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IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1441-1444/7/7/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Wednesday 17th – Thursday 18th April 2024

Before:
Ben Tidswell

Dr William Bishop

Tim Frazer

(Sitting as a Tribunal in England and Wales)

BETWEEN:

CICC I - II **Proposed Class Representatives**

v

Mastercard, Visa & Others **Proposed Defendants**

A P P E A R AN C E S

Lord Wolfson KC, Michael Bowsher KC, David Caplan, Ligia Osepciu, Flora Robertson & James White (On behalf of CICC)

Brian Kennelly KC, Daniel Piccinin KC & Emily Neill (On behalf of Visa)

Sonia Tolaney KC, Matthew Cook KC, Veena Srirangam & Hugo Leith (On behalf of Mastercard)

1 Wednesday, 17 April 2024

2 (10.30 am)

3 THE PRESIDENT: Yes. Good morning, everyone, good morning.

4 LORD WOLFSON: Good morning, Tribunal.

5 THE PRESIDENT: I should probably do the livestream warning

6 first, if you do not mind. I will just read out the

7 piece I have here. Some of you are joining our

8 livestream on our website.

9 I must start, therefore, with the customary warning,

10 an official recording is being made and an authorised

11 transcript will be produced, but it is strictly

12 prohibited for anyone else to make an unauthorised

13 recording, whether audio or visual, of the proceedings

14 and breach of that provision is punishable as contempt

15 of court.

16 Yes, Lord Wolfson, good morning.

17 LORD WOLFSON: Good morning, again. Tribunal, I appreciate

18 it is customary to begin with reciting appearances for

19 each party but we have got a lot of people, it seems

20 also that everyone here knows everyone else rather well

21 already and I am the late gatecrasher to this particular

22 party.

23 So if the Tribunal will permit me, I will take the

24 appearances as read and after two short points I will

25 move to the substance.

1 The two short points are these; first of all, as to
2 timing, we understand the Tribunal is going to sit later
3 tomorrow morning from 11.15. The parties have discussed
4 and, so far as we are concerned, what we would propose
5 is that we have, so to speak, a normal court day today.
6 If we need to sit later tomorrow to make up the time,
7 then I understand that that would be possible. It may
8 be that we do not need to sit later tomorrow in any
9 event but we can see how we go. But we are obviously in
10 the hands of the Tribunal; if you would rather sit
11 a little bit later today, if that is easier, we will
12 obviously do that.
13 THE PRESIDENT: Yes, thank you, that is helpful. We did
14 have a slightly different suggestion -- and again really
15 for you to decide how helpful this is.
16 Sitting later is a little bit constrained both days.
17 I have a 5 o'clock call this evening and a 5.15
18 tomorrow, so I would have to finish a bit before that,
19 but what we thought we might offer, if it was helpful,
20 was a shortened lunch, the short adjournment to be
21 shortened even further so we could start again at 1.30,
22 if that is satisfactory to everybody concerned,
23 including, of course, the transcription service, and
24 that would, if you took it up, on both days, give you
25 back an extra hour, and we could always do a little bit

1 of extra time after 4.30.
2 So, in a way, slightly in your hands as to how you
3 prefer to do it but there is definitely some extra time
4 there, if you think you need it.
5 LORD WOLFSON: Can we take that, so to speak, and park it
6 and, if we may, we will get back to the Tribunal as the
7 hearing progresses, but I am sure in principle either
8 that or something like it can be sorted out.
9 THE PRESIDENT: That would be helpful. Have you got a sense
10 of how the time will be broken up between you?
11 LORD WOLFSON: That was my second point.
12 THE PRESIDENT: Yes, right.
13 LORD WOLFSON: What we have agreed, again subject to the
14 Tribunal, is that, very broadly, it would be 50/50 as
15 between us and the schemes. If, therefore, we want some
16 time for a reply, we would leave over time, so to speak,
17 from our original 50% and use it by way of reply, but
18 I do not think we are going to fall out in this case
19 over five minutes here or there, but very broadly that
20 is our suggestion.
21 Again, we are in the Tribunal's hands. It may
22 depend in part on the Tribunal's questions but broadly
23 that is how we see it going.
24 THE PRESIDENT: That is very helpful, and really I think all
25 that we are concerned about is that we get to the end of

1 tomorrow with everybody feeling like they have had
2 a fair go, and we are happy to be as flexible as we can
3 to make that work. I think we do now have difficulties
4 with Friday, as you will have picked up, another
5 commitment that means we cannot have an overspill, I
6 am afraid, so if we are going to get it done this week
7 and not have to come back some other time, I think we
8 need to make sure that the timings work.
9 LORD WOLFSON: Certainly we are confident that we ought to
10 be able to cover the essential issues in the two days
11 the Tribunal has allocated.
12 THE PRESIDENT: Good, thank you.
13 LORD WOLFSON: So unless there is any other housekeeping
14 points, let me, so to speak, go to the substance.
15 Obviously, today's hearing follows on from a hearing
16 about a year ago now, when the PCRs sought certification.
17 Since then, there have been a number of hearings, both
18 in the Tribunal and in the Court of Appeal.
19 The Tribunal will be well aware of those hearings.
20 I may need to dip into some of them at some point, but
21 essentially I am going to take them as read, if I may,
22 especially the Tribunal's own judgment last time round.
23 I will dip into it. I am not going to take you through
24 it paragraph by paragraph.
25 The central point is that, in its judgment of 8 June

1 last year, the Tribunal decided not to grant any of the
2 CPO applications in their then current form, stayed all
3 four of them so the PCRs could present revised
4 proposals. Those revised proposals, as you know, have
5 now been presented. They have been met, it is fair to say,
6 with the same vociferous opposition from Mastercard and
7 Visa as did the original proposals. Perhaps in fact
8 there are no proposals which we could make which would
9 meet with their agreement, or at least their consent,
10 but fortunately that is not something you have to
11 decide.
12 Now, as we set out in our written argument at
13 paragraph 4 -- and again, with respect, I am going to
14 take the skeletons and the underlying materials as
15 read -- the Tribunal concluded three things. First,
16 each of the proposed collective proceedings raised
17 common issues to satisfy Rule 79(1)(b). Second, each of the
18 opt-in proceedings was brought on behalf of
19 an identifiable class, and third the opt-out proceedings
20 were suitable for an award of aggregate damages.
21 But, as we identified in paragraph 5 of our written
22 argument, there were four key factors which led the
23 Tribunal to decline to grant the applications.
24 I am not going to read them out, but you can see
25 them set out in paragraph 5 of our written argument.

1 That led the PCRs to issue the revised applications,
2 which differ from the original applications in the
3 following main respects -- and just let me set them out
4 now. We may come back to some or more of these. First,
5 removal of interregional cards; second, a more developed
6 methodology for addressing Article 101(1) infringement;
7 third, more detail in our approach as to integration
8 with the Umbrella Proceedings; fourth, more evidence as
9 to how merchants can be matched to commercial card
10 transactions using information held by merchants, by
11 acquirers and indeed by the schemes themselves, and
12 fifth, a revised class definition in the alternative to
13 the original class definition.
14 Now, as I say, I know the Tribunal will have read
15 the written material. To assist the Tribunal with
16 regard to the oral presentation, what we propose to do
17 orally is as follows: I will address the Tribunal on the
18 class definitions. My learned friend Mr Bowsher KC will
19 address you on the remaining issues of methodology. My
20 learned friend Mr Caplan will address you on the issues
21 arising with regard to suitability (and that is both the
22 utility of these collective proceedings in light of the
23 Umbrella Proceedings and also integration with the
24 Umbrella Proceedings), and then I will deal with the
25 remaining questions of authorisation and any points as

1 to conduct.
2 So that is the scheme.
3 The intention is that we will not repeat points that
4 others have made and it may therefore be that questions
5 which you have, I hope you will know where to direct
6 particular questions, I hope that is helpful, and
7 between us we will cover, I hope, the whole of the area.
8 So I will start, if I may, with the class definition
9 issue. I propose to deal with that in the following
10 way: first, I want to address where we are on the facts;
11 second, I want to say a few words about the relevant law
12 and on what points are open to us at this hearing, and
13 third, I am going to deal with what we have been calling
14 the original class definitions, although, of course,
15 technically they will have been tweaked to remove
16 interregional and non-UK MIFs, but the Tribunal knows what
17 I mean when I say original in this context, and fourth
18 I am going to address our revised class definition.
19 Now, the reason I am starting with the facts is
20 that, certainly as I read the 2023 judgment of the
21 Tribunal, the major concern for the Tribunal was
22 a factual concern. We can see that from the judgment at
23 paragraph 183, that is at {N/3/60}.
24 Perhaps we can just put that on the screen quickly.
25 I will take this relatively quickly, Tribunal, if I may,

1 because you are obviously on top of your own judgment,
2 if I may say.
3 You will see what is said there:
4 "... merchants have no obvious way of determining
5 that question themselves ..."
6 I.e. whether they have carried out a relevant
7 transaction:
8 "... there is no reason for the acquirer to provide
9 that type of transaction detail to merchants in the
10 ordinary course, given that the MSC in blended contracts
11 is not dependent on the transaction mix."
12 The judgment continues in the same theme. I am not
13 going to read out the relevant sections but at 185(2),
14 if we could just scroll down, {N/3/60} -- my screen has
15 just gone blank. At 185(2), no evidence acquirers would
16 hold sufficient and readily available records, and at
17 187, over the page, {N/3/61}, it is said effectively the
18 evidence was that Visa could not map data about MIF
19 types to individual merchants on a large scale. Again
20 over the page to 190, {N/3/62}, some merchants may have
21 no ability to verify the position. At 191, this has
22 consequences under both rules Rule 79(1)(a) and Rule 79(2)(e).
23 It is the screen which is unclear; not the judgment,
24 just to make it clear.
25 Now, we might want to note while we are here what is

1 said at 193: Rule 79(1)(a) allows for a degree of
2 uncertainty, and I will come back to that point, if
3 I may. If we can then skip through to -- sorry. Yes,
4 sorry. Thank you very much.
5 Thank you. Apologies. If we skip to paragraph 211
6 on page 66, please, {N/3/66}, there it is said that our
7 submission that Visa's data could be used misses the
8 point, which is that a merchant has no access to Visa's
9 records at this stage and therefore no way of knowing if
10 they are a class member. Again I emphasise those last
11 few words. Paragraph 212, at the end, the nature of the
12 contracts with acquirers is opaque as to the type of MIF
13 involved. Then 213 is perhaps the punchline, hundreds
14 of thousands of merchants on blended contracts, no
15 sensible means, so far as we are aware, to deal with it.
16 So that was essentially why we lost on the point
17 and -- actually could we just take a second. These
18 screens are very dark, the ones next to me, and I simply
19 cannot see them.
20 THE PRESIDENT: Would you like us to rise for five minutes?
21 LORD WOLFSON: I do not know how quickly -- it is only the
22 brightness.
23 (Technical pause)
24 I am sorry.
25 THE PRESIDENT: No, not at all. It is important that you

1 see, Lord Wolfson. Just say if you want a little more
2 time, if you would like us to rise.
3 (Technical pause)
4 LORD WOLFSON: I imagine we are going to have a break in the
5 middle of the morning, are we not, so let us stick with
6 this and we will try and sort it out then. I do
7 apologise.
8 THE PRESIDENT: If you would like to fix it now, I would be
9 happy to rise now if it is disadvantaging you. I do
10 not want you to feel like you are in difficulty, even if
11 it --
12 LORD WOLFSON: This one here seems to work. Maybe if we
13 could have five minutes.
14 THE PRESIDENT: Why do we not give you five minutes to sort
15 it out and let us know when you are ready.
16 LORD WOLFSON: Yes, so sorry.
17 (10.44 am)
18 (A short break)
19 (10.50 am)
20 THE PRESIDENT: All fixed.
21 LORD WOLFSON: We seem to be better, thank you very much.
22 I think it was a voltage problem. I had not even got
23 going yet.
24 Now, I was about to take the Tribunal to 213,
25 I think, in the Tribunal's judgment, which I think I was

1 saying is really perhaps the punchline, hundreds of
2 thousands of merchants on blended contracts, they will
3 face that problem, no sensible means, so far as we are
4 aware, to deal with it. So that is essentially why we
5 lost on that point.
6 The Tribunal went on to say, at 215, {N/3/67} that
7 there may be factual matters which could demonstrate that the
8 class definition, or some variant of it, is workable.
9 Deeper investigation might produce a different picture.
10 All of that, of course, related to the opt-out
11 class. The Tribunal held there was no identifiability
12 problem when it came to the opt-in class. The reference
13 for that is 218-222.
14 Just to close off this point. If we look at
15 paragraph 256 on page 78, {N/3/78}, we there see it said
16 that:
17 "... the defects in the proposed proceedings should,
18 at least in part, be capable of remedy."
19 In 258 the Tribunal gave the PCRs a further period
20 to address the concerns set out in the judgment.
21 Following through to 263, on page 80, {N/3/80}, the
22 third sentence: contemplated there might be further
23 factual investigation, which might establish greater
24 clarity in respect of the class definition or produce
25 a workable methodology for easily identifying whether

1 a merchant is a member of the class.
2 That is particularly relevant to points now made by
3 Visa and Mastercard, about some supposed res judicata
4 bar to us submitting that the original class definition
5 is workable, and I will come back to that point. So
6 that is the judgment.
7 The central issue was the concern about the factual
8 position; vast numbers of merchants on blended contracts
9 would have no sensible means of finding out whether they
10 have accepted a commercial card, no reason for the
11 acquirer to provide that information and the acquirer
12 may not even have it. So that is where we were.
13 Let me now move to where we are and the facts now
14 before the Tribunal. In my submission, the facts now
15 are entirely different and address the concerns
16 expressed in the judgment. Let me start with the IFR,
17 and I do not want to get into a somewhat arid debate
18 about whether the IFR is a fact or not, let us just look
19 at what it is. It certainly exists.
20 Can we start with Article 12 of the IFR, that is at
21 {P/30/13}, and that is one of the articles essentially
22 left unchanged following Brexit. The reference for that
23 point -- I will just give you the reference -- is at
24 {P/24}. You will see at paragraph 1:
25 "After the execution of an individual card-based

1 payment transaction ..."

2 The payment service provider must provide the

3 following information. You will see (a), (b) and then

4 (c):

5 "The amount of any charges for the card-based

6 payment transaction, indicating separately the merchant

7 service charge and the amount of the interchange fee."

8 Then carrying on:

9 "With the payee's prior [written] consent, the

10 information referred to in the first subparagraph may be

11 aggregated by brand, application, payment instrument

12 categories and rates of interchange fees applicable to

13 the transaction."

14 Then in paragraph 2, {P/30/14}, you will see that

15 the information must be provided periodically at least

16 once a month and in an agreed manner. A payment service

17 provider includes but is not limited to acquirers.

18 Now Article 12 has applied since 9 December 2015.

19 We get that from Article 18 (2) at page 15, {P/30/15},

20 so it has been in force throughout the relevant claim

21 period, and that materially changes the picture in

22 itself.

23 Payment service providers, which include acquirers,

24 are required by law to provide merchants with

25 a breakdown of their transactions into different payment

1 instrument categories and interchange fee rates
2 separately showing the amount of the interchange fee.
3 Now, one would assume, and indeed presume, in the
4 absence of evidence to the contrary, that, at least in
5 the vast majority of cases, if not in all cases, people
6 will have complied with what are their legal
7 requirements and their legal obligations. I think there
8 is a Latin tag to that effect, but I am not sure I can
9 either remember it or indeed need it.
10 Indeed in the evidence filed by Mastercard, in the
11 form of a report on the UK and international card
12 payment industry at {E/15} -- I will just give the
13 reference -- it is said there at page 63 that -- and
14 I quote -- acquirers are legally required to provide
15 some reporting to merchants for free and merchants
16 normally receive a monthly statement from the acquirer
17 which gives details of the number, volume and type of
18 card transactions.
19 So there is very good reason to believe that all
20 merchants that use payment service providers have been
21 given this information throughout the claim period and
22 obviously it follows that the payment service providers
23 have the information as well.
24 Now, that point that I have just made about
25 Article 12 and its implications was set out in our

1 Reply, the reference is {G/1/15}, and there has been
2 zero response to it in Visa and Mastercard's skeletons.
3 There is an attempt in Mastercard's skeleton to divert
4 attention to a rather less significant regulatory
5 requirement introduced by the PSR in 2022 -- that is
6 paragraph 3.35A of its skeleton -- but nothing is said
7 about the implications of the IFR, which is a much more
8 fundamental point, as I showed you. So that is the IFR.
9 In my submission, it is hugely significant on the class
10 identifiability question.
11 THE PRESIDENT: Can you just help us with the bit at the
12 bottom that is on page {P/30/13}, so Article 12, the bit at
13 the bottom talks about aggregation of information. Do
14 you say that that still means that it would be plain
15 from the information -- I suppose we do not know how it
16 might be aggregated, but are you saying that does not
17 make a difference to your point because it talks about
18 aggregation of all rates and interchange fees applicable
19 to the transaction?
20 LORD WOLFSON: Exactly, it is not a -- that is not going to
21 cause a problem. Indeed, one starts with what it says
22 here, if Visa and Mastercard want to say, "Okay, but
23 that is what it says, but in practice it does not mean
24 that or it has not been read that way," well, let them
25 say it, but they are not saying that. On the face of

1 the instrument itself, the information ought to be
2 available.
3 I was going to come to actually show you some
4 statements, where we actually look at what people do get
5 in practice, and I will show you that, and we can see
6 aggregate is one of those words that can mean different
7 things in different contexts. We are used to it in a
8 football context; it means something rather different
9 when you are talking about insurance and when you
10 aggregate incidences, whether they amount to one
11 insurable event or two. So I wanted to show you the
12 statements to see how it is actually applied in
13 practice, and when we look at the statements, you will
14 see that people get the information which shows them --
15 as they are meant to get from this instrument, which
16 shows them what is going on.
17 THE PRESIDENT: Yes.
18 LORD WOLFSON: Also, I am reminded by Mr Caplan just to show
19 you that it is payment instrument categories and, of
20 course, commercial cards are a category for these
21 purposes as well, so I think that is another part of the
22 response, sir, to your question.
23 THE PRESIDENT: Yes, I think you are saying that, on the
24 face of it, this does not mean that an acquirer could
25 aggregate all of the different MIF information so that

1 it was not clear whether some of them were commercial
2 cards or not. That is the point you are making, is it
3 not?
4 LORD WOLFSON: Exactly, and indeed, if they were doing that,
5 it really would be to subvert what this is all about.
6 As I say, let us have a look at what they are to do, because
7 they do not do that, no doubt for this reason.
8 So let us have a look then at some of the
9 statements, because we have put in some evidence on this
10 to show if there is any, so to speak, proof in the IFR
11 pudding, and if we start with Ross 6 at paragraph 32,
12 which is at {D/1/10}. I know the Tribunal has read
13 this, but could I just ask the Tribunal to re-read,
14 quickly, from 32 to the end of 35, just to remind
15 yourselves of what is said there, please. (Pause).
16 THE PRESIDENT: Yes.
17 LORD WOLFSON: Now we have the table to which Mr Ross refers
18 at D13, if we could have that on the screen, please,
19 {D/13/1}. You will have seen that, that is the review
20 of the sample merchant statements received, and you will
21 see the information there set out. If we then go to the
22 detail of the actual statements, which are at {D/14/1},
23 please, so just to run through this.
24 I do not know whether you have had a chance to see
25 this in the reading in but the first is Dojo, which is

1 actually a trading name, you will see at the bottom, of
2 Paymentsense Limited, and you can see on page 3,
3 {D/14/3}, the breakdown between the different card
4 types, which, sir, I think goes to the question you
5 asked me earlier. I will not spend too much time going
6 through each of these. Let us just go to the next one,
7 Barclaycard, page 5, please {D/14/5}. Then, if you run
8 through to page 7, {D/14/7}, you will see again the
9 breakdown, same thing. Again, let me just cut to the
10 next one, the actual breakdown at page 13. {D/14/13}
11 This is a different statement, but you get the gist of
12 the point I am making.
13 THE PRESIDENT: Yes, can I ask you a couple of questions
14 about these. So all of the ones that are exhibited to
15 Mr Ross's statement are 2023 statements, and I think
16 there is some reference somewhere -- I think there is
17 a reference to 16 and I think there are 16 listed in the
18 table. I am not sure I have seen the other 13. Maybe
19 I have missed them in the documents, but I am not sure
20 whether -- and I think it is possible that the proposed
21 defendants asked for them and may have seen them, but
22 I am not sure we have seen them. I just wonder whether
23 you have any statements that predate this? In other
24 words, have we got anything that goes back into the
25 period -- the actual period of the claim, and

1 just as a sort of ancillary question to that, one of the
2 consequences of being 2023 statements seem to be that it
3 postdated the PSR's initiative in October 2022, which
4 I think you referred to as something that Mastercard has
5 raised?
6 LORD WOLFSON: Yes.
7 THE PRESIDENT: I was not completely sure that that had not
8 changed the game as well in the sense of requiring
9 further things. Are you able to explore that just a bit
10 for us?
11 LORD WOLFSON: The second point, I am going to come to.
12 THE PRESIDENT: Yes, good.
13 LORD WOLFSON: The first point, the full suite of redacted
14 statements are at F34. Can I come back to you on the
15 date point?
16 THE PRESIDENT: Yes, of course. I suppose the two things
17 that struck me about the table was, firstly, the
18 question of the date range, because I think it would be
19 helpful to know if we have the evidence that goes back
20 into the claim period, and secondly, just the range of
21 acquirers. But if you have the full suite, then we will
22 get a sense of that from the documents.
23 LORD WOLFSON: The full suite of redacted statements are at
24 {F/34}, and perhaps over the short break I will get and
25 come back with the information to respond, if we can, to

1 any of the other points.
2 THE PRESIDENT: Yes, of course.
3 LORD WOLFSON: But the other regulation and what that
4 actually required, I am going to be coming to as part of
5 my submissions.
6 THE PRESIDENT: Yes, thank you.
7 LORD WOLFSON: So what we see from there is that the
8 information is broken down in the way you would expect
9 having looked at the IFR, and Mr Ross also explains in
10 his 7th witness statement -- I will just give you the
11 reference, it is at paragraph 19 at {G/6/5} -- that, in
12 some cases at least -- and indeed today you would
13 probably infer in all cases -- this sort of information
14 can be accessed from an online platform, as one would
15 anticipate.
16 So that is the information, subject to the points
17 I will come back on, as to the information held by
18 merchants and acquirers.
19 There is also more evidence now about the
20 information held by Visa and Mastercard themselves. You
21 will have seen references in the evidence and
22 submissions to merchant ID numbers, MIDs, and card
23 accepter ID numbers, CAIDs -- or at least that is the
24 way I am pronouncing it -- and there is quite a lot of
25 evidence on this. So in these oral submissions, let me

1 try and summarise what we say are the key propositions
2 which flow from that material.
3 First, each merchant will be assigned by its
4 acquirer one or more MIDs or CAIDs, which are
5 essentially identification numbers. I do not think that
6 is controversial. For present purposes, they are
7 functionally identical -- a phrase used in the evidence
8 is “wholly synonymous”. That is Mr Ross's evidence based
9 on documents from the schemes themselves. That is at
10 Ross 7, paragraph 24, and 32-33, the reference is
11 {G/6/6} and {G/6/8}. The only difference is that Visa
12 calls the number a CAID and Mastercard calls it a MID.
13 Now, once Mastercard or Visa give out a MID or CAID,
14 or are given, rather, a MID or CAID number, they can run
15 automated searches across their data to see whether
16 there were any commercial card transactions recorded
17 against those numbers. That is accepted in terms by
18 Mastercard, see Cotter 2 at paragraphs 55-56. The
19 reference is {E/2/20}, perhaps it is worth putting that
20 on the screen quickly. You see at paragraph 55:
21 "For each transaction which it switches and/or
22 clears, Mastercard is provided with the relevant ...
23 MID."
24 Then over the page at 56, {E/2/21}:
25 "To the extent an accurate MID is provided, the data

1 Mastercard holds does allow it to identify the
2 transaction volumes associated with that particular MID,
3 broken down by reference to (for example) the type of
4 card ..."
5 At paragraph 68 on page 25 {E/2/25} -- and, sir,
6 this again goes obliquely to your point -- Mr Cotter
7 makes clear here that this was the case throughout the
8 claim period.
9 Now, Visa does not deny that it could do the same
10 thing, and in this context the absence of any denial
11 speaks volumes. What Visa seeks to do is a forensic
12 soft shoe shuffle, avoiding the issue by referring to
13 difficulties in reconciling CAIDs with particular
14 merchants or merchant names with particular
15 transactions. Now, I will come back to this, but we do
16 say that that is a forensic sleight of hand. The point
17 I want to make here is that both schemes can take a MID
18 or a CAID or a list of them and readily determine
19 whether they are associated with any commercial card
20 transactions.
21 Finally, in this context, in my submission, it is
22 obvious that both Visa and Mastercard are hugely
23 sophisticated businesses, with very sophisticated data
24 analysis capabilities, and indeed the analyses which
25 they have produced for this hearing, and indeed the

1 previous hearing, albeit only on points which they think
2 assist them, demonstrate just what they are capable of
3 doing. Just to give an example from each, for
4 Mastercard if we look at Cotter 2 at paragraph 76 at
5 {E/2/27}, I do not need to go through the detail of this
6 but there is clear evidence of an ability to analyse
7 whether commercial card transactions are associated with
8 particular MIDs, and again just to give the Tribunal the
9 reference, for Visa, the same point, Steel 2 at
10 paragraph 39, {F/2/14}.
11 Of course, in this context also, we have adduced
12 evidence that Visa and Mastercard go out into the
13 marketplace and trumpet their ability to sell their data
14 analytic capabilities, including for merchant
15 identification purposes. We have set out that evidence
16 in Ross 7 at paragraphs 57-63, the reference is
17 {G/6/13}. I will not go through that material now,
18 I will leave it to what counsel usually laughably call
19 the Tribunal's spare time to look at it again. The key
20 point for today is that there has been no answer to that
21 evidence and that is why I am just giving you the
22 reference to it.
23 THE PRESIDENT: Can I ask you, just is there -- this is
24 a point for which you highlighted the reference earlier in
25 the original judgment, to missing the point, and

1 I just want to make sure that we are not in the same
2 territory here, because I think you are saying that, if
3 somebody turns up with a MID or CAID and gives it to
4 Mastercard or Visa, then they are going to be able to
5 work out whether or not there are any commercial cards
6 or not and, obviously, if one were to (inaudible)
7 hypothesise that your claim was successful and there has
8 to be distribution of damages, one can see that might be
9 a way in which one could deal with that. If we are
10 dealing with identifiability -- and it may be I am
11 straying into what you are going to come on to, which is
12 the law, in which case feel free to tell me to wait, but
13 the question: are you saying that the fact that they can
14 do that ticks the box or are you saying that
15 therefore it is irrelevant that, as a matter of
16 practicality, hundreds of thousands of merchants might
17 not do that or indeed they might not be able to process
18 them. Is that the point you are making?
19 LORD WOLFSON: I am going to be dealing with exactly that
20 point. Indeed, when you said, "Perhaps deal with it
21 when you come to the law," I was just about to go to the
22 law.
23 THE PRESIDENT: Excellent.
24 LORD WOLFSON: If I may say, that was very well timed. Can
25 I take a moment just to summarise where I say I am on

1 the facts and then I will come to the points on the
2 law, and I hope in those submissions I will answer
3 precisely that question, because the question on the law
4 is what is the relevant threshold, what is the target
5 that we are aiming at here, if I can paraphrase, sir,
6 what you are putting.
7 THE PRESIDENT: Yes.
8 LORD WOLFSON: So on the factual point, just to take
9 a minute just to summarise where I submit we are on
10 that, three points: first, we say the evidence before
11 the Tribunal is now clear that merchants will have been
12 receiving throughout the claim period -- and I will come
13 back to that point -- regular breakdowns of their
14 transactional activity, including the mix of card types
15 they have accepted, point 1. Point 2, merchants will
16 either know that information, be able to get it from
17 their records or be able to get it from their payment
18 service provider, and point 3, merchants have
19 identification numbers and if such numbers are given to
20 the schemes, they can check, it would seem easily and
21 rapidly, whether there is a commercial card transaction
22 associated with them.
23 So now let me deal with the law and in this regard
24 also the issue of what points are open to us, and I will
25 try and deal with everything.

1 Now, we dealt with the law on the identifiability
2 criterion, i.e. Rule 79(1)(a), as well as its relevance to
3 suitability, Rule 79(2)(e), in our Reply, and the reference
4 is paragraphs 8-14, at {G/1/5}, so I am not going to
5 read out or repeat those points, I know you will have
6 read them. But I do first want to address a point taken
7 by both my learned friends, that even making these
8 submissions is somehow illegitimate or some sort of
9 collateral attack on the Tribunal's previous judgment.
10 That is at Mastercard's skeleton at
11 paragraph 3.3(2), Visa's skeleton at paragraphs 10.1 and
12 11.
13 In my submission, that is wholly misplaced. Indeed,
14 this appears to be part of a broader challenge on the
15 part of the schemes that we are not allowed for our part
16 to challenge anything fact or law in the judgment -- in
17 your judgment because we did not appeal it. That is
18 a complete non-point. Appeals, as we all learn on the
19 first day at law school, are against orders and not
20 against reasons. You do not appeal against reasons, you
21 appeal against an order. Last time, the Tribunal told
22 us, if I can respectfully paraphrase, to go away and
23 come back again, if we could, with a revised
24 application, and you did that for a number of reasons.
25 Some of those were reasons of fact, I have taken you

1 through some of that, and so on, and there was a bit of
2 law in there, if I may say, as well.
3 It would have been impossible to appeal on
4 a discrete point of law, such as what is the correct
5 test on identifiability, as that alone would not have
6 resulted in a different order and, as I say, you appeal
7 against orders, you do not appeal against reasons.
8 Indeed, given what the Tribunal had said, the
9 Court of Appeal would no doubt have told us, if we had
10 rocked up in front of them: what do you think you are
11 doing here? The Tribunal have said you can go back with
12 revised proposals, so please go away and, as a first
13 step, do what the Tribunal invited you to do.
14 Indeed, before the Court of Appeal would have told
15 us that in the hearing, no doubt Visa and Mastercard
16 would have made the same point in their skeletons in the
17 Court of Appeal; in other words, they would have been
18 arguing, we can be absolutely sure, the precise opposite
19 of the points which they are now contending.
20 So we respectfully submit that there is no barrier
21 whatsoever to us arguing, at this revised hearing,
22 points of law that may have been covered in the
23 judgment.
24 In any case --
25 THE PRESIDENT: Can I just test you a bit on that,

1 Lord Wolfson, because I do struggle a little bit with
2 the breadth of that. I can absolutely understand you
3 coming along and saying, "We now have some better facts
4 and, therefore, we get through the -- we get to tick
5 the box." But if in the judgment, after hearing
6 argument for the parties, we reached a finding of law as
7 to what the appropriate test was, are you saying you are
8 really entitled to open that now? Has that not been
9 decided between the parties -- regardless of the point
10 of appeal, put aside whether it is an appeal or not,
11 have we not actually resolved as between the parties
12 what the meaning of the particular rule is?
13 LORD WOLFSON: Well, I answer that in two ways. First of
14 all, I do maintain the submission I just made; that
15 there was no other way to appeal it and the Tribunal
16 ought to look at all these points again at the revised
17 hearing. I do not think we need get into this point, is
18 my second submission, because it is not clear that there
19 is actually, if I can put this respectfully, any real
20 distance between us, so to speak, and the Tribunal when
21 it comes to the law. That is why, when the Tribunal
22 goes back to look at paragraph 10 of our Reply, we
23 deliberately phrased it in a conditional sense. It
24 starts off, "Insofar as the Tribunal took a contrary
25 view on these points ..." because it does not appear to

1 us actually that there is much difference on pure points
2 of law between us and the Tribunal. So for today's
3 purposes, we submit that, if I need my first primary
4 submission, I obviously maintain it.
5 It is not clear that I really need to go that far in
6 any event, but I am making it out of an abundance of
7 caution in case I do.
8 THE PRESIDENT: Yes, that is helpful and, just to be clear,
9 if you are saying that we got it wrong, then I am not
10 going to -- there is no sort of pride of judgment here,
11 so if you want to contest it, that is fine, subject to
12 your ability to do so.
13 LORD WOLFSON: Yes.
14 THE PRESIDENT: I think what is important for us is that we
15 understand whether you are doing that or not and so if
16 you can put down a marker where, if it needs to be part
17 of your argument today and tomorrow that you are
18 contesting the legal conclusions we have reached, then
19 we need to know that, I think, and obviously, both
20 defendants need to know that you are doing that as well
21 because they need to be able to respond, and we will
22 reach our conclusions as to whether it is open to you to
23 do that or not.
24 LORD WOLFSON: Precisely, precisely. Indeed, what I want to
25 do now is to take you through and identify how we put

1 the law, and I am going to be looking at how
2 the Tribunal put it in the last judgment, so I hope that
3 the next few minutes will answer, sir, your question.
4 THE PRESIDENT: Yes, thank you.
5 LORD WOLFSON: So starting with a point on -- that we
6 respectfully agree, picking the judgment up at
7 paragraph 58, this is at {N/3/24}, we respectfully agree
8 with what the Tribunal say there at paragraph 58, and
9 the Tribunal refer to paragraph 6.37 of the Guide. I am
10 not going to read it out, but we see what it says there:
11 it must be possible to say, using objective definition,
12 whether the person falls within the class. It is not
13 necessary to identify each class member.
14 Then the Tribunal quotes Trucks at 59, and I draw
15 the Tribunal's attention in particular to the last
16 sentence:
17 "The requirement is not concerned with the manner in
18 which a potential class member proves that they come
19 within the objective class definition, a question which
20 generally arises only at the time of distribution of
21 damages."
22 We also agree with everything said in paragraph 62.
23 THE PRESIDENT: Sorry to interrupt you, before you move on,
24 can I pick up in the middle of that quote from the Guide
25 there is a reference to:

1 "Indeed, it is the class definition which potential
2 class members will read when considering whether to opt
3 in or out of the proceedings."
4 LORD WOLFSON: Yes.
5 THE PRESIDENT: In some ways, I think that may go to the
6 sharp point of whether in fact there is any difference
7 or not because it seems to me that a lot of what you see
8 in the judgment, and indeed when you get into the
9 application of Sun-Rype, the Canadian case, is about the
10 practicality of a merchant's position. So when one
11 talks about -- I am not completely sure what it means
12 about using an objective definition of the classes but,
13 maybe a bit like aggregate, it could mean lots of
14 different things, but what I think we were saying in the
15 judgment is that, part of this, there needs to be some
16 basis objective -- a factual basis, rather than what
17 people think, but it must be possible to be able to say
18 whether I am in or not and it must be possible for me to
19 say it as a merchant, as opposed to somebody else if
20 I was -- some other chain that was theoretically
21 possible, that takes us straight back to the MID and the
22 CAID point, does it not?
23 LORD WOLFSON: Yes.
24 THE PRESIDENT: So I just wanted to -- I am sorry to
25 interrupt you. I just wanted to pull that out as being

1 a point which I think crystallises, if there is
2 a difference, that may be where it is.
3 LORD WOLFSON: That is why I started with the facts.
4 THE PRESIDENT: Yes.
5 LORD WOLFSON: I mean, you know, if I can mention -- I do
6 not know if I am allowed to mention J M Keynes in the
7 Competition Appeal Tribunal, it might be offensive to
8 his memory, but insofar as I can, the famous dictum,
9 "When the facts change, I change my mind", well, I
10 started off by showing the Tribunal that, as sir you
11 have just indicated, one of the issues here is, on the
12 facts, is a merchant going to be able to do this. That
13 is why I started with the facts, because the facts are
14 really important here.
15 THE PRESIDENT: Yes.
16 LORD WOLFSON: They become somewhat arid actually, some of
17 the legal debates, about what precisely is the test.
18 The key thing is that you need to be able to look at it
19 objectively and know whether you are in or out. That is
20 really the key.
21 THE PRESIDENT: Yes.
22 LORD WOLFSON: There are always going to be edge cases -- in
23 all of these cases there will be some edge cases, we
24 have to accept that but, for the average merchant, are
25 they going to know whether they are in or out.

1 Now, I was just about to say that we respectfully
2 agree with everything the Tribunal says in 62, which has
3 6 subparagraphs, which we understand to be
4 the Tribunal's summary of the law and, sir, that might
5 again be part of the answer to your question as to
6 whether there really is a meaningful issue, a different
7 issue of law between us. So there is not, in my
8 respectful submission, some sort of full frontal assault
9 here as a matter of law on what the Tribunal said at the
10 last hearing or indeed the reasoning. The submissions
11 we are making on the law are really by way of emphasis
12 and only insofar as the Tribunal applied a more
13 stringent test than justified that we would say it would
14 have been wrong to do so.
15 So therefore, all I really want to do on the law is
16 to emphasise particular points which now the Tribunal
17 will be applying to what we say is the new fact pattern.
18 So the first point is this, no need for absolute
19 certainty, and the Tribunal held in 62.2, and again in
20 slightly different terms at paragraph 193, that rule
21 Rule 79(1)(a) does not require an absolutely rigid definition
22 of the class so that no doubt might arise at the
23 certification stage about who is included or not
24 included. We have put the point in terms of it not
25 being necessary for it to be practicable, or perhaps

1 even possible, to create a comprehensive list of class
2 members, and we do submit that that is evident from the
3 class definitions in other cases. Indeed, you can see
4 in some other cases there would have been very
5 significant room for uncertainty.
6 Take the Merricks class definition. That is set out
7 in the judgment at the top of page 63. Now, certain
8 aspects of that were analysed in the following
9 paragraphs of the judgment, but with respect, I would
10 like to focus on a slightly different element of it.
11 Purchases made at a time when an individual was resident
12 in the UK for a continuous period of at least
13 three months. Now for most people that is not going to
14 be a problem. For many people it might be, particularly
15 as the time period goes back to 1992, and of course back
16 in 1992 card acceptance was much less prevalent than it
17 is now. We are all familiar now with some merchants who
18 only take cards, I mean they will not take cash for
19 example.
20 So the point here is simply this; there will be
21 many, potentially thousands in some cases, of what
22 I have called edge cases, where people will not know,
23 certainly not offhand, or without some investigation,
24 whether they fall within or without the class. The
25 other example we referred to was the Gutmann class

1 definition, that is at {P/32/3}, which I apprehend
2 the Tribunal is more than familiar with, for various
3 reasons. This produces, we would say, a huge number of
4 potential uncertainties. I mean, did I purchase or
5 otherwise pay for a ticket of the specified kind,
6 because, of course, my ticket could have been of
7 a different kind, in a period going back to 2015? Did
8 the person who travelled, who may not have been me, have
9 a travel card of the right type and so on so forth.
10 I am not suggesting that those will affect most
11 class members, but one can readily see that they will
12 affect, are really bound to affect, quite a number of
13 potential class members. In the Court of Appeal
14 judgment in Gutmann, if I could have {P/8/28} on the
15 screen please, it is instructive, in my submission, that
16 the Court of Appeal noted at paragraph 87 that there
17 might be a substantial number of consumers who had
18 sustained a loss but would not want to come forward,
19 including because they did not have proof of travel.
20 Now, I accept that that was said in the context of
21 a debate about distribution. I accept that. But it is
22 an illustration of the practical difficulties to which
23 the Gutmann class definition could realistically give
24 rise. If you do not have proof of travel or proof you
25 paid for somebody else's travel, it follows that you may

1 have particular difficulties in determining whether you
2 are a member of the class. That is the main point
3 I wanted to make on the law, and I think now that I have
4 made it, I apprehend the Tribunal will have the feel
5 that, in my respectful submission, there is not really
6 very much between us on the actual law.
7 I am identifying and highlighting certain points but
8 the real question is to what facts are the Tribunal
9 applying that law. So that is the first issue of law
10 I was going to focus on.
11 THE PRESIDENT: Perhaps help me a bit with this,
12 Lord Wolfson. It seems to me that -- and actually
13 I think this was something that confronted us when we
14 read the original judgment, there is a question of
15 judgment involved in this, this is not a test that lends
16 itself obviously to sharp lines and absolute
17 positions -- indeed I think we said that in the
18 judgment -- and so to some extent we are making
19 a judgment about identifiability and therefore the
20 utility of the proceedings and the ability of people to
21 participate sensibly in them, recognising, I think as
22 you say, that you are not going to be able to legislate
23 for every situation, and if you did that, you probably
24 would never -- certainly with anything of any size - you
25 could never be confident you could.

1 But you do have to be able to identify a mechanism
2 of some sort which objectively allows you to make
3 a decision in principle as to whether or not somebody
4 falls on one side of the line or the other, and the
5 mechanism may not apply universally, it may in some cases
6 be difficult to apply, but as long as you do have
7 a mechanism, you have an identifiable class. Is that
8 pretty much what you are saying?
9 LORD WOLFSON: I am very happy to accept that, sir, as
10 a summary. Of course, the other point I would make --
11 this is really a theme which will go through all the
12 submissions -- is that at -- I do not need to make this
13 point, we all know it, but let me just say it. At the
14 certification stage, the Tribunal -- this is not, so to
15 speak, a one-time only event. I mean, going forward,
16 the Tribunal keeps a -- has a responsibility and will
17 keep an eye on all of these proceedings and it is an
18 iterative process, if I can adopt that phrase from
19 a different area of the law, and I submit respectfully
20 that builds into the point, sir, that you just put to me
21 as well. In other words, you are taking that decision
22 as part of what is going to be an iterative process but
23 certainly the fact that there will be edge cases, as
24 I would summarise the last bit of what you said, does
25 not mean that you have not got a workable identifiable

1 definition for the majority, vast majority of cases.
2 THE PRESIDENT: Yes, and then just coming back to the MIDs
3 and the CAIDs, it may be that there is a distinction
4 between your two -- well, actually you have three
5 factual categories, I think. But between the first two
6 on the one hand where the merchant either on your case
7 has the information or can get it pretty easily and, on
8 the other hand, possibly with the schemes where
9 the practical exercise of doing that might not be a very
10 realistic one. Just to put that in context, if, for
11 example, 300,000 merchants had no other way of finding
12 out other than ringing up Visa and Mastercard and
13 saying, "Would you please tell me," that is not a very
14 practical mechanism. So as part of the judgment you
15 might reach the conclusion that that was not entirely
16 satisfactory and certainly not as satisfactory as being
17 able to ring up your acquirer or indeed just go online
18 or look in your ringbinder folder where you have all
19 your statements.
20 LORD WOLFSON: Yes.
21 THE PRESIDENT: Is that a fair distinction to draw? Would
22 you accept that?
23 LORD WOLFSON: Well, it is fair in the sense that 1 and 2
24 are, so to speak, easier than 3 because you do not
25 depend on schemes. I would not accept the schemes

1 really have a problem here or it could not be done. But
2 the submission I would really make is that, when you
3 look at the totality, one has to ask in respect of the
4 totality is this workable?
5 THE PRESIDENT: Yes.
6 LORD WOLFSON: Which really comes back, if I may say, to the
7 point you were summarising earlier. That is the real
8 question today: in totality is this workable or are we
9 going to sort of effectively throw our hands up and say
10 no, there is just no way this can work, we cannot
11 proceed any further. That is ultimately -- forgive me
12 for putting it in rather demotic terms but ultimately
13 that is where you get to on identifiability.
14 THE PRESIDENT: Yes, because you might say, might you not,
15 that if for some reason you could not -- again on your
16 case, and obviously the schemes will have some
17 things to say about the factual evidence, but on your
18 case, if for some reason your acquirer did not return
19 the phone call and you could not find your papers
20 because you had shredded them and you had lost your
21 password and could not go online, at the very least
22 a small number of people might get some sense out of the
23 schemes because, if that was necessary -- and you would
24 say it is not, but it is part of the picture of how one
25 might verify the mechanism if you like.

1 LORD WOLFSON: Exactly. I mean, in the real world, you
2 would expect -- if you have got your three buckets or
3 categories, in the real world you would expect most
4 people to be in 1 and 2. Insofar as you need to resort
5 to 3, 3 is there, fine, and that is part of the mix,
6 absolutely. It is another route.
7 THE PRESIDENT: Because it is a curious test, is it not,
8 because I think we are not really engaged, as we have
9 discussed, in the exercise of making sure that everybody
10 can do it.
11 LORD WOLFSON: Exactly.
12 THE PRESIDENT: Yet we are concerned with making sure
13 everybody has the opportunity to do it in some way,
14 which is a slightly odd construct, is it not? Not
15 everybody, the vast majority or large majority are
16 likely to be able to have some way of doing it.
17 LORD WOLFSON: Yes, I mean it is inherent in the concept of
18 what collective proceedings ultimately are. I mean, if
19 I may say, it goes to the heart of what this whole
20 jurisdiction is about. It goes to the heart of what
21 this whole jurisdiction is about, to achieve justice on
22 a collective basis for large numbers of people for whom
23 otherwise there is no effective route to justice. That
24 is basically what we are here about. It is therefore a
25 balance and the cases set out the test and the test is

1 you have to have an identifiability criterion which is
2 objective. It does not mean that you need to be able to
3 draw a list up of everybody in and everybody out.
4 Can I now go to the second point on this, because
5 I appreciate there is quite a lot we have to cover,
6 which is the law on no loss class members, and that is
7 the question whether, as Mastercard alleges in 3.39 to
8 3.40 of its skeleton, whether in collective proceedings
9 a class cannot include members who have suffered no
10 loss. That is a point of law which is really relevant
11 to the revised class definition, but as I am on the law,
12 let me deal with it now and I will come back to it again
13 later.
14 Now, there is a separate question about whether the
15 presence of no-loss class members renders the
16 proceedings unsuitable. That we will deal with later
17 in the context of suitability, but I just want to now
18 analyse it because it is put against me as a hard edge
19 proposition of law, and we submit there is no legal
20 barrier to a class which includes no-loss members, even
21 if you know or can predict with relative certainty that
22 such members are within the class. We dealt with this
23 point at paragraph 28 of our Reply, the reference is
24 {G/1/11}, and we say the authorities support the four
25 propositions which we set out there.

1 I am not going to read them out, you have got them
2 there. We also say that they are inconsistent with
3 Mastercard's submission. Now, this point was considered
4 in terms in the minority judgment at Merricks, if we
5 could look at {P/1/43} please. Again, you will have
6 seen this many times before, it is between 93 and 97 for
7 your note but, for today's purposes, if you could focus
8 in on 95, and -- thank you -- if you just take a moment
9 just to glance through that again and 97. There is no
10 need for individual class members to prove loss.
11 Liability and aggregate damages can be established
12 on a class-wide basis. No need for an individual
13 assessment "for all purposes antecedent to an award of
14 damages, including proof of liability ..."
15 Now, of course, that was said in the minority
16 judgment. But in Gutmann CAT at paragraph 111 at
17 {P/3/40}, the Tribunal held at 111 that their view on
18 this point was not inconsistent with the majority and
19 was correct. You will see that at 112 the Tribunal went
20 on to address a no-loss point as a matter of principle
21 by reference to Merricks in the Court of Appeal and, of
22 course, the whole of this bears re-reading.
23 THE PRESIDENT: We have something else, I think.
24 LORD WOLFSON: Oh, it is {P/3/40}. Yes. That looks more
25 like it.

1 THE PRESIDENT: Yes.
2 LORD WOLFSON: So the paragraphs I was directing you to were
3 95 and 97, but if you could look through later from 93
4 to 97, and then the conclusions are stated at 137 on
5 page 59. Again if you just take a moment just to read
6 that, please. (Pause).
7 Now, Mastercard says that this does not help because
8 it refers to "More than a minimal number" of no-loss
9 claimants. That, with respect, does not meet the point
10 because this is a fundamental question put against me as
11 a matter of principle about eligibility. Either the
12 presence of no-loss class members is inconsistent with
13 the statutory scheme and therefore fatal to eligibility
14 or it is not. It is put against me as a point of
15 principle, and the decisions show that it is not. We
16 get broadly the same point out of Gutmann in the
17 Court of Appeal at paragraph 73 to 74, that is at
18 {P/8/25} -- can we please have that on screen quickly
19 please -- and again, when the Tribunal comes back to
20 look at this, you will see that the Court of Appeal
21 endorses the CAT's decision that the presence of no-loss
22 class members is not fatal. So all of that case law, in
23 my submission, is one way and is determinative of the
24 point. Indeed, I am right, I would submit, even before
25 we get to the case law because on a textual basis the

1 point is a thoroughly bad one, it is based on two
2 provisions, first of all section 47B(1) of the 1998 Act,
3 that is at {P/23/5}.
4 Now, that provides in summary that you can bring
5 collective proceedings combining two or more claims to
6 which section 47A applies. section 47A is on page 4, {P/23/4}, and that
7 provides that first a person can make a claim to which
8 the section applies before the Tribunal. Second, such
9 a claim is a claim "of a kind specified in subsection
10 (3) which a person who has suffered loss or damage may
11 make in civil proceedings ..."
12 Now, Mastercard says that this means that collective
13 proceedings can only combine claims of those that have
14 suffered loss, but with respect that is not right. On
15 a proper reading, in line again with all the cases we
16 have looked at, what this is saying is no more than
17 collective proceedings can be brought before
18 the Tribunal combining claims of a kind that if brought
19 elsewhere would have individual loss as an essential
20 element of the cause of action. Now, obviously a claim
21 will need to include at least some individuals who
22 suffered individual loss, loss on the part of the class
23 as a whole is necessary, there would not be
24 a claim without that, but the statute does not mean, in
25 my submission, that each and every person within the

1 class must have suffered some personal and individual
2 loss. So I have looked at the case law, I have looked
3 at the text of the statute. Third, from a policy
4 perspective, that must be right. If Mastercard's
5 submission were correct, the statute would make the
6 construction of classes in many cases impossible and it
7 would be particularly difficult in cases where large
8 numbers may have suffered small losses, or in some cases no
9 loss.
10 But those are the very proceedings for which this
11 regime was designed. It is not limited to those
12 proceedings, but it was certainly designed with those
13 proceedings in mind. It might well be known at the
14 outset that a proportion would suffer no-loss. So take
15 in this case last time I think there was reference to
16 the market stallholder so let me come back, if I may, to
17 the market stallholder. One might be able to predict,
18 in some isolated cases perhaps even know, that that
19 person had suffered no-loss, that could be the case on
20 either class definition. Perhaps it might be known that
21 the trader surcharges so as to pass on any increased
22 costs, but had not in fact suffered any loss of business
23 as a result. It could not be right, in my submission,
24 as a matter of policy that the existence of that single
25 trader would deny the opportunity for all other small

1 traders to access the collective proceedings regime,
2 which is realistically the only one in which they are
3 going to be able to get any justice and vindicate their
4 legal rights, but on Mastercard's case it would be game
5 over.
6 So I submit on the no-loss point that the Tribunal
7 should not conclude that the collective proceedings regime is
8 so limited unless you are absolutely compelled to do so
9 and, for the reasons I have submitted, you are not.
10 The next point I would like to come to is the
11 question: can we pursue our two-pronged approach?
12 Now, I think this is the only other point under this
13 heading. You may quibble this is not a point of law but
14 I will treat it as a point of law. Now, what I mean is
15 this; can we rely on our original class definition as
16 tweaked and alternatively the revised definition? Both
17 Visa and Mastercard say no, we cannot do it and we are
18 confined, they say, to the revised definition because
19 pursuing the original one represents a challenge to the
20 Tribunal's judgment on it last time around.
21 Now, I have already dealt with that submission as
22 a matter of principle in my earlier comments,
23 the Tribunal has my case on that.
24 In this context, we really do not understand the
25 submission at all. I took the Tribunal through the

1 judgment. It is pretty clear, in my respectful
2 submission, that the Tribunal gave us the opportunity to
3 go away and come back with a revised evidential picture
4 that might satisfy the Tribunal in relation to the
5 original class definition, and that is what we have
6 done, or perhaps more respectfully I should say that is
7 what we sought to do.
8 Mastercard also suggests that we only decided, they
9 say impermissibly, to rely on our original class
10 definition in reply. That is their skeleton at
11 paragraphs 329-330, that is wrong. Again, let me just
12 give you the references. In the letter accompanying the
13 revised CPO applications, which is at {O/8}, we made
14 absolutely clear at paragraphs 10 and 11 that we were
15 taking the two-pronged approach. We summarised the
16 position at paragraph 12, and at {D/1} pretty much the
17 entirety of Mr Ross's evidence which supported the
18 applications went to the original class definition,
19 indeed he says that is the primary -- his words --
20 purpose of his evidence.
21 So this is not some new point or a change in
22 position.
23 So that is really all I want to say on that.
24 THE PRESIDENT: Yes, slightly odd -- I hesitate to say
25 unhelpful -- that the amended claim form does not set

1 out the (two options. That might have been clearer,
2 I think, for everybody, and I am sure that a letter sets
3 the position out, or maybe it does not, but I certainly
4 recall it doing so. But I think that is the -- and that
5 is not even a pleading point really, it is just
6 a clarity point. I suppose the question I have for you
7 is, what is it that you are inviting us to do in
8 relation to this, because you are effectively giving us
9 two -- you are going to come on to that.
10 LORD WOLFSON: I am going to get worried that you have seen
11 my note, you keep asking me questions which are related
12 to the point I am coming to.
13 THE PRESIDENT: I will stop asking questions then.
14 LORD WOLFSON: If the question is, so to speak, do I have
15 a primary and secondary case.
16 THE PRESIDENT: Precisely --
17 LORD WOLFSON: That is exactly what I am coming to.
18 THE PRESIDENT: (Overspeaking) If we were to reach the
19 conclusion that one of them was no good and one of them
20 was good, then obviously, certainly on your approach,
21 that is fine and straightforward. If we reach the
22 conclusion that both of them work, how do we deal with
23 that? I am not sure we should be making a decision
24 about which -- in that situation, which of them should
25 proceed, should we?

1 LORD WOLFSON: The way I am putting the case is that our
2 original class definition is our preferred case. The
3 revised definition is the secondary alternative case.
4 So as you anticipated realistically, if I do not have
5 a choice, I will take whatever the Tribunal gives me.
6 If I have a choice, that is the way I put my
7 preferences.
8 THE PRESIDENT: Yes.
9 LORD WOLFSON: I hope that answers the question.
10 THE PRESIDENT: It does, thank you. That is helpful.
11 LORD WOLFSON: Let me turn to the original class definition.
12 I want to try and be reasonably brief on that because
13 I have covered quite a lot of the factual material here
14 already, and I do want to make sure that we have time to
15 cover everything today.
16 In my submission, the evidence now shows the
17 following: first, merchants were required by law to be
18 given, and would have received throughout the claim
19 period, regular breakdowns of their transactional
20 activity, including the mix of card types they have
21 accepted; secondly, as we have discussed, they will
22 either know that information, be able to get it from
23 their records or knock on the door of the payment
24 service provider; third, they have identification
25 numbers, which is the point if they give it to the

1 schemes, they can run the searches. We have looked at
2 all of that.
3 So we say that class identifiability, whether looked
4 at through the requirement under Rule 79(1)(a) or the
5 suitability factor, is not a problem now. It is clearly
6 not a problem for those merchants who are not on blended
7 contracts. For those who are, they will either know
8 because they will have been told periodically whether
9 they have accepted commercial card transactions or they
10 can find out from their own records or from their
11 acquirers and, if they cannot, they can provide the MIDs
12 or CAIDs, MIDs, I am not sure -- I will still call them
13 MIDs and CAIDs -- and the information could be obtained
14 through the schemes. We say that is more than
15 sufficient to meet the identifiability criterion.
16 Now, I was then going to come to some points raised
17 against me by Visa and Mastercard. If, sir, you are
18 intending to have a short break, that might be
19 a convenient moment to do it.
20 THE PRESIDENT: Yes. So we will just rise for 10 minutes
21 and come back again in 10 minutes time.
22 LORD WOLFSON: I am grateful, thank you.
23 (10.45 am)
24 (A short break)
25 (11.57 am)

1 THE PRESIDENT: Lord Wolfson.
2 LORD WOLFSON: I was going to come to some points made by
3 Visa and Mastercard in the context, can I just interpose
4 a short answer, sir, to the question which you asked
5 about the data and the statements.
6 There are statements going back to 2019, let me give
7 you two references, {F/34/57}, the detail is at 58, and
8 at {F/34/68} the detail is at 70. We have statements
9 from seven acquirers in total. To put that in context,
10 as we will see a little bit later, it looks like there
11 are only perhaps 10 or 11 for the vast majority of cases
12 in any event, so it is a very good coverage, so that is
13 an answer.
14 If we can add any more to that, we will come back
15 further.
16 THE PRESIDENT: Yes, thank you.
17 LORD WOLFSON: Sir, I was coming to the Visa and Mastercard
18 points they make a number of points, in my submission,
19 there is nothing in any of them. First, can merchants
20 ascertain the position without recourse to scheme data?
21 They say that the evidence that merchants on blended
22 contracts will be able to identify whether they have
23 conducted commercial card transactions is
24 "Insufficient". Not wrong, not contradicted by any of
25 their own evidence, or indeed anything else, but

1 insufficient, or I think Mastercard may prefer not
2 sufficient. I am not sure whether that is meant to be
3 different.
4 But either way, that is rather a weasel-worded
5 response to say it is insufficient. They are reduced to
6 sniping from the sidelines, rather than submitting any
7 hard evidence of their own, and we can be sure if they
8 had any evidence on this point, they would have adduced
9 it.
10 It is also telling, in my submission, that they
11 resorted to some light misdirection, let me say, of the
12 Tribunal on this point. Let me show you what I mean.
13 Mastercard, for example, makes the point at
14 paragraph 3.35A of its written argument -- this is
15 a point, sir, we were on earlier -- that a PSR
16 regulation in October 2022 only came into effect in
17 2023. But the implicit suggestion, sir, which may have
18 been lying behind your question, that this in some way
19 materially affected the position and that this and only
20 this required there to be a breakdown of transactions,
21 that is simply wrong. The IFR is the source of the
22 obligation to provide a breakdown of transactions, the
23 PSR regulation is aimed at something different.
24 Well, since, sir -- I was not going to go to it but
25 since you asked about it, let us have a quick look at

1 it. It is at {G/15/1}, its purposes are set out at
2 paragraphs 1.4 and -- so you see 1.4, 1.5 and then 2.4.
3 Thank you. You will see that, in short, it provides
4 a bespoke summary box to be provided and pricing
5 information to be given to prospective customers, so it
6 does not -- it is not this which is the source of the
7 obligation to provide the information, and I showed you
8 the statements which provided it prior to this.
9 THE PRESIDENT: Yes, and I think we saw the summary box in
10 some of the statements.
11 LORD WOLFSON: Exactly.
12 THE PRESIDENT: Yes.
13 LORD WOLFSON: Visa, for its part, suggests at paragraph 46
14 of its skeleton argument that the PCRs -- and I quote:
15 appear to now acknowledge that the samples, ie the ones
16 we have produced, may not be representative of the
17 position across merchants.
18 Now that, I am afraid to say, is thoroughly
19 misleading. If one looks at that bit of their written
20 argument, you will see -- it is at {A/2/14} for the
21 screen -- that there is a footnote reference to Ross 7
22 at paragraph 64. It is rather small. Can you see it?
23 THE PRESIDENT: Yes.
24 LORD WOLFSON: You will see that there is a quote and then
25 there is an ellipsis at the end of the quote. Now,

1 first rule of advocacy, whenever the other side put in
2 an ellipsis what is omitted is invariably more important
3 than what is being cited. Advocacy rule 101, and this
4 is a proof of it, because the point being made in Ross 7
5 was not that every opt-out claimant -- sorry, the point
6 being made in Ross 7 was that not every opt-out claimant
7 would need to provide material such as statements, it
8 was not that they would not have them, Mr Ross in fact
9 goes on to say "These materials are clearly available"
10 and that representative examples were provided.
11 You would not think that from looking at the
12 footnote but that is actually what Mr Ross says. I have
13 already made my submissions on the IFR, you have seen
14 the statements, there is simply no evidential
15 basis for contending otherwise, and Visa does not
16 actually contend otherwise. So there is nothing to
17 contradict, we submit, and there is everything to
18 support the position we make on identifiability issue
19 and insofar as there are what I have been calling edge
20 cases, they are certainly no greater or different in
21 concept than the ones I identified could arise in
22 Merricks or Gutmann, and that goes back to the
23 discussion we had earlier before the short break.
24 The second range of points they make is about the
25 schemes' own data. They make various points about the

1 alleged deficiencies about the data held by the schemes.
2 Now, of course, as I submitted earlier, we only need --
3 a merchant only needs the data held by the schemes if
4 they cannot use the other methods. Again, we covered
5 that ground earlier on. For the reasons therefore we
6 have submitted, this is likely to be a less important
7 method than perhaps it was perceived to be at the time
8 of the original judgment.
9 But let us assume that there are such merchants.
10 The main criticism advanced by both of the schemes in
11 relation to the process by which the merchants could use
12 scheme data aim at a straw man and do not identify the
13 real point. I will pick Visa's skeleton by way of
14 example. Paragraph 42, which is at {A/2/13}, that
15 focuses on the ability to use CAIDs or MIDs to:
16 "... reliably match transactions to specific
17 merchants ..."
18 Now, that is another, I say respectfully, sleight of
19 hand in forensic terms. Mastercard makes the same point
20 substantively at their paragraph 3.36. No one is
21 suggesting that you need to match transactions with
22 specific merchants in the sense of merchant name records
23 and so on or to do so on a particularly large scale.
24 All that is required is to match particular MIDs or
25 CAIDs that would be provided by merchants, perhaps by

1 the PCRs, to particular types of transactions. That can
2 be done and indeed the evidence that the schemes have
3 produced for the hearing show that it can be done.
4 Again, I will just give you the references, I think
5 I may have mentioned these earlier, Mastercard's Cotter
6 2 at paragraph 76, {E/2/27}. Visa, Steel 2 at
7 paragraph 39, {F/2/14}.
8 Now, there is a slightly more on point criticism
9 advanced only by Visa, which relates to potential
10 problems with the CAID data itself and this point is
11 made on the basis of confidential evidence exhibited to
12 Mr Steel's statement, so I will try to be careful what
13 I say in open court.
14 If we could go to Steel 2 at paragraph 34 at
15 {F/2/11}, if you could just look at the opening wording
16 of that paragraph, please, you will see a reference to
17 a Mr Hester, and he is previously one of Mr Steel's
18 subordinates. Now, I am not going to go through --
19 THE PRESIDENT: Sorry, can we go over the page, please.
20 LORD WOLFSON: Oh sorry, yes, at the top. My apologies,
21 sir.
22 THE PRESIDENT: No, we have it, thank you.
23 LORD WOLFSON: I will not go through the spreadsheet for two
24 reasons: first of all, it is confidential; secondly, it
25 is very long. The key point, however, is this: nothing

1 whatsoever is said in the evidence about how it was
2 prepared, other than that on the basis of Mr Steel's own
3 evidence, he asked for it to show the issues, to show
4 the issues that can occur with CAIDs.
5 So it appears to be a sample deliberately selected
6 to focus on cases where there are issues, out of what we
7 know are millions, literally millions of CAIDs and
8 billions of transactions. See paragraph 36 in the
9 statement. We also know that it extends beyond the UK
10 market for this purpose; see paragraph 34.1.
11 So in those circumstances, this spreadsheet tells
12 you nothing, or nothing reliable, about how widespread
13 the issues are, how likely they are to be encountered,
14 in practice or indeed in these proceedings. So it is
15 said, for example, different acquirers can assign the
16 same CAID to different merchants.
17 Now, you would have thought that would be a rare
18 occurrence, and it would be soluble where it did occur,
19 perhaps by reference to other data fields such as
20 acquirer identity; and for incorrectly entered or
21 missing CAID data, that is a point made at 34.6, you
22 would have thought that would be a reasonably rare
23 occurrence as well, not least because Visa's own rules
24 require such data to be provided accurately.
25 The reference for that -- we do not need to pull it

1 up -- is {F/3/6} at bullet point 5.
2 Now, I mean, I am sure there are occasions where
3 people do not enter data correctly, but we do not
4 proceed on the basis, absent any proper evidence, that
5 this is a widespread or indeed a huge problem. So what
6 we do know, therefore, is on the basis of the evidence
7 as we have it, there may never be a single instance in
8 the context of these proceedings where Visa is unable to
9 match a CAID that it has given to the relevant
10 transaction data. We can certainly proceed on the basis
11 of the evidence that if there are any, there will be
12 very few instances.
13 Now, the possibility of these rather speculative and
14 presumably rare examples of merchants who do not know,
15 despite the information they received, whether they have
16 accepted a commercial card, cannot get the information
17 from their payment services provider, and in respect of
18 whom Visa has compromised data in some way for some
19 reason, that cannot fairly or realistically mean, in my
20 respectful submission, that the class fails the
21 identifiability test.
22 As I said earlier, there will be edge cases in every
23 collective action, and to allow the edge cases to render
24 the class unfit would render collective proceedings
25 inaccessible in precisely the sort of cases where they

1 are the only realistic route to justice, and indeed, the
2 only also realistic route to providing the ex-ante
3 incentives, which is another part of this jurisdiction.
4 So to conclude my submissions on the original class
5 definition, we submit it is important to keep in mind
6 that the question whether a merchant can determine
7 whether it has accepted a commercial card transaction
8 within the claim period is only likely to arise in
9 relation to opt-out decisions, and in relation to the
10 distribution of damages. In relation to opt-out
11 decisions, identifiability issues are inherently
12 unlikely to be a problem. If a merchant wants to opt
13 out, it will be presumably because it wants to bring
14 a claim of its own which encompasses commercial card
15 MIFs.
16 Now, there may be no such merchants left, or very
17 few of them, but if they still happen to exist, they
18 will realistically already know whether they have
19 accepted commercial card transactions, in order to form
20 the view that they are interested in bringing
21 a claim which would encompass them. In relation to the
22 distribution of aggregate damages, that is the stage
23 where -- I do not need to go into this in detail,
24 I hope, that is the stage where the Tribunal has
25 unparalleled flexibility. See Merricks and all the

1 other authorities on the topic, which I do not think
2 I need to go through now.
3 So one does need ultimately to bring a bit of
4 realism and real-world focus to this topic.
5 On the evidence, this is unlikely to be
6 a significant, let alone a large-scale problem, and
7 therefore we respectfully commend the original class
8 definition as tweaked to the Tribunal, and we invite the
9 Tribunal to find that it passes the relevant tests.
10 I am sorry, I do not seem to have a cup, which is
11 why I am swigging from the bottle. Do excuse me.
12 Now, I was going to come to the revised class
13 definition.
14 THE PRESIDENT: Just before you do, just to come back to
15 this point about the timing of these statements.
16 LORD WOLFSON: Yes.
17 THE PRESIDENT: You have indicated there are two that go
18 back to 2019. I suspect it is going to be said, so we
19 may as well get it out on the table now, that the
20 evidence you have got primarily postdates your claim
21 period, and so -- because I think under your definition
22 of your claim period, it runs through to the date of
23 filing of your claim form, 2016 through to the date of
24 the unamended claim form, which I think was some time in
25 2021. Mr Caplan, I think probably knows the answer.

1 I am guessing.
2 So I think it may well be said that there is
3 a mismatch between the evidence you have got about what
4 merchants knew and the period of your claim.
5 Now, I absolutely take your point that the IFR sets
6 the parameters. You say -- I think you are saying you
7 can infer from what was happening in 2023, that should
8 be happening in 2016, 2017, 2018 as well, because of the
9 IFR. But just to put that point to you, so I am clear
10 about where you are with it, what is your position on
11 that?
12 LORD WOLFSON: What you have got is you have the IFR, which
13 imposes legal requirements. I could have made my
14 submission on the basis that this is the law, and absent
15 any evidence at all to the contrary, courts up and down
16 the land, on Mondays, Wednesdays and Fridays, proceed on
17 the basis that the law is complied with, unless there is
18 evidence to assume that it is not being complied with.
19 So I could have hung my hat, so to speak, just on
20 the basis of that. We have gone further and we have
21 produced statements, and surprise, surprise, those
22 statements, not just in 2023 but going back to 2019, are
23 in accordance with the law's requirements.
24 What I ask rhetorically, respectfully, is what is the
25 basis to assume that in 2017 everybody was not

1 complying with the law, but in 2019, we see that people
2 were complying with the law.
3 I mean, again, one has to have -- there has to be
4 some material basis to this submission. Visa and
5 Mastercard have not engaged with this at all. They have
6 just simply not engaged with this point in terms of
7 evidence. You have evidence in terms of what the law
8 is. My primary position is that is enough. We have
9 statements from 2023; we have statements from 2019.
10 The smoke and mirrors point of the -- I was going to
11 say the PSR, smoke and mirrors point in the
12 PSR, as we have discussed, does not change the position.
13 That is where, for example, the 2019 statements are
14 useful, although you just look at what the PSR says, and
15 it is clear in its terms what it does. So that is my
16 response to that point.
17 THE PRESIDENT: I note in the definition of claim period,
18 there is also the reference to damages being sought up
19 to the date of judgment.
20 LORD WOLFSON: Yes.
21 THE PRESIDENT: You may not be familiar with this, but there
22 has been some fuss in relation to some of these
23 collective proceedings about what the claim period can
24 be, but at the moment, obviously, your claim period
25 falls before -- many of the statements you have given

1 us. Some of those statements do fall within the period
2 in which you are going to no doubt --
3 LORD WOLFSON: Claim damages.
4 THE PRESIDENT: Claim damages.
5 LORD WOLFSON: Precisely.
6 THE PRESIDENT: I suppose you are then into this curious
7 question again, which I think goes back to the
8 discussion we had before, that if you have got somebody
9 who has got a statement in 2023, and therefore as
10 a merchant knows -- can know objectively from that
11 statement, even if you are wrong about the IFR, at that
12 stage, you would say they are legitimately included in
13 the class and that is the job done, I think, would you
14 not, regardless of what they might have done in 2016.
15 LORD WOLFSON: Yes.
16 THE PRESIDENT: Because they could bring a claim -- on the
17 assumption your claim period adjusted, they could bring
18 a claim for that.
19 LORD WOLFSON: Precisely, and when you get to the
20 distribution stage, I mean, that is a completely
21 separate form of enquiry and form of questioning i.e. what
22 is required at the distribution stage and how is that
23 going to be done. I do not want to trespass on points
24 which are going to be made by my learned friends, but
25 I hope I have answered, sir, your question.

1 THE PRESIDENT: That is very helpful, thank you.
2 LORD WOLFSON: I was going to turn now to the revised class
3 definition, and I have made it clear, I hope clearly,
4 that this is our secondary case, but the revised class
5 definition focuses on whether the merchant had in place
6 an agreement with an acquirer which enabled the merchant
7 to accept commercial cards. The Tribunal has obviously
8 picked up the difference between the original and the
9 revised definition, and I do not need to spend too long
10 on that, I hope.
11 We have set out an example at B2. Now, we say that
12 this also passes the identifiability test. There is no
13 issue, as I understand it, between myself and learned
14 counsel for Visa, because they accept that at
15 paragraph 5.12 of their CPO response. The reference is
16 {F/1/13}. But it is contested by Mastercard.
17 Now, in relation to the revised definition as we see
18 it, there are broadly three categories of issue which
19 I need to deal with. First, identifiability issues
20 raised by Mastercard but not by Visa; second, the
21 question as a matter of principle whether a class can
22 have no-loss class members, I have already covered that;
23 and, third, the impact of the presence of no-loss class
24 members on suitability.
25 So, as I say, of those three, I have dealt with 2,

1 so I am going to now deal with 1 and 3. Let me first
2 deal then with Mastercard's identifiability issues.
3 They raise three issues which go to identifiability.
4 First, the undertakings issue, the use in the
5 definition, when it comes to excluded merchants, of the
6 concept of an undertaking; that is in their response at
7 paragraphs 4.87-4.89. The reference is {E/1/55}.
8 There is a short answer to this point, and if I can
9 cite, was it Yogi Berra, who says: that deja vu feeling
10 all over again. Well, this really is a deja vu feeling.
11 The Tribunal considered that point last time round and
12 rejected it; see the judgment at paragraph 222. There
13 is no basis for resuscitating it now, and certainly not
14 for reaching a different conclusion on it. That is all
15 I propose to say about undertakings.
16 The second point, merchant knowledge. They say
17 there might be difficulties in merchants working out
18 whether they were able to accept commercial cards during
19 the claim period. That is their response between
20 paragraphs 4.90 and 4.92. The reference is {E/1/56}.
21 We say there is nothing in this at all. First,
22 Mastercard's own evidence is that the vast majority of
23 merchants did have, and do have, the ability to accept
24 commercial cards. If we look at the material on this,
25 at {E/15/1}, there is an RBR report from 2020 on card

1 acceptance. If we could turn through to page 6
2 {E/15/6}, please, you see the objectives of the report
3 which I am not going to read out now. The methodology
4 is at page 8 {E/15/8}, please. Thank you.
5 Then the section for the UK starts at page 13
6 {E/15/13}, and given the time, I am not going to --
7 I have not got the time, I am afraid, to go through this
8 in huge detail, but the key paragraph for our purposes
9 is on page 68 {E/15/68}. You will see at the top, the
10 essential punchline for our purposes is that the number
11 of merchants that have exercised the option of refusing
12 to accept commercial cards "has been negligible".
13 There is another, less detailed report in the next
14 tab at {E/16/1}. This was commissioned by Mastercard
15 itself. See paragraph 1.2, which I think is on the next
16 page, from memory. Yes. So you see it is commissioned
17 by Mastercard itself. It is focused on the impact of
18 the IFR, and if you could go to page 6 {E/16/6}, please,
19 you will see on the right-hand side of the page, in the
20 penultimate paragraph -- yes, if we could go to the
21 penultimate paragraph on the right above 1.4, you will
22 see it says:
23 "... the Study did not find that rights to choose
24 ... were widely adopted by either merchants or
25 consumers. Merchants did not report that they exercised

1 their right to reject un-regulated product such as four
2 party system commercial cards..."
3 It does go on to say on page 8 {E/16/8}, if we could
4 go to that, please, top left, thank you:
5 "The highest proportion of merchants that reported
6 that they reject commercial credit cards were in the UK
7 ... at 10% ..."
8 That is the high point of Mastercard's evidence, and
9 you will see on page 12 {E/16/12} that the data is based
10 on a survey of post-IFR 400 merchants, and I will just
11 give you the reference, it is by telephone interviews.
12 That comes from page 17 {E/16/17}.
13 Now, even here, the important point for present
14 purposes is this: of those merchants that said they did
15 not accept commercial cards, they knew that fact and
16 were able to tell the interviewer that on the phone, on
17 the phone. Not after rummaging through all their
18 materials, just on a phone conversation. That stands to
19 reason, because they had made the choice not to accept
20 them.
21 There is then a third study at {E/17} which is also
22 interesting, at page 207 {E/17/207}, please, in the last
23 paragraph. You will see there:
24 "Among the merchants that responded to the survey
25 ... nearly all (99%) declared that they accept ...

1 commercial cards and did so already in 2015. However,
2 acceptance rates vary by card scheme ... close to full
3 acceptance rates ..."
4 So on Mastercard's own evidence, we have got a range
5 here from negligible to 10%. It is not entirely clear
6 to me why in their skeleton argument they have picked
7 10%. I mean, you can make a submission, but that, with
8 respect, is a forensic sleight of hand. They have
9 picked the outlier of these three reports, and it was
10 based on a limited survey. In any event, if you did not
11 take it, you know you did not take it. That is the
12 central point: merchants will know.
13 If we could go back to the IFR, because that is the
14 genesis, or to go to Latin rather than Greek, the fons
15 et origo for all of this, this time to Article 9. This
16 is at {P/30/12}. Article 9:
17 "Each acquirer shall offer and charge its payee
18 merchant service ... individually ... different brands
19 of ... cards ... different interchange fee levels unless
20 payees request the acquirer ... to charge blended
21 merchant service charges."
22 Then in 2 {P/30/13}:
23 "Acquirers shall include in their agreements ...
24 individually specified information ... with respect to
25 each category and brand of payment cards ..."

1 So there have been rules on what acquirers have to
2 tell merchants in their agreements, unless a positive
3 choice is made by merchants for a different regime.
4 Related to this, in 10(4), which is on the same page,
5 you will see that payees have a legal obligation if they
6 do not accept particular cards, such as commercial cards, to
7 inform their customers of that "in a clear and
8 unequivocal manner". So merchants will have made
9 a choice, they will know about it and they will have had
10 to tell their customers about it, too.
11 So all that material necessarily points to the
12 conclusion that the overwhelming majority of merchants
13 will find out or will know in any event.
14 Now, could there be some who do not know, and also
15 cannot find out? There may be some. But it will not be
16 anything like the 10% which is the high point of
17 Mastercard's evidence, who chose not to accept
18 commercial cards, but there could be some. But that
19 possibility, as I have already submitted, does not
20 undermine the revised class definition.
21 In reality, weeding out those merchants only really
22 presents a problem, if indeed it is a problem at all, at
23 the damages distribution stage. It is not likely to
24 come up as a practical issue at any earlier period in
25 time. So there is nothing in the second point raised by

1 Mastercard on identifiability.
2 The third and last point is about payment
3 facilitators. They say it would be necessary to
4 identify merchants who did not have a contract with
5 an acquirer, but only a payment facilitator. This is in
6 their response at 4.93-4.94 {E/1/57}.
7 Now, the suggestion that this will present any
8 difficulty is wildly overblown. As I have said earlier,
9 there are a limited number of acquirers. The evidence
10 before us in the PSR 2021 market review is that there
11 are 11. That is at paragraph 3.49 {O/24/27}. I do not
12 think we need to go to it. You will see the number
13 there. It is five plus six from memory.
14 So merchants will know, or will be able to find out,
15 whether they have or have had a contract with one of
16 them. I mean, if necessary, we could post a list of UK
17 acquirers that existed in the claim period in the class
18 definition itself and on the claims website. Again,
19 could there be some merchants who fall between those
20 particular cracks? I mean, possibly. I mean, there
21 could be one or two or three or four, but again, this is
22 the tail wagging the dog. I mean, it is the edge of the
23 tail wagging a very big dog in my respectful submission.
24 So there is no class identifiability problem. Visa was
25 right not to challenge it. I have answered, in my

1 submission, Mastercard's points.
2 THE PRESIDENT: Lord Wolfson, this may be a silly question,
3 and I think I know the answer to it, but I have
4 forgotten if I have. Why are you not including payment
5 service providers in the class definition? Why are they
6 excluded? Do you know the answer to that question?
7 LORD WOLFSON: Well --
8 THE PRESIDENT: It just seems an oddity --
9 LORD WOLFSON: Yes, we have set out the position of that in
10 Allen 4 at paragraph 33, which is at {G/2/9}.
11 THE PRESIDENT: Yes.
12 LORD WOLFSON: Well, let me see if there is anything I can
13 add to that.
14 THE PRESIDENT: No of course. I am just curious as to why
15 it is -- why, to the extent it creates a problem, it may
16 or may not, I am just curious as to why it has been
17 done.
18 LORD WOLFSON: Yes, well, let me, so to speak, give you two
19 parts of an answer now, but there may be a third.
20 The first is, in my respectful submission, it does
21 not create a problem for the reasons I have submitted.
22 THE PRESIDENT: I understand.
23 LORD WOLFSON: The second is the reasons set out there.
24 Perhaps over lunch, if there is anything more I can add,
25 I will, sir, come back to you on it.

1 THE PRESIDENT: Yes, thank you.
2 LORD WOLFSON: So that was the first issue. There were
3 three issues I was dealing with here. The first I have
4 just dealt with. The second is the same that arose
5 under the first head i.e. no-loss as a matter of
6 principle, no-loss members as a matter of principle.
7 The third is in terms no-loss and its
8 reference to suitability, so let me just make some
9 submissions on that.
10 Now, to be very clear, there is a suggestion by Visa
11 at paragraph 6 {A/2/4} of its written argument that it
12 is "seemingly common ground", that is their words, that
13 a particular proportion of members of a revised class
14 will have suffered no-loss. They say that is common
15 ground.
16 It is not common ground. Maybe that is advocacy 101
17 rule 2. When "seemingly" is put in a skeleton, you know
18 it is not the case. The position is this: that there is
19 likely to be a substantial proportion of no-loss members
20 of the revised class is common ground.
21 The precise level of no-loss membership, if I can
22 call it that, is not common ground. So I think for
23 present purposes, the Tribunal has where we are. I just
24 want to make that point clear.
25 I am very willing to proceed on the basis that for

1 present purposes, it can be assumed that a substantial
2 proportion on the revised class definition may not have
3 suffered loss. The question is: does that make
4 collective proceedings unsuitable? In my submission, it
5 does not and the objections raised by the schemes on
6 this point are illusory.
7 We have dealt with these points in our Reply from
8 paragraph 88 onwards. That is at {G/1/31}. I will deal
9 with those points in a moment, but just to orientate
10 ourselves as to where we are at this point in the
11 argument, if we have got to this point in the argument,
12 the Tribunal will necessarily be with me that the
13 presence of some no-loss members does not of itself
14 provide some sort of hard barrier to certification,
15 because if you are against me on that, then I failed at
16 an earlier point.
17 So the question now is a more soft-edged question,
18 not a hard-edged question, about whether the presence of
19 such members affects suitability. Now, in different
20 cases, and in different circumstances, the presence of
21 no-loss members may have different impacts. In some
22 cases -- I have been trying to think of one and I have
23 not been able to think of one, but I am prepared to
24 accept that there could be cases where it would present
25 a major practical impact. In others, it may have

1 a negligible effect. So one is really looking, in my
2 submission, at this stage of the argument, at the
3 practicalities of the position, and one has to look at
4 the practicalities in this context.
5 If a class definition which includes no-loss class
6 members is necessary in order to get collective
7 proceedings past the identifiability threshold, and if,
8 absent certification of such collective proceedings,
9 large numbers of class members would not get practical
10 access to justice, then the question is, are the
11 practical implications of including no-loss class
12 members so significant and so detrimental as to justify
13 shutting off that avenue to practical justice and
14 leaving the class members with nothing? I mean, that
15 ultimately is what the question is.
16 We say, looked at in that way, the schemes' points
17 on suitability are really a smokescreen, because they
18 want there to be no collective proceedings. I mean,
19 they are opposing both class definitions. We do submit
20 the Tribunal should not be blinded to reality by the
21 schemes' submission that they are acting in the -- or
22 advancing arguments in the interests of merchants.
23 They do not want any proceedings, let alone these
24 collective proceedings. That is the point which -- you
25 will have read the Court of Appeal judgment on

1 permission to appeal. That is essentially the point
2 which Lord Justice -- I think it was Flaux -- Green and
3 Flaux were making towards the end of the judgment.
4 Paragraph 36 in particular, where they say it is worth
5 standing back, and you will be familiar with that.
6 THE PRESIDENT: It does give rise to a question which I have
7 been restraining myself from asking, but inevitably
8 I was going to ask you, which is why the class
9 representatives are not bringing a claim for all MIFs,
10 because of course if they were doing that, all of this
11 goes away. I do not think we ever really understood
12 that when we heard the application the first time.
13 Mr Steel does refer to it in his witness statement as
14 a consideration still, I think.
15 It may be that it is not something you can say very
16 much about, but also -- and I am not going to press
17 you -- there may be all sorts of reasons why you cannot.
18 It is something that is probably more curiosity than
19 anything else. It is a point that goes to the
20 submission you have just made, which is that there is
21 another way of doing this, which is to bring
22 a collective action for the whole lot.
23 LORD WOLFSON: I am limited, for obvious reasons, in what
24 I can say. But let us approach it from sort of both
25 alternatives. Let us assume that tomorrow, somebody

1 turns up with, so to speak, the rest of the jigsaw, a
2 claim for the rest of the jigsaw, what would
3 the Tribunal do then? The Tribunal would, in my
4 respectful submission, say: right, we need to manage
5 these things together, use of judicial resources, we
6 need to run it together. My learned friend Mr Caplan
7 will be making some of these points in relation to
8 Umbrella Proceedings, but certainly you would want to
9 have effective case management.
10 The flip-side, though, is let us assume that that
11 claim does not -- so if that claim does materialise, it
12 is not a bar to this claim. We can run it together. If
13 that claim does not materialise, does that mean that
14 this claim should not go anywhere? Obviously, I submit,
15 not.
16 Perhaps the only other thing I can say is, and of
17 course there are issues of privilege; let me just
18 approach this from a bird's eye view. One can readily
19 think that if you put yourself in the position of
20 funders, and these claims have to be funded claims in
21 reality, the funding issues for that all MIFs
22 claim raises different issues. I do not want to get
23 into what those issues might or might not be, but let us
24 just say they are different issues. That goes to
25 funding, that goes to the reality of being able to bring

1 those claims. I would hope that a claim can be brought
2 for the other MIFs, and if it is, these will have to be
3 case-managed properly together.
4 But, you know, let us not let, so to speak, the
5 perfect be the enemy of the pretty good. I was
6 anticipating a question on that, and I am concerned that
7 I cannot perhaps say as much as I would personally like
8 to, for reasons which you will appreciate.
9 THE PRESIDENT: Yes, look, I understand and it is helpful --
10 I think you have given us an indication that there are
11 reasons, and people have thought about it, and there are
12 reasons why we are where we are.
13 LORD WOLFSON: The point which, sir, you have just made,
14 that it has been thought about, again, I cannot say too
15 much because of privilege, but I can say obviously those
16 things are thought about.
17 THE PRESIDENT: Yes. Thank you.
18 LORD WOLFSON: The next point I was going to come to on --
19 in this context was information and disclosure requests.
20 Visa say at paragraphs 50(1) to 50(2) of its skeleton --
21 that is at {A/2/15} -- that no-loss class members will
22 be adversely impacted by the litigation, because of
23 potential disclosure or information requests.
24 I mean, frankly, we do not see this as a realistic
25 point at all. The Umbrella Proceedings are not

1 a relevant comparator. They have individual claimants.
2 Even if, even if, the Tribunal were to endorse some sort
3 of evidence-gathering exercise, involving the opt-out
4 class, there is no reason why the obligation on
5 disclosure or evidence gathering could not be limited to
6 merchants that can provide a MID or a CAID that can be
7 linked to a commercial card transaction. So this is
8 really an illusory point.
9 Indeed, of course, this point could also be made in
10 virtually any opt-out collective proceedings, where the
11 possibility of information being sought by someone who
12 has not sought to participate in litigation, and who may
13 ultimately be found to suffer no-loss, could arise. So
14 really there is nothing in that point at all.
15 I mean, somebody has obviously sat down and tried to
16 think of lots of theoretical points here. The next one
17 is perhaps the best: being bound by judgments. I mean,
18 this is a point which might work in chambers in the
19 Temple, but has nothing to do with real life whatsoever.
20 This is a suggestion by both Mastercard and Visa, Visa
21 reference, paragraph 50(3) {A/2/16}, Mastercard,
22 3.41(a), that no-loss class members would be bound by
23 judgments in these proceedings which would have
24 implications for them in other proceedings. This, with
25 respect, is entirely confected.

1 First, a judgment on liability issues on commercial
2 cards will not affect claims for other types of MIFs.
3 Second, nor is it clear that any findings, including on
4 pass on, would preclude the issue being addressed in the
5 different context of other card types in subsequent
6 claims.
7 Visa says: well, it would be an abuse of process for
8 no-loss class members to seek to do so. It does not
9 explain why, just an ex cathedra statement, it would be
10 an abuse of process. An abuse of process, as we all
11 know, requires a broad Merricks-based approach, looking
12 at all the circumstances. It is in my submission
13 impossible to see how a class member in collective
14 proceedings relating to one type of card would be acting
15 abusively if it brought individual proceedings relating
16 to another type of card and makes in those individual
17 proceedings whatever arguments it chooses.
18 So that really is a point which is entirely
19 theoretical. It is also, if I may say, time to get real
20 in this context. It is simply fanciful to suggest that
21 there are substantial numbers of opt-out merchants out
22 there, who have not already brought individual
23 proceedings in respect of MIFs, notwithstanding the
24 procedural innovations which have been created in the
25 Umbrella Proceedings which Mr Caplan will be talking

1 about, and who are likely to bring such proceedings in
2 the future, let alone after a judgment on pass on in
3 those proceedings. This is just an unrealistic
4 proposition.
5 A related point, and a point which is no better, is
6 the point about the merchants having difficulty in
7 assessing their litigation options. It is said that,
8 well, opt-out class members who suffered no-loss would
9 have difficulty in making decisions as to their
10 litigation options, if they want to bring claims for
11 other types of card. Visa's skeleton, this is now
12 paragraph 50(4) {A/2/16}; Mastercard, 3.41(b).
13 Again, it is fanciful to suggest that significant
14 numbers of opt-out merchants who have not already
15 brought individual proceedings -- I referred a moment
16 ago to the procedural innovations in the umbrella
17 proceedings; let us also remember the way in which those
18 proceedings have been advertised. I mean, they have
19 been advertised all around. It is fanciful to suggest
20 that they would bring proceedings in the future.
21 Indeed, it is hard to see why the fact that some class
22 members have suffered no-loss in relation to commercial
23 cards would make things any more difficult and, indeed,
24 if any issue were to arise that could arise at any time
25 even after the deadline for opting out.

1 But the short point is that this again is
2 a theoretical point. The schemes are ostensibly acting
3 in the interests of merchants. In fact, they are just
4 trying to cook up any argument against these proceedings
5 being certified.
6 We then get to a point -- I think this might be,
7 yes, the last main point -- of dilution. This is
8 a point principally made by Visa; that the inclusion of
9 no-loss class members is detrimental to those who have
10 suffered loss because the haves will be diluted by the
11 have nots or no-loss class. That is their skeleton at
12 50(7).
13 Now, this is a slightly odd point to take. The
14 schemes are saying the original class definition does
15 not work. So you cannot have collective proceedings on
16 the original class definition. When we put forward
17 a revised class definition they say that means that
18 those who are in the original class definition will be
19 worse off because in the revised class definition we
20 have all the no-loss merchants as well.
21 Now, if I can track the Court of Appeal, with
22 respect, one has it take a step back and just think
23 about that, the reality. They are saying there should
24 be no collective proceedings at all. If there are no
25 collective proceedings, the merchants get nothing.

1 Their rights are simply not vindicated at all.
2 To use the fact in the revised class definition that
3 there might be some dilution not to have proceedings at
4 all, i.e. the reason why you should not have the revised
5 class definition, that is positively perverse.
6 Now, Visa says: well, oh no, merchants can join the
7 Umbrella Proceedings. We know the vast majority have
8 not and it can now be safely presumed that they will
9 not. So the choice really is a choice between something
10 or nothing and that is really what the Court of Appeal
11 recognised and I do not need to go back to that
12 judgment.
13 In any event, when it comes to distribution as
14 the Tribunal knows, that is the paradigm example of the
15 position where the Tribunal has power, unparalleled
16 flexibility. It might conclude overall, it might
17 conclude overall that a distribution method with some
18 element of dilution is overall the best solution. That
19 was specifically contemplated in MOL in the
20 Court of Appeal. I will just give you the reference, it
21 is paragraph 35, {P/12/18}.
22 But, in any event, there were also methodologies and
23 we are looking well down the line here to avoid
24 dilution, one suggested in our evidence is to make
25 participation distribution conditional on the production

1 of a MID or a CAID that is associated with a commercial
2 card transaction. That is Mr Ross's seventh witness
3 statement at paragraph 37 at {G/6/8}. There is nothing
4 impracticable about that, particularly in circumstances
5 where when you get to that stage there is a pot of money
6 waiting to be claimed and a huge publicity drive.
7 Now, those are the main points put against the
8 revised class definition.
9 There are some other points which were mentioned in
10 the CPO responses, but were not picked up in the
11 skeleton. We will try to leave some time today for
12 reply tomorrow. If they are dealt with orally, I will
13 come back to them.
14 But let me, before I conclude my submissions on
15 class identifiability, just address a couple of rather
16 unfortunate ad hominem attacks which I need to deal with
17 because they have been presented in the evidence and it
18 is right for my instructing solicitors and my clients
19 that I should do so. Mastercard says at paragraph 3.45
20 of its skeleton that the revised class definition and
21 I quote:
22 "... serves no actual purpose except to seek to
23 circumvent the unidentifiability of the group of
24 merchants that actually have arguable claims."
25 Well, that is a rather tendentious way of putting

1 things. No one on this side of the court is seeking to
2 circumvent, that is the word used, anything.
3 The purpose of the revised class definition is to
4 ensure access to justice, which is what this entire
5 jurisprudence and jurisdiction is all about and some
6 measure of compensation if -- I have made my submission
7 clear this is my alternative case -- if the original
8 class definition is found wanting.
9 Next, Visa says at paragraph 50(8) of its skeleton
10 that the revised class definitions somehow show that the
11 PCRs want only "a tiny fraction" of damages distributed
12 and the rest to go to their lawyers and funders who
13 stand to be, and this is their word, "enriched".
14 Now, I have to say that there is simply no basis for
15 that submission and it should not have been made and we
16 would quite like it to be withdrawn. We do not
17 anticipate it will be, but that sort of submission ought
18 not to be made. But let me be clear. It is not the
19 PCR's intention or desire for only a tiny fraction of
20 aggregate damages to be distributed nor is that the
21 PCR's expectation, nor, in the real world, is there any
22 prospect of the Tribunal sanctioning any such
23 arrangement. I will leave the "enriched" point, I am
24 not sure that even merits any more response.
25 So to conclude, that is what I wanted to say on the

1 revised class definition and also on the original class
2 definition. I know there are one or two points where
3 I said I would come back if I can and I will do that
4 later on if possible. But what we say is, first, the
5 original class definition is workable and appropriate
6 and we respectfully invite the Tribunal so to conclude
7 but if resort needs to be had to the revised class
8 definition that is also workable and appropriate and the
9 proceedings can be certified on that basis.
10 So, gentlemen, that is what I was going to say on
11 the first point.
12 I was now proposing to pass over to Mr Bowsher who
13 will address you on methodology unless you have any
14 further questions and unless you wanted to take a slightly
15 earlier break and come back earlier. We are in your
16 hands.
17 THE PRESIDENT: Thank you, Lord Wolfson. Just on timing --
18 we do not have anything before you, Mr Bowsher -- just
19 in terms of timing, how do you think you are doing
20 because I anticipate we may have held you up with some
21 questions and I am very keen to make sure that we do
22 have an opportunity for you to make some reply without
23 infringing on the arrangement you have made about
24 timing.
25 So it might be helpful if we were to give you the

1 extra time we offered you over the short adjournment.
2 Would that be sensible?
3 LORD WOLFSON: Sorry, I did promise to come back to you on
4 that. I think I saw nods from my learned friend
5 Ms Tolaney. Yes, we were only willing to have three
6 courses rather than five.
7 THE PRESIDENT: Yes, excellent. So, would it be convenient
8 to rise now and start again at 1.20? Is that a sensible
9 way forward?
10 LORD WOLFSON: Sorry, I am told they would like 45 minutes.
11 If we rise now and we come back at 1.35.
12 THE PRESIDENT: Yes, we do not give you very much back if we
13 do that.
14 LORD WOLFSON: I gain 15 minutes. I am told that Ms Tolaney
15 would like, and her team would like the time, but we are
16 in the Tribunal's hands.
17 THE PRESIDENT: Well, I am just concerned, Ms Tolaney, what
18 is going to happen here -- and we have all seen this
19 before -- is we are going to end up with a rush
20 tomorrow, and we would like to hear from PCRs in reply.
21 I think it would be helpful. I do not want to find that
22 that gets squeezed into either your time or into an
23 unreasonable hurry at the end of the day tomorrow, but I
24 am afraid we do have some hard deadlines.
25 If you are telling me you cannot do half an hour,

1 then I obviously understand that, but I would be very
2 keen to give as much time back as we can.
3 MS TOLANEY: We are in the Tribunal's hands. I think we are
4 just conscious that we have got to take in -- we may
5 start today, and we have to take in some of the points
6 that have come up, but we are in the Tribunal's hands.
7 THE PRESIDENT: Certainly if you do start, I am anticipating
8 it will still be you tomorrow morning, so hopefully that
9 would allow you to manage that.
10 MS TOLANEY: Yes.
11 THE PRESIDENT: I do not want you to be put in a difficult
12 position, but if that would work, I think we would
13 prefer to take half an hour and then come back and keep
14 going.
15 MS TOLANEY: That is fine.
16 THE PRESIDENT: If you do feel you need some extra time
17 later on, obviously we will manage that.
18 MS TOLANEY: Thank you.
19 THE PRESIDENT: Thank you. We will resume at 20 past 1.
20 (12.50 pm)
21 (The short adjournment)
22 (1.20 pm)
23 Submissions by MR BOWSHER
24 THE PRESIDENT: Mr Bowsher.
25 MR BOWSHER: Good afternoon. I am tasked with dealing with

1 methodology, and I will try and do that with reasonable
2 expedition.
3 The PCRs' approach to the requirements for the
4 provision of various methodologies to support their
5 claim is essentially pragmatic: they support the revised
6 application with methodological material which is
7 intended to meet the various concerns expressed by the
8 Tribunal in the CPO judgment. Some of that is quite
9 long, so I apologise now if, in the interests of time,
10 in some places I will just give you long references, as
11 it were, assuming that much of it will already have been
12 pre-read anyway. But it may be worth just putting those
13 references in the transcript, so that you see where they
14 fit.
15 The PCRs note that the context against which they
16 are to prepare that material has very substantially
17 moved on: for instance, understanding of the
18 infringement issues, which took up so much time last
19 time, has been very much more fully elaborated in this
20 Tribunal now there has been Trial 1 in the umbrella
21 proceedings, although plainly the fruition of that
22 process is yet to occur. At the very least there is
23 a degree of overlap between the subject of that trial
24 and the infringement issues in these claims, and some of
25 the matters which were treated as possible live issues

1 a year ago have fallen away in the Umbrella Proceedings;
2 others are no longer live for other reasons and, absent
3 some special reason to think that they are going to come
4 back to life, we assume that they're not going to have
5 any impact here at all.
6 Of course, there has been some, not a lot, but
7 there's been some relevant guidance provided by both the
8 Court of Appeal and the Tribunal as to what is required
9 of the relevant methodological material.
10 Our position as to the relationship between these
11 proceedings and the Umbrella Proceedings has already
12 been ventilated in writing and orally, and we will come back
13 to that again. Inevitably, some of the uncertainty
14 regarding that interplay has some effect on the
15 methodology, but we have tried to minimise that lack of
16 certainty. But it is baked into the process until
17 plainly when Trial 1 judgment comes out that will have an
effect
18 on whatever has been said about infringement
19 methodology, and I would hope that the Tribunal can just
20 assume that that's something that will have to
21 be done at whatever time and in whatever way it needs to
22 be done.
23 The core position is that the PCRs will seek to
24 coordinate the substantive approach they take in these
25 proceedings to the extent that it is fair and

1 practicable, and my learned friend Mr Caplan will come
2 back to that in a little more detail later.
3 The PCRs' primary responsibility, however, must be
4 to their class members and to seek such case management
5 directions as are appropriate to best advance their
6 interests.
7 The key development for today is that considerable
8 further work has been done by the PCRs' expert to work
9 up methodologies that are responsive to concerns that
10 have previously been expressed. This has been done
11 without prejudice to various points that might be
12 available as to whether one or another particular
13 methodology is necessarily required, and we have made
14 clear in our skeleton that we do take certain positions
15 about what the process test does or doesn't mean. But
16 for today's purposes, the practical approach is that we
17 put this new material before the Tribunal and ask that
18 the case be certified on the basis of that new material,
19 and we say that meets the requirements that have been
20 set.
21 The schemes seek to misdirect attention to the fact
22 that we are reserving our position on questions as to
23 what is or is not required, as if that was somehow
24 demonstrating some lack of co-operation or whatever, but
25 on the contrary, our approach is to respond very fully

1 and positively to the CPO judgment a year ago, but
2 bearing in mind our responsibilities to our class
3 members, we do reserve our position in one or two
4 places, as already noted in the skeleton, and I am not
5 going to go over that in any detail now.
6 The body of the new material is substantial and
7 references are primarily to the 5th and 6th reports of
8 Mr von Hinten-Reed, and you will know that those are in
9 file {D/33} and file {G/33} respectively. They occupy
10 most of the content of those reports and are designed to
11 address those concerns.
12 In our Reply, from paragraphs 9 in {G/1/8}, we cover
13 recent developments in the law, and particularly from
14 paragraph 21, developments in the law regarding the
15 level of detail for a methodology that is required.
16 Without going to all of the material and the arguments
17 set out there, can I take the Tribunal to Stellantis
18 which is {P/14/28}, paragraph 102, four lines in after
19 a comment about the broad margin of discretion,
20 five lines in after the comma:
21 "... it is not for the PCR to produce an expert
22 methodology which addresses every conceivable issue or
23 defence which the defendants say they will or may run.
24 To go down that route would be to encourage a plethora
25 of expert evidence addressing every conceivable argument

1 that might be raised ..."

2 And so on and so forth, and to the end of that

3 paragraph we say is important subsequent guidance from

4 the Court of Appeal as to what is required at this

5 stage.

6 That is consistent with what the Tribunal has said

7 in Boyle v Govia at {P/27/5}, in paragraph 8(1), only

8 where a claim cannot be tried is it right to deny

9 certification, and then following on at paragraph 9(6)

10 on page 8, {P/27/8}, the Tribunal says that, as noted

11 from Stellantis, what is usually required is a short

12 report from an expert as to an articulation of a theory

13 of harm and a demonstration as to how the infringement

14 was causative of loss and how that would be quantified.

15 It is the expert economist who is best placed to explain

16 how it is envisaged the evidence will be developed.

17 It is important, of course, to keep separate and

18 quite distinct the sort of analysis that is appropriate

19 to be discussed there and is appropriate today from the

20 sort of discussions that one sometimes gets in carriage

21 disputes, such as in Hunter v Amazon, which we put in

22 the bundle more as an illustration of the other

23 situation, where the Tribunal does engage in a sort of

24 relative merit analysis of different methodologies,

25 where you have more than one, obviously it is a very

1 different question for the Tribunal. That is not the
2 question today, and I refer back to the access to
3 justice points that have already been made by my learned
4 friend before lunch.
5 Before getting into the detail of the methodologies,
6 may I just raise one other sort of general broad point,
7 which is that a number of the points, particularly at
8 the back end of our discussion, deal with methodologies
9 addressing matters on which the defendants bear the
10 burden of proof. Many of the points raised by the
11 schemes as a criticism of our methodology will be
12 matters on which they would and must bear the burden of
13 proof and separately from whatever position, whatever
14 the right level of detail that might be required for
15 a methodology, it is the PCR's position that such
16 a methodology should not be required in detail to
17 address all matters on which the defendants bear the
18 burden of proof, for a number of reasons both of
19 principle and of practicality.
20 If a methodology explains how a PCR seeks to get
21 from proposition A to proposition Z to make out all the
22 elements that it needs to make out in order to get to an
23 award of compensation that is sufficient, requiring the
24 PCRs to go further and set out how the defendants might
25 run defences and obtain evidence for them and analyse

1 them would be both unnecessary and unfair. It would
2 also set up a significant barrier to entry, with
3 implications for the principle of effectiveness, and
4 will make it very difficult in some cases to mount
5 a claim at all, particularly where defences can and do
6 fail for complete lack of evidence.
7 The second point is really one of practicality. As
8 a matter of realistic and pragmatic case management,
9 even if there remains some requirement for methodology,
10 that must be adapted and reduced. There is some
11 discussion about this in Mr von Hinten-Reed's sixth
12 statement, and I do not want to get too sort of dogmatic
13 about it and there is a risk of over-simplifying the
14 position but necessarily what the PCRs can best do at
15 this stage is indicate what sort of methodology they
16 might prepare to check another methodology which the
17 claimants have already produced because, in a sense,
18 whatever we are doing has to be bolted on to whatever
19 the point is that we are addressing.
20 Until we know what those -- and those will be -- the
21 nature of the methodology will be sensitive to the point
22 that is being addressed. In a way, it is best
23 illustrated by looking at real things, rather than
24 talking about it rather airily in the abstract.
25 THE PRESIDENT: I think that is probably right, is it not,

1 because I think when we get to the points of contention,
2 they are all things that are very plain to everybody.
3 We know that there is going to be an argument about
4 exemption, we know there is going to be an argument
5 about acquirer pass on, we know there is going to be an
6 argument about merchant pass on, and actually it
7 seems -- and I think probably the last time we had this
8 discussion in relation to the original judgment, part of
9 the problem was that there was an empty space for some
10 of that. So I think that is quite different, that is
11 quite a different situation from the point you are
12 making about burden of proof, which is that I think it
13 is clear from the authorities, is it not, if you know
14 that something is coming, you need to have your best
15 view at how you think it might impact the triability of
16 the case and that will obviously be, as you say,
17 fact-sensitive to the case and to the circumstances and,
18 in this case, we have -- you have to take exemption, we
19 know it is going to be taken and there are pages and
20 pages of this and things like the Mastercard decision of
21 the European Commission, so we know exactly what the
22 analysis has been before.
23 MR COOK: We do with some of this.
24 THE PRESIDENT: Quite, and I am trying to shortcut it -- in
25 a sense, I am trying to perhaps cut to the chase on it.

1 I am just not sure how much the burden of proof point or
2 the sort of the authorities help us here because of the
3 specificity of the things that are being advanced and
4 because of the history of the proceedings.
5 MR COOK: Yes.
6 MR BOWSHER: I am trying to keep our submissions on
7 methodology today intensely practical, but I do not want
8 to lose sight of the fact that there are one or two
9 points of principle, although quite how you characterise
10 them is not necessarily straightforward but, in a sense,
11 they do not really arise because, as I say, you have got
12 a lot of detail and when we pull out the detail, these
13 points have been engaged with.
14 THE PRESIDENT: Yes, understood.
15 MR BOWSHER: Some to greater -- and the varying
16 level of detail reflects the nature of the points that
17 are being responded to. If the points are more --
18 necessarily, Mr von Hinten-Reed, dealing with a point
19 that is more speculative, has to produce necessarily a
20 response which is more speculative.
21 THE PRESIDENT: Yes.
22 MR BOWSHER: Not surprising. Just to wrap that point up but
23 to sort of book end the point, if I may, the Tribunal
24 presumably had all of those sorts of points in mind when
25 it said in Gormsen v Meta -- I don't think we need to

1 pull it out. It is at {P/19/7}:

2 "Unless a particular point ... needs to be

3 established in order to make good a claim, it is unwise

4 to anticipate it."

5 We do not need to over analyse that point but that

6 is the sort of practical reality which I would submit

7 the Tribunal has been trying to apply to these sorts of

8 cases, particularly with our difficult methodological

9 questions.

10 The PCRs, as I say, have sought to bring forward

11 material that provides guidance as to the methodology to

12 be applied in that spirit. The first stage of that

13 response is the provision of instructions to the expert.

14 That required a full, fresh analysis of the key issues

15 which caused the Tribunal difficulty. I do not propose

16 we pull them up now but it is relevant to start from the

17 instructions to the expert because some of what is in

18 the reports can be read in that light. For the fifth

19 report, it is at {D/33/223} and for the sixth report, it

20 is at {G/33/82}. You can see there the PCRs have set

21 a comprehensive menu of topics which the expert has been

22 invited to look at. If some things are more

23 difficult -- if the expert concludes that some things

24 are more difficult than others, then, in my submission,

25 that is a fair position for him, as the expert, to take

1 and, as we have already seen, the Court of Appeal has
2 encouraged a degree of deference to a considered
3 reflection on how far one can go in responding to the
4 various issues that are raised.
5 As I have already said, it is not at this stage for
6 the Tribunal to second-guess or assess the merits of the
7 methodology as against any counterproposal that might be
8 put up by the schemes. Much of the criticism that has
9 been made of these methodologies, one might expect to
10 see at a liability trial or whatever and perfectly
11 legitimate at that stage. But in our submission, the
12 criticism does not really bite at this stage. Unless
13 the criticisms demonstrate that the methodology is
14 fantastic or wholly unworkable, then, in our submission,
15 the Tribunal ought to defer to the consideration given
16 and proceed to certify the claims.
17 Plainly also the matters involve substantial
18 iterative improvement during the proceedings. They
19 involve, as we have just been discussing this morning,
20 a lot of material which is in the hands of the
21 defendants. There is a process of finding out what the
22 defendants can and cannot produce and necessarily the
23 methodology can only be improved as one learns what is
24 available and what can readily be done, and one knows
25 that, of course, again a different aspect of the events

1 of the last year is that the Tribunal itself has been
2 engaged in similar sorts of activities in its -- is it
3 weekly or fortnightly sessions leading up to Trial 1 and
4 those -- the various hearings looking at what can and
5 cannot sensibly be done in building up to the past and
6 immediately forthcoming trial in the umbrella
7 proceedings.
8 On the one hand, the schemes vehemently criticise
9 the methodologies put forward for seeking too much data
10 and then they say that the result of the methodology is
11 insufficiently accurate, but the criticisms rather
12 significantly fail to identify where the methodologies cannot
13 produce usable conclusions, even if the conclusions
14 involve some approximation or are based on data that
15 is -- on limited data currently available or even where
16 it tends to a rather broad margin of sort of target
17 zone, those are all perfectly legitimate approaches for
18 a methodology to take, particularly at this stage when,
19 at the end of the proceedings, there will have to be
20 some judgment exercised by the Tribunal, and there is
21 some sort of bingo prize for being the first person to
22 use the phrase "broad axe", but I think that's the point
23 when it comes in, and that has to be borne in mind. To
24 criticise -- a number of points, Mr von Hinten-Reed is
25 criticised because he points out that the number he will

1 produce is not accurate to the last -- to X decimal
2 places. Well, he is being very sensible in so doing,
3 what he is trying to do is indicate how you would gather
4 the material to assist the Tribunal to identify the
5 range within which the broad axe would be wielded.
6 That, in our submission, is the right and proper
7 approach in a case like this.
8 There will obviously have to be judgments made as to
9 which methodological improvements are worth attempting
10 and which will not, and some of that judgment will have
11 to be made either in engagement with the Tribunal or
12 pursuant to the direction of the Tribunal after debate.
13 That is part and parcel of the case management of
14 complex collective proceedings such as this and the fact
15 that that needs to be done is not a flaw in the
16 methodologies, plainly there is a great deal more data
17 available. It is simply that how much of that data is
18 to be provided and what is or is not proportionate is
19 a judgment that will have to be made.
20 There is just one example of the evidence of the
21 data that is available and for the
22 extent to which it has been made available one can look
23 at the second statement of Mr Cotter at {E/2/24}. If
24 I just invite you to look at paragraphs 64, 69 -- 64,
25 I do not know how long it takes to read. 69. (Pause)

1 and 76.1.2. (Pause). Which is a couple of pages
2 further on, apologies. There we are. Obviously, the
3 splodged out bits can be found in the confidential version of this
4 document.
5 So there is a lot more data. For various reasons --
6 and this is not a criticism but Mastercard may have many
7 reasons for not gathering the data for its own business
8 purposes, but just because it has chosen hitherto not to
9 do so or it does not need to gather that data does not
10 mean it is not there and not potentially gatherable. It
11 is a discussion for the future, in my submission, as to
12 what routes are worth taking and what are not.
13 This is slightly repeating a theme but it is
14 a general theme of the schemes' presentation to misstate
15 the position of Mr von Hinten-Reed, frequently referring
16 to concessions by him when they are nothing of the sort,
17 but the expert does not make concessions on behalf of
18 the PCR, that is fairly elementary, but often what they
19 characterise as concessions are simply
20 Mr von Hinten-Reed saying this is what I think -- you
21 know, he is making an effort to do something. He is not
22 necessarily saying, I think that is actually what is
23 necessary, he is saying this is -- I am producing it
24 because I have been asked to. Whether that is or is not
25 the best way forward is not a concession, and there is

1 a lot of, in our submission, rather overwrought language
2 about that.
3 So then turning from there, what I am going to do is
4 deal with infringement fairly briefly, I hope, because
5 that has mostly been dealt with, then take quite some
6 time -- I hope not too much -- on the approach to the
7 methodology for aggregate damages, because there is
8 a lot of analysis on that, and then take -- then go
9 a little bit faster when I get into MPO exemption issues
10 and APO, largely either because the criticism was
11 different the last time so there is a rather different
12 approach been taken and also because they fall into the
13 category which we have already discussed of points which
14 are sort of ancillary to defences that will have to be
15 thrown up.
16 So turning first to liability infringement. One of
17 the Tribunal's key concerns at the hearing a year ago
18 was the lack of methodology in respect of infringement.
19 Indeed, as regards methodology, that was probably the
20 core principle concern but not the only concern. The
21 reference for that is paragraph 2414(i), that is file
22 N -- I don't think we need to pull it up because
23 I imagine that you will be well familiar with it.
24 {N/3/74}.
25 The Tribunal drew particular attention to certain

1 issues raised in Dune, but at least as far as commercial
2 cards were concerned, Dune was focused on liability
3 issues, which we will come on to in the infringement --
4 infringement issues which we will come on to when we
5 deal with the infringement methodology.
6 It seems that there is no continuing issue regarding
7 the methodology put forward on infringement from the way
8 I read the skeletons from the defendants. There is
9 a very substantial piece of work done in the
10 two reports, no doubt more can be done but that does not
11 seem to be the major target on methodology ranged by the
12 defendants.
13 This, in our submission, is an important development
14 and demonstrates the responsiveness of the PCRs and
15 their expert to the concerns raised the last time.
16 So the main challenges are to, as I said, aggregate
17 damages, MPO, Article 101(3) exemption issues, countervailing
18 benefits and APO.
19 The first and perhaps the one that has taken the
20 greatest length is the criticism of the approach to the
21 methodology for calculating an amount of aggregate
22 damages for the purposes of the opt-out claim. It is
23 a point taken by Mastercard only but it occupies a fair
24 chunk of Mastercard's skeleton, so I apprehend really
25 I need to spend a bit of time on it.

1 It is a point which was mentioned but not in great
2 detail at the previous hearing, so it is certainly
3 a point which has developed in importance over the last
4 year, it appears, in Mastercard's mind, so this is
5 newish but not entirely new material from last year.
6 The building blocks of the PCRs aggregate damages
7 methodology is to be found in Mr von Hinten-Reed's sixth
8 report, which is at {G/33/10}. Figure 3.1 is the
9 summary of that process. This is, of course, the second
10 of Mr von Hinten-Reed's reports. That figure is
11 actually an abstract of part of figure 5.2 from
12 Mr von Hinten-Reed's fifth report, so it is not new
13 material in the sixth report; it is just an edited
14 excerpt from what was already in the fifth report.
15 One can see there that the proposed methodology has
16 three steps. Step 1 is to calculate the gross
17 overcharge, that is the commercial card MIF actually
18 paid minus the counterfactual MIF multiplied by the
19 number of commercial card transactions. As the Tribunal
20 will appreciate, we say that the counterfactual MIF is
21 zero, so the gross overcharge, we say, is all of the MIF
22 that has been paid on commercial card transactions in
23 the UK over the claim period.
24 At step 2, Mr von Hinten-Reed proposes to deduct
25 from that gross overcharge the value of existing claims,

1 that is pending and settled claims, against Mastercard
2 in respect of commercial MIFs. And at step 3,
3 Mr von Hinten-Reed proposes to apportion what is left
4 after the deduction for existing claims, which he refers
5 to as the residual claim value between the opt-in and
6 the opt-out class based on various metrics, which we
7 will come to, and in fact what he does -- we will come
8 to it.
9 Mastercard criticises step 2 and step 3 for being
10 unreliable and likely to understate the size of the
11 opt-out aggregate damages. In each case we say the
12 difficulties that it identifies stem from the way in
13 which the Mastercard -- which Mastercard records
14 transaction data and the lack of interrogation or
15 analysis of that data, at least at this stage.
16 Mastercard should not be entitled to rely on this as
17 a bar to certification.
18 To illustrate, for step 2, that is the exclusion of
19 the existing claims value, Mr von Hinten-Reed's initial
20 proposal assumed that Mastercard would already have
21 information on the value of existing claims against it.
22 You can see that in {G/33/12}, paragraph 32, and that
23 picks up a point which was in his previous report,
24 stated in rather more detail in {D/33/61}.
25 If you could start at paragraph 206 at the bottom,

1 it runs on into paragraph 208, so it is worth reading.
2 (Pause). I guess we can turn the page. It runs on to
3 the end of 208. (Pause).
4 So that is the approach which Mr von Hinten-Reed
5 describes. Mastercard came back in its response to say
6 it does not know the value of existing claims and it
7 would be extremely onerous to work that out. This seems
8 slightly surprising given that Mastercard has made
9 public statements in US regulatory filings about the
10 value of both settled and unresolved UK damages claims.
11 That is at {D/33/62}. We have just covered it, sorry,
12 so we have just seen that reference. So there is at
13 least somehow they got to that number.
14 The issue is that identified in the second statement
15 of Mr Cotter, effectively Mastercard's transaction data
16 includes MIDs but not merchant names and a single
17 merchant can have multiple MIDs, a topic already touched
18 on this morning, so I will move on quickly past it, but
19 you know the point.
20 Matching a single merchant to all of its MIDs on the
21 basis of the Mastercard data alone is said to be very
22 laborious, that is in Cotter 2 -- again, I do not think
23 we need to pull it up. It is Cotter 2,
24 paragraphs 59-62, and Mastercard has apparently not done
25 it, even for all the merchants with existing claims.

1 Apparently it has only done this for 28% of existing
2 claims. We get that from the Mastercard skeleton,
3 paragraph 3.11, footnote 9. You have to do some
4 arithmetic to get there but it is in the footnote, and
5 the matching process is simplified when a merchant
6 provides a full list of its MIDs but Mr Cotter says that
7 sometimes MIDs provided by merchants are not accurate,
8 so that can cause issues.
9 Again, Cotter 2, paragraph 58, {E/2/21}, again I do
10 not think you -- so for those reasons, Mastercard says
11 it does not have an existing claim value available off
12 the shelf. Well, yes, these are data problems, and I am
13 not going to repeat what was said this morning about the
argument that
14 there are going to be problems with this -- there will
15 be errors in the data that need correcting, but just
16 because there are errors in Mastercard data does not
17 mean that one throws up one's hands in horror and says
18 the whole thing is impossible. That is the problem of
19 dealing with real data in the real world. In principle
20 the bulk of the data is there. Some -- what my learned
21 friend referred to as edge issues will have to be
22 resolved and ironed out along the way. Until we can see
23 what they are, what those errors are and how widespread
24 they are, there is really no means of Mr von Hinten-Reed
25 to come up with an error correction facility at this

1 stage, even if it is needed at all, because it may
2 simply be totally trivial.
3 In principle it appears to be possible to use the
4 Mastercard data alone to identify merchants but the
5 process is said by Mastercard to be impractical. The
6 process could however be made more practical if persons
7 with existing claims are asked to provide a full list of
8 MIDs. This is something that Mastercard does do from
9 time to time for individual claimants in the umbrella
10 proceedings, usually when it gets to settlement.
11 I think that is a point which we have already seen when
12 we looked at Cotter 2, paragraph 69. We can see it can
13 be done. Now, in principle one does not understand why
14 that cannot be done more. I mean, if it is a hugely
15 disproportionate and burdensome point, well, that may be
16 a point that has to be addressed, but that is
17 quintessentially a matter of case management as to how
18 one cuts through that problem.
19 There is no reason to suppose it will stop doing
20 that sort of -- it, Mastercard, will stop doing that
21 sort of matching exercise and indeed it is reasonable to
22 suppose it will do more and more of that matching as the
23 Umbrella Proceedings advance towards a determination of
24 quantum, which presumably Mastercard will want to ensure
25 is as accurate as possible.

1 So pausing there. We say, Mr von Hinten-Reed's
2 initial proposal for step 2 remains perfectly adequate
3 for this stage of the collective proceedings.
4 Mastercard should know the liabilities it faces in other
5 cases and, if it does not, it should be able to work
6 them out.
7 In his sixth report, the second report since the
8 last judgment, Mr von Hinten-Reed quite properly
9 addresses the possibility that by the time of a quantum
10 trial in the collective proceedings Mastercard still
11 remains unable to identify precisely the value of all
12 other existing claims so that there is a need to fill
13 a gap in the data. If one gets to that stage,
14 Mr von Hinten-Reed says he can use information about the
15 value of existing claims that have been quantified to
16 estimate the value of the existing claims that have --
17 sorry, that have not been quantified, and it seems to be
18 fairly self-evident, when one thinks about it, this
19 would essentially involve assuming that the unquantified
20 existing claims have the same average value as the
21 quantified existing claims and all of this comes in
22 around {G/33/13-14}, just for your note. Just as
23 a footnote, as it were, if there is something wrong with
24 that assumption, that is presumably a point which
25 Mastercard will want to and can make. But it seems odd

1 that we would assume -- that it would be for the PCRs at
2 this stage to assume some wild departure from that
3 common sense assumption.
4 The assumption is perhaps -- if there is any obvious
5 problem with it, it is probably conservative in
6 Mastercard's favour because the existing claims that
7 have been quantified are probably more likely to be
8 those claims brought by larger merchants or -- liabilities of larger merchants, it is
9 probably more likely that if larger merchants that have
10 made the claims, it is probably more likely the larger
11 merchants have settled the claims.
12 So just at a common sense level, it is probably the
13 case that unquantified existing claims are likely to be
14 of lower value. That has been, as it were, our working
15 assumption, but again it would have to be for Mastercard
16 to knock that down or refine that point if there were
17 something more to be said.
18 At 3.11 of its skeleton, Mastercard says that, if
19 you take Mr von Hinten-Reed's approach to gap filling,
20 using only the existing claims that have been quantified
21 to date, that would eliminate 65 to 75% of the
22 theoretical maximum claim against Mastercard. Now,
23 leaving aside that first point, that still leaves a very
24 large claim just against Mastercard. Those numbers,

1 I think, take one down to about 530 million, so
2 a reduction of 65% from 2.1 billion takes one to about
3 over half a billion pounds, which seems like quite
4 a large claim just against Mastercard.
5 But the bigger point is that this is surely an
6 underestimate of the residual claim value driven by the
7 fact that the quantified existing claims are mainly
8 those of larger merchants with a higher average
9 claim size. This is a point which Mastercard appears to
10 acknowledge itself in its skeleton at 3.10. It is
11 a slightly different point, so let me make it again.
12 The residual claim value is driven by the fact that the
13 quantified existing claims are likely to be those of
14 larger merchants with an average higher claim size and that
15 then drives the way the reduction works.
16 There is a simple answer in practice to this:
17 Mastercard can improve the estimate -- by
18 providing -- by matching more merchants with existing
19 claims to MIDs. It is not impossible, it may be
20 disproportionate to do it for every single merchant,
21 again, quintessentially a matter for case management to
22 decide whether, how far and how to do that but not
23 a reason not to certify.
24 So on step 2 there is a perfectly adequate
25 methodology put forward for removing the value of

1 existing claims which draws partly on 1, matching more
2 merchants to MIDs, and partly 2, extrapolation from what
3 has been matched. The appropriate and proportionate
4 balance between those things is not a matter for
5 certification and as I have said, but bears emphasis,
6 there is going to be more matching done in the process
7 of progressing and settling claims in the umbrella
8 proceedings. I mean, there is an absolute certainty
9 that is going to continue as the Umbrella Proceedings
10 continue.
11 This is one of the points just to highlight, this is
12 not a -- this is a point where Mastercard has sought to
13 say that Mr von Hinten-Reed somehow concedes that there
14 is under-compensation here. He is not making any
15 concession, he is not conceding some weakness in the
16 methodology. He is simply saying, on the material, this
17 is logically a methodology to achieve the outcome. Yes,
18 given -- the data is limited. Given the limitations of
19 the data, it is probably an approximation at the lower
20 end of the range. That is what he is saying. And
21 obviously it is capable of improvement.
22 So moving on to step 3 of the aggregate damages
23 methodology that was step 3 from those blocks we were
24 looking at, that is the apportionment of the residual
25 claim value to the opt-out class, which is -- just to

1 remind you what that is, that is removing the value
2 attributable to those in the opt-in class.
3 Now, in the fifth report, it was proposed that this
4 would be done by -- on a number of alternative bases,
5 including by reference to data from the Office of
6 National Statistics on the number of business in value
7 turnover figures corresponding to the opt-in and opt-out
8 classes, and Mr von Hinten-Reed acknowledges in his
9 sixth report at paragraph 53 -- again I don't think we
10 need pull it up, it is {G/33/15} -- that this approach
11 would likely overstate the opt-out claim. It is an
12 approximation which, for the reasons he states, is
13 likely to give a slightly overstated number for the
14 opt-out claim.
15 So in VHR6 he provides an additional approach to
16 apportionment based on the residual claim value based on
17 the transaction data from merchants that have been
18 matched to MIDs, so we are back to the data set we have
19 talked about, and he covers this at {G/33/17}, it is
20 paragraphs 63-67. I am not sure it is helpful I do not
21 think we need to read it, I do not think the Tribunal
22 needs to read it all now but that is where it is. In
23 short, each matched merchant is allocated to the opt-in
24 or the opt-out class, there would then be a process of
25 calculating the proportion of total commercial card MIF

1 paid by matched merchants paid by the merchant in the
2 opt-out class and that would then be applied to the
3 residual claim value.
4 There is a recognition that this approach is likely
5 to provide an underestimate of the size of the opt-out
6 claim and this seems to be -- it may be that this is
7 even common ground because -- and the reason for that is
8 that however one randomises one's approach to drawing
9 data from the sample, the sample itself the matched
10 merchants, the aggregate merchants are more likely to be
11 large merchants and are more likely to be in the opt-in
12 class. That seems likely.
13 Mr von Hinten-Reed says, paragraph 69 of his sixth
14 report, section 3.4, that this whole section or part of
15 the work can obviously be refined by providing the more
16 data one achieves.
17 So what Mr von Hinten-Reed has now achieved is two
18 estimates of a target, and it seems to be fairly well --
19 there does not seem to be any meaningful challenge to
20 the proposition that one of them is an overestimate and
21 one is an underestimate. So Mr von Hinten-Reed is now
22 straddling the target. Both of those estimates can be
23 improved with more data. There will have to be
24 a question as to how much improvement is worth doing and
25 how much improvement in the estimate, and one narrows

1 the range of those two estimates.
2 But that is quintessentially the way in which one
3 narrows the range within which the broad axe is wielded.
4 THE PRESIDENT: Can I ask you about Dr Niels's supplemental
5 note.
6 MR BOWSHER: Yes.
7 THE PRESIDENT: Which I think was served on 9 April, and he
8 deals with this and I think provides the foundation for
9 some of the material that appears in the Mastercard
10 skeleton.
11 MR BOWSHER: Yes.
12 THE PRESIDENT: Two questions really, do you have any
13 objection to it going in?
14 MR BOWSHER: No.
15 THE PRESIDENT: Do you have any observations about the
16 numbers that we see -- I think it is in 3.17 of the
17 Mastercard skeleton. Is that accepted as being the
18 right -- I think obviously subject to your point that
19 it is an understatement, but in terms of the mathematics
20 of the mechanics, are you contesting that?
21 MR BOWSHER: We are not contesting. In the short time
22 available to him he has made a sample.
23 THE PRESIDENT: Yes.
24 MR BOWSHER: Of the set I have just described. Now, we have
25 no reason to criticise the way in which he has made that

1 sampling. We do not know how he did it, but he
2 presumably has done a random sample. But he has done a
3 sample of a data set, which is biased for the reason we
4 explained, so we end up back at the same place. I am
5 not contesting it dramatically because, in a sense, it
6 is simply making the point in the same way, that, yes,
7 Mr von Hinten-Reed is indeed coming up with two
8 different estimates. He is not conceding that both are
9 wrong; he is saying those are the estimates, the
10 starting point for trying to understand where the target
11 might be.
12 THE PRESIDENT: Yes, so you would say if he did a different
13 sample, he might have a different answer.
14 MR BOWSHER: Might well have a different answer. Probably
15 do.
16 THE PRESIDENT: But there is a sample that has been done
17 that apparently produces a number and the number that is
18 produced does have a quite significant effect on the
19 claim value and the opt-out claim, does it not?
20 MR BOWSHER: Yes, but even that does not reduce it to zero,
21 and it is interesting -- I put it no higher than that --
22 that in the short time available between
23 Mr von Hinten-Reed's sixth and the time that note was
24 produced, that work was done with a sample of 200.
25 Well, I am not going to debate -- I do not think

1 the Tribunal would welcome a debate today as to what is
2 a worthwhile sample for that exercise if we were
3 preparing for a fuller trial, but it might be bigger
4 than 200.
5 THE PRESIDENT: (Overspeaking).
6 MR BOWSHER: And we can improve the underlying data set, so
7 we could have a bigger sample of a better data set.
8 THE PRESIDENT: So you are accepting that could be
9 a possible outcome but you are absolutely not, that is
10 not your case that that's the right answer.
11 MR BOWSHER: No, I am not saying -- 6%, I think he comes out
12 with.
13 THE PRESIDENT: He comes out with 6%. I am never quite sure
14 what I am supposed to say and what I am not but --
15 MR BOWSHER: I think you're allowed (Overspeaking).
16 THE PRESIDENT: I am sure we are. So you would say that
17 that is just a reference point, another reference
18 point --
19 MR BOWSHER: Another reference point which is much higher.
20 THE PRESIDENT: Somehow that gap will need to be managed and
21 reduced to something which the Tribunal could decide in
22 due course.
23 MR BOWSHER: Yes, but those -- they are -- there is probably
24 another approach but those are two obvious limiting
25 ranges and it is good news, from the purposes of

1 quantifying this claim, that it seems to be understood
2 that one is likely to be an underestimate and one is
3 likely to be an overestimate. Back to my point, it
4 seems to be understood that, if there is a hypothetical
5 right answer, if there could ever be such a thing to
6 answer this particular question, it is somewhere between
7 those numbers, and the question is how much effort is
8 necessary to narrow that range.
9 THE PRESIDENT: Because there are two points here, are there
10 not? One is the methodology point. Then, of course,
11 they say, as I understand it, that when you end up with
12 numbers like that, you do then get into a suitability
13 analysis or becomes part of a suitability analysis
14 because the claim might not be as big as -- I do not
15 know whether you are going to deal with that.
16 MR BOWSHER: Suitability comes a bit later --
17 THE PRESIDENT: can deal with that.
18 MR BOWSHER: Sorry, I cut into your question.
19 THE PRESIDENT: No, I am just making the observation that it
20 has implications (Overspeaking). For the purposes of
21 the methodology point, I think your answer is you have
22 identified two ways in which it can be done. Those are
23 unlikely to be the only two ways later on and therefore
24 one would expect that there will be some material that
25 would allow the Tribunal to make a rational, albeit

1 perhaps broad axe, decision about what the aggregate
2 damages should be allocated to the opt-out.
3 MR BOWSHER: We are only dealing with one of the claims
4 here -- 6% of a very big number is still a large number.
5 I mean, it is easy to knock and say it is not that big.
6 It is not that big if you compare it with however many
7 billion but it is still many tens of million. That is
8 still an important claim. If the Tribunal, at this
9 stage, is into arguing whether or not -- what is the
10 right number for a suitability argument, in our
11 submission, that is really not a question for
12 certification. That may be something --
13 THE PRESIDENT: I am afraid I think we might depart there
14 because we are going to have to look at cost benefit,
15 and I am sure Mr Caplan, I am sure we are going to get
16 there, and clearly with the litigation budgets we have
17 and with a claim that was tens of millions, one might be
18 asking some questions about that. But I think the key
19 point -- I do not think we need to get into that,
20 particularly if it is coming, I think the key point is
21 you are saying that this is likely to be an
22 underestimate, not necessarily the right answer for that
23 particular methodology and somewhere between that and
24 Mr von Hinten-Reed's first go is likely to be a number
25 that will have to be determined in due course; that is

1 the position on that.
2 MR BOWSHER: Just to make three quick further points, which
3 I may be treading a little bit on Mr Caplan's toes,
4 firstly the number is not trivial, it is still
5 a substantial number. It is only the claim against
6 Mastercard -- one part of the claim against Mastercard,
7 and, of course, the Tribunal, as we know, in
8 certification retains a supervisory jurisdiction over
9 the certification of a claim. I mean, if a claim were
10 simply to evaporate to zero, something might happen,
11 but, you know, we are not in that -- we are simply
12 nowhere near that.
13 Anyway, Mastercard objects to both the ONS approach
14 and matched merchants approach on the basis that they
15 are unreliable. They suggest again -- no, sorry.
16 I have covered the biases, have I not?
17 I think, sorry, you have done to me what you did to
18 my learned friend and I now find myself reading the
19 answer that I have just given. I am just checking
20 I have not missed anything. Yes, for what it is worth,
21 6% of 2 billion is £128 million, for what it is worth,
22 just to pick up that last -- I have a couple of pages on
23 this.
24 I mean, in short, I can summarise all that by saying
25 the supplemental note actually demonstrates that, as

1 a workable methodology it is workable. It ends up with
2 a number, it is still a large number.
3 The matching process can obviously be simplified if
4 merchants in the opt-out class provide Mastercard with
5 a complete set of their MIDs. Now, there are issues
6 about the extent to which that can -- to the extent all
7 the MIDs can be provided and that matching can be done,
8 that obviously would be one way of improving the
9 process. It is something that PCRs could ask opt-out
10 merchants to provide on a voluntary basis once the
11 claim is certified. It is not something you would
12 expect anyone to do now, but if the claim is certified
13 and we go forward -- and part of the engagement with the
14 class, you might expect, would be requests such as that,
15 and it is not onerous and as long as one got
16 a reasonable uptake from claimants with their numbers,
17 that would enable, that would ease the burden for
18 Mastercard to improve the data set that they have got.
19 So you can see a number of probably fairly easy devices
20 for getting to a better data set.
21 Yes, and I am reminded that if more opt-out
22 merchants provide MIDs, that would help correct the bias
23 towards large merchants which is currently inherent in
24 the data set.
25 In the sixth report, Mr von Hinten-Reed also refers

1 to modelling techniques, particularly the technique of
2 logistic regression that can be used to estimate and
3 correct for bias in a sample. He acknowledges the
4 possibility of using that. But all of these are simply
5 refinements of his approach to calculation of what is
6 called the residual claim value, which is, as we see,
7 a key step along the way to calculating the aggregate
8 damages figure.
9 So there are some subsidiary points which Mastercard
10 make about the aggregate damages figure, it complains
11 that PCRs have not put forward any methodology for
12 excluding UK transactions acquired by foreign acquirers.
13 We do not really see why that is a huge problem because
14 Mastercard says it holds information on the identity of
15 the acquirer for each transaction, that is necessary for
16 its clearing and settlement function. That is in
17 Mr Cotter's second statement --
18 DR BISHOP: Just a question. If I understood you correctly,
19 you said that in Mr von Hinten-Reed's sixth report, was
20 it?
21 MR BOWSHER: Yes.
22 DR BISHOP: Discussion of use of logistic regression to
23 correct a bias in the sample. Can you give me the page
24 reference there?
25 MR BOWSHER: Sorry, yes, it is {G/33/20}, paragraphs 78-82.

1 Is that the right one? Sorry.
2 That was the main one I had. It is a discussion of
3 what could be done. I will leave it up while it is
4 there.
5 THE PRESIDENT: Can I ask you, just while Dr Bishop is
6 looking at that, can I ask you about the point you made
7 about foreign acquirers. Can I clarify what your
8 position is on that. Is it the case you are excluding
9 UK transactions cleared by foreign acquirers or acquired
10 by foreign acquirers? It was not completely clear to
11 me -- it seemed to me there was some ambiguity in your
12 position on that.
13 MR BOWSHER: I think, can I --
14 THE PRESIDENT: I think it would be helpful to clarify it
15 because I am sure it is a point that is going to be
16 made.
17 MR BOWSHER: Can I make the top three points and then carry
18 on with the methodology, the conclusions. It may be we
19 come back to the detail --
20 THE PRESIDENT: By all means, I think it would just be
21 helpful to be absolutely clear about what your position
22 is on that, because it was not clear to me, and I have
23 to confess it was not clear to me why you would take the
24 position that you would exclude foreign-based acquirers
25 (Overspeaking) transaction (Overspeaking).

1 MR BOWSHER: Let me state the conclusion and then move on
2 and then we can decide who provides the argument, as it
3 were, to support it. In short, centrally acquired
4 transactions are not excluded from either the opt-in or
5 opt-out claims.
6 THE PRESIDENT: That is the answer to my question.
7 MR BOWSHER: That is the answer. All of those -- and the
8 basic key point is all of those transactions are
9 transactions which must comply with Mastercard's UK
10 rules and are governed by the UK's regulator, the PSR.
11 THE PRESIDENT: Yes, so they are transactions that take
12 place in the UK.
13 MR BOWSHER: Exactly.
14 THE PRESIDENT: (Overspeaking) based in the UK.
15 MR BOWSHER: Exactly. There is more detail and perhaps it
16 would be best if my learned friend deals with that.
17 THE PRESIDENT: I think if that is the case -- it may be
18 I am wrong but it seems to me the point goes away
19 (Overspeaking) the point is being premised on you
20 excluding those transactions.
21 MR BOWSHER: Exactly.
22 THE PRESIDENT: No doubt we will hear about that.
23 MR BOWSHER: That (inaudible) -- sorry, it is -- I just
24 wanted to keep -- but you are absolutely right, that is
25 the point that has been made, so yes, I mean, the data

1 can be filtered appropriately, is the short point, we
2 say.
3 It is said that there is no proposal for dealing
4 with merchants that you have UK points of sale that are
5 not domiciled elsewhere but this we say can be addressed
6 by building on the existing methodology. It is hardly
7 a significant problem in the opt-in class as merchants
8 will know where they are domiciled, and if they seek to
9 opt-in, the point can be addressed. For opt-out, again
10 one would expect some sort of sampling approach can be
11 done by reference to public source data.
12 They say there is no proposal for dealing with
13 merchants that choose to opt-out of the opt-out. Again,
14 we suggest there is no reason to think that that is
15 a substantial problem. Realistically, even if -- we
16 think it unlikely there will be many merchants that opt
17 out but if those that do are likely to be doing so to
18 pursue their own proceedings, they will have discussed
19 internally and considered the approach to quantifying
20 the value of their proceedings, presumably that is why
21 they will be opting out, and opting out is a conscious
22 act and, in order to opt-out, they will have to tell the
23 PCRs that they will do so, they will have to give
24 notices and there can be a process for making sure that
25 the correct information is obtained at that time to

1 ensure that they are properly excluded.
2 So in conclusion on the aggregate damages point, we
3 say the aggregate damages methodology is adequate as
4 a roadmap for the trial and it is not to the point to
5 say that all of these numbers can be improved with more
6 data and better methodology.
7 THE PRESIDENT: I am sorry to take you back, could you just
8 help me with the UK transactions by non-domiciled
9 merchants.
10 MR BOWSHER: The UK transactions point, yes.
11 THE PRESIDENT: So that is premised again on those
12 non-domiciled merchants not being in the class
13 definition so where does that -- can you show me where
14 that is in the class definition because I could not
15 actually find it because certainly the revised
16 definition, it may be a bit of homework for you.
17 MR BOWSHER: I don't think it is there clearly. That is the
18 whole point. It is not excluded, that is the point.
19 THE PRESIDENT: So the same position applies as the --
20 MR BOWSHER: Same point. Yes, sorry, I should have made
21 that clear.
22 THE PRESIDENT: That is fine, that is helpful, thank you.
23 MR BOWSHER: Same point, see above.
24 THE PRESIDENT: Yes, thank you.
25 MR BOWSHER: MPO, merchant pass on, you will be aware that

1 there was already quite a lot of material before
2 the Tribunal about merchant pass on and quite a bit of
3 discussion in the judgment about it. Let me try and
4 speed up a bit to deal with it. As explained in the
5 sixth report, that is {G/33/56} and following, it is
6 paragraphs 291-293, Mr von Hinten-Reed proposes to
7 conduct individual MPO analyses for a sample of opt-in
8 merchants and use these as proxies for MPO by opt-out
9 merchants in a similar economic sector filling in gaps
10 with publicly available studies.
11 Mastercard says that the fundamental deficiency in
12 that approach is that it assumes similar rates of pass
13 on for large and small merchants. Mastercard makes that
14 point at 3.27 of its skeleton, Visa makes a similar
15 point in its skeleton at 54.8.
16 We say those sorts of arguments about what is the
17 right proxy for a sampling process is really not for
18 this stage. That is not relevant to the process --
19 application of the process test. The whole point at
20 this stage is to try and come up with a usable
21 methodology which will provide a useful and approximate
22 answer to take forward which may be improved with better
23 data. That is inherent in all of this. So to state
24 perhaps the self-evident point, which I am now repeating
25 myself, that these numbers can be improved with better

1 data and a better understanding of what is or is not
2 a representative claimant or whether a different group
3 of representatives might be selected, really does not
4 take the Tribunal further forward at this stage.
5 It is an obvious sensible route forward to get at
6 this point.
7 THE PRESIDENT: Can I ask you, it was not entirely clear to
8 me whether Mr von Hinten-Reed is anticipating
9 determining effectively an economy-wide pass on rate for
10 the class or whether he was thinking of something
11 different, because it seems to me it is going to be
12 quite difficult to deal with merchant pass on at
13 anything other than an economy-wide rate once one is
14 dealing with aggregate damages. I may be wrong about
15 that but that did seem to me to be a bit like, if you
16 are familiar with the discussions about the Merricks
17 collective proceeding joining the interchange umbrella
18 proceedings, where in the Merricks proceedings it is
19 very much an economy-wide pass on rate. Do you
20 know if that is the position here?
21 MR BOWSHER: Well, I think what Mr von Hinten-Reed indicates
22 in his report is that there is a process going on, as it
23 were, towards being able to construct proxies for each
24 economic sector. You get that from --
25 THE PRESIDENT: Sorry to interrupt you, just to pause there

1 though, how can that possibly work in practice, though,
2 if we are -- if we are -- are you then saying that, as
3 a matter of distribution, we are going to have to work
4 out what sector everybody is in and they will get a
5 different number? I mean, is that not too far down the
6 chain? If one assumes that we get to the point where
7 you succeeded on infringement, and we have got the
8 calculation of the aggregate damages, is not the next
9 necessary step to deduct from the aggregate damages what
10 has been passed on and is that not going to have to be
11 on an economy-wide basis. I may be wrong about that and
12 that is the question I am testing and by all means tell
13 me I am wrong about it, but that is where I got to in my
14 analysis of it.
15 MR BOWSHER: He ends up at one possible outcome at a UK
16 rate -- shall I give a reference, {G/33/64-65},
17 paragraph 331. I am hoping that -- and he is explaining
18 there that one can come up with an understanding of what
19 the pass on rate would be leading possibly to a UK rate
20 or a more sector-specific rate, and it may be that you
21 are right that it has to be the UK rate because that is
22 logically the only one that is going to work, he is
23 putting forward a methodology that leads in that
24 direction.
25 There is -- but one of the points may be, for

1 example, that there could be flexibility in
2 distribution. So it might be that one of the -- if it
3 turns out that there is a wildly different outcome --
4 and it is possible to show this, there is a widely
5 different outcome or significantly different outcome in
6 different sectors in pass on, it might be the
7 distribution has to be done differently.
8 THE PRESIDENT: Is that not logically impossible because do
9 you not have to work out what the damages are before you
10 could distribute them?
11 MR BOWSHER: You would, you would probably have to use a UK
12 rate and then maybe work backwards, I suppose.
13 THE PRESIDENT: I am not quite sure why you would bother
14 doing that. In a sense, that is a little bit what
15 bothers me about where -- and perhaps this is --
16 I suspect this is a level of detail we do not need to
17 get into, and I do not want to get into a big debate
18 about the right way to try merchant pass on. I mean,
19 maybe just simply to observe that you will be aware that
20 in the Umbrella Proceedings the debate has been about
21 how much individual sampling or information or
22 merchant-specific information is required in order to
23 answer the question and there it may well be that we end
24 up looking at it by sectors and so on. But I suppose it
25 does not seem to me to be terribly sensible -- and I do

1 not know if he is suggesting this but if
2 Mr von Hinten-Reed is suggesting we try and work out at
3 some level of disaggregation what the pass on rate is in
4 order to aggregate it again in circumstances where,
5 certainly as far as Merricks are concerned, they say
6 they can do it on an economy-wide basis without that, it
7 just seems very odd to have gone down into the detail
8 and come back up again.
9 Now I just make that observation, and if I have
10 misunderstood it, then that is fine. But it does -- if
11 one is just standing back from it, I would have thought
12 the easiest way to do this would be to approach it at
13 economy-wide basis and certainly Mr Coombs, who is the
14 expert for Mr Merricks, has made it very plain he thinks
15 that's a very doable thing to do and he is doing it.
16 MR BOWSHER: Well, the starting point is, yes, the aim is to
17 keep it simple, and I really do not want -- I do not
18 want to use up too much precious time on debating those
19 points. But I mean, in that paragraph 3 which I have
20 just taken you to, the simple end point of a UK rate is
21 contemplated as one possible output. It is also the
22 possibility of having more granular answers to that
23 question, if they are useful, so as particularly as the
24 make up of the claimant class -- it is self-evidently
25 different between Merricks and this case, it is

1 a different level altogether, but it may well be that
2 particularly if commercial cards are weighted towards
3 particular sectors, it may be that there are -- that
4 there is -- again it may be a question of having a UK
5 rate calculated one way and then be able to show that
6 sectors might weight it.
7 THE PRESIDENT: I can see you might have your weighting in
8 your economy wide -- it might not be economy wide
9 because it might be -- the only reason for making the
10 point really, Mr Bowsher, is you are being attacked for
11 a methodology which is said not to work because it is
12 not practical and delivers the wrong answers. I mean,
13 we have in front of us something which Mr Coombs for
14 Mr Merricks has put forward, which is actually
15 considerably simpler, I think, from what is being
16 suggested and certainly, I would have thought, passes
17 the methodology test because it is in relation to a case
18 which has been certified, and you say there are some
19 differences but it is basically the same question, which
20 is how much has been passed on from the merchants to the
21 consumer, so I just -- and I think I am probably -- it
22 may not feel like I am being helpful, but I think
23 I probably am being helpful.
24 MR BOWSHER: You are being helpful, and I think the only
25 reason why there is any debate about it at all is it is

1 a danger I am arguing the next stage of these
2 proceedings because, of course, there will be different
3 arguments made about how you actually come up to produce
4 that rate. But a starting point is yes, we start with
5 the simplest version. It may be when we get there,
6 there are other arguments to be made. But to be
7 criticised for us now saying, "We can do the simple
8 version, we may be able to refine it later as well," is,
9 in our submission, simply not a valid criticism.
10 THE PRESIDENT: Okay, thank you.
11 MR BOWSHER: All of those points about proportionality,
12 about whether it is or is not proportional to get into
13 a more refined version of that process, is a fascinating
14 argument for another day. What I do not want it to be
15 said, and obviously Mr von Hinten-Reed would not want me
16 to let it be said, is that somehow I have agreed
17 today this is only ever a UK rate case, because there
18 might be quite a few refinements to do.
19 There are other points made -- the claimants --
20 whatever evidence is required, claimant-specific
21 evidence so forth can be tailored as necessary, it is
22 all to the end of improving the estimate, narrowing the
23 target to the correct target. It is not the case that
24 the PCRs, as has been suggested, are in some sort of
25 deliberate collision course on the approach to MPO.

1 There is a practical problem, which Mr Caplan will come
2 on to, about Trial 2 being only a day or two away, as it
3 were, so quite how it fits, but that is a -- it is
4 a related problem but we are not on a collision course.
5 We are in a position where we are trying to engage with
6 that process to the extent sensible.
7 But that does not mean that we do not have also
8 other points to argue and to, we say, contribute to
9 assist the claim in that regard.
10 Article 101(3) is a -- the criticism of our methodology on
11 Article 101(3) is a point taken by both Mastercard and Visa.
12 The short point they make is that we still -- they say
13 we still have not provided any methodology. I have
14 already discussed in general terms our point about
15 burden of proof and trying to understand what the points
16 are that are being run against us. The question of
17 exemption we say is firstly evidently triable because it
18 has been tried in individual proceedings, it will be
19 tried in the Umbrella Proceedings. An exemption
20 analysis being a market-wide analysis is something that
21 is actually relatively easy to deal with in collective
22 proceedings, perhaps more so than in individual
23 proceedings, because it is a market approach and we will
24 be able to bring a broader section of the market to --
25 before the Tribunal to consider that.

1 It is a contrast to something like MPO, where you
2 would ordinarily look at more claimant-specific topics
3 and consider how pass on has actually worked, so -- but
4 because we say MPO is consistently essentially something
5 which does work well in a collective proceeding once the
6 Article 101(3) points have been elucidated to be tested.
7 It is not however the case that we have provided
8 nothing. Mr von Hinten-Reed has stated in his fifth
9 report at section 5, {D/33/75}, and he has done so at
10 section 7, he has done so where there are not
11 self-evidently -- we have made this point -- specific
12 exemption claims to deal, and even the points that were
13 raised a year ago are not obviously in play now because
14 those points from Dune that were raised a year ago, in
15 the commercial card context, are Article 101(1) infringement
16 issues, not exemption issues.
17 So there is not an obvious menu of exemption points
18 against us.
19 THE PRESIDENT: Well, that is not quite right, is it?
20 I mean, the subject that has been rehearsed at some
21 length in the Commission's decision in Mastercard and
22 there is an enormous amount of literature about it.
23 MR BOWSHER: So what we do is we started with Sainsbury's at
24 the top -- exactly, so we started, as
25 Mr von Hinten-Reed -- what I mean is there is not a list

1 immediately in front of us in this litigation for us to
2 deal with. There is a history of these points being
3 taken, which broadly speaking has not succeeded, so trying
4 to understand which are the ones which are going to be
5 live and pursued is a difficult choice, which are the
6 points which are going to be taken now, what
7 Mr von Hinten-Reed can best do at this stage, as he does
8 from paragraph 297, is set out a methodology for testing
9 the evidence that will be put forward by the schemes
10 without necessarily knowing what it is that is going to
11 be put forward. It is at paragraph 297, page 78.
12 It will be points that will be based on evidence
13 produced by the schemes themselves. I mean, they will
14 typically be of the type of the MIF revenues which are
15 necessary in order to provide certain benefits which
16 they cannot otherwise provide. That encourages card
17 take up and card take up is good for merchants. I mean
18 that will be the simple point that will be made.
19 But what this bit in the middle is, what this
20 service is will have to be analysed on a case-by-case
21 basis. Is it fraud prevention or Amex switching? At
22 this stage, all that Mr von Hinten-Reed can do is take
23 at a general level the sorts of generic points which
24 have been put forward and come up with a methodology
25 which, as I say, he does at 297, responding to the

1 general point which he deals with earlier in that
2 section that this is all based on material that comes
3 from the commercial card -- from the card issuers.
4 MR FRAZER: Mr Bowsher, 297 seems to simply be a mirror
5 image of Article 101(3), in other words it is just
6 repeating the outline provisions of Article 101(3) and saying
7 that is what he will address. It does not actually say
8 how he will address them.
9 MR BOWSHER: What he is trying to do is -- well, he is
10 trying to express the inherent difficulty in putting
11 forward a granular methodology for an exemption which
12 has not been dealt with, he provides examples, which we
13 will come on to one or two later, particularly when we
14 look at the Amex switching point, but all he can do is
15 give an example or two and set it in the broader context
16 of what it is that Article 101(3) requires him to do at a
market
17 level.
18 There is not much more at this stage that can be
19 done because there is not -- as I said, even the Dune
20 issues are no longer live in the context of exemption
21 for commercial cards. And as he says earlier on in his
22 report, in VHR6, paragraph 179-184, again and again what
23 we deal with is -- what we encounter are instances where
24 the schemes have failed in claims for exemption for want
25 of evidence, for example, want of evidence as to how

1 they would actually use the MIF revenue, whether they
2 actually use it to incentivise card use, and that is
3 really from paragraphs 179-184 of the same report,
4 pages 35-37, it may be worth just pulling that up.
5 Sixth report, did I say -- sorry, I am sorry,
6 {G/33/35-37}. Thank you. That is from 179-184. Have
7 I got the wrong page, it should be another page on then.
8 Yes, there we are. He goes through exactly as you have
9 indicated, sir. He starts with Mastercard and goes
10 through the sorts of things which have been thrown up
11 and really indicates a whole load of various items which
12 have been considered and have got nowhere. I mean, how
13 many times can one produce a methodology to test that
14 something has got nowhere? What he is trying to do is
15 put before the Tribunal the possibility yes, whatever
16 comes up now, there will be a methodology to deal with.
17 THE PRESIDENT: Yes.
18 MR BOWSHER: But -- and it is a bit artificial to pick on
19 one because we do not know whether -- the Amex switching
20 one is one that has been talked about a lot recently, so
21 it is one that he deals with in a bit more detail. But
22 it is a worked example because how many worked examples
23 can you need to do to show that you can do it, and each
24 one will be different according to whatever the context
25 and framework of that example is.

1 The PCRs cannot, we say, realistically be required
2 to do any more than this at the trial beyond that we are
3 just writing the expert report for trial on the basis of
4 points which have not yet been fully elucidated.
5 Then last on the -- sorry, not last. Countervailing
6 benefits, nearly there. We face a difficulty with again
7 we do not have pleadings from Visa and Mastercard and,
8 of course, on these points we do not know what the
9 specific benefits are that are alleged. Many of the
10 CVBs floated in other cases are the same points one sees
11 raised in respect of exemption and indeed are done so in
12 the context of an exemption analysis and the difference
13 seems to just evaporate into nothing.
14 THE PRESIDENT: Mr Bowsher, can you help me, what do we mean
15 by countervailing benefits? Where does it fit in the
16 Article 101 analysis?
17 MR BOWSHER: I am puzzled myself but an example -- the --
18 an example which is put forward, which is dealt with by
19 Mr von Hinten-Reed in VHR-5, paragraph 307-308 -- and
20 I have forgotten to give myself a page number for it,
21 but I will find -- it must be {D/33/79}. He looks at
22 the Amex switching point.
23 THE PRESIDENT: Yes, so you probably followed enough of
24 Trial 1 to know that there has been an enormous amount
25 of debate about where Amex switching fits in the

1 analysis.
2 MR BOWSHER: Yes.
3 THE PRESIDENT: Just because of that, and that being
4 a matter which is something --
5 MR BOWSHER: We are not going to be the ones that suddenly
6 tell you that countervailing benefits are the great
7 answer for the defendants here.
8 THE PRESIDENT: Well, I suppose I am not entirely sure who
9 started countervailing benefits, in terms of -- I do not
10 whether it was Mr von Hinten-Reed or somebody else who
11 started the chain going.
12 At some stage, it would be helpful for someone to
13 explain to me, whoever has introduced it to explain
14 where they think it fits in the analysis. If it is this
15 side of the court room, they know perfectly well that
16 that is a debate which we have had in some detail, and
17 actually it is not something that we want to resolve in
18 this matter, not least because it is subject to an
19 outstanding judgment in relation to Trial 1, and
20 I certainly do not want to indicate any view on it in
21 relation to that.
22 I just would like to understand where it is it sits
23 in the analysis, and why, if it exists as something
24 separate from exemption, what that is. If it is not
25 you, I do not mind if you do not -- if you do not know

1 the answer to that question, then I am very happy for
2 you to tell me that.
3 MR BOWSHER: Let me quickly state where I put it in my head.
4 It is the same as Article 101(3); it is simply an aspect of
5 Article 101(3). It is the countervailing benefit that might
6 (inaudible) Article 101(3) perhaps. That might be
7 a countervailing benefit, that might be one, or it might
8 be a cost incurred, a cost of mitigation, but I do not
9 know anyone to have actually really identified those
10 costs.
11 THE PRESIDENT: I wonder whether maybe you need not spend
12 any more time on it.
13 MR BOWSHER: Because it is not really for us to run.
14 THE PRESIDENT: Mr Kennelly.
15 MR KENNELLY: (Overspeaking) help this debate. We rely on
16 it. We raise it for the purposes of damages. We say it
17 is part of the analysis they should be putting forward
18 in a methodology for the purposes of damages.
19 Countervailing benefits arise in the context of damages.
20 THE PRESIDENT: So you are going to -- you are saying you
21 are going to argue -- well, you may not be, you are
22 indicating you may argue that once if the PCR succeeds
23 on everything else, when we get to quantification, you
24 are going to say: we need to give a credit for some
25 benefits that merchants have got that they would not

1 otherwise have got; and therefore that is just a but for
2 analysis.
3 MR KENNELLY: Yes. We rely on these points for the purposes
4 of Article 101(3). There will be an overlap.
5 THE PRESIDENT: Of course, I understand.
6 MR KENNELLY: Even if we fail on that -- similar points come
7 up at the damages stage under the heading of
8 countervailing benefits.
9 THE PRESIDENT: Ms Tolaney.
10 MS TOLANEY: Just so you know, it is in Mr von Hinten-Reed's
11 fifth report in support of the revised application as
12 step 3 of the aggregate damages claim {D/33/53}.
13 THE PRESIDENT: You say that is where it pops up first.
14 MS TOLANEY: That has popped up first.
15 THE PRESIDENT: I do not want to go down a rabbit hole on
16 it. I think for your purposes, Mr Bowsher, I think
17 unless you want to say something about it in relation to
18 what Mr Kennelly has just said, clearly it is something
19 which encompasses Article 101(3)-type issues. If you have
20 anything to say about it in relation to damages, then
21 please do so, but otherwise, I think we can hear what
22 they have to say.
23 MR BOWSHER: Point one, we do not understand how it operates
24 as a matter of damages, but that is for some other day.
25 The reason why it is in Mr von Hinten-Reed's report is

1 because it is covered in -- it was raised in the last
2 judgment. It is identified as a -- it is identified as
3 a criticism by the schemes, and actually identified by
4 the judgment at paragraph 112 as a specific criticism of
5 Mr von Hinten-Reed's methodology, and it is broken out
6 as a separate item.
7 THE PRESIDENT: Perhaps it is my fault.
8 MR BOWSHER: Not blaming -- not at all.
9 THE PRESIDENT: I have been educated by six weeks with this
10 side of the court room.
11 MR BOWSHER: Without going into the archaeology, we could
12 spend some time and find out where it originally came
13 from, but it was not from us.
14 THE PRESIDENT: No, thank you.
15 MR BOWSHER: But what -- Mr von Hinten-Reed has tried to
16 engage with that by valuing something that might be
17 a CVB. Usefully, it is something which obviously
18 applies at an Article 101(3) level, namely the Amex switching
19 argument which you will know a lot more about than I do.
20 THE PRESIDENT: I am not sure about that. We will see. How
21 are you doing for time?
22 MR BOWSHER: I am nearly there. On methodology --
23 THE PRESIDENT: Apologies, we need to take a break in a
24 minute, but if you can wrap up --
25 MR BOWSHER: I had just got to APO and then I am wrapped up.

1 I wanted to check because I think all of this -- I had
2 a lot more on what we do not understand about CVBs, but
3 I think I can skip all of that.
4 THE PRESIDENT: I do not think you need to do that.
5 MR BOWSHER: APO, this is a point taken by Visa only, not
6 Mastercard, and it is very much a point that builds on
7 the APO methodology from last time. It is not clear
8 that it is the point that Visa push the most strongly.
9 In the fifth report, Mr von Hinten-Reed proposes to use
10 PSR data to estimate APO, as is being done in the
11 Umbrella Proceedings, we understand.
12 Mr Holt, in Holt 2, that is at -- I am not sure that
13 is right. I am going to read it anyway, A2/7/26.
14 I hope that is right. Holt 2 speculated that the PSR
15 data may be unsuitable for an assessment of commercial
16 card MIFs, as it might not cover a period of sufficient
17 variation in the commercial card MIFs to enable a
18 regression analysis specifically in respect of
19 commercial card MIFs.
20 Well, I mean, yes, he does not -- I understand what
21 that means and why that might be a problem for
22 a regression analysis, but it is -- it starts by being
23 it "may be unsuitable"; well, we will have to test. He
24 does not say that if -- the data is unsuitable for that
25 reason, even though this is the data to which access --

1 has access in the Umbrella Proceedings.
2 In any event, Mr von Hinten-Reed explains that it
3 should be possible to extrapolate APO for commercial
4 card MIFs from an APO analysis of consumer MIFs, with
5 a certain number of additional targeted data requests to
6 acquirers. That is in his sixth report {G/33/55},
7 paragraph 284.
8 There is no suggestion that the PSR data is
9 unsuitable. It is hard to see how that could possibly
10 be said, and to make the obvious point that the APO data
11 will be addressed on a market-wide basis in Trial 2.
12 I mean, if there are problems with the methodology at
13 that point, and any particular difficulties in applying
14 it across to commercial MIFs, we will have to deal with
15 it then. But there plainly is a methodology. In our
16 submission, the methodological issues have been
17 addressed, and that should not hold up certification of
18 this claim.
19 I sit down after having taken too long.
20 THE PRESIDENT: I think if it is convenient, we might,
21 Mr Caplan, take 10 minutes and give you a chance to get
22 settled, and we will resume at 3 o'clock. How long do
23 you think you are going to be?
24 MR CAPLAN: I can be quite quick, as soon as I work out how
25 to use the microphone. I suspect I could shrink my

1 submissions down to half an hour. It depends on
2 questions.
3 THE PRESIDENT: I think we will have some questions for you,
4 I am sure, but I suspect they will probably be the
5 things that you are going to address us on anyway. I do
6 not want to rush you. I want you to feel -- that you
7 get down what you want to get down. But I think that
8 would be quite helpful, I think, or maybe even if you
9 were able to sit down by 3.45, if that was convenient,
10 then that would give the proposed defendants a good
11 45 minutes or an hour to run this evening.
12 MR CAPLAN: Just so you know, so Lord Wolfson after me is
13 going to be dealing with some authorisation and conduct
14 issues, which is quite short.
15 THE PRESIDENT: Yes.
16 MR CAPLAN: Most of the material will have been covered.
17 THE PRESIDENT: That is just an indication. I do not want
18 you to feel constrained, and if you feel you need more
19 time, particularly if we bother you a lot, then you
20 should obviously have it.
21 MR CAPLAN: I will be as expansive as I feel is appropriate.
22 THE PRESIDENT: Thank you. We will resume at 3 o'clock.
23 (2.51 pm)
24 (A short break)
25 (3.01 pm)

1 Submissions by MR CAPLAN
2 THE PRESIDENT: Mr Caplan.
3 MR CAPLAN: Thank you. So I am going to be dealing with the
4 question of suitability. There are two broad issues
5 under this heading really. One is the general question,
6 the relative suitability question, collective versus
7 individual proceedings, particularly against the
8 background of the existence of the Umbrella Proceedings.
9 Secondly, we have the particular question of integration
10 of the current proceedings with the umbrella
11 proceedings, which I know is something the Tribunal is
12 obviously interested in.
13 Time is rather tight, so I am going to take our
14 written submissions as read. Obviously we rely on what
15 is said there.
16 I am also going to reasonably assume you do not need
17 me to say anything on the law. Everyone knows the
18 relative suitability test is not one assessed in the
19 abstract, but requires a comparison between relative and
20 individual proceedings, or at least everyone in this
21 room.
22 I should also say that one of the schemes' major
23 points on relative suitability, the no-loss class
24 members point has already been dealt with, so I do not
25 need to deal with that now. But before getting into the

1 details of the debate between the parties, I think it is
2 important to take stock of where we are, and there are
3 four points to make in that regard.
4 First, the Tribunal held in its CPO judgment that
5 despite the existence of the Umbrella Proceedings, the
6 proposed claims were relatively more suitable to be
7 tried in collective proceedings than in individual
8 proceedings. I will be coming back to that.
9 Second, that conclusion was strongly endorsed by the
10 Court of Appeal, and in the context of that appeal, the
11 schemes essentially deployed before the court most if
12 not all of the objections they are persisting with
13 today, and they were rejected.
14 The third point is that in relation to integration
15 with the Umbrella Proceedings, time has obviously not
16 stood still since the first CPO hearing, and nor have
17 the Umbrella Proceedings themselves. So the question of
18 integration means something slightly different now than
19 it may have done 10 months ago. In particular,
20 obviously Trial 1 has happened.
21 Fourth, and relatedly, our position vis-à-vis
22 integration with the Umbrella Proceedings has been
23 rather mischaracterised by the proposed defendants. As
24 you will have seen from the evidence, we are engaging
25 closely with those proceedings, but we are in something

1 of a window of uncertainty, if I can put it like that,
2 because we do not know what the outcome of Trial 1 is
3 going to be. We have our views, we can speculate, but
4 we do not know.
5 But what I can say is that we are not, as is
6 suggested, doggedly committed to ploughing our own
7 course, come what may, but nor can we blindly commit to
8 a course of action which might be to the detriment of
9 our class members. That is the position we find
10 ourselves in. I will go into that in more detail, but
11 in my submission, any other approach frankly would be
12 a breach of the PCR's duties to their class members.
13 So with that brief introduction, can I turn to the
14 CPO judgment. The Tribunal's suitability analysis
15 starts at paragraph 229. That is {N/3/71}. If we could
16 bring that up, please. I am not going to take you
17 through this. It is your judgment. I am sure you know
18 it better than I do. But I would ask you just to
19 remind yourselves, if you need to, of this section at
20 some point.
21 The key is really paragraph 240 on page 73 {N/3/73},
22 and if we could bring that up, please:
23 "We are not therefore convinced that the existence
24 of the Umbrella Proceedings confers sufficient
25 advantages on a potential claimant to make individual

1 proceedings more suitable than collective proceedings.
2 This applies to both the opt-in and opt-out proposed
3 proceedings."
4 However, things get rather more gloomy for us when
5 you go to the very bottom of the page, paragraph 241(4),
6 where there is an overall conclusion on suitability, and
7 in the Roman numeral paragraphs over the page {N/3/74},
8 we get a various summation, if I can put it like that,
9 of the reasons why ultimately, despite the conclusion in
10 principle on relative suitability, you were not
11 satisfied last time round that the overall suitability
12 requirement was met.
13 Just breezing through them very quickly, (i) and
14 (ii) relate to methodology problems. Now, for the
15 reasons given by my learned friend Mr Bowsher, in my
16 submission, we have remedied those. Paragraph (iii)
17 related to the inclusion of EU-wide transactions. As
18 you are aware, we have taken those out, that is no
19 longer a problem, although Mastercard actually criticises
20 us for doing that.
21 (iv), the Umbrella Proceedings are a point in favour
22 of all the proposed collective proceedings, providing it
23 is clear how we intend to be integrated. That is
24 something I am going to come back to.
25 Then (v), identifiability, in my submission,

1 Lord Wolfson has addressed that.
2 So the overall submission is that we have addressed
3 those issues, so the relative suitability conclusion can
4 now be taken effectively to its logical conclusion
5 towards certification.
6 Now, as you know, Mastercard and Visa attempted to
7 appeal your decision on relative suitability, and that
8 attempt did not succeed. We have got the
9 Court of Appeal's decision at {N/8}. That is
10 an important document, so I would like to go to it,
11 please.
12 First, I just want to identify the arguments that
13 were being run. The reason I want to do so is because
14 there is a sense, particularly when it comes to
15 Mastercard's submissions, that they are raising issues
16 where, if I can -- we have been there, done that, and
17 got the t-shirt, not only before the Tribunal last time
18 round but before the Court of Appeal as well.
19 So if we go to page 8 {N/8/8}, please, and
20 paragraph 11, we do not need to read this, I just want
21 to note a few points. You will see a heading: size,
22 scale and sophistication of the proposed class. That is
23 something you will probably have seen repeated in the
24 submissions for this hearing.
25 If we go over the page {N/8/9} to paragraph 12, just

1 note the last two sentences:
2 "To the contrary, the evidence indicated that claims
3 were valuable and capable of pursuit in individual
4 proceedings, particularly via MIF Umbrella Proceedings.
5 Such claims had been brought many times before."
6 Then 13 deals with the size of class members. 14,
7 the substantial value of the claims. You see the
8 heading in 15 "Extent of prior litigation and
9 settlement". Costs and benefits dealt with in 16.
10 Here, just note, three lines in:
11 "The MIF Umbrella Proceedings covered all MIFs
12 whereas the opt-in proceedings concerned only commercial
13 and interregional MIFs, such that opt-in proceedings
14 would determine only a sub-set of any proposed class
15 member's total claim leaving that member to pursue
16 separate claims in respect of the residue."
17 So the splitting point, which is again taken today.
18 Then at paragraph 19, over the page {N/8/10}, under the
19 heading, "Practicality and proportionality", it is worth
20 noting, just towards the end, about five lines up, the
21 memorable submission, I remember well, made by
22 Mr Piccinin:
23 "So aggressively proactive were these organisations
24 [that is publicising the Umbrella Proceedings] that ...
25 '... the ambulance comes to the claimant'."

1 I mean, I would hope the ambulance comes to the
2 claimant if they are in difficulty, but anyway, one gets
3 the sense of what was being said.
4 Paragraph 20, just to look at the heading,
5 "Deprivation of the right to sue and settle".
6 Then if we move on to the Court of Appeal's actual
7 ruling, we do not need to worry about what it says on
8 jurisdiction, but if we go to page 12 {N/8/12}, please,
9 and it is paragraph 29, the point is made in the second
10 sentence:
11 "... it is not the case that because individual
12 natural or legal persons could bring individual
13 proceedings, this is dispositive against collective
14 proceedings. It is within the contemplation of the
15 scheme that individual proceedings may be feasible but
16 that, because of other factors, collective proceedings
17 remain preferable."
18 That is obviously relevant to Mastercard's
19 submission, repeated again, that individual proceedings
20 remain feasible.
21 Over the page {N/8/13}, the Court of Appeal then
22 went through the adequacy of this Tribunal's reasoning.
23 Obviously I am not going to read all this out, but if we
24 could look at the end of paragraph 32, please, there is
25 an important point there, not important only because it

1 was a submission I made, but it was said:
2 "... as was submitted by counsel for the PCR during
3 the permission to appeal hearing, the claims were
4 presented to the CAT to be heard together, as a package.
5 It was artificial to analyse the opt-in and the opt-out
6 proceedings as if they were severable and to be
7 litigated separately. The CAT did not demur from this
8 proposition, and its conclusion necessarily had to take
9 account, in a rounded manner, of both types of claims."
10 Now, that is a particularly important point to keep
11 in mind because Mastercard's approach remains one which
12 deals with opt-in suitability and opt-out suitability
13 separately, and no doubt they have their forensic
14 reasons for doing that. But as the Court of Appeal
15 makes clear, it is the wrong approach and it rather
16 skews the analysis.
17 Moving on in the Court of Appeal judgment, we get,
18 if we can go to paragraph 36, but at the top of page 14
19 {N/8/14}, please, we get the important point, it is the
20 worth standing back point. Lord Wolfson referred to
21 this, and if you have not read it already, I would ask
22 you to read that section at some point. But it is
23 important. It is the reality of what is going on here.
24 In the following paragraphs, the Court of Appeal
25 goes on to reject each and every one of the schemes'

1 complaints. Worth noting just at paragraph 39, in the
2 second and third lines, we see the recognition that the
3 Umbrella Proceedings are individualised claims and
4 settlements. So one obvious point of distinction is
5 that aggregate damages are simply not available in the
6 Umbrella Proceedings. That is not a possibility there.
7 It is a possibility here. We can get a class-wide
8 remedy.
9 Also noting at paragraph 40, the Court of Appeal
10 sees the fact that the scope of the proceedings could be
11 dealt with as an incident of future case management.
12 That is how the Court of Appeal puts it, and obviously
13 the Court of Appeal notes the broad powers that the
14 Tribunal has under rule 4 to manage these proceedings
15 alongside any other proceedings that raise similar
16 issues.
17 Paragraph 41 is important. They are dealing with
18 the deprivation of the right to sue and settle, but it
19 is the recognition in this paragraph, and it is perhaps
20 worth reading, it is at the top of page 15 {N/8/15}:
21 "In the vast majority of cases, particularly where
22 consumers are involved, class members may have no
23 knowledge of the proceedings and/or will never have
24 contemplated bringing individual claims. In a real and
25 practical sense, they are given a right they could never

1 otherwise have enjoyed. Given the industrial scale of
2 the claims farming that the applicants have drawn
3 attention to and been critical of ... if an individual
4 merchant has not, yet, commenced an individual claim it
5 is not unreasonable to infer that it will not do so and,
6 it follows, a collective action might be the best means
7 of vindicating rights."
8 That, again, we say, is absolutely bang on point and
9 is something critical to keep in mind.
10 Finally, paragraph 45 is important and I would ask
11 you to read that. That is on page 16 {N/8/16}. You may
12 have read this already, but the critical points are the
13 Court of Appeal interpreted this Tribunal's decision,
14 including its decision on permission to appeal, as
15 laying down a clear position on individual versus
16 collective proceedings. Whilst it would not be an abuse
17 of process for a reconsideration of that position to
18 happen, they were not inviting or encouraging
19 the Tribunal to do so, given that they have endorsed its
20 assessment of individual versus collective proceedings.
21 So that is what I wanted from the Court of Appeal
22 judgment. Against that background, can I turn then to
23 the schemes' current arguments on relative suitability,
24 and I am going to focus on Mastercard's submissions
25 because although some of the points are taken by Visa,

1 in the skeletons, Mastercard really focuses on this and
2 Visa focuses more on the question of integration with
3 the Umbrella Proceedings.
4 So I start with three rather obvious points; the
5 first one is the got the t-shirt point. Mastercard is
6 directly running pretty much all of the same arguments
7 that it ran last time round, and before the
8 Court of Appeal, and on which it lost.
9 Now, I do not say it is absolutely prohibited from
10 doing that, but it is a rather ambitious approach, in my
11 submission, given in particular the endorsement of this
12 Tribunal's decision last time round that we have just
13 seen. It is also a rather strange position for
14 Mastercard to take, given its own complaints about the
15 supposed illegitimacy of points we are taking, that it
16 says were decided last time round. I do not think
17 a consideration of that point is going to get anyone
18 very far.
19 On the substance, however, nothing has changed to
20 make the arguments on relative suitability any better
21 for Mastercard now than they were last time round. That
22 is the first point.
23 The second rather obvious point is that despite the
24 passages in the Court of Appeal judgment to which I drew
25 your attention, Mastercard is still treating the opt-in

1 and opt-out proceedings as hermetically sealed
2 categories when it comes to relative suitability, and
3 I have shown you that that is the wrong approach, and it
4 skews the analysis, and it could have an impact on
5 certain points.
6 So take, for example, the complaints about the size
7 and sophistication of the opt-in class. We say it is
8 not a good point anyway, but it is simply wrong to view
9 the opt-in class in isolation in that way. These
10 proceedings as a whole are designed to vindicate the
11 rights of a range of merchants, a very large number of
12 small merchants, some very, very small indeed, and a
13 smaller number of larger merchants. It is by no means
14 a proceeding dedicated entirely to large and
15 sophisticated businesses.
16 The overall package remains one which is and will be
17 dominated in fact, in terms of numbers of merchants, by
18 small merchants. Once one strips out that sort of
19 artificiality, most of Mastercard's arguments on
20 relative suitability simply fall away.
21 The third, rather obvious point but it is pretty
22 critical, is that it can reasonably be assumed that
23 merchants who had not yet joined the umbrella
24 proceedings are not likely to do so, and they are not
25 likely to bring any individual proceedings at all. That

1 is the point that the Court of Appeal was making in
2 paragraph 41 {N/8/15}.
3 This is not because there are not many such
4 merchants left. In fact, if one goes through, I will
5 just give you the references because of the time, but in
6 paragraph 76.2 of Mr Cotter's second statement --
7 the Tribunal will probably want to look at the
8 confidential version because it has the figures.
9 I ask -- it does not need to be brought up, but
10 {XE/2/28}, one can get a sense of the scale of the
11 number of merchants from the figures there given, that
12 have not brought a claim. It is the vast majority. It
13 is the vast majority and it is likely to be tens or
14 hundreds of thousands of merchants.
15 As we have seen, the reason they have not brought
16 a claim is not because the Umbrella Proceedings have not
17 been publicised enough. The ambulances have all
18 been sent out, but there are lots and lots of merchants
19 that they have not reached. So really, if these
20 collective proceedings are not certified, those tens or
21 hundreds of thousands of merchants will recover nothing,
22 and there will be no claim for them at all.
23 I would like to show you on this a quotation in
24 Merricks. If we could go to {P/1/39}, this is in the
25 minority judgment, it is paragraph 84, but it memorably

1 expresses the point. It is right at the end of the
2 paragraph. It is the quotation from Judge Posner:
3 "The realistic alternative to a class action is not
4 17 [million] individual suits, but zero individual
5 suits, as only a lunatic or a fanatic sues for $30."
6 I say that is -- for those have not already settled
7 or claimed, that is the reality. What faces you is
8 a decision between collective proceedings or no
9 proceedings.
10 I can deal really rather quickly then with the
11 specific arguments that Mastercard makes in its
12 skeleton.
13 So one of its arguments is that the focus only on
14 commercial card MIFs would split merchants' claims and
15 cause difficulties for that reason. We do not need to
16 bring it up, but it is in paragraphs 3.49 {A/3/21} and
17 4.13 to 4.14 {A/3/28-29} of its skeleton, but it is just
18 a straight rerun. It is a straight rerun of a point
19 they made last time before the Tribunal and that they
20 have made before the Court of Appeal, so this is the
21 third attempt at running the point.
22 There is a suggestion that because the proceedings
23 now deal with one type of MIF instead of two, last time
24 we had interregional, that might make a difference.
25 But, in my submission, it makes no difference in

1 principle to this particular argument, and, in fact, in
2 places, it seems that Mastercard itself recognises that.
3 If we could bring up actually {A/3/21}, please, just
4 to look at its skeleton at paragraph 3.50(b), we see the
5 point there is put:
6 "The drawbacks in the Opt-Out PCR bringing
7 proceedings in respect of only one MIF (or two MIFs) are
8 real."
9 We see that really as a recognition that this point
10 of principle relating to splitting does not depend on
11 whether there is one or two or three, it is a more
12 general point than that. But in any event, the real
13 choice, as I have said, is between merchants who have
14 not brought claims so far having a claim brought
15 collectively for commercial MIF or there being no
16 claim at all, that is the choice.
17 Obviously, insofar as any case management
18 difficulties or practical difficulties are concerned,
19 they are just not likely to arise because these are
20 merchants that are highly unlikely to bring any claim.
21 There is not going to be this vast splitting of
22 merchants who have some claims being brought
23 collectively and other claims not. That is just not
24 a realistic prospect.
25 So that is what we say about that argument.

1 Another argument resurrected by Mastercard is that
2 individual proceedings remain feasible and it relies in
3 this regard on the extent of prior litigation and
4 settlement, you see that at paragraph 4.8, also at
5 paragraphs 4.14 on its skeleton. Again we have seen the
6 answer to that. The point is no better now than it was
7 on the previous two occasions when it was rejected.
8 Then we have got an attempt to revisit the cost
9 benefit analysis, and this may be something from the
10 indications earlier that the Tribunal may be slightly more
11 interested in. Mastercard effectively suggest, well,
12 the claim value has been reduced because of the change
13 in scope of the proceedings and it is reduced to such an
14 extent that the cost benefit analysis no longer favours
15 any decision in our favour on relative suitability.
16 Now, we say first of all this is a rather
17 opportunistic point because the reduction in scope
18 really follows from specific concerns raised by
19 the Tribunal about the inclusion of international
20 transactions, and I showed you, when it came to your
21 conclusions on suitability, that that was the case.
22 In fact, those conclusions were urged upon
23 the Tribunal by the schemes themselves. I just give the
24 references to the original responses to the original CPR
25 application. In Mastercard's response, paragraph 4.71,

1 that is at {L/1/44}, they were saying, well, the
2 inclusion of other markets meant there was a commonality
3 problem.
4 Visa was even more explicit at {L/7/27}, it takes
5 that point at paragraph 75, and in fact at paragraph 76
6 it says the Tribunal should exclude such aspects of the
7 claim as relate to foreign markets. So the schemes say
8 this is a problem. The Tribunal agrees with them. We
9 address it and it is now said the solution is the
10 problem.
11 In my submission, that is a rather unattractive
12 approach. The flip-side, of course, is that it does not
13 really take much imagination to envisage what Mastercard
14 would be saying if we had not made those changes, "You
15 have ignored the Tribunal, blatant disregard of the
16 indications that were given," and so on.
17 So we say this is a deeply unattractive point to
18 take but, in any event, whether the position is
19 unattractive or not, on the substance we say the point
20 is not a good one at all.
21 The value of the claims remains very significant.
22 Now, Mr Bowsher has addressed that to an extent but
23 since Mastercard throws around a number of figures on
24 claim value in its skeleton, some of which were debated
25 with Mr Bowsher, I do want to address the point in this

1 context. If we could go to {F/43/21}, please, this is
2 Mr Holt's second expert report, when it comes up.
3 Fantastic, and if you look at paragraph 57, just note
4 the figures, this is essentially noting
5 Mr von Hinten-Reed's estimate of the potential value of
6 the claim just against Visa for commercial cards, and
7 you see there is a range from £2.9 to £3.7 billion, which
8 is a fairly substantial figure.
9 Over the page, I do not want to be unfair to
10 Mr Holt, so if we look at paragraph 61, {F/43/22}, he
11 thinks this is an overestimate, and his calculations, if
12 you look at the end of the paragraph, suggest that
13 acquirers paid MIFs, and he is talking about commercial
14 card MIFs here, of 1.7 billion in the relevant period,
15 and that is just against Visa, so that is a very
16 substantial figure indeed.
17 Dealing with Mastercard, if we could go to Cotter 2,
18 please, and I am not sure if this will work but if there
19 is any way for the Tribunal to look at the confidential
20 version because that is where one gets the figures, it
21 is {XE/2/27}, it is {E/2/27} for everyone else. I am
22 not sure if this is better done in the courtroom or
23 I just give you the references but if you effectively
24 take the figures that Mr Cotter gives in
25 paragraph 76.1.1 at the bottom of the page, in relation

1 to aggregated merchants and extrapolate that over the
2 claim period, then one needs to add to that the
3 non-aggregated merchants dealt with in paragraph 76.2
4 over the page, and extrapolate that as well over the
5 claim period, because these figures are just for 2022,
6 one comes to a very significant figure indeed and that
7 is the claim against Mastercard.
8 So we have very, very significant figures for the
9 value of commercial card MIFs against both defendants in
10 the claim period.
11 Now, even accounting for the fact that existing
12 claims and settlements will need to be removed, and even
13 accepting for present purposes, though, as I think
14 the Tribunal is aware, it is not accepted, that all
15 settlements cover commercial card MIFs and all
16 settlements are valid, there would still be a very
17 substantial claim left on any view, even if one were to
18 strip out all their value.
19 So we say on the value side of the equation of the
20 cost benefit analysis we are talking about a very
21 substantial claim and I do very briefly just want to
22 address the supplemental note that you debated with
23 Mr Bowsher because we are here really in the realm of
24 lies, damned lies and statistics. We do not dispute the
25 mathematics of what Dr Niels has done but we do submit

1 the suggestion that this 6% figure and the figures,
2 monetary figures, it reveals is somehow a representation
3 of Mr von Hinten-Reed's methodology is a gross
4 mischaracterisation of that methodology.
5 You have got chapter and verse on this in his sixth
6 report, it is from paragraph 69 at {G/33/18}, two
7 approaches, one tending to overestimate one tending to
8 underestimate, it is not accepted by any means that the
9 6% figure will remain the 6% figure and there are all sorts
10 of issues about improving the data, stripping out bias,
11 and obviously there is a whole debate about what it
12 actually means and what the effect will be of stripping
13 out existing and settled claims. So we do not accept
14 the figures given in the supplemental note as being even
15 a realistic indication of a lower band, and obviously
16 I think they are just against Mastercard anyway.
17 Overall, we say there remains huge potential value
18 here both for opt-in and opt-out.
19 So that is the value side of the equation. On the
20 other side of the equation, dealing with the costs of
21 the proceedings, as you will have seen from our written
22 materials, we have purposefully -- and we have thought
23 about this, we have purposefully put in budgets that are
24 conservative as to what cost savings might be achieved
25 from integration with the Umbrella Proceedings. Now,

1 the figures have actually reduced from last time round.
2 They have reduced in the opt-in claim by approximately
3 35% and by approximately 13% in the opt-out. The
4 anticipation is that further significant cost savings
5 will be achieved by virtue of alignment with the
6 Umbrella Proceedings.
7 But we cannot guarantee that because of the window
8 of uncertainty we are currently in.
9 Now one point we did make, and we made this point in
10 our written materials, there is something of an oddity
11 in a complaint that our budget has been set on
12 a conservative basis or that we have too much funding.
13 At the end of the day, the Tribunal is going to control
14 what costs are payable from one side to the other. It
15 is not going to just give us our budgeted amount, even
16 assuming we spend it all, and it is important to really
17 focus on the purpose of providing a budget at this
18 stage, and one gets that from the Guide to proceedings
19 at {P/26/9}, it is paragraph 6.33, and obviously this is
20 something to which we have paid close attention:
21 "... the Tribunal is required to consider relates to
22 the proposed class representative’s financial
23 resources: would the proposed class representative be
24 able to pay the defendant's recoverable costs if ordered
25 to do so? ... By extension, the proposed class

1 representative’s ability to fund its own costs of
2 bringing the collective proceedings is also relevant.
3 In considering this aspect, the Tribunal will have
4 regard to the proposed class representative's financial
5 resources, including any relevant fee arrangements with
6 its lawyers, third party funders or insurers. The costs
7 budget appended to the collective proceedings plan
8 referred to above is likely to assist the Tribunal's
9 assessment in this regard."
10 Now, there is obviously sense in that. The last
11 thing one wants is to be left as a defendant effectively
12 jilted at the altar by a PCR who runs out of money
13 before trial and, of course, we are funded, so putting
14 in a budget that effectively assumes the worst, to
15 a reasonable extent, is far preferable, in my
16 submission, than under-budgeting and under-funding, and
17 to criticise us for doing that we say is rather
18 misconceived. I will come back, and I will keep coming
19 back to the fundamental point that there are huge numbers
20 of merchants who are not going to get justice any other
21 way. Whatever criticisms might be thrown at us, that is
22 the reality, there is no other game in town.
23 So if I can sum up, there are obviously points of
24 detail made in these skeleton arguments, which I will
25 try and deal with in reply, but to sum up on relative

1 suitability, there is nothing to change the assessment
2 that was made last time that was expressly endorsed by
3 the Court of Appeal and the fundamental reality is that,
4 if these proceedings are not certified, the vast
5 majority of the class members will not get any redress
6 at all.
7 Then I come on to integration with the umbrella
8 proceedings -- I see the time, I will try and speed up,
9 if possible. These are points principally made in
10 Visa's skeleton that I need to respond to. The first --
11 and really it is a fundamental point to make -- is that
12 we do propose on this revised application to join the
13 Umbrella Proceedings, to the extent that it is possible
14 and practicable to do so. The only caveat is that we
15 have to be responsible and realistic about what we can
16 commit to now. Now, there is some evidence on this,
17 there is a fair bit of evidence on this. I do not ask
18 you to read it now but it is in Allen 4, paragraphs 8-14
19 {G/2/2}. But if I can summarise, the Tribunal knows we
20 have been closely following the Umbrella Proceedings.
21 We attended Trial 1, our attendance was endorsed in the
22 sense that a direction was given to provide us with
23 documents. We intend to continue to follow the umbrella
24 proceedings and we would like to be more involved if
25 possible. If we can join the bi-weekly CMCs, fantastic.

1 We would very much like to do all of those things.
2 We have been closely war gaming -- those are the
3 words used in the evidence -- what steps to take given
4 certain developments in the Umbrella Proceedings, so if
5 there is success in Trial 1 on commercial cards, maybe
6 there is a summary judgment application in the offering.
7 There is obviously a limit to what I can say about these
8 points without waiving privilege.
9 THE PRESIDENT: Can I -- Mr Caplan, maybe that is a good
10 time just to jump in. Can we work through that
11 a little. The bit I don't understand is why you would
12 not want to join in and it just -- just to take perhaps,
13 just to work through an example of that. So let us take
14 Trial 1 and let us just assume there may be all sorts of
15 different outcomes but in relation to commercial cards
16 let us just assume two binary outcomes. One is that the
17 claimants win, in which case there is an infringement in
18 relation to commercial cards, and one is that the
19 claimants lose and there is no infringement.
20 Now, in the first situation, you suggest you might
21 apply for summary judgment. Actually if you joined the
22 Umbrella Proceedings, you would get the benefit
23 immediately of that judgment. Is that --
24 MR CAPLAN: That is essentially the intention.
25 THE PRESIDENT: That is fine. That is the point I want to

1 push at.
2 MR CAPLAN: Yes, the procedural mechanism is -- we can
3 debate the procedural mechanism but the point is that if
4 we can piggyback on anything that has happened in the
5 Umbrella Proceedings, we will.
6 THE PRESIDENT: If the other outcome -- and obviously this
7 may be (inaudible) not unrealistic as being the
8 likely outcomes, if the schemes were to succeed and
9 satisfy the Tribunal that there was no restriction, what
10 is your position then? Are you really suggesting you
11 intend to continue to litigate that point? Is that not
12 quite a powerful blow against your case?
13 MR CAPLAN: I am sure it would be a blow. I have no doubt
14 it would be a blow, it would depend on the reasons.
15 THE PRESIDENT: Of course.
16 MR CAPLAN: And appeals and so on. But standing here as
17 someone representing the PCR who is representing a very
18 large class of merchants --
19 THE PRESIDENT: I understand that point. I suppose I am not
20 asking you to make a commitment, what I am really trying
21 to explore is just an understanding of the reasons --
22 your thinking and reasons why you might not. It is not
23 at all clear to me why you would not. So I mean,
24 I think the position -- it seems to me the position in
25 relation to Trial 1 is actually quite binary. There may

1 be nuances and indeed things may happen. I quite
2 understand why you want to reserve your position for the
3 unexpected, but if it is the expected of one of those
4 two, then either it seems to me you want to take the
5 benefit of a positive finding as quickly as possible.
6 If it is a negative finding, you are in trouble because
7 actually persuading the Tribunal to hear a trial on the
8 same matter -- I appreciate you may well say there is no
9 reason in principle why you could not, but you are going
10 to have some difficulty persuading us we are going to
11 devote judicial resource to progressing a case on
12 something we have just decided.
13 MR CAPLAN: I understand.
14 THE PRESIDENT: Because of the nature of the proceedings
15 being -- it is not as if they are specific to particular
16 claimants, it is a general point really about whether
17 commercial card MIFs infringe or not.
18 MR CAPLAN: Yes.
19 THE PRESIDENT: So if one just parks that for a minute and
20 then moves on. Now, Trial 2 deals with merchant pass on,
21 acquirer pass on, as you know, and I was not entirely
22 clear from the litigation timetable what the plan was
23 with that but, I mean, again it seemed to me,
24 particularly given the exchange with Mr Bowsher about
25 how one might -- what one is trying to achieve in

1 relation to merchant pass on, I cannot see why you would
2 want to litigate that separately.
3 MR CAPLAN: As I say, we are in a window of uncertainty --
4 and there is really two aspects of that. One is the
5 outcome of Trial 1. I suppose there is conceivably
6 settlements as well, we do not know what will happen
7 after Trial 1, after judgment comes out. There may or
8 may not be a Trial 2, we just don't know.
9 THE PRESIDENT: That is entirely fair. If that happens,
10 then the game changes.
11 MR CAPLAN: The other uncertainty is the timing of our
12 certification because we would like to participate in
13 Trial 2 but there is going to be a practical question.
14 THE PRESIDENT: I think that is fair. I think the reality is
15 it would be very difficult for you to participate in
16 Trial 2 on the basis that you were fully engaged in the
17 expert process. I understand that, and it may be that
18 is quite a difficult pill to swallow, but on the other
19 hand, does that really mean that you are going to turn
20 your back on Trial 2 when the very thing that you need
21 to have done is going to be done, with the benefit of
22 a great deal of effort and expense and actually with the
23 production of an awful lot of evidence which will make,
24 I would have thought, I would hope, it reasonably
25 straightforward for you to extrapolate it or use it for

1 purposes of the collective proceedings, if certified.
2 MR CAPLAN: There is no intention to do anything other than
3 to participate to the extent that we are able to
4 responsibly give that indication now. As standing here,
5 I have to obviously caveat what I say because we do not
6 know what is going to happen. Conceivably we do not
7 know what is going to happen with Trial 2, there could
8 be something which unexpectedly --
9 THE PRESIDENT: No, no --
10 MR CAPLAN: But we want to participate and we want to
11 co-operate as much as possible. That is our position.
12 THE PRESIDENT: Let us be clear, it is all hypothetical, not
13 least because actually, before you could join the
14 Umbrella Proceedings, the parties would need to have the
15 opportunity to express that and the President would need
16 to express a view on that, being his decision, not mine.
17 But I suppose -- I think it probably -- it has to be
18 a decision that is made -- if certification is granted,
19 it has to be a decision that is made post certification.
20 I am not asking you to commit to it, just to be clear
21 about it. On the other hand, it is not immaterial to
22 the matters before this Tribunal in relation to
23 certification.
24 MR CAPLAN: Of course. I completely understand the concern.
25 As I say, our position is we want to commit to the

1 extent we responsibly can. The uncertainties that are
2 just inherent in where we are mean we cannot assume
3 budgetary savings when it comes to cost because we do
4 not know what is going to happen with Trial 1 and 2.
5 I completely understand the forensic difficulties we
6 will have in trying to persuade the Tribunal to devote
7 judicial resources to another trial on infringement if
8 Trial 1 is lost.
9 THE PRESIDENT: Even actually to have another trial on merchant
10 pass on if we have done it already. Why would we want
11 to do that. If we are going to spend eight weeks or
12 whatever it is at the end of this year doing it and you
13 could participate in that, it is not going to sit very
14 well with the Tribunal if you choose not to.
15 MR CAPLAN: Of course, if we could participate, I can
16 understand the suggestion that we effectively turn our
17 back on it and then, six months later, say, by the way,
18 do it all again, no-one is going to be very happy with
19 that. But that is not our intention. If we can, we
20 will, that is effectively the message.
21 But the point is that I cannot commit today to
22 say -- and this is something -- this is a point that
23 really Visa makes, and maybe it short circuits the whole
24 discussion, they effectively say you are not willing to
25 be bound by what happens in Trial 1, therefore, it is

1 game over for you. That is somehow disentitling us from
2 certification. We say that is an absurd position.
3 No one in my position could possibly say, yes, of course
4 we are going to be bound by a trial in which we did not
5 participate.
6 THE PRESIDENT: To be fair to them, I think there is quite
7 a lot of material in your claim -- your application
8 which rather suggests at the very least a more ambiguous
9 position than you just put to me.
10 MR CAPLAN: Well, we have had to effectively deal with all
11 eventualities. The budget is a good example. We cannot
12 assume that everything will be done in the umbrella
13 proceedings effectively on which we can piggyback. We
14 just cannot assume they are going to get to the end, for
15 a start. We know that one very major claimant group
16 settled towards the end of last year, we do not know
17 what is going to happen with Trial 1 and the judgment.
18 We do not know what settlements might follow from that.
19 THE PRESIDENT: Yes, but it is a little odd, is it not, that
20 your default position just now is that you would like to
21 be involved if you can. I do not think you can say that
22 about your documentation. The trial timetable has you
23 going for a trial on issues regarding Article 101(1)
24 in September 2026.
25 MR CAPLAN: It also has a potential summary judgment

1 application.
2 THE PRESIDENT: Well, it does, but I think you would
3 struggle to describe the trial timetable as one where
4 the default was participation (Overspeaking).
5 MR CAPLAN: I agree but the other -- that is right, it is
6 a worst-case scenario. The other flip-side is, if we
7 had put in a litigation timetable and say a budget
8 appended to it, which said, yes, we are just going to
9 join the Umbrella Proceedings, assuming that they
10 succeed every step of the way and exist, one can imagine
11 what would be said against us: you have got a half-baked
12 plan or you do not have a plan because you are just
13 assuming this other process will encompass you. So we
14 have had to come up with something to say, look, if this
15 has to run on a standalone basis, it can. You have got
16 a methodology for all these points, we have got
17 a budget, we are funded. But if we can join the
18 Umbrella Proceedings -- and, as I say, there has to be
19 a caveat there because of the window of uncertainty in
20 which we are operating -- we will. That is our position
21 in a nutshell.
22 I hope that is good enough for the Tribunal because
23 I do say it would be, with respect -- and I do not --
24 clearly I do not think the Tribunal is saying this, but
25 I understood Visa to be saying it, it is not right to

1 say we have to commit to be bound now, because that is
2 completely unreasonable. It is just not a reasonable
3 ask, and I note that Visa is not saying, well, if it
4 loses in Trial 1 and we do not join for some theoretical
5 reason, they will agree to be bound. I mean it is
6 a complete one-way commitment in advance, which no
7 sensible PCR could give in these circumstances.
8 THE PRESIDENT: I think, for all the reasons we rehearsed,
9 I do not think it can be said with any certainty that
10 you, if certified, will end up in the umbrella
11 proceedings, not least because that is a matter for the
12 President on the submission of the parties to those
13 proceedings. But I think where we have got to, just to
14 be absolutely clear, is that you are proceeding on the
15 default assumption that you will if you can.
16 MR CAPLAN: Yes.
17 THE PRESIDENT: I think that is an important point. You
18 know, if we were to proceed to certify, we would need to
19 rely on that because actually our expectation would be
20 that is what you would do. Obviously, that does not
21 foreclose you from arguing something different or doing
22 something different later but, in that situation,
23 I think it would be unhelpful for you to take
24 a different position (Overspeaking).
25 MR CAPLAN: Of course. One can see -- and you have very

1 significant case management powers. Even if we -- even
2 if I was to give no indication of our intentions at all,
3 you would be able to say: we are going to case manage
4 this with the Umbrella Proceedings. It would not just
5 be up to us. I mean, obviously, we would have to be
6 given an opportunity to say things, but the existence of
7 the Umbrella Proceedings, in my submission, is, as you
8 held in your judgment, a point in favour of
9 certification because there is effectively already
10 a very large-scale examination of many of these issues
11 going on, and we want to be able to slot in if we can.
12 THE PRESIDENT: That is helpful, thank you.
13 MR CAPLAN: I am not sure I can take it much further.
14 THE PRESIDENT: I agree.
15 MR CAPLAN: I do not think I really need to go through
16 Visa's submissions on this because that really
17 encapsulates our point, I will try and deal with points
18 in reply, if possible, but I hope that sets out our
19 position in a reasonably clear way.
20 THE PRESIDENT: Yes, it does.
21 MR CAPLAN: With that, I think that deals with the points on
22 relative suitability, unless there are any other
23 questions or issues that anyone has.
24 THE PRESIDENT: No, thank you.
25 MR CAPLAN: I will hand back to Lord Wolfson.

1 THE PRESIDENT: Thank you very much.
2 Submissions by LORD WOLFSON.
3 LORD WOLFSON: I am now doing the last lap of this
4 four-legged relay, which is authorisation and conduct,
5 and I will try to do this pretty quickly. The central
6 points have been canvassed in our written material.
7 I am just going to, in these short submissions, try and
8 highlight the relevant points as they appear to us now
9 to be relevant.
10 So we address this, to give you the references, in the
11 revised claim form, obviously, and in particular in the
12 Reply and in our skeleton at section (vi), and the
13 essential test is whether it would be just and
14 reasonable for the PCRs to be authorised and that means
15 whether we would act fairly and adequately in the
16 interests of class members. So what I am going to do
17 briefly is to remind the Tribunal very briefly of the
18 findings in the last judgment, explain why the issues
19 you identified last time no longer arise and then I will
20 look at some of the other points that the schemes take.
21 On the judgment, you did not reach a final view on
22 authorisation but you did set out a number of relevant
23 points. This is at {N/3}. The first is at pages 75-76,
24 paragraphs 242 to 250. You were not persuaded on some
25 of the concerns the schemes had raised as part of their

1 initial responses, Mr Allen's expertise, the
2 incorporation history. But you did go on to say at
3 around paragraph 246 that the issues raised as the
4 eligibility condition, for example as to methodology,
5 had caused you to question whether the PCRs were being
6 directed "As well as they might be". Separately there
7 was a point on the advisory panel, you will remember,
8 and you wanted us to adopt "a considerably more
9 thoughtful and compliant approach".
10 Well, my submission here is that we are now
11 thoughtful and compliant. I am not going to get into
12 the attribution of who has been more or less thoughtful
13 and compliant at previous stages, but the critical point
14 is that the judgment identifies that you cannot draw
15 a bright line between the factors which went to
16 eligibility and authorisation. As that last point
17 shows, one bleeds over, if I can use that phrase, to the
18 other.
19 So you wanted to know from the PCRs, for example, the
20 point just raised, how they would relate to the umbrella
21 proceedings and also cost budgeting.
22 Now eligibility, the first issue raised, I have
23 already made my submissions on that. I am not sure
24 I need to say much more about it but we have now
25 identified, in my respectful submission, why we have

1 an identifiable class and why the no-loss issue is not
2 a relevant issue. As to methodology, you have heard
3 from my learned friend Mr Bowsher as to why the
4 methodology satisfies the process test, and clearly we
5 also say the proceedings satisfy the suitability
6 requirement. As my learned friend Mr Caplan said, this
7 really is effectively the only game in town for the
8 merchants who have not joined the Umbrella Proceedings.
9 If they have not joined now, they are not going to be
10 joining.
11 So now we say, unlike last time, issues as to
12 eligibility should not negatively impact the
13 authorisation condition, and in fact, insofar as they
14 bleed into each other, we now pray in aid the fact that
15 we satisfy eligibility as part of our authorisation
16 submissions. So that is a crossover point.
17 Second, advisory panel. You have seen the evidence
18 on that. In short, we have got one, it is up and
19 running, there are proper people on it and they are
20 involved and they will continue to be involved. I am
21 not sure there is much more I can say orally on that.
22 Third, Umbrella Proceedings and the budgets, well,
23 I am not sure there is really much more I can say given
24 what my learned friend Mr Caplan said, in particular, if
25 I may say respectfully, in response to the questions you

1 have asked. This all comes back under this head as
2 well, and I am happy to go through it again but I really
3 would be making the same submissions.
4 Just on the litigation plan, just to remind you what
5 the point of the litigation plan is under rule 78(3)(c),
6 which we have for your reference at {P/25/9}, it has to
7 include a method for bringing the proceedings on behalf
8 of represented persons, also includes any estimate of
9 and details of arrangements as to costs. We would
10 invite you -- I will not turn it up now given the
11 time -- to look at the Trucks certification judgment for
12 some guidance on this. I imagine you will be familiar
13 with this already.
14 The reference is at {P/7/19}, paragraph 32, and
15 the Tribunal there cited and endorsed some Canadian
16 authority. The plan is a framework in which the
17 litigation is going to proceed.
18 Otherwise, the relationship with the umbrella
19 proceedings, I think I cannot really say much more than
20 my learned friend already has.
21 On cost budgeting, again, the central point there is
22 that we have been conservative and we do not want to run
23 out of money halfway through. The critical point is to
24 be conservative. The more savings we can make, the
25 better, and just to underline the point, it would be

1 utterly naive for us to expect the Tribunal to revisit
2 points it has just argued. Anything we can do to save
3 money and join in with the Umbrella Proceedings we will
4 do, and the Tribunal will hold us to that anyway,
5 frankly, going forward, so I hope that is a realistic
6 submission.
7 I think that covers the authorisation points. As to
8 eligibility, advisory plan and the relationship between
9 these proceedings and the Umbrella Proceedings. Those
10 are the three central points from last time round.
11 As you can probably guess, I am trying to finish by
12 4 o'clock. The schemes' separate complaints, there is
13 a rag bag of separate complaints which are made, some of
14 them I do not still understand, in which case I will
15 deal with them in reply, if I have to. There is only
16 one point I want to say a quick word about now. That is
17 book building. As to that, they complain we have not
18 taken adequate steps to book build for the opt-in
19 proceedings. Again a little odd point for them to take.
20 I mean, you would have thought from their position the
21 fewer opt-ins, the better. But in any event, the short
22 point is we cannot formally book build, as you will
23 appreciate, at the moment, because there are not any
24 proceedings into which people can opt-in.
25 What we have done is to explore the extent of

1 interest in the opt-in proceedings and to ensure that we
2 can engage with the merchants at the appropriate time.
3 We have set that out in the evidence in Allen 4 in
4 particular.
5 We have gone to the trouble of renewing applications
6 for the opt-in CPOs. We have funding and we have
7 engaged with 37 opt-in claimants. They all, all but
8 one, I think, expressed an interest, 12 of the 37 had
9 registered their interest to opt-in, intention to opt-in
10 at the relevant time and, as you will see from Ross 3,
11 paragraph 24, the reference is {K/1/10}, they are claims
12 of a materially large amount.
13 We have also looked at gauging further interest, we
14 have had -- there has been a webinar, we have produced
15 databases, etc. I am not going to go through the detail
16 of all of that.
17 That is really book building. There is then, as
18 I say, a bit of a rag bag of fairly micro points. The
19 central point perhaps I would make is this, to try and
20 wrap it all up. Those complaints are essentially
21 complaints about certain aspects of the conduct of the
22 proceedings so far. They do not go to the substance of
23 them or the ability of the claims to be tried or to
24 specific criteria for certification. There is no
25 authority of which I am aware where a counterparty's

1 dislike, or even a court's dislike, if I may say, of the
2 way in which litigation is being prosecuted has been
3 found to provide grounds to throw the claim out of court
4 and that is really what the courts are seeking to
5 achieve.
6 At the root of all of this is an intention to
7 facilitate access to justice. On this side of the
8 court, we submit we have a proper plan, we have a proper
9 scheme, we have proper representation, and for those
10 reasons, in our submission, it would be wrong in
11 principle to refuse certification and say you cannot go
12 any further at this stage.
13 I am hitting now 4 o'clock. I think that is all
14 I was planning to say on authorisation and conduct.
15 There may be some points in reply, a short reply
16 tomorrow, but unless I can assist the Tribunal further,
17 those are our, plural, submissions on certification.
18 THE PRESIDENT: Thank you very much, Lord Wolfson, thank
19 you.
20 Submissions by MS TOLANEY.
21 THE PRESIDENT: Ms Tolaney.
22 MS TOLANEY: Good afternoon. I will be addressing the
23 opt-out claim first and I will deal with two topics.
24 First of all, I am going to address the flaws in the
25 PCRs’ class definition and, secondly, I will address
the

1 PCRs’ methodology for calculating aggregated damages and
2 explain why it is not workable.
3 Mr Kennelly is going to address the Tribunal on the
4 further points in relation to the PCRs' methodology,
5 which arise both in relation to the opt-out and opt-in
6 claims, and he will also respond to the submissions on
7 suitability and authorisation across both claims.
8 So before I come on to the detailed points on class
9 definition for the proposed opt-out claim, it is worth
10 emphasising that the proposed proceedings have been on
11 foot for almost two years and the Tribunal has already
12 obviously held one certification hearing in relation to
13 the proceedings and obviously identified a number of
14 difficulties with the proposals made. In a nutshell,
15 our position is that, even on this second attempt, the
16 proposals put forward, such as, for example, class
17 definition, remain in flux and unworkable, and instead
18 of clarifying their approach, the PCR has now decided to
19 put forward two class definitions, both of which are
20 unworkable.
21 The original class definition, of which you are
22 aware, is at paragraph 2 of the PCRs' skeleton and is at
23 {A/1/3}, just to remind you. I am sure you are familiar
24 with it.
25 It was defined as merchants who paid a merchant

1 service charge in respect of interregional and
2 commercial card transactions. You see that at
3 paragraph 2, and that class definition was rejected
4 because the Tribunal concluded after full argument that
5 there would be a significant number of merchants who
6 would not be able to determine whether they fell within
7 that class. I will come back to your judgment, you are
8 obviously familiar with it, but the crucial paragraph
9 was paragraph 198.
10 Now, following that decision, the PCR, the opt-out
11 PCR put forward a revised class definition. Can we look
12 at that, please, it is at {B/4/1} and it is at annex 13A
13 to the claim form. The revised class definition is
14 hopeless because it is now so wide as to include
15 significant numbers of merchants who the PCR accepts
16 would have no claim to bring. My learned friend
17 accepted that in terms this morning at page 72 of the
18 [draft] transcript:
19 "The position is this: that there is likely to be
20 a substantial proportion of no-loss members of the
21 revised class ..."
22 A substantial proportion. As a matter of law, we
23 say the collective proceedings regime does not permit
24 the inclusion of such individuals in the class and it
25 would not be -- even if I am wrong on that, it would not

1 be appropriate to define a class, a substantial
2 proportion of which actually aren't properly members of
3 it, so it just does not work.
4 We pointed out the flaws in that revised definition
5 and the PCRs' reaction seems to have been to ride two
6 horses, pivoting from one definition to the other. My
7 learned friend suggested he was entitled to do so, and
8 when pressed -- and this was at pages 46-section 47 of this
9 morning -- he suggested that he is primarily relying on
10 the original class definition and the revised class
11 definition is only an alternative case. He also
12 suggests that in relying on the original class
13 definition, he is not mounting a "full frontal" attack
14 on the judgment, but he is, he has to, and although he
15 made a series of concessions in response to questions
16 from the Tribunal, he suggested he was making points of
17 emphasis, but he ultimately came down to accepting that
18 he had to say that the Tribunal had not applied the
19 correct test as a matter of law and that, of course, is
20 the position taken in the skeleton argument.
21 So in order to succeed on the original class
22 definition, the Tribunal has to be satisfied, first of
23 all, that the PCR is entitled to challenge the previous
24 judgment in this forum, having not done so on appeal,
25 and, secondly, he will have to convince you that last

1 time round, the Tribunal got the law wrong and applied
2 the law wrongly, and I think the last prong is that
3 there is new evidence to support his case. So one would
4 have to work through all of those steps to be satisfied.
5 THE PRESIDENT: So I think he would say that the third step
6 is independent of the first two, so I think he -- and in
7 the end, I think largely the submission, as I understood
8 it, was that last time we said there was not enough
9 evidence to satisfy ourselves about identifiability. As
10 a result, we said no, but we left it open for him to go
11 away -- it was not actually him. For somebody else to
12 go away and produce more evidence, he would say -- I am
13 not suggesting that is right, but he would say -- and he
14 has now done that, brought back some evidence which
15 actually cures the original lacuna of evidence that
16 could satisfy us that the class was identifiable.
17 I think he would say that is quite independent of any
18 question as to whether we got anything wrong as a matter
19 of law on the first judgment.
20 MS TOLANEY: We will look at that. It is not entirely
21 clear, but I think he has to do both.
22 THE PRESIDENT: Yes.
23 MS TOLANEY: Is the answer. But either way, as I will come
24 on to say to you, it does not matter because he does not
25 succeed, but I think he has to do both because he has to

1 satisfy you both that the class is identifiable and the
2 evidence shows that but you have obviously got the
3 points made just as a matter of law the first time
4 round, and he would have to satisfy you on that
5 irrespective of the evidence.
6 But the short point is that contrary to some of the
7 submissions made this morning, the PCR is challenging
8 and attacking the Tribunal's judgment, specifically on
9 the legal test and the application of that test.
10 So can I outline my response to it, which can be
11 summarised in six points: first of all, this Tribunal
12 has already determined that the original class
13 definition was not workable and has rejected that
14 definition and it was after, as I say, full argument and
15 in a detailed judgment, so the attempt to challenge that
16 finding, particularly the legal finding, by the backdoor
17 is impermissible and it is inappropriate. Any argument
18 that the PCR had that the Tribunal applied the wrong
19 legal test was a matter for appeal.
20 There was a suggestion this morning that the PCR
21 could not appeal the Tribunal's finding on the law but
22 that is wrong. My learned friend made a legal point
23 that one appeals orders, not reasons, but there was an
24 order here. It was the order refusing certification
25 staying the proceedings. Mastercard and Visa did appeal

1 the decision, as you know, focusing on one part of the
2 Tribunal's reasoning, and indeed the Tribunal itself
3 made clear that if there was to be a challenge to the
4 decision, an appeal would be the appropriate course and
5 that was clear from the Tribunal's approach in dealing
6 with the proposed defendants' applications for
7 permission to appeal, because the Tribunal refused to
8 grant an extension of time for the PTA until after the
9 revised applications. What you said is: if you want to
10 challenge the decision, go and do it now.
11 So it is inappropriate for the PCRs, having not
12 appealed, now to seek to challenge aspects of the
13 Tribunal's judgment, in particular the approach on the
14 law.
15 Secondly, the Tribunal's decision was in any case
16 correct, so the Tribunal's approach to the law was
17 beyond and remains beyond criticism and the PCR is
18 therefore wrong in any event.
19 Thirdly, for good measure, there is no new evidence
20 that would have altered the application of the law in
21 any event. Fourthly, and this is crucial, because the
22 PCR in fact accepted the Tribunal's decision and did not
23 appeal it, it put forward the revised class definition
24 for this hearing and indeed it had seemingly moved on
25 from the original class definition until a recent

1 revival in the PCRs' Reply. To be fair, I should say
2 the PCRs did refer in their letter of December 2023 to
3 pursuing a two-pronged approach, which we note in our
4 skeleton argument, but they had in practice only
5 advanced the revised class definition at that point and
6 what they did, if the Tribunal will remember, is that
7 the Tribunal directed -- and the reference for that is
8 {N/4/4} -- and then it approved publicity notices put
9 forward by the PCR in relation to the proposed claims
10 and that was on 14 February 2024.
11 If we can just pull that up, it is {O/13/1}, and
12 then I think if we go to {O/15/1}, I am hoping that the
13 class definition -- I may have the wrong reference here.
14 Is it enclosure 2. Sorry you have to download it, I
15 am afraid, that is it, there we are. Thank you.
16 You will see there that the class definition
17 included in the draft publicity notices at the bottom of
18 page 1, if we can bring that up, please, which is the
19 revised class definition, if you can see that, I do not
20 know if you are able to.
21 THE PRESIDENT: We need to go back up please to the top,
22 that is helpful. Yes.
23 MS TOLANEY: So in the publicity notice it is the revised
24 class definition that is publicised with no mention of
25 the original class definition and it would be extremely

1 odd to have a publicity process if the PCR is now free
2 to seek certification as its primary case, it says, on
3 a different class definition to that notified to
4 potential class members.
5 But, and this is my fifth point, even if
6 the Tribunal is minded to allow the PCR to do so, the
7 original class definition remains deficient for the
8 reasons the Tribunal has already found and, sixthly and
9 finally, the original class definition would not even be
10 the class definition pursued by the PCR because it would
11 be amended.
12 So I am going to start with the revised class
13 definition on the basis that that is the one that has
14 been publicised to potential class members for this
15 hearing and then I will come on to address the original
16 class definition as well.
17 THE PRESIDENT: Just on the point about these notices, the
18 consequence of -- what is the consequence, do you say,
19 of a publicity notice that only contains the revised
20 definition? What in practical terms -- I know you say
21 it is not the right thing to do but why does it matter,
22 what is the prejudice?
23 MS TOLANEY: The prejudice is that is the class that has
24 been notified and that is what it has been said the
25 purpose of this hearing is for, which is to seek

1 certification in relation to that class. It would be
2 quite odd now for the PCR to actually turn up and say:
3 in fact we are seeking something different.
4 THE PRESIDENT: Yes. So I mean the point of the publicity
5 notices are to notify obviously the world but
6 particularly presumably anybody who might be in the
7 class, who might perhaps want to do something about it.
8 I do not think anybody ever has. Actually it is not
9 true, I think we have had some responses to them before.
10 So your point is that this has been set up on a premise
11 that has told the world, particularly the class, that
12 they may be, if the Tribunal were to certify, included
13 in the class and that is not happening.
14 MS TOLANEY: Precisely. And either the publicity notices
15 have a purpose and they were directed and served on that
16 basis, or they do not, in which case it would not
17 matter, but clearly it has been the subject of the
18 Tribunal's directions and it has been done for
19 a specific purpose and the whole point is, if you come
20 to this court to seek certification of a class, you need
21 to know very clearly what the class is, and the attempt
22 to pivot between different definitions -- and it has
23 been called, as I say, the original class definition but
24 actually it is not. It is not even the original class
25 definition, it is a different one -- just underpins the

1 state of flux and the unsatisfactory nature of the
2 application being made.
3 But the reality here is that this is the definition
4 that should be looked at and what has gone before is not
5 relevant on the original class definition but I will
6 address you on both.
7 So starting with the revised class definition, as
8 you have seen, it included all merchants who at any
9 point during the claim period had in place a merchant
10 agreement with an acquirer which enabled the merchant to
11 accept commercial cards as a means of payment for
12 transactions in the UK, and as the PCR notes in its
13 skeleton at paragraph 19, the focus of the revised
14 definition is the ability to accept commercial cards,
15 rather than actual acceptance, and it has been
16 deliberately widened to try and overcome the problems of
17 identification that the Tribunal found last time, which
18 is that it is trying to include almost everybody but actually
19 the breadth of it is what makes it fatally flawed. The
20 two fatal flaws in the revised class definition are,
21 first of all, the class definition cannot be adopted as
22 a matter of law because it includes any merchant who
23 could have accepted a commercial card transaction
24 regardless of whether they did in fact have any such
25 transaction, and that does not work because the evidence

1 clearly shows, and it appears to be accepted, that
2 a large number of merchants do not have any commercial
3 card transactions, so the opt-out class would include
4 large numbers of merchants who the PCRs accept have not
5 suffered any loss and crucially do not have any claim to
6 bring therefore.
7 It is not just a question of loss, they do not
8 actually have a claim, and that is impermissible under
9 the statutory framework for bringing collective
10 proceedings.
11 The second flaw is that, in any event, there would
12 remain a problem of the identifiability with this
13 definition because the PCR assumes that merchants would
14 have documentary records available to ascertain if they
15 were able to accept commercial card transactions but the
16 evidence shows there are real difficulties even large
17 merchants had in producing contractual documentation
18 going back many years. The reference to that is
19 Mr Cotter's second statement, paragraph 46.
20 So again, many merchants would not be able to
21 determine whether they fell within this class.
22 So the upshot is the revised definition is actually
23 even worse than the original one because it fails in two
24 ways, as a matter of law and as a matter of
25 identifiability.

1 THE PRESIDENT: Are you going to develop those?
2 MS TOLANEY: I am.
3 THE PRESIDENT: Yes, good, so I will wait, I will be
4 patient.
5 MS TOLANEY: I am very happy --
6 THE PRESIDENT: No, no I do not want to take you out of
7 course. I want to ask you (Overspeaking).
8 MS TOLANEY: Of course. I was going to develop them. What
9 I was going to do before I turn to the detail of them
10 was to just give the Tribunal a sense of the proportion
11 of the class that would be made up of merchants without
12 any claim.
13 THE PRESIDENT: Yes.
14 MS TOLANEY: On any view, the evidence indicates that a very
15 substantial proportion of merchants did not undertake
16 any commercial card transactions, and I think my learned
17 friend used the term "substantial proportion" himself.
18 If we could look at, please, the Mastercard CPO
19 response at paragraph 4.17, I am going to show you the
20 confidential version, so I will not read out the
21 figures, it is {YA2/1/31}. I think you should have a
22 confidential bundle at the bottom of the ...
23 THE PRESIDENT: I think this is -- so Y ...
24 MS TOLANEY: It is {YA2/1/31}. I do not know if
25 the Tribunal can get that.

1 THE PRESIDENT: We can, I think there is a hard copy.
2 DR BISHOP: Anyone know the bundle reference?
3 MS TOLANEY: The bundle reference is YA2. I am just trying
4 to take instructions on whether these figures are in
5 fact confidential.
6 THE PRESIDENT: Right, I think we are now there.
7 MS TOLANEY: Thank you. It was paragraph 4.17. I
8 apologise, we are not sure how confidential this is but
9 it is in the confidential version. You will see there
10 by reference to Mr Cotter's evidence that the percentage
11 of merchant IDs are aggregated at 3% but they make up
12 a percentage of 43% of all commercial MIFs in 2022. And
13 when I say merchant ID, that is the unique code which is
14 allocated by a particular acquirer to a merchant in
15 respect of transactions at a particular outlet or sales
16 channel.
17 For each transaction that Mastercard facilitates
18 processing for, or clears, Mastercard is provided with
19 a merchant identification number, so a MID, and when
20 I say aggregated, that is the process by which the
21 multiple MIDs associated with a particular merchant or
22 business are linked together by reference to an
23 aggregate merchant name.
24 Mastercard aggregates merchant IDs to monitor the
25 transaction activity of particularly large merchants,

1 but as we note in the paragraph I referred to you, even
2 for those large aggregated merchants, just under 25% of
3 them did not accept a single commercial card transaction
4 and then, of course, you have the remaining 97% of
5 merchant IDs which are not aggregated and in the period
6 between 2016 and 2023, only 23.5% of the MIDs accepted
7 one or more commercial transactions. You see that at
8 4.17(b).
9 So less than a quarter of the unaggregated merchant
10 IDs actually accepted any commercial card transactions
11 in 2016-2023, so those are very stark figures. There
12 are obviously limitations with matching MIDs to
13 merchants, as we have explained and I will come on in
14 a different context to show you.
15 But what is clear for the Tribunal's purposes is
16 that we are not talking about a case where there would
17 be the odd class member who was caught by a class
18 definition but who in fact did not have a good claim or
19 "may not have suffered loss". We are talking about
20 a substantial proportion that we know at this point does
21 not have a claim.
22 THE PRESIDENT: Is it reasonably common ground that the
23 aggregated merchants tend to be the larger ones? Is
24 that a valid working assumption or ...
25 MS TOLANEY: That is the evidence and it has not been

1 challenged, so it is common ground.
2 THE PRESIDENT: So what this is telling us then is that the
3 larger merchants tend to have, as one would expect,
4 a greater proportion of commercial card transactions and
5 then for the wider population of the non-aggregated then
6 on average smaller merchants, they have a much lower
7 proportion of commercial cards.
8 MS TOLANEY: That's right, but even those larger merchants
9 you can see.
10 THE PRESIDENT: The larger ones have -- 25% of them do not,
11 whereas with the smaller -- I mean it is probably wrong
12 to call them larger and smaller but just for convenience
13 the numbers are reversed effectively.
14 MS TOLANEY: That's right.
15 THE PRESIDENT: So under 25% of them do.
16 MS TOLANEY: That's right, but what you can see is that is
17 not just potentially a substantial proportion, it could
18 be the majority of the class therefore who does not have
19 a claim. The other point that is common ground, because
20 of the evidence and what my learned friend said this
21 morning, is that the PCR accepts the revised class
22 definition will include a substantial proportion of
23 members who have not suffered any loss and have no
24 claim.
25 So with that in mind, which is relevant context, can

1 we look at the statutory framework.
2 THE PRESIDENT: I think I understand how this is done. If
3 you look at A at the top of that page, where you talk
4 about the number of merchant IDs which have not been
5 aggregated, and then the number that haven't accepted
6 any cards, that is the 74%, so just in terms of how
7 Mastercard does that, that is just using overall data
8 for commercial card transactions and is it removing the
9 aggregated transactions from them, is that right? Is
10 that how it is done? I am just wondering how you get to
11 that number.
12 MS TOLANEY: I think that is right. I will double check
13 that, if I may, but I think that's right.
14 THE PRESIDENT: Yes, and which is obviously completely
15 separate from any question of linking merchant IDs with
16 transactions. You are just looking at the data you have
17 for a pool which includes all of the merchant IDs that
18 have been aggregated.
19 MS TOLANEY: That's right.
20 THE PRESIDENT: Yes.
21 MS TOLANEY: That's right.
22 THE PRESIDENT: Thank you, that is helpful.
23 MS TOLANEY: With that context in mind, may we look at the
24 statutory framework. I know the Tribunal will be
25 familiar with this, but if we could look at, please,

1 {P/23/5} and that should be section 47B.
2 THE PRESIDENT: Yes.
3 MS TOLANEY: section 47B, excellent, thank you, which I know you are
4 familiar with but obviously provides that it is subject
5 to the provisions of the Act and the Tribunal rules that
6 proceedings may be brought before the Tribunal combining
7 two or more claims.
8 I emphasise those words because you actually have to
9 combine a claim to which section 47A applies. Then if
10 we go back to page 4, please, {P/23/4}, you see section 47A(1):
11 "A person may make a claim to which this section
12 applies in proceedings before the Tribunal, subject ..."
13 Et cetera. Then section 47(2) provides:
14 "This section applies to a claim of a kind specified
15 in subsection (3) which a person who has suffered loss
16 or damage may make in civil proceedings ..."
17 So it could not be clearer on the statutory product
18 that section 47 applies to a person who has suffered loss or
19 damage, and if they have not, then section 47B does not apply
20 and section 47B is obviously directed at combining existing
21 claims, not proceedings which include people who do not
22 have a claim.
23 THE PRESIDENT: Lord Wolfson says that section 47A(2) is just
24 a qualifying reference and so it just says -- I think
25 his argument is that all it is doing is telling you the

1 type of claim that could be combined and it is doing it
2 by reference to a type of claim that could be brought in
3 civil proceedings.
4 MS TOLANEY: But on the face of the clear wording of the
5 statute, it does not work because the heading is it has
6 got to be a claim for damages, section 47A. (1), a person may
7 make a claim. This section applies to a claim of a kind
8 specified in subsection 3. Pause. That is his
9 different types of claim.
10 THE PRESIDENT: Yes.
11 MS TOLANEY: "... which a person who has suffered loss or
12 damage ..."
13 So there would be a break and you have to read
14 "which a person who has suffered loss or damage," and
15 then if you go back to section 47B, which is over the page,
16 sorry, you see proceedings may be brought combining two
17 or more claims. Here, it is not just a case, as I said,
18 of not having suffered loss or damage. They do not have
19 a claim.
20 THE PRESIDENT: You will come on to this, how do you square
21 that off with the cases where there have definitely been
22 people who have suffered no-loss and yet included in the
23 class and get certifications being given? Is that not
24 an absolute bar to that sort of approach?
25 MS TOLANEY: I will come on to those cases, but the short

1 point is none of those cases have considered this
2 question. At the outset, when you are defining the
3 class, can you include not just one but a mass of people
4 who have not suffered any loss and have no claim. It is
5 a very different point.
6 THE PRESIDENT: Yes, so I certainly understand the degree
7 point. But the existence point, because on your
8 analysis that would prohibit the inclusion in a class of
9 anybody who did not have a claim.
10 MS TOLANEY: Well, if you knew at the outset that they did
11 not have a claim. Now, some of the cases -- and I will
12 come on to them, probably tomorrow now. Some of the
13 cases, at the end of the day, in a different context,
14 recognise that somebody may not have a claim for loss.
15 This is not a may not have. This is a does not have at
16 the outset.
17 I think the relevant case, if we can just look at it
18 now --
19 THE PRESIDENT: Yes, we should keep going a bit, if
20 everybody is happy to do that. I am just conscious of
21 the time we are taking away from you tomorrow morning.
22 MS TOLANEY: Thank you, because if I can just show you one
23 case and perhaps that will be the natural place to stop.
24 It is a case you will be familiar with, it is the Sony
25 case, which was last year.

1 DR BISHOP: Which case?
2 MS TOLANEY: The Sony case, so it is at {P/21/1}, and you
3 will be familiar with this case -- well, certainly
4 Mr Tidswell will be. The issue arose in this case as to
5 the class definition and the definition of the relevant
6 period, and you can see that at paragraph -- it starts
7 at paragraph 62, which is page 23 of the decision,
8 {P/21/23}, and you see the heading "The class definition
9 point" and the PCR's proposed class definition, and they
10 sought to define the relevant period for class
11 definition purposes as extending all the way to the date
12 of the final judgment or earlier settlement and then you
13 can see that over the page at paragraph 63 on page 24.
14 {P/21/24}
15 You can see from paragraph 64 and 65 that Sony
16 argued that only claims that were extant as at the date
17 of the claim form could be combined into a class action
18 under section 47B(1) and section 47A. You can see as well, at
19 paragraph 66, the quote from the Tribunal's Guide that:
20 "... collective proceedings are a form of procedure
21 and do not establish a new cause of action. The claims
22 of the class members brought together in collective
23 proceedings ... must each be claims to which section 47A
24 of the 1998 Act applies."
25 So that is from the Guide.

1 We see at paragraph 67 Sony relying on a passage
2 from the Merricks decision -- this is a decision of the
3 CAT, Merricks 3, where the Tribunal had considered the
4 domicile date which should apply in those collective
5 proceedings, and if we can go over the page, please, to
6 page 25, {P/21/25}, it says the Tribunal had this to say
7 about the nature of the claims to be included in the
8 regime, and you see the quote:
9 "The bringing of collective proceedings by the
10 proposed class representative combines actual claims by
11 the proposed class members and a CPO is required for
12 those collective proceedings to continue. Accordingly,
13 the individual claims of potential class members are not
14 contingent claims or potential future claims which can
15 start or crystallise only if and when a CPO is granted.
16 It is therefore fundamental to the CPO application that
17 all the potential class members have existing claims at
18 the time when the application is made."
19 So just pausing there. What this means is that when
20 the CPO application was made on 1 June 2022, all
21 potential class members would need to have existing
22 claims as at that date and that is a point obviously
23 about the original class definition because, in that
24 context, my learned friend submitted it was enough for
25 a merchant to know that it accepted commercial card

1 transactions in 2023 and relied on the 2023 statements
2 that he showed you. That is simply wrong in light of
3 this decision and the relevant statutory approach. The
4 merchant would need to know that it had accepted
5 commercial transactions between 2016 and June 2022
6 because a merchant which only had a commercial card
7 transaction in 2023 would not be within the class.
8 THE PRESIDENT: We are possibly in danger of mixing up two
9 different points here, are we not, because that point is
10 a point about the period of the class definition and
11 would -- it seems to me it would be open to the PCRs to
12 specify a different date, it is just that that date --
13 that is not what they have done at the moment, they have
14 set a date that concludes in June 2022, whenever it is.
15 That is a different point, and you can read paragraph 26
16 from Merricks as being about just about that and not
17 about your other point, which is that you cannot be
18 a member of a class unless you have a claim.
19 Now, I think you are saying that 26 is saying you
20 cannot be a member of a class if you have not got
21 a claim.
22 MS TOLANEY: Well, I think it has to be, because if you read
23 the first sentence, not the -- the second sentence,
24 "Accordingly, the individual claims," might go to the
25 latter point but the point about having a claim:

1 "The bringing of collective proceedings by the
2 proposed representative combines ..."
3 The words I would emphasise are "actual claims".
4 THE PRESIDENT: Yes, but, of course, because the argument is
5 about timing here, rather than about -- that is the
6 context in which this discussion is taking place.
7 MS TOLANEY: Yes.
8 THE PRESIDENT: So you could read this as making the
9 assumption that everybody in the class should be in the
10 class and, in a way, you almost have to do that with
11 Merricks, do you not, because Merricks is one of those
12 examples where there must be, as we noted in the
13 original judgment, real uncertainty around what
14 Lord Wolfson calls the edges, of people who might not
15 have a clue whether they had a Mastercard and used it.
16 Is that not right? Mr Cook is disagreeing violently.
17 MS TOLANEY: Mr Cook is the expert on Merricks.
18 THE PRESIDENT: I know that, I am very happy to hear from
19 him.
20 MS TOLANEY: Mr Cook is happy to explain it.
21 MR COOK: Briefly, and it is a mistake many people make in
22 relation to the Merricks claim. While obviously the
23 origin of the Merricks claims is about transactions on
24 Mastercard cards or Mastercard cards, the class is every
25 consumer who bought goods from a merchant that accepted

1 Mastercard cards hence the pass on point.
2 THE PRESIDENT: Yes, I understand.
3 MR COOK: So even though there might have been -- I am
4 throwing numbers around -- a million people who had
5 Mastercard cards there were 45 million people in the
6 class. That is all the other people who bought with
7 cash, whatever else. So the only -- (overspeaking) --
8 so the only uncertainty there is the theoretical
9 possibility that somebody who lived here might actually
10 have shopped at little corner shops in Scotland that did
11 not accept credit cards but in reality they say everyone
12 at some point has to have gone somewhere, they shopped
13 at a bigger merchant that accepted. Theoretically one
14 or two people might not, but it is almost fancifully
15 unlikely.
16 THE PRESIDENT: Yes, thank you very much.
17 MS TOLANEY: In answer to your point, sir, as well, I think
18 it is difficult to read the third sentence as only about
19 timing:
20 "It is therefore fundamental to the CPO application
21 that all the potential class members have existing
22 claims at the time when the application is made."
23 Because although in this context it was a timing
24 point, the premise of this is you have got to have
25 a claim, so you just simply cannot include in a class --

1 the class is only the sum of the individual's existing
2 causes of action and here what you are being asked to do
3 is to certify a class where you are being told right now
4 you know that the class is comprised of people who do
5 not have a cause of action and that is not what
6 collective proceedings are about. As it is said
7 collective proceedings are about bringing together
8 different individual's claims.
9 MR FRAZER: But does that not set an impossible standard in
10 the sense that if you bring together two or more claims,
11 that would seem to satisfy the definition, whether or
12 not there was a presence of people who had no
13 claim within that group, and when you are dealing with
14 such large numbers it may well be the case; however
15 well-tuned the definition it still includes people who
16 in the end it seems have no claims. You can deal with
17 those at the distribution stage, right at the end. From
18 a language perspective, a combination of two or more
19 people who do have claims would seem to on, a literal
20 basis, satisfy the definition.
21 I think you can read, and I think frankly you should
22 read Sony as talking about whether the claims which are
23 combined are existing or contingent and each of the
24 sentences I think are capable of being approached in the
25 way in which the chairman has suggested, but I am very

1 happy to listen to what you have to say on that.
2 MS TOLANEY: I think it is difficult to read:
3 "It is therefore fundamental that all potential
4 class members have existing claims..."
5 All the potential class members. So it is not
6 suggesting that two or more and will be in the class
7 otherwise. I think that is the first point, that I would
8 not read Sony as limited in that way and I think that is
9 consistent with the statutory provisions which talk
10 about everybody having a cause of action.
11 THE PRESIDENT: Well, the fundamental could be to the last
12 phrase about the time when the application is made
13 rather than did all -- so it could be that it is
14 fundamental that potential class members have existing
15 claims at the time the application is made, could it
16 not? I mean, you can read it both ways.
17 I am open obviously to your persuasion, your
18 interpretation, but I think you can read it both ways.
19 MS TOLANEY: Yes. Well, I think I would say that it is
20 consistent with, and we see this in 69, the acceptance
21 that the wording of section 47 and section 47B are clear and
22 the approach was correct and I would say that when you
23 look at section 47A and section 47B, the whole essence of
collective
24 proceedings is not that you create a forum in which
25 people bring proceedings and some may happen, some may

1 not to make it easier.

2 The whole point about collective proceedings is that

3 every single person within a class would be bringing

4 their individual claim, but within a forum that has been

5 put procedurally and that is why it is said in the

6 Guide, when we go back to 6.3 of the Guide which is

7 quoted, that is at paragraph 66:

8 "Collective proceedings are a form of procedure and

9 do not establish a new cause of action..."

10 And:

11 "The claims of the class members brought together in

12 collective proceedings must each be claims to which

13 section 47A of the 1998 Act applies."

14 So, in my respectful submission, the Guide, the

15 legislation and this decision are all consistent and one

16 can understand it. I think the point that may be being

17 conflated, with respect, is what happens if you later

18 find out that somebody does not have a good claim, but

19 that is the same in any cause of action. If you bring

20 proceedings you might lose, you might find that you had

21 pleaded a case but it was defective. You might have

22 brought a case believing that you had suffered loss but

23 you have not suffered any recoverable loss.

24 THE PRESIDENT: I think it is a slightly different point

25 that is being made. I think the point that is being

1 made is it is inherent in the nature of these collective
2 proceedings which have vast numbers of class members
3 that in those classes there may turn out to be people
4 who have not suffered loss and therefore do not deserve
5 to participate in the distribution. That may be the
6 same thing as saying we have not got a claim, but the
7 point is that your assumption about the way you have
8 classed the class definition may catch some people who
9 have not actually suffered some loss.
10 MS TOLANEY: May catch some people.
11 THE PRESIDENT: Well, quite. But that is really the debate we
12 are having is about the hard-edged point as opposed to
13 the degree point. I appreciate you have got to come on
14 and address us on the degree point --
15 MS TOLANEY: Yes --
16 THE PRESIDENT: And I am sure you are going to say even if
17 you can have a 'may' point, then you should not extend it
18 here. But just dealing with the hard-edged point
19 I think we are testing you on whether it is absolutely
20 as hard edged as you are suggesting.
21 MS TOLANEY: Yes, and so I would stick with the hard-edged
22 point is the answer and the reason is that what you are
23 positing to me is in these proceedings you cannot be
24 sure when you have a class that every single person has
25 a good claim or will recover because a class may catch

1 inadvertently people who do not have a good claim.
2 But the statute has to provide what collective
3 proceedings are doing and all we can do is take it as
4 matter of principle and then apply it here. So as
5 matter of principle the objective of the statute is to
6 combine claims that individuals have, causes of actions
7 that individuals have under an umbrella -- I know
8 umbrella is used differently in these proceedings -- but
9 under an umbrella wrapper procedurally and of course it
10 may turn out that a class catches inadvertently somebody
11 who does not have a claim and that will be discovered at
12 a later stage.
13 It will also be possible that people within the
14 class do not have a good claim and that will be
15 discovered within there. But at this point when
16 the Tribunal is certifying a class you apply the
17 hard-edged test.
18 Now, if you were faced with, and I accept the
19 practicalities, if you were faced with an argument that
20 the class was defined and we did not know that every
21 single person caught within it would have a claim but
22 you took the view that the evidence was it was
23 a definition that would catch people with claims, that
24 may be one scenario. Here, and I am taking this not as
25 a degree point but as a hard-edged point, here at the

1 time of certification where you know for a fact that the
2 class definition encompasses -- and I am not talking
3 about degree -- people who do not have a cause of action
4 then I think it is a hard point of principle because you
5 can say: Well, it does not meet the test and we know
6 that.
7 THE PRESIDENT: So effectively you are saying the hard-edged
8 point is you might find yourself inadvertently having
9 certified something that includes no-loss to class
10 members but you should not set out on that road?
11 MS TOLANEY: Well, that is right, and you can see that the
12 statute clearly did not intend that. The statute is
13 intending as I say to provide a wrapper for existing
14 claims.
15 Obviously within a certification process you can
16 only do the best you can when you have the information
17 at the start and so the exigencies that you are
18 talking about may develop. That is very different for
19 a decision from a Tribunal where you have clear evidence
20 from the start that the statue has not been complied
21 with.
22 THE PRESIDENT: Can I, just to cause more trouble, and it
23 may be -- I am conscious of the time -- and it may be
24 something you would like to reflect on.
25 To what extent have we decided this in the original

1 judgment against you because I think we did say some
2 things in the original judgment about this not being
3 hard edged, I cannot remember precisely what we said,
4 and maybe we should all have a look at it. But would
5 you mind just taking that and having a --
6 MS TOLANEY: Of course. I am going to come on to your
7 judgment and I will do that.
8 As a headline point, I do not accept the point has
9 been decided but of course I will take you to the
10 relevant references. I do not know whether I should
11 just finish in the judgment before we break.
12 THE PRESIDENT: Yes, please do.
13 MS TOLANEY: It may add nothing, but obviously there is
14 paragraph 70 which is on page 26, just by way of
15 conclusion. I will come back to you on the judgment,
16 but obviously the follow on from this is I do not need
17 the hard-edged point because with this proportion we are
18 into different territory, but I am still maintaining the
19 hard-edged point because it is right and I think as
20 a matter of principle it is appropriate to make that
21 point.
22 THE PRESIDENT: Yes, I understand. Tomorrow morning,
23 I think we told you 11.15.
24 MS TOLANEY: You did.
25 THE PRESIDENT: I have got a meeting here which may finish

1 earlier and I wondered whether you wished to be ready to
2 start at 11 if that was possible.
3 MS TOLANEY: Of course.
4 THE PRESIDENT: Would that be convenient? I will try and
5 get out of my meeting as quickly as I can so we can do
6 that. But if you will forgive me if it is not at 11
7 sharp, I will be here as soon as I can.
8 MS TOLANEY: Thank you very much.
9 THE PRESIDENT: Good. Thank you very much.
10 (4.46 pm)
11 (The hearing was adjourned until 11 am,
12 Thursday, 18 April 2024)
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