6. Go to the website of the Chartered Society of Physiotherapy,[2] and we see that the Society define an "evidence-based" approach in the following, circular, terms:

> Evidence-Based Practice (EBP) requires that decisions about health care are based on the best available, current, valid and relevant evidence.

This neither a definition of evidence nor a meaningful articulation of a practice. "Evidence is evidence" is no definition; nor is it a meaningful to say that "evidence-based practice is practice based on evidence".

7. I do not mean to pick on the Chartered Society of Physiotherapy. Indeed, they deserve a measure of credit for at least trying to define their terms, which many bodies do not do. Most demands for "evidence-based" responses[3] and most "evidence-based" reports simply do not address the point.[4]

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[2] www.csp.org.uk/professional-clinical/clinical-evidence/evidence-based-practice/what-it (accessed 15 November 2022).

[3] I have particularly in mind the processes for selection of judicial office and the KC selection process, where one might hope these matters would actually be thought about.

[4] There is, under the rubric of evidence-based approaches the notion of evidence-based policy or evidence-based government. See, for example, Davies, *Is Evidence-Based Government Possible?*, given as the Jerry Lee Lecture 2004 in Washington DC on 19 February 2004. Evidence-based policy and evidence based government is well-outside the remit of this paper, and indeed my expertise. But the points touched upon resonate closely with some points made in Section C below, regarding the distinction between "law" and "fact".

8. This unformed approach to evidence is, I anticipate, informed by the practice of modern civil courts, in particular the courts operating out of the Rolls Building and the Tribunal that I am privileged to lead, the Competition Appeal Tribunal. Courts used to draw a very clear line between evidence that was admissible and the weight of evidence that was admissible. That is a distinction that has become eroded, and perhaps dangerously so.[5]

9. My point is that it is not enough to regard evidence in the way we regard gravity, something that we all understand and whose effects are immutable – and therefore predictable. Gravity governs our conduct, whether we like it or not: we cannot opt out or re-define it. On the other hand, we can choose to decide matters without reference to evidence (and this is sometimes entirely proper: it will be a theme of this essay that not all decisions are, or should be, evidence based); or we can frame the rules – "rules of evidence" – which determine the material that we are permitted (as decision-makers) to use when making such decisions. These decisions have consequences, and they can be quite fundamental.[6]

(2) Definition and purpose of the law of evidence

10. Whilst there may be a form of Platonic idea that is "evidence",[7] this is a term that we should not use in the abstract or in isolation. We should refer to "the law of evidence" and must be clear in our own minds that evidence is a body of legal principles or set of norms that is made and not inherent.[8] Whilst there are surely

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[5] Rule 21 of the Competition Appeal Tribunal Rules 2015, SI 2015/1648, is very much framed discretionary terms. As will be seen, there is a great deal to be said for this, but the unavoidable downside of discretion is a lack of clarity in terms of what – in hard-edged terms – is or is not admissible.

[6] On this, see Tapper, *The Law of Evidence and the Rule of Law*, [2009] CLJ 67, where the point is made that the introduction of discretion is antithetical to the rule of law. There is a great deal to debate in this regard, and my only point (at this stage) is that Professor Tapper is entirely right to raise the question of compliance with the rule of law in the terms that he does.

[7] Platonism affirms the existence of abstract objects (widely defined, so as to include properties, types, propositions, meanings, numbers, sets, truth values, etc), which are asserted to exist in a third realm distinct from both the sensible external world and from the internal world of consciousness.

[8] I am not going so far as to say that there are no "higher values" that go to inform what the "law of evidence" should contain or deal with. There are, doubtless, good and bad evidential laws, and that implies some kind of objective standard. But it would be altogether wrong to suggest that if I were to say "my decision is evidence-based", anyone hearing that comment would understand the process by which I had derived my decision, or even that I personally would or would not regard as evidence. In short, you will not be able to understand my statement without a prior articulation of what is, and what is not, "evidence". That articulation is provided by the law.

general principles that will inform the content of the "law of evidence", what is and what is not "evidence" requires very specific articulation precisely because "evidence" is not inherent. What is more, evidence is an adjunct to processes of decision-making and will be informed by the nature of such processes. English law – as is well-known – is based on an "adversarial" process, in contrast to many civilian systems that are "inquisitorial" in nature. It would be surprising if what were to be regarded as "evidence" did not differ according as to the dispute resolution process in play.

11. So, "evidence" is the law of evidence. It is procedural and adjectival, not substantive, in its nature. Substantive law defines outcomes; procedural and adjectival law defines how outcomes are reached. When it is put this way, one wonders why adjectival law is relegated to the backwaters of law courses.

12. Having positioned evidence as having an essentially legal, and procedural, character, we can go on to attempt to articulate its content still further. *Phipson* tells us that the purpose of the law of evidence is "to lay down rules as to what matter is or is not admissible for the purpose of establishing facts in dispute".[9] In other words, the role of the law of evidence is to define that material which we can and cannot admit in order to prove a certain fact. Whether that evidence does establish that fact turns on its relevance and its weight, not on admissibility. I am going to park questions of relevance and weight for the moment, but I will be returning to these criteria. I shall also treat these terms as essentially synonymous and will refer only to "weight".

13. Admissibility, as I have defined it, thus constitutes a hard-edged set of rules as to what material can, and what material cannot, be deployed in court in order to decide a certain issue. Admissiblity is not the only reason why evidence may be excluded from the court process. It is perfectly possible for a party to adduce, late, evidence which (had it been produced on time) would have been admissible and perhaps of great weight. In such a case, the reason for exclusion would be not on grounds of inadmissibility (in the sense I am using the word) but because of another aspect of procedural due process, namely fairness between the parties

[9] Malek (ed), *Phipson on Evidence*, 20th ed (2022) at [1-01].

and the right of one party to answer the case made by the other. It is for this reason that court procedures turn on the claimant having the first word, the defendant responding, and the claimant replying. Such procedures are only effective where each party has enough time to prepare their respective cases. The point I am making is that there are exclusionary rules that apply to evidence, that serve to exclude that which would otherwise be admissible. And the court, having excluded such evidence (which, as I say, may be both admissible and of weight) will have to reach a decision imposed on the parties without the benefit of this evidence.

14. I return to *Phipson*'s definition of the purpose of the law of evidence. *Phipson*'s definition is – as one would expect from such a work – admirably clear. There is no point in asserting that one is following an "evidence-based" process unless and until one has identified that body of law that defines what is, and what is not, evidence and how it is to be treated. In short, an inquiry that purports to be "evidence-based" needs to have a law of evidence that it applies.

15. I have therefore reached a position where I am saying that processes that cannot identify their evidential rules are defective in a very serious way. That, in and of itself, is quite a serious assertion. Not because of the deficiencies in the processes for judicial appointments or KC applications – everyone knows (even if they do not say) that "evidence-based" is a shorthand for saying that "we are trying to be objective here", and is not asserting that any kind of formal, evidence-based, process is actually being applied. It is a serious assertion because courts and administrative decision-makers are the arbiters of serious issues and disputes where – if we are to be faithful to the ideal of the rule of law – the basis upon which we decide questions of fact needs to be clearly articulated. If a clear articulation does not exist, then we run the enormous risk of introducing arbitrariness into a process that should be the very reverse of arbitrary.

(3) Themes to watch

(a) The nature of the decision-maker

16. I noted earlier that the rules of evidence are coloured by the nature of the decision-making process itself. Courts of different jurisdictions will have different laws of evidence because they have different procedures. Even in the same jurisdiction, the rules will differ according as to the nature of the decision-maker. So, for example, rules of procedure – including the rules of evidence – will be different for courts than for administrative decision-makers.[10] Within the broad distinction of courts versus administrators, I am going to refer to the Competition Appeal Tribunal (the "Tribunal") as the court I am primarily going to focus on; and to the Competition and Markets Authority (the "Authority") as the administrative decision-maker I am primarily going to focus on.

17. I will, of course, range further than this – and look to court and administrative practices more widely. But this an essay on evidence in competition law and I hope my focus on the Tribunal and Authority is for that reason understandable. I am also going to focus rather more on evidence before the Tribunal than on the Authority; and on courts rather than administrative bodies:

    (1) The Tribunal's rules of procedure have expanded over time, moving from appeals (I include judicial reviews in this rubric) to follow-on actions, to stand-alone actions, to collective proceedings. With the exception of subsidy control, this jurisdictional expansion has thus occurred in the field of private actions, not competition regulation. The Tribunal's rules of procedure have very largely drawn from the Civil Procedure Rules of the Senior Courts – and why not? These rules are carefully framed, and the Business and Property Courts of England and Wales (where I also sit) deal with some of the most heavy-weight

[10] See, for example, *Group Eurotunnel SA v. Competition Commission*, [2013] CAT 30 at [124]*ff*. The contention that the rules of natural justice applied in exactly the same way to the Competition Commission (an administrative investigatory body) as to a court was rejected. It is not that the rules of natural justice are not equally important in both contexts – they are. It is that the processes involved in reaching an outcome are very different; and these differences are reflected in the procedural rules. Although these rules concerned the rules of natural justice, exactly the same point arises in relation to the law of evidence.

commercial litigation in the world, including (although diminishingly) competition cases. But – and I will be coming to this – competition cases raise issues, including issues of evidence, which are special to competition law, and my growing sense (in line with the two holy grails I mentioned at the outset) is that the Tribunal's Rules need to be review to reflect these special attributes. In short, the area for work and detailed consideration lies at the court and not the administrative level.

(2) The next distinction or theme that I must come to is the distinction between admissibility and weight. This is a distinction that applies far more readily in the context of courts than administrative bodies, although it is a distinction that does not necessarily apply. (It is perfectly possible for a law of evidence to be value-based and discretionary: it may not be a very good law of evidence, but it would certainly deserve the name.) For this reason, I am going to focus on court (and Tribunal) based processes and questions, and leave for less detailed consideration the position of the Authority and administrative decision-making bodies generally.

(3) That is also because of what I will call "feedback loops" between the administrative and judicial processes. The fact is that how a court reviews an administrative decision judicially affects the way the administrative body conducts its work in the future. Courts need to be astute to this, and ensure that they are adopting standards of review that enable administrators to perform their functions properly. Although, as I have said, my focus is going to be on the law of evidence in the context of private litigation, it would be wrong to assume no cross-fertilisation between private actions and appeals (broadly defined) and so no indirect effect on administrative processes. The short point is that everything is linked to everything else!

(b) Admissibility and weight

18. Rules of admissibility are rules of exclusion and control. Their effect is to cause that which might be probative to be excluded, notwithstanding its probative

value, because the material in question fails to meet the admissibility threshold. Weight, by contrast, is not really rule-based at all. It is the extent to which a decision-maker attaches value to a particular fact in order to reach a particular decision. One only gets to weigh a particular piece of evidence in support or opposition to a particular fact when once it has passed the hurdle of admissibility.

19. Obviously, rules as to admissibility look much more like rules than an approach that says "if it's relevant, I'll look at it". But it would be a mistake to characterise a discretionary approach to evidence as something that is not the "law of evidence". A discretionary approach is as much a "law of evidence" as a strict, rules-based, approach: they are different ways of doing the same thing. They have different strengths and weaknesses. It is to these that I now turn.

(4) Weight as a legal "wild west"

(a) An absence of rules and principles?

20. Given the way that I have defined weight, one might be forgiven for thinking that it is something of a legal "wild west". Essentially, weight is what weight a decision-maker chooses to give a particular piece of evidence. So, Judge *A* might be particularly swayed by the testimony of a particular witnesses, in circumstances where Judge *B* would not be. Clearly, it is undesirable for there to be radical differences between decision-makers in terms of how they reach decisions, but it is difficult to see how rules as to weight can help. The best we can hope for is to articulate broad principles, which affect how decision-makers approach the evaluation of evidence.

21. One good example of this, arising in the practice of the Business and Property Courts and the Tribunal, concerns documentary evidence and the approach to memory and recollection. I want to stress that these principles have evolved out of the determination of document-heavy commercial litigation. In that context, they work well. How far they are translatable into heavy competition litigation is a matter that I will be coming to:

(1) In *Armagas Ltd v. Mundogas SA (The "Ocean Frost")*,[11] Robert Goff LJ said this:

> …Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses motives and to the overall probabilities, can be of very great assistance to a Judge in ascertaining the truth…

This, as Robert Goff LJ stated explicitly, was a fraud case, but the points made about the fragility of memory and the need to cross-check recollection against "objective facts" go well-beyond fraud cases, and Business and Property Courts Judges are very conscious of the importance of the contemporary document, even in cases not involving fraud.[12]

(2) This point was made in *Gestmin SGPS SA v. Credit Suisse UK Ltd*,[13] where Leggatt J stressed the general fallibility of memory, the fact that the litigation process might make attempts to recollect even more defective and (again) the importance of cross-checks to "objective" evidence:

> 15. An obvious difficulty which affects allegations and oral evidence based on recollection of events which occurred several years ago is the unreliability of human memory.
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> 16. While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony. One of the most important lessons of such research is that in everyday life we are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are. Two common (and related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of

[11] [1985] 1 Lloyd's Rep 1 at 57.
[12] See *Simetra Global Assets Ltd v. Ikon Finance Ltd*, [2019] EWCA Civ 1413 at [48] to [49] on the importance of *The Ocean Frost*. Fraud cases, I would say, are an example where there is a problem with deliberate attempts to mislead the court. But many cases, involving witnesses doing their very best to help the court, actually involve misrecollection when assessed against the contemporary record, and it may be that the message in *The Ocean Frost* is even more important in such cases.
[13] [2013] EWHC 3560 (Comm) at [15] to [22].

recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate.

17. Underlying both these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact, psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is true even of so-called "flashbulb" memories, that is memories of experiencing or learning of a particularly shocking or traumatic event. (The very description "flashbulb" memory is in fact misleading, reflecting as it does the misconception that memory operates like a camera or other device that makes a fixed record of an experience.) External information can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. Events can come to be recalled as memories which did not happen at all or which happened to someone else (referred to in the literature as a failure of source memory).

18. Memory is especially unreliable when it comes to recalling past beliefs. Our memories of past beliefs are revised to make them more consistent with our present beliefs. Studies have also shown that memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time.

19. The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. This is obvious where the witness is a party or has a tie of loyalty (such as an employment relationship) to a party to the proceedings. Other, more subtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give evidence for one side in the dispute. A desire to assist, or at least not to prejudice, the party who has called the witness or that party's lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces.

20. Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often (as in the present case) when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does nor does not say. The statement is made after the witness's memory has been "refreshed" by reading documents. The documents considered often include statements of case and other argumentative material as well as documents which the witness did not see at the time or which came into existence after the events which he or she is being asked to recall. The statement may go through several iterations before it is finalised. Then, usually months later, the witness will be asked to re-read his or her statement and review documents again before giving evidence in court. The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events.

> 21. It is not uncommon (and the present case was no exception) for witnesses to be asked in cross-examination if they understand the difference between recollection and reconstruction or whether their evidence is a genuine recollection or a reconstruction of events. Such questions are misguided in at least two ways. First, they erroneously presuppose that there is a clear distinction between recollection and reconstruction, when all remembering of distant events involves reconstructive processes. Second, such questions disregard the fact that such processes are largely unconscious and that the strength, vividness and apparent authenticity of memories is not a reliable measure of their truth.
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> 22. In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.

(3) Obviously, Judges cannot turn themselves into expert psychologists trained in the working of human memory, and then apply that training to the witness giving evidence. How memory works is probably something that Judges should steer away from, and defer to those more expert. But Judges are undoubtedly concerned with the recognised fragility of memory in a trial process that is based (even today) on oral testimony. In a sense, the fraud case – where one protagonist or the other may be lying – is the easy case, although studies have shown that relying on the "demeanour" of the witness is not safe either. But at least one can, as Robert Goff LJ said, look to the motives and the probabilities. In a case where all witnesses are striving to tell <u>their truth</u>, working out what is the truth is extraordinarily difficult if the "unreliable narrator" is the norm and not the exception.

(4) That is why cases like *The Ocean Frost* and *Gestmin* are so important: Judges recognise that there is a hugely subjective element <u>in their own process of assessing the credibility of a witness</u>, and it is that subjectivity

(where different Judges, on the basis of the same evidence, may reach different outcomes) that is inimical to justice under the rule of law.

22. But we need to understand what cases like *The Ocean Frost* and *Gestmin* are trying to do. They are not laying down rules. They are providing something more akin to advice or guidance as to how evidence is to be evaluated in terms of weight. Granted, this is advice or guidance of a peculiarly important type, and the first instance Judge who disregards the advice or guidance is likely to find problems emerging on appeal.[14]

(b) Other controls

23. Subject to these broad guides, principles or values if you like to the assessment of evidence, is the question of weight really the "wild west" I have suggested it is? I fear that the answer, unsatisfactory as it is, is "Yes", but there are a number of broader, and less measurable, controls which I have not yet articulated:

(1) First, if our evidential assessments are as subjective as I am concerned that they might be, the qualification of the decision-maker becomes very important. That has a number of aspects to it:

(i) Having a diverse judiciary is critical because those imposing life-changing decisions on others ought to reflect the society in which they act. That is not just because of public perception of the judiciary, although this is clearly important.[15] I suspect that a judiciary that is "in tune" with society will better reflect that society's values, including in relation to evidence disputed questions of fact.[16]

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[14] *Simetra Global Assets Ltd v. Ikon Finance Ltd*, [2019] EWCA Civ 1413.

[15] Judges are, of course, unelected, and need a certain moral authority to buttress the legal consequences that follow from their judgments. So they need to reflect the best of the society they are representing and acting for, including as to its diversity.

[16] This is a proposition that I cannot defend by reference to metrics. But take Rumpole's "golden thread", the presumption of innocence that exists in our criminal law. This is an evidential rule or value, but it derives its importance not from its formulation (poetic though "golden thread" is) but from the extent to which the desire only to imprison the guilty and leave the innocent free is actually embedded in our society. The criminal standard of proof – proof beyond all reasonable doubt – is the corollary of the

(ii) Subject to that broad need to reflect the society within which it acts, a tribunal trying a particular type of case ought – broadly speaking – to reflect the nature of its general user group. That is one reason why the Tribunal has a particular credibility, because of its three-person panels, with a competition litigation expert in the chair, and two ordinary members, with equal voice in the outcome, representing wider business and regulatory practices and the economics that underpin so much of competition law. A panel that reflects the nature of its general user group, if selected from the best there are, will be a useful combination of the generalist and the specialist. Specialists are important. It is one of the great strengths that underlies the English Commercial Court; and also, if differently, the Tribunal. But specialists must not be allowed to "stovepipe". The great danger of specialisation is that one becomes the prisoner of one's own expertise, and that is a serious drawback if it happens. One of our great past-chairs – Lord Carlisle of Berriew, KC – was not a competition lawyer when appointed a chair of Tribunal. Asked at interview what he brought to the Tribunal (and I have this from Lord Carlisle himself, so I am not telling tales out of school) he said "I think I will widen the gene-pool". Exactly so.

(2) Secondly, although we are, for understandable reasons, light on specific rules or principles constraining the weight placed on certain facts, there are two broad-brush, but important, related controls that ensure there is a relationship between the totality of the admissible evidence and the outcome at the end of the trial. I am referring to the related rules of burden of proof and standard of proof. Essentially, the rules as to burden identify who loses if a particular outcome is not established to a defined standard. The rules as to standard define the line that must be crossed in order for the burden to be discharged. The two rules cannot, really, be separated. Thus, burden of proof is rarely articulated or determinative in

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presumption of innocence but both only have real meaning if and to the extent that society truly believes Blackstone's *dictum* "better that ten guilty persons escape, than that one innocent suffer".

civil proceedings because the standard of proof is the civil standard, on the balance of probabilities.[17] Because the protagonists in civil litigation are meant to be equal, the burden of proof is as close to parity as possible. The court is intended, in the best possible way, to be indifferent as to claimant or defendant success. So a standard of "more probable than not" is appropriate; and because outcomes are usually far-clearer than on the balance of probabilities, the test is actually very rarely determinative in civil litigation.[18] On the other hand, in the criminal law, the burden is generally on the prosecution, and the standard is the asymmetric one of "beyond all reasonable doubt". Even disregarding the jury-element in criminal trials, which is no part of this paper, the fact is that this higher standard is a potent control on the subjective weight that decision-makers can attach to specific facts, and a very important control for that reason.

(3) Thirdly, there are the rules on admissibility – to which I will come. They inject a control over subjectivity, but at the price of excluding that which may – properly – be determinative.

24. Before I turn to the rules on admissibility, I should say a word about the court as the "finder of truth", because this is a misdescription of what it is that courts do.

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[17] The balance of probabilities means exactly that. In those cases where the factual margins are extraordinarily tight, the party who is on balance right, wins. It is often put as 51% chance, you win, 49% chance, you lose. In one sense this is right; more fundamentally, it is deeply misleading, because human beings do not evaluate factual questions in this way; and because, if you parse factual issues into minute and tiny sub-issues, you can turn even the civil standard of proof into an extremely onerous burden. It is probably better – just as with proof beyond a reasonable doubt – to see this as a guide to how facts are to be assessed and, indeed, how one side is to be treated as against the other. In a civil case, both sides come before the court as equals, and although there has to be a burden of proof, it needs to reflect as nearly as possible the fact that both sides are equal. In a criminal prosecution, on the other hand, we have taken the policy decision that the accused ought to be protected, and that the greater burden should be placed on the prosecution. The burden is graphically described in Turow's novel, *Presumed Innocent* (1st ed (1987) at 235: "As a prosecutor, I used to find this part of Larren's routine unbearable, and Nico and Molto both look pale and upset. No matter how many times you tell yourself that the judge is right, you can't believe that anybody ever thought it was going to be explained so emphatically…".

[18] **[Is there learning on this?]**

(5) "You have to decide…"

25. There is a common perception that courts exist to establish the truth. That is simply not the case, unless you define what is the "truth" in a very particular way, namely to align "truth" with the outcome of the court process – which is the sort of circular definition that I dislike, and have already criticised.[19] "Truth" is intrinsically subjective, but even disregarding that particular problem, there are a number of reasons why the outcome of a court process may not reflect the "truth":

    (1) Take the example that I gave earlier, of admissible, relevant, evidence being adduced late.[20] Courts across this jurisdiction will strain to admit such evidence, but sometimes other values outweigh this ability to allow the evidence in. Take the case where evidence is adduced late in the day, without proper excuse, in circumstances where fairness requires that the other side be given a right of response, but where such a response can only meaningfully take place if the trial is adjourned. This is the sort of case where – with great regret – the Judge will likely exclude the evidence. And, unfortunately, "exclude" means "exclude". The evidence is not taken into account by the Judge, and the case is decided on the evidence that was before the court. If the evidence was material, it may be that the outcome would have been different. Legal outcome and truth diverge – and rightly, if unfortunately, so.

    (2) This is the case with any rule of admissibility. Rules of admissibility – I promise, I will come to them – exist to exclude not the irrelevant, but the relevant which is (for other reasons of policy) not to be admitted.[21]

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[19] See paragraph 6 above.
[20] See paragraph 13 above.
[21] Again, the criminal context provides an excellent example. What should the court's response be to evidence illegally obtained (say, because of a defective search warrant) by law enforcement? Assume the evidence is probative. Should it be included for that reason, and the breach of search processes thereby at least indirectly sanctioned? Or should it be excluded, because illegally obtained? And how far does the exclusion go? Does it extend to exclude the "fruits of the forbidden tree" – i.e., to facts ascertained as a result of investigations deriving from the illegally obtained evidence? The wider the exclusionary rule, the greater the potential for divergence between "truth" and "legal outcome".

(3) Take, also, the courts' attitude to after-acquired evidence, by which I mean material that was not available at trial, but which has become available subsequently, and which has a material bearing on the (past) outcome of the trial. Does one automatically set aside the judgment, and re-hear the case? That is not the default. It is difficult – even in criminal cases – to do this. In short, a trial determines an outcome on the evidence before it – and, if later material emerges, the usual answer is that the process is closed, and will only be re-opened in particular circumstances.

(4) Finally, Judges are not historians. They are finders of fact (amongst other things) and they are not permitted to abdicate that responsibility by saying "I don't know" or "I need more facts to decide".[22] Courts are not seekers of truth, but arbiters of outcomes based upon the evidence that comes before them. In this there is a significant difference between courts and administrative decision-makers, and courts and historians. It is worth quoting from Lord Hoffmann's speech in *Re B*:

> 30. However, despite an elaborate and meticulous analysis of all the evidence, the learned judge was unable to make a "nding about the alleged sexual abuse of R by Mr B. Instead he concluded, at para 339, that:
>
> > (i) I cannot make a properly founded and reasoned conclusion that it is more likely than not that R was sexually abused by Mr B as she alleges or substantially as she alleges, and thus that she is telling the truth, (ii) I cannot make a properly founded and reasoned conclusion that it is more likely than not that R was not sexually abused by Mr B, and thus that Mr B is telling the truth, (iii) my answer to the question which of the above two possibilities (and thus which of Mr B and R is telling the truth)is more likely, would be a guess because I cannot even answer that question by attributing and giving weight to the competing arguments on a properly founded and reasoned basis, and (iv) on an approach founded on evidence and reasoning, and not on suspicion and/or concern, I am unable to conclude that there is no real possibility that Mr B sexually abused R as she asserts or substantially as she asserts and I have therefore concluded that there is a real possibility that he did.
>
> 31. My Lords, if the judiciary in this country regularly found themselves in this state of mind, our civil and family justice systems would rapidly grind to a halt. In this country we do not require documentary proof. We rely heavily on oral evidence, especially from those who were present when the alleged events took place. Day after day, up and down the country, on issues large and small, judges are making up their minds whom to believe. They are guided by many things, including the inherent probabilities, any contemporaneous documentation or records, any circumstantial evidence

[22] See *Re B (Children)(Care Proceedings: Standard of Proof)*, [2008] UKHL 35.

> tending to support one account rather than the other, and their overall impression of the characters and motivations of the witnesses. The task is a difficult one. It must be performed without prejudice and preconceived ideas. But it is the task which we are paid to perform to the best of our ability.
>
> 32. In our legal system, if a judge finds it more likely than not that something did take place, then it is treated as having taken place. If he finds it more likely than not that it did not take place, then it is treated as not having taken place. He is not allowed to sit on the fence. He has to find for one side or the other. Sometimes the burden of proof will come to his rescue: the party with the burden of showing that something took place will not have satisfied him that it did. But generally speaking a judge is able to make up his mind where the truth lies without needing to rely upon the burden of proof.

26. This last paragraph underscores the reason why the judiciary need to command the respect of those liable to be subject to their decsions; and why rules of evidence are of peculiar importance. Whilst it is, for obvious reasons, highly desirable for "truth" and "legal outcome" to align, that is not inevitable in any way, and our systems need to be robust enough both to justify and explain that divergence between outcome and "truth".

27. That brings me – in rather the wrong order, having considered weight first – to question of admissibility.

(6) Admissibility

(a) Why have rules?

28. As I have mentioned, rules of admissibility limit the extent to which the "rules" of the "wild west" hold sway. I am going to turn to an area where it is well-known that testimony of witnesses is liable to be unreliable, not because of any desire to obscure or lie, but simply because the best efforts of the witness are not good enough: identification evidence. A witness – physically well able to see, and having an unobscured view of the *locus in quo* – may nonetheless make a mistake about who they saw at the scene. I am <u>not</u> saying that such evidence is always unreliable. If that were the case, matters would be considerably easier. What I <u>am</u> saying is that *(i)* there is a not immaterial risk that the witness will be wrong, where *(ii)* it is not actually possible, from an examination of the

witness themselves, to discern whether the witness is wrong or not.[23] In this case, the scope for uncontrolled subjectivity is great. One judge may regard the witness – for no objectively stateable reasons – as reliable; another may not. It is not possible to determine, by any sort of examination, which Judge is right or which is wrong.

29. In such circumstances, the law of evidence developed rules of corroboration. Evidence subject to such rules would only be admitted if it was corroborated. What could constitute corroboration varied: it did not have to be the evidence of another eye witness. Some other, corroborative, material would suffice. A rule of corroboration is one way of eliminating the problem of subjectivity in relation to the assessment of evidence. Put another way, it takes away from the decision-maker the burden of making a decision about a matter where the correctness of that decision cannot be checked against other factors. That is the great concern of any judge: that one is reaching a decision that cannot be justified save by reference to one's own judgment. Sometimes decisions of fact based on pure judgment are inevitable: but they are best avoided.

(b) The problem with rules

30. The reason the civil courts have adopted a "weight" not "admissibility" approach is because there is a strong sense, not without justification, that exclusionary rules become over-complex over time. That is a general trend, but it is particularly damaging when such complexity arises in the case of an exclusionary rule. Take, for example, the "hearsay" rule, whereby evidence "at second hand" was effectively excluded from the courts. Over time, exceptions to what is not a bad rule accreted, because it excluded too much. In the end, one was left with a hollowed-out exclusionary rule, with enormously complex exceptions that permitted admission of evidence that was *prima facie* excluded. It is no surprise that in our civil courts at least, the rule has been abandoned, and

[23] I am assuming an honest and apparently capable witness, who (trying their best) is wrong in a manner that cannot be detected by the Court. Contrast the rather easier case in *Twelve Angry Men*, where the jury decide in the course of their deliberations that a witness was hiding the fact that they generally wore spectacles, which they did not have on at the time of the observation. Such a factor would constitute an objective reason for doubting the evidence. The problem is that a witness with excellent sight and every opportunity to get things right, still may get things wrong.

the view taken that it is better to trust the judge (particularly where there is no jury) to weigh the evidence rather than oblige them to exclude the evidence unless certain requirements – so complex that they become arbitrary – are met.

31. The advantage of such an approach is that it avoids technical accretions where judges strive to create exceptions to broadly sensible rules for those cases where valuable evidence is excluded for no good reason. The disadvantage is that the law becomes unpredictable and based upon the subjective view of the judge.

(c) A principles-based approach

32. It must be asked whether there is a middle course, between rule and discretion. That is not a matter that I can address in any detail now, but it is something I have addressed elsewhere. For the moment, all I would say is this.

33. It may be that a principles-based approach can meet the requirements of predictability, whilst satisfying the needs of justice. Thus, by way of example, commercial courts – I am excluding courts largely concerned with competition law, where different rules apply – will have a very flexible view about hearsay. If the fact required to be proved is what *A* said to *B* in a conversation, a statement from *A* as to what was said is unlikely to carry much weight unless *A* presents themselves to give evidence. The "exception"[24] to that exclusionary "rule" will exist in those cases where there is a good reason (e.g., death or illness) for *A* not giving evidence. This, in flexible form, is very much an articulation of the strict rules of hearsay. Unless those rules,[25] *A*'s statement was not admissible unless *A* was dead or "beyond the seas" (this being a reflection of the fact that the court did not have unlimited jurisdiction to compel). This "beyond the seas" exception really makes the point that flexibility has a lot to offer: in these days of video-conferencing and easy international travel, judges will not be particularly impressed at a statement that *A* is "beyond the seas", without understanding

[24] I put "exception" in quotation marks, because we are not talking about rules, but principles or values. Even when talking about principles or values, it is very difficult to avoid language that imports the hard-edges of a rule-based approach.
[25] I am speaking at a very high level: it is no function of this paper to delve into the obscurities of a complex body of law not currently applicable.

more about the unavailability of video-conferencing or why it is that *A* cannot travel.

34. On the other hand, data is liable to be accepted in a court without a witness giving evidence as to the facts recorded in the data provided the judge knows where the data comes from. If the data was produced in an unreliable fashion, why then it will be downgraded in terms of weight. If, on the other hand, the systems are well-though-out and auditable, then the data will be accepted.

35. Formerly, data was sought to be shoehorned in one or other of the many "hearsay" exceptions. But that very much misses the point. The point about data is that it is the evidence. I will start with a very simple, records-based, system. Your card-index library record, if you will. The point about the card-index – primitive as it was – is that it was better at storing certain types of data. You could, on a card, correlate author, with title, with location. I remember the old card indices in the Law Bodleian at Oxford. These covered a (long) wall, and were (entirely unsurprisingly) far more reliable than the individual librarians who compiled it. If you needed – for some obscure reason – to prove the likely location of a book on some date in the past, you would go to the card-index (having established the reliability of its general compilation) in preference to the recollection of the individual librarian as where that particular book should be found.

36. In short, the hearsay rule misleads, for the card-index is not second best and should not be admitted by way of an exception. It should not be regarded as some sort of exception to be justified, but as evidence in its own right, and subject to criteria that have nothing to do with hearsay.

37. The question is whether we can evolve a middle way between rules and discretion, so as to obtain the advantages of both and eliminate the disadvantages that each have. Can we frame broad rules or principles, with the spaces in-between filled by a discretion that does not "accrete" or itself become too much rules-based? I am not going to answer this question now: but – when I come to consider evidence in the competition context, this will be a major factor to bear in mind.

C. TWO DIFFICULT QUESTIONS

(1) Articulation of the questions

38. I am going to return back to the definition of the law of evidence in *Phipson*. The role of the law of evidence is, as we have seen, "to lay down rules as to what matter is or is not admissible for the purpose of establishing facts in dispute".[26]

39. Two difficult questions arise:

    (1) What is a "fact"?

    (2) What is a fact "in dispute"?

    These questions are related.

(2) What is a "fact"?

(a) The problem

40. The definition of a "fact" seems straightforward, but the more one thinks about it, the less straightforward matters become. One definition of a fact might be "a thing that is known or proved to be true". If we narrow this definition to a "thing that is proved to be true" (ditching the "known"), and also state that it is by way of the law of evidence that a thing is proved to be true, then we getting a little nearer the mark. Facts, then, are the outcome of a process (the trial) using the law of evidence to convert allegation or assertion (which is what is pleaded in parties' pleaded cases in civil actions) into fact (which is what is found, by the judge, in their judgment).

41. This appears to suggest that there is a distinction to be drawn between law and fact. Most commentators would (I am confident) accept that such a distinction

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[26] Malek (ed), *Phipson on Evidence*, 20th ed (2022) at [1-01], with emphasis added. See paragraph [*] above.

exists. But is that the end of the classification, so far as the law of evidence is concerned? Are questions either questions of fact or questions of law? This is not an area traversed by books on the law of evidence, but the implication, I would suggest, is that matters in issue before a court are either one (fact) or the other (law).

42. I am extremely keen to avoid drowning in what are philosophically deep waters. But – with a high degree of trepidation – I am going to venture to suggest that the correctness of this comprehensive distinction between law and fact is wrong, and that this is an error which matters very much to competition lawyers and competition economists. I am going to come to the reasons why these questions matter in due course: my present objective is to create a frame of reference so that a discussion can be had. It is probably best to acknowledge, at the outset, that the frame of reference that I am going to try to articulate is empirical at best, and very much in the process of articulation. It is empirical because – if I am being entirely frank – an abstract philosophical articulation of these distinctions is not something I am qualified to do, nor something I am particularly interested in doing. The reason it matters is because, at matters stand, competition lawyers are relegating the work of competition economists into the category of "fact". I accept that the work of competition economists is not law. My uneasiness in calling economic work product "fact" strongly suggests at least the existence of a third category, beyond the law/fact divide, and quite possibly a fourth.

43. I am going to begin with the distinction between law and fact, and I am not going to spend very much time of this, partly because this is an area that has been well-traversed; and partly because it is relatively incidental to the subject matter of this paper.

(b) Law versus fact

44. Laws – unless foreign – are not susceptible of proof in the usual way.[27] By definition, domestic law is not subject to the law of evidence. Indeed, the law

[27] The difference between "domestic" law and "foreign" law is stark and very informative. Judges in the courts of this jurisdiction (England and Wales and the United Kingdom, to name the overlapping

of evidence is part of domestic law, and the circuity of imagining that factual assessments could apply to law is best illustrated by imagining the proof of the law of evidence by factual means.

45. Of course, the relationship between law and fact is complex and quite difficult to articulate. It is beyond the scope of this paper to go into this question in any detail, but the law in this area (such as it is) was summarised in *Groupe Eurotunnel SA v. Competition Commission*:[28]

> 48. The sixth edition of Mr. Fordham QC's *Judicial Review Handbook* contains, in paragraph 13.2.2, a helpful citation of cases that articulate the distinction between questions of fact and questions of law, which the Tribunal put to Mr. Harris on Day 2. In *R (The Royal Borough of Windsor and Maidenhead) v. The East Berkshire Justices*, [2010] EWHC 3020 (Admin), the court had to determine whether an object was a "knife" within the meaning of section 141A of the Offensive Weapons Act 1996. Sir Anthony May P stated at [10]:
>
> > "In my judgment this is not a pure question of fact, but rather a mixed question of fact and law. Once it is determined what by description the article is and what are its characteristics it is a matter of law whether it is a knife within the section of the Act..."
>
> 49. Similarly, in *R (Thames Water Utilities Limited) v. Water Services Regulation Authority*, [2012] EWCA Civ 218, Laws LJ stated at [23]:
>
> > "...The water is, however, a little deeper when we consider the nature of the question, a very familiar question, whether a statutory measure applies to a particular set of facts. For this question is ambiguous. It may mean: is the statute to be construed so as to cover the accepted facts? That is a question of law. Or it may mean: are the facts to be judged as falling within the accepted meaning of the statute? That is a question of fact..."

46. The process by which a court "finds facts" and/or "applies law to fact" is I suspect neither linear nor straightforward. I want to recognise these difficulties – acknowledge them – but I cannot, in this paper, deal with them any further.

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jurisdictions in which I decide cases) decide the law on the basis of what the law "is" not what it is "proved to me". Indeed, under the common law, judges actually make law, when there is not a precedent on point. The same is true – if a little more complex – as regards legislation. But "foreign" law is seen as a factual matter, to be proved. If – as frequently occurs – the law of Ruritania is at issue, experts will attend to explain to the judge what the substance of that law is, and the judge will decide the point as a question of fact. On this, see further, Fentiman, *Foreign Law in English Courts*, 1st ed (1998).

[28] [2013] CAT 30.

(c) Standards or norms and their relationship to facts

47. Laws are norms.[29] But they are norms of a very particular nature, in that they are the subject of enforcement by courts – and are made in a very particular way, either by legislation or judicial decision.[30] Do all other norms fall into the realm of the "factual"? This is to re-package the question put earlier:[31] namely, so far as the law of evidence is concerned, are questions either questions of fact or questions of law? However, the re-packaging is serving a useful purpose, in that it does not seem right to label a "fact" as a "norm". Indeed, at first blush, it would appear that facts are emphatically not norms.

48. I am going to propose a four-fold classification of matters that come before courts. That classification involves:

(1) *Legal norms.* These I have already considered, and I am not going to consider these any further at this point.

(2) *Value-based norms or moral norms.* Value-based or moral norms – and I am now only going to use the former, at the expense of the latter – are almost certainly not facts. They can, I think, be assertions, but they are not facts because they are not, easily, capable of translation from assertion to fact by way of the law of evidence. Take Jefferson's marvellous words in the Declaration of Independence:

> We hold these truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness.

I am not going to quarrel with the use of the word "truths", but I would defy anyone to label Jefferson's values as facts. Indeed, the clue lies in Jefferson's use of the words "self-evident". He is actually asserting, in

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[29] I am defining a "norm" as an established standard. A legal norm is one that is embedded in law; a non-legal norm is one that is not. A legal norm is clearly not factual. The status of a non-legal norm is rather more difficult.

[30] There is a great deal of jurisprudence on this, but if one is a legal positivist (along the lines of Professors HLA Hart and Joeseph Raz) then there is a clear distinction to be drawn between a "legal" norm and a "moral" norm.

[31] See paragraph 41 above.

this, that his truths are not susceptible of proof at all, and that seems to me to be right. There are a number of implications from this:

(i) Value-based norms can also be legal norms, but that is usually not a good idea for either a legal system or for the judges who operate within it. One of the great virtues of legal positivism is that it keeps law and value (or morality, as Hart and Raz would say) separate, with judges applying law to fact, and generally leaving value to the legislature and the executive.[32]

(ii) That is not to say that the UK judiciary is a "value-free" zone. My point is that UK judges – with one, rather critical exception – take their direction in this area from the legislature and the executive, thereby preserving both a democratic connection with the values our society espouses and a level of political impartiality that matters hugely to the due administration of justice. Judges in this jurisdiction are seen as impartial partly because of their skill-set, but partly because they are rarely called upon to determine values.

(iii) The critical exception is the rule of law. Contrary to what is implied by its title, the rule of law is not a rule of law. It is a moral value, somewhat uncertain in scope, but one which informs all involved in our legal system, and in particular the judges. That is why, much earlier in this paper,[33] I stressed the importance of a judicial "in tune" with society. That is because – even if they are not decided upon – values diffuse through our system and – in the case of the rule of law – inform it in a quite

[32] Appointments to the UK Supreme Court are, of course, the subject of a challenging process. Appointees need to be exceptional lawyers, with exceptional legal judgment. But the appointment process is very different from the political process that nominees to the US Supreme Court must undergo. That is because, unlike the UK constitution, the US constitution allocates ultimate control of a number of values to the judges. And, naturally enough, those who care about such values, care about those tasked with implementing them – including probing their views in rigorous and partisan selection processes that have less to do with legal judgment and more to do with ascertaining whether any given nominee will go one way or the other on a particular question.

[33] See paragraph 23(1)(i) above.

remarkable way. Administrative law is, surely, a creation of the rule of law.

(iv) The conclusion I am suggesting is that in the court process, "values" take a back-seat, save to the extent they are positively embedded in law and/or save to the extent they arise out of the rule of law. Where values do matter in the legal process, they are not factual questions at all, and are not subject to – or ought not to be subject to – the law of evidence which – as I have said a number of times – is chiefly concerned with the transubstantiation of (certain types of) assertion into fact.

(3) *Other standards or norms.* I acknowledge that "other standards or norms" to be a most unsatisfactory label, particularly when standards are of enormous importance in competition law.[34] I define this category as a norm that creates a means of common understanding, where the "common understanding" may ultimately be factual. Take something like the distance between two objects – or the distance between an observer and an object. Distance is a matter that we can all perceive. Indeed, even without a standard, we can probably agree that something is near or far away. But if we want to use distance efficiently – for instance, if we want to create a railway timetable – we are going to need a much more precise common measure of distance (as well as a reliable measure of time). That is where these standards fit in. To be a little bit more specific:

(i) Things like distance, time and weight are matters that we perceive but which we can only express with precision if we subject them to a created unit of account. There is nothing intrinsic to the metre or the yard, the pound or the kilogram.[35]

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[34] It might be said that there is a direct correlation between competitive markets and standards defining the nature of the product sold, so that the only variables for negotiation are price, quantity and time for delivery. This is the case with exchanges, which are the best way of enabling a market to express a price.
[35] On measurement, see generally: Chang, *Inventing Temperature*, 1st ed (2007); Vincent, *Beyond Measure: The Hidden History of Measurement*, 1st ed (2022); Cock-Starkey, *The Curious History of Weights & Measures*, 1st ed (2023).

They are invented, and provided they are uniform or standard, they will serve their purpose, which is to communicate accurately something which we perceive.

(ii) Such units of account are not facts in themselves, but they are a means of expressing facts with accuracy or – to put the point in a more litigious way – to provide a means of proving or disproving a fact in controversy. It may, in some cases, be sufficient to say "the car was going very fast". But in a case of speeding on the motorway, that is not sufficient: all of the cars on a motorway ought to be going fast, the question is whether the driver of Car *A* is going too fast. We need a unit of account to define the speed limit (70mph) and to define the infringement (85mph). Neither of these measures are facts: but they are (in one case) a means of expressing a rule; and (in the other case) a means of expressing an infringement. When once the infringement has been proved, the allegation of speeding becomes a fact (Car *A* was, in fact, going at 90mph).

(iii) And that is precisely what societies do. They create standards. Indeed, mathematics may be the ultimate standard in this regard; and language the most ambitious and unreliable. And sometimes, these standards work by deliberate over-simplification. And physicist will tell you that time is not what it seems; and that colours are simply wavelengths. But we impose our own rules on a disorderly world.

(iv) Things like money are also units of account, but much more abstract: money measures value, and value is itself a difficult matter to get a grip on.[36] But money also measures price, and one can easily see the potential of determining facts expressed in currency. But that does not make money, as in a unit of account, a fact.

[36] See Moscati, *Measuring Utility: from the Marginal Revolution to Behavioral Economics*, 1st ed (2019).

(v) The reason why my label is so vague is because the use of standards to enable allegations to be described, and facts to be found is surprisingly prevalent. A great deal of human interchange involves common communication based on agreed understandings. So, not only do we use common measurements, we speak common languages; and perhaps, in mathematics, we have a means of communication that is universal. These standards – and I suspect you now see my hesitation in the use of the term – are not in themselves facts, but the means of expressing them.

(4) That leaves a rump-end of "stuff" that I will call facts. Facts, in the sense I am using them, are judicial findings of fact, established after a trial conducted pursuant to the rules of process that we have. One of those basic rules is that facts are decided on the basis of the evidence before the court. Although there are limited instances where a court may take "judicial notice" of some fact that is not "proved", most facts in dispute are merely allegations or assertions until they have been found as facts by the court. The court will find facts on the basis of evidence, and that is why the law of evidence is so important. It identifies what does and what does not constitute material that a court can take into account and – but to a lesser extent – articulates the value or weight that can be placed on such evidence.[37]

(d) Some conclusions

49. I am not going so far as to say that a norm cannot be a fact. I suspect that my categorisation is not as watertight as that. But the following propositions are (I am going to submit) generally true:

(1) Legal norms are not facts and – if properly framed – can avoid difficult value judgments on the part of the judiciary, which is desirable.

[37] Although weight is undoubtedly a part of the law of evidence, it is not rules-based, but judgement based or discretionary. For that reason, there is actually little that can be said in terms of formal articulation of rules.

(2) Value-based norms are also not facts and although they can inform legal norms, they can (certainly on positivist legal theory) be kept apart from legal norms, and thereby preserve both the independence of the judiciary and the democratic link to a society's values.

(3) Other standards or norms are not generally speaking facts,[38] but means of conveying factual assertions that can, through the law of evidence and the judicial process, be converted into findings of fact which may or may not (depending on the process) approximate to the "truth", whatever that may mean.

(4) Finally, there is a class of material known as "facts" that are the subject of the law of evidence, and which – if in dispute – need to be proved via the sausage-machine of the judicial process. Facts may overlap with my "other standards or norms" class – but that does not cause any particular concern.

50. So much for my first area of difficulty. I have answered – not completely to my satisfaction, but sufficiently to provide a framework of reference for what follows – the question of "what is a fact". The other area of difficulty – "what is a fact in dispute?" can be dealt with rather more quickly. This question, as we shall see, is very closely related to the question of relevance, which is itself very closely related to the fact/law divide that was considered earlier.

(3) What is a fact "in dispute"?

(a) The relevance of relevance

51. No court decides unlimited numbers of facts. It is not possible; and it is not necessary. Law, as I see it, has two key functions, and any legal norm will – to a greater or lesser extent – have both of these functions. Those functions may be described as the substantive and the adjectival. I touched upon the meaning of these terms earlier,[39] but to re-cap:

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[38] I am not excluding the possibility that such a norm can also be a fact. I am not sure that it matters.
[39] See paragraph [*] above.

(1) Substantive law defines outcomes.

(2) Adjectival law (or procedural law) defines how outcomes are reached. The law of evidence is adjectival law – but so are many other aspects of process and procedure.

52. To articulate the functions that legal norms have, I will divert to a simple example – the law of contract. The law of contract is concerned with the enforcement of bargains between people, and the compensation of a party injured by a contract-breaker's breach of contract.[40] The law will define what promises are legally enforceable; the circumstances in which non-performance is justified; and – where performance is required – the consequences of failure to perform. There we have it – the law of contract in a nutshell! The result of a contractual dispute – assuming the parties do not settle[41] – may be that *A* is ordered to do something or pay a sum of money to *B* because *A* has breached their promise to *B*. So far, so substantive.

53. What the law of contract also does – by the very process of articulating the substantive rules – is state what facts need to be satisfied in order for the substantive outcome to follow. So, a valid contract may require consideration; or may need to be in writing; or signed by a particular person. These requirements – substantive in nature – define the list of things that the parties to the dispute must either agree or in relation to which they must articulate their disagreement and adduce evidence to show that they are right – to "prove their case". These matters, legally defined, are issues of fact that the court must resolve. That list is not inherent, it is derived, and derived from the substantive law. Inevitably, in stating what is a legally enforceable promise, the law articulates what facts must be proved in order to trigger that particular outcome. From that list, the law of evidence can take over.

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[40] As with my articulation of the hearsay rule, I am discussing a complex subject at a high level of generality.

[41] Of course, any settlement will be informed by the legal landscape. That is one of the reasons public justice is so important. The way trials are resolved informs the outcome of disputes that settle before a trial take place.

54. It follows from this that there is a correlation between the precision of the substantive rule and the facts that need to be evidenced. A vague rule creates uncertainty as to what facts are, and what facts are not, relevant. It follows, of course, that vagueness becomes highly undesirable, at least for this reason.

55. Sometimes, the rule is such that it is impossible actually to articulate what material should be deployed in order for a case to be made out. That may be for a number of reasons:

(1) The legal rule may actually control other laws. Human rights legislation and constitutionally entrenched law tend to have this effect, which is why they are much more political in their effect, and much harder to align with the traditional functions of courts. In short, such legal norms tend to embody or contain value-based norms, with all the difficulties that this entails. Courts are at their best when they apply precise law to controverted fact, allowing legal principle to evolve incrementally, and leaving the value-based norms to the legislature and the executive.[42] This, of course, is the common law system, of which (cards on table) I am a staunch defender.

(2) Administrative law controls administrative decision making, and facts tend to take second place to understanding and control of process. Administrative law is less controversial than entrenched constitutional law because the courts remain subordinate – in terms of value-based norms – to the legislature and the executive.

Neither of these cases is particularly interesting from the point of view of this paper. The third class is:

(3) Vague substantive law. If it is unclear what you need to demonstrate to make good your case, immediately the evidence you adduce, if you wish to make good your case, or properly defend it, expands. As I have noted,

[42] I am going to leave for separate consideration (i.e., not in this paper) the extent to which value-based norms are – or ought to be – more the province of the legislature than the executive. That is an interesting question that does not need to be answered in this paper, and is beyond its scope.

there is a correlation between the precision of a substantive rule and the facts that need to be evidenced. A vague rule creates uncertainty as to what facts are, and what facts are not, relevant. That is one attribute of competition law that is problematic, and which I propose to address further.

(b) "Disputed"

56. Courts are really only interested in disputed fact. The whole point of pleadings is to plead fact not law, and only fact, and no evidence. That learning has largely gone by the wayside now, even in "ordinary" claims (pleadings get longer, and their argumentative and evidential quality greater) and the Tribunal (with its system of "front-loading" cases) is a particularly good example of this. Front loading may work in regulatory cases, but I suspect it may need to be revisited in civil litigation before the Tribunal.

57. The purpose of pleadings is <u>not t</u>o present the case or to argue the case or to state the law. The purpose of pleadings – in the ordinary case[43] – is quite simply this:

(1) To list those facts that have to be proved in order for a claim that is asserted to succeed.

(2) To enable the parties to agree amongst themselves that which is in dispute and that which is not.

(3) To enable the court to manage the process to trial, so as to work out what material needs to be assembled in order to enable the court to make findings on controverted facts.

[43] Competition cases may be different.

D. AN END TO THE "THEORETICAL BIT"

58. At this stage, it is incumbent upon me to repeat the apology in paragraph 4 above, and (to misquote Willie Nelson[44]) to say that the time for theorising is over, and the practicality has begun. I would only say, in my defence, that the theory is necessary in order to make the practical points that I want to make.

E. PROBLEMS REGARDING EVIDENCE IN COMPETITION LITIGATION, AND SOME SUGGESTIONS

(1) Focus

59. I want to return to my two "holy grails", the need to control costs and the need for greater consistency and predictability of outcome.[45] I doubt very much whether anyone would disagree with the desirability of either of these objectives. Where disagreement emerges is in the manner by which such objectives are to be achieved. A great deal of reform is devoted to treating the symptoms of the problem, and not the problem itself. Thus, for instance, costs controls, controls over disclosure, the time frames in which disputes must be resolved are procedural devices that pre-suppose that the parties and the courts are wilfully making things longer and more expensive and more difficult to try. Whilst, no doubt, there are some cases where this occurs, such instances are the exception, not the rule. I have the highest regard for those who bring their cases before the Tribunal for it to manage and try, and I would like to think that the Tribunal makes a reasonable fist of managing and trying them.

60. If – as is clearly the case – we have problems, I doubt very much that they are capable of resolution through a "quick fix". Litigation before the Tribunal is not complex because the parties make it so, or because the Tribunal is not competent, but because these disputes involve issues that are enormously complex and enormously important. The importance of competition law is a matter I am going to take as read, although I do think some advocate ought to

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[44] Nelson, *Red Headed Stranger*, "Time of the Preacher".
[45] See paragraphs 2 and 3 above.

step forward to explain to the wider world precisely why it is so important. The complexity we can also take as read: it is how we improve a complex system without degrading the quality of outcome that is the challenge, and it is my thesis that the links between substance and procedure (and particularly the law of evidence) that I have been explaining in what has been a remarkably abstract consideration so far hold the key. It is time, therefore, to be more concrete. I am going to focus – primarily – on *(i)* private, *(ii)* standalone, *(iii)* non-collective competition litigation. That is not so say that appeals, collective proceedings, and follow-on actions do not have their own issues, but I regard this case as the paradigm.[46]

61. The topics I am going to consider are as follow. I set them out in what I hope is a logical order – but in any event, the list below is the order in which I consider them in this paper:

(1) The implications of a commitment to a market economy on "economic evidence".

(2) The problem of evidencing generalities or what I call "generic issues".

(3) The importance of articulating a methodogy, rather than pleading facts.

(4) Is a counterfactual question a question of fact?

(5) **[6]** Failure by the lawyers to understand pass-on (and possibly failure of the economists to understand pass-on also!)

(i) Scope of pass on – the Derek Ridyard point. i.e. the four categories.

(ii) The problem of proof.

[46] Appeals raise interesting and difficult questions of their own and, in particular, the manner in which decisions of the Authority are dealt with – if appealed – by the Tribunal. There is much I would like to say on this topic, but the evidential questions that feature so heavily in this paper are not really the source of the problem in appeals. Follow-on actions and collective proceedings are variants on the stand-alone theme, and for that reason take a back seat.

(iii) Was Sainsbury's right? The Derek Ridyard point (a different one!).

(6) **[7]** The problem of multiple common issues. One roof. Umbrella proceedings.

(7) **[8]** Data not disclosure.

62. Before I commence on this list, I should make clear that I am not – for purposes of this paper – particularly interested in cost control. My consideration is directed to how we improve a complex system without degrading the quality of outcome. I believe that if we get this right, costs will fall, not increase, and consistency and predictability of outcome will improve. What do I mean by "quality of outcome"? It seems to me that this implies a process before the Tribunal where:

(1) Each interested party is enabled to frame their case (whether it is as a claim or as a defence to a claim) in its strongest and best form.

(2) Points of genuine dispute and points of genuine agreement are articulated early,[47] and the evidence to be heard by the Tribunal marshalled accordingly.

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[47] I have made the point in the past that the areas of agreement between the parties may be as much in need of explanation to the Tribunal as the areas of disagreement. See Smith, *Lawyers come from Mars, and Economists come from Venus – or is it the other way round? Some thoughts on expert economic evidence in competition cases*, (2019) 18 Comp LJ 1 at 2:

> Experts can be relied upon to articulate their thinking very clearly when the other expert disagrees. It is when the proposition is uncontroversial as between the experts that there is a danger that the proposition will be unarticulated. Every economist will accept that correlation does not equate to causation. The layperson, rightly or wrongly, may see a link between correlation and causa- tion, and that may be right in a particular case. But cor- relation and causation are not the same thing, and the difference needs to be articulated particularly because the economist will say 'oh, of course'.
>
> We lawyers all know the test for implied terms: the stranger, the officious bystander, listening in on the contracting parties, and saying 'you have not accounted for X', being put-down by the parties saying testily 'but, of course, the answer is Y, and is so clear it does not need to be articulated'. I wonder whether we ought not to have an 'officious expert', listening in on the parties' experts as they discuss the case, primed to say 'you have not explained this obvious point'. Instead of being told by the party-instructed experts testily to hold his or her counsel, the officious expert would be lauded. 'Thank you', the party-instructed experts would say, 'the judge may not know this...'.

(3) After a trial, which appropriately focusses on these points, a reasoned judgment is rendered, which enables the losing party *(i)* to understand why they have lost and *(ii)* to frame a challenge as tightly as possible for any appeal court to hear.[48]

(2) Implications of a commitment to a market economy on "economic evidence"

(a) Overview of the point

63. The essential point is that our competition law is predicated on a certain system – a mixed market economy – which it is not open to the courts to challenge, but which rather forms a part of our "competition law DNA". A failure explicitly to articulate this means that those economists who give evidence before the Tribunal have no sense of where the Tribunal is coming from, and their evidence is – entirely unsurprisingly – unfocussed for this precise reason.

64. The questions addressed in this section are first, it is possible to say – consistently with the duty of a court to decide cases according to law on their individual facts – that there is a "competition law DNA"; secondly, if it possible to do this, what exactly is in the "competition law DNA"; and thirdly, if the "competition law DNA" can be stated in this manner, what the implications are for economic evidence before the Tribunal.

65. It is, unfortunately, now necessary to dive back into theory. However, instead of legal theory, it is economic theory that I am going to have to traverse.

(b) Some economics

(i) Perfect competition and its importance?

66. Perfect competition does not exist and – contrary to its name – if it did exist would result in a world that no-one would want to live in. The reason for my

[48] In my experience, the winner in litigation is interested in a robust judgment in their favour, but (robustness apart) are remarkably indifferent as to why they have won.

beginning with a theoretical, but ultimately undesirable, model lies in what it teaches us about the "hard wiring" or DNA in our competition law. In short, I am suggesting that there is a value-based norm[49] central to our competition law which we must understand and acknowledge in order to be able to corral the evidence needed to decide competition cases. In short, perfect competition teaches us about what drives the market economy that underlies our Western democracies. That, in turn, shapes the terrain which – in particular – our expert economists must traverse, and the evidence that they give.

(ii) The basics of supply and demand

67. The perfectly competitive market involves the buying and selling of a single, identical or homogeneous, product (the "Product"). Unlike many products in the real world, our Product does not have any separate components, and can be made by a single seller. Issues about supply chains and the manufacturers of the different components that make up the Product are eliminated from the model.

68. The market, in this case, is inhabited by "Buyers" and "Sellers". The Sellers, of course, all sell the Product. The Buyers are all potential buyers. A number of interesting questions arise out of the legal personality of Buyers and Sellers (the nature of the undertaking, if you like) which I am not even going to begin to traverse.[50] The only thing I would say about the Buyers – and this does matter – is that they are all what I would call "ultimate consumers". They are not buying Product as a factor of production to make or on-sell as part of other products.

69. We all know enough about the shape of demand and supply schedules for me to be able to take this part extremely quickly (although, in doing so, I am cutting some corners). The demand schedule – the number of Product that is purchased at any given price – will typically slope downwards from left to right. The demand schedule or demand curve, let us remind ourselves, measures only quantity demanded against price, holding all other influences constant.

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[49] See paragraph 48(2) above.
[50] However, I would not wish in any way to understate the importance of "the nature of the undertaking" to economic analysis and to competition law. However, the topic is not for this paper.

70. I will have more to say, later on, about proving (or not being able to prove) the shape of the demand curve, but the downwards sloping part is actually quite intuitive. Bear in mind that Buyers are a collective of individuals, with different values and different abilities to spend. Demand from Buyers – shifting from the individual to the collective – is an aggregate function of these two factors: value, and ability to spend:

(1) Ability to spend is quite easy to get to grips with. A Buyer may very much want to have the Product, but they simply cannot afford it. They do not have the money.

(2) Value is much more slippery. Like ability to spend, it is subjective to the Buyer (in that every Buyer may have different disposable income), only more so. Whereas ability to spend may vary from Buyer to Buyer – and to that extent is subjective – its measurement is objective. By contrast, not only does value vary from Buyer to Buyer, but its measurement is difficult if not impossible. Economists and philosophers have spilled a great deal of ink over this, and I am not going to follow suit.[51] The point is that Buyer 1 and Buyer 2 – both very rich – may value Product differently. One may value it at £100, and the other at only £80. If they are the only two Buyers interested at this sort of price level, then the demand curve will show a doubling of demand between the £100 price point and the £80 point. The point is, Buyer 1 will buy Product at £100 or £80 (although will prefer paying only £80), whereas Buyer 2 will only buy Product at £80.

71. This is all pretty elementary stuff. But it is important to note that the forces driving the demand curve are not monolithic. They are individuated depending – even in this very simplified world – on subjective value judgments and abilities to spend. Aggregate demand – as we really should call it – is the collective demand of all Buyers at varying prices for product. We measure variations in demand according to price by what is termed "elasticity of

[51] On this, see Kauder, *A History of Marginal Utility Theory*, 1st ed (1965); Moscati, *Measuring Utility: from the Marginal Revolution to Behavioral Economics*, 1st ed (2019).

demand", and that is fine. I would just say that "demand", when one talks about it in this way, begins to look much more monolithic than it actually is.

72. There is one term that I would like to introduce at this stage, and that is "consumer surplus". Consumer surplus is a Buyer's excess benefit calculated by analysing the difference between what the Buyer would have paid for the Product as against what the Buyer would have had to pay. So, take Buyer 1, who buys product at Buyer 2's price of £80. Buyer 1's consumer surplus is £20. Note that this is an individuated surplus. Of course, it can be aggregated – the consumer surplus of all Buyers – but its virtue arises out of the individual value judgement of each Buyer.[52]

73. Just as the demand schedule seeks to map demand as a function of price, so the supply schedule seeks to map supply, also as a function of price. The supply curve moves upwards, left to right, such that the level of supply of Product increases with price. Again, this is intuitive. More Sellers are drawn into the market the higher the price. As with the demand curve, the supply curve represents an aggregation of how much Product multiple Sellers would supply at any given price. (Because I use the term later, I should briefly define "producer surplus", which is the difference between the price actually received by a Seller in the market and the (lower) price at which that Seller would still be prepared to sell at. As with consumer surplus, it is an individually calculated value, but one that is informed by Seller's ability to make a proft: in short, producer surplus is cost-driven.[53])

74. The price is that point where the demand and supply curves intersect. That point – the point of intersection – will identify an equilibrium at which a certain quantity of Product – let us say 1,000 units – will be sold at a certain price – let us say £50/Product. The reason this is the equilibrium price is because at the

[52] It must be queried how far consumer surplus can actually be measured. There are two problems, which I will consider later on in this paper. The first, as I have already noted, is that "value", and so individual consumer surplus, is either impossible or just very hard actually to measure. The second is that this problem is multiplied because we are not talking about a single individual, but about buyers or potential buyers across the market. So, even if computation of individual consumer surplus was just very hard, that difficulty would multiplied across many Buyers.

[53] Precisely how cost is computed is yet another area where I am going to have to note the issue, and move on.

margin the marginal Seller will not break even if the price goes down; and the marginal Buyer will not pay any higher price, because their consumer surplus is at break-even point also.

75. The importance of the marginal case in economics bears emphasis. We are not talking about collective behaviour in any real sense, but in the choices at the margins of individual Buyers and Sellers viewed as a collective for analytical purposes. It is this duality – individuals viewed as a collective – that can lead to mistaken analysis, because market forces – whilst analysed in a monolithic way – are not an outcome determined by the monolithic, but by the individual. The people who matter (even if we cannot identify them) are the marginal Buyer who values the Product enough to pay £50, but not £51; and the marginal Seller who will break even at £50, but make a loss at £49.

(iii) Too much theory?

76. Of course, all of this is appallingly artificial. Markets are dynamic and not static; and the data will rarely be so unequivocal, except perhaps in the case of an extremely liquid exchange. But bear with me – this will end up back at the law of evidence at some point.

77. The point I am making at the moment is that what we are seeing is a remarkable blend of the collective and the individual. The marginal case – the purchase and sale of an individual Product – is obviously focussed on the sale of a single Product. Yet the demand and supply curves are aggregates of both demand and supply, and economics is concerned with the collective, and not the individual. The explanation for this tension lies in Adam Smith's "invisible hand".[54] A market economy operates not as an organised collective of Sellers and Buyers, but in exactly the opposite way: without any kind of controlling mind. Sellers and Buyers make decisions individually, without reference to each other, and without knowledge of the (hidden) intentions of others. Thus, the "collective"

[54] This is a term made famous by Adam Smith in *The Wealth of Nations*. As with most quotable phrases, it is usually used out of context. In this context, what I derive from the phrase, and the reason why I use it, is to convey that the essence of the market forces I am describing is an absence of top down direction. It is remarkable how unplanned interaction between buyers and sellers leads to the efficient production of complex products.

of Sellers will respond to market conditions – in particular to price – in an individuated manner, and certainly not in collusion.[55] What matters, in terms of analysis, is the collection of individual responses to price, where that price is itself the outcome of multiple individual decisions.

78. An outstanding example of the benefits of the free market was created by Thomas Thwaites, and described in Lipsey & Chrystal:[56]

> A good example of how the modern economy delivers very complex products at low prices is provided by a project conducted by Thomas Thwaites, a London-based design student, who set out to make a simple toaster from scratch. His comparator was a basic two-slice toaster available on sale at Asda in 2010 for £4.47 (but was £3.94 when he started the project). Much more sophisticated toasters were on sale at the same time in high street stores for anything from £10 to around £50.
>
> Thwaites started by taking the Asda version apart. He found that it had 404 separate components made of many different materials. He then set about collecting the raw materials to construct components for a toaster of his own making. For him, this meant not just buying finished components, like wire and screws, but rather getting the ore necessary for metal parts and converting this into refined metal before moulding it into the needed parts.
>
> It took him nine months of his time and £1,187.54 of his own money to construct from scratch a device that would toast a piece of bread. This sum excludes the value of his own time, which would have increased the costs substantially even if he had only paid himself the minimum wage. He product worked far less well and looked much less attractive than the basic Asda model!

79. Some analysts debate whether technology will overcome the inability of "top down" command economics to replicate the efficiencies and innovation of the market.[57] That, in a very real sense, is above my pay grade. The point that I am making is that the mixed[58] market economy is intrinsic to Western democracies in a way it is perhaps <u>not</u> intrinsic elsewhere in the world.

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[55] Hence my "competition law DNA": this absence of collusion is, of course, central to the Chapter I prohibition. This is why.

[56] Lipsey and Chrystal, *Economics*, 13th ed (2015) at 6. See also Leonard Read's splendid essay, *I, Pencil*, all about the way in which a market creates the humble graphite pencil, and the hidden complexities of this process.

[57] Thus, Posner and Weyl (Posner and Weyl, *Radical Markets*, 1st ed (2018) at 278*ff*) speculate that super-computers and AI can – in a top-down way – replicate the individuated decisions of Buyers and Sellers. Whilst I am sure that computers and AI can make markets more efficient, I doubt whether they can act as a substitute for the individual judgements – and particularly the value judgements of Buyers – that truly inform market forces.

[58] This qualifier has to be introduced, because no-one is suggesting a "pure" market economy, even if such a thing were capable of existing, which I personally doubt. Whenever I use the term market

80. Assuming – as I am – that all Buyers are ultimate consumers, it is important to note that these consumers are not in competition with one another. Those Buyers prepared to pay the market price will receive the Product; those not prepared to pay the price, will not receive the Product. This is not a case of rationing. This is not a case of demand exceeding supply. It is simply the case that supply is limited at the price that the marginal Buyer is prepared to pay. Were the marginal Buyer prepared to pay more, then the equilibrium point would shift. The essential point is that Buyers are not competing amongst themselves either to maximise consumer benefit or to maximise the aggregate supply of Product. All they are each trying to do is maximise their individual (and potentially very different) consumer surplus.

81. On the other hand, Sellers do complete, and this is the critical lesson that perfect competition teaches us, and what I have been leading up to.

(iv) On to perfect competition

82. It cannot, sensibly, be said that the supply and demand curves articulated so far bear any resemblance to the "real world". They are – intentionally so – over-simplifications, enabling analysis of the "fundamentals" at work: but at the price of a high level of disconnection with reality. Perfect competition is a special case in the sense that it imports a series of further simplifying assumptions, which cause the model to depart still further from the real world. In the following paragraphs, the nature of these further simplifying assumptions and their effect on the model are explored.

83. We have already hypothesised a market involving a single Product with essentially homogenous but individuated collectives of Buyers and Sellers, who only differ from each other in terms of their individual consumer and producer surpluses. Perfect competition involves further assumptions:

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economy, the (admittedly) vague qualifier of "mixed" needs to be added in. Again, the question of how far a "free" market is possible – and I do not think it is – is something I will only be able to touch on in this paper.

(1) All Buyers have good market knowledge, and are well informed about the characteristics of the Product and the prices charged by each of the Sellers. The Buyers cannot be caught out by an absence of market intelligence. Market information is an area critical to the operation of markets, in two ways. First, information exchange is critical to the proper or orderly operation of markets; yet, secondly, the illicit exchange of information – particularly between competitors – is something that can be enormously distortive of markets. The problem is differentiating between one and the other.[59]

(2) Each Seller is – viewing the collective as a whole – relatively small. When each Seller is operating at their normal capacity, their output is a small fraction of the industry's total output. Thus, we avoid any suggestion of "dominance" or even of market power.[60]

(3) The industry is perfectly contestable. Contestability – another matter we will be coming back to – involves no barriers to entry or exit from the market. Instead, there is freedom of entry and exit, meaning that a new firm is free to enter the industry and start producing, if it so wishes, and that an existing firm is free to cease production and to leave the industry, with not additional costs arising out of the mere fact of entry or exit.

84. Although often classed as an assumption,[61] a consequence of these various assumptions is that each Seller is a "price taker". No single firm can, by altering its output, affect the market price of the Product. Each firm must accept the market price – the intersection of supply and demand curves – because otherwise its demand will evaporate and it will go out of business. If, of the very large number of Sellers in the market, one or more unilaterally seek to increase their margins by increasing their price, then whilst aggregate demand will stay the same, all of the demand will flow away from those Sellers whose price has increased (bear in mind the market is perfectly contestable – all Sellers can scale

[59] Again, a matter that occupies competition lawyers considerably. Why are some forms of information exchange proper and some improper. See, on this, Gerber, *Information Exchange between Competitors in EU Competition Law*, 1st ed (2021).
[60] Another aspect of competition law: we see the direct resonance with the Chapter II prohibition.
[61] See, eg, Lipsey & Chrystal, *op cit*, 127 – which is acknowledged in footnote 3.

up production, at the drop of a hat) to those Sellers who have not. There is thus a trend to uniformity of price without collaboration between members of the collective Sellers. In short, price is driven down to just above cost.

85. It is important to stress that collaboration between Sellers as to how they compete is something that is inimical to the market economy, where competition, not collaboration, is the order of the day. Constraining improper collaboration lies in the realm of competition law. The point, for the present, is that Sellers may not (lawfully) collude as to price or even inform one another secretly of their intentions. They cannot say to one another "I am going to charge more than the prevailing price for the next month", even if there is no implied suggestion that the others follow suit. Sellers must act independently – that is what competition means. So no Seller will know how other Sellers will react if prices are increased: every Seller will know that if they are undercut, all of their business will be lost. So there is an in-built incentive for prices to fall, and they will fall to a point where the producer surplus is nil.[62]

86. Perfect competition does not assume infinite demand. Rather, the industry in which Sellers operate will have the normal, downward sloping demand curve. But that is the demand curve for the industry, not the demand curve for each individual Seller. Because of the relative size of each firm to the overall size of the industry (remember, each Seller is a tiny part of the industry) the effect of the assumptions we are making is that each Seller faces an individual demand curve that is perfectly elastic. Because of the good market intelligence of Buyers and the homogeneity of the Products on offer from Sellers who can enter or leave the market as they wish, if a single Seller increases their price above that offered by any other Seller, Buyers will purchase Product from those Sellers offering the lowest price. The consequence is that prices offered by Sellers collectively will be perfectly attuned to costs of material inputs and their own efficiencies in manufacture and production. The inefficient seller will simply go bust (or, rather, leave the industry); the venal seller, who seeks to sell at above market price will simply not be able to do so.

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[62] In other words, Sellers obtain the minimal proper return in terms of their margin between cost and price, but no producer surplus, as I define it.

87. The effect of additional competitors entering (real life) markets tends to show the truth of the perfect competition model. Take the price of pharmaceutical medicines coming off patent. As the life of the patent draws to expiry, generic manufacturers will seek to enter the market. Because the costs of market entry are by no means negligible, usually very few (one or two) generics will seek to enter the market, and (without improper communication) will seek to maintain margin. That, in turn, attracts other contenders, and (in due course) the price will drop to just above marginal cost. That is the outcome perfect competition predicts from the outset.

(c) The lesson we learn from perfect competition

88. What perfect competition shows – and this point can be made very briefly – is that it is attuned to maximising consumer surplus and minimising producer surplus. I am going to suggest that our imperfect markets reflect this truth, and that it is this objective that competition law exists to further. It is the essence of the "mixed economy" that underlies our Western democracies.

89. Although it has taken a while to get there, to answer the first two questions I posed at paragraph 64 above, there is a competition law DNA, and it is capable of being formulated. (I should make clear that one of the purposes of framing this "competition law DNA" in a draft paper is to invite firm push-back. It may very well be that *(i)* there is disagreement about the existence of "competition law DNA at all (in which case, the next section is simply wrong) or it may well be *(ii)* that my framing of the "competition law" DNA is wrong (in which case the next section will need some re-drafting). I now proceed to the third question – what are the implications for economic evidence before the Tribunal?

(d) Implications for economic evidence before the Tribunal

90. The essential point is that the nature and direction of the economic evidence that will assist the Tribunal in resolving the disputes that come before it is framed by normative economic understandings – value-based norms that are economic in nature – on which no evidence should be received. The nature of these value-based norms, if articulated, enables the economist to push back in their evidence

to the Tribunal in a focussed manner. There has, in short, been too little articulation of what it is that competition law serves to protect – and, as the various footnotes earlier in this paper show, there are clear resonances between what is no more than economic theory and the DNA of competition law.

91. The notion of a value-based norm in relation to which no evidence should be received sounds remarkably pre-judgmental. If our values are embedded, and if we are not prepared to receive evidence in relation to those values, what is the point of the evidence at all? I hope that those reading this paper know the Tribunal well enough that this is the last thing on my mind. Let me expand my thinking in a little greater detail:

(1) I have already identified the rule of law as one of the few value-based norms that inform judicial behaviour.[63] Let me pick one strand that most would agree forms a part of the rule of law, namely a marked hostility – for reasons that are obvious – to retrospective legislation. That does not mean that the United Kingdom has no retrospective legislation. It actually has quite a lot. Nor does it mean that when a piece of retrospective legislation comes before a judge, the judge immediately bellows at the hapless advocate: "This is an affront to the rule of law. Leave my courtroom now, and never darken it again…". What the inherent value of the rule of law does is indicate to the advocate that such a provision is going to require particular forensic care when arguing the case before the court. The competent advocate will know that it will be important to focus on the true meaning of the provision in question (retrospective statutes are notoriously difficult to construe) and on the purpose of the retrospectivity (purposive construction matters, and Parliament passes laws for a reason). What the competent advocate will not do is assert that retrospectivity in general is a pretty neat idea, and that the court really should not be concerned. This sort of conversation is informed by a value-based norm that is itself accepted – indeed, provides the starting point for the conversation. That is how I see a value-based norm influencing, but not determining, the judicial process.

[63] See paragraph 48(2) above.

(2) The problem is that we have not – in terms of our legal process – sought to articulate the value-based economic norms that inform our competition law. I have no doubt that – just like the rule of law – these norms are going to be disputed at the fringes. But that does not undermine their value.

(3) I am in no way setting up perfect competition as a paradigm, merely as a device for understanding what – in its most basic sense – drives markets. So, not only does our world not emulate the world of perfect competition, it would be undesirable if it did. Perfect competition overlooks or undervalues certain matters (wage and environmental protection) that we do and should value. These values exist in tension with the way our markets operate. My point is more that economic evidence should not explore the paradigm, but the reasons why the real world is in tension with the paradigm, because that tension may be for good or for bad reasons.

(4) Perfect competition suggests that price should fall to cost plus a reasonable return, thereby maximising consumer surplus and minimising producer surplus. My suggestion is that economists should not – and should not be permitted – to push back against this, in just the same way as my hypothetical barrister should not be permitted to say "retrospectivity is a pretty neat idea". However, my hypothetical economist ought to be permitted to explain why, in a particular case, a price above cost is a proper outcome in this market. In short, we are able to frame the debate in a manner that – in the very restraints it imposes – frees the economist to do their job. Let me take two examples where price will not be at cost[64] and where that is not improper:

(i) A manufacturer of generic white "T" shirts has a strong brand. Although the unbranded "T" shirt sells at £1, with a brand designation the "T" shirt sells at £45. Assuming a ready market

[64] Again, I am reverting to a lazy shorthand: even perfect competition permits a proper return, just no producer surplus. I am including that return in the "cost", because it is shorter.

for both branded and unbranded "T" shirts, the £45 is the market price, because of the (quite possibly irrational) value enough Buyers are attaching to the branded "T" shirt.

(ii) A manufacturer of a pharmaceutical product sells a branded product under protection of a patent-generated monopoly. The product is important and so the effect of the patent is that the manufacturer can name their price. This is an area that calls for really very nuanced economic evidence, in terms of what does, and what does not, constitute an excessive price. One would expect evidence going to the importance (in terms of costs sunk in R+D) of patent protection and some attempt at framing what limit – above strict cost – the law ought to impose. My point is that the price of the pharmaceutical product at above cost – whatever that may mean – is something that has to be justified, but not that it is incapable of justification.

92. I am going to have to leave this (to me) very interesting point for further debate. The questions that I want leave on are these:

(1) Does the articulation of this kind of norm assist? My sense is that it does, but that the process of articulation is actually very difficult. It might be worth asking how – without any statutory or common law definition – the rule of law became embedded in the legal thinking of the judges of the United Kingdom?

(2) How far can this sort of articulation go? Do we actually need economic expert evidence to explain to us the "defaults" for demand and supply curves in their downward and upward slopes? That is a point I will be returning to in a later section.

(3) To what extent can this sort of normative articulation assist in the most vexed topic troubling competition courts today, namely the question of

pass-on? Again, this is something that I will be coming back to, but the importance and difficulty of the question has not gone unnoted.[65]

(3) The problem of evidencing generalities

(a) Introduction

93. I am going to move away – for the moment, at least – from "value-based norms", which are not the subject of evidence, but which inform the evidential debate, to something that is very much a part of the law of evidence, but which is insufficiently addressed in the law at present. Indeed, the only area of law where this appears squarely to have been addressed is in the law relating to trade marks, and I am going to making some reference to the standard work in this area, *Kerly's Law of Trade Marks and Trade Names*.[66]

(b) The problem stated

94. Let us locate ourselves in the evidential schema that I have articulated. We are talking about *(i)* facts, *(ii)* in dispute that *(iii)* therefore have to be proved.[67] I do not want to write a treatise on the law of evidence. Those books have already been written. It is, however, necessary to identify two areas where competition litigation departs from the norm and requires very specific consideration. Those two areas are as follow:

(1) First, a single competition law infringement can – and frequently does – give rise to multiple claims. That, of course, is the explanation for the importance of collective actions. A single (alleged) infringement[68] – take, for example, the interchange fee litigation against MasterCard and/or Visa – can generate literally thousands, sometimes millions, of

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[65] See, for example, the rulings in the Merchant Interchange Fee Umbrella Proceedings, [2022] CAT 14 and [2022] CAT 31; and the judgment in "Trucks I" (*Royal Mail Group Ltd v. DAF Trucks Ltd*, [2023] CAT 6) at [549]*ff*.
[66] Mellor *et al*, *Kerly's Law of Trade Names and Trade Marks*, 16th ed (2018)("Kerly").
[67] See paragraphs 48 and 49 above.
[68] I am going to lose the word "alleged" going forward. It is obvious in what I am saying that I am talking about factual allegations not found facts, but those defendants involved in multiple-claim litigation before the Tribunal (notably MasterCard and Visa) should understand that word "alleged" should be read into everything I say.

low value claims. The advantage of the collective actions regime is that the issues in dispute are resolved in a single set of proceedings. However, multiple claims can be generated outside collective proceedings, and the Tribunal is faced (both in the interchange fee and the trucks litigation) with multiple self-standing claims, as well as some collective actions. The problem of inconsistent findings of fact that arise is an issue that I will be returning to: I identify it now as the first aspect of competition litigation that is outside the norm.[69]

(2) Secondly, and entirely unrelatedly, competition law infringement generate disputes of fact that are generic. Let me unpack this:

(i) Normally, a factual dispute will be articulated much as in the game of Cluedo: "Did Ms Scarlett kill Colonel Mustard in the library with the lead piping?" The factual issues that go to resolving this question will be manageably specific. Whose fingerprints are on the lead piping? What was the time of death? Where was Ms Scarlett at that time? Is the angle of the blow to Colonel Mustard's head consistent with the respective heights of victim and accused? These are not easy questions – but they can, with a bit of effort, be framed clearly and precisely, and the evidence marshalled to prove or disprove them.

(ii) Of course, competition litigation may well generate questions like this. Did competitors *A* and *B* meet to discuss future prices on such-and-such an occasion? But often the questions – whilst questions of fact – are far more generic. I will refer to them as "generic issues", although I cannot say I like the label very much. No-one is going to dispute, for instance, that the shape of the demand curve can be a matter of great importance in competition litigation. Yet, as I have described, that shape is determined by the individual reactions to price of that set of persons I refer to

[69] I am not, of course, saying that this aspect is unique to competition litigation: it is not. What is unique is that more often than not a single Chapter I or Chapter II infringement will generate multiple claims.

> as Buyers. More to the point, we need to know the reaction of Buyers to a whole range of prices. Assuming, for the moment, that this is a question of fact at all, how is it to be judicially determined? It is this issue that I propose to address in this section.

(c) Differentiating norms from facts

95. Whilst I appreciate that there are many generic issues that may trouble a court dealing with competition litigation, I am going to stick with just the one, the shape of the demand curve of the Product.

96. The first question – which, I think, it is necessary to ask, even if the answer is obvious – is whether this is a question of fact at all. I said earlier that the downward slope of the demand curve was "intuitive".[70] I do not think that that fact elevates the shape of the demand curve into a norm – and, if it is a norm, it falls within my third category of "other standards or norms"[71] which can also be facts. Put another way, it would (I think) extremely odd if we classified the demand curve as something on which courts were not prepared to receive factual evidence and on which they were not prepared to make factual findings. It seems to me that whilst it is worth asking the question, any answer that does not result in labelling this issue a factual one is seriously open to question.

(d) Proving generic issues

97. Unfortunately, this is the beginning, and not the end, of our problems. The difficulty is made plain in *Economics for Competition Lawyers*:[72]

> …a lot of the time that economists spend working on competition cases actually involves trying to locate this demand curve. They need this, for example, to delineate the relevant market, to measure market power, or to simulate the price effect of a merger. Economists can normally observe only

[70] See paragraph 70 above.
[71] See paragraph 49(3) above.
[72] Niels, Jenkins & Kavanagh, *Economics for Competition Lawyers*, 2nd ed (2016), [1.26].

> one price-quantity point in the field, which is the current price and quantity.[73] If they are lucky, they can observe a few more points – for example, if the price has changed from last year, and a different quantity was sold at that price (even then, quantity changes may be due to factors other than price changes). But it is never possible to see the full relationship between price and quantity. Economists have to assess empirically the properties of demand in the vicinity of the price-quantity points they can observe. They will in particular want to know how sensitive demand is to price…

98. The true nature of the demand and supply in relation to a given product or in a given industry is hugely difficult to identify, and a great deal of material that comes before the Tribunal has the flavour of material that would not be given the time of day in other courts. I am not thinking so much of expert evidence, but (for example) of the surveys and questionnaires describing consumer preferences that have been served up to me in more than one price control appeal. And I say this with no disrespect to those doing the serving up. The fact that such material is adduced is a sign of the paucity of data that will exist in many competition and market disputes.

99. But that does not answer the question of approach to these generic issues, and it is here that we may be able to learn something from trade mark infringement cases. Such cases regularly do give rise to generic issues <u>of the type</u> I am describing – although, of course, the specific issue will be very different. I am not going to suggest that trade mark cases contain the answers – but they do frame the issues extraordinarily well:

    (1) A number of generic trade mark issues are resolved using the construct of the average consumer. Such a person is – obviously – a construct (like the person on the Clapham omnibus) and certain qualities (like being reasonably well-informed and reasonably qualified) are attributed to this person.[74] Is there room, in competition law, to frame the average or typical buyer, and to give that person certain qualities or attributes as a means of framing the generic issue? Ought a general characteristic of the average buyer to be thrift or a desire for value for money? Are some

[73] Actually, even this goes too far: market participants are – quite understandably – enormously reluctant to release such data into the public domain, as it shows much too much of their market position.

[74] See Kerly at [3-004] to [3-005].

characteristics specific to buyers in certain markets? I am thinking of the buyers of my branded "T" shirt. To what extent can or should behavioural economics or behavioural psychology frame the attributes of the average buyer? I am not even coming close to answering these questions, but they need to be put.

(2) In terms of the evidence that is deployed in trade mark cases, we see the appearance of questionnaires and surveys, much as in competition law. But there appears to be a distinct sense of scepticism, in the practice in these cases, as to the value of such questionnaires or surveys.[75] This sort of evidence is specifically considered in Kerly at [23-022]*ff*, and it is fair to say that the approach of judges in this field has *(i)* "led to a rather hostile attitude",[76] with *(ii)* significant case management control over such material, if it is permitted to be adduced.[77] Space does not permit going into the details – but it does seem to me that we have a lot to learn from this particular jurisdiction.

(3) If not survey evidence, then what? Sticking with the shape of the demand curve, the will generally be some data as to quantities of Product sold at certain prices, but the evidence is going to be partial and incomplete. That is why resort is had to the survey or the questionnaire in the first place. But if we are only to use survey or questionnaire evidence where it is truly probative, all we are left with is the judge's judgement as to what value Buyers attach to Product to cause them to buy in those quantities that shape the demand. That seems to be where the trade mark jurisdiction has ended up: these are questions of fact, but at the end of the day they are factual questions determined by the judge using their common sense:[78]

> …The clear message was that national courts were not by any means required to adopt an evidence-heavy approach. To the contrary, the court was discouraging the use of surveys and the like and indicating that they

[75] See Kerly at [3-031].
[76] See Kerley at [23-028].
[77] See Kerly at [23-031]*ff*.
[78] Kerly at [3-009], emphasis added. The discussion was of a decision of the EU Court of Justice, but the general thrust is clear.

> should only be used in cases of particular difficulty. Otherwise, the court was suggesting that, having identified the average consumer, the national court should make up its own mind in the circumstances of the case as to the presumed expectations which the sign, mark or statement evokes in the mind of such a person.

100. We all need to ask ourselves whether we are prepared to turn the Buyer in a market into yet another passenger on the Clapham omnibus, whose attributes and reactions are in essence determined by judicial decision, informed only loosely by what lawyers would ordinarily call evidence. It is at this point that "norm" and "fact" may very well elide.

(4) The importance of articulating a methodology, rather than pleading facts

101. Pleadings in competition litigation are curious things. The infringement itself – particularly where the allegation is of a secret cartel in a stand-alone claim[79] – can be extraordinarily difficult to plead, simply because the claimant lacks the information to plead an arguable case. This is a problem common to many claims that are not competition claims, and I am going to leave questions of pre-action disclosure and the like to another day. These are interesting, and difficult, points – but they are not unique to competition litigation.

102. Assuming a case on infringement can be pleaded, there will be two main areas of fact which will have to be asserted:

(1) The existence of an overcharge. In other words, did the competition law infringement cause damage. I am assuming, for the sake of argument, the damage to be payment by someone of a higher price for the Product than would have been charged had the infringement never taken place.[80]

(2) The fact that the claimant or claimants suffered this loss. Normally, one would expect that it is the party who pays the (excessive) price that is

[79] Chapter I prohibition claims might be said to fall into two classes: "overt" cartels, where the agreement said to be infringing is there for all to see (e.g., as in the interchange fee cases), but where the argument is as to whether the agreement does, as a matter of law, infringe; and "covert" cartels, where the dispute is less about its legality, and more about whether it existed at all. In the case of "covert" cartels, getting the factual material to plead the allegation can, in and of itself, be very challenging.

[80] It is quite possible for damage to arise – and so be alleged – differently. But this would be the paradigm case.

the party suffering the loss, but that would be to disregard "pass-on". Pass-on arises where the *prima facie* claimant is not an ultimate consumer,[81] but (having acquired Product at an inflated price) uses it (in some way) to produce another product, which is then itself sold at an inflated price. In this case, the initial purchaser does not actually bear the loss arising out of the infringement, but has passed it on. It is now established law that the initial purchaser cannot claim for the overcharge,[82] and that the claim should in fact be brought by the indirect purchaser of the Product.

103. Neither of these assertions is straightforward to establish, but I am going to stick, for the moment, with what a claimant has to plead, which is no more than a seriously arguable case.[83] So what does a claimant have to plead? I am going to go back to a *locus classicus* to answer this, a book so old (1990) that it predates most private competition litigation:[84]

> Where the plaintiff claims that he has suffered damage, e.g. injury, of a kind which is not the necessary and immediate consequence of the wrongful act complained of, it is his duty to plead full particulars to show the nature and extent of the damages claimed, i.e., the amount which he claims to be recoverable, irrespective of whether they are general or special damages. This operates fairly to inform the defendant of the case he has to meet and to assist him in computing, if he so desires, a payment into court.

104. This is a helpful articulation of a sensible rule. In a case of, say, physical injury, it is possible and helpful to set out the loss and damage consequent on the accident with reasonable precision, pleading facts and not law or evidence. To take the facts from Cyril Hare's excellent *Tragedy at Law*,[85] where the unfortunate defendant and ultimate murder victim (a High Court Judge, no less) is involved in a motor accident in which he has the misfortune to injure the knuckle-joint in the finger of a pre-eminent concert pianist, one would expect the pleader (in addition to articulating the pain and suffering and general loss of

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[81] As I have defined that term: see paragraph [*] above.
[82] To that extent, the infringer has a "defence" to the claim.
[83] That is a low standard, but the point about pleadings is not to show that the claimant's claim will succeed, but to enable the defendant to know the case they have to meet and respond to it, and to enable the court to case manage the proceedings to trial, so as to enable the court to give a proper judgment.
[84] Jacob and Goldrein, *Pleadings: Principles and Practice*, 1st ed (1990) at 87-88.
[85] Hare was a pseudonym for a Circuit Judge who wrote crime novels: Hare, *Tragedy at Law*, 1st ed (1952).

amenity) to set out the pianist's loss of future earnings. It would not be expected to prove these, but a statement of the pianist's earning prior to the accident, and the contended for effects on his future earnings would have to be set out.

105. Translating this helpful practice into the competition context shows a number of difficulties. Of course, the claimant can allege an overcharge and assert that they did not pass it on. But what greater specificity can be produced, given that the extent of the overcharge will depend upon the articulation of the counter-factual, and an expert opining on the likely difference between the actual and the counter-factual? Greater specificity, other than the bare assertion, will be difficult, because all the evidence will not (yet) have been disclosed, and it is not the practice (for this reason and for reasons of cost) to insist on a full articulation of the evidence in support of a claim at the outset.

106. Competition pleadings, therefore, run the great risk of either being overloaded with expert analysis that will have to be re-done when once disclosure is complete or being so short as to prevent either the defendant or the court from knowing what the claimant's case actually is. This was the problem in *Michael O'Higgins FX Class Representative Ltd v. Barclays Bank plc*,[86] where – despite considerable assistance from the experts – it was actually impossible to understand how the loss claimed was sustained by the claimant class. *O'Higgins* was an early certification of collective proceedings case. The law regarding the management of such proceedings has moved on in a series of cases emphasising the importance of what I shall call the "*Pro-Sys* test", deriving its name from a Canadian decision *Pro-Sys Consultants v. Microsoft*.[87] As articulated in the UK jurisprudence, the *Pro-Sys* test has evolved to form a bridge between the bare assertion of a claim that is of no use to anyone and the detailed but premature establishing of a claim through expert evidence. That bridge is built out of a requirement, on the claimant, to articulate the methodology by which the claim for loss and damage is to be established.

[86] [2022] CAT 16 at [197]*ff*.
[87] [2013] SCC 57 at [118].

107. As I have said, there has been a great deal of recent jurisprudence in this area and – with *O'Higgins* coming on for appeal – there is likely to be more. I will quote from one of the more recent decisions, *Gormsen v. Meta Platforms Inc*:[88]

> 36. …The decision concerned the extent to which collective proceedings needed to be buttressed by sufficiently plausible or credible expert methodology. Although the actual *Pro- Sys* test was concerned with the satisfaction of the Canadian commonality requirement, the test ranges far more widely than this. Transplanted into the United Kingdom collective proceedings regime, the *Pro-Sys* test serves as a requirement – both for the parties and for the Tribunal – to ensure that before a claim is certified so as to proceed to trial, the parties satisfy the Tribunal as to the steps that need to be undertaken in the future so as to ensure that the claim, if certified to proceed, can be heard in an efficient manner, consistent with the Tribunal's governing principles. Put another way, the purpose of the *Pro-Sys* test is to minimise the related risks of the *(i)* parties throwing away unnecessary costs; *(ii)* the Tribunal's time being wasted; and *(iii)* a matter coming to trial in an unmanageable form.
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> 37. Pleadings are the traditional way in which courts have exerted control over the issues they try and the evidence that is needed in order properly to try those issues. Pleadings are of critical importance in competition cases, because the issues that arise tend to be rather more wide-ranging and less easy to nail down than in conventional litigation; the evidence needed to determine such issues is similarly difficult to identify.
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> 38. Properly articulated pleadings have nothing to do with the merits of a case: they simply enable an arguable case to be properly tried. That is also the purpose of the *Pro-Sys* test. Why, it might be asked, have a specific test – over-and-above a patrolling of the pleadings – that is specific to collective actions.
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> (1) The *Pro-Sys* test serves as an excellent articulation of what the Tribunal ought to be doing in every case, collective or otherwise. The Tribunal has extensive case management powers, and those powers should (and will) be exercised to ensure that the Tribunal's governing principles are upheld. It is simply that collective proceedings – because of the specific need for the proceedings to be certified – have a specific stage in the certification process devoted to these questions. But the questions themselves are not so very different from the questions the Tribunal ought to be asking of itself and of the parties at early case management conferences in every case.
>
> (2) Collective proceedings have the special requirement for certification because *(i)* there is less "claimant control" and *(ii)* damages are or can be assessed at the level of the class rather than individually. These two reasons for certification constitute, in themselves, the reasons why the *Pro-Sys* test exists as a specific test in collective proceedings. In individual actions, the claimant chooses to bring the proceedings, and "calls the shots". One can expect a high degree of control from the claimant, and claimants will (typically) wish to minimise costs and costs exposure and maximise recovery. That implies a level of control of the litigation that will trend to the proportionate, and which will align to the claimant's interests in accessing justice to vindicate their rights. Of course, this is always subject to the court's control. The point is that in collective proceedings, opt-in as well as opt-out (although the problem is

[88] [2023] CAT 10.

starker in opt-out proceedings), claimant control is far less, and the conduct of the litigation vests in the class representative. It is entirely right and proper that the class representative's intentions as to the future conduct of the litigation (including how the claim will be made good) receive a scrutiny that is higher than that facing the individual claimant.

(3) Assessing damages at the class level involves a degree of uncertainty that cannot usually be unpicked or crystallised in conventional pleadings. Given that the merits are not in issue, it would be entirely inappropriate to require the class representative to justify, in any merit- based way, the likely quantum that will be recovered. Not only is this an impossible task, quantification being a matter for trial, it is also an improper demand. A proper cause of action should not be killed off unless liable to be struck out, as the Supreme Court in *Mastercard Incorporated and others v Walter Hugh Merricks CBE* has made very clear. However, it is entirely right and proper that the Tribunal be satisfied that the proposed class representative knows how it is proposed to make the claim good or – to put the same point another way – what directions the Tribunal will, either immediately or in due course, have to make, so as to ensure an effective trial at some point in the future. Although quantification will usually be the area of most doubt and concern, issues may arise in relation to other aspects of the claim, and the *Pro-Sys* test should not be regarded as limited to issues of quantum.

The recent case-law

39. There has been a great deal of recent law dealing with the *Pro-Sys* test, reflecting the fact that it has become (at the moment at least) the objection of choice for respondents seeking to prevent certification of a claim.

40. As to this, and without seeking to go over old ground clearly expressed in the decisions of other courts, the following points emerge:

(1) The merits are not for review at any stage prior to trial, unless the claim pleaded warrants striking out. We have already stressed this, but the point bears repeating.

(2) The Tribunal bears a heavy responsibility as the gatekeeper in collective proceedings. As we have described, this role reflects the Tribunal's management responsibilities in all cases that come before it, but in collective proceedings – for the reasons given in paragraph 38 above – the gatekeeper function is of particular importance. The duty is a proactive as well as a reactive one, and the essential object is to ensure that there is in place a blueprint for the parties and for the Tribunal of the way ahead to trial.

(3) This point can be shortly stated, but ought to be unpacked. There are, we consider, at least two misapprehensions on the part of proposed class representatives which need to be laid bare:

(i) *The "St Augustine" fallacy.* St Augustine is reputed to have prayed, "Lord, make me good...but not yet". So, too, in many applications for the certification of collective proceedings, the proposed class representative can be heard to say: "The answer to this particular problem will emerge on disclosure." An excellent example is the litigation plan of the Proposed Class Representative in this case. Paragraphs 61 to 70 set out the PCR's proposals in relation to disclosure and it is evident (from paragraph 64) that the PCR sees disclosure as a somewhat opened ended and uncertain process. Whilst, of course, some

degree of uncertainty and open-endedness is to be expected, to the extent that the expert methodology for (e.g.) the assessment of quantum is dependent upon disclosure from the proposed defendants, we would expect the disclosure that will be required to be articulated (ideally by the expert). That is a very important aspect of demonstrating to the Tribunal how a particular assertion will be made good at trial. We stress, again, that the Tribunal has no particular interest in this stage in the strength of the methodology: even weak and (in terms of outcome) uncertain methodologies will not be killed off. But the parties and the Tribunal need a blueprint and (absent very good reason) collective proceedings will not be permitted to progress unless and until that blueprint has been provided.

(ii) *The "not my problem" fallacy.* Often, a proposed class representative will assert that it is not for them to make good – even in terms of "blueprint" – points that will be part of the defence of the respondents, should the case proceed.[45] We stress that such a contention will rarely be satisfactory. Of course, we appreciate that there will be points on which the proposed defendants will bear the burden of proof. But where – at the certification stage – a proposed defendant makes clear that a certain point will be taken, then, whilst the proposed class representative does not have to have an answer to the point, it is incumbent on the proposed class representative to show how – methodologically speaking – the point can be addressed. The two-sided nature of the market in this case[46] presents an excellent example. As we shall come to describe, Meta contended that the outcome of the Unfair Price abuse allegation would be significantly affected by the fact that the Facebook service was provided in the context of a two-sided market. That may, or may not, be the case, we cannot say: but the methodology for the assessment of quantum needs to be sufficiently robust to deal with the point. Otherwise, one is left with a PCR unable to explain at certification how a claim to damages can withstand a defence that is going to be articulated by the proposed defendants, if the action proceeds. (It is worth pointing out that this involves a certain degree of "cards on the table" from the proposed defendants: if there are methodological problems, they need to be articulated at certification, and not to arise as unwelcome surprises post-certification.)

(4) A failure, on the part of the Tribunal, to engage in this process is an error of law. It is worth quoting from *McLaren*:

> "50. In its Judgment, the CAT identified the battle lines, but said that the battle along those lines was for trial. In our judgment this was an error in approach. Once it had decided to grant certification, the CAT should have gone on to address the ramifications of the challenges to the Class Representative's methodology. At the CPO stage it was clear that this represented *the* pivotal dispute in the case.
>
> 51. In this regard, if the CAT was of the view that it lacked sufficient information to perform this elucidatory role it could, exercising its broad case management powers, have directed the Class Representative to set out more fully its response to the overall pricing case, as presented by the appellants. If, however, it considered that the appellants had not sufficiently particularised or evidenced their overall pricing case, it could have directed them to provide further detail and then directed the Class Representative to respond. Either approach would have enabled the CAT fully to exercise its gatekeeper role and at the outset lay down a more developed judicially approved trial preparation pathway. Instead, we consider that the CAT did err in

> simply stopping in its tracks when confronted with two starkly opposing price theories and holding that they were for trial."
>
> (5) The Court of Appeal, in *McLaren*, was confronted with collective proceedings that had already been certified by the Tribunal – a conclusion which the Court of Appeal upheld. It was in its failure to apply the *Pro-Sys* test that the Court of Appeal held that the Tribunal's error of law arose. When such matters arise before the Tribunal – as they do here – it is, of course, a case management question whether the proceedings are certified and the satisfaction of the *Pro-Sys* test left for later, or whether certification is delayed until a satisfactory "blueprint" is provided. Generally speaking, however, the latter course will be the preferable: it makes no sense to certify proceedings whose triability is in doubt. In the case of *McLaren*, had the error of law not been made by the Tribunal, then we have little doubt that the right course would have been to put off the order certifying the proceedings until the issues identified by the Court of Appeal had been resolved.
>
> (6) Clearly, the application of the *Pro-Sys* test is fact and context sensitive. Valuable observations on the test were provided by Green LJ in *London & South Eastern Railway Ltd v. Gutmann* at [52]*ff*. It would be duplicative to set them out here: the fact that we do not do so, does not mean that we have not conscientiously sought to apply them in the present case…

108. My sense is that the *Pro-Sys* test, as it is being developed in the courts, has more to give and that it is unlikely to be confined to collective proceedings only. Its great virtue, as I see it, is that is does not require expert economists to provide "the answer", but it does require them to articulate, and stand by, the methodological approach by which the claimant will achieve "the answer".

(5) Are counterfactuals questions of fact?

109. Almost every competition case involves a "counterfactual". They are called counterfactuals for a reason: counterfactuals involve an analysis that is contrary to the facts as they stand. In many cases – and I am certainly not trying to be exhaustive – they involves imagining what the market would have been like absent the infringing agreement or provision or act.

110. The question that I am going to ask is the extent to which this is entirely a factual question. "Counterfactual" questions arise in every claim for damages for breach of contract or where a tort has been committed and the tortfeasor claimed against. The court's duty is to put the claimant in the position they would have been in had the contract been minimally complied with or had the tortious act or omission never taken place. Although not expressed as counterfactuals in

these non-competition cases, the questions are absolutely counterfactual in nature. Take the person injured by another's tort, such that they can never work again. The actuarial tables will be consulted to see how long they would have lived, but for the accident. Evidence will be adduced to show what that person's career structure would have been, so that loss of earnings (as one of many heads of damage) can be assessed over a defined period of time. These are difficult questions of factual judgment, done by our courts every day.

111. To what extent are the questions that arise in a competition case different, if at all? My suggestion is that they are different, in that they contain – or can contain – a normative element.[89] The nature of the norm is less easy to state, save that I doubt very much if it is legal. Before I consider this normative element, there are a couple of preliminary points that I should make in relation to counterfactual questions:

(1) First, entirely unsurprisingly, the evidence of expert economists is of cardinal importance before the Tribunal, reflected in the fact that to enable proper evaluation of that evidence, the panels of the Tribunal comprise an economist. Economic or econometric[90] evidence is common, and we are beginning to see the deployment of behavioural economists and game theorists. That is all grist to the Tribunal's mill. If it is of assistance, and is genuine opinion evidence, we will admit it. It is evidence of a very different quality to that admitted in other disputes, but the fact is that an analysis of markets involves an altogether broader brush than the resolution of a bilateral dispute of fact between *A* and *B*.

(2) Secondly, however, and in contra-distinction to my first point, economic evidence is not the be-all and end-all, and there are limits to the extent to which economists can assist in understanding an industry. Economists are not industry experts. No matter how eminent, no economist can tell us (or, if they do, it is not proper opinion evidence) how deep-sea cables are laid or how credit-card transactions actually work. We must beware

[89] Of the sort described in paragraph 49 above.
[90] Use of statistical or mathematical models to test hypotheses.

of overreach in terms of how parties deploy their economists – and the parties must be aware of the limits and well as the strengths of this sort of evidence.[91]

(3) Thirdly, where we are presented with rival expert opinion, the Tribunal may prefer the view of one expert over another and adopt that view wholesale. In my experience that is the exception rather than the rule. It is certainly possible for the Tribunal to adopt a magpie-like approach, and select the nice, shiny bits from each expert's evidence, and so reach a conclusion neither expert has necessarily contended for. The submission that an expert's work cannot be critically re-worked by the Tribunal is one that crops up quite often in competition cases, and it seems to me it is something that needs to be rejected, for the reasons given by the Tribunal in *Cardiff Bus*:[92]

> 395. In closing, 2 Travel re-worked some aspects of Dr Niels's calculations. Mr Flynn, on behalf of Cardiff Bus, objected to this (Transcript Day 10, page 23):
>
> > "This goes to the PwC report, 30 per cent market share estimate, and re-works some calculations of Dr Niels in a way that was not put to Dr Niels at trial. We say this approach is simply unacceptable. This is inadmissible new evidence, unsupported by an expert's report and not put to our expert for comment. That sort of approach again should form no part of the Tribunal's conclusions in this matter. The Tribunal's task is, if I may say, a difficult one possibly, but making sense of the evidence that was given at trial, and not subsequent attempts to re-jig it."
>
> 396. We address this point briefly, in case Cardiff Bus were minded to suggest that the Tribunal is fettered in this way.
>
> 397. Of course, it is absolutely right that the Tribunal can only determine this case on the evidence before it, and cannot have regard to factual material that was not adduced before it. Neither Mr Good, nor Dr Niels nor Mr Haberman adduced such factual material. They provided expert opinion evidence. In particular, Mr Good and Dr Niels sought to assist the Tribunal in what sort of revenue would have accrued to 2 Travel had the Infringement not taken place. We have found their work extremely helpful, and have taken it fully into account, but we certainly do not consider that the opinion evidence in their reports must be used on a "take it or leave it" basis. It is for the Tribunal –

[91] See the warning in *Sainsbury's* at [36]*ff*; and see, generally, the outcome and factual analysis in *BridNed Development Ltd v. ABB AB*, [2018] EWHC 2616 (Ch), substantially affirmed on appeal at [2019] EWCA Civ 1840.

[92] *2 Travel Group plc (in liquidation) v. Cardiff City Transport Services Limited*, [2012] CAT 19, emphasis added.

> based upon the factual evidence – to make an assessment of what would have happened in the counter-factual scenario, and this may very well involve re-working calculations done by the experts or adopting an approach which – although it draws on the work of both experts – adopts neither approach completely. That is what has occurred in this case. Our approach is neither that of Mr Good nor that of Dr Niels but – based upon the factual evidence we have heard – represents our concluded view as to what would have occurred in the counter-factual scenario.

112. This, third, point is one which I suspect crops up more often in the case of economic evidence than in other types of expert evidence. That fact is that economists need to apply their judgement across a range of questions, where the factual underpinning is both fluid and open-textured in terms of what is or may be relevant. In other words, the range of reasonable opinion in economic judgment is far wider than arises in – say – the expert engineer who explains how an oil valve works or the expert software designer who explains a particular piece of computer functionality.[93]

113. These issues of assessment of evidence are, I think, general, although competition cases may involve these points emerging with a particularly hard edge. But I also said that competition cases involve a "normative element", which I do think is specific to competition law. As to this:

(1) In paragraph 94(1) above, I touched upon the problem of single infringements giving rise to multiple claims, a problem that I am going to consider in the next-but-one section. The problem occurred in three interchange fee cases heard in the Tribunal and in the Commercial Court in 2016 and 2017.[94] The inconsistent outcomes in those three cases are concerning, and the problem is being addressed in a number of ways (which I will come to). For the present, I simply want to note that in the first of these cases, the Tribunal adopted a counterfactual which supposed that – in the counterfactual world – multilateral interchange fees were replaced by bilateral interchange fees.

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[93] See Smith, *Lawyers come from Mars, and economists come from Venus – or is it the other way round? Some thoughts on economic evidence in competition cases*, (2019) Competition Law Journal 1.

[94] *Sainsbury's Supermarkets Ltd v. Mastercard Incorporated*, [2016] CAT 11, before the Tribunal; *Asda Stores Limited and others v. Mastercard Incorporated*, [2017] EWHC 93 (Comm), before Popplewell J; and *Sainsbury's Supermarkets Ltd v. Visa Europe Services LLC*, [2017] EWHC 3047 (Comm) and [2018] EWHC 355 (Comm), before Phillips J.

(2) The details do not matter. What is significant is that Popplewell J felt obliged to reject the Tribunal's analysis. When doing so, Popplewell J said – and I think that this was a criticism – that the bilaterals counterfactual, which was rightly said to be at the heart of the CAT's conclusion, was "a construct of the Tribunal itself". I disagree in that the point was evidentially based on material before the Tribunal, albeit that that material was in different form before Popplewell J, hence the different finding made. It is right to say that the approach adopted by the Tribunal was not advocated for by either party – but that is simply a reflection of "Magpie" approach I have already described. As I have said, I do not consider that a court is required to choose between two arguments advanced by experts, without considering alternatives, justified by the expert evidence, in the teeth of what the experts were contending as their opinion. Not to be critically evaluative of the experts' view is itself an abdication of judicial responsibility, and in *Sainsbury's* we considered very carefully Dr Niels' reasons why there would be no bilateral interchange fees; found those reasons wanting; and rejected them.

(3) There is a more fundamental issue that arises when assessing counterfactuals where a market is involved, which goes well-beyond the question of whether the evidence exists to make a given finding or not. One of the points advanced in this paper is that competition law is informed by value-based economic norms. But, apart from the existence of these norms, it is a mistake to consider markets as somehow inherent or natural or self-evident. Markets are completely unlike the actuarial tables used in the assessment of the quantum of PI claims. The outcome there is informed by the actuarial tables, which are governed by the laws of statistics. A claimant cannot choose to have a greater life expectancy than the expectancy predicted by the tables, save to the extent there is a material variable in the specific case not catered for in the general case described in those tables. And nor can a judge – properly at least – make such a finding in defiance of the statistical laws.

(4) Markets are not like actuarial tables. They do not come in a single shape or size. The point is illustrated when one comes to talk about the term "free" market, as if the more deregulated a market, the better and more competitive it is. That is, if I may say so, nonsense; and the fact that it is so not only de-bunks the notion that regulation is a bad thing, it also informs the "normative element", namely that markets are what we make of them.

(5) Let me start by de-bunking the notion that regulation and competitive markets are inimical to one-another. The most efficient markets (in terms of articulating price by the interaction of supply and demand) are the most regulated. I am talking about exchanges. It is interesting that in his description of the market, Marshall had primary recourse to exchanges as good examples of working (or competitive) markets.[95] The point about exchanges is that the variables in the contracts for the buying and selling of whatever the product is are limited essentially to quantity/volume, price and time for delivery. The product itself – whether it is a share or a ton of copper – is fungible, standardised. This limitation means that the forces of supply and demand are given free rein, and pricing through the interaction of supply and demand is more accurate, not in terms of what the price "should be", but of what the market thinks the price is. That, of course, is what markets are all about: the generation of a market price.

(6) Exchanges do not arise out of nowhere. Nor do the rules for auctions or quasi-exchanges like the FX markets. Markets are made (whether by accident or design) and are neither inherent nor inevitable but are sculpted by their legal underpinning, which can be various. If we take the view that markets are what we make them, then – when considering them in their operation in the "real world" and when considering the counterfactual scenarios that arise in any given case – we need to understand and explain the market structures in any given case before

[95] Marshall, *Priniples of Economics*, Prometheus Books (1997), and abridgement of Marshall's 8th edition of this work (1920) at 140-141.

the Tribunal. Market operation – what the market is trying to achieve, and the rules that enhance and constrain it – needs to be carefully borne in mind.

(7) Professor Alvin Roth has written books on the designing of markets.[96] In his introductory chapter, Roth makes the critical point that markets are not about the price – that is an important element, but only an (optional) element that not all markets have – but about matching supply and demand. He describes markets – for instance, donor markets – which operate not on money or conventional supply and demand but on matching donors of kidneys to those who have the need for a kidney. He makes the important point that even altruism requires structure if it is to work efficiently:[97]

> Sometimes a matching process, whether formal or ad hoc, evolves over time. But sometimes, especially recently, it is designed. The new economics of *market design* brings science to matchmaking, and to markets generally. That's what this book is about. Along with a handful of colleagues around the world, I've helped create the new discipline of market design. Market design helps solve problems that existing marketplaces haven't been able to solve naturally. Our work gives us new insights into what really makes "free markets" free to work properly.
>
> Most markets and marketplaces operate in the substantial space between Adam Smith's invisible hand and Chairman Mao's five year plans. Markets differ from central planning because no-one but the participants themselves determines who gets what. And marketplaces differ from anything-goes laisse-faire because participants enter the marketplace knowing that it has rules.
>
> Boxing was transformed from brawl to sport when John Douglas, the ninth Marquess of Queensberry, endorsed the rules that bear his name. The rules make the sport safe enough to attract competitors but don't dictate the outcome. In just this way, marketplaces, from big ones like the New York Stock Exchange to little ones like a neighbourhood farmer's market, operate according to rules. And those rules, which are tweaked from time to time to make the market work better, are the market's design. *Design* is a noun as well as a verb; even markets whose rules have evolved slowly have a design, although no one may have consciously designed them.

(8) An understanding of the true environment in which a market actually operates, its design, requires evidence from those who know how the

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[96] See, for example, Roth, *Who gets what and why?*, 1st ed (2015).
[97] Roth, *op cit*, 6-7.

market works, or should work, which will probably not be evidence from an economist in the first instance – although such economic evidence will, generally, be a critical analytical tool.

(9) Put another way, a counter-factual question in a competition case does not simply involve asking "How would this market be, if the infringement was not occurring?", but also "How should this market be, if the infringement was not occurring?" Focussing only on the first question implies that if the infringement were removed, there is only one possible counter-factual outcome. That, without mincing my words, is not right, and is merely a reflection of the erroneous notion that the market is a single construct or interface that is in some fixed way inevitable in its form. So the criticism of the outcome in *Sainsbury's* is, in my respectful submission, wrong for two reasons. First, a minor point, there was evidence for the conclusion reached. That is a minor point because courts in later cases had to consider the facts as evidenced before them, and reach their decisions based on these and not on other facts. But secondly – and this, to my mind, very important – the question whether the counterfactual in the interchange fee cases is a bilateral or multilateral scenario is not straightforwardly a question of fact. It is a question, in essence, of what structure would best serve the interests of the consumer. Of course, that is a question that will be informed by the evidence and the facts, but it contains a very important normative element that should not be disregarded.

(6) Pass-on

114. The manner in which to resolve issues relating to pass-on is probably the most difficult and the most pressing matter before the Tribunal. It is a question that arises in almost every private action before the Tribunal. The difficulties are evident in the fact that the Tribunal has ordered a three-day evidential hearing in the interchange fee cases to try to grapple with the question in those proceedings; and in the dissent that arose in Trucks I.[98]

[98] *Royal Mail Group Ltd v. DAF Trucks Ltd*, [2023] CAT 6 at [549]*ff*.

115. It follows that I am not going to be able even to scratch the surface of what is a singularly intractable matters; and that – even if there were scope in this paper – it would be dangerous for me to anticipate what will, in any event, be coming down the line to me in my judicial capacity.

116. I will, therefore, confine myself to a few, very limited, points:

(1) In the *Merchant Interchange Fee Umbrella Proceedings*,[99] the Tribunal adverted to the "evidential difficulty" inherent in pass-on issues – namely, that pass-on can be very difficult to show. At [21], the Tribunal noted:

> …Indeed, it is very difficult even to identify what that evidence might be, leaving on one side the altogether separate difficulties that arise when seeking to adduce that evidence in court.

(2) In *Sainsbury's*,[100] the Tribunal was very conscious of this difficulty, and resolved it in the manner described at [484]:

> (4) We have already noted that whilst the notion of passing on a cost is a very familiar one to an economist, an economist is concerned with how an enterprise recovers its costs, whereas a lawyer is concerned with whether a specific claim is or is not well-founded. We consider that the legal definition of a passed on cost differs from that of the economist in two ways:
>
> (i) First, whereas an economist might well define pass-on more widely (i.e. to include cost savings and reduced expenditure), the pass-on defence is only concerned with identifiable increases in prices by a firm to its customers.
>
> (ii) Secondly, the increase in price must be causally connected with the overcharge, and demonstrably so.
>
> There is danger in presuming pass-on of costs to indirect purchasers (*pace* Article 14 of the Damages Directive), because of the risk that any potential claim becomes either so fragmented or else so impossible to prove that the end-result is that the defendant retains the overcharge in default of a successful claimant or group of claimants. This risk of under-compensation, we consider, to be as great as the risk of over- compensation, and it informs the legal (as opposed to the economic) approach. It would also run counter to the EU principle of effectiveness in cases with an EU law element, as it would render recovery of compensation "impossible or excessively difficult".

[99] [2022] CAT 31 at [20].
[100] [2016] CAT 11.

> (5) Given these factors, we consider that the pass-on "defence" ought only to succeed where, on the balance of probabilities, the defendant has shown that there exists another class of claimant, downstream of the claimant(s) in the action, to whom the overcharge has been passed on. Unless the defendant (and we stress that the burden is on the defendant) demonstrates the existence of such a class, we consider that a claimant's recovery of the overcharge incurred by it should not be reduced or defeated on this ground.

(3) On this basis, pass-on would rarely succeed as a defence to a claim, unless there were – waiting in the wings, as it were – an indirect claimant class claiming the same loss. This approach was rejected – albeit *obiter* – by the Court of Appeal.[101] The evidential difficulty was, thereby, resurrected, and it remains to be resolved.

(4) It may be that the answer lies in an understanding of how – in the world of perfect competition – pass-on would be dealt with. In *Sainsbury's*, the Tribunal considered the manner in which an overcharge might be dealt with by a firm:[102]

> When faced with an unavoidable increase in cost, a firm can do one or more of four things:
>
> (1) It can make less profit (or incur a loss or, if loss making, a greater loss).
>
> (2) It can cut back on what it spends money on – reducing, for example, its marketing budget; or cutting back on advertising; or deciding not to make a capital investment (like a new factory or machine); or shedding staff.
>
> (3) It can reduce its costs by negotiating with its own suppliers and/or employees to persuade them to accept less in payment for the same services.

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[101] *Sainsbury's Supermarkets Limited v. Mastercard Incorporated & Others* [2018] EWCA Civ 1536 at [338]:

> There was disagreement between Mr Hoskins [Counsel for Mastercard] and Mr Brealey [Counsel for Sainsbury's] as to whether the second point at [484] of the CAT's decision – viz that MasterCard was not able to identify any purchaser or class of purchasers of Sainsbury's to whom the overcharge had been passed – is a substantive point of law which must be satisfied in order to establish a pass-on and so distinct from the first point – viz that no identifiable increase in retail price was established. Although it is not necessary to resolve that issue on this appeal, we consider that it is not an essential condition for recovery: it would reflect the kind of policy decision which motivated the US Supreme Court in the *Hanover Shoe* case and is inconsistent with the principle that damages are compensatory rather than punitive. In any event, it is sufficient that MasterCard accepts on the appeal that the CAT was entitled to come to the conclusion that MasterCard failed to satisfy the CAT that there was no identifiable increase in the retail price attributable to the unlawful MIF.

[102] [2016] CAT 11 at [434].

(4) It can increase its own prices, and so pass the increased cost on to its purchasers.

This was considering matters in a world of imperfect competition. In a world of perfect competition, the only available option is Option (4). The other options are not possible in the world of perfect competition, because they represent saving which, if they could be made, would be made. In other words, if the increase in cost caused by the overcharge, is truly unavoidable, it is passed on.

(5) If that is the case in the world of perfect competition, it may be that this ought to be the presumption in the world of imperfect competition that we inhabit, and that it is for the party contending for a different outcome to produce evidence to this effect.

117. I am quite sure that there is more to be said on this topic, but (for the present, at least) that is all I am going to say.

(7) Trying multiple common issues

118. As I have noted, in competition cases, the same facts give rise to multiple claims. The cartel that fixes the price of widgets gives rise to a potential cause of action vesting in each purchaser of the over-priced widget. As we all know, the story does not end there. If the purchaser of the widget is not the ultimate consumer, but someone who uses the widget as a component in order to make blodgets, and increases the price of blodgets because of the inflated price of their widget component, why then an indirect claim is generated, vesting in each person who has been (indirectly) overcharged. The price of the overcharged widget has been passed on to the purchaser of the blodget.

119. Aside from questions of causation, loss and damage, where (generally speaking – and subject to certain qualifications I will make) the loss is individual, these claims will bear a remarkable similarity to each other, particularly when considering questions of infringement. Of course, these claims will be legally similar. But we have a doctrine of precedent to deal with that and, over time,

law that is unclear or uncertain will become clear and certain – or, at least, clearer and more certain.

120. The problem considered here exists in relation to questions of fact. The facts relating to one market abuse, one competition infringement, will generate multiple causes of action. Yet the findings in one case will not bind the tribunal hearing later cases. That is because there is no identity of parties and so no room for *res judicata* or issue estoppel. It may be that there is a "lead" case approach that can be adopted, along the lines of *Ashmore v. British Coal Corporation*.[103] In *Ashmore*, 14 sample cases proceeded to trial out of 1,500 claims under the Equal Pay Act 1970. When the representative sample was selected before the Industrial Tribunal, it was agreed that the decisions in any of the sample cases would not be binding upon the applicants or the respondents in any of the non-selected claims, although it was hoped that the decisions would assist with the resolution of the other claims. The 14 sample cases were dismissed after a hearing before the Industrial Tribunal and subsequent appeals by the employees were unsuccessful. Mrs Ashmore subsequently sought to proceed with her own claim, which had been stayed pending determination of the sample claims. Her employers successfully obtained a strike-out order on the basis that it was an abuse of process to seek to re-litigate issues determined in the sample claims. Mrs Ashmore's appeal to the Court of Appeal was refused.

121. The critical factor in this failed attempt at "re-litigation" was the sheer similarity between Mrs Ashmore's claim and the failed claims that had preceded it. Stuart-Smith LJ considered that it would bring the law into disrepute, and be a source of grave injustice, if a later claim based on the same evidence should succeed, when prior claims had failed.[104]

122. *Ashmore* is a useful weapon in the procedural armoury, but I fear that it will not be sufficient to resolve the concerns that I have. That is because the concerns that I have, have already manifested themselves in the past, and *Ashmore* did not resolve them. Whilst it is, quite self-evidently, wrong for very similar

[103] [1990] 2 QB 338.
[104] [1990] 2 QB 338 at 352 and 354-355.

background facts to give rise to radically different outcomes where in nature the same competition infringement is being alleged, that is exactly what happened at first instance in the Mastercard/Visa MIF litigation. This litigation, – having featured at first instance before the Competition Appeal Tribunal, Popplewell J and Phillips J (as they then were) – went up to the Court of Appeal, thence to the Supreme Court, were then remitted back to the CAT, and fortunately settled.

123. All three cases concerned a claim that MasterCard and/or Visa had infringed competition law in establishing and implementing certain fees known as MIFs – multilateral interchange fees. The first case concerned a claim by Sainsbury's against MasterCard, with Sainsbury's alleging that the fees it was required to pay on debit- and credit-card transactions under MasterCard's scheme were in violation of competition law.[105] This was one of those cases where there was no mystery about the allegedly infringing arrangement, which was there, for all to see, in the contractual documentation. The question was whether an overt contractual provision infringed competition law, and this was – and remains – a very hard question of law and fact.

124. In *Sainsbury's*, the Tribunal – and I should declare an interest here, for I was one of its members – had to consider many issues, one of which was whether there was an infringement by effect. In considering this question, we carried out the traditional analysis of identifying the allegedly infringing provision (obvious here) and trying to work out what its harmful effects were by reference to what the position would have been in the absence of the allegedly infringing agreement or provision. In other words, we carried out a "counterfactual" analysis. In later cases, this "counterfactual" analysis was somewhat dubiously characterised as a question of fact.[106] That is a point I will be returning to.

125. At the moment, I am considering how common factual questions (not necessarily counter-factual ones) can result in different outcomes. Our conclusion, in *Sainsbury's* – based on the somewhat limited evidence before us

[105] *Sainsbury's Supermarkets Limited v. MasterCard Incorporated*, [2016] CAT 11.
[106] That is not a characterisation that I would necessarily agree with. See *Sainsbury's* at [180], especially footnote 102.

– was that in the counterfactual world, the MIF would have been replaced by bilateral interchange fees negotiated between each participating bank and MasterCard.[107] This, we also concluded, would result in a better market in terms of outcome, for the reasons we articulated.[108] It is easy to see why MasterCard was so opposed to this, because the difference in benefit to Sainbury's of a bilateral system over and above a multilateral system would directly feed into the calculation of Sainsbury's damages, as, indeed, it did in our decision.

126. Come the next case, tried in the Commercial Court before Popplewell J, MasterCard had re-arranged the deck-chairs.[109] Popplewell J was invited to follow or "read across" previous decisions of the EU Commission. He declined to do so, for reasons which (if I may respectfully say so) are unimpeachable.[110] Of course, what is sauce for the goose, is sauce for the gander, and Popplewell J took exactly the same approach in relation to the decision of the Tribunal in *Sainsbury's*:[111]

> "There is also, of course, a very substantial overlap between the factual issues decided by the CAT and those I have to decide. Here too I am not bound by the findings, although the parties agreed I should take them into account and give them such weight as I thought appropriate. It is important to keep in mind in this context that the evidence before me was not the same as that before the CAT in important respects. For example, the CAT Bilaterals counterfactual, which is at the heart of the CAT's conclusion, **was a construct of the Tribunal itself**; it had not been addressed in the witness statements or experts reports of

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[107] The counterfactual options were set out at [153]. MasterCard contended that the bilaterals option was not open to the Tribunal (at [179] to [181]), an argument that prevailed – albeit in somewhat different form – in the Court of Appeal, but which we rejected. For the reasons given in [182] to [197], we concluded that bilaterals would be concluded if MIFs were not permitted.

[108] At [196] to [197].

[109] *Asda Stores Ltd v. MasterCard Inc*, [2017] EWHC 93 (Comm).

[110] At [84] and [85]:

> "84. Mr Lowenstein, QC [counsel for the Claimants] urged me to approach the issues by starting with the MasterCard Commission Decision, and applying it to the EEA MIFs for the majority of the claim period (which were not the subject of the Decision), and to the UK and Irish MIFs for the claim period, unless I could identify material differences which justified drawing a distinction. This process was characterised as "read across". This suggested approach reflected the way the claims had been framed in the Statements of Case, with the Claimants relying on the MasterCard Commission Decision and MasterCard identifying respects which made its application to the current dispute inappropriate. This in turn infected the framing of the Phase 1 issues and of some of the issues on which the experts were asked to express their views.
>
> 85. I do not consider that this is a helpful way to address the issues which I have to decide, for a number of reasons. First, I am not bound by the Commission's findings of fact and although it is sometimes possible to discern the evidence before the Commission which informed its conclusions, that is by no means generally the case. There is a logical flaw in the suggestion that this court should follow another tribunal's findings of fact unless it can identify a specific and material difference in evidence when this court is not in a position to identify the extent of the evidence before that tribunal. There was, for example, a lively debate on whether by reference to the memorandum referred to at recitals 626ff and in Annex 7 the Commission had considered UK MIFs. It remains unclear exactly what aspect of this evidence the Commission took into account or how, without an understanding of which it is impossible to assess the validity of any "read across"…"

[111] At [93], emphasis added.

> either party and had not been put to factual witnesses. By contrast the parties put before me detailed factual and expert evidence on the point, tailored specifically to the findings and reasoning in the CAT Judgment, which was all to the effect that such bilaterals were unrealistic. Moreover there was no identity between expert evidence in the two trials: Dr Niels gave evidence for MasterCard in both cases but different experts gave evidence on behalf of the respective claimants. They were not expressing the same views. For example, in the CAT proceedings Sainsbury's and its expert accepted that a MIF at some positive level was lawful; whereas the Claimants before me and their expert contended that any MIF above zero was unlawful. Nor was there anything like identity in the factual evidence put before the CAT and this court, either documentary or oral. The CAT had documentary material which was not in evidence before me and vice versa. The CAT heard from four Sainsbury's witnesses whose evidence I did not have; whereas I heard from a variety of Claimants' witnesses whose evidence was not before the CAT. Some MasterCard witnesses were common to both sets of proceedings but some were not. The experience of having arguments and evidence tested in the Sainsbury's proceedings inevitably led to fuller or more focused evidence before me on some points, both factual and expert; for example Dr Niels had the opportunity to consider over time, and address in writing, points which he had faced in cross-examination in the CAT without forewarning. Even where the evidence was materially similar, I must make my own assessment of the witnesses and the other evidence before me; it would be an abdication of judicial responsibility simply to accept findings of fact made by the CAT."

127. With one qualification, I respectfully agree. My qualification has already been stated: I push back against the assertion that the bilaterals counterfactual was a "construct" of the Tribunal and not put to the witnesses or the parties. As the judgment in *Sainsbury's* makes clear, it was.

128. What this passage does is highlight the very considerable difficulties that arise in litigating market-wide issues in sequential, party-against-party cases. The fact is that we are going to have to find a way of resolving market-wide issues consistently between cases, in a manner that is also fair to the individual litigants. We have made a great deal of progress in this regard, although much remains to be done. The first step to ensuring consistency is to "house" all these claims in a single jurisdiction, under "one roof" as it were. The Court of Appeal in the *MIF* appeal made clear that similar cases falling within its jurisdiction should be transferred to the Tribunal.[112] That has now happened. The Rolls Building has done a clear-out of common cases, and the CAT now has a fine collection (running into the thousands) of interchange fee and trucks cases.

[112] [2018] EWCA 1536 (Civ) at [356] to [357].

129. But housing claims under the same jurisdictional roof does not solve matters. All it does is create the potential for resolving similar issues in similar proceedings in the same – or at least not inconsistent – way. That potential needs to be achieved. It may be that *Ashmore* and sampling will be a tool that we can deploy, but it may also be that an issues based approach, involving all parties in all relevant claims, is the answer. Tribunal *aficionados* will have clocked the Tribunal's Practice Direction 2/2022 on Umbrella Proceedings, where Rule 17 of the Tribunal Rules 2015 has been pressed into service to enable an issue in one case to be plucked out and heard, if appropriate, by another Tribunal that has similar issues before it. We are in the early stages of seeing whether Umbrella Proceedings can do what we would like them to do – resolve, in a single forum, multiple similar issues. And it would be dangerous to underestimate the procedural and logistical difficulties that arise.

130. But even in these early foothills of the process, we are discerning positive effects. Many claimants seek a stay of their proceedings. The Tribunal is happy to grant such a stay, but it is on terms. First, an undertaking is extracted that whatever happens in the proceedings binds the party to the stay. And, secondly, there is an exposure to the need to give disclosure, should that be ordered, notwithstanding the stay. So, you do go to the back of the queue, at your own request, unlike Mrs Ashmore you can't re-litigate and the evidence in the stayed case – if relevant – will be available to the other parties in those proceedings that do go ahead.

131. Long story short: this is, I believe, an instance where we can – with careful case management – "have our cake and eat it", in that we decide individual cases individually, and yet also consistently. We do so, by ensuring that evidence in different cases is heard and considered across and in those different cases, where common issues exist.

(8) Data not disclosure

132. Disclosure is one of the great cost centres of modern litigation, not just in the Tribunal but in the Business and Property Courts generally. I am not going to say anything about the general issues, although they are very important, for they

do not involve economic evidence before the Tribunal, and these are questions of legal reform that need to be addressed elsewhere.

133. However, I consider there is some value in ensuring that expert economists are engaged in minimising disclosure whilst maximising the data they need. Given that an articulation of methodology is likely to be demanded more often than less, it would make sense for the expert economists to identify early the data they are going to need, and to begin assimilating and agreeing it, whether the material is in the public domain or arises out of the parties' disclosure.

F. CONCLUSIONS

134. In conclusion, there is – at this stage at least – not very much to say. Competition litigation (not to mention competition law generally) is living through interesting times, and the challenges that we all face are immense and (perhaps for that reason) invigorating. The purpose of this paper has not been to express concluded views. Rather, the purpose has been – is – to inform discussion.

135. The Tribunal is immensely served by the skill and sheer competence of the community of competition lawyers – academic and practitioner – that surround it. The purpose of this paper is to provoke debate, as to enable my two "holy grails" better to be achieved. It is my firm belief that in improving the quality of process before the Tribunal – which I hope is already high – the objectives of reduced costs and improved predictability and consistency of outcome can be furthered without any sacrifice in standard. Indeed, it is improving the standard, a quest that should not end, this is our ultimate objective.