IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1517/11//7/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Wednesday 24th January 2024

Before:

The Honourable Mr Marcus Smith

(Sitting as a Tribunal in England and Wales)

IN THE
Merchant Interchange Fee Umbrella Proceedings

BETWEEN

Claimants

SSH CLAIMANTS & Others

v

Defendants

Mastercard Incorporated and Others

And

Visa Europe Limited and Others

_____

A P P E A R AN C E S

Jamie Carpenter KC & Oscar Schonfeld on behalf of the Stephenson Harwood and Scott + Scott Claimants
Ben Lask KC on behalf of Allianz
Tristan Jones on behalf of Primark/Ocado
Christopher Brown on behalf of Inchcape Retail Limited and others.
Daniel Jowell KC on behalf of Visa
Owain Draper on behalf of Mastercard

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(10.30 am) **Wednesday 24th January 2024**

MR PRESIDENT: Good morning, everybody, and welcome. Before we begin, two short housekeeping matters; and one, rather longer and more substantive direction of travel for the submissions today.

The housekeeping points first. These proceedings, although entirely remote, are also being live streamed and the usual rules regarding the non-photographing transmission or recording of these proceedings apply. They are as if in open court, and a breach of that injunction would be a contempt of court. That's the first housekeeping point.

The second housekeeping point is a more pleasurable one. Mr Jones, well done. Many congratulations. I have written you a note. I am sure we'll all want to echo those "congratulations, well done."

So those are the housekeeping points.

Fundamentally, I've read with great attention the various very helpful written submissions on the extremely interesting order that I am being invited to make. I think it's fair to say that I have got some concerns, and I think it's worth my articulating them so that instead of going through the submissions that you make, those concerns can be addressed front and centre as well as making any submissions that need to be made in light of that.

So let me start by a general point, which is not too troubling. Given that the draft order that I have seeks to make a prospective regime with retrospective elements operate in a manner that actually locks down the incidence of costs in future matters, in circumstances of all sorts of contingencies, some of which I am going to go into,

whether that is a cost order that one can appropriately make with that degree of granularity at this stage, we all accept of course that there is a very broad discretion in the Tribunal to make costs orders, but as we have seen, that jurisdiction is by no means unlimited, as you might think -- I have one in mind the overrule of this Tribunal by the Court of Appeal in the *Durham subsidy* case, where a cost cap regime was applied somewhat aggressively, and the Tribunal was told in no uncertain terms that can't be done, not on discretionary grounds, but as I read the Court of Appeal decision, on jurisdictional grounds.

Now, it may be that the CAT's rules need to be clarified and extended in terms of their discretion, but we live with rules as they are, and I think I do have some concerns that if we were to make a rule or an order along these lines, there might be issues going forward.

Now, that is the short point, and my real concern is whether such an order should be made. Last night when I was reading, as I said, very helpful written submissions, there are a number of points which seem to me to be missed by this regime, which is, reading very prescriptively, I understand why that is.

But let me give you a few hypotheticals -- I will take from my 10 or 11 examples of problems -- and you'll get a sense of why I am uneasy about making an order of this sort.

So what about Claimants that have already been articulated in the written submissions? Should one have the same regime going forward for those who have taken a stay? I can see a very strong argument for saying, "No. If you apply a stay on terms, you are out, and you shouldn't be exposed to costs."

On the other hand, there may very well be circumstances in the conduct of a stayed litigant, for instance, when they apply to unstay or when they are subject to disclosure which might make a costs order appropriate in certain specific circumstances. So first

example.

Secondly, what about those Claimants who are suing one Scheme but not the other? We have three Schemes here. We have claims against Visa. We have claims against Mastercard, which are parallel to the claims against Visa. And then we have Merricks. I appreciate Merricks is not formally within the Umbrella Proceedings Order, but Merricks wants to be, and that is an application that we have parked for the future. So that's another variable that is problematic.

What about already settled claims? Are they affected? Can they be affected? Should they be affected? What about what I regard as almost a nightmare scenario, which happened just before Christmas, when Visa settled with a number of Claimants against them.

Now, that didn't raise any costs questions, but we could see the disruption that an order to get a settlement can create when one has got a large corpus of Claimants removing themselves, and all the parties will know of the difficulties that occurred in the sampling exercise when we lost basically 60 or 70 percent of the sample.

Now, to be absolutely clear, that is not a criticism of anybody. We welcome settlements. It's a great thing that Visa reached a deal with that many Claimants. Fantastic. But it did highlight very clearly the case management issues that arise in this sort of litigation.

Just imagine, when Visa or Mastercard is doing a deal with a large number of Claimants against them, leaving a rump end bearing the costs or potentially bearing the costs of big litigation. Suppose in the middle of Trial I, there's a settlement with 50 percent of the Claimants, and the costs burden suddenly changes unless the exit of the parties settling is in some way controlled by the court.

Now, this order would achieve that end, but I wonder whether one could not achieve that end by simply saying, "If there is a settlement, the basis on which the settling

parties exit" -- obviously not Visa or Mastercard -- "but the basis on which the Claimants' exit as regards those claims needs to be controlled by the court in terms of the costs exposure of the remaining Claimants because one of the things I am not going to have is use of a costs threat against the diminishing band of Claimants being used as a costs threat against the diminishing band of Claimants.

So that is an interesting problem. What about participation in different trials? We have got some people participating in Trial I, some people are participating in Trial II, some people are participating in both.

And what about different outcomes of trials? Suppose one has got at the end of Trial II radically different pass on rates established, such that some Claimants are hugely successful, and some Claimants are not. We ought to have a costs regime that is sensitive to that sort of thing, which the present regime certainly is not. That raises my last example.

The question of basis on which costs should be calculated, whether it is pro rata or per capita or case by case. So again, that is a hugely difficult question, particularly when one is determining it in advance.

So that is a little list which I could easily supplement of concerns I've got about a rigorous order going forward, which I think altogether dwarfs the question of jurisdiction, which is in the back of my mind but not the front.

The final point before I shut up and hand over to SSH is this. I do accept that the parties -- all of the parties -- are entitled to a form of guidance. They ought to, I think, know the Tribunal's starting point in any question of cost.

Now, I am not saying that the starting point will be the finishing point. That will be to create an order of the sort that I'm not really very keen to make, subject to submissions this morning, but it might be helpful for there to be a form of guidance, for instance, to say, unless something very strange happens, where a party does not apply to lift a

stay and doesn't participate in the proceedings but accepts the obligation of disclosure where ordered and accepts as binding the outcome, that that party should be safe from costs, only in the general case, but as a guide, and equally, one might well say that where there is a big settlement of a large group of Claimants, the Tribunal will want to control the exit according to which those Claimants leave the litigation, not to police the terms of the settlement, but just to ensure that there isn't a shock to the remaining Claimants such that they are placed in the position in terms of having to settle with the guns to their heads.

That is something which there might appropriately be guidance on. I do think there may be a number of points like that in which the Tribunal could helpfully say, "This is what we think will probably happen in the future, subject to argument in a specific case." I can't see it being any more than guidance.

So I'm sorry, that is a rather long introduction. I think if anybody wants to rise to talk about this, we can certainly do that, otherwise as I am minded, simply to hand over to SSH, to Mr Carpenter for you to take matters forward, but if anyone wants time to consider this, of course you can have it.

SUBMISSION BY MR JAMIE CARPENTER KC

MR CARPENTER: Thank you very much. For my part as the main person to whom it falls to address those concerns, and of course extremely helpful to understand sir what your current direction of travel is, I am quite prepared to embark on my submissions.

The points that you've raised are points that the parties were going to raise, and knowing that you shared some of those concerns will enable me to focus my submissions, I hope, on the particular points that concern you. I hope those concerns

may be unnecessary.

The purpose of this application and the purpose of the order is, as we say in our reply submission, threefold. It is important I submit to keep in mind that the three aims are independent ones, and it is open to you, sir, to make an order which encompasses one or more of those aims, and to the extent that the order does not encompass to give the sort of guidance which you've just said that you understand will be a benefit to all parties, even if not ultimately embodied in an order, to give an indication of what the Tribunal's likely thought process in relation to the future cost issues that are going to arise is going to be.

Those three purposes are as follows.

Firstly, to ensure that any liability which may fall on the Claimants for any costs of the Card Schemes which are common to more than one claim is several rather than joint and several. Now, that is an order which the Tribunal could make by itself simpliciter with nothing more, and I've certainly seen orders of this kind where actually no more is said by the court than simply the Claimants' liability will be several and not joint.

The second aim is to ensure that all of the Claimants who seek to benefit from the outcome of these proceedings share in any adverse costs liability, including those Claimants whose claims have been stayed and including those Claimants who are less than fully active.

Following recent developments, it may be that that is not actually a distinct category of Claimants, but I make submissions on that later --

MR PRESIDENT: Just to interject there, Mr Carpenter. You are absolutely right to draw the distinction, and you are actually right to make clear or imply or make clear that the Tribunal's view of stayed claims is extremely different to the Tribunal's view of non-stayed, non-active Claimants.

We are not keen on a studious silence from parties. We want them either in or we

want them stayed, for obvious reasons, and that, I think is beginning to coalesce, and we do have a number of parties making clear, extremely helpfully, where they stand. For our part -- just so everyone knows what we are doing -- we regard the question of stay and activity as a movable feast. If someone rethinks their position and wants to lift the stay and come in, then subject to cost, considering the individual circumstances, that will happen, and that is just a factor of the dynamic here. We have seen some people are much more interested in Trial I rather than Trial 2. Some are interested in both; some, neither.

That was very helpful, Mr Carpenter. I just jumped in to make the Tribunal's position clear. Thank you.

MR CARPENTER: Thank you, sir. We are of course very much alert to that distinction, and it's certainly open to the Tribunal to decide, for example, that stayed Claimants, we say they should be in, should be out, but those who wish to pick and choose which trial they take part in, should be in.

And then the third purpose is the purpose that you, sir, express some concerns about, which we absolutely support, which is to ensure that when Claimants settle, they take with them, as it were, the appropriate share of the common cost which cannot then be loaded by the Card Schemes onto what you call the rump end, and we are absolutely keen to ensure that that cannot happen so the last man standing, as it were, faces the entirety of the common cost, and that is a separate and discrete aim of this order, which we say can be catered for by what we propose, but also could be, if not formalised in an order, by an expression by the Tribunal that is what it expects to happen.

It may be helpful -- I said that by way of introduction – if I start by taking you through the draft order to show you exactly how we say it works because, with respect, some of the concerns that you express may come from a belief that the order actually does

more than it really does, particularly in terms of your concern about the rigidity that it might impose on any future cost decisions.

So I am looking at Page 16 of the Hearing Bundle, Tab 2, for anybody using a hard copy. A couple of important points, sir, to make at the outset.

Firstly, the essential format of this order, with a couple of bespoke tweaks, is absolutely standard for this kind of order. There's nothing particularly unusual in the drafting, and the most important overarching point is -- and I make this point really strongly in response to some of your initial concerns, sir -- is that all the order does is to allocate between Claimants the quantum of any liability for the Defendants' costs, which the Tribunal sees fit to impose.

It does not in any way predetermine what cost order the Tribunal can or should make, except in one respect, that it presupposes any order that encompasses what is defined as common cost will be made against everybody who falls within the definition of a Claimant.

But if a particular Claimant is not ordered to pay costs, this order would not impose any liability on them, and the order does not in any way constrain the Tribunal's ability to make an appropriate order for cost at any stage of the proceedings.

So having said that by way of introduction, I'm --

MR PRESIDENT: Just pausing there. Take your common cost definition. It would not be open for me to say the Claimants should bear this portion of costs which are common cost except for this particular Person X. That would not be envisaged by this order.

MR CARPENTER: It will depend, sir, on the reason for wanting to single out X. If it was X, those common cost, for example, were not actually germane to X, and the incurring of them had no relevance to X's claim, then they wouldn't be common cost at all; they would be what we call an issue cost.

So indeed, actually, what is different about this order from perhaps the mainstream of orders of this kind is that we have included this category of issue costs precisely in order to give the Tribunal additional flexibility.

Now, if it was because there was something very peculiar about the conduct of X that meant that the costs were common costs, nevertheless, X should not have to pay them, and it's perhaps it's really difficult to engage in hypotheticals; yes, let's put it this way, that would disrupt the operation of the order.

But I do stress -- Paragraph 1 begins: "Unless the Tribunal orders otherwise."

And that is a very important provision which is always a feature of these orders, which is essentially a safety valve.

Now, it's not of course intended to simply provide the Tribunal with open-ended discretion to depart from the order whenever it sees fit, because that would obviously undermine the benefit of the order of giving everybody certainty as to what the future is likely to look like, but it does mean that if in unforeseen circumstances, there was a reason why this order was no longer just and no longer just in relation to a particular category of cost that the Tribunal was dealing with, then it would have the power to depart from it.

It's a very important point to make. It's not the straitjacket that it might appear to be.

So everything I say --

MR PRESIDENT: That's very helpful, Mr Carpenter, because what you are saying -- I mean, I think I've grasped correctly the straitjacket that the order seeks to impose because the common cost -- the straitjacket is that which is what drives most of my concerns, but what you've just said about Paragraph 1 makes the difference between this order and the sort of guidance judgment that I ended up with, in my opinion, makes them rather closer together.

I mean, yes, I think the extent to which a straitjacket is imposed by an order is greater

than a judgment, which is not an order, but we're still talking about a straitjacket in either case because at the very least, in a guidance judgment, a judicial expectation is created, and in the case of the order, there is a default that can only be departed from, probably if there is a material change in circumstance or a material set of circumstances that were not envisaged by the order when it was made.

So it's two points in a spectrum but neither at the extreme.

MR CARPENTER: Yes, I think, sir, if I may say so, that's a very fair way of putting it. It's clearly stronger than guidance, but if it's a straitjacket, perhaps some of the buckles are undone.

So moving on to how the order actually works. In Paragraph 2, we have the definition, which sets up the subsequent structure.

So we have a commencement date which is the date on which the Umbrella Proceedings Order was made. That is obviously a matter which is hotly contested in terms of whether the order should have any retrospective effect if it is made.

If it is retrospective, nobody has questioned the wisdom of that being the appropriate date or suggested an alternative one.

The definition of Claimants is then obviously controversial because as drafted, it encompasses and is intended to encompass everybody who has been a Claimant since the 4th of July, 2022, including stayed Claimants and those who have settled their claims.

But I pause there to address a point, sir, that you raised in opening, which is that this order could never have any effect on the liability for cost of any Claimants who have already settled their claim.

The only reason settled Claimants fall within the definition of Claimants is the third of my three purposes, which is to ensure that when calculating shares of common issue cost, that share is attributable to, let's say, the HK Claimants' account.

That is its only purpose, and again, this comes back to the fact that what this order does is to distribute quantum. It doesn't impose liabilities. It needs an order to be made against the Claimant before it has any effect at all, and quite obviously no cost order is ever going to be made nor could be made against someone who has settled their claim.

We then come on in E, F, G, H to the key definitions of individual cost, issue cost, and common cost, and subject, as I've said, to the inclusion of the additional issue costs, again, these are very standard definitions, and particularly in H -- the fact that -- and this is really the key aim of these orders -- is to ensure that where an individual Claimant puts their head above the parapet for the benefit of the group generally, whether that be by way of a formal lead claim or because they've provided evidence, for example, at Trial I, or they've provided some disclosure, it can't be said afterwards, "Well, you did that. We incur these costs dealing with your evidence. Therefore, you should pay those by yourself."

So there's a general principle here that everything being done for the benefit of the group, even if individuals themselves have more prominence within the group, that doesn't change the fact there's common cost or issue cost, as the case may be.

Another important point to make about these categories, sir, is that these are categories of costs which exist in principle and would need to be considered -- whether or not a cost sharing order is made.

In this respect the CSO doesn't create a complication which did not otherwise exist. There will always in principle be common cost which are payable by all Claimants and individual costs which are only payable by a particular Claimant.

And nor does the order determine what costs are in each category beyond defining them. So it will always be -- whether or not there is a CSO -- for the Tribunal or for any cost the judge conducting an assessment to determine what are individual cost,

and those are always only going to be to the account of the particular Claimant to which they relate or what are common cost which are going to be shared, whether it is joint and several or several, are going to be shared on some basis between all of the other Claimants.

The next definition to draw your attention to, sir, is the MIF start date. You appreciate that this is part of the mechanism which we say is appropriate for sharing costs pro rata according to claim value rather than per capita.

I am not going to say more about that right now. I may well come back to that, if I may, when I address you on the specific issue of pro rata versus per capita, but that is where it comes from; the definition of total MIF charge underneath.

Paragraph 3 is then obviously the key from the point of view of the first of my clients' three aims. As I've said, actually, an order of this kind could say nothing more than Paragraph 3, and it would still have achieved the desired effect to that extent.

Paragraph 4 then defines how one calculates each Claimant's share of issue cost and common cost. I don't understand those to be controversial, and it's certainly very standard wording.

4c is controversial because it sets out the method by which the total MIF charge for each Claimant including settled Claimants is to be determined. That is said by the Primark Group to give rise to practical difficulties. I will address those, again, when I address more generally the basis of sharing.

MR PRESIDENT: Again, just pausing there. I appreciate you will be coming to it. This would form part of the firmer parts of the straitjacket. I appreciate that you are accepting that the straitjacket is in part unbuckled or buckled, but not particularly tight. But here, I am sensing that where it is a question of common cost, the manner in which those costs are allocated is within the tighter confine or straitjacket rather the looser confines; is that fair?

MR CARPENTER: Yes. I do say that, sir, and I do say that if the Tribunal was of the view that several cost sharing is in principle appropriate, then it would be absolutely necessary for the Tribunal also to decide whether it should be on a per capita basis or a pro rata basis, and if it is on a pro rata basis, to establish the mechanism for determining what the value of each claim is for that purpose. Those have to go hand in hand --

MR PRESIDENT: I understand. That's helpful to have those locked in.

MR CARPENTER: Paragraph 5 has caused some concerns, which I do respectfully say are misplaced, but if they are concerns which arise from a particular wording, of course we can look at the wording.

What Paragraph 5 does is define the calculation of the proportionate shares in relation to each Defendant separately. Now, all that means is, you have two separate pots: one for Visa and one for Mastercard.

The Claimants have expressed concern that that might mean that some Claimant who doesn't sue one Card Scheme could nevertheless find themselves liable for that Card Scheme's cost.

I hope it's obvious that it is not envisaged and could never happen in practice because there is no conceivable justifiable basis on which a Claimant who, for example, does not sue Mastercard, could ever be ordered to pay Mastercard's cost, and the concern, again, may stem from a lack of appreciation that this order is not about imposing liabilities; it's about quantifying them.

So, all Paragraph 5 is saying is that there will be two separate pots, and you make the calculation separately in relation to Visa or in relation to Mastercard.

MR PRESIDENT: Mr Carpenter, of course I see that, but the realities of the way this litigation is going to run does, I think, need to be factored in here. I quite see that you are in Paragraph 5, trying to make sure you are catering for the one-Scheme-only

Claimants. That is helpful. Very understandable.

The trouble is, there are some areas where Visa and Mastercard are in clearly separately delineated positions, where one could certainly say that in any settlement, there would be entirely separate cost pots, but there are equally a large number of issues -- I am not going to go into them -- where their positions are actually aligned and where I would expect, and I'm sure Visa and Mastercard will deliver. I would expect a common approach, and who takes the lead on that? Who knows. It'd be down to Visa and Mastercard to work it out. Certainly the Tribunal will not be impressed by a kind of jockeying for position in terms of who's taking the lead and who isn't, by reference to a definition of different cost pots in a cost order. That would be to make the tail wag the dog.

Again, I raise it now because it seems to me that you've got an extremely good and valuable point being made here. It's just that one needs quite a high degree of flexibility, once one knows how a case has panned out in order to define where the incidence of costs should lie.

In other words, it's a multi-layered liability that we are talking about, and I've picked one, which is –the read across between two sets of costs, which seems to me in this case to be quite likely, and that's leaving altogether out of account the joker in the pack -- if I can be that rude -- the Merricks case. If they're in, then you've got an altogether, probably quite separate bit, but there is still the common issue there, which is why we are still undecided where Merricks comes in or stays out of Trial 2.

A long interruption, but I felt it was appropriate to just raise that as a potential problem.

MR CARPENTER: Yes, thank you, sir. I think there are two distinct issues there.

The first issue is what is in each pot. Prima facie, if Mastercard have taken a lead on a particular issue, those are costs that Mastercard have incurred, and unless Mastercard or Visa have agreed between them to share those costs, then those are

simply costs in the Mastercard pot, and conversely any issue that Visa has taken the lead on, the costs of will be costs in the Visa pot.

That doesn't pose any difficulty, and whatever is in the pot is then shared between those who are liable to pay them.

The second issue is that you may have in mind, sir, that I was too quick to say there is no possibility of Claimants who don't sue one Card Scheme being ordered to pay the cost of that Card Scheme.

Now, if the Tribunal takes the view -- this is entirely hypothetical -- it shouldn't be inferred that I would suggest that it be appropriate -- but if the Tribunal did take the view because of the way Visa and Mastercard had shared certain issues, that actually, it would be right that a Claimant who didn't sue Mastercard should nevertheless in the exercise of the Tribunal's discretion be ordered to pay some of Mastercard's cost.

Then again, that doesn't need a specific provision in the order because all it does is it creates a liability, which will then be put through the mechanism of the order so that it is going to get shared appropriately between those Claimants. So either way, in my submission, the situation is catered for. The Tribunal has much flexibility as it needs to have.

MR PRESIDENT: In this case, you fall within your Paragraph 1 “unless the Tribunal orders otherwise” --

MR CARPENTER: You wouldn't even need to do that, sir, because if certain Claimants who are not suing Visa are ordered to pay some cost of Visa, then it is simply a circumstance to which the order will apply.

It will then simply quantify the share of the costs between those Claimants under the existing rubric of the order. So one will assume, for example, that they are common cost, and those Claimants who have been ordered to pay them, they will pay proportionate shares accordingly.

Merricks, I will say something about when I finish going through the order, if I may, but that I think there may not be any concern in relation to that.

The other aspect of Paragraph 5, which is standard and uncontroversial, is that these calculations are done on a quarterly basis. Now, that involves a certain amount of artificiality. In fact, someone leaves the proceedings during a quarter, but it's a balance of perfection of mapping of costs incurring against as to whether the people are in and out of the claim, which would be enormously labour intensive, against the middle ground of a reasonable period of recalculation.

Of course these calculations don't take place while the claim is ongoing, but only at the end of the case, but the quarterly calculations are standard in these sorts of orders.

Paragraph 6 to 9 then deal with what each Claimant will have to pay. I think uncontroversial in themselves, in that it's any individual costs that relate to them and whatever is their proportionate share of any common or issue cost.

Paragraph 9 just makes absolutely clear that several liability means that you cannot be going looking to anybody else for somebody's several share.

Paragraph 10 simply makes clear what would otherwise be implicit anyway, which is that in relation to the period before this order has any effect, which as drafted will be the date of the Umbrella Proceedings Order, the costs are in the discretion of the Tribunal in the usual way.

Paragraph 11, I don't think is picked up by anybody else, but just to explain in case you are wondering, sir. Again, it is a standard provision in these sorts of orders. It's always been included ever since the Court of Appeal's decision in Sayers and Merck SmithKline Beecham.

It's an authority that we have in the Bundle, but I don't propose to turn it up unless you want me to do so. What it deals with is the position of a particular claimant which discontinues, for reasons which are peculiar to them and perhaps unconnected to the

global merits of the proceedings.

What it means is that although they will pick up their liability for individual cost straight away, they won't immediately pick up any liability for common cost, and the Tribunal will deal with that when it deals with common cost generally.

So if a particular Claimant discontinues, the Tribunal has the power to decide that in those circumstances that discontinuing Claimant shouldn't have to pay any of the Card Schemes' common cost. It doesn't say anything about how they should make the decision. It simply means that the Tribunal can make that decision at the appropriate juncture.

And finally, Paragraph 12, again, I don't think is controversial. It's a very standard provision that just makes sure that people whose claims have ended come alive for the purposes of sharing any cost of detailed assessment as is necessary.

Now, there is one point of refinement that I need to address, which isn't currently reflected in the order, but my clients are happy to be reflected, and that is the position of Claimants in the same corporate group.

You will, I'm sure, have picked up from your reading that Scott + Scott have previously agreed that liability within their clients in the same corporate group should be joint and several inter se, and in the case of Scott + Scott, that also reflects a mapping onto the claim forms. So you will find with the Scott + Scott Claimants a correlation between Claimants in the same Corporate Group and Claimants on one claim form.

We say in our reply submissions that they don't seek to resile from that. Now, the Stephenson Harwood Claimants are also content to proceed on that basis; so the companies in the same corporate group will inter se have a combined joint and several liability for adverse cost, and that appears also to be the approach that the Primark Group has taken because they make the point in their skeleton argument that they approach these things in terms of the value of the claims and so forth at a group level.

Now, if that finds favour with the Tribunal, the order will need to be amended to reflect that because it doesn't at present. It is not a difficult task, we would say, and one would just need to add that a little bit of care is needed with the definition of what it means to be in the same corporate group because of course sometimes you get enormous conglomerates, where people who are in extremely distant relations represent the same corporate group. I understand that, actually, in these proceedings there are examples of companies, strictly speaking, in the same corporate groups actually being represented by different firms of solicitors.

Now, the way we think that can be approached in relation to the Stephenson Harwood Claimants is where they are in the same corporate group and appear in the same claim form, but that is not to say that we accept that simply being in the same claim form more generally is a basis for joint and several liability. We don't accept that.

But we do say that can provide a workable definition of being in the same corporate group for these purposes. But, of course, if this is simply making the wording work, I'm sure we can do that.

That certainly ameliorates some of the concerns that have been expressed by the Card Schemes about the burden of enforcement and that sort of thing.

MR PRESIDENT: I quite take your point about the difficulty lying there in the detail. I think Mr Tidswell of this Tribunal has a wonderful example where he spent six months leading the litigation for a party, which on close examination had been suing itself, and when he lost, he discovered that in fact the victory was on the other side rather pyrrhic because the only people literally who won in that case were the lawyers.

So it's obviously an issue, and we have to look at that quite carefully, but I am grateful for that clarification.

MR CARPENTER: Thank you. Now, having taken you, sir, through the order, I want to make four general points, if I may, before I get into the detail of some of the very

specific disputes.

The first picks up something that -- sorry, I said I would deal with Merricks before I commence with this. Merricks does not feature expressly in the order that we submit, but it doesn't need to. The purpose of the order is only to regulate the sharing of cost between these Claimants.

To the extent that Merricks takes part in any proceedings these Claimants are also involved in and to the extent that the Tribunal wishes to make cost orders in favour of the Card Schemes, that is not a difficult circumstance.

What the Tribunal would need to do, we would say, is if it makes orders against both, it would need to determine the relevant share of those orders that on the one hand Merricks should take, and on the other hand, the Interchange Claimants, and having done that, the share apportioned to the Interchange Claimants then feeds through the CSO in the usual way, and Merricks will deal with its share in the usual way.

So the level at which any involvement of Merricks comes into play is before you get to the CSO. It is at the point at which the Tribunal makes its order, but the fact that the CSO doesn't address Merricks is not a problem for the way it operates and does not impose any problems for the possible involvement of Merricks in these proceedings.

MR PRESIDENT: Great.

MR CARPENTER: Coming onto my fourth general point. The first picks up something you've already mentioned, and that is the question of vires. Now, none of the represented parties have suggested that the Tribunal does not have the power to make an order of this kind under its general power in Rule 104 (2) to make orders for cost, including orders in advance.

The only party that has suggested that there may be a vires issue is Hill Dickinson. As you may have seen from their letter, they referred to what they call jurisdictional creep, perhaps a slightly half-hearted suggestion that the Tribunal may lack vires.

They don't explain why that is, but I mention that because it's out there, but nobody appearing before you today, I think, suggests the Tribunal wouldn't have this power.

I do hear of course what you said about the Durham case. It's a case that I was involved in, so I know something about that, and of course that was the case where actually the particular issue was, in a way, the reverse, that what the Tribunal had sought to do was something which could not be done under the CPR. There wasn't, as it were, an analogy for it in one of the general civil litigation rules, and it was held that the Tribunal did not have the jurisdiction to do what it did, but this is actually the adverse.

What we are seeking to introduce here is something that undoubtedly can be done in the wider run of civil litigation and very often is done and should not provoke any concern about whether the Tribunal has the power to do it at all.

MR PRESIDENT: I think, Mr Carpenter, that actually puts the finger very neatly on exactly the point. I was quite surprised at the extent to which the CPR analogy fed into the construction of the rules of what is an altogether different Tribunal, and what the Durham case has done is make me extremely jumpy about how the Tribunal construes its own rules because one is getting a bleed across from what is going on in jurisdictions which obviously are helpful guidance, but I would say no more than that. But clearly higher courts have taken a different view, and one has got a real problem, I think, in how one equates the Umbrella Proceedings regime, which is unique to the Tribunal, into the established GLO litigation, which has its own cost jurisprudence in the High Court, and I, for my part, can see a real risk in the Tribunal saying, "well, this is not what we are going to be doing in the context of these very particular proceedings running according to this very particular process, which is being evolved and which – although I would say so myself – seems to be working rather well." And yet, when one makes an order which one thinks is consistent with the way

it's working, one then gets the party that does not like it, one can see a number of parties who wouldn't like it, taking it up to the Court of Appeal.

We then have Trial I being proceeded with, on the basis of an order which says X. It then gets overturned, and we have a complete car crash.

Durham didn't matter because it was a limited costs cap in a tiny case.

Here, the jurisdictional question is, you know, really, quite important because if I go down your route and make an extremely prescriptive order – I hear what you say about the release of various buckles on the straitjacket – but nonetheless a very prescriptive order and proceed through Trial 2 on that basis, and then we discover that actually I've got it completely wrong, we have a real problem.

So I do think jurisdiction is a major issue here in terms of legal certainty.

MR CARPENTER: Well, of course the possibility of an appeal is always a difficult one to cater for, and these sorts of decisions are perhaps quintessentially ones which certainly in broader civil litigation are extremely hard to challenge on appeal, but of course one can't legislate against the possibility that someone will try.

But in terms of the read across from civil litigation into these proceedings, these mechanisms have been developed in broader civil litigation from essentially open textured rules and no more or less open textured rules than the Tribunal has.

And they have been the subject over time of a number of appeals to the Court of Appeal which have actually given rise to the well-understood approach in broader civil litigation.

Of course many of these claims began in the High Court and but for the existence of this specialist Tribunal would've remained and been tried there. They are private law damages claims, albeit of a specialist nature, which makes it sensible and expedient to try them in this Tribunal, but fundamentally what we say is that there is nothing about the inherent nature of the claims which makes it inappropriate to translate what

are well-understood approaches to cost in this sort of managed litigation – in private litigation more widely – into those proceedings.

Of course it's not just group litigation – we mentioned GLOs, sir – but actually, increasingly often, this is actually a point made in the textbook that we have in the Authorities Bundle, the recent trend actually is not to go forth with GLOs precisely because one can expect the courts are developing more and more flexible ways of dealing with the kinds of issues to which actually GLOs can be unnecessarily restrictive.

And so you don't need to have a GLO in order to get these sorts of cost orders. They can be done in managed litigation of any kind. What we say are the leading cases in this area, *Ward* and *Rowe,* are ones which are not GLO cases –

MR PRESIDENT: Mr Carpenter, you are making my point for me. Let's suppose I do what you really want on the list, which is to make a several costs order effectively and according to some formula, which I accept have got to follow.

I am not going to ask either Mr Jowell or Mr Draper what Visa or Mastercard will do in those circumstances, but an appeal has got to be on the cards. I mean, given the points that are being taken in this regard, there is obviously an issue here, and we – are going to get sucked into what actually is going on here. Is it a Tribunal bespoke process? Is it to be analogised to a GLO? Is it to be analogised to a High Court litigation outside the GLO?

We have already got a wonderful argument, which is asking itself, is the discretion that is being exercised actually a discretion or is it an error of law.

Now, in Durham, I thought it was rightly a discretion. I was wrong. Here, you are telling me I'm exercising a discretion, and I am saying it looks to me given how forward-looking the order is, that you want me to make, notwithstanding the wiggle room that you've given me in Paragraph 1 and elsewhere, it looks to me very much

like a rule-based order and not a discretionary-based order, and therefore, one that is very susceptible of challenge with all the legal uncertainty and disruption that will incur because we've got Trial I coming up now. If you had made this application 12 months ago, we could've had an expedited appeal of an order made in these -- and sorted it out. We have not got that luxury now.

So what I am putting to you, and when you've reached the end of your four general points, I want to take stock to see whether there will be some benefit after hearing anybody else who is rowing behind you on this order whether I would make a preliminary statement as to whether we ought to be debating the terms of an order or whether we'll be debating the terms of a guidance judgment because I see those two things as being extremely different, and I think shape differently in the submissions that I would hear in the course of the day.

So I say that by way of pushback on your first general point. Please respond to that and then do go through the other three general points that you had.

MR CARPENTER: Thank you, sir. If I may say so, with all due respect, it's something of a counsel of despair to say that they shouldn't make an order because of the risk that someone will appeal it.

As I say, no one can be stopped from seeking to appeal an order. If they end up being rejected, that will have turned out to be an expensive waste of time.

It's the purpose of these proceedings that I think may be important to stress. There is no suggestion that anybody's future conduct of these cases certainly is going to be affected by whether this order is made or not.

So your concern, sir, about the possibility of going through Trial I and then afterwards have another court say that actually this wasn't the right order to make should not, in my submission, cause any concern that that will in any way retrospectively affect or disrupt the way anyone would've approached Trial I and that you can have that

comfort.

Beyond that, I may not be able to say much more precisely because one can't prevent someone who doesn't like having an order that's made having a go appealing it, but given --

MR PRESIDENT: Of course my concern is not actually that there will be an appeal. As you say, that cannot be stopped and should not be stopped. My point is, I see rather more traction in that appeal.

I appreciate that vires is not being raised. I am raising it because I see it as a risk, and I do think that given the explicit aim of this order is actually to give legal certainty to all of the parties as to how really quite significant costs are going to be allocated amongst parties.

The idea that an overrule of an order like this is not going to introduce legal uncertainty, well, that's fanciful. I mean, the whole point of this is to give the parties a form of certainty which they absolutely should have, and my pushback is, is this the best way to achieve it?

MR CARPENTER: Well, sir, I am grateful for that indication of your thoughts. I mean, if ultimately it comes down to the difference between the formal order and guidance, we seek an order. We prefer certainty of an order, but if that is not as far as you are willing to go, sir, and instead you want to give guidance in the same grounds that we seek with the order, that would be welcomed also, but of course an order is what we seek, and we say it's something that the Tribunal has the power to do.

In the course of addressing that, I have covered my second point, which was novelty, and it not being an answer to the application simply that it has not been done before. Obviously, this whole private law competition jurisdiction and involving these sorts of numbers of parties is a maturing jurisdiction.

It cannot be said what we are seeking to do is overturn years of well-established

practice. I don't want to labour the point, but all we are seeking to do is actually introduce into these proceeding what does reflect here is well-established practise in the wider litigation field.

The third point to mention is the test. I think this is common ground but just so to be clear at the outset. It's ultimately what fairness demands in all the circumstances, and that comes from *Ward v Guinness Mahon*, and it's been applied in all the subsequent cases. I don't think there is any controversy about that.

The fourth general point to address is timing. All the parties who oppose the making of a CSO say that it shouldn't be made now or that there's no need to make it now because all of these issues can be addressed when the Tribunal actually makes a cost order.

What I say in response to that is two points. Firstly, the multiplicity of the disputes this application has actually thrown up and which will arise whenever a cost order is made actually demonstrate precisely the value of an advance order like this so that everybody knows where they stand.

And secondly, it is a curiosity of those submissions and an obvious tension in them, that they complained about the application having retrospective effect while submitting all of these issues should only be addressed at a time when the effect would be maximally retrospective.

If people are concerned about not having the playing field changed from what they thought it was after the event, then the answer to that is to make an order of this kind, even if it's only prospective. To what extent should it be retrospective? Obviously that's a separate question.

But there clearly are lots of prospective costs in these claims still to be incurred: Trial I, Trial II, and Trial III, and they benefit in an order being made even if only to that extent.

The uncertainty issues. In terms of the time, I anticipate, having and also knowing the number of parties who need to respond, I am going to have to cut my cloth accordingly, and therefore, I am going to leave a certain amount of what I would've said with our written submissions.

MR PRESIDENT: Now, Mr Carpenter, when you talk about issues, are you talking about why it is, for instance, that a joint and several order should be made and the granularity of the Scheme that you are promoting? Have I got you right?

MR CARPENTER: In fact, what I was going to do is address each of the three broad themes and the particular issues which have been thrown up in relation to them by the other parties, yes.

MR PRESIDENT: That is helpful, Mr Carpenter. The reason why I am raising that is because it seems to me that the shape of how you articulate those points and indeed how the other parties are likely to respond is going to make -- is going to be different, according to whether we are talking about an order or whether we are talking about a guidance judgment.

I think on all the points that I've got on my list of things to be discussed, I can see that you would be likely to be emphasising the objectives. The objectives stay the same, but emphasising objectives is different.

So I think -- but I am waiting for a pushback on this -- I think it would be helpful if we were clear going forward and whether we would be debating an order or whether we would be debating guidance, and what I had in mind was actually giving a short ruling on that; so everyone knows where they stand.

So that's why I am asking whether we've reached the bright line between advocating for an order and here is why versus the content of the order, which is something which I think can be beneficially shaped by my indicating the direction of travel going forward. So that's why I raise it now.

MR CARPENTER: Sir, obviously any indication of direction of travel is helpful. I am not sure that my submissions would really be much different, depending on whether what you had in mind, sir, was to make an order or to give guidance, because we would hope that any guidance would essentially be to the effect that on the issues which have been thrown up by this application such as several versus joint and several liability, and sharing per capita and sharing pro rata, the Tribunal's present view is that subject to whatever may happen in the future, this is likely to be the right approach or something along those lines but not as prescriptive as the order, but I would still need to address you on the basic issue of several versus joint and several per capita versus pro rata, for example.

MR PRESIDENT: Mr Carpenter, I positively welcome submissions, and it seems we must have the time to develop those. It's just that certainly the questions I would be asking you are likely to be quite different according to the route that we go down, and that may be a peculiarity in the way I am seeing it, but if it's not going to [AUDIO FADED] you and subject to hearing from anybody else who is pushing for an order rather than guidance, what I will do, I am going to pause your submission now, hear from anybody else who wants to support you in your preference of an order, and then we will see where we go.

So is there anybody who is in the Carpenter, “I want an order" boat? If so, then I would be delighted to hear from you. If there are others around who are obviously opposed to the content of the order but more substantively opposed to an order *per se*, then I have got in mind the guidance, then we can debate whether such guidance should be given or whether it shouldn't. I need you to articulate to me why an order is appropriate.

I've got all of those points well in mind, and I think a round of submissions or not would be a waste of everybody's time. So I'm interested in those who have something

positive to say about Mr Carpenter's primary submission, recognising that the difference between an order and guidance may be rather less, depending on what the guidance or the order say.

MR LASK: Good morning. I act for the Allianz Claimants. I will be brief. The Allianz Claimants support the application for an order in broad terms, although as you may have seen from the correspondence, we align with the Respondent Claimants, represented by Mr Jones, when it comes to the parameters of the order.

The key reason we support the making of an order is because we say it does promote certainty as submitted by Mr Carpenter.

Allianz is particularly concerned with the settlement issue that has already been debated to some extent this morning, in particular the prospect that without some form of order, Allianz could be facing a very large bill for the Defendants' cost, if multiple Claimants drop out of the picture as a result of further settlements.

I don't have anything further to say on why an order should be made. We gratefully adopt Mr Carpenter's submissions in that regard.

And if the Tribunal is not minded to make an order, we would welcome a ruling that gives guidance along the lines articulated by yourself, sir, and we would be particularly grateful if that guidance would cover the settlement issue that I've referred to on which we understand from the comment you made, sir, the Tribunal may have some sympathy with the concerns I have articulated.

That's all I need to say, sir. At this stage.

MR PRESIDENT: Very grateful to you, Mr Lask.

Does anybody else have anything to say on the narrow points I've framed?

Very grateful. I would expand on the reasons why I am going to take this course in the judgment that I will reserve and in due course hand down in the totality of these issues. I am satisfied that I should direct the submissions that I'm going to hear on the

basis that I will not be making an order along the lines articulated by some of the Claimants in Tab 2 of the Bundle before me, which is a draft cost sharing order.

That does not mean to say that I may not make a more limited order depending on the way the submissions go, but my primary intention is that this is a case that is appropriate for a guidance judgment setting out a starting point that but no more of how the Tribunal will approach questions of cost rather than to have a straitjacketed order which more or less directs, subject to wiggle room, how these weighted good cost questions ought to be articulated.

RULING

The reason I am making this ruling now as to how I want to hear submissions is because it does seem to me that it will materially affect how those submissions are made.

If we go down the order route, then we will have a great deal of debate about precisely how shares of common costs are to be calculated. There will be enormous amount of granularity because the whole point of this order is to impose, subject to wiggle room, certainty going forward, and that is precisely the problem.

We are dealing with enormously complex litigation, which is in terms of serious costs being incurred at the relatively early stages. We are before the first major substantive trial in these proceedings. Trial I begins in the middle of February. We have Trial II, another enormous trial at the end of the year. There is a Trial III, not listed, but anticipated.

Of course past costs have incurred over the years, but we are in the ground where we can see the enormity of the costs parties are going to be incurring and the critical importance of how the Tribunal is going to deal with the incidents of those costs when the time comes to make a costs order.

The parties are entitled to as much certainty as the Tribunal can give them, but certainty always comes at the price of inflexibility, and inflexibility is, it seems to me, the problem with the order that I am being invited to make, and which to be clear, I am not going to be making today.

It seems to me that unless one reads the opening words, “unless the Tribunal orders otherwise”, as imposing precisely the sort of flexibility that the guidance judgment has intrinsically, we are heading for dangerous waters in three respects.

First of all, it seems to me that there is a real risk that there will be a challenge to the Tribunal's order on the basis that it has exceeded discretion and made a rule of law regarding costs which ought to be reviewed on appeal and which would not benefit from the broad discretionary generosity that is accorded to first instance tribunals.

Secondly, it seems to me that irrespective of the question of challenge, the likelihood of there being multiple exceptional cases which do not fit into the template of this order is more likely than not, and therefore, it seems to me a prescriptive order is wrong in principle, and guidance is right.

Thirdly, there is the wider picture. It is perhaps not a coincidence that exactly this point is being raised in the similar but subject matter wise a very different litigation of the Trucks. Where you've two litigations, it seems to me clear that it would be wrong to impose an order where it's likely to be translated across other cases, notably the Trucks litigation. Without having the Trucks litigants before me, that certainly does not arise with a guidance judgment where there is a degree of flexibility.

In other words, I do not want to have a situation where in one case I make a very specific order -- although it won't -- which is intended to resolve in this case something of a common problem, which then will be read across to Trucks.

The problem with that is either I read it across, in which case the Trucks Litigants will say, "We haven't got a chance to submit this."

Or one doesn't and will now have the problem of inconsistent orders in cases which essentially are raising the same sorts of problems.

And so it seems to me that the wider picture also is something that I ought as a tertiary point to bear in mind.

So for all of those reasons which, as I say, I will include and expand upon in the reserved judgment on this. I am going to indicate very clearly that I want submissions to be directed to the guidance that should be given rather than to a prescriptive or semi-prescriptive order.

I want to conclude on this point. It does seem to me that to the extent criticisms were made of this application being raised, they were entirely misconceived. I am enormously grateful to SSH for raising this issue. These points are really very, very important, and I welcome the opportunity to address them in the guidance judgment.

It does seem to me that the fact I'm not giving Mr Carpenter what was his first position, namely, an order along the lines of the draft costs sharing order in no way should detract from the gratitude that everyone should have that these points are now being aired, so that whatever guidance can appropriately being given is given before the commencement of Trial I. It seems to me important that that point be made here and now.

We have a transcriber. Would this be a good time to give the transcriber a break?

MR CARPENTER: Yes, certainly.

MR PRESIDENT: Thank you, Mr Carpenter. Just to list the points on which I think guidance is likely to be required, it will be the Tribunal's approach to stayed claims. It will be the extent to which whether it is a large or a material settlement between a body of Claimants and Visa and/or Mastercard, whether the court needs to be consulted and whether the court's permission to exit the litigation by the Claimants is something which will require specific articulation of the effect of that departure on the costs burden

on those who remain in the rump.

Thirdly, joint and several, whether one could indicate that there would be no specific order but a general approach and what that approach should be. Third point.

Fourthly, the court's approach to lead claims or lead points and how those will be viewed in terms of which parties incurred those and whether they should be regarded as they were pan Claimant or pan end of points.

Fifthly, the relevance and the extent to which it should be required for funded litigation -- information. That's my list. I suspect it could be added to if I've made points which don't trouble the parties, then please do tell me, and we can remove them from the list, but I throw those in as thinking material.

It's now a quarter to. We will resume at five to midday. Thank you very much.

(Break.)

MR PRESIDENT: Welcome back, Mr Carpenter, over to you.

MR CARPENTER: Thank you very much. I should resume by saying something about timing. There's been some discussion between timing between counsel before. I was due to finish my opening submissions in 17 minutes' time. Obviously it has taken a slightly different and perhaps unexpected course, and I can say there is no realistic possibility that I can address you on the issues you want to be addressed in that time. So I hope the Tribunal and the other parties will indulge me to some extent in needing a bit longer than that to be able to develop my submissions.

I propose, sir, you having given that very helpful list of points you are interested in to address them in that order which I hope will be helpful. So I will start with the position stayed claims. Obviously what I say is intended to apply to those, if indeed it is still a separate category of Claimants who propose to pick and choose the trial they take part in, certainly my submission is that actually, they are active and the recent order that you have made, sir, really accorded that.

They may not be represented in Trial I, but if you are active, you are active for your purposes. We will certainly say you are exposed to cost for all purposes, and it is only the stayed Claimants who need particular consideration.

In relation to those, I would make seven points.

The first is that all parties who issue claims should do so in the expectation that if their claims fall, they will have to pay costs.

The second point is that these Claimants were stayed on the express basis that the Claimants would be bound by the result.

Now, obviously whether that is ultimately a benefit or a burden will depend only on the result, it does mean that the stayed Claimants stand to benefit from success achieved by others without having to lift a finger.

Now, those who represent the position of stayed Claimants and object to that, say they have no ability to influence the litigation, but in my submission, the quid pro quo for that is not having to incur their own cost, which taking a more active part in the litigation would entail.

Obviously to date, they have trusted those who have been more active to run the claims competently. If they were concerned that the way the litigation is being run, it would've been open to them to become more active and more have chosen to do so. So we say there is nothing in that.

The third point is that the Authorities make clear that in managed litigation generally, the category of claimants who should pay any cost in issue are those that stood to benefit.

I will at this point, if I may, go to the Authorities for the first time. Starting with *Rowe*, which is a case which I imagine we'll come back to a few times. It's at Tab 8 in the Authorities Bundle. I will pick it up at Page 91, Paragraph 24.

MR PRESIDENT: Yes.

MR CARPENTER: Actually, not so much a dictum of Mr Justice Nugee himself in *Rowe* but that a quotation from an earlier case, *Nationwide Building Society v Various Solicitors,* which is referred to in Paragraph 24, an example of several liability.

Where it says: "Although the Nationwide managed litigation is not a group action of the kind

considered in *Ward* v Guinness Mahon & Co it is not relevantly different. The task is to define the Defendants who can fairly be said to have benefited from the litigation among whom the burden of any order apportioning the generic costs should be shared."

That was the case that cost sharing is on the defendant's side, not the claimants. In my submission, supports the proposition.

Then we also see it in the same case at Paragraph 55, Page 99, where Mr Justice Nugee said in the second half of that paragraph: "The general principle does not seem to me to be difficult to state, which is that all the Claimants who were potentially interested in the part of the case on which the costs were incurred should bear an apportioned part of

The liability for the defendant's costs insofar as they were common cost."

Point 4, it is fundamentally unfair for some of the Claimants to have a privileged stay and be able to pursue the litigation risk free, and in support of that proposition, I rely on what Mr Justice Hildyard said in the *RBS* Rights litigation. You will find that behind Tab 5 in the Authorities Bundle, and I will pick that up at page 51, Paragraph 46.

It might be easiest to begin by just inviting you, sir, to read Paragraph 46, which encapsulates the position which the group of potential Claimants want to adopt, and which, I would submit, is really almost an exact description of what the stayed Claimants in these proceedings want to achieve.

MR PRESIDENT: Yes. I've read 46. I've read that. Thank you.

MR CARPENTER: And then you will note what is said rather – in the following Paragraph, that: "It would enable claimants to avoid any costs liability for litigation being conducted by others by waiting on the sidelines to see whether the case has been won or lost. It has the obvious attractions of a permitted bet on the 2.30 race at 4 o'clock."

MR PRESIDENT: That is precisely not this case. Let me put it to you how I see it as working, and you can tell me why I've described it wrongly. We are corralling the Claimants at an early stage, and let me make it clear, what I was saying is based upon -- let's take the first order that was made in the Interchange Fee litigation for a stay, and we had a debate about the disclosure and the binding.

This was not a situation where as here, you are saying you can wait on the side lines and then decide to relitigate if you don't like the result, which was a very real concern at the time.

The reason we said you can get out or, rather, have a stay, you get it only if you agree to be bound, and that is, I think an unusual case arising out of the *Ashmore* decision from the Court of Appeal, where it was to avoid that risk, consistent with *Ashmore,* by actually embodying an order.

That makes me question whether your citation of *RBS* is altogether appropriate here. It does seem to me that what you are buying by a stay is you are contracting out but abiding by the arguments in which you have no influence of other people, and of course you are right, you don't incur your costs going forward, but equally, those who are progressing the litigation as active Claimants know exactly what they are doing, and I would be quite surprised -- maybe I am wrong -- was if you are thinking of the Claimant class, we can claw some of it back from the stayed claimants.

One of the advantages in this matter being raised is if that is the expectation, we can work out whether it is legitimate or not.

MR CARPENTER: Of course, sir, that would have been the effect of the CSO having been made so that is undoubtedly something on which the parties would welcome guidance in the absence of CSO.

To answer this specific question that you've just put to me, it may be what really is a criticism of, although Mr Nugee analogy wasn't entirely -- because it's because not a question of when you place the bet. This is why it's important to look at Paragraph 46 and see what was being proposed by Mr Snowden as he then was for those Claimants, because it wasn't that they could wait on the sidelines and decide whether to bring the claims at all once the result was known; it's that they would join the GLO -- recognise they would have to -- they will be bound by any decision in relation to GLO issues but nevertheless should be able to choose to have their claims parked not actively progressedi, and whilst parked, all subject to such a stay, not allowed to contribute to Claimant's common cost.

So I do say that is an exact description of the position of the stayed Claimants in these proceedings. They have brought their claims. Those claims have been parked. They are bound by the outcome, but they want to achieve the benefit of any success without having to take on the risk of paying adverse cost if they lose.

MR PRESIDENT: I appreciate that, but of course you are missing the significance of *Ashmore* because one of the things the Tribunal has been doing is it hasn't just saying, "Well, we've got these Claimants."

We have had more than one eye on the *Ashmore* case. We don't want Johnny Come Lately's coming in, saying, "Oh, we see this litigation. We weren't parties at all. We will now bring our claim."

What we have been saying or trying to say is, "We want everybody in before the courts.

You can then decide whether you stay or not, subject to the two conditions that we impose: disclosure and binding."

But we have been pressing people to come in. We have not been saying, "We are indifferent to the participation before the Tribunal."

Following the Court of Appeal's direction in the Sainsbury's case, where it was said that the High Court case should be paused and warehoused in the CAT because of the risk of inconsistent results.

What happened is that it's been a sweeping out. These have not been made without the court's thought. The Chancery Division and the Commercial Court have been conducting a broom exercise of pushing these cases out, transferring to the CAT, and I don't think one can say these are voluntarily before the court.

They are before the court because of the transfer, and what we are doing is we are saying, "We don't want you to discontinue to or abandon the claim. We are saying we want you to be bound. We like that consistency, but we don't want to force you to participate, and that, I think is a difference -- maybe I'm wrong -- but it does seem to be a difference between the Mr Snowden QC proposal in 46 and the situation that we are in here.

MR CARPENTER: I think there may be three points to make in response to that.

Obviously insofar as the Tribunal has sought to corral all these Claimants and encourage them to bring their claims now, that is analogous to the GLO, under which you essentially were in operation have no choice but to bring your claim within it.

And insofar as it's a question of what people have the right to do or might be forced to do -- the Card Scheme response to the CSO application -- is that individual Claimants don't have a right to have their claims heard by themselves.

If there are very many claims which raise the issues, the court absolutely has the right, if not a duty, for the sake of -- more widely, to bring those claims together and manage

them in some sensible way, and parties who don't want to part of that may say they don't want to, but obviously it's within the court's power to ensure that that happens whether or not individual parties like it.

The third point relate to the comparison between this and the Sainsbury's situation. I want to come on to that separately. That was going to be my fifth point, if I may.

But before I do, I would really like to finish with the *RBS* case. The observations made by Mr Justice Hildyard in more general terms, in Paragraph, 51 over the page, which I do say are apt.

MR PRESIDENT: Yes.

MR CARPENTER: And again, it's 51(1), first of all, he notes what the principal objectives of the GLO are: "One of the principal objectives of a GLO being to corral all claims with a view to the economic adjudication of common issues and the avoidance of separate trials (and the likelihood of expensive duplication and the risk of inconsistent decisions), directions should be fashioned to encourage all Claimants to co-operate together, pool resources and bring forward all their arguments at once."

Then 3: "It is not consistent with these objectives, nor is it fair, to provide for privileged. 'observer status' without risk in respect of adverse costs nor contribution to Claimants' common costs."

That's a separate issue we are not concerned with.

Then 4: "Costs-sharing is a fundamental feature and advantage of a GLO: Subject to special circumstances, or any special arrangements agreed between group members inter se as to sharing within that group: All Claimants (whether active or passive, stayed or not) should be subject to the same regime of common costs liability as regards both adverse and own costs, including those incurred prior to issue of their own proceedings."

Those are statements in my submission which are not unique to

GLOs. They are applicable to all forms of managed litigation including this.

Point 5, I said I was going to raise the Sainsbury's question here, and I do. Sainsbury's is really in my submission a very stark demonstration of the particular benefit that Claimants, including stayed Claimants, get by taking part in these proceedings because they are bound by the outcome for [AUDIO FADED].

In many of the responses to our application, comparison is made between what is said to be the sort of default position when you have a number of unrelated claims, and you've got one particularly large Claimants proceeding effectively as a tested case, the outcome which may well determine what happens in the remaining cases, and of course in those cases I quite accept there is no sort of cost sharing between Claimants who are simply bobbing in the water, waiting to find out what happens with the largest case, but Sainsbury's demonstrates what can then happen because what we got was a succession of inconsistent first instance decisions going in different directions, demonstrating very clearly, for example, the Card Scheme's desire to relitigate issues where they can.

So the fact that what you get through Claimants being bound by any outcome that they are not actively involved in, far from being a burden, it's an enormous benefit to them because it means success in the claims is success in their claim.

There's no question of anything then being relitigated in relation to them, and so there is a very clear difference between the sort of Scheme that we have in place here and matters as they pertain prior to Sainsbury's.

MR PRESIDENT: I am not sure that's right. Let's go to the debate that we had in the Trucks Wave II litigation, where there was an argument about whether one adopts the Trucks I Wave model or adopts the "let's try them by the issues" model.

Now, both of those regimes are consistent with the Court of Appeal's approach in Sainsbury's, the desire to avoid inconsistent results. It's just that in one case, you say,

"Let's try a test case first, this Trucks I, Trucks II, Trucks III," and try to learn by experience going forward, but costs lying where they fall in those individual pieces of litigation, versus the model here, where because the earlier cases are not necessarily good guides to later cases either because they are a little bit too idiosyncratic or because they go away and settle, you pivot to an alternative to issue-based approach, but why should the costs regime be so dramatically different that you can give them what they have already intended, at least, to be similar ways to slice a cat?

MR CARPENTER: Sir, as I understand it, the first cost regime which will apply in Trucks is yet to be worked out --

MR PRESIDENT: Indeed. That's why this hearing is so useful.

MR CARPENTER: Of course cases which are managed in different ways may also necessarily be cost managed in different way. It's very important to understand the case management is the master of the cost management and not vice versa.

My understanding is that Trucks is being case managed on the basis that results are expressly not binding on other claims, and if I'm right about that, it's obviously very important, and I would say crucial distinction between those proceedings and these.

It's precisely because, again, as in other managed litigation in GLOs, that those who are on the sidelines will directly and in their cases get the benefit of the cases in relation to the claims of more active Claimants.

What that brings with it, as Mr Justice Hildyard has said, is the obligation to contribute if things go south.

MR PRESIDENT: Mr Carpenter, you are obviously right. Trucks I was run as a self-standing litigation, and on that regime the costs lay according to the outcome of that litigation with no effect on any other parties, but that is to, I think miss the thinking behind Mr Justice Peter Roth's direction as to how the Trucks I litigation should be run, which was that there would be an informed understanding that the Tribunal would be

following a similar legal approach in the earlier cases, in the later cases, and therefore, one would hope that the issues would drop off.

Now, how far that actually worked is unfortunately impossible to tell. It may be that the settlement of Trucks II and the settlement of Trucks III is causatively linked to the outcome in Trucks I or it is not.

One of the big problems we've got is we don't know, but the fact is that if there was a benefit, then the later litigants did not pay for it.

Now, you say yes, they are not bound, and of course that is the problem with these cases. They aren't sufficiently cookie cutter to enable you to say, "If I decide this case, then you are going to lose your case when you bring it later."

But the same question of benefit and bindingness, it's not really the point. What we are trying to do is knock on the head a large number of disputes at once. If we try them all individually, it would be the next 30 years. That's one way of grappling with, and these are simply two different ways of grappling with that problem.

MR CARPENTER: They may also therefore merit two different ways of managing the cost.

There is another benefit to mention about the way these proceedings are being conducted, which is because they are trials effectively of all the claims, if groups of Claimants do settle, and that's the concern, for example, that has been raised by the Primark Group in their skeleton argument, because of the way they are being managed, in principle, others can step up and pick up the ball and run with it from there.

The difficultly you can have in the test case structure is that you think something's going to be a test case, and then it settles. Anybody coming behind has to start basically from scratch. There's no question of stepping the shoes of the entity that's just settled. In principle, it can happen here.

So again, there is another potential benefit of proceeding in the way that we are, but it also highlights the fact that this is in a sense a common enterprise. There's a single bus heading in the same direction, and everybody on the bus should pay for a ticket.

MR PRESIDENT: We are going up to a point. I mean, I am reminded of the extraordinary problems that arose -- entirely understandably, and I want to be clear this is no criticism of the central parties -- but when Visa reached the settlement with a large group of Claimants here, the fact that we have to re-engineer the selection, sampling process because certain people were no longer present in the litigation, and it wasn't a question about passing the ball onto someone else; it was a question of one ball being taken away and another rather different-shaped ball, rather less satisfactorily shaped, but as I think Mr Draper will recall, being substituted.

MR CARPENTER: Yes. Well, sir, I think I've made the points I need to make --

MR PRESIDENT: Yes, you have. I am very grateful.

MR CARPENTER: I probably do need to move on. I have two more points to make. There should be no perverse incentive for people to seek to have their claims stayed simply to gain a procedural advantage. I mean, of course all solicitors acting for Claimants in these proceedings must advise their clients what is in their client's best interest. One is potentially going to have problems if the advice that would have to be given to every client is, it is in your best interest to have your claim stayed and let someone else run this for your benefit, at a cost risk.

But I am sure at this late stage any application for a stay in advance of Trial I or even possibly Trial II would not be acceded to by the Tribunal, but it's not fanciful to suggest that assuming success at Trials I and II, with everything planned for at Trial III, everybody at that point may actually think, "Well, I'd rather like to have my claim stayed now. Someone else can run Trial III, and they can take the risk if it all goes wrong."

I would suggest that's not an absurd scenario because consistently with their duties to

their clients, it may be that the Claimants' solicitors would have to advise their clients that is what they should do. That is the sort of perverse litigation behaviour that one should be keen to avoid.

MR PRESIDENT: Again, Mr Carpenter, that is an extremely valuable point. You are absolutely right. It seems to me that the point in time at which a stay is sought is a significantly material consideration as to what the costs consequence should be, and one might take -- let's go back to Richer Sounds as being at one extreme. There was an application made when we actually launched the issues-based approach that we have been following; so it's made at the earliest possible opportunity. Richer Sounds' position was "please don't sample us. We would like to be non-sampled."

You are right. A stay at Trial III is absolutely at the other end of the extreme of a stay at the beginning, but equally -- and you haven't mentioned this and I throw out that you can -- was the debate about the exceptions regime. It's this the Tribunal has been quite hostile to.

We don't like the idea of there being a generic judgment, which then has built within it a whole series of exceptions, enabling those points that differentiate parties to be litigated ad nauseam after the judgment is being handed down.

So we have been very careful not to articulate the circled exceptions regime. The consequences of that is that there are a number of parties -- Mr Jones's clients are perhaps the best example, people who were initially non-stayed, non-active, who now become entirely appropriately, rather more active. So they are not stayed. They have been forced out of the woodwork because we are not very keen on exceptions regime. And in a sense, you might expect that the people who are staying are paying quite a burden for not participating because these are not cookie cutter cases. If you are a party subject to a particular pass-on state of affairs and seems to be the case of everyone on the side of a pass-on is settled, in terms of difference.

If you are in a peculiar sector, then your choice at the moment is either you come in, in which come you are not stayed, or you say, "Well, I'll take the risk that my differences will not matter", and why in those circumstances, having taken what is already unsatisfactory outcome, if you are different, then why should you be exposed to cost? Assuming you've taken that stayed decision at an appropriately early stage?

MR CARPENTER: Thank you, sir. I think there may be three points. Firstly, I can quite see that the position could be different in respect of those Claimants who have always been stayed. I don't say it should be, but I obviously acknowledge the potential distinction exists there.

The second is that you express, sir, the position of stayed Claimants, vis a vis Trial II, as being one of risk, but I would put it in terms of benefit. If you have been stayed, the result of Trial I and Trial II, subject of course to Trial II, is essentially you are handed your claim on a plate. You are handed liability through Trial I, and through Trial II you are handed in fact quantum.

Again, that is a benefit. You have got to that point without having spent a penny on your own cost and also, if they would have it without risking a penny in terms of adverse cost.

As for the exceptions regime, I'm aware of course of how the issue arises. If the concern is that it's not fair on stayed Claimants if, let's say, the likes of Ocado want to come along and say, "Whatever you decide for supermarkets generally doesn't apply to us," they would very obviously, in my submission, be costs which only be for Ocado's accounts, if that is the account that you are sitting there and this enormous entity like Ocado taking it upon themselves to have cost incurred because it wants to be regarded as an exception, well, those would never, one would expect, be for the account of the Claimants group more generally anyway.

MR PRESIDENT: Mr Jones, I hope you are taking note of that because I would be

interested in whether large entities who have come in are content to accept that description of the costs they incurred.

Now, I appreciate we are probably talking more pass-on than the overcharge, but nevertheless I would be interested to know whether that label is one which is a common one amongst the earliest parties in terms of how these costs are seen.

MR JONES: Yes, sir, I will certainly pick that up. Thank you.

MR PRESIDENT: That was just a note for me as well as Mr Jones.

MR CARPENTER: Thank you, sir. That's the seventh of my seven points. It's simply this. It's a forensic point, but in my submission it is a valid one. In all the responses on behalf of the stayed Claimants or made the position of the stayed Claimants to this application, of course they all said that it would be unfair to require stayed Claimants now to contribute to cost.

Not one actually said that if they had known they were faced with any cost exposure that would've affected their position in relation to the litigation. Not one said they would've changed to become active. Not one said they would've never proceeded with their claims or would've ended their claims. Not one said that the CSO that is being sought would force them into discontinuance or settle on the terms.

So if we are considering matters like prejudice, what I really say is that being disabused of the false hope that you might be able regard these proceedings as a one-way bet, is not prejudice. No one is saying that they would be retrospectively denied that they have made a decision which they would have liked to make if they had known what was coming.

MR PRESIDENT: Again, Mr Carpenter, don't worry about time. These are -- in a sense I am using you as a punch bag for a number of points that are troubling me. We will go for as long as it is useful, and you needn't look at the clock.

But one of the benefits, viewing it from a Tribunal case management perspective of

stays, is this, we have got to have in mind the overall fairness of these proceedings, and it's one of the hugely difficult case management challenges of trying to contain all interested parties in a single courtroom in proceedings that are manageable.

Now, it inevitably requires a pushing -- not so much of the Defendants. There are only two of them -- pushing of the Claimants into camps, and that has deficiencies, but it also makes the whole process workable.

Now, one of the ways in which one achieves workability is one says, "If you are stayed, the Tribunal doesn't actually have to worry about you."

Because you've got a stayed claim which you can revive as and when you wish it, the Tribunal can just sit back and think, "Well, I really need to manage the issues that the active parties are bringing before the Tribunal for it to resolve, and we know that all of the stayed Claimants have their own lawyers." If they see the Tribunal going off in a direction it doesn't like or submissions being made in a way they don't like or points being argued by the Claimants camp provisionally ally, which they don't like, then they can come back in, and we can work out the basis on which they did.

But until that happens, we can take the bunch of stayed Claimants and park them in the "doesn't matter for now" allocation, which is looking at it in terms of procedural fairness, hugely important for the Tribunal's case management functions, and maybe what I am putting to you is that enormous advantage, both to the Tribunal and the parties who litigate having a fair process, is something that needs to be incentivised, and one of the ways to incentivising it is to say, "Well, if you stay and 'say nothing to do with me until I choose to reengage,' you get a reward in the costs exposure but only in the costs you don't incur yourself."

MR CARPENTER: Sir, my response to that is no such incentive is required. The incentive, as I've already said, is that you get the result without having to pay your own lawyers for it, but the [AUDIO FADED] role is one that is not necessary and which is a

matter of principle, as articulated in the *RBS* Rights case, is not justified.

And of course these concerns are not unique to these sorts of proceedings in this Tribunal in the GLO context or outside of a formal GLO. It is quite common to stayed claims which are not proceeding as lead claims or test case, and that expressly does not carry with it an immunity from adverse cost.

One sees that. We have it in the Bundle. It's in the Authorities Bundle. We have got the relevant parts of CPR19 and 46, which show you what the position is in relation to formal GLOs.

It is quite clear that you can be stayed, but you are going to share in any adverse cost.

So we would say this is a well-established balancing of interests. It's a benefit to the Tribunal; of course it is. It's a benefit to the Defendants as well, and that's relevant to the issue of several; joint and several. It is very much a benefit to all the Claimants.

I will move on then from there to your second item on the agenda, which is the position of settled Claimants. Now, the principle in my submission, shouldn't seriously be in dispute, which is that whether you've got a CSO or not, where there is a group of Claimants in relation to whom cost would have been common, and those Claimants settled their claims, they take away with them whatever is an appropriate share of the common costs.

In fact, this is not a theoretical issue. Right now this is a very live issue in relation to the Volvo Limitation on costs, which of course you will not see today. I am not asking you to make any decision on that.

Undoubtedly, such guidance as you give is going to be very relevant to that because the Stephenson Harwood and Scott +Scott Claimants have taken the point post HK Settlement that that does necessarily affect the cost, which the Card Scheme can now seek from them in relation to Volvo, and the Card Scheme do not can accept that.

So the principle is established in my submission and can be demonstrated by

reference to a couple of cases in the Authorities Bundle.

Firstly, the Sales case, which I mentioned earlier in relation to Paragraph 11 of the CSO, but it also has something to say about risk. That's at Tab 4 in the Authorities Bundle, Page 34, at the very bottom of the page.

It's actually a quote from another case, from Mr Justice May in a case called *Foster*. He said: "If Plaintiff leave the group" -- this is the very bottom of the page, sir -- "If plaintiffs leave the group by settlement or discontinuance before the conclusion of the litigation when a general costs order is made, a calculation should be made to withdraw from the plaintiffs' central costs and from the

Defendants' costs a fraction of each of the then totals whose denominator is the number of plaintiffs then in the group before the departing plaintiff leaves."

Now, of course that was part of a cost sharing order, but one which reflect what is obviously the principle position, and we see it again expressed more generally as a principle in the SFO, which is behind Tab 13 --

MR PRESIDENT: Just pulling that out. I think it's common ground that it hasn't happened in the Visa Claimant settlements that occurred before Christmas. I don't know if that's right or wrong. I think that's right, but it does seem to me that that is a very clear indication of the need for guidance, but also that if the costs that had hereto been incurred were not in some way compensated, that certainly wasn't clear to me, and I may have forgotten.

But it does seem to me that we need to understand what the parties have been doing in the past to appreciate what sort of guidance ought to be given in the future because what happened in the past is at the very least is an indication of how the parties in settlement.

MR CARPENTER: When you say it hasn't happened, sir, maybe what you meant -- and forgive me; of course you'll correct if I've misunderstood -- is that no

specific direction was sought from the Tribunal when the Tribunal approved the first stay and then withdrawal of the HK Claimants' claim.

MR PRESIDENT: We just made the order permitting the withdrawal of the claim. So we know nothing more about the terms of the settlement, but it may be that that is something which has been addressed.

Now, I don't know, but it does seem to me that it -- you or someone can't help me -- but someone, I think is going to have to give me some idea as to what the general expectations are because one would expect that point to be made totally clear to the non-settling parties so that they know whether they are going to be faced with an increasing proportion of costs going forward or whether in fact a certain number of costs have been taken out of the pool because they have been taken into account in the settlement.

Now, I don't know.

MR CARPENTER: What we say, sir, fundamentally is it depends on the particular terms of the settlement [AUDIO FADED] requires any direction of the Tribunal. It's simply a matter of principle that can't absolutely be actually altered by the terms of the settlement.

Now we'll have to be careful getting into the specifics of the Volvo Limitation costs because, as you said, you're not [INAUDIBLE] today, and no one is asking you to make --

MR PRESIDENT: I would rather stay out of the Volvo Limitation costs and take instead the example that is much less [AUDIO FADED] and more, I think pertinent to the sort of things that we are only to be getting here, which is where you get in the course of proceedings a number of parties reaching a deal -- a significant deal -- with one of the Schemes, but I think not the other, where I know nothing more than that.

But it does seem to me -- maybe I am just barking up the wrong tree -- but I fear that

the idea that one could come years after the event and say, "Well, as regards the very significant costs that have been incurred at the time of the settlement, we are going to stick you with them," that seems to me a little strange.

MR CARPENTER: Well, I would agree, sir, respectfully, and that is of course the point that we make, but we also say of course specific guidance from the Tribunal would be very welcome, but as an application of principle, it doesn't require a direction from the Tribunal. It doesn't require an order to be made when the settlement is reached, and it certainly doesn't require anything to be included in the terms of settlement.

One would generally assume that settlements in this case -- and we understand this to be what happened with the HK Claimants -- are going to be for undifferentiated sums, which are not going to distinguish damages and costs, but again, to be full and final settlements. That's what you would expect. It'd be unusual for it to be any different terms.

But other than that, sir, you don't need to enquire into what was the cost element. The only principle that needs to be applied is that whatever the terms of the settlement, when somebody drops out who notionally carried out a share of any common cost, they take that share with them, and that precisely prevents the reductio ad absurdum of the last Claimant standing, facing a bill for the entirety of the Defendants' common cost.

We say that simply can't happen, and it's very easy to demonstrate that it can't happen. Can I show you, sir, the other case I was going to refer to. It's the SFO case at Tab 13 of the Authorities Bundle, from Page 202.

MR PRESIDENT: Yes.

MR CARPENTER: Judgment of Mr Justice Foxton, Paragraph 5 in the second half of it, which in my submission -- expression of principle of, as I rely on. In the second half of Paragraph 5: "The principle that parties who reach settlements in continuing.

Litigation should not be able to visit the entirety of the costs of their disputes inter se up to the point of settlement on those parties who carry on litigating derives some support from the decision of the Court of Appeal in Dufoo v Tolaini [2014] 6 Costs LR 1106, to which Mr Pickering QC referred me. While both the context in which the issue arose in that case, and the mechanism adopted to address it, differ from the position before me, the decision reflects the fact that such a Settlement does not have the effect that costs which would otherwise have been recoverable from a number of Defendants (with rights of contribution inter se) are thereafter to be paid in their entirety by those Defendants who do not settle."

In my submission, that's a clear expression of precisely the principle, and it does not matter whether one agrees or not with my submission that it does not require the direction of the Tribunal because clearly so you are mind to give some guidance on it, but the direction of that guidance, in my submission, can only be one way, which is precisely in accordance with the concern that you have expressed, that Claimants who settled take with them any ability of the Defendants in the future to look to remaining Claimants for any share of common cost which would otherwise have been foisted onto those settling Claimants.

I don't think I really need to say anymore. That's something that I haven't addressed.

MR PRESIDENT: I think you will have to say something more. Let me just get an example where I think I see a problem, but maybe it's not a problem at all.

Let's suppose we've got a group of Claimants, C's 1 through 15, suing two Schemes -- Scheme 1 and Scheme 2 -- and Claimants 1 to 10 of 15 settled against Scheme 1, and they have no claims against Scheme 2, but they are in litigation involving Scheme 2 by the remaining people who are also suing Scheme 1.

And they get a hundred pounds plus an undertaking that Scheme 1 will not seek to recover costs from them at any time in the future, that Scheme 1's costs are left out of

the account, and let us suppose there is a contribution to the costs of C1 through 10, but the settled amount is perhaps less than one might otherwise have desired because of the high level of the costs incurred by C's 1 through 10.

So we've got a limited costs arrangement between Scheme 1 and a pool of Claimants, which doesn't affect Claimants 11 through 15.

Now, to what extent do the terms of those settlement inform any future costs order that might be made as regards the apportionment of costs between the entirety of the group of C1 through 15 as regards the costs incurred at the time the settlement was reached? You say not at all.

MR CARPENTER: In this instance, it's very straightforward. The settlement between C's 1 to 10 is obviously on a full and final basis. It wouldn't actually require an undertaking not to seek further costs from them. The mere fact of it being a full and final settlement will have that effect.

MR PRESIDENT: I know we haven't seen much American drafting in that case.

MR CARPENTER: But possibly not, although the Americans do love to write the draft. If C's 11 through 15 then go on to lose against Scheme 1, the whole point is that Scheme 1 will only then be able to look to those Claimants.

4, in relation up to the point where the settlement was reached with 1 to 10, let's keep it simple and assume per capita sharing.

5, 15 or one-third of the common cost during that period.

MR PRESIDENT: We come to the flip side of the coin. It's that 1 through 10 are brought back in.

MR CARPENTER: No, they can't be --

MR PRESIDENT: How does it work?

I see. So the settlement needs to take into account that there's not going to be any past -- but they are going to have to work out which bits of the earlier claim are to be

attributable to which Claimants are settling. That's how it's going to have to work.
MR CARPENTER: Again, to keep it simple, assume that all of the costs we are dealing with are common cost. So if on that basis you are sharing on a per capita basis, and let's assume up to the point of settlement, all the costs are common cost.
The principle is that Scheme 1 won't be able later to look to C 11 through 15 for the share of those common cost, which is referable to C's 1 to 10 --
MR PRESIDENT: I get it, but we are going to have a massive debate, depending on the size, about what is and what isn't common costs, and what they were or they weren't at the time of the settlement.
MR CARPENTER: We're always going to have that, sir, with respect --
MR PRESIDENT: I see where you are coming from.
MR CARPENTER: You're always going to have a debate whether some individual costs are common costs, but in terms of the mechanism, it's very important, I think, to make the point this is completely irrelevant of the terms of settlement between C's 1 to 10 and Scheme 1 [AUDIO FADED] as a full and final settlement.
That means Scheme 1 can never look to those Claimants for cost. I mean, this happens all the time. The settlement will reflect success by Claimants 1 to 10, but perhaps in circumstances where liability is in doubt, and what was offered, let's say, to Claimants 11 to 15, was not enough for them. Claimants 1 to 10 perhaps didn't have so much appetite for the risk; so 11 to 15 going to fight to the trial, and in fact, they lose. Perhaps that means if C's 1 to 10 had fought at trial, they would've lost too, but that's irrelevant because they settled, and they got their payment from Scheme 1.
So the only question is what one needs to see 11 to 15 for --
MR PRESIDENT: No. I think there's an intervening question, which I think we need to get out there even if it's a mad idea. I think it is common ground that, if you are settling, you are going to need some form of order that permits you to withdraw, which

is the normal full extent to which Tribunal is involved. You get a stamp sent, saying, "Please allow these claims to be withdrawn." The terms are not disclosed to the Tribunal, which is fine. Standard Tomlin Order, or whatever you call it these days.

What I am suggesting is that you don't get as a settling group of parties the automatic withdrawal stamped by the rubber stamp of the Tribunal. All you get is, when you've done a deal, the Tribunal says, "Okay. That's great. We like that. We like settlement, but we would like to have an understanding as to how the [AUDIO FADED] for future costs and the [AUDIO FADED] present costs now is going to be resolved because we don't want to have this debate going on at the end as and when someone loses.

We would like to know that the regime and the exposure of the rump end is controlled for right away to avoid both the arguments that you are postulating going to have to occur, but also to avoid the other pressure that arises, which is when you've got a mountain to climb as regards future costs, that you are not under immense pressure to settle simply because you are at the rump end.

Now, that is a very nuanced thing that needs to be addressed, and maybe it can't be, but I do think there is the intervening stage when we at least ought to unpack as a possible way of dealing with this point before we say, "Well, it can't be done."

MR CARPENTER: Sir, I didn't mean to speak across. I don't say it can't be done. If the Tribunal wants certainty when it's asked to effectively approve a settlement in those circumstances, it could, for example, require an undertaking from the Defendant not to seek from any remaining Claimants a proportion of share, however it's worded, of any common cost in which the settling Claimants shared.

I mean, I'm not drafting on the hoof, but if the Tribunal wanted some record of that, that could be done. My primary submission is that it's not, strictly speaking, necessary, but obviously certainty is desirable.

As between the debate between you and me, sir, I don't think there's any dispute about

the principle; it's really a question of the question mechanism to achieve it. We both agree, if I can put it this way, that the rump end problem shouldn't arise; it shouldn't be possible. If it's just a question of the mechanism, then that can undoubtedly be done.

MR PRESIDENT: Thank you.

MR CARPENTER: I think then I can move on to, or at least begin my submissions, on the third of your issues, and that is the question of joint and several versus several liability.

MR PRESIDENT: Yes.

MR CARPENTER: I can take this at greater or lesser length, essentially depending on the extent to which I go laboriously through the various paragraphs in *Rowe*, and given the time -- and I appreciate what you said about that, but I'm also acutely aware that there are several other parties who need to have their say -- perhaps I can be forgiven if I don't do that and give you perhaps pointers to where I say the key dicta are to be found.

MR PRESIDENT: I think I am much more interested in what is the right form of guidance in these circumstances than to be told that the answer lies in reading across from another case.

I'll read *Rowe* again, and you can take it that I have in find those points, but I think you ought to be addressing me, if I may suggest this, from a point of principle as to why this order is appropriate, and leave the Authorities to catch up to the extent that they are persuasive.

MR CARPENTER: I am very happy to do it on this basis, sir. In fact, I was going to begin my submissions on that basis and then use *Ward* and *Rowe* perhaps to make them good; so that might reflect what you're asking me to do.

In the time we've got before the short adjournment, then perhaps I will start with the premise to all of this, which in my submission, to that extent dictates the outcome, and

that is the Defendants face a very large number of individual claims, which it would be impractical and absurdly expensive to try at the successive trials of each operate claim.

And the Tribunal has therefore used its power of case management to gather together rules in these claims and determine an efficient way to dispose of them, which at one time was going to be by means of a trial of some the claims, and now it's going to be by a trial of common issues.

And the resulting economies of scale are obviously beneficial for the Claimants, but they're also enormously beneficial for the Defendants for whom these proceedings are going to be far cheaper than fighting in succession of thousands of individual cases.

It's in those circumstances -- and I hope I can be forgiven for relying on authority at this stage in my submission -- but it's in those circumstances where the courts have held without any identifiable exception that Claimants should only face several liability for adverse common cost.

Fundamentally, it is a policy decision, but it is one which has been consistently applied in *Ward*. It's ultimately about allocating collection risk. Joint and several liability means of course that a Defendant can pursue a single Claimant with deep pockets and leave that Claimant to seek a contribution from all the other Claimants, and then the collection risk lies with the Claimants.

Several liability means that the collection risk lies with the Defendants.

Of course we don't deny that that collection risk exists. The Authorities acknowledge that. I acknowledge it. Now, we do say it's very easy to overstate, but the Defendants do overstate it, and I won't go through the reasons in detail, but Paragraph 27 of our reply submissions sets out why that is an overstated concern.

But it is in those circumstances where *Ward* and the cases subsequently have decided that what that means in practice is that there should be several liability, and it was the

case, as Mr Justice Nugee said in *Rowe* that up to that point he had been given no example of any similar circumstances in which any order other than for several liability had been made --

MR PRESIDENT: For common costs?

MR CARPENTER: For common costs. Of course. An individual cost is always several. I don't think anyone is suggesting otherwise. Individual costs only ever lie with the Claimants who has caused those costs to be incurred; so we are only talking about common cost.

MR PRESIDENT: The reason I picked up on this, Mr Carpenter, is not that I don't understand the difference, but it's because the difference is perhaps rather more [INAUDIBLE] in cases like this than they might be in other cases.

For instance, let's take pass-on as a nice example. Let's suppose that Mr Jones's client need an awful lot of data only in relation to their sectors, and yet, the Tribunal takes the view that in fact this data informs in answer to all the other sectors, and it's actually a common issue, even though the economists haven't been putting it that way, but that's the role the Tribunal takes.

Now, is that a common cost? Is that an individual cost? Is that something which we've never described before? What is it?

MR CARPENTER: Sir, that in a way brings us back to the CSO and the definitions of the various categories.

MR PRESIDENT: Oh, yeah.

MR CARPENTER: You may be describing what would perhaps be best labelled the issue costs. It may be that at a very high-level view of Trial 2, and says, "Well, ultimately all of this was to the benefit of all of the Claimants, and it doesn't make sense to salami slice and dice a sector.

So in the Tribunal's view, everything in Trial II is simply globally common costs."

Or the Tribunal can take the view that, actually, it does make sense to divide it up by sector. So if in relation to a particular sector, there was a particular preponderance of cost, the fair thing to do would be to allocate those costs to every Claimants that has a claim fallen within that sector."

The Tribunal has the flexibility to do all of these things, but that's a separate question from whether the liability is several or joint and several. All the Tribunal is thereby doing is identifying the costs which are potentially to be paid by more than one Claimant.

If in fact in relation to the involvement of a particular Claimant, the Tribunal decides that they were so self-interested in the way they pursued that, in fact, they should be regarded as individual cost, well, then no problem again; they would just be paid by that particular Claimant.

But I would say, with respect, it does not shine a light on the principle of several versus several and joint; it only gives rise to the need to grapple with that question insofar as there is more than one Claimant, which is going to have to pay those costs.

MR PRESIDENT: All you are doing is making the several costs order inevitable by presupposing a very clear demarcation between issue costs, common costs, and individual costs, but if you take the view in fact, these costs are rather less easy to categorise, in fact, they will be very difficult to categorise, then why then do you say, "I am not going to categorise them at all." They are of course relevant to take into account, but what we are going to do is we will say we have this corpus of costs. Someone is going to have to pay them because someone won and someone's lost. Costs follow the event, generally speaking. What we are going to do is we are going to have a regime which is not fettered by the joint and several distinction. We will consider what order is appropriate, bearing in mind the series of factors.

And this is why I think the debate about guidance is far more important than joint or

several.

Let's take a situation, where you've got these Claimants along, and it emerges -- and excuse me if I am using, Mr Jones, your client as an example -- it emerges that your clients are the last parties standing, and you litigate against Visa and Mastercard, and everyone else's either stayed themselves or settled themselves, and they are out of the ring, and you fight the tail end of the trial, and you lose.

And Visa and Mastercard both come back asking for costs. Someone is going to have to pay it.

Now, why should the Tribunal deprive itself of saying, "Well, we are going to require you to pay, say, 50 percent of the costs bill for your own account, and because you are not much of a credit risk -- the money should be paid -- we will make you pay a further X amount on the basis that in fact that is a joint and several obligation, which you can -- because that's how we're slicing it -- seek to recover from the other parties as opposed it being a problem for Visa or Mastercard."

Now, we can slice the cake any other way. What I am suggesting is that we don't want to have a clear statement right away -- costs several, where they are common -- we want to be saying, "Costs are extremely complex. We want to have informed who bears the costs so who bears the collection responsibility by reference to factors, taking it into account rather than some kind of immutable rule."

That's why I'm pushing back. What I am concerned about is that if we take too straitjacketed approach to both the question of costs being joint or several and indeed the effect of settlements and the effect of stays, if we are relying on these issues, then by the end of the day we are going to have a car crash because it's now that something happens that we have not predicted.

So perhaps what we ought to be saying is maximum flexibility, but by way of example -- I know you are going to push back on this -- but if you stay early and don't

try to intervene, then you will probably be safe from the clutches of Visa or the clutches of Primark trying to recover costs on joint and several basis.

If you settle and you do so without reference to the rump end, then there may be a risk.

If on the other hand, you settled and you say to both the parties and the Tribunal, "You know, the settlement is on the basis that we are dealing with the costs incurred by Visa and Mastercard in a particular way, and the Tribunal and the other party should know this," well, maybe a different result emerges.

So that what I am looking at is really a complete absence of straitjacket and a complete presence of a variable geometry informed by principles that are clear, so we don't get to the end of the day, the court had made a several costs order, and that is the one thing that is immutable in a situation where there are all kinds of considerations in play.

So that's a long question on a point that is really troubling me.

MR CARPENTER: It's very helpful, sir, to know what your concerns are. I note the time. Perhaps I can attempt to give you the answer at two o'clock.

MR PRESIDENT: Yes. Now, I anticipate that -- you are very helpful in the assistance of my questions, which will enable the other parties to take points a little bit more quickly, but I don't want anyone to feel that they are going to be cut out.

So if we were resume at a quarter to two, would you be able to cover the rest of the points in 15 minutes and will the rest of the afternoon, by which I mean to 4:30, enable the other parties to have their appropriate say, given that we are not short of parties?

MR CARPENTER: I think I can do it.

MR PRESIDENT: We will see about the other side. I mean, 15 minutes is certainly what I am willing to give you, but I don't know what the others say about how long they need.

So let's see how to stretch those minutes. We will need replies.
MR LASK: Sir, I am not anticipating that I will be very long at all, given that our position is essentially aligned with one party or another, but I would like to reserve the right to say something based on how the submissions pan out this afternoon.
MR PRESIDENT: To go last, Mr Lask; is that right?
MR LASK: That's probably sensible.
MR PRESIDENT: Okay. The Schemes, how long -- well, I think it's the people who I think will have most of to say are Visa and Mastercard; and Primark and Ocado. So if you would say half an hour each?
MR JOWELL: Half of an hour would suffice for the Visa Defendants, certainly.
MR PRESIDENT: Mastercard?
MR DRAPER: Likewise for Mastercard. We had anticipated that between the two of us, Mr Jowell and I would be about an hour.
MR PRESIDENT: Perfect. If you want to divide it differently, that's fine.
Mr Jones?
MR JONES: And so likewise. Myself and Mr Brown and Mr Lask were, between the three of us, going to be, I think 55 minutes -- about an hour. I think we will be shorter than that because, as you say, the discussion has clarified certain issues.
How much shorter, I am not sure, but I would think certainly between the three of us, less than an hour.
MR PRESIDENT: The three of you get an hour. If you use less, that's fine. The Schemes get an hour. That brings us to 15 minutes of fame for Mr Carpenter at the end.
It looks like, Mr Carpenter, you have a bit more than 15 minutes to address me on, but if you could keep to 15 minutes as a target, that'd be great, but I think there's room certainly for another 10.

MR CARPENTER: Thank you. I will do my utmost.

MR PRESIDENT: Don't take it as a hint for you not helping me considerably, Mr Carpenter. You have been of great assistance, and I am very grateful. I am only trying to make sure that we've got enough time.

We will resume at a quarter to two. I will adjourn until then.

(Lunch break 13:09 to 13:45.)

MR PRESIDENT: Mr Carpenter, good afternoon.

MR CARPENTER: Good afternoon, sir. In picking matters up after the adjournment, I just wanted to state, if I may, and respond to extent to the observations that you made before we adjourned, with the objective of this exercise, if I can put it that way, in a world where no order is going to be made by the Tribunal envisages giving guidance. All I wanted to, really, was to emphasise the value to all of the parties of that guidance while of course to the extent you think appropriate for the possibility of departure when the time comes, and I think that is the reason why you didn't want to make the order in the first place.

But while not being immutable, it is sufficiently certain that those involved in the proceedings can plan and then consider their positions on the basis of it.

So I think in particular, for example, of cost provision on the part of those who might find themselves facing costs, those who have ATE insurance for example, considering whether they have enough of it, and that useful guidance might offer at least an indication of what would be the starting point in any future cost argument and perhaps some indication of what it might take to drive the Tribunal from its starting point so that some appreciation can be formed of what the future might hold in that regard.

Having said that, sir, I will just come back to where I was in terms of my submissions and at this point just show you briefly what the Authorities have to say about several versus joint and several, and in particular, because you put in your issues to address

the position of lead Claimants, I will start by showing you *Ward*, in the Authorities Bundle.

This is a case which wasn't a GLO; it was essentially commercial litigation, and it was a successful appeal where the judge below had refused to pre-empt an order for several liability.

The Court of Appeal, giving the sole judgment, held that several liability was appropriate.

And in terms of the principles, I think I can pick it up at Page 17 of the Authorities Bundle, just below letter F.

I am not going to read this but just note that between F and around H, the Master noted that the issue was, as I said, where should collection risk lie, and then he articulates the test, which is applied, in the situation what does fairness demand, and the submission being made on behalf of the defendant that it was premature to make any order at all as to what the outcome at the end of the trial might be, which he noted was contrary to previous guidance in the *Davies v Eli Lilly* case that what parties do need to know "subject, always, to the discretion of the trial judge to modify that order at the end of the trial."

Then over the page is the conclusion which also deals in particular with the position of lead Claimants.

I should've picked it up. At the very bottom of the page, he says: "Speaking for myself, I am persuaded by Mr. Guthrie that it is, in all the circumstances, appropriate to make an order that the liability of the individual plaintiffs be limited to the proportionate share of the overall costs, whether incurred by the plaintiffs or payable by the plaintiffs to the defendant, and that such liability should be several and not joint. It appears to me that the Defendant is no worse off under such an order

than if it had been sued to judgment by 99 plaintiffs; although it is fair to add, given the sums involved (many of which are quite small) that such an event would appear extremely unlikely.

This is the really important part:

"I am, however, persuaded by Mr. Guthrie's argument that the role of lead plaintiff would be one which, on the Defendants' order no well-advised plaintiff would be wise to accept; and furthermore, that the purpose of selecting lead cases would be vitiated if regard had to be paid not to the issues in particular actions but to the means or willingness of the particular plaintiffs to accept a high degree of risk."

Of course we don't have here a formal lead claim, but as has been noted, we do have some Claimants who are more prominent than others. For example, in Trial I, we have some Claimants who are giving evidence for the purpose of [INAUDIBLE] the issues. It would be extremely unfortunate and deeply unfair, in my submission, if those Claimants, because they put their heads above the parapet in that way, were exposed to a greater degree of cost than if they had simply hidden behind the mask of Claimants.

So that was particularly important in *Ward,* which justified several liability.

Rowe, I'm going to say less about, although it is an important case, and I do respectfully ask you, sir, to read it when you come to write your judgment, but you've heard the references in our submissions, and essentially Mr Justice Nugee took *Ward* as being, and particularly if you'll note at Paragraph 22 and 23: "If not...essentially a binding decision absent a good reason to distinguish it in a particular case while noting that...of a similar kind which have taken a different approach."

And then remains the case today. I am not aware of, and the Defendants have not made reference to any case of a similar case in which an order for several liability and,

common costs has not been made.

What I think, in the time I've got, I really want to focus at this point in the argument is the question of sharing pro rata versus per capita. It wasn't specifically, I think, sir, in your list of issues, but it's very important for the Claimants who do need to know if they are likely to be sharing in any costs what the basis of that sharing might be.

In the absence of having to defend a particular mechanism in the draft CSO, which I won't do anymore of course, there are two key points, really, that I want to make good. Firstly, in my submission, it's obvious that sharing by reference to claim value would be fairer than sharing per capita.

Secondly, once it's decided, assuming it is, that it should be per capita, then a workable way to establish the value or a proxy for value has to be found.

Now, I don't need to go on to say we have found it because you're [AUDIO FADED] deciding that, I think, sir, but the principle is that you have to do what you can to make it workable if you decide that sharing by value is the right thing to do.

So on the first of those, on the basic issue of fairness, I am sure you have in mind, but I am going to start by highlighting how enormous the spread of the values of claims in these proceedings are.

I asked those instructing me for examples, and just within the group of Stephenson Harwood claims, I am told, for example -- and this isn't necessarily the largest spread but just illustrative -- there are maybe claims worth about 20,000 pounds and claims worth more than 200 million pounds.

Now, that is a spread whereby the larger figure is 10,000 times the smaller figure, and I also understand that generally among these things in all claims, there are many Claimants who have relatively smaller claims, and it's in those sorts of circumstances that both the *RBS* case and *Rowe* made clear that sharing pro rata is fair, and I will turn up what those cases have to say about this, if I can do that quickly in the time that

I've got.

RBS is Tab 5 in the Authorities Bundle. It's dealt with briefly in this case because it was agreed by everybody that there should be pro rata sharing, but this is a case where there is a very great disparity in claim values because you had individual investor Claimants, but you also had very some large institutional Claimants.

At Page 46 -- it's Paragraph 28, first of all, where after noting that the default position under the specific GLO rules was per capita sharing, Mr Justice Hildyard went on: "It is not fair or equitable that an institutional investor with millions, in some cases hundreds of millions, at stake should pay an equal contribution as individual Claimants with claims in the hundreds, or even hundreds of thousands. Adoption of the default rule would tend to negate a primary purpose of GLOs."

Then he came back to that, at page 48, Paragraph 33(3). If I can just ask you to turn to that, sir. He said: "Whilst for the reasons I have already adumbrated, the starting point of equality of risk for every litigant must, where there is such a disparity in the value of claims, yield to some fairer relationship between risk and reward, the objective should be a fair alignment of risk and reward by reference to the position of each Claimants, the group they have chosen to join being of little, if any, legal or logical relevance."

As I said, that was not an issue in *RBS,* but was in *Rowe* between the Claimants and one of the Defendants, and I will show you what was said about that, at tab 8 of the Authorities Bundle.

MR PRESIDENT: Yes.

MR CARPENTER: Page 94. When you come to give your judgment, sir, I would respectfully ask you to take note of really everything Mr Justice Nugee said between

Paragraph 34 and 50.

All I can do now is just pick out a couple of highlights. At Paragraph 35, he quoted what he had previously said in his oral judgment, where he said: "I have not the slightest doubt that it should be apportioned pro rata to the size of their cash investments, rather than per capita."

At Paragraph 37, he noted what were the disparity of claim values in that case. It was far less than this one, where it seemed the largest claim was about 300 times the size of the smallest claim.

He then went on in Paragraphs 39 and 40 to refer to *RBS* and went on at 41: "My own view is very much aligned with these. Given that I have already decided that the liability of the Claimants for the Defendant's costs should be several rather than joint, it seems to me fairer that the risks to a Claimants of participating in the litigation should be proportionate to the reward that he or she might obtain from the litigation. The notion that someone who invested £36,000 (and who, if successful, might recover compensation, whether for loss of investment, penalties or interest, commensurate with that) should contribute to the common venture exactly the same as someone who invested £10.5m (and whose compensation if successful would be very much larger accordingly) seems to me plainly unfair on the most basic principles of equity."

There wasn't really very much I can usefully add to that except to point out, sir, that a point taken by the Primark Group that those with larger claims don't cause more cost to be incurred was expressly rejected as a relevant consideration at Paragraph 44, but in the time I've got, which is almost nothing, I won't take you to that now. That's just a signpost for your note.

If it is decided, as I've submitted, it should be that pro rata was fair, then one should only abandon that decision if there is simply no practicable way of ascertaining the value of each claim.

One has to be pragmatic, and one should not let the perfect be the enemy of the good enough.

And there is guidance on this in *RBS*, if I can just briefly go back to that. I think this may be the last trip to the Authorities Bundle. It's Page 49, again, behind Tab 5 in the Authorities Bundle.

And Paragraph 34, first of all, where the Judge noted what the competing suggestions were, which was by reference to the acquisition cost of the shares or, alternatively, by the amount of the compensation claimed or recovered.

And he was clear that it was the first of those that was the sensible way to do it, and that's in Paragraph 36(1). "Potential rewards may in some cases not easy...in most cases may depend on which...the objective should be to select...without material unfairness."

And then at 4, over the page: "...is fixed...appropriate in every case...in this case the measure...fair proxy as in across the board measure of potential reward."

And we would have said and do still fundamentally say what these Claimants have actually paid by way of MIF would have been a good proxy.

Now, in the circumstances -- we don't need to work this out once and for all now. It may be that someone could in due course identify a better one -- but the point of principle is that one should absolutely do what one can find to find a workable proxy because it wouldn't be appropriate just to throw out one's hands and say, "It's too difficult. Let's fall back on per capita" when per capita is obviously unjust.

I think, sir, that just leaves to be dealt with very briefly the last of your five concerns, which was the relevance of funding information.

MR PRESIDENT: Yes.

MR CARPENTER: Which I hope I correctly interpret for these purposes being the point made by Visa that --

MR PRESIDENT: Paragraphs 48 and 49?

MR CARPENTER: Exactly. One needs to know what the situation is. Now, the fundamental submission that there is no conceptual or logical connection between the ability of Defendants to recover their costs and ordering several versus joint and several liability, well, that's one within and I address in our reply submissions, and I don't propose to get into that specifically.

What I wanted to develop very briefly was the suggestion that there should be any sort of order, if one is still sought, that all of the Claimants should disclose what their funding arrangements are.

Now, of course you may have seen, there has been recent correspondence on this, and many of the Claimants have stated what their situation is, but as a matter of principle, it would not be right to order those who haven't to do so, and in my submission, that's really putting the cart before the horse.

If the Defendants think they have grounds to seek security for costs from any of these Claimants, whether or not the cost sharing order was made and whether the basis of liability is joint or joint and several, then it's up to them to raise that in the usual way, and what would ordinarily happen is that they would say, "Well, we've looked at your accounts. We think you are insolvent or you're teetering on the brink of insolvency, and we don't think you'll be able to pay our costs. So please put up security."

Then that is a matter for that particular Claimant how they respond to it. It may be that they do then produce ATE. It may be there's a corporate parent comes along and says, "Well, we'll put up the money." Whatever it may be.

But the start point isn't the Defendants simply have a standalone right to require Claimants to provide information about their funding arrangements. That simply deals with matters in the wrong order, and it wouldn't be right to make an order which short circuits the ordinary way of doing things.

So if the Defendants do want to take these matters further and do want to seek security, although of course they've left it very late in the day, that can be picked up in correspondence, but it should be no further than that today.

MR PRESIDENT: I'm very grateful to you.

MR CARPENTER: Sir, give me a moment just to check with those around me?

MR PRESIDENT: Absolutely.

MR CARPENTER: I am grateful. Those are my submissions. Thank you.

MR PRESIDENT: Mr Carpenter, very grateful to you.

Who's next? Will I hear from the Schemes? Then we can have Mr Jones sweeping up any loose stones because you are between the two extremes, I think.

MR JONES: So we had agreed an order. Some of my Learned Friends, they may have planned their submissions on the basis that I may have said things that then they don't need to repeat. If you are happy for me to go next, sir?

MR PRESIDENT: That would be very helpful. Thank you.

SUBMISSION BY MR TRISTAN JONES

MR JONES: Sir, my clients' primary position, as you have seen, is there should not be a CSO, and the reason for that was essentially the reasons that you have given, which is that the decisions which will be made as regards to costs will be nuanced ones, and the Tribunal should be free to look at all of the circumstances in the round, and the issues which were thrown up by the CSO application required the Tribunal now to take quite firm black or white decisions on a series of different topics.

And I only mention that at the outset, sir, because I am now going to go on to address you on two particular topics, which is stayed and non-participating Claimants and then pro rata versus per capita.

That overarching point still, in a sense, applies -- with your guidance judgment in mind, I will be promoting, as it were, what my clients say are the best options on stayed and non-participating and on pro rata versus per capita.

But it remains the case that there is not a perfect solution which can be stated in the abstract to any of these points and, sir, I am not seeking to persuade you that there is; I am simply seeking to feed into the guidance judgment but keeping in mind that the ultimate decision will be a nuanced one.

On the topic of stayed and non-participating, I will start, sir, if I may, with the wholly-stayed Claimants, which among my clients are Heal's and Fortnum & Mason, and I will then come on to say how the logic applies to Primark and Ocado, who are active in Trial II but not in Trial I.

It is very important to distinguish between the question of trial management, of whether there should be sequential trials or issue-based trials, and the very different question of how costs exposure, costs liability should be apportioned between different Claimants because of course Mr Carpenter sought to tie those very different issues together. In my submission, they are completely separate topics.

In relation to the question of cost, the key factor, in my submission, is not the structure of the trial. The key factor is whether the litigation is litigation in which Claimants can choose, in other words, self-select to press ahead or to stay.

If that is a bare choice given to Claimants, it is a standard choice in this kind of case, and Claimants face a well-known trade-off. They either choose to go ahead, in which case they are exposed to adverse costs liability, but they get to run the case themselves; or they choose not to press ahead, not to participate in which case they do not have adverse costs exposure, but they also do not have input into the way the case is run, and those are the choices which the Claimants in these claims have faced.

Obviously before they were transferred to the Tribunal and before the UPO, but as I

will go on to develop, after the UPO because nothing had changed at that stage. They were given the same options, and there was at that stage no suggestion of costs sharing --

MR PRESIDENT: Just to intervene there. Isn't it a little bit more extreme there? I am looking back to the case management hearing that we had earlier this month on pass-on and there, the Tribunal was looking for certain parties who admittedly were Claimants but who also expressed a willingness to provide data on pass-on. Your clients -- at least Ocado/Primark, Primark in particular -- I recall their submissions very well, and what we got was "we don't do sampling" or "we are not going to do sampling because one might have unreliable data from unwilling persons. Let's look to the willing who have relevant information."

And we effectively self-select. Now, the fact is your client helpfully enabled us to torpedo sampling by saying, "We have the data, and we are willing to provide evidence and participate on that basis."

Now, on one level, that is a degree of willingness, which you might expect in the ordinary case, so well, you put your head in the costs noose.

On the other hand, it does seem to me that you, in that particular instance, were actually assisting the Tribunal in a general question on how to handle pass-on and, really, to call you a willing participant would be actually a little bit unfair.

What you were, were targeted customers, targeted because you had the capacity and the data to assist on what the Tribunal has recognised as a very difficult question.

Now, I am not saying anything about how these factors should play out. I think what I am saying is that they are factors that need to be taken into account in terms of where, depending on how things go wrong or how things go right, depending on where the costs go.

Let's face it. It's much more significant if you lose than if you win, in terms of

discussion, and perhaps that'd be our general thought. Let's not think about the situation where you win against Visa and Mastercard. Let's think about the problems that arise where the Claimants' population as a whole loses or wins. So it's when Visa and Mastercard are going on the hunt for their costs, and they are saying, "Well, we need our costs. We need to get them from someone because costs follow the event, and let's assume that is how we approach it."

Is there any question of how much and from who, and the idea in that situation that one would say that Primark, having adduced helpful evidence, causes the part on the case to be lost, so you actually recover nothing.

It will be a little strange if that being the case, you were footing the entire or a disproportionate amount of the bill for that service, given that you were acting in a partially proxy capacity for the entire market because who knows how they're going to use this information?

I made very clear at the hearing that triangulation or extrapolation would be involved.

MR JONES: Yes. And so these are precisely the kinds of complexities which led us in the start to say these are not points that you can really decide in the abstract now before looking at things in the round.

There is an important distinction between the amount which anyone might have to pay at the end of trial and one can well see that someone in, say, Primark's position may have arguments about the amount which they might have to contribute, given that they did put their head above the parapet, and I am going to come on to that when I talk about pro rata versus per capita.

There is a prior question, which is: should they really be in the discussion at all about sharing adverse costs liability?

And Primark has accepted, and Ocado has accepted that they should be in that discussion, by which I mean: if at the end of Trial II, the Schemes have won, and

Primark and Ocado chose to participate in Trial II, they would've contributed to the way in which the case was run by the Claimants there.

So that would need to be part of the discussion about the allocation of cost.

Heal's, Fortnum & Mason, and the others stayed Claimants, what really distinguishes them is that they are not even participating, they are not running the case, not having any input into the way the claims are run.

And just on that point about stayed Claimants, there's a really very, very stark contrast with the GLO situation which Mr Carpenter places emphasis on. I should say, just for clarity, there is actually no case in the Bundle in which stayed Claimants have been included in a CSO against the will of the Claimants, and it was agreed in the *Ward* case, and the *RBS* case, which Mr Carpenter spent some time on, but I'll have to look at that -- even just briefly -- but I'm going to look at that.

That case, it was only a provisional decision, as it happens. I will show you that in a moment.

In broad terms, the context there was totally different to this case. The Claimants were being encouraged to join action groups. Most of them were already in action groups, and of course an action group in a GLO context is a group where Claimants are participating not only in sharing costs between themselves but in running the case, through steering committees and so forth, that decide how they input into the running of the case.

The decision to impose a GLO itself was made with a view to costs sharing. You see that from the judgment.

So that was part of the purpose of the GLO from the outset.

The CSO was made very shortly after the GLO, and it was imposed at a time when no other significant decisions about the case had been made; so they didn't know whether there would be test claims, for example.

What the judge did say is that he didn't think it was likely anyone would be allowed to stay their claims.

So just standing back. It's a situation where you are taking a very different approach to trial management. You want to funnel everyone forwards. You want to get them to catch up. He says there should not be stragglers left behind.

You want action groups. You want participation, and you do it early on.

Sir, if I just look at that authority, please. It's in Tab 5. I'll just give you a few quick references to make good those headline points that I've just made.

Paragraph 1, I just mention it, to note that the hearing for the CSO was in December 2013.

Paragraph 12 is the reference to action groups.

Paragraph 18 tells you when the judge decided to adopt a GLO, and that was over the period of July to December 2013.

Paragraph 20 tells us the intentions of the GLO.

And subparagraph 5, "a particular consequence and perceived advantage of a GLO is that it opens the way to orders for costs sharing, "without which many smaller investors would in all probability be prevented from pursuing a claim (since the exposure would so enormously outweigh any potential recovery)."

So there was an access to justice element to the costs sharing which fed into the decision to adopt a GLO in the first place.

I said there was no decision at this stage about how the Claimants would be managed. I'll just give you the reference to Paragraph 91(2), which tells you there is no decision yet on test Claimants.

Paragraph 51(5) -- which I am actually going to come to in a moment -- which tells you that the judge was broadly opposed to the idea that anyone could stay their claim.

You've seen the argument from Paragraph 45. Could I just go back to that, please.

Paragraph 45, which is on Page 51, tells us that the whole issue about stayed Claimants – who are being run by the QE Group – is that they haven't yet started their claims.

So the people who had started claims, as far as I can discern from this judgment, were not stayed, but in any event, if they were stayed, they shouldn't share in costs.

It was a separate body, a virtual group, who was saying -- you see from 46 -- that they wanted to be able to start but parked their claims. That's the context in which you get the vivid metaphor for 47, and you have been taken through the reasoning in 51.

I am just going to go through those myself because in my submission, actually, when one looks at these points, none of them applies here.

The first one is one of the principal objectives to be corralled in claims with a view to economic adjudication. Direction should be fashioned so Claimants cooperate together, pool resources, and bring forth all their arguments at once.

Well, yes, as I say, they were being put into action groups, and they were not going to be enabled to stay their claims. They were going to be put forwards all at once, but it's quite different from saying, "You can either pursue your claim or stay it."

The second one is a point about limitation periods, which doesn't obviously arise in our case because it was a GLO-specific point about the cut-off date of the GLO versus the potential limitation period.

3, then it says it is not consistent with these objectives to provide observer status, and these objectives are the two which I've just gone through which, as I've said, don't apply here

4, costs sharing is a fundamental feature and advantage of a GLO.

Sir, again, the point is obvious. It is not a fundamental feature and advantage of an Umbrella Proceedings Order.

5 is a return to the limitation point, but this is where one sees it in this second half.

The Judge says it's more likely that case management directions will be given to require stragglers to catch up rather than be permitted to place late bets on all the races.

So no one was going to be able to stay.

And then at 6, there was a further point about stragglers.

MR PRESIDENT: That was a point about gaming between classes, wasn't it?

MR JONES: Yes.

MR PRESIDENT: In other words, you bet late because you might think one class is doing better than another.

MR JONES: Yes.

So there were a myriad of considerations in that case, which made it fair to indicate that provisionally, as one sees at the top of page 51, the Claimants would not be able to avoid costs exposure by having their claims stayed.

And of course costs sharing in that case was fair because it was a very different situation. It's fair because all Claimants were being encouraged to participate. The process to trial hadn't been decided yet, and what one can see is that it was almost not certainly going to be a process in which individual Claimants would just self-select to participate or not.

As I said, the contrasts to our case are striking because in the High Court, going back to the *Sainsbury's* trial, clearly what was happening was a standard approach where Claimants could elect to stay or I think there were other forms of go slow, which have a similar effect, extending the date of service of the claim form, et cetera.

And although nothing is certain in litigation, and although I take the point that there could've been some sort of surprising order made, the reality is that litigants have to work on the basis of established practice, and the established practice expectation would be that if you are stayed or go slow, you are not going to be exposed to costs.

The claims were then transferred to this Tribunal, and sir, you will recall -- I will just give you the reference in the Bundle - Volume 2, Tab 13 -- to your order of the 16th of March 2022, which actually predated the large transfer of claims from the High Court, but that was an order in which this Tribunal made clear that Claimants would be able to elect to stay or to participate.

I think I don't need to take you through the later orders because that is what has remained the case throughout for people who faced that choice, and there was never, until this application was made in July, a suggestion that there would be any different costs consequences applied here to what normally applied in those situations, and that's the background against which parties have chosen whether to participate or not.

Sir, there is a practical point which I should add very briefly, which is: if one is going to divide costs on the basis of what are common issues and individual issues and so forth at the end of the proceedings, then one will need a basis on which to decide which costs are common and which costs are individual.

And of course it's right for Mr Carpenter to say that that will need to be done in any event for participating Claimants because the position for stayed Claimants is different, and it's very hard to see how one could decide for Claimants who haven't even pleaded out their cases, which is the case, for example, for Heal's, and Fortnum & Mason, which issues they were participating in, other than at a very, very high level.

So there's also that practical reason not to include them in any costs sharing.

Sir, I need to come to the position of Primark --

MR PRESIDENT: Again, it's a little bit more nuanced. I take your point that there is going to be an enormous definition or problem with -- and your point about an unpleaded, unarticulated case is a good example of that.

Let's also take the situation where you might, as a stayed Claimant, have a perfectly respectful argument that you are actually different, you are an exception, but your

value at risk is sufficiently small or you say, "Well, who knows? The Tribunal order by way of, say, pass-on. It may be X. It may be Y. Frankly, the difference between X and Y is not great enough for me to walk up and argue for Y."

So you then get a common issue only because the party has decided to make it itself by not intervening, and you might very well take the view that if you are looking at a slug of costs coming your way, if you lose on the pass-on question that isn't the way you put it, you might rethink your position if all you are being protected against is your costs of arguing the point which you don't incur because you've chosen not to argue it.

So I put that out there as another question which needs to be articulated in this extraordinarily complex process.

MR JONES: Sir, I entirely agree, and the question of incentive, I wasn't going to go into, but it's actually a very good example of all the complexities that one gets into if you try to draw up on this.

My Learned Friend said you don't want a situation where people are incentivised to just sit back, but of course -- well, his clients are not sitting back, and my clients in Trial II are not sitting back; so we don't have that problem.

We have a situation where people want to be in the driving seat and are driving forwards, and if you find yourself in the situation for Trial III that no one is coming forward, then it may be an appropriate moment to rethink the cost regime or rethink the approach to the selection of Claimants to take things forward.

So that incentive problem doesn't arise, but there are other sorts of problems which might arise, precisely, sir, the one which you've just mentioned, which is that there might well be people who would like to participate if they are going to have to participate in costs exposure in any event. They might say, "Well, on that basis, I may as well take part."

And obviously it's to the benefit of the wider group that there are so many Claimants sitting back and prepared to just be tied to the outcome because it makes these proceedings much smoother, and although, sir, I am glad to hear that it's helpful -- hopefully will be helpful for Primark and Ocado to participate -- clearly, if too many people were participating, things would become rather difficult.

Sir, those are my submissions generally on stay. I should make a point about Primark and Ocado, who are participating in Trial II and not Trial I.

Sir, you have made clear on, I think several occasions that parties may be able to choose to be stayed for a certain period and then to have the stay lifted, and it isn't a once and for all election.

And of course if a party were to do that, one would expect that the Tribunal might need to look closely at the situation before deciding in a blunt way what the costs consequences are of that election, but in very, very broad terms, one can imagine, for instance, there might be someone who is stayed now and who says when Trial III comes that they want to participate, and in broad terms one can see that it might be sensible there to say, "Well, all right. You didn't participate in I and II, so you are not exposed to costs liability for those, but if you're participating in III, you'll be exposed to costs liability for that."

The reason I use that example is that it's essentially what Primark and Ocado are trying to do. They would, if they could, be stayed for the duration of Trial I, and they then lift the stay to participate in Trial II.

The only reason they can't do that is timings. So they've got to participate in Trial II now, which means they can't have a stay now, and that is why they are in this in-between position where they are not stayed, but as you put it, sir, they are not fully participating.

They are not, if I may say, fence sitting, in the sense that they have now --

MR PRESIDENT: They generally came off the fence. I think there might be a justification for using the label used in the middle of last year, but I can't now recall exactly how we expressed it in the order, but you are expressed to be participating in the trial without representation. I think that's how we put it in the Trial I order.

And in Trial II, of course you are full participants. I think that's how it's put.

MR JONES: Yes. Precisely, although just to be clear, what the order says is "they are active notwithstanding they elect to be unrepresented in trial 1" --

MR PRESIDENT: Yes, that's exactly right, but if you take that as having essentially three pots: stayed, non-active non-stayed, and active.

We are not very keen on the middle category, the non-stayed non-active.

We want to have free choice between the two, but the point you are making is that actually the label in this case is in large part misleading because you are making clear that you are, in substance, in reality, stayed as far as Trial 1 is concerned, which is why the order says "active but not participating" or "participating but not active". It's the same point.

You have decided that you are not going to incur the costs and not going to waste the Tribunal's time, not incur costs by incurring costs with other parties in dealing with the points that you might otherwise bring to the party. And what you say is that it ought to have some significance in terms of costs, and I think I am agreeing with you it ought to have some significance.

The real problem is how far one gives a bright line of certainty, even a guidance judgment, to say there is no prospect of you paying for the costs of Trial I, and that would be going, I think too far in the other direction. I'm not sure it would get to saying Primark and Ocado wouldn't pay for any Trial 1 costs.

The rather difficult line that I would have to tread is to avoid straitjacketing myself too much whilst not rendering a judgment that is so vague as to be pointless.

MR JONES: Yes. Sir, I wouldn't disagree with any of that, and of course we have been -- as regard to a straitjacket as well. If I had to draw a line, you will see the line we draw -- because I did have to draw one when the CSO was being proposed -- and the line which we drew there was to say the costs would need to fall in a way which reflects that sort of middle ground that they're in, in other words, we fully accept that Ocado and Primark could be part of the mix when you look at Trial II but not for Trial I.

So that was the line which I draw. You heard my comments about the pros and cons of line drawing, so I'm not going to push that line too hard. So that was the landing that we reached.

The next topic which I need to address you on is the per capita, pro rata point. Here again, I'm going to just start, again, just drawing our own scepticism about line drawing. The reason I do it here is that, frankly, neither of these is a perfect approach. Again, it's said in our skeleton argument -- CSO because line drawing is difficult and imperfect, but if there is one, then per capita is better than pro rata, and of course with a CSO, you have to choose between those two because one could not have a CSO on some other nuanced basis, leaving it for the future. One would have to go one way or the other.

And it remains the case that per capita is much better than pro rata, and I am going to address you on that, but I am going to emphasise again, neither of them is perfect, and it may well not be necessary to give guidance on this particular theme in your judgment.

The per capita approach is the standard approach in GLOs. That, I think, is uncontroversial and is provided for in the CPR.

None of the cases in the Bundles is a case in which a pro rata approach was ordered against the wishes of the Claimants. There is no example of that in any of the

Authorities.

I need to very quickly just go to three cases, and two of them are the two that Mr Carpenter took you to, and then there's a third that I want to look at briefly.

The first is *RBS*, which you may have still open. It's in Tab 5.

MR PRESIDENT: Yes.

MR JONES: Paragraph 28 was a particular Paragraph which my Learned Friend highlighted, which is where the judge said where there is a considerable disparity, the default rule is unlikely to meet the requirements of fairness.

You will see there, where there's a contrast drawn between an institutional investor and an individual with a small claim. You will see at the end of that Paragraph, what it says is: "Adoption of the default rule will tend to negate a primary purpose of GLOs." That, in my submission, is a key explanatory sentence because it raises the question "what is the primary purpose of a GLO?"

It is not entirely clear from the judgment, and I'd just remind you that this is in any event unperturbed because, as my Learned Friend pointed out, it was actually agreed there between the Claimants that they should depart from the standard approach.

What it appears that the judge had in mind there, where he said it would negate a primary purpose of the GLOs is the purpose which we saw back in Paragraph 20(5), which was the access to justice consideration, in which essentially it was said that where one has a GLO, that essentially can assist the less wealthy claimants to bring claims.

Now, that may well be an advantage of a GLO, but in my submission, it was not one of the stated purposes of the Umbrella Proceedings Order in this case.

The point actually goes considerably further because if you place the access to justice considerations here, they are very different. We know in this case that Trial I and Trial II are going ahead. We know that they are funded. The reason we know that is that

there are various Claimants who want to go ahead with their trials and are going ahead with their trials.

So it is not the case that one needs a costs sharing order to ensure that those trials go ahead. The only potential impact, if it has any at all, of a judgment sharing out costs in this case, would be to deter other Claimants from coming forward -- smaller Claimants from coming forward -- because they would know they could not come forward and just sit and be stayed, but instead, they would have to participate in costs. So it's not only that the access to justice point doesn't apply here, but as I say, the opposite is true in this case.

MR PRESIDENT: Well, up to a point. I mean, you are obviously right that there was a corpus of Claimants well-funded, willing to bring these claims without, for instance, the involvement of some rather significant players who are coming in.

But one does need to think that the wider picture needs to be taken into account. If one gets into a situation where, if you start, you are left with the exposure or the lion's share of a costs order, then it's going to have a game of reverse chicken in a later case, where there is a perfectly good claim, but everyone is saying, "Pick someone else rather than me to bring it because the moment I stick my head above the parapet, if I lose, I'm seen as the person without whom the case could never have been brought". True, but also the person who's made the participation of others unnecessary, which is the mischief, I would suggest.

MR JONES: So the answer to that is that one just needs to look at what happened in these sorts of cases, and that's where the people are sitting in the background, not wanting to progress their claims or whether actually there are people coming forward, wanting to be first.

In practice, there are always claimants who want to be in the fray and want to be frontrunners. From *Sainsbury's* onwards, there are always going to be claimants. Of

course, Mr Carpenter's clients are the current examples, as in Trial II are some of my clients -- who are willing to take on the burden of pushing the matter forward.

If it ever happens that that wasn't the situation, then of course it may be right to look for different costs solutions, if that is the cause of the problem.

Sir, when you have a system which is working extremely well and encouraging claimants to come forward, that problem simply does not arise.

The next case, which I need to look at quickly, is the *Rowe* case, which my Learned Friend took you to. Again, it's very important to see precisely how the point arose. I'm on the per capita point here. It's in Tab 8 of the Authorities Bundle.

All of the Claimants here were individual Claimants, and you can see at Paragraph 6 -- the Paragraph numbers go a bit strange -- but it's on Page 85, and it's indented -- which it shouldn't be. It's Paragraph 6 there.

There were three firms of solicitors acting for this large number of Claimants. So they were all in groups. It's a case where there were already a small number of Claimants, and crucially, what you then see in Paragraph 36 is that all the Claimants had agreed that they should share liability on a pro rata basis.

It was one of the Defendants -- UBS -- who said that it should be per capita.

So that's the context in which, in the course of discussions which then followed, Mr Justice Nugee repeatedly said that the Claimants had embarked on what he called a common venture, and that's the expression which he used in Paragraph 35, in Paragraph 41, and in Paragraph 43.

And it was that fact of being in a "common venture", which in Mr Justice Nugee's reasoning, made it appropriate for them to share costs exposure on a pro rata basis. They were working together to bring their claims and consistently with what they had agreed. They had agreed on how costs liability should be shared between them, and the judge said, "They brought a common venture. That way of proportioning costs

between themselves makes good sense."

And one can contrast with the third and final case, which I want to go to, which is the *Upham* case, which is in Volume 2 of the Authorities, at Tab 16.

It's right to say that *Upham* was deciding on a slightly different point, which does not arise here. So just by way of context, the Claimants in *Upham* had agreed, again, on a pro rata distribution, but there was a question about whether that pro rata cost sharing should apply across two distinct groups of Claimants or whether each of these two groups of Claimants should be treated separately, and the submission which was made was that in *RBS* and in the *Rowe* case - the court had emphasised the desirability of making an order pro rata applicable to all Claimants.

So if I could just pick up the reasoning, Paragraph 34, please. You see that the judge rejected that submission. If I can pause and ask you, sir, to read Paragraphs 34 and 35.

MR PRESIDENT: I will read that […] Yes.

MR JONES: You will see there that the essential point was that the Claimants had not embarked on a common venture in the same way as they had in *Rowe*. I make the same point here. There just is not a common venture. There are different Claimants. Some of them were in groups, where they're perfectly free to decide between themselves how to share costs liability between themselves, but some of them are individual Claimants. They have not agreed the basis on which they should check off between themselves, and the Applicants are a mix of large and small companies, and they are free to reach whatever agreement they wish, but they or perhaps their insurers have then looked out at the wider group of Claimants, and they have seen some other large companies -- notably my clients and I suppose Mr Lask's clients -- and they understandably feel that they would like to make those companies shoulder a larger part of the cost.

But I do say that those larger companies are not causing any higher cost. I also say they haven't agreed to act with others or indeed to subsidise the claims of others, and I also say that unlike in the GLO cases, there is not a policy reason -- an access to justice policy reason -- to require my clients to pay a larger share than smaller companies.

And that is why if one had to choose pro rata versus per capita, the per capita approach should apply.

So there is also, again, a practical point about the pro rata approach. You have seen, I think in the written submissions, various concerns raised about how one goes about determining the relevant MIF payments by each of the Claimants.

There are all sorts of complexities involved in that. It's an exercise to see what is the MIF claim, as it were, by each Claimant.

There is then a further point, which is these Claimants have different claims. Some of them have one and one claims, one and two claims. The pass-on analysis might be very different for different Claimants.

And so it is not the case even if one could get a rough approximation of their MIFs that that is necessarily a rough approximation of the value of their claim. All the submission boils down to from the Applicants is that costs should be allocated in a broad-brush way broadly, consistent with each Claimant's card turnover. So I do say that that is a further reason why pro rata is not the right approach because there just isn't a principal basis on which to allocate costs.

Sir, you raised the point about costs which may be incurred by the example of Ocado. I'll just say a couple of words on that because I think it comes up here. Ocado will be participating in Trial II, and it will of course cause the Schemes to incur some costs in responding to its expert report -- there may be a question to classify those costs, if one needs to decide if they're individual or issue or common costs.

Sir, I am not going to attempt any answer to how one would classify them because I don't know, and again, it goes back to the point where guidance should be only at the highest level at this stage.

Then a second question, which is, if they are common between a particular group, a particular cohort of Claimants, how should they be shared between that cohort of Claimants?

Again, sir, I reiterate the point. Again, it is very, very difficult to be absolute about that. One can ask the question why should those other Claimants share in the costs liability which on this hypothesis Ocado would've caused? That's just the flip side of the question which I ask, which is why should Ocado share in the costs liability which those other Claimants will have caused the Schemes to incur in the course of the trial? One really needs to keep a degree of flexibility to look at the end of these proceedings and ask not only who took which points but were the points valuable, was it sensible to take them, and one might then take into account the potential size of the different claims. One should also take into account, in my submission, the number of Claimants overall.

Sir, I am not sure if I can say anything more than that on this particular question, on Ocado's costs, other than that it does tend, in my submission, to illustrate the dangers in trying to be definitive at this stage.

MR PRESIDENT: Thank you, Mr Jones. Can I ask you this. It's a very general thought experiment, but it may assist in trying to structure a set of principles or broad-brush rules that could guide rather than specify.

Let's suppose we reverse the hypothesis, which I think is the one most important to give guidance on, where, if the Claimants, generally speaking, lose against the Schemes and, therefore, there is an attempt by the Schemes to recover.

But let's suppose the other way around. Let's suppose actually the Claimants

essentially win against Visa and Mastercard, and there is a costs order that Visa and Mastercard ought to pay the costs of the parties who brought the claim.

Does the question of how those costs ought to be distributed or allocated actually inform the other question that I started with, namely, incidence of costs assuming the Claimants lose?

For instance, would one be saying that one would not be interested in assessing the recoverability of the costs of, say, a stayed Claimant in those circumstances and that that is something that Visa and Mastercard would not have to pay, and does that in some way inform what we ought to be thinking about the opposite side, which is the extent to which there is a liability, hypothetically, for the stayed Claimants?

MR JONES: Yes. So one can certainly see in relation to the stayed Claimants issue, precisely the reason that you've just given there, that is a helpful thought experiment, generally speaking, for the duration of the stay, one would not expect costs to be recoverable by the Claimants against the Defendants unless of course they chose to lift the to stay and had to participate in some way.

So from that point of view, yes. I am quickly trying to see if I may have any other helpful analogies for other parts of the case. I can't immediately think of any, sir, but it may be that there are other wider ramifications as well.

MR PRESIDENT: I suppose one that struck me was that we've got a situation where Visa and Mastercard -- let's just take one and make it easy -- Visa lost, and the Class are seeking to recover from Visa X million.

Does it matter, for purposes of holding harmless the costs that have been incurred which Visa are having to pay, whether they can be tied to particular issues or otherwise, or one would just say, "Look, this group of Claimants have incurred this amount of costs. They are not going to recover everything because costs will be assessed, so they will recover 70 percent" or ought one just to say that one allocates

that 70 percent by reference to, well, say pro rata rather than per capita cost?

I mean, in a sense, when I put it that way, the notion of individual issues and common costs seems to me to be taking something of a backseat. Now, that may be wrong, and that is really why I'm raising something -- there is just so much at this junction between the two streams that I launch on the parties the thought experiment that perhaps be binned rather than articulated?

MR JONES: I think, sir, for my part, I have two concerns. One of them, to be frank, if I try to think on my feet, I may say something which I might come to regret -- but the other is just to revert to a point I made a few times about the danger of trying to be too prescriptive at this stage because if you reverse the example -- that's the example you've just given me -- I'm sure if I had time, I'd think of all sorts of other considerations which could play into that example and which really just serve to emphasise how cautious one needs to be about even giving guidance at this stage.

MR PRESIDENT: Well, that's helpful, Mr Jones. Can I put it this way. If one looks at a spectrum of outcomes of the guidance judgment, on one extreme, we have Mr Carpenter, who is saying what I wanted to say, I'd like a granular order.

You, I think at the other end, were saying that guidance is rather dangerous, and you would rather have discretion to exercise at the end of the day than an excess of fettering, even if it is through a judgment that is expressly intended to be of guidance rather than anything else. Is that putting it fairly?

MR JONES: I think that is right, sir, yes.

MR PRESIDENT: Fair enough. That's very helpful, Mr Jones. Thank you very much.

SUBMISSION BY MR CHRISTOPHER BROWN

MR BROWN: I think it is for me to go next. I notice the time. I will try to be very brief.

I will seek not to duplicate submissions made by Mr Jones and the stayed Claimants -- my main area of interest on behalf of all that fall into that bracket.

I adopt Mr Carpenter's submissions on pro rata versus per capita. Unless there are particular questions you wanted to raise with me?

The parties all agree, I think, that the question is what is fairness in the circumstances. I think that's the way Mr Carpenter put it. The legal principle, we agree.

Now, where we part company with my Learned Friend is the way in which he portrayed the advantages and disadvantages to the respective parties of clients such as the Freeths Claimants, and the position painted or the portrayal by my Learned Friend was that stayed Claimants in this privileged position sitting on the sidelines being able to free ride on success achieved by the active Claimants.

We say, for both the reasons that you explored with Mr Carpenter, sir, but also for additional reasons, that's a too simplistic picture.

I want to pick up one or two additional reasons rather than simply agreeing with points that you put to Mr Carpenter this morning.

Mr Jones [AUDIO FADED] this litigation, and that differs from the GLO context where it is routine that parties -- that Claimants get together in groups and have steering committees to have say in the running of this litigation.

But there is another point which I don't think has been touched on so far, sir, which is that being on the sidelines -- I should have perhaps started by saying, if not already clear, that the Freeths Claimants at one end of the spectrum intend to stay -- they have been stayed essentially since the outset, and if it would help, I can go through the background briefly which is --

MR PRESIDENT: I don't need that.

MR BROWN: Our claims were commenced in December 2021 and was essentially put on ice until they were transferred, and then a formal stay came into effect almost

immediately, pursuant to what had gone on --

MR PRESIDENT: No, you don't need to --

MR BROWN: The point we have always been stayed. And being stayed, you are intrinsically in a weaker position than active Claimants, as regards to potential settlement.

Active Claimants, it stands to reason, are in a much better place as the litigation proceeds, to assess the relevant strengths and weaknesses of the cases and develops a much better position to assess when the best time is to seek to start any settlement discussions or the terms in which to propose and so on.

That obviously is just as good for the Schemes as it is for the active Claimants. They have full visibility over the arguments as they're developing the evidence that's coming out.

Contrast that with stayed Claimants, who are in essence in exactly the same position as anyone else in the world. They can witness what's going on in the Tribunal, but they are not involved in the litigation beyond that; so are undoubtedly in a weaker position.

We say that that point just isn't captured by Mr Carpenter's portrayal of the position, the so-called privileged position of stayed Claimants.

Sir, that was really the key point I wanted to make.

I do want to draw your attention today briefly to the delay on the part of the active Claimants in raising this issue. I know we are no longer in the territory of potentially making an order here, but undoubtedly we say it is relevant to the overall fairness question.

We raise fairness in my skeleton argument that there's never been an explanation for the timing of the application. I take your point, sir, the point you made this morning, Mr Carpenter has raised important issues. We don't dispute that, but what we do say

is the timing of it coming a year after the UPO and 18 months after the March 2022 CMC is a factor to be taken into account when assessing the overall fairness.

MR PRESIDENT: I think it cuts both way because any Applicant for a stay could have sought articulation of the costs position, and the fact is that the stays say nothing.

MR BROWN: They do, but I would endorse Mr Jones's point, which is that we were in the standard position. It's fair to assume that stayed Claimants were entitled to assume that the ordinary position would apply.

MR PRESIDENT: I am not sure that follows. All I am saying is I think you got that point because this is not a stay, for instance, on foreign grounds or anything else; this is a stay in interactive and a very complex proceedings where already two unusual conditions were being attached to a stay.

I don't think the ordinary question of this is an ordinary case remotely applies here. This is a whole series of rather unusual questions, and if the only point you are making is that Mr Carpenter deserves a telling off for coming late, well, I think it -- if the shoe fits many feet here, and I am really not very interested in working out whose is the best fit. I think there are far better points.

MR BROWN: I won't -- that point.

Mr Carpenter made one further point this morning. I just want to pick up on one of them, which was that the Tribunal should not give Claimants a perverse incentive to seek advantage by hiding behind others.

Now, sir, you pushed back on that. I am not going to make that point again, but in any case, sir, it does paint a simplistic picture of the situation behind the stay, and I say that the incentives really are not as straightforward as Mr Carpenter paints them.

So that was all I wanted to say on the question of stayed Claimants. Can I just make one point on Mr Jones's pro rata basis versus per capita submissions?

As I say, we adopt the submissions made by Mr Carpenter on this point, particularly if

we are not going to persuade you on our stayed Claimant point.

The question is what does fairness mean in the circumstances? Indeed, it was in the context in the per capita debate in *Rowe* and *RBS*, where that principle is drawn from; reflected in other cases as well.

So that's the guiding question. It's not whether the regime is aimed at access to justice, in my submission, was Mr Jones' point on the GLO regime in *RBS*.

The overriding question is fairness.

As regards the *Rowe* case, Mr Jones addresses the common venture that the Claimants were said to be engaged in. In my submission, that, again, is not the defining feature of that judgment, and indeed, in Paragraph 41 of the judgment -- just for your note -- isn't couched in those terms. So we say again, that's not a distinction.

That's all I wanted to say on that, bearing in mind the time.

I just want to make one point about our position, which is that we are proceeding against one Scheme only: Claimants only against Visa.

There was some debate this morning as to the potential costs liability as regards the Schemes in [AUDIO FADED] and whether that could arise. Mr Carpenter said that wasn't the intention behind the CSO.

I just wanted to lay down one marker, which is that we would have a real concern if we ended up potentially settling at some stage with Visa, and then having some unknown contingent costs liability, vis a vis the party -- the Scheme, and if that were a real risk, then that would make settlement much more difficult to enforce and will not further the interest of both the parties in the Tribunal encouraging settlements in cases of this kind.

Sir, that was all I propose to say unless you have further questions for me.

MR PRESIDENT: Very grateful, Mr. Brown. Thank you very much.

MR LASK: I wonder if it falls to me to finish off for the Claimants? I can be very brief.

MR PRESIDENT: Yes, I think we'll do it. We'll take a break for the transcriber.

Mr Lask, over to you.

MR LASK: Thank you, sir.

SUBMISSION BY MR BEN LASK KC

MR LASK: I want to address briefly the position of stayed and inactive Claimants. We gratefully adopt Mr Jones's submissions on this. I would simply add the following brief remarks.

Allianz is in a similar position to Primark in that it is not participating in Trial I, but it is participating in Trial II. We agree there are strong arguments that stayed Claimants should not share in the adverse costs exposure. They agree to be bound by the outcome of a trial, yet they give up any say in the conduct of the litigation. They don't adduce evidence. They don't make submissions. They do not affect the incurring of costs by the Defendants.

The natural and appropriate quid pro quo for that is that they do not share in the costs exposure. This promotes a more efficient and streamlined approach, as you pointed out earlier, sir, and the main thrust of my submission is that the same logic applies to those Claimants like Allianz, who are unstayed but not participating in Trial I.

In substance, there is no difference at Trial I between a stayed Claimant and a Claimant such as Allianz.

And then just to pick up on a point you put to Mr Jones about the position of lead Claimants at Trial II. You gave the example of Primark leading on the provision of data at Trial II and what Primark's adverse costs exposure may be in those circumstances.

In my submission -- and we obviously have one eye on the possibility that Allianz will

end up effectively being the lead Claimant for the insurance sector at Trial II -- but in my submission the lead Claimants for a given sector should not bear the whole risk, the whole cost risk for that sector, where there are Claimants from that sector -- sorry, other Claimants from that sector who are present at Trial II and are able to feed into the process. By which, I mean they are able to help shape the conduct of the litigation. They are able, in theory, to adduce evidence, and influence the submissions that are made.

The ability to feed into the process distinguishes those sorts of Claimants from Allianz's position at Trial I, where it is not participating at all, and on that basis, in my submission falls to be considered in the same way as a stayed Claimant. That's really all I want to say on that issue.

Then just finally, on the issue of per capita versus pro rata, we agree with and adopt Mr Jones's submissions on the merit of a per capita approach.

Unless I can assist the Tribunal further, those are my submissions.

MR PRESIDENT: Thank you very much, Mr Lask.

Would now be a sensible time to rise for ten minutes to enable the transcriber to take a short break? We will then have an hour, maybe even a bit more for the Schemes.

Very good. I think it's 10 past. We will resume at 20 past 3.

(Break.)

MR PRESIDENT: Welcome back.

MR JOWELL: Should I commence my submissions?

MR PRESIDENT: Please do. Thank you.

SUBMISSION BY MR DANIEL JOWELL KC

MR JOWELL: If I may start by saying that we recognise the wisdom of not making

any order at this stage of the proceedings, and we also are very much in Mr Jones's camp in the sense that we don't think it's sensible also to give any very firm guidance on at least most of the issues that are before you.

On some of the issues, we as the Defendants Schemes don't have very much of a bone in fight, and so I don't intend to address you on them. These include the question of the liability of stayed Claimants or lead Claimants and also the pro rata versus pro capita issue.

What I would like to address you on, if I may, are three issues.

The first is the question of settlement -- in the effect of settlement, whether those should be supervised, which I know it's not an issue that is raised directly by the application, but I apprehend that it is one that the Tribunal is very interested in.

The second is the question of joint and several liability.

And the third question is the provision of information on funding.

Now, in relation to settlement, I'd like to start, if I may, by expressing what I understand to be the concern, then by looking to mitigating and countervailing factors.

And then finally, I would like to address you on what we think is a potential way through.

The concern, as we understand it, is essentially what the Tribunal referred to as the last man standing point, namely, that where there are settlements between Claimants and Defendants, particularly when those settlements come at a late stage of the litigation, there is a potential for significant pressure on the remaining Claimants, if those remaining Claimants apprehend that they may be liable for the totality of the historic common costs that have been incurred as regards to all Claimants.

And we understand that those concerns exist; however, there is a mitigating factor. The mitigating factor is that if they pursue the matter to trial, and they find that there is a cost order against them for the totality of the Defendants' cost including common

cost, they would be in a position to then seek contribution from the other Claimants who have already settled in contribution proceedings, seeking a pro rata proportion of common cost.

So that would always be open to them regardless of whether those Claimants have settled as against the Defendants.

Now, I appreciate that that is only a mitigating factor because of course it may be uncomfortable for them even to have to contemplate a very large cost order for all common costs as against themselves even if they do take some comfort from the fact that they could potentially seek a contribution, but it's important nevertheless to bear that in mind.

The second point is a more fundamental one, which is that --

MR PRESIDENT: Understood. What you are saying is at the end of the process, the unsuccessful last man standing would, say, "Make a joint and several costs order against me in regard to the entire group of Claimants, and I will then seek contribution from the others."

Is that how it works?

MR JOWELL: Yes. That certainly would be open to them. They could seek a contribution for the costs. It'd only be the historic costs of course because they are always going to be on the hook for costs going forward, for the historic costs. There's no reason why they cannot seek contribution from those Claimants that have settled.

Now, I don't say that that is the complete answer to the point because it does require them potentially to bring contribution proceedings, and in the first instance, they may be out of pocket for that large sum. So I don't suggest that that is a complete answer to the point, but I just think it's important to bear that in mind, and I think it relates to the point that I will come to in a moment.

So the second point is this. It's a more general point. That is that in general, it is very

important to not to disincentivise or to make unduly complicated the settlement of proceedings, and it's inevitable in cases like this that settlement, if it comes, typically comes in dribs and drabs and not all in one go, and that's obviously desirable because it results in the finality of litigation, and also, just as importantly, takes the burden off the Tribunal in resolving these types of disputes, and historically, most of these disputes have result by settlement.

So introducing any step that makes settlement more complicated, more difficult requiring the supervision of the Tribunal is in principle to be avoided, in our submission, because it contradicts that very important priority.

So how then to square the circle? What is the way through? Well, you were shown by Mr Carpenter the general statement of Mr Justice Foxton in the Serious Fraud Office case, and we, for our part, would not object if the Tribunal were to give at a very high level and duly caveated an indication that it would expect that in most cases or in the typical case where there is a -- where there are settlements by some Claimants, one would then expect that the Defendants, if they are successful, would be expected to abate their claims for historic common cost as against the remaining Claimants by a fair extent or by a proportion that is attributable to the settling Claimants.

Now, what amounts to a fair proportion would be the amount that the remaining Claimant would be able to obtain were it to bring its own contribution proceedings as against those Claimants.

In other words, the extent of abatement of the claim would reflect what would be fair and reasonable for them to have obtained as against those other Claimants.

One doesn't need to go into that basis of that apportionment at this stage, but simply one needs to state the point in principle, and that should, in our submission, gives non-settling Claimants sufficient comfort that they won't be stuck with enormous prima facie liability for costs beyond their proportionate share of those costs.

And that, we say, is the proper solution to this, rather than expecting all settling Claimants and Defendants to come before the Tribunal for an extensive sort of inspection process that is going again to hold things and deter a settlement.

So that's our proposal of the way through on that first issue.

In relation to joint and several liability, we say that it's simply impossible for the Tribunal to give any meaningful guidance at this stage of the proceedings, and that's now in our submission very clear because in order for it to be meaningful to say that cost should be several, it's necessary to specify at a minimum at least two further things.

The first is the unit over which several liability rather than joint liability is to attach, and the second is the basis of apportionment for that several liability. One can't simply say wholly in the abstract without addressing those two things, whether it's desirable or not desirable to have several rather than joint liability.

Now, by the unit of several liability, what I mean is, essentially is it to be several as between each and every Claimants or on some other basis?

Now, Mr Carpenter in his order stated that the liability is to be based on several as between each and every Claimant.

In reply submissions, it was said, at least in the case of Scott + Scott, it was accepted that it would be on the basis of each and every group of Claimant.

In his oral submission, Mr Carpenter went further and said at least Stephenson Harwood would also accept liability on a group basis.

Now, we don't know whether how much further it goes, but clearly it's sensible that any, if there were to be several liability, that several liability would at the very least have to be on a group-by-group basis.

And that would have to apply across the board. One can't expect the Defendants to be chasing one company in a group, each separate subsidiary in a group of companies for their individual costs. That's manifestly unreasonable, and I think that is recognised

by the concessions of Scott + Scott and Stephenson Harwood.

But for that to apply also across the whole board that at a very minimum, one has to start looking at groups of Claimants, but we would say, Why stop there?

Why shouldn't it be also the case that all Claimants who have banded together to bring their claims on a single claim form? Why should they not also be as between themselves jointly liable?

And indeed those who have chosen to instruct the same solicitors, why should they not be jointly liable? They must have cost arrangements between themselves to cater for that scenario.

So we say there's a total lack of clarity as to the very much basic question, which is over what unit is several liability to attach, and we say there needs to be a proper debate and consideration about this, and that would have to be at the relevant time.

The second aspect here is the question of the basis of the methodology that is used, first, whether it's per capita or whether it is to be on a pro rata basis, but also if pro rata, what is the methodology to be adopted to achieve that pro rata?

And I think it was accepted by Mr Carpenter that you can't talk about several liability without also resolving those things jointly.

Now, we made a number of detailed criticisms of the pro rata methodology in our written argument and the extraordinary difficulties there would be of seeking to arrive at the sums for the proposals on which the order is based, of how to work out what the relevant pro rata will be for each Claimants.

None of those have been addressed either in reply submissions or today. Unless one is prepared to say, "Well, one definitively goes down per capita," one certainly can't say that it will be a pro rata several liability without also jointly considering whether the particular method for working out pro rata actually workings and whether it's practicable.

So we say one can't make these determinations in the abstract without also considering those other issues jointly, and that is why one can't come to any kind of firm guidance on whether that should be joint or several.

Indeed, if you are attracted to the per capita methodology, one still would have to then wrestle with the question "if the capita, as it were, is not a Claimant -- each individual Claimant -- but Claimant groups, how does one then work out a per capita methodology? Does one still count up the number of Claimants within each group? Or is it to be by some other method? And how workable will that method be?"

So all of this shows is that one can't come to even a guidance on whether things should be joint or several without wrestling with these other issues.

And indeed, there are other specific reasons why it would be inappropriate now to give such an indication. One of those is timing.

Now, I know the Tribunal is not attracted to the delay in and of itself, but it remains the case that from the perspective of the Schemes, numerous cost awards have already made in the proceedings against various sets of Claimants.

We made those in our respective skeleton arguments on various preliminary issues and strikeout applications.

In the cost order that have followed those applications, where they have been made in favour of the Defendants' Schemes, there's been no suggestion that the Claimants' liability for costs is to be on a several basis, and in those circumstances, the natural meaning of all of those orders must be that the Claimants are liable for all of the costs on a joint and several basis.

After all, our cost order stipulates that the Claimants without distinguishing between particular Claimants are to pay the costs. There is only one natural meaning of that order. They are liable to pay the costs jointly and severally, and that is how we understood the orders at the time, and indeed it is how they were complied with.

As Mastercard observed in their written submissions, even where the Claimants have issued across five separate claim forms, it was always accepted on each occasion that the Claimants would be jointly and severally liable for any adverse common cost orders in the Defendants' favour.

And we do say that where the parties have been proceeding on that basis for over a year after the Umbrella Proceedings Order was made, it would be wrong to simply turn around and say retrospectively, at least, that a different approach is to apply.

And so we say at that the bare minimum, if there were to be any indication that cost should be several rather than joint, it should only be on a prospective basis, but as I've said, our main submission is that it is simply impossible and inappropriate without wrestling with all of these other issues to determine which way and in which manner costs should be allocated as between Claimants.

Finally, I should deal with the question of the provision of information. Particularly, I should say, if the Tribunal is inclined to give any guidance that costs may be on a several basis, then obviously that does raise serious spectre from the Schemes' point of view that because any cost award in its favour may be extremely difficult, if not impossible, to enforce as against many, many of these Claimants, particularly the smaller Claimants, or those that are overseas.

And in those circumstances, it is very important that we are in a position to understand how these claims are being funded.

Now, it's quite true that we could go and ask them how they are being funded, and indeed, we have done so, and you will see in the Bundle, and just to give you an example. Some of the Claimants have responded, and they have explained that they have funding. Others have responded and said that they don't have funding, but they are very large entities, and we shouldn't be concerned, but others have simply have failed to respond at all and have refused to provide any information about whether they

are self-funded, whether they have ATE, and so on.

And to give you an example of those in the latter category, just for your note, if you look at Tab 76 and 78 of the Bundle, Pages 282 to 283 and Page 285, you will see correspondence between us and the Scott + Scott Claimants, in which we raised this importance of understanding their funding position in light of this application for several liability, and they simply refused to respond, providing no information on how on their funding position of any of their clients.

And we say that in those circumstances, an order should be made on this occasion that they should provide that information. Many others have. It's a wholly reasonable request. It arises directly as a result of their application, and this is not what -- what we are not saying is that security for cost is some kind of quid pro quo for a cost order; we are simply saying that having raised this issue, this is a potential knock-on consequence, and that is something that is absolutely recognised in the case law that you would have seen, and that it's already been referred to, and we say that in those circumstances it's fully appropriate that they should provide that information which can't be difficult to provide and then, if necessary, applications for security for cost can be made in due course, which will of course be adjudicated on their own merits.

MR PRESIDENT: That is now?

MR JOWELL: Yes, that's right; exactly.

Having raised even the possibility of several liability, unless the Tribunal is content to give a clear guidance that cost will be joined across the board, then this issue arises, and on that basis we do need this information, and it's an entirely reasonable request. The timing is purely because up to now, it's generally been understood that liability would be joint. But if that is to be contested, then this inevitably arises, and it's not a burdensome question. It should be complied with.

Unless I can be of further assistance, those are our submissions.

MR PRESIDENT: Thank you very much, Mr Jowell.

Mr Draper, is there anything you have to add?

SUBMISSION BY MR OWAIN DRAPER

MR DRAPER: Yes. If I can pick up on two of the components of my learned friend's submission.

The first is settlement, and then moving to joint and several liability. I will have some things to say about that topic.

I can deal with settlement very briefly. We endorse what Mr Jowell has said, and so it stands for both Schemes as regards the unattractiveness of the Tribunal having to be involved at this stage of settlement.

As Mr Carpenter made clear, the problem is not the settling Claimants' liability for costs; the problem is the remaining Claimants and what abatement, if any, there is of their costs liability as regards to historic costs, those incurred during the time when the settling Claimant was a live participant.

To bring some sort of indication of the practical importance of that, there have historically been dozens of settlements per year in the Interchange Fee Litigation. The Tribunal has seen in recent times that there's been a very substantial settlement in the latter part of last year, and as you are aware, sir, that was actually both Visa and Mastercard that settled with the HK Claimants.

So it's a very real concern about that there being impairment to that process. As my learned friend Mr Jowell says, effectively the problem can be dealt with at the stage of the remaining Claimants paying costs and, to the extent it's useful, to give an indication to all Claimants that there will be an abatement to reflect the Defendants' costs that are attributable to the settling claim.

It's very hard to object to the idea that there being a fair and reasonable abatement.
We are on the same page with Visa as regards those settlement points.
If I can turn then, sir, to --
MR PRESIDENT: Just pausing there then. I think what you are both saying is that it would be unattractive -- and I understand why you say that, and I think I agree -- for the Tribunal to get involved in the nuts and bolts of a settlement. Tribunals don't.
It's for the parties to do the deal and for the Tribunal to manage the process, which normally means pointing the way to the exit. That's the role that we play in that situation.
So I think we are on the same page there.
Would there be an advantage in -- normally there is an order I can send, articulating the exit that is being made either by way of stay or by way of the withdrawal of the claim or whatever.
Would it be worth having a form of recital in that order in terms it would be agreed between the settling parties as to what the Tribunal could take as regards the costs position, from the settlement of it being undertaken, in other words, to provide in the control of the parties a statement that could be taken into account when considering the question of costs at a later day?
I don't know whether that's something which has crossed the Schemes' mind, but it would be potentially quite helpful to know what the thinking had been in an appropriate degree or vague -- I don't think one would want granularity, but I think one would want a sense, if it was possible to give, of what the effect of a settlement was on costs incurred by Visa and Mastercard in the past.
MR DRAPER: In my submission, sir, it goes back to the point Mr Carpenter made. The settlement can't affect the liability of the Claimants who stayed in the action, and that is the concern that the Claimants and the Tribunal, as I understand, both have.

The question is, do the remaining Claimants benefit from some abatement of what would otherwise be their liability because some part of the Defendants' costs up to the date of the settlement are attributable to the settling Claimants.

Now, my submission, for that purpose, one doesn't need know anything about the terms of the settlement because ex hypothesi, it is a settlement that works as full and final settlement and must in principle be resolving costs issues.

So from the perspective of the other parties, the Tribunal will need not peek behind the curtain, in vague terms or otherwise.

MR PRESIDENT: Well, okay. That is saying that there is a certain inevitable assumption that follows from the very fact of settlement. I mean, what is that assumption, if that's the case?

MR DRAPER: I think, again, as Mr Carpenter has said on the issue, unless costs issues have been left live in some way, so remaining within the Tribunal's jurisdiction -- that would presumably be apparent on the face of the order -- the presumption would be that all matters between the settling Claimants and Defendants have been resolved such that they fall out of the picture.

That then allows the remaining Claimants to say they are gone, and gone with them was a proportion of the common costs, and there should be therefore, an abatement to reflect that, is the term used by Mr Jowell.

So in my submission, neither of the other parties -- the non-settling parties nor the Tribunal -- need to have any insight into the settlement beyond the fact that it has resolved all of the issues.

MR PRESIDENT: Yes.

MR DRAPER: Sir, if I can then move to the question of joint and several liability as opposed to several. I can be relatively brief, I think, because I embrace what's been said by Mr Jowell to the effect it's quite difficult to give any firm guidance as to what

the application of the principles will mean on any given set of facts.

I don't think there is a huge amount of disagreement as to what the principles are. I will come back to qualify that in a moment.

But, really, if the overall question is what is just or what is fair in all these circumstances, then the question becomes what are the circumstances, and that's why, in my respectful submission, it's a process that the Tribunal can and should engage in to the extent necessary for the purpose of the adverse costs of orders that it makes.

It can look at what the trial at issue was or what the issue that's being resolved composed, and to the extent joint and several liability as between the participating Claimant groups is appropriate, on the facts of that trial or on the facts of that issue.

So with that heavy caveat as to how much I'm going to be able to help you, sir, I propose to make submissions on the three headings very briefly.

The first is to underline the practical importance of this distinction between the two forms of liability.

The second is to identify the principles by reference to which one sides between those two forms of liability for costs.

And the third is to do my best at getting to the kind of guidance that the Tribunal might be able to make if it was so inclined as to what answers those principles give.

So briefly on practical importance, the first heading. As you said at one point, sir, it's very important to remember what is the context in which these issues will arise. So the context is that the Tribunal, ex hypothesi, is to determine whether the Claimants ought to pay the costs or some of the costs of the Defendants in relation to a particular trial or issue.

It follows -- and I don't think this is in dispute -- that justice favours that those costs can in fact be recovered. Of course the Tribunal are quite interested whether there

will be practical enforcement of costs awards.

And in this case, sir, there are thousands of Claimants, many of them overseas. If liability is joint, that isn't a very big problem because as we have seen in practice, what happens is defendants are able to make a request for payment on relevant firms. The firms go to their clients, and it's not a matter for us what arrangements they have, but they have some arrangements that allow them then to make sure every claimant contributes an appropriate amount, and the costs are discharged by the firm on behalf of all of their claimants.

If, however, one has several liability, then that smooth running structure falls because the incentives don't line up properly for it to work properly in that way.

Claimants who face only a small amount of liability and perhaps benefit also from being overseas, claimants might take the view that there's no realistic prospect of them ever being pursued for costs, and without the realistic prospect of reinforcement, they don't have an incentive to contribute.

So that's the reason why it matters. Now, as my learned friend Mr Jowell has said, some of the Claimants have cooperated in trying to assuage our concerns about that. We know that many of the Stephenson Harwood Claimants, for example, benefit from an ATE policy, against which, on the face of it, the Defendants would be able to demand payment.

But that's not the position, or we don't know whether that is the position as regards other Claimants. As Mr Jowell says, the Scott + Scott Claimants have decided not to respond to questions about funding or ATE.

So that's of practical importance.

If I can come now to points of principle. At the outset, you said you had a slight concern that there might be jurisdictional issues in relation to some of the provisions of the order. I don't think anyone here goes quite that far, but in my respectful submission,

there would be a real danger in starting from the proposition that the guiding principles are to be taken from the GLO context or what is very close to that, that the answer and the reasoning in *Rowe* provides strong guidance as to what should be done here.

As I come on to say, the proceedings -- the *Rowe* case -- are really very different to what you said described the very particular circumstances of the Umbrella Proceedings.

And when one identifies the applicable principles, the differences between the two sets of proceedings are highly material to the application of those principles.

In my respectful submission, it does come down to this question of collection risk, and where justice requires that it sits.

So two points on that.

As I said, this is not a GLO case or anything like it. In GLO case, there are strong reasons of public policy. You've heard about them today, principally access to justice that GLOs are in favour of -- that very sadly, the Defendants have to bear the collection risk because the alternative is intolerable because it violates the access to justice of the individual Claimants.

So take the situation in *Ingenious*. One can well understand that whatever the arguments the other way, the risk of Claimants joining the GLO being individuals, individual Claimants being faced with bankruptcy, but at least a notional joint liability, one can see that that wins the day.

If I could ask you, sir, to turn to Paragraph 40 in my written submission. That's here in Bundle 1, Tab 3, at Page 32.

MR PRESIDENT: Yes. Thank you.

MR DRAPER: And this is a very headline summary at Paragraph 40 of the types of claims or actions -- probably better to call them actions to distinguish them from the underlying claims that are in the actions -- that form part of the Umbrella Proceedings.

So one has some actions where all the Claimants are related corporate entities. Some examples are given there.

Just pausing there. Footlocker. We have in the Hearing Bundle. It's at Volume 4, Page 450. That's an example where although we will talk about Footlocker as being the Claimant, there are in fact there are 17 separate corporate entities, the vast majority of which are foreign, forming part of that affected party. We would describe it as a single party.

And it's only today that we've had the concession they should all be treated as a single Claimant for the purposes of liability for adverse costs.

Looking at (b), there are some actions where there is a small to medium number of relatively large corporate merchant Claimants.

Then (c), there are a few claims where there are just many small Claimants.

Then there are, lastly, (d), in the written submissions. There are some actions where there really is a mixture of small merchants, but also amongst them, really large corporate Claimants.

An example would be the iHerb claim form. We also have that in the Bundle.

Just so you can see the type of variety. That's at Page 456 of Hearing Bundle 4.

As you said, sir, this really is a peculiar -- not in the critical sense -- but a peculiar set of proceedings and that there is a huge amount heterogeneity in terms of the type of actions that fall within it.

If we were only talking about one of the actions such as Maltavini, listed there at (c), there are just lots of very small merchants, one might have different arguments about whether there is any analogy with GLOs.

What we are faced with is there is a great deal of heterogeneity.

What they all have in common, sir, distinguishing them from a GLO or the *Ingenious* case, is that these are all commercial entities rather than individuals. Many of

them -- not all but many -- are large and sophisticated undertakings.

Most of them in all likelihood have entered into funding arrangements and some, we know, ATE -- insurance arrangements -- and they have between them sufficiently sophisticated arrangements in place that they're able to instruct single sets of solicitors.

So many Claimants, for example, having instructed Stephenson Harwood.

In my submission, if one then asks, "Well, where would justice require if one had to fall on one side of the line and say should this be joint and several or should this be several liability," one has to ask where does justice require that collection risk falls, then collection risk should fall on the Claimants side. They have made common costs where they have instructed the same firm. They must have arrangements for paying their own costs, and those arrangements could be used in order to discharge adverse costs, liability as well.

Sir, it may well be that many of the Claimants other than Stephenson Harwood also have ATE policies that mean, in practice, the collection risk is no problem for them.

Sir, those are my submissions on the contrast to a GLO. If one puts to one side then the contrast to a GLO, is then left with reasoning up from the ground.

And if one reasons up from the ground, we know from the cases -- I am not going to take you to them, sir -- we know from the cases including *Ontalmus*, which is referred to of course in *Ingenious*. *Ingenious,* there's a fair run through the cases.

The starting point is that where parties sue together or where they make common costs, even if not on the same claim form, they are generally liable together. The justice of that is obvious.

Where parties come together, concentrate their resources in order to pursue a claim together, and they lose together, justice requires that they continue to present a single front to the defendant that seeks payment of its costs.

It is in general unfair for them to then disperse and for defendants to be left chasing down small amounts from each of them.

So those are the principles. Put GLO to one side. Start from the proposition that making common costs generally means joint liability.

And I come to the last of my three headings, which really lines up with Mr Jowell's question about what unit is it we are talking about, and that, sir, is wherer rubber hits the road as to how much guidance can usefully be given.

So we had today in the course of submissions a concession that the smallest unit there should be, if I can put it that way, is the corporate group; so where one has 6 Dr. Marten entities or the 17 Footlocker entities, they should all be jointly liable.

But as soon as one goes beyond that, there's no agreement between the two sides as to dispute what the minimum unit is, and in my submission, it's not very easy to identify from first principles what that answer should be.

I can give you, sir, one example where the answer is very obvious. That is not where there's another corporate group, but where in practice, there is obviously a single Claimant for all practical purposes.

Take, for example, franchises, where they are all under the one brand. They are not, for technical reasons or business structuring, they are not corporate. They are not a corporate group. They are unrelated companies in that sense, but they present as a single business in these proceedings.

Or take as an example the hotel chains. So we have in these proceedings various hotel groups. Kew Green Hotels, for example, operates many international brands of hotels. We have some in these proceedings.

We've got the InterContinental Hotel, IHG. There are 12 IHG Group companies that are Claimants in these proceedings, but aside from those, there are other IHG Claimants. They just happen not be group companies. They operated under the brand

and under a management agreement.

If one asks what in substance is going on, they are group Claimants for our purposes. They caused us to incur costas of defence as though they were a unit, and justice would clearly require that they be treated as a unit when it comes to paying our costs. So one slightly beyond the common ground on corporate groups.

Then if one zooms out slightly further and ask what practical guidance can be given beyond that -- what Mr Jowell said about claim forms. Obviously there, the parties -- the Claimants -- have cooperated sufficiently to bring their claims together and must've made arrangements to that end. At least a strong starting point will be that they are sufficiently unitary for the purposes of the proceedings that joint liability is appropriate and just.

Then if one zooms out slightly further, Claimants not on same claim form but who have come together and instructed the same solicitors.

If one applies my yardstick of litigating as a single unit and have made common costs, then often the answer will be "yes, they have," but good lawyers and bad lawyers both answer every question with "it depends," and the answer here is, it depends.

Take the first trial, sir.

Stephenson Harwood, despite the huge number of the Claimants that they represent and the heterogeneity of those Claimants when one looks at some of the claim forms, for trial purposes, they are litigating as a unit.

We talk about them as the SH Claimants. They instruct counsel on behalf of the SH Claimants. They participate in procedural hearings as the SH Claimants. And they will win or lose in Trial I on that basis as well.

But it's not a tool that exactly the same analysis would apply in Trial II, where the Tribunal will be addressing necessarily different sectors, and those SH Claimants will be spread across those sectors.

The Tribunal may even have to consider to some extent particular businesses within sectors. So the situation becomes more complex, and that's where, sir, in my respectful submission, if one's looking at the practical justice of the costs order, that the order has to be responsive to the facts as they present, and after the trial or after the determination of an issue, the Tribunal will be in a position to identify to what extent common cause was made and to what extent the Defendants' costs were incurred in response to effectively a single unit of Claimants or not.

So that's the solicitor groups.

Now, zooming out even further from there, beyond solar systems now, we're looking at the galaxy, in my respectful submission, it is impossible to say anything meaningful about sharing of liability on a joint or on a several basis between all of the Claimants in the Umbrella Proceedings.

The Umbrella Proceedings are multiple in terms of the trials taking place, and there is at present trying to make prospective provision. The principles we have to draw the line between joint and several liability simply don't allow us to engage with the huge uncertainty as to what costs will be incurred by the Defendants responding to what, and without being able to grapple with a sufficiently specific factual basis, the Tribunal cannot say at this stage what will be just.

So in my respectful submission, it becomes the position on the application is the Applicants say that merely because these claims are being managed together, gives the Tribunal the ability to give an answer to joint and several liability as opposed to several liability.

Our position has and remains that it is not possible to give that answer in the abstract, but to the extent that the Tribunal wants to give guidance, it's very clear that joint liability is the correct answer, at least as regards some of the levels of the analysis as one zooms out from the small units to the large.

Those are my submissions, sir.

MR PRESIDENT: Very grateful, Mr Draper. Thank you very much.

Can I express my gratitude to everyone for the help they have given me on what is not a straightforward matter. I will give thought to a judgment to be handed down.

I will bear in mind that guidance that is too specific might be as bad as guidance that is too vague, and I will try and steer a middle course.

Thank you all very much. I will end the hearing now. Very grateful.

(Hearing concluded.)