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)

Thursday, 18 April 2024

(11.00 am)

Submissions by MS TOLANEY (continued)

THE PRESIDENT: Ms Tolaney.

MS TOLANEY: Good morning.

THE PRESIDENT: Good morning.

MS TOLANEY: I was addressing the class definition point and I showed you yesterday the statutory provisions and the the *Sony* decision citing *Merricks*. Just to remind you before I move on to the next point, the class representative in *Sony* sought to include within the class individuals who did have a claim at the time when the claim form was issued but because there were claim individuals who would acquire a claim subsequently and that is why there was a wider class posited.

So the wider class posited the inclusion of people who definitely had a claim and the question was one of timing, but the principle derived from the case that you cannot include potential future claims in a class is simply, as I said yesterday, an illustration of the fundamental requirement in the statutory framework that the class cannot include class members who do not have a claim to bring.

I think it is important before we move on to the subsequent cases relied upon by my learned friend to

distinguish here between no claim and no-loss because what you will see is the terminology that there may be people who have suffered no-loss and a suggestion in *Gutmann* and *Merricks* and others is that one may find that later down the track; that was the exchange we had yesterday, sir.

But here this is a very different point. It is that there is, right at the outset, no claim and that is recognised. I will come on to the other point that was put to me in a moment which is you have got the hard-edged principle, but there is also a question of materiality. So it may be that you do not need to decide the hard-edged point because here the position is so extreme that the materiality requirement would be satisfied but I am still going to address you on the hard-edged point because I think it is important I take it in that logical way.

MR FRAZER: Ms Tolaney, can I interrupt you for a technical reason, we do not have any documentation up here.

MS TOLANEY: Right. I will wait until it starts.

THE PRESIDENT: I think you should continue and we will catch up with you.

MS TOLANEY: Thank you.

The Tribunal also asked me yesterday whether this point had been decided in the judgment and I said

confidently no, it had not and I was right about that and the reason for that was the revised class definition was not before the Tribunal and this point did not arise as to whether people with no claim could be included in the class.

You may have had in mind a point about the identifiability of the class, which the judgment did address and that is at paragraph 193 of the judgment where the Tribunal noted that the requirement of identifiability allows for a degree of uncertainty and there may not need to be an absolutely rigid definition of the class so that no doubt might arise at the certification stage about who is included and who is not.

So I think that is the point you did find and we will come on to that in the context.

THE PRESIDENT: Yes, exactly, that is the point I had in mind, yes.

MS TOLANEY: That arises in the context of the original class definition more squarely and I am going to address it there. What I say for present purposes is a completely different point because that is concerned with the identifiability of the class and how clear the class definition for those purposes needs to be. It is not concerned with defining a class which the Tribunal

knows right at the outset would capture members who have no claim and therefore to put it another way, simply just could not form a class and that is the question where you have to step back and say there are two points, one is they cannot actually form a class because they have got no claim, so they cannot be part of a class who is bringing a claim; and, secondly, when you think about the aggregation of damages they could not be part of an aggregate claim for damages and we will come on to see in the *Merricks* case, that is what the minority judgment was concerned with; the ability to claim aggregated damages rather than individuals being required to prove individual loss.

But when the Tribunal already knows that there are members who cannot be put into the pool for the aggregated claim of damages, it would put the PCR in a very strange position that they are bringing a claim on behalf of people who they cannot claim for, so one sees the problems and it may not have arisen squarely in another case because it is such an extreme proposition to go into a certification hearing with a definition where you say it captures people who do not have a claim. It is an unusual situation.

So can I then turn to the cases that my learned friend relied upon as supporting his not hard-edged

rule.

THE PRESIDENT: Yes.

MS TOLANEY: Which is first of all the minority decision in *Merricks*, then the CAT decision in *Gutmann* and then the Court of Appeal decision in *Gutmann*. He also referred to some cases in his Reply but did not deal with them orally.

The key point that applies to all of those cases is that not one of them considered the question that is before this Tribunal which is whether collective proceedings may combine the claims of persons who have no claim and in respect of whom no allegation of loss is made and none of them considered the statutory language of section 47(A)(2) and section 47(B)(1). What they did do, however, was proceed on a basis that I will show you, which assumed that there was a claim and we will see that from the minority judgment in *Merricks*, if we could go to that, please, it is {P/1/42}.

So the passage that my learned friend took you to is 93 to 97 of this judgment, paragraphs 93-97, and you can see from paragraph 83 that this was the judgment of Lord Sales and Lord Leggatt.

What my learned friend focused on in particular was paragraph 95, which is the judgment holding that:

"A provision for aggregate damages may ... go

further and serve an additional purpose. It may also permit liability to be established on a class-wide basis without the need for individual members of the class to prove that they have suffered loss, even though this would be an essential element of their claim."

Now, what these paragraphs were concerned with was the section 47C which dispenses with the need for individual proof of loss. You can see that from the sentence above in paragraph 94 and also paragraph 97 over the page. {P/1/43} You will see it is section 47(c) So it is not concerned with the provisions that we are looking at. But going back to 95, what you can see is it may also permit liability to be established on a class wide basis.

Now just pausing there. If the working assumption here is that it can permit liability to be established, ie the loss, the liability and loss can be produced on a collective basis, you could not possibly have a statute that would permit lots of people with no claim to be included within that class because you are giving them a gift. It is not liability, you are actually doing something quite contrary to the statute.

THE PRESIDENT: Is the reasoning here not based on the nature of the claim because it is a tort claim for breach of statutory duty, you would ordinarily have to

show loss before you could establish liability?

MS TOLANEY: Exactly.

THE PRESIDENT: So they are reasoning that you do not need to do that because liability is presumed as part of the -- part of as you say section 47(C)(2).

MS TOLANEY: That is right.

THE PRESIDENT: Because loss is presumed and therefore liability is presumed.

MS TOLANEY: That is right. But that is why the whole point is that it is a different section but in any case it would be where liability was effectively a given.

THE PRESIDENT: So you are saying if you get into the business of starting to presume loss, you therefore cannot include people in the class who do not have claims because otherwise you are attaching loss to people who have claims, yes.

MS TOLANEY: Exactly.

You can see if you go to paragraph 98, and I am only showing you this because this is the judgment relied upon, it is obviously the minority judgment, but it is relied on by my learned friend and you see there:

"A class action procedure which has these features provides a potent means of achieving access to justice for consumers. But it is also capable of being misused. The ability to bring proceedings on behalf of what may

be a very large class of persons without obtaining their active consent and to recover damages without the need to show individual loss presents risks ... as well as "

Etcetera, and you can see that you could use this class action device oppressively or unfairly and that is why, over the page, {P/1/44} one sees that it is for the CAT to certify so that this cannot be used oppressively.

"... the substantive legal advantages afforded by the collective proceedings regime are conferred only in appropriate cases [as] a control mechanism ..."

Then if you go down to 101:

"... claims are 'eligible for inclusion in collective proceedings' only if two conditions are fulfilled. These are that the CAT considers that the claims (i) [so pausing there, 'the claims'] raise the same, similar or related issues ... and (ii) 'are suitable ...'"

Now, if somebody does not have a claim they cannot have suitable common issues and the second point I would make before I move on from this is that the whole discussion about suitability in this judgment which starts at paragraph 115 proceeds on the basis that you will already have determined that there are sufficiently common claims before you consider suitability.

So here you do not even get to the question of

suitability because that is not satisfied.

Can I then turn to the *Gutmann* case, please. My learned friend relied first on the CAT decision at paragraph 111 and this is {P/3/56}, please. We will have to go back. Let me get the right reference.

THE PRESIDENT: Could you show you us, would you mind, I do not know if you have a reference for it, it would be helpful to remind ourselves of the class definition of this. Sorry that is from left-field. Presumably it is fairly early on, in the judgment.

MS TOLANEY: It is paragraph 4.

THE PRESIDENT: Yes, thank you.

MS TOLANEY: Sorry I do not have the reference to hand now because I have the hard copy without. Thank you, I think that is the proposed definition of the class there.

THE PRESIDENT: Yes, thank you.

Yes, thank you.

MS TOLANEY: So then if we go back to 111, please, this was the passage relied upon I think by my learned friend again this is on the section 47(C)(2) point you see at the end, so it does not take matters any further because we are dealing with a different section.

Then if we go to paragraph 129 at page 56, here is the discussion in the CAT starting:

"The residual possibility ... is minimal ..."

Then here you have the sentence that I think is relied upon:

"Almost any class action will include some claimants who suffered no-loss ... see para 112 above regarding *Merricks*."

I will go back to that but what you see here is, first of all, some claimants who have suffered no-loss and it would be unfortunate:

"... if potential defendants could sustain objections to the eligibility condition based on speculative examples."

So what you here see is the point that you might get to the end of the day and find that somebody had not suffered loss. There is no point speculating at the early stage to exclude. Here this is not what the Tribunal has in front of you; you have -- it is non-speculative and it is not about no-loss, it is about knowing that there is no claim from the outset.

THE PRESIDENT: Just putting aside the speculative point though, is this debate not about whether somebody does or does not fall within the class, the same sort of debate, because the example that is given in the beginning of 129 is the passenger did not hold a valid travelcard at the time of the journey and that, as we

see from the class definition, is part of the requirement in order to fall within the class. So are we not talking about the same thing here? It may be -- I take your speculative point but I suppose I am -- I am perhaps coming back to the observation in the earlier judgment about there being some grey around the edge of what you say is hard-edged.

MS TOLANEY: So the point is that there may be grey round the edge about whether somebody falls within the class and/or can prove a claim and there may be some grey round that edge and one can see the issue. But there is a big difference between going forward with a class definition that you know from the outset includes members who have no claim at all and could never have a claim.

THE PRESIDENT: So I think we did touch on this briefly yesterday just so I am absolutely clear about what you are saying, are you accepting that it might always -- might not always be possible to -- you might be including in the class people who turn out not to be in the class but I am not quite sure how that works because you are not including them in the class, so if they do not have a travelcard they are not in the class, so why do you need to have this discussion on 129? On your analysis, they are just not in the class.

MS TOLANEY: So the starting point is that the statute requires everybody to have a claim and all the collective proceedings do is put a wrap around to join the claims together and the question is: do the claims of each individual have sufficient commonality that therefore you can be satisfied that there is a good reason to have collective proceedings, that is stage 1, and stage 2 is then suitability, which has other requirements.

When you come to define the class I accept that as was found in *Merricks* and here, there may be some very small elements of grey, so I think in *Merricks* what was said -- and we will see this -- was that it was a very residual or unlikely possibility that people would not ultimately have a claim who were caught, would not suffer loss, rather, who were caught and here it is being said it may turn out that somebody does not suffer loss.

But that is a different point from saying from the outset you know that they have no claim.

THE PRESIDENT: Yes, I have that point. I just I think -- and I think I am clear about what you are saying. Do you mind if I just try again?

MS TOLANEY: Sure.

THE PRESIDENT: I think there is an oddity in this, is there

not, because the use of the words "claim" and "loss" and then of course the inclusion of the class may not all correspond, so it is quite possible you could end up -- perhaps a fairly easy example, it is possible you could end up in the class and have a claim and have suffered no-loss, that may be for all sorts of different reasons, but one of them may be that you purchased a card and then you got a refund -- you purchased a travelcard and then you got a refund in this case, you purchased a ticket. So there may be reasons why you suffer no loss but actually I am not sure that that really -- well, then you come to the question as to whether 47C gets round that problem, but in a way that is a different problem to the one we have here.

You then have the possibility -- and this is where I think it is difficult -- you might have -- you might have -- might not have a claim. In this case, the person who did not have a travelcard will not have a claim, will they, because it is inherent in the class definition and therefore the cause of action that you have had a travelcard?

So you might find yourself -- but then I do not know why those people are included in the class if they do not have the travelcard.

MS TOLANEY: So they would not be included in the class --

so to be in the class a person would have need to have had a travelcard and that is what we saw at paragraph 4,

THE PRESIDENT: Yes, I have that.

MS TOLANEY: A speculative example in 129 --

THE PRESIDENT: Sorry, we have just lost that, can we have that back, 129.

MS TOLANEY: Thank you. Back over a page, please. {P/3/56} The speculative example in 129 is that a person would not have had a card at the time of travel.

THE PRESIDENT: So what are you -- so, yes, in which case it says that journey is not in the scope of the claim, they do not have a claim.

MS TOLANEY: They are not in the class.

THE PRESIDENT: Well, but is not -- the whole debate about this is that they might be, is that not the whole point of 129, that they might be in the class without a claim?

MS TOLANEY: Well, I will come on to show you the Court of Appeal but I think what they are saying here is because they might not have either had a card at the time of travel they would not be in the class or -- and the Court of Appeal deals with this at the end of its decision -- because they cannot prove that they have a travelcard they might not come forward and show their loss.

THE PRESIDENT: Yes, that is obviously a different point.

MS TOLANEY: So it is a different point.
THE PRESIDENT: It may be --
MS TOLANEY: But here they would -- because they did not actually have their travelcard at the time of travel, they would actually fall outside the class.
THE PRESIDENT: Maybe it is just a -- maybe we need to have a closer look at the context on which this discussion takes place. I am just not sure why they go on and talk about the residual ... "almost any class action will include some claimants who suffered no-loss" in circumstances where the debate is about somebody who should not actually be in the claim because they do not have a travelcard.
MR FRAZER: It is possible that this is a reference to the speculation in paragraph 126.
MS TOLANEY: Exactly.
MR FRAZER: Which I think has been discussed in 129 and these are examples of where loss may not occur
I believe, we cannot see the whole of 126 on the page at the moment.
MS TOLANEY: If we go on the page back. Thank you.
MR FRAZER: I think these are examples of people who are in the class because they had a travelcard at the time but did not suffer loss as a result of some strange circumstances identified here, is that correct?

MS TOLANEY: Then 127 says if necessary the class definition could later be amended.

Then 128 deals with example 4.

Then 129 is saying the residual possibility that the passenger might not know when purchasing a ticket in advance whether they would have a travelcard by the time of travel is minimal.

THE PRESIDENT: So it is a timing point actually?

MS TOLANEY: Exactly, that is what I was saying. It is a timing point.

THE PRESIDENT: I see now, thank you.

MS TOLANEY: One can see then if we go to the Court of Appeal's decision, which is at {P/8/25}, and my learned friend I think referred to paragraphs 73 and 74, and you see the passage we just looked at I think cited.

But you have seen the context in which that arose and then if we then go on to 87, please, paragraph 87, {P/8/28} what you see here is an analysis on distribution and the gloomy forecast, it is open to the CAT to consider if there are appropriate proxies for distribution.

Then if we drop down to the sentence that starts "This might be":

"This might be because it would catch a substantial portion of the consumers ... who for whatever reason

would not come forward to make a claim because they no longer possess proof of travel."

So what you are seeing here is that there are going to be issues round the edges on identifiability, proof of loss and that is recognised.

But two points on that: one is *Merricks* makes it plain in the *Merricks* class definition that they considered that was going to apply to very few people indeed; and, secondly, in *Gutmann* it was said to be speculative and in *Merricks* it was again speculative because they did not know.

THE PRESIDENT: *Merricks* is the people who were not in the country for a three-month period or whatever it was.

MS TOLANEY: Exactly, as Mr Cook explains. So in both cases it was not known as a fact that they were not included, and secondly, to the extent it was considered a possibility it was considered to be speculative and a very limited possibility.

So what I would say is it does not take away from the hard-edged rule because you have got as the purpose an analysis of what the class is supposed to do, the Tribunal is then entitled to say, well, this definition works, I understand it catches people with claims. There is a residual possibility maybe that a limited one or two members may not be able to prove

their case, but that will be dealt with possibly by proxies or later down the line as with any individual case.

So if I could put it one last way before I move on from this, imagine a case where a group of individuals came to court or to the CAT and had no claim. That claim would be struck out. There would be no basis for bringing the claim, the defendants could just strike it out. They had no cause of action. Essentially what the PCR is asking you to do is put a wrapper around that and allow it to carry on as collective proceedings together with people who have got good claims. So you are being asked effectively to allow strikeoutable claims to proceed under the banner of a collective proceedings.

Now, that cannot be what the statutory purpose of the provisions was and it is contrary to the language and the intention.

Even if I am wrong, as I said, on the hard-edged point and you do not actually need to find in my favour on that, as I said yesterday I think I am right on it and I think it is the logical place to start, but here what you can say is, well, even if you do not need a class definition that captures only people with claims such that you allow a possibility for a residual number of people who are caught, what the case law shows is

they are caught inadvertently by accident and speculatively, and it is a limited number. Those are the authorities that my learned friend has relied on and that would be his high point of the submission, if you like.

Here he has conceded that a substantial proportion, his words I think, of the class would not have a claim. So there is no case law that would support that class being certified.

THE PRESIDENT: When you say people being caught by accident speculatively, I think you are saying that could arise because there might be uncertainty, difficult for them to tell whether they are or not, and so they may end up being treated as included when in fact they should not be, but you are still saying they should not be in the class if they do not meet the requirement.

MS TOLANEY: Exactly.

THE PRESIDENT: Then the other possibility is they may have suffered no-loss, for whatever reason, which is perhaps the *Gutmann* example.

MS TOLANEY: Exactly.

THE PRESIDENT: You say that is a different problem.

MS TOLANEY: Exactly.

THE PRESIDENT: But what you are saying is what you cannot do is start by saying if you know there is no claim you

create a class that deliberately has a whole bunch of people that has no claim.

MS TOLANEY: You cannot certify a class where the substantial portion of it is not a class because they do not have a claim. That is the problem.

So in a sense that is the end of this now, because the case just does not get off the ground because there is no class to certify.

Can I, however, then turn to the original class definition and, having done that exercise, one might see why now my learned friend has pivoted his primary case back to the very definition that this Tribunal rejected, because he knows that the revised class definition does not really get off the ground.

There are all sorts of other problems with it, I will not take up time now, but we address those in paragraph 3.41 of our skeleton, which are based on actually the Tribunal's findings last time round that capturing people who do not have a claim in this class may prejudice them if they do actually have a legitimate claim that they wish to bring elsewhere, and it is inappropriate, therefore, to do so against their will. It is the abusive nature of collective proceedings point.

THE PRESIDENT: So those are really -- that is when it

bleeds over into suitability.

MS TOLANEY: Sort of, or one might just put it as the legal and practical difficulties with the class definition is the way I am putting it.

THE PRESIDENT: Yes, you could -- both ways.

MS TOLANEY: So it is probably pre-suitability, but there is an overlap.

There is also the fact, as we address in our skeleton, and this is at paragraphs 3.46 to 3.48, that in any case the revised class does not satisfy the identifiability requirement for any reason, because it will be still difficult for merchants to ascertain whether they were able to accept commercial card transactions, and also it does not capture merchants who use payment facilitators. So we have addressed all that.

So the revised class definition we say just simply could not be certified by the Tribunal, whether on a hard-edged basis or not, because it does not work and it would not be appropriate for a class, primarily comprised of people whose claims could be struck out, to be allowed to carry on and claim aggregated damages with no individual proof of loss potentially when it is known they have no-loss.

THE PRESIDENT: When you say merchants might not have known

if they were in the class because they would not have known if they were accepting commercial cards, the starting point for that would be the inference that they would be taking all cards though, would it not? So they obviously are entitled to make a decision not to, particularly post the IFR. But that would require a decision on their part, would it not, otherwise they would be in the presumption that they were taking cards?

MS TOLANEY: I do not think that is correct on the evidence.

THE PRESIDENT: Not quite.

MS TOLANEY: Because, and this is all in Mr Cotter's evidence, that this is all about whether or not you had the relevant agreements and it would depend on whether they had the relevant agreements and had the records to identify what they did, and if I can just give you the references to Mr Cotter's evidence, it is in {E/2/16}. I do not think we need to bring it up, but it is paragraphs 46 onwards.

THE PRESIDENT: I suppose I think a challenge to that was, as I understood, that the inference would be that the agreement would cover commercial cards unless the merchant had decided they did not want to take them, because that is the default, that is generally the default position, and obviously merchants can decide not to, but if they did not then one would assume the

agreement did. I think that is the point that was being put, and in those circumstances the merchant would know if they had not because they would have made a deliberate decision not to.

MS TOLANEY: But that would be something they would have to go back in their records to establish from 2016.

THE PRESIDENT: Yes, although I think, again, I think Lord Wolfson was putting it on the basis that if you made a deliberate decision to do that, the likelihood would be that you would remember that.

MS TOLANEY: Well, except that these will be a whole range of scale of merchants. Some will have finance directors who were in charge who have left since 2016, others may simply -- the relevant individual is no longer there or contactable.

So unless my learned friend can give you a basis on which he can demonstrate that it would be easy to find that information, which he has not done, the working assumption is that it is as difficult to know whether you have the ability as whether you did it, or at least it is on a sliding scale of difficulty.

THE PRESIDENT: If we know from the various reports that between 3% and 10% of merchants may have declined to take commercial cards, do you say that falls outside the first of those categories where you -- the uncertainty

category, because this is not a hard-edged point, is it? We are now into the assessment --

MS TOLANEY: Identifiability, yes.

THE PRESIDENT: Yes. So are you saying that is too big a number to treat as just being speculative in the terms of --

MS TOLANEY: Exactly, exactly.

I take these points lightly because these are a question of nuance, but I am showing you that there are also problems on identifiability and particularly on the payment facilitators point.

THE PRESIDENT: No, of course. I just wanted to make sure I understand -- I expect we will have to deal with them regardless of what our conclusion is on your main points, so I just want to make sure I understand your position on it.

MS TOLANEY: Yes, it is covered in our skeleton at 3.46, but I would suggest that one just simply does not get there because the class definition is so fatal.

THE PRESIDENT: Yes, I understand your submission on that.

MS TOLANEY: So may I then move to the original class definition, and obviously I have already taken the point that it is not actually open to my learned friend to seek to revive this definition, and he does so based on two points. The first is an attack on the approach

taken by the Tribunal as a matter of law; that simply is not open to him. The second is he does so on the basis of saying there is new evidence, but this Tribunal having found that the class definitions suffered from the flaws it did as a matter of law, it is difficult to see how the new evidence could cure it in light of the legal findings, and that is why I said the two go hand in hand.

There is a third aspect to this which is he is not even in fact pursuing the original class definition though it is called that, because he would wish to amend that definition to exclude certain bits of it. But as we heard yesterday, it is actually not very clear which bits are in or out. We had proceeded on one basis on centrally acquired transactions; we were told yesterday we were wrong on that.

So the point is that the original class definition is not even what is in play here, and so what you are actually being asked to certify is something that has never been applied for formally, has not been publicised, and is some offshoot of a definition that was roundly rejected and not appealed.

So that is not a promising start to this occasion and it has not been made therefore in any recognisable form of a certification hearing.

But in any case it is wrong, and so if I can just briefly go through the arguments made in support. The first is the matter of law.

It is said that the Tribunal applied the wrong test in law in finding that the requirement of identifiability was not met in the June 2023 judgment, and if we go to the June 2023 judgment this is the Tribunal's judgment at {N/3/59}, it is paragraph 180 that I think is the relevant paragraph.

At paragraph 180-182 is the essence of the conclusion. You will note that the Tribunal, you observed that the choices made by the PCR had been a problem, and if we could just go back to paragraph 84, that is at page 34, there is the description in 84-86 just to remind you of the blended contract.

THE PRESIDENT: Yes.

MS TOLANEY: Then, please, if we could go to page 60, back to 185, the Tribunal recorded there the PCR's reliance both on merchant data and acquirer data and dismissed that reliance as unrealistic, and then the question of Visa's data was addressed at paragraphs 186-188 over the page, please. So it was considered that it was not sufficient to rely on Visa's data.

Then we go to 193, which I have already highlighted when answering your questions. This was the paragraph

about no rigid definition, and then you considered expressly the *Merricks* class in 194.

Then going over the page, please, 195-197, and you noted that:

"... the vast majority of consumers will meet the class definition. While it is theoretically possible that there will be consumers ... [etc] it seems unlikely that will be a material number."

What was said is that was not the case, 197.

So you were not applying here a hard-edged rule, which is the criticism made by the PCR when challenging now the law. It said that the Tribunal found that there had to be a rigid definition, and one can see that that is not what you found.

THE PRESIDENT: But I think, I think we were articulating what we have just discussed as being the uncertainty --

MS TOLANEY: Exactly.

THE PRESIDENT: -- improvement provision, which is you may find -- it is permissible to have some difficulty about determining who is in and who is out because of the sort of characteristics that we talked about.

MS TOLANEY: Exactly.

THE PRESIDENT: That we talked about there.

MS TOLANEY: Exactly. But what you did not find, which is the complaint made in the Reply at paragraph 10, it is

said that the Tribunal required too strict approach and that it is not necessary or practicable to create a comprehensive list of class members.

Well, you can see from the discussion here that is not what you were saying at all. You were saying based on the law that the proposed class, as it was, meant that hundreds of thousands of merchants on blended contracts were not able to know, would not be able to know whether they fell within the class or not.

So there is no basis upon which there can be a challenge to the Tribunal's approach on the law and, indeed, you can see this yet further because if we go on to paragraph 199, you will see that the Tribunal considered the Canadian decision in *Sun-Rype*, which was accepted by both sides to be relevant, and set out the relevant law in some detail in 200-203.

If we could pick up the discussion in paragraph 208, please. That is page 66. Thank you. {N/3/66} So all parties accepted the decision is relevant.

You can see on the Canadian legislation that one of the distinct purposes is to identify those persons who have a potential claim, and there is also the question of notice.

Then if you just cast your eye over, please, 210 and 211. (Pause) Then if we go over the page, please, to

paragraph 212, you see that the Tribunal rejected the PCR's attempt to rely on the *Trucks CPO* and drew the distinction between the verification of a class member's claim and the ability of a merchant to know whether they are, or are even likely to be a class member. Here, obviously on the revised definition, what we were saying is people would know right now that they were not actually properly one, but fall within. Here on the original class definition, you held very clearly that it was a problem on the definition, and one can see that at 213 as well.

We then go on to 215 where the Tribunal recognise that there might be factual matters which demonstrate the class design, etc. So you left open the possibility that there may be room for further factual evidence.

So my learned friends say, well, the Tribunal applied the wrong test. There is absolutely no evidence based on that extended passage and the application of the law that the Tribunal did any such thing and that what my learned friends say is that the class definitions in *Merricks* and *Gutmann* should have been considered and were not properly considered.

But *Merricks* was considered, as I showed you, in paragraphs 194-197, and I have also shown you the *Gutmann* case where it is quite clear that the analysis

was, as I say, about the loss and proving the loss, as the Court of Appeal said in paragraph 87, as we looked at, so would not have changed the analysis here.

So that, I think, disposes of any challenge to the law. There can be no challenge to the application of the law even if it were permissible not to have appealed it, which we say is not the case. But in any case, it is quite clear that the Tribunal properly applied the law and reached a conclusion that was within the appropriate scope of the Tribunal's discretion having had regard to all the relevant principles, and there is nothing there that this Tribunal would now correct in the analysis at all.

That then takes me to the evidence, and the second argument that the PCRs attempt to make is that the evidence has changed in three respects and therefore the identifiability problem is resolved. So the first point relates to merchant data, and what the PCR says is that there is evidence that merchants on blended contracts are able to identify from their own statements and invoices from acquirers whether they have conducted commercial card transactions. That is in the PCRs' skeleton at paragraph 16b.

In support of that submission, that there is an ability to identify from their own records, the PCRs

rely on three different topics. The first is the acquirer's obligations under Article 12. The second, certainly in their evidence, was the PSR-specific direction, although there was some uncertainty in the submissions yesterday about that, and I will come on to that, and the third is the 16 merchant statements.

Now, in making this point about the so-called new evidence a lot of emphasis was placed on Article 12 of the IFR suggesting, I think, that, and this is from {Day1/52}, it was the source of the obligation to provide a breakdown of transactions, and what was said is the PSR regulation is aimed at something else.

That is why I said it is a bit confusing, because they had in fact introduced the PSR regulation. So the case appears to be pinned very heavily on Article 12 now.

Just to put this, the PSR point, to bed, could I just show you Ross 7 at paragraph 20, please, which is {G/6/5}.

So that, we had understood the PCR to be relying on this specific direction because it was referenced in this way in the evidence. Yesterday my learned friend said at page 52 that it was light misdirection for us to refer to it, which was a bit confusing given it was their own case. But in any event, that is where we have

landed and I am going to address both instruments just in case there is a change of position again.

Turning then to Article 12, please, my learned friend said yesterday, {Day1/13-14}, that the provision required acquirers to provide a merchant with a breakdown of transactions into different payment instrument categories. That was at Day 1, page 13, line 23 {Day1/13:23}.

There are three problems with that submission and it is not right. First of all, Article 12 does not in fact require acquirers to provide merchants with anything. There is no obligation in requiring that.

If we could just turn that up. It is {P/30/13}, please. We are looking at Article 12, paragraph 2, so if we go over the page, please {P/30/14}. Now, my learned friend did not engage with this test. What you see is.

"Contracts between acquirers ... may include a provision that the information referred to in the [previous subparagraph] shall be provided or made available periodically ..."

So may include a provision and made available. It is not an obligation requiring information to be provided, and even the PSR interprets that, the PSR regulation, interprets that as requiring that the

information is available on request. It has not been interpreted as requiring the acquirer proactively to provide it to the merchant.

So the short point is that the merchant may receive nothing at all unless it specifically asks for it. There is no evidence before this Tribunal to think that merchants generally did ask for that information. So, many merchants will have had no data at all about the type of transactions they entered into.

Now, if we could go back over the page, please, to Article 12(1), which is where my learned friend focused. {P/30/13} This is my second of the three points. There is no requirement in the information to be provided for the acquirer to provide a breakdown by type of transaction. So you can see the section in front of you, and at the end:

"... the amount of ... charges for the card-based payment transaction, indicating separately the merchant service charge and the amount of the interchange fee."

So just pausing there, this paragraph is what the acquirer may make available subject to paragraph 2, and it includes that information. But there is no requirement to state what the type of transaction was.

So even if a merchant receives what I would call ordinary Article 12(1) data, so non-aggregated, all it

would get is a long list of transactions showing the MSC and interchange fees, and in the real world the merchant would have no idea which interchange fee was a commercial card MIF as opposed to an interregional MIF, for example.

Subparagraph 1 goes on to state, as you can see at the end:

"With the payee's prior and explicit consent, the information ... may be aggregated," in the manner set out.

Again, my learned friend relied at page 16 yesterday of the transcript on the aggregation. But the aggregation by payment instrument categories can only occur where the merchant has provided explicit and prior consent, and the PCR has not put forward any evidence suggesting that merchants provided this consent.

Absent that consent, the acquirer does not need to provide or make available aggregation by payment instrument category to the merchant.

Then my third point --

THE PRESIDENT: Yes.

MS TOLANEY: -- relates to my learned friend's suggestion that the Tribunal should assume that Article 12 information was provided by acquirers on the premise that acquirers were legally required to do so.

Now, I do not accept the premise because I have just explained to you that it has a lot of twists in turns in Article 12(1) and 12(2), and my learned friend did not engage with 12(2) at all.

But in any case, the assumption that my learned friend invites the Tribunal to make is wrong as a matter of fact. The largest acquirer, Barclays, was unable to provide Article 12 data for several years and was fined for that failure, and we have added a copy of the PSR's decision and this is at {O/38/1}, please.

If we go over to page {O/38/2}, please could you read paragraphs 2.3-2.5, which provides a summary of what was decided. (Pause)

Then, please, if we go to paragraph 2.10, you will see that Barclays was one of the largest acquirers processing approximately one in every three payment card transactions. So we are talking about a third of the market here. What we see is that they were unable to, and did not, provide Article 12(1) information for several years.

If we then go, please, to page 6 of this document, paragraph 4.8, you will see the distinction that I had made earlier about providing information to merchants and making it available. So this, in the way it has been interpreted, enables an acquirer to either provide or

make available information periodically. (Pause)

So it is not a given.

If we go then, please, to paragraph 4.19 on page 7, please, what this shows, I will let you read it, is that Barclays provided some of the Article 12 information to merchants in aggregated form but the amount of information depended on the type of contract, and this is an important point when we come on to the 16 statements which are all from after 2018. It is not clear that those merchants were on standard blended contracts and the likelihood is that the 16 statements relate to merchants who had agreements which provided for different merchant service charges for consumer and commercial card transactions.

Then if we go to 4.48, please, of this document, paragraph 4.48, what we see here is that Barclays chose to take advantage of the option of agreeing that information would be made available rather than provided.

So all of this shows that first of all as a matter of legal interpretation my learned friend is wrong in suggesting that there was an obligation, and secondly, that there is no basis for the assertion that acquirers would have provided merchants with a breakdown of transactions which clearly showed commercial card

transactions in the period between 2016-2022, and that was his case.

THE PRESIDENT: Can we just come back and have a look at the IFR, Article 12 again.

MS TOLANEY: Of course.

THE PRESIDENT: So I think if we start with (1) rather than (2), (1) does create an obligation to provide something, does it not; you are not disputing that? But you say that it does not extend to specifying it is a commercial card transaction.

MS TOLANEY: If I can get that up on screen, it is {P/30/13}.

THE PRESIDENT: Yes.

MS TOLANEY: So (1) is the information that is specified, but it is subject to (2) --

THE PRESIDENT: Well, hang on. Just before you get to (2), it is not made subject to (2), we will come to (2), but just (1) on its face requires the payment service provider to provide the following information so they have to do it.

MS TOLANEY: Yes, the reference.

THE PRESIDENT: The question is what is it they have to do, and you say that it does not include to the level of specificity, that it does not require them to specify the type of MIF.

MS TOLANEY: Exactly, which is what my learned friend has to demonstrate.

THE PRESIDENT: Yes. So you say that. So you would say nothing in (1)(a), (b) or (c) requires that level of specificity.

MS TOLANEY: Exactly.

THE PRESIDENT: Then when you get to the additional paragraph in (1), when it talks about -- why would it then talk about aggregating the information in (a), (b) and (c) by payment instrument categories if (a), (b) and (c) did not include information by payment instrument category?

MS TOLANEY: Well, I think it may be just an alternative presentation; it is the aggregation point.

THE PRESIDENT: Well, it is permitted, is it not? It is saying you do not have to do it. So (1) says you have to do some things, and we are not sure at the moment what those are -- you are but I am not -- and the additional paragraph says if you do not want to do it after every transaction, you can aggregate them. Is that not right?

MS TOLANEY: Well, it could be both because you can have either if you do not want to do it after every transaction, or this may provide a further level of information by aggregation.

THE PRESIDENT: So you are saying that there is an additional optional provision of information under that paragraph?

MS TOLANEY: Yes.

THE PRESIDENT: Then you go on to (2).

MS TOLANEY: That is right.

THE PRESIDENT: You say, now, (2) is permissive. That is the point you are making. You are saying (2), it is clearly permissive, but (2) is permissive in relation to how it is provided, not whether it is provided, is it not? Provided or made available, I mean.

MS TOLANEY: That is right, which may include a provision that the information referred to may be made available periodically at least once a month.

THE PRESIDENT: Is not (2) saying you have got to provide this information but you can agree, if you wish, in your contracts, that you can do it on a periodic basis as long as that is not longer than a month? You do not have to provide it as long as you make it available?

MS TOLANEY: In an agreed manner which allows payees to store and reproduce.

THE PRESIDENT: Yes. So in other words, not only -- which I think probably is more important in relation to the make available, so that if you are not actually providing it then you have to keep it so that it is

available without being changed.

MS TOLANEY: That is right. So the point is the contract may provide. So the way my argument goes is you have got an obligation to provide some information but it would not actually be what my learned friend needs. But the contract may actually provide that you do not in fact have to provide it, you can just make it available and make it available periodically.

THE PRESIDENT: Yes, exactly.

MS TOLANEY: So there is not even necessarily, it is not obvious, that in practice there was any such requirement because the contracts may have had different provisions.

THE PRESIDENT: Well, I mean, it depends, does it not, on what you think is included in (1)? But just to put to you -- I know you do not accept this, but if (1) did require you to provide commercial card information, so if, for example, it was decided that (1)(c) included -- because it says the amount of the interchange fee, if (1)(c) required you to provide it or identify it as a commercial card interchange fee, then it does not really matter, does it, whether you are getting -- if you are the merchant, it does not matter if you have been told about it every month or whether in fact you can just go online and get it?

MS TOLANEY: Except the words we are relying on and what

I showed you in the Barclays decision was that it may be sufficient for the acquirer to simply make it available.

THE PRESIDENT: No, I accept that, I accept that, yes.

MS TOLANEY: So it may well be that a whole host of people just never took it up.

THE PRESIDENT: Quite. I accept that.

MS TOLANEY: Yes.

THE PRESIDENT: But under (2), if it was made available they have to keep it, do they not?

MS TOLANEY: Yes, and that is why I was saying that my learned friend had not engaged with (2) at all, because his argument has to have three limbs to it, each of the three points. First, that the information in Article 12 (1) would capture what he needs. Article 12(2) would mean that merchants were given it and therefore had access to it, and three, for the whole period.

What I am saying to you is, first of all, (1) does not obviously capture the information he needs, (2) demonstrates that merchants may not have had access to it if they had contracts that allowed it to be made available but they never took it up, and three, the Barclays decision which covers at least a third of the transaction, a third of the market, shows that one of the largest acquirers was not in fact complying with Article 12 anyway.

THE PRESIDENT: Just focus on (2) for a minute, because I do not think this is about whether merchants got it or looked at it. It is about whether they can get it and look at it, is it not? So it is about now.

MS TOLANEY: That is right, but it is not obvious that this requires a storage for this period.

THE PRESIDENT: I think that is what sub 2 says, is it not --

MS TOLANEY: Which allows payees to store and reproduce.

THE PRESIDENT: Store, I think, refers to them being provided with the information, and reproduce refers to it being available, does it not? Does this not say --

MS TOLANEY: But that is at the time.

THE PRESIDENT: Unchanged, why would it say unchanged if it was at the time?

MS TOLANEY: Because, for example, I mean, data protection now, would those records be stored?

THE PRESIDENT: What, because they were not necessary? It was not necessary to keep them? But it is necessary to keep them because the regulation says so.

MS TOLANEY: Not indefinitely. It was made available and if no one took them up.

THE PRESIDENT: So let us just come to three. I think you said something about the whole period.

Now, if a merchant were able to identify that on

1 1 November 2020 they conducted a commercial card
2 transaction, does that not (inaudible) the class? They
3 do not have to show anything more than that, do they,
4 because they have got a claim?
5 MS TOLANEY: Well, I think it is the other way round, is it
6 not, because the class is -- the claim period is from
7 2016?
8 THE PRESIDENT: The claim period is from 2016 to 2022.
9 MS TOLANEY: That is right.
10 THE PRESIDENT: In order to be able to meet the requirement
11 that we have been looking at in relation to class
12 definition, they need to show that they have a claim and
13 if they were able to show in one instance that they
14 accepted a commercial card, we are talking about under
15 the old definition?
16 MS TOLANEY: That is right, but they could --
17 THE PRESIDENT: Old definition mark 2.
18 MS TOLANEY: But they would have to prove their claim for
19 the period, they could not just say: uh-huh, we did one
20 in 2020.
21 THE PRESIDENT: Well, not to get in the class, would they?
22 Surely once they have got a claim they have got past
23 your problem about class definition. They might have
24 an issue -- obviously they have to prove more than that
25 for distribution.

MS TOLANEY: Also indeed on the methodology.

THE PRESIDENT: Perhaps on the methodology. But certainly in relation to identifiability, they are over the line -- as soon as they have clocked one instance of accepting a consumer card and can demonstrate that, they are over the line, are they not?

MS TOLANEY: I think my point here is that this was put to the Tribunal as demonstrating in terms that merchants were -- would have a breakdown of transactions into different payment categories from 2016 because this came into force in 2015. What I am just trying to show you is, first of all, the information to be provided would not actually be the relevant information that would be needed for this claim.

THE PRESIDENT: Yes.

MS TOLANEY: Secondly, that it is not obvious that the merchants would be in possession of it or have ever seen it anyway because of clause 2 because we do not know what the contracts provided for. But what we do know is that they look as some of them may have been only if the merchant had specifically requested it at the time. Then the Barclays decision just simply shows that one of the largest acquirers was not complying with its obligations because it could not do so, which was meeting my learned friend's point that everybody would have

complied because it was a legal obligation and what I am showing you as a matter of fact is that even Barclays was not complying for certainly a period; and, secondly, took advantage of the make available provision.

THE PRESIDENT: Yes.

MS TOLANEY: So the reason we can -- I accept that if somebody could show that they had a claim at some point they would be in the class but that is not the target I am meeting at the moment. The target I am meeting at the moment is the submission that because of Article 12, which I think is the high point of the new evidence point, because of Article 12, it is well-established to this Tribunal that all acquirers would have provided all merchants with a breakdown of the relevant information to which they would have access and I am saying that that submission is just not sustainable on any one of the three bases.

THE PRESIDENT: Yes, I think I am not completely sure that is how Lord Wolfson put it but he will get a chance in reply. I think -- can I just ask you again one other point about Article 12(1).

You say that this does not require, however it is provided or made available and obviously putting aside all the discussion we have just had, but you say this does not deal with the specifying that it is

a commercial card interchange fee in Article 12(1)(c). Obviously if you saw that, if you were the merchant and you did see it, you would know it was not a consumer card or a debit card, a consumer credit or debit card fee, would you not, because obviously they are capped at 0.2 and the commercial card fees were higher. You might not know whether had it was a commercial card fee or an interregional fee but you would certainly know that it was not -- if you were given an individual interchange fee for commercial cards, you would recognise that at least it was not a credit or debit?

MS TOLANEY: So it would be the lending point.

THE PRESIDENT: Well, I think, well, but then you get into the -- you get into the bit in the second paragraph which says -- which I think is saying if you aggregate it, and this is again I think you take a different view on this, but it does seem to me it is not the proviso but the bit at the end of the paragraph says you can aggregate it. But these are the ways in which you can aggregate it and if you aggregate it by payment instrument categories, then that is going to show all the commercial card interchange fees separately.

MS TOLANEY: That is true but you would not necessarily know the distinction between commercial card and interregional.

THE PRESIDENT: No, I understand that point, yes. I think I said that, yes.

MS TOLANEY: You did, you did.

THE PRESIDENT: Yes.

MS TOLANEY: I think the reason I am sort of taking this quite carefully is that ultimately my learned friend's submission to the Tribunal is if he gets over even being allowed to get into this territory, is that this is new evidence that shows that people within the class could easily, all of the -- however the Tribunal put it, hundreds of thousands of small merchants would be able to identify whether they were in the class on the old definition and what I am saying to you is that submission does not work because he is putting it on the basis of a legal obligation under Article 12. But the legal obligation under Article 12 is to provide information that could be ambiguous.

THE PRESIDENT: Yes, so because -- I do not think he is, I do not think he is putting it on the basis that -- certainly I do not think for his case he is saying it is necessary to go as far as showing that every transaction is available to every merchant, I do not think he is saying that. I think he is saying that the thrust of the IFR is to change the game so that acquirers in the generality should be provided a (inaudible) obviously

a dispute about what it is but assuming he is right, that it does require them to identify commercial cards, then he would say at some stage during the period 2016-2022 one can presume from the IFR that a merchant is going to be able to find some way of identifying whether they have had at least one commercial card transaction.

That may be the threshold point of his case, he may want to put it higher but it seems to me that if he gets to that point, making the assumption that you disagree about the commercial cards, then he says I am over the hurdle.

MS TOLANEY: What he said -- this is at Day 1 page 13: {Day1/13}

"Payment service providers which include acquirers are required by law to provide merchants with a breakdown of their transactions into different payment instrument categories and interchange fees separately showing the amount of the interchange fee."

THE PRESIDENT: I think that is true subject to the point about how specific it has to be. I mean, you would not dispute that in relation to Article 12(1), would you, subject to the point about whether it shows the commercial card fee?

MS TOLANEY: Just unpicking exactly what Lord Wolfson said,

"payment service providers are required by law to provide" ... yes, but subject to subparagraph 2 which might take you into territory of making available, so it is not obvious they were required to provide it.

THE PRESIDENT: Yes, understood.

MS TOLANEY: That is point one.

Point two was a breakdown of their transactions into different payment categories.

THE PRESIDENT: You take issue whether C goes that far --

MS TOLANEY: Exactly.

THE PRESIDENT: -- and whether the initial bit --

MS TOLANEY: I do not think Article 12(1) actually does do that.

THE PRESIDENT: Yes.

MS TOLANEY: Separately showing the amount of the interchange fee, well, yes, but that does not tell you that it is a commercial card fee.

THE PRESIDENT: Yes.

MS TOLANEY: So that is where I am.

THE PRESIDENT: Yes, I understand. I think that is helpful.

MS TOLANEY: Exactly.

Then 4 added to that. We know as a matter of fact that that is not in fact what certainly one of the largest acquirers in the market did for a considerable amount of the period and then when it did it, in 2018

onwards, it took advantage of the make available provision you saw in the decision.

THE PRESIDENT: Yes.

MS TOLANEY: So it did not provide.

THE PRESIDENT: Yes, but we do know as a result of that I think it is a fairly strong inference that from whatever date in December it was, December --

MS TOLANEY: 2018.

THE PRESIDENT: -- 2018 Barclays has been at least making it available.

MS TOLANEY: Making it available.

THE PRESIDENT: So therefore the question arises as to whether if a merchant had it available between 2018 and 2022, or indeed it is still available for them to request that information, they could verify that they had accepted commercial card subject --

MS TOLANEY: Then you would be back into the "what information" --

THE PRESIDENT: Subject to the "what information" point.

MS TOLANEY: Indeed whether it was distinguished between Visa and Mastercard as well.

THE PRESIDENT: Yes, well that is interesting, is it not? Yes.

MS TOLANEY: Because that is another problem.

THE PRESIDENT: Yes.

MS TOLANEY: What I would say is because of the way in which the application has been made, it is for the PCR to satisfy you on this because otherwise we are in the same territory as your judgment on the previous hearing which is that it is too uncertain and unrealistic and there is not enough evidence to show it can be done, this is speculative.

THE PRESIDENT: Yes. Just on the Visa/Mastercard point, I mean, it is the same point, is it not, because in the additional words in Article 12(1) it talks about "aggregated by brand" so that would presumably mean by Mastercard or Visa?

MS TOLANEY: Exactly.

THE PRESIDENT: Then we are back to the argument about whether that aggregation is permissible effectively or whether actually you are not obliged to do that on your point.

MS TOLANEY: Exactly, what I would say to you is that the Tribunal at that point has to take into account that these proceedings have been on foot for two years, that you rejected the original class definition, that if there is going to be a reapplication and one is ignoring the revised class definition which should be the definition you consider at this hearing but nevertheless look at some version of the original class definition,

then you would have to be satisfied at this point not that there might be a speculative possibility of some evidence out there, but that it fixes, there is evidence that fixes the concerns that you had because it is not good enough at this stage, you cannot defer it again in the hope that an investigation can be made. It has been two years and we would say this is grasping at straws.

Can I then turn to the PSR-specific direction.

THE PRESIDENT: Yes.

MS TOLANEY: This I raise this because obviously this was part of my learned friend's case in his evidence in Reply but then it was sort of jettisoned yesterday as if it was something we had introduced. But the position is that a regulatory change was introduced by the PSR in October 2022 requiring acquirers to provide merchants with a breakdown of their transactions. Now, this was only necessary because they were not doing it and that is the relevance of this.

So if I can show you this, this is at {G/15/1} and if we go, please, to page 4, {G/15/4} I am just checking I have the right reference here. Sorry if we can go back one page, {G/15/3} this is an exhibit to Mr Ross' statement and this is the PSR direction. If you could read, please, the 1.4, paragraph 1.4 and 1.5. (Pause)

You see it is also addressed to 14 payment service

providers. It only came into force on 6 July 2023 and that is apparent from paragraph 7.1 of this and if we go, please, to paragraph 2.4, that is at page {G/15/4}.

THE PRESIDENT: So this is different from the IFR, is it not, in character because --

MS TOLANEY: It is.

THE PRESIDENT: -- albeit related, this is about pricing, that is about transactions?

MS TOLANEY: It is, but it would not have been necessary, we suggest, if all the information was being provided in the way that one might have thought under Article 12. You see that the concern is that things are not transparent or let me put it another way: if the information Lord Wolfson suggests was available under Article 12 was available and was being provided, this would not have been necessary.

THE PRESIDENT: That is a slightly odd submission, that, is it not because I think Lord Wolfson puts it on the basis that for the purposes of the exercise we are going through, having some degree of comfort that merchants can be identified objectively and one could therefore assume that if there was legislation saying that that information had to be at least available, then that requirement could be met and you are saying that we should not go down that path because there is evidence

both in the form of the Barclays decision and this that suggests that people were not doing what they should be doing under the regulation.

MS TOLANEY: Well, I am putting it two ways: the Barclays decision shows people were not doing what they should have been doing and then also shows how the acquirers interpreted it as making available.

What this shows, if we look at 1.4 and 1.5 again, is that statements predating this direction were not providing full and transparent information about the charges merchants were paying and what I am saying to you is that what this demonstrates is that what was required under Article 12 was not sufficiently clear.

THE PRESIDENT: Well, when we talk about pricing and the services, we are talking about the acquirer's pricing and services, are we not? We may be talking about interchange fees in terms of the transparency, but as we know there is not actually any price competition in relation to any of these interchange fees and so it does not make any difference if that is specified and so really this is about the merchant service charge element that is the acquirer's charge, is it not?

MS TOLANEY: Well, it could be but the reason this is interesting -- and that is why I think Lord Wolfson tried to distance himself from it -- is that this was

relied upon by Mr Ross in paragraph 20 of his statement as I showed you, because it was introduced by him, as showing that the acquirers have all of the information the merchants might need. So he relied on this directive as showing enough, showing -- and saying that the sort of information that was required under this directive would be what this Tribunal would be interested in.

THE PRESIDENT: Are you agreeing or disagreeing with that? Because I think as I take your submission you are saying this shows that they were not providing the information required by the IFR. Does that not suggest you agree with Mr Ross that actually this is intended to require merchants to provide -- acquirers to provide information to merchants of that sort?

MS TOLANEY: Well, I think I am saying that it is required to provide transparent information and it was only necessary to introduce this because it was not being provided. So whatever was required under Article 12 was either not sufficient or not being provided but that this does not help the PCRs' claim because it only came into force in July 2023.

THE PRESIDENT: No, I understand. So you are -- you are in Mr Ross' camp, broadly, but not Lord Wolfson's.

MS TOLANEY: Not on its relevance.

THE PRESIDENT: Not on its relevance, yes.
MS TOLANEY: What I am saying en passant is why would this be necessary if all the information was already so clear cut? Unless Lord Wolfson can distinguish between the types of information very clearly, but he cannot, because he cannot tell you that under Article 12 the information he needs to show merchants would have was in fact what was required.
THE PRESIDENT: So if the claim period was not 2016-2022 and if the claim period was in fact until today, for argument's sake, what would the implication be of the PSR in your submission?
MS TOLANEY: I would say still of limited relevance but not because of the quality of the information, but because it is only addressed to certain payment service providers. So if we look at paragraph 3 --
THE PRESIDENT: This is pretty much the market though, is it not?
MS TOLANEY: Well, it is only to payment service providers, none of them is a payment facilitator.
THE PRESIDENT: Sorry, could we go up just a fraction?
MS TOLANEY: There are no payment facilitators and payment facilitators in answer --
THE PRESIDENT: They are outside the class anyway, so -- as I understand it.

MS TOLANEY: Well, payment facilitators -- well, it depends which of the definitions you are looking at on the original definition. But payment facilitators serve 80% of the smallest merchants.

THE PRESIDENT: So are you saying that payment facilitators are in the original?

MS TOLANEY: Well, I think they were in the original class definition as unamended.

THE PRESIDENT: Right, okay, but they are not in the revised?

MS TOLANEY: Well, so far we do not --

THE PRESIDENT: Mr Caplan is nodding, that appears to be the case.

MS TOLANEY: Right.

THE PRESIDENT: So this only covers, yes so you are saying this does not cover the payment service providers who are a big chunk of the market.

MS TOLANEY: Yes, and in answer to your timing point, even if a merchant could see from a recent statement that it has not had a commercial card transaction in the last six to 12 months, that would not tell them anything about the relevant six-year period.

THE PRESIDENT: Yes.

MR FRAZER: Irrespective of the period, is this not, as chairman pointed out, paragraph 1.4 of the direction, it

is talking about the transparency of prices for card acquiring services rather than the transparency of interchange fees, if that is what this is directed at?

MS TOLANEY: That may be right but it is not entirely clear whether it would have caught interchange fees and I assume that the PCR relied on it because they thought it was an argument that it did. It shows categories.

THE PRESIDENT: When we come to look at the statements which -- I am holding you up, I know, and I am sorry about that, but it is very helpful to work through this, when we come to look at the statements we will see how this plays out because the statements -- I think the statements we are going to see or we have seen --

MS TOLANEY: That is right.

THE PRESIDENT: -- reflect this requirement at least in part.

MS TOLANEY: Shall I come on to the statements now and we can come back?

THE PRESIDENT: I think Mr Frazer wants to-- shall we move on to the statements?

MR FRAZER: Yes.

MS TOLANEY: So the 16 statements have been provided and this was exhibited to Mr Ross's sixth statement at paragraph 34 and it was suggested that the 16 statements show that merchants can find out from their records

whether they accepted any commercial card transactions. Now, we say they do not assist the PCR for three reasons. First of all, you have my points on Article 12 as to the quality of the information that was available and I will not repeat that point and also whether it was available or -- sorry, made available, if I can put it that way.

Secondly, the statements largely post-date the period relevant for class identification purposes and there are good reasons because of the material I have shown you to think that the position has changed over time and there is no evidence that the statements reflect the position in earlier years.

Turning to the 16 statements, these are in bundle {O/30/}, 13 of the 16 statements relate to 2023. One of them is from September 2022 and that means 14 relate to the period after the PSR-specific direction was made and 13 after I think it came into force. They are obviously not within the period which is relevant for identifying the class members because the 2022 one I think is November 2022 from memory.

So if the Opus operator can open the file. If we go to the first statement, I think it is.

THE PRESIDENT: Ms Tolaney, we have not had a break I do not know whether -- how long you think you might be with it

in a sense if we do not have a break -- well, I am not sure whether actually having a break is a very good idea if we are going to finish quite soon. Just terms of timing, firstly we have --

MS TOLANEY: I am doing quite badly, I am afraid.

THE PRESIDENT: So I am assuming if we invited you to have a short adjournment, you would be keen for that?

MS TOLANEY: Very.

THE PRESIDENT: Which we are very happy to do and I would be happy to make it quite short.

MS TOLANEY: I am almost at the end of this topic but I have got methodology and I will try and take that quite quickly.

THE PRESIDENT: Of course and it has been very helpful. I appreciate we have taken you up hill and down dale but it has been very, very helpful. What is the most sensible way to deal with it, bearing in mind the transcriber should have a break?

MS TOLANEY: Would you like me to deal with this document as it is on screen, so I have about five minutes or so on this and then I have a third topic, so to do the whole topic I would say 10 to 15 minutes.

THE PRESIDENT: So that would take us through pretty much close to 1 o'clock, and you are happy to do that? Thank you very much and if you finish before 1 we will break

as soon as you are ready and then we will work out when we start again.

MS TOLANEY: Good, thank you.

So you have a Barclaycard statement on screen and we know that Barclays was not able to provide the Article 12 information for several years at the start of the period, the statement is from May 2023 which you can see on the top right-hand corner and so it is outside the class identification period and after the PSR specific direction was made.

Now, while the document is open, can I ask the operator to go to page 3, please. {O/30/3} You will see there are multiple different merchant service charges which have been agreed with the merchant and you can see that in the "Transaction Charges" box. You can see the different ones for consumer cards and commercial cards.

Now, this is true of all the 16 statements provided and I will come back to that but obviously 14 of the 16 are outside the claim period, so they do not provide insight into whether this was the case previously and there is no evidence to suggest that the format of the statements was the same. We have two invoices which predate October 2022 from 2019. The first is from First Data and the second is from Wirecard, neither of whom is one of the five large acquirers and the five largest

acquirers together account for 95% of the card transactions acquired in the UK. They are Barclaycard, Elavon, Global Payments, Lloyds Bank, Cardnet and Worldpay.

I think I have named six there despite saying five but I will check which one is the erroneous one. Now, that comes from the PSR's November 2021 report into card acquiring services and the reference to that -- there is no need to go to it -- is {O/24/27}, and I am being told Lloyds Bank Cardnet should be one, it is my notes I have wrong. So that is five. The relevant paragraph there is 3.49.

There is no evidence, therefore, before the Tribunal on how the five largest acquirers were reporting transactions in merchant invoices for merchants on blended contracts before October 2022 and there is no reason to assume that ones from 2023, given the changes I have shown you, would reflect the earlier period or that First Data or Wirecard's statements would reflect the largest acquirers.

Then on the third point in the statements, all of the statements relate to merchants who have agreed as you can see here what I would describe as disaggregated merchant service charges, so different merchant service charges for consumers and commercial cards. None of

them relate to merchants who had agreed a single blended merchant service charge which applied to both consumer and commercial transactions and can we go, please, to {O/39}.

THE PRESIDENT: I am sorry, just before you leave this or are we staying on the same thing I would not mind just having a look at how this document shows the boxes that we have just been talking about from the PSR's 2022 -- I cannot remember whether it is above or below in this.

MS TOLANEY: If we go back to page 2, please. This is page 1, which -- {O/39/1}

THE PRESIDENT: Yes, keep going.

MS TOLANEY: Then if we go over the page, there is nothing on page 2. {O/39/2}

Page 3 {O/39/3} is showing the monthly charges plus the transaction charges activity based charges.

THE PRESIDENT: Yes.

MS TOLANEY: E-commerce charges, so total charges.

THE PRESIDENT: The next page? Certainly we did look at one yesterday that had the boxes in and I do not know whether it is easy to find a version of it but it would be helpful just to pull that up.

MS TOLANEY: Shall I see if those behind me can find one and then we can go back to it and I will carry on until we

do.

THE PRESIDENT: Yes. It might even have been among the three actually that Mr Ross exhibited. Anyway, it would just be helpful just in the context of the discussion we had about what it is that the boxes are aimed at.

MS TOLANEY: Yes, were showing. But what you see on page 3 that we were just looking at are disaggregated merchant service charges.

THE PRESIDENT: Yes.

MS TOLANEY: Now, obviously merchants who had agreed a single blended merchant service charge would not have had that breakdown so if we can go to {O/39/1}, this is the PSR report in November 2021 and if we could please go to page 45, {O/39/45} you see here paragraph 1.173, if we can make that a little larger. So over 95% of acquirers merchants have standard pricing which are headline rates applied to different types of purchase transactions, then there is a breakdown by reference to different acquirers.

THE PRESIDENT: I think Mr Ross says in his evidence that the 16 statements are from are blended contracts. Now obviously you are saying that is not right but I think he does actually say that in his evidence, does he not?

MS TOLANEY: We will check that.

THE PRESIDENT: I thought he said in his witness statement.

If you -- so how does it -- if you are in the post IFR world given the requirements of Article 12(1), are you saying that if you have a standard contract you would not see any notional list because it would be a notional list, would it not, of interchange fees of the transactions you completed, you just see -- well, what would you be required to be provided with under Article 12(1) in a standard contract?

MS TOLANEY: If we look at 1.207 here, sir, that is page 53, {O/39/53} you might just see this, the headline rate.

THE PRESIDENT: Yes, so if you have done 100 European issued cards that is what you would get.

MS TOLANEY: Exactly.

THE PRESIDENT: So you would not get what we have just seen, you are saying you would not get a list of commercial cards --

MS TOLANEY: Not unless you agreed disaggregated.

THE PRESIDENT: Not unless you agreed disaggregated.

MS TOLANEY: Which is not typical.

THE PRESIDENT: So you are saying you could -- if you were on a standard contract, you could still request disaggregated information but it would be notional would it not?

MS TOLANEY: Exactly.

THE PRESIDENT: Because it would tell you what the headline

rate was, but you are actually getting a different rate.

MS TOLANEY: Exactly and you can see here the same thing with Worldpay, custom tariff three different transaction types they have been but we see that they had a simplicity tariff, if you go down to 1.214, please, and if we could make that a little larger, thank you.

THE PRESIDENT: Yes.

MS TOLANEY: There you are, you see the single headline rate.

THE PRESIDENT: Yes.

MS TOLANEY: So the strapline is we are no further on from where we were at the last hearing, which is if you have a single merchant service charge for all transactions, there will be no reason to provide a split showing commercial card transactions because they have no impact on the price.

THE PRESIDENT: You would say that is fully in compliance with the IFR --

MS TOLANEY: Exactly.

THE PRESIDENT: -- because that is what you have agreed to charge?

MS TOLANEY: Exactly. So statements from merchants that had differentiated pricing as I have just shown you tell the Tribunal nothing about the information that merchants with a blended merchant service charge would

receive and we will check precisely what Mr Ross says on that. We will check his evidence on it --

THE PRESIDENT: Yes.

MS TOLANEY: -- and come back to you and also just find another statement.

THE PRESIDENT: Yes, thank you.

MS TOLANEY: I was going to move on to reliance on acquirer data and finish off the topic.

THE PRESIDENT: Thank you.

MS TOLANEY: So the second argument made by the PCR is that the PCR tries to argue that even if merchants cannot locate records showing whether they accepted commercial cards they could get the data from acquirers, so they say this in their skeleton at paragraph 16(c). Now, that is simply repeating the argument that I showed you when we went through the judgment that has been rejected. That was paragraph 185(2) where the Tribunal held that that trying to contact hundreds of thousands of acquirers and merchants doing so -- sorry, hundreds of thousands of merchants contacting the acquirers to get such information was unrealistic and the Tribunal has already rejected that point.

The PCR does not when making this submission engage with the Tribunal's finding unless it is on the topic the Tribunal got it wrong as a matter of law and that is

why if you remember, sir, you asked me at the beginning yesterday did there need to be both arguments and I said well, I think there did because they juxtapose into each other. That is why I said to you that Lord Wolfson's submission actually did require him to meet both his criticisms on the approach taken by the Tribunal and then on the evidence, and this is a good example because the evidence is unchanged on this topic, there is no evidence before the Tribunal on what data the acquirers hold for merchants on blended contracts, how long they hold it for and how practicable it is for the acquirer to give it to the merchant, so that is simply a repetition of an argument that has been rejected.

The third point is reliance on scheme data and, again, this was looked at in the context of Visa's scheme data which I showed you in the judgment from last time. The point is put I think slightly differently this time round, but because it is based on merchant IDs, and what the PCR says is that the schemes can provide confirmation of whether a merchant has accepted a commercial card payment, that is at paragraph 16(d) of the skeleton.

Now, this is made out to be as simple as the PCR providing a merchant ID to the schemes and the schemes being able to confirm whether any commercial card

transactions were accepted by the MID, the Merchant ID. But the PCR has not explained how it proposes to obtain this list of MIDs from the hundreds of thousands of merchants in the opt-out class and those are merchants with whom it is not likely to in fact have any contact with until distribution and that is a problem in the approach.

Without a clear understanding of how the PCR proposes to use the MIDs to resolve the problem of identifiability, they cannot possibly proceed on that basis.

So the problem faced by a merchant on a blended contract and identifying whether they had accepted a commercial transaction is not actually solved by this approach. In any case, even if the Tribunal said, well, it sounds like they could do that, however voluminous the task, it is very difficult, as Mr Cotter has explained in his evidence, to match up merchant IDs to merchants. So could I ask you to look at Mr Cotter's evidence and I will use the non-confidential version for the moment and this is at {E/2/20} and it is paragraph 55, please. He explains there why it is so complicated, if you could please read that paragraph on the screen. (Pause)

Then if we could go over the page, please, {E/2/21}

to 56, finishing 55, and if I could ask you to read 56 and 57 as well, please. (Pause)

Then if we go over the page, please. {E/2/22} We are missing 58 because it is the non-confidential version, I do not need take up your time but in paragraph 58 of the confidential version he gives an example of settlement negotiations with merchants and explains the difficulties and I can give you the reference if you want to look at that.

But the point is that matching merchant IDs to merchants is laborious and time-consuming and it cannot realistically form the basis of any class identification process. That is no doubt why Mr Ross in his evidence accepted that Mastercard's records cannot be the only or even primary way in which merchants would check their class membership and the reference to that is Ross 7, paragraph 18 and we do not need to go to it but it is {G/6/5}.

So just pulling together, and I will come back to you if I may on the two questions you asked me, but just putting together where we are at then. The class definition is the starting point before we get into anything else and in my respectful submission the only class definition that is in fact before this Tribunal on this certification hearing is the revised class

definition. It is what has been put forward for certification. It has been publicised to the prospective class and it was the basis on which the Tribunal invited, it is in response to the invitation by the Tribunal to the PCR to go away and put forward revised proposals and that is what they did.

So that is the only definition that you were being asked to certify in any proper and appropriate process and I have explained to you that there is no universe, in my respectful submission, in which a class that is substantially comprised of people without a claim can even be considered to be a class, let alone certified and I have addressed you on that.

In the alternative, although it is advanced yesterday and today as the now primary case, a different class definition is put forward. It is said to be the original class definition which was roundly rejected by this Tribunal and nothing has changed on the evidence. The only argument that has been advanced as a different point is under Article 12 and there is a complication for my learned friend because he is not, as I say, actually asking for the original class definition as it stands. He is asking for something different which is an amended version.

The amended version removes interregional

transactions, but the removal of interregional transactions provides a complication to his argument under Article 12 because it is that distinction at the very least under Article 12 between commercial transactions and interregional transactions where his suggestion that information is apparent falls down. So the point, putting it more clearly, is that he is not actually pursuing the original class definition, so what he is pursuing is something that has been never publicised to a class and nobody has ever sought certification of in a formal way and, therefore, the Tribunal cannot even contemplate it.

But even if you did, the definition -- either the new definition suffers from exactly the same defects that you found last time and to the extent a new argument of "evidence" has been introduced, that is only Article 12. I have shown you that under Article 12 even if you assume that people were complying, which there is material to suggest they were not, it is not clear -- in fact, it is the opposite, that information about commercial card transactions would have been provided at all.

So there is no new evidence that would support the original class definition as now amended, version 2 and all of the same criticisms apply and that, before one

gets to my learned friend's challenge to the Tribunal's judgment through the backdoor of trying to say the Tribunal got it wrong last time and the reason he has had to run that case is because so little has changed on the evidence he cannot succeed unless he persuades you that a more "relaxed less rigid" approach should be taken.

So in order to find for him on his original version 2 class definition the Tribunal would have to first of all accept that no formal certification process needed to be followed; that two, it got it wrong at least in certain respects last time round; that three, the original version 2 fixes the problems; and four, there is new evidence to demonstrate that. I suggest to you that none of those four points is satisfied and I would also suggest that it is, with no disrespect intended to PCR, completely inappropriate to be advancing an "original" class definition that is not anything of the sort; it is a second version revised that permission has never been sought for.

So in my respectful submission, the Tribunal should actually simply focus on revised class definition and reject it and reject the original class definition, version 2, in equally robust terms and so therefore we never get to any of the later stages. But of course we

will address you on those.

THE PRESIDENT: Is that your point?

MS TOLANEY: It is, and subject to your questions I would then move to methodology and go through it as quickly as I can.

THE PRESIDENT: Would it be sensible to come back at half past 1? Would that be useful?

MS TOLANEY: Yes, please.

THE PRESIDENT: In terms of availability I think I have something at 5.15 which means I can sit through to 5 o'clock, probably, if that works for the other panel members, so we will give you a little bit the other end.

I think it is important that PCR gets a period of reply, so I am just conscious that there is a lot -- I am sure you have a lot to get through and to cover but if you could work out some way in which that would work sensibly, that would be much appreciated.

MS TOLANEY: We will do that and I will try quite hard to cut my cloth on methodology because I have taken a long time on this topic so I will take it quite quickly but if there are points that the Tribunal wishes to hear from me on, I can pivot to those if you ask me.

THE PRESIDENT: I think there are probably good reasons why we have spent a lot of time on what we have just been through because it gives rise to lots of different

things, methodology is perhaps a little bit more straightforward so hopefully we can move more quickly and bother you less, that is good.

So we will resume at 1.30 pm.

(12.54 pm)

(The short adjournment)

(1.32 pm)

THE PRESIDENT: Ms Tolaney, good afternoon.

MS TOLANEY: Good afternoon. I said I would come back to you on I think the two points that you raised.

THE PRESIDENT: Yes.

MS TOLANEY: The first was, sir, I think you raised the point about blended contracts that Mr Ross describes --

THE PRESIDENT: Yes.

MS TOLANEY: -- the statements as evidencing blended contracts which he does and he is correct in the sense that they are not MIF plus plus contracts. The merchants that he has shown the statements for have service charges that are not dependent on which specific MIF applies, but the distinction that we need to be very clear about is all the statements are for disaggregated blended contracts and so obviously if you have a separate service charge because you have agreed it for commercial cards, then it would be identified.

The problem is, as you found in your judgment last

time, we know that a material proportion of merchants are going to be on standard blended contracts which will have only a headline figure.

THE PRESIDENT: Yes.

MS TOLANEY: That was the example of Stripe that I showed you, the reference to that was {O/39/53}, paragraph 1.207 which had its headline rate so in order for those statements to be of any persuasive value there would have to be evidence showing that the relevant merchants would be on the disaggregated blended type of contract and like I said to you from what we know, that is very unlikely that that will be a substantial proportion of the class, but what you can safely say is you have absolutely no evidence to support that and so what you found last time about blended contracts holds good in the absence of new evidence to that effect.

THE PRESIDENT: Yes, I mean I think we probably, blended contracts I think is probably a somewhat imprecise term, is it not?

MS TOLANEY: It is.

THE PRESIDENT: I think the standard contracts as the PSR describes them have tiered contracts, do they not, and then perhaps some other -- I think there is a number of different ways in which a standard contract might be adjusted.

MS TOLANEY: That is right.
THE PRESIDENT: I think we tend to use blended contracts as shorthand for those where there is nothing more than a --
MS TOLANEY: A headline rate.
THE PRESIDENT: -- A headline rate yes.
MS TOLANEY: But reality is that the PSR report showed is that is because the vast majority seemed to be headline rates.
THE PRESIDENT: In terms of number --
MS TOLANEY: In terms of number.
THE PRESIDENT: -- of merchants.
MS TOLANEY: That is right.
THE PRESIDENT: Yes.
MS TOLANEY: So that is why this type of statement, again not just from the time period but on its content, cannot be taken as evidence that is going to apply to the hundreds of thousands of merchants that we are talking about.
THE PRESIDENT: Just in terms of the 16 and what sort of -- can we more accurately define what they are because they are not -- they are not IC plus plus and they are not the -- what we have just described as the blended, they are something in the middle, why have they got --
MS TOLANEY: I think we are calling them disaggregated

because you have -- you have not aggregated the individual types, you have disaggregated them out into individuals.

THE PRESIDENT: Yes.

MS TOLANEY: But there is no evidence and in fact I would go so far as to say the evidence is the other way that that would be commonplace looking at the PSR report.

THE PRESIDENT: Yes, you are saying there is no evidence to say what they actually are but the one thing they are not, and that is because on the face of them it does not, under the IFR, the requirement is to specify the charge.

MS TOLANEY: Exactly.

THE PRESIDENT: Under what we call a blended contract the charge the Stripe example it would be 5 -- I cannot remember what it was.

MS TOLANEY: Exactly and then -- you.

THE PRESIDENT: That would be the number you would have to specify.

MS TOLANEY: That is right and you have the evidence from the PSR report on the stats so that is at November 2021 obviously this was a -- the period goes back before that, so the answer is that going back to my original point, there is no material new evidence that would interfere with the finding you made on the last hearing

about identifiability within this class due to the nature of the contracts and on this point -- I know one does not like to talk about burdens, but on this point the burden is firmly on the PCR to show you if there is definitive new evidence that would change that finding you would have to be satisfied there really was and therefore that you could be content that what you found last time no longer applies in the light of that evidence and that is not possible in my submission on what you have seen.

Then Mr Frazer asked me a question as well on the direction and what type of information would be provided and you asked I think what the PSR-specific direction was aimed at and transparency of prices, so we know that it introduced a requirement for a summary box and I think that is what Mr Tidswell was referring to in one of the statements. If we have a look at first of all the specific direction, that is at {G/15/12}, please. So there is the requirement that has been introduced.

You see:

"PSPs may apply a 'headline rate' to a particular type of transaction which can take the form of a pence per transaction fee ... or a combination ...

"The intention is that the summary box clearly explains to the merchant how they are charged for

accepting transactions and to highlight that the different characteristics of a transaction may affect the cost."

So what you can see is the summary box of the characteristics of the transaction is to be included and then I can give you an example when we are ready to move, it is {G/16/2}, and you can see the summary box so what you can see here is under your card payment summary, can you see the text:

"You can use this to compare our service with other providers, to find the best deal for you.

"We are required to provide this information by the Payment Systems Regulator."

Then you have the summary box. So this was what was introduced in October 2022 and effective from July 2023 and the statement I think is August 2023.

THE PRESIDENT: So that suggests that at least Global Payments thinks it is necessary to provide information that identifies commercial card usage from that point in time.

MS TOLANEY: From that point in time, so that is why you can see the contrast therefore between what comes into force from the PSR and Article 12 is what I was showing you and why, therefore, this is not relevant because of the timing point but also is relevant to undermine in

a sense the value potentially of Article 12 at all.
THE PRESIDENT: You are not saying this differs depending on the type of contract? It does not matter whether it is blended or IC plus or whatever that the PSR requirement does not distinguish those?
MS TOLANEY: I think it does not, it is just that you would have the same costs of accepting presumably if it was a single --
THE PRESIDENT: Yes.
MS TOLANEY: Yes.
THE PRESIDENT: So the bit about the breakdown of the percentage of transactions, because its transactions it would presumably conclude would be the same for everybody, whereas the costs might differ depending on the type of the contract.
MS TOLANEY: I think so, and if I am wrong someone will tell me.
THE PRESIDENT: I am conscious I am asking you something about the other side's evidence.
MS TOLANEY: Yes, I think so. Doing the best I can, yes.
THE PRESIDENT: I suppose putting the question a different way, there is nothing that you have shown us from the PSR's whatever it is called direction that suggests it is not treated that way.
MS TOLANEY: That is right and my point is that if one looks

at the chronology of this, Mr Ross introduced the PSR direction relying on it to show that merchants would have the information available. He was met then with the argument: well, not really for the time period we are talking about, and there has been a pivot to Article 12, no doubt mindful of the time period point, but what I am also showing to you is the contrast between what has now come into force and what Article 12 appeared to provide and showing you that that was not enough and indeed had it been then, there would have been no need to introduce this.

THE PRESIDENT: Should we be concerned that if these proceedings had a different reference point that went outside this then you might not be able to make these submissions? If we -- if the reference point was today's date, then presumably you would have to accept that every merchant at least since October 2022 would have been able to tell whether they had a commercial card payment or not, is that not something that we should be bothered about?

MS TOLANEY: I do not think so because in a way that is like saying if I had a contract for which there was consideration, would it mean that the case would fly, when the contract before you had no consideration? The answer is it is a different case.

THE PRESIDENT: It is slightly different, is it not, because -- it is because of the class, is it not because of that point that if you can tick the box once you are into the class and the problem about how many transactions you have had becomes for another day.

MS TOLANEY: Well, it might go into suitability.

THE PRESIDENT: I accept that, yes.

MS TOLANEY: Because volume does matter and easy proving does matter but here all I can do is take it in stages and in a sense and I just wanted to also show you this does lead quite neatly into the point that I wanted to show you which is when you apply for certification you have to do so on the basis of a published and pleaded class definition for good reason and we go back to the purpose of the statute on that point, which is that you are having -- you are gathering together individual claims and providing a wrap-up and Lord Leggatt said it is one that could be abused because it has quite a lot of advantages, particularly on the aggregate damages point.

That is why there are stringent rules on not only the certification decision by the Tribunal, but actually how you go about it and I am just going to get a reference. Thank you. It is rule 75(5) which I think is something you will be familiar with, which is at

P/4.1/1.

I have about three different references.

THE PRESIDENT: We will get there eventually.

MS TOLANEY: {P/25/1}, that is right and if we could please go to rule 75(3) if we have that the manner of commencing the proceedings and this is what is required: a description of the proposed class and it has to be verified by a statement of truth.

Then if we could look at 75(5), please. You have to have annexed the draft collective proceedings order and a draft of the notice referred to in rule 81 and obviously we have that and this is -- sorry I mixed up my references here, we have that draft collective proceedings order at {B/4.1/1}, and if we go to page 4, please, paragraph 13 is the class. {B/4.1/4}

So in answer -- in a long-winded answer to your question, I do not think you can be concerned with it unless you think the definition has gone wrong and that is not what is being said to you. What is being said is this is the period of the class and you have to look at it. The second related point is obviously going to the original version 2 which is none of this process has been followed so the reality is that the Tribunal should not really in a way engage with this at all because the only definition that is before you in a proper format is

the revised class definition, but if you do then I do not think it is of concern that you should be extending the period because there is no submission to you that that would -- is the appropriate thing to do.

So those are my submissions on class definition.

May I move then briefly to methodology and with apologies for what will be probably quite a rapid pace through it. I was going to take it -- there were two points. First of all briefly to just remind you of the law on methodology which we have addressed in our skeleton and I will take that very briefly; and the second point is to turn to the methodology actually proposed to show you why it is unworkable.

The overarching point of course when one is talking about aggregated damages is that the aggregated damages must be compensatory to the class and that is a fundamental principle. So what you are looking for is a methodology that will truly provide a way of calculating the right compensatory amount. So if there are parts that are omitted or parts that are defective, it means not just that the methodology is unworkable or deficient, which are terms that are often used, it risks real injustice because in fact it is not adhering to the compensatory principle at all.

Turning then to the law, the short point is that

the Tribunal correctly summarised and applied the relevant principles of law in relation to the requirements for a methodology. The PCR on this application suggests that the legal requirements are in fact different and, again, rather like with the class definition are seeking having not appealed the legal approach taken by the Tribunal to challenge it. They cannot do that, the findings made by the Tribunal on the law on methodology were part of the ratio of the *Dune* judgment and led to the order refusing to certify so there is no basis for the challenge.

In any event, the Tribunal's approach to the law was impeccable so there is no basis to suggest it was indeed wrong.

There were three key points that featured in the Tribunal's judgment on the law. The first is that the methodology has to be a blueprint, a broad blueprint for identifying issues at trial and how they are to be resolved and we see that at paragraph 67 of the Tribunal's judgment. I do not know if you would like to quickly be reminded of those findings or if you are familiar with.

THE PRESIDENT: I do not think you need to, thank you.

MS TOLANEY: Of course that paragraph of the judgment was applying paragraph 44 of the Court of Appeal decision in

Gutmann.

The second point was that even on points where the defendants bear the burden, the methodology still needs to address them if it is known that they will come up and that was paragraph 70 of the Tribunal's judgment, relying on and referring to the *Meta* decision.

The third point was that the Tribunal held that the importance of the methodology to the Tribunal was as its role as gatekeeper and protecting the interests of the proposed defendants as well as the proposed class of members and we saw in the *Merricks* minority judgment the Supreme Court being aware of that and that came from paragraphs 143-145 of the Tribunal's judgment.

We have addressed the law in detail in our CPO response at paragraphs 3.14 to 3.21, so I will not develop it beyond that but those were the headline points and the judgment properly applied all the relevant authority including *Gutmann*, *Meta* and *McLaren* so there is no basis to challenge it at all.

Turning then to the PCR's proposed methodology for calculating aggregate damages, we suggest that it is absolutely clear that the methodology is defective, it is unworkable and incomplete. There are five defects that we have identified, there may be a sixth but there are certainly five.

The first is that Mr von Hinten-Reed's methodology for excluding the value of the existing and settled claims from the calculation of aggregate damages is unreliable.

The second is that his revised methodology for apportioning commercial card MIFs to the opt-out class is unreliable and in relation to both of those defects, he accepts that his revised methodology would be inaccurate but tries to suggest that his methodology would underestimate the aggregate damages calculation.

But the upshot is that on his own admission he is proposing a methodology which is unreliable and biased against the class.

There are then three further defects, in respect of which no methodology is put forward at all. First of all -- this is the third defect -- there is no methodology put forward to exclude transactions in the UK with merchants that are not UK domiciled; this issue has not been resolved by my learned friend's suggestion that the opt-out claim would include non-UK domiciled merchants.

The fourth defect is that there is no methodology for excluding transactions by merchants that opt-out.

The fifth defect is that the methodology for assessing countervailing benefits of commercial cards to

merchants is largely absent. So those are the --

DR BISHOP: What is the last one?

MS TOLANEY: The last one is that the methodology for assessing the countervailing benefits of commercial cards to merchants is largely absent and I will briefly mention this at the end of my submissions. But the concept of having to take into account the countervailing benefits was in fact introduced in Mr von Hinten-Reed's fifth report, so that is where it has come from.

But I said I would mention a sixth possible defect. That is the point about centrally acquired transactions. It is plain on the face of the Reply at paragraph 67, that is {G/1/23}, that the proposed claim would exclude transactions acquired by non-UK based acquirers. My learned friend however said in his oral submissions yesterday that that was not the case, so if one just looks at paragraph 67 of the Reply.

THE PRESIDENT: I think if you look at Ross 7 it is not actually so clear that is what Mr Ross is saying, but I absolutely agree that is fairly plain there.

MS TOLANEY: That is what they said then yesterday Day 1, page 121, lines 3-7, {Day1/121:3} it was said that centrally acquired transactions are not excluded from either the opt-in or opt-out claims and obviously it is

a large value, this, but it is now being said that they are back in.

But can I just remind you of how this developed. The PCRs' original claim form was unclear as to whether non-UK merchants were excluded and that was their amended claim format paragraph 58, that is {B/3/25}, and that may be where Mr Ross' evidence comes in. The Mastercard CPO response noted the lack of clarity in relation to both the opt-in and opt-out claims at paragraph 4.59 and 5.28 to 5.30.

We then had the Reply that said it was limited to transactions in the UK that used a UK based acquirer and then yesterday we are told it is the opposite. So we see the flip-flopping which again is another example of how this is quite in flux. But in any case what we say is that if they are back in then there needs to be a methodology to deal with them and there is not -- that is the headline on centrally acquired transactions.

The points that I am making on methodology, the five defects plus this one are not points of detail that can be worked out. They are fundamental problems and we say that they render the methodology not a blueprint to trial, but something that is both defective and incomplete.

The second point is that the methodology

demonstrates that there is no cost benefit of having collective proceedings because I think as you picked up, sir, yesterday Mr von Hinten-Reed's approach revised approach on the first and second defects leads to very substantial reductions in the theoretical maximum value of the claim and you can see the figures in our skeleton argument at paragraphs 3.6 and 4.7, the theoretical maximum has now dwindled to £32 million to £44 million and that is only after excluding those two aspects. It may actually be much less than that.

So that raises very serious questions about the cost benefit analysis that will be picked up after I have dealt with the methodology.

Now, all the problems with the methodology actually stem from where it starts. If we go to Mr von Hinten-Reed's fifth report, that was the report that was served with the revised CPO application in December of last year, and that is at {D/33} and we are looking at section 5 which is page 52 {D/33/52} now this is said to be the chapter on methodology and if we go to section 5.9, that is at page 58, please, {D/33/58} what you will see in this section is that Mr von Hinten-Reed's proposed method for calculating aggregated damages for the opt-out class uses as its starting point the entirety of the value of commercial

card transactions in the UK. What that means is a very large proportion of transactions that should not be included in the calculation of aggregated damages at all are included by virtue of that starting point.

These include transactions of merchants that have brought proceedings including those who have settled their claims or are maintaining individual proceedings and we are talking large numbers, and transactions of merchants that are not in the opt-out class, so merchants that are part of an undertaking with a turnover of above 100 million and are within the opt-in class and also transactions at merchants who opt out of the claim; Mr von Hinten-Reed accepts that certainly the first and second of those would need to be excluded and presumably the third as well and we see that in his figure 5.2, which is on page 57. {D/33/57}

If we go over, please, it must be 58. If we go over the page, please, thank you. It is 59, you can see what needs to be excluded. So the starting point starts with a claim for methodology, a methodology that has grossly over-egged the damages that could be claimed.

If I then turn to the first defect I mentioned in the methodology, which is his proposal as to how to exclude the value of existing and settled claims. Now, the value is very, very significant and if you see the

number of claims, if you look at schedule A, that is {E/18/1}. We can flick through but there are a lot of claims that we are talking about, so if we go over the page and over the page again, and again.

THE PRESIDENT: I have the point.

MS TOLANEY: Right, so that is the scale and the value of it, if I can just give you the reference, because it is in the confidential bundle is {YA2/5} which is Schedule B to Cotter 2. So the number of settling merchants is well into four figures and includes the vast majority of major retailers in the UK which are the businesses where most transactions take place, so this is a very material point.

The methodology that Mr von Hinten-Reed had proposed to use in his fifth report was to use data held by the schemes to ascertain the value of the commercial card MIFs applicable to the settlements effectively or the existing claims and the reference for that is paragraph 206 of that report, which is {D/33/61}. As we explained, we simply do not have the data relating to individual merchants that he would need for that exercise and we address this in our responsive evidence.

He then proposed a different methodology which I will come to, but just by way of a footnote, the PCR in its Reply appears to suggest that they can still use

Mastercard's own data and we explain and I will give you the references, given the time, in Mr Cotter's second statement in paragraphs 54-75 why that is simply not practicable or possible and there does not appear to be any compelling answer to that.

So the Tribunal's working assumption has to be that it is Mr von Hinten-Reed's revised methodology now that we should look at and that appears in his sixth report which is at {G/33/1}. Page 12 {G/33/12} you see at paragraph 33 he notes the difficulties set out in Mr Cotter's evidence of using the sort of information or providing it that he had identified and if I just show you the last sentence of paragraph 36, and then we go on to paragraph 38, please, over the page {G/33/13} where he says that he has revised his methodology and that is therefore what is before the Tribunal now and what it is based on.

We see his revised methodology at paragraphs 41-46 but if I could ask you to go to Mastercard's skeleton at paragraph 3.9, that is probably a quicker place in the interests of time, to take that up. What we see from that is that the revised methodology involves looking first at merchants that are identified in Mastercard's data and at the number of merchants that have brought claims or settled. That number is then compared to the

number of merchants that have brought claims or settled but which have not been identified or linked in the data, so he takes those two subsets and says he has got a ratio and the ratio is then applied to the quantum of commercial card MIFs to produce a calculation for those that he says are associated with the settling merchants but have not been identified, so that is the revised methodology.

He accepts that it produces a bias, albeit he says it is one against the opt-out class, that is paragraph 47 of his sixth report. He then however does not carry out the calculation which is surprising because obviously he has got the ability to do so as to where that leads him on quantum. We have set that out at paragraph 3.11 of our skeleton and you see that the estimate indicates that the total amount of commercial MIFs for the period of the claim attributable to claiming and settling merchants is in a range of 1.4 approximately to 1.6 million.

DR BISHOP: 1?

MS TOLANEY: Sorry 1,378,000,000 to 1,606 million.

DR BISHOP: Million?

MS TOLANEY: Billion. Sorry, I had million in my head: billion.

So this can be compared to the total amount of UK

commercial card MIFs over the period which can be seen in footnote 5 of our skeleton, confidential, so I will not read it out.

So on this revised methodology the lion's share of between 65 and 75% of commercial MIFs correspond to existing and settled claimants. So the upshot is that applying the revised methodology on step 2, which Mr von Hinten-Reed has put forward but then not done the calculation, means that there is an enormous reduction in the potential maximum value that the aggregate damages calculation could have.

Now, I will ask the Tribunal to keep those figures in mind as we then turn to another part of the revised methodology that we discussed yesterday, this is the second defect and this is Mr von Hinten-Reed's methodology to apportion commercial card MIFs to the opt-out class and I have shown you that the starting point is to include the value of all commercial card MIFs paid at transactions at all merchants so this step is concerned with ensuring that the aggregate damages calculation excludes MIFs on transactions with merchants in the opt-in class, so in other words it is only MIFs on transactions at merchants in the opt-out class that have to count on this methodology, so he has to get rid of the extra that he started with.

Now, it is common ground that his initial methodology for this step which is step 3 in the figure I showed you is not workable, because he had proposed to use ONS data and both he and the PCR now accept that that would not work and that is in the Reply para 79 and Mr von Hinten-Reed's sixth report paragraph 53. His revised proposal we summarise at paragraph 3.16 of our skeleton, if I could just ask you to cast your eye over that, please.

Could I have a reference for that?

THE PRESIDENT: We have got it.

MS TOLANEY: Thank you. Sorry, I am looking at it in hard copy. (Pause)

Now, as the Tribunal observed yesterday, Dr Niels has implemented this methodology using a random sample of 200 merchants that are identified and linked in Mastercard's data, that is in section 2 of his supplemental note and of the 200 merchants sampled 43% would be classified as opt-in, so that figure would imply that there are hundreds of thousands of businesses which would fall within the proposed opt-in class. Now it was suggested in response to the fact that the conclusion of Dr Niels exercise was only 6% of total UK commercial MIFs would be apportioned to the opt-out class. My learned friends Mr Bowsher and Mr Caplan did

not challenge the maths, but what they said was it was a sample and that the 6% figure or whatever figure they said was calculated on this revised methodology would be just one end of the range and that Mr von Hinten-Reed's original methodology would be at the other end and that was Day 1, page 111, {Day1/111} so what Mr von Hinten-Reed has now achieved is two estimates of a target and Mr Caplan made a similar point, Day 1, page 163 {Day1/163} but the fundamental problem that that submission does not engage with is that Mr von Hinten-Reed has accepted and the PCR has accepted that the original methodology was inaccurate, so having a range with inaccurate figures that are accepted to be inaccurate at the top end is not viable, so there is no top end in the way that was posited yesterday.

So can I draw together quickly the points that follow therefore from the revised methodology on the first and second defects, his steps 2 and 3; step 2 would leave a total of between 530 million and 737 million of commercial MIFs not accounted for by existing claims and settlements. Step 3 would indicate that only 6% of that amount would be apportioned to the opt-out class and that leaves the theoretical maximum value of the aggregate damages sought for the opt-out class, as the figure I said at the outset 32 to 44 million. So

we are not looking at 6% of 2 billion which is what was said to you yesterday, use Dr Niels' estimate and that is the theoretical maximum because of course it does not actually take into account things like exemption acquirer pass or merchant pass on reductions.

Now, the figures that Mr von Hinten-Reed calculated for the opt-out class in his fifth report are at {D/33/50} and we have two sets of different figures Euromonitor figures and RBR figures and you see the levels that were claimed, 486/901 and then that is against Mastercard.

So that is where he was in his fifth report and now as I have shown you using his own methodology it is a tiny, tiny fraction so in view of those figures I have three submissions about how the revised methodology has a bearing on certification and this is in our skeleton at paragraph 3.7.

First of all, such substantial reductions in the theoretical maximum size of the aggregate damages award have an important bearing on the Tribunal's assessment of the reliability of these figures because that is an incredible drop between the fifth report and the sixth report, albeit be the sixth report does not actually set them out in terms.

Secondly, it has a real bearing on the assessment of

the costs and benefit of the proposed proceedings as the Tribunal noted yesterday during my learned friend Mr Bowsher's submissions, proceedings that would cost the PCR many millions, and indeed the schemes are far less likely to be justified if their theoretical maximum is around 20 to 30 million as compared to proceedings with a theoretical maximum of half a billion or more.

Thirdly, the Tribunal has, as noted in the judgment in *Dune*, a gatekeeper function which includes taking account of the interests of the proposed opt-out class and it would not be appropriate to certify proceedings based on a methodology that is unreliable and is biased against the class.

(Text missing due to audio fault)

An issue that arises will be that there will be UK transactions that take place at points of sale in the UK but with merchants domiciled outside the UK, and they would be outside the scope of the opt-out claim. That follows from the draft opt-out collective proceedings order at paragraph 25. That is {B/4.1/5}.

THE PRESIDENT: Which order is this, the original or the revised?

MS TOLANEY: I think this is the revised order.

Now, under the legislation establishing the collective proceedings regime, persons domiciled outside

the UK cannot be part of the opt-out proceedings unless they take the positive step of opting in. The draft order does not contemplate them opting in at all. So the transactions by those non-UK merchants which occurred at points of sale within the UK will need to be excluded from the aggregate damages calculation.

But Mr von Hinten-Reed has not proposed any methodology to do so, and that is a problem because the data sources he has proposed to use measure card activity in the UK. We raised this point in our CPO response at paragraph 4.5 9. The reference is {E/1/44}. The point was then entirely ignored in the Reply and Mr von Hinten-Reed's sixth report, and it was also ignored in PCRs' skeleton.

The only response that has been advanced was in Mr Bowsher's oral submissions in response to a question from the Tribunal where he said in fact non-UK domiciled merchants could be part of the claim. That was {Day1/123:9-20}.

Now, irrespective of what has been said in the documents, including non-UK merchants leads to a number of problems for the PCR and to give you two examples, the first problem is that step 1 is to start with all commercial card MIFs on all UK transactions and that data will include transactions that are with merchants

domiciled outside the UK. So there needs to be a step that excludes those transactions otherwise step 1 is over-inclusive.

DR BISHOP: Can I just ask, can you give us some idea of the scale of the problem, are we talking about half of 1% or 29%? Can someone ...?

MS TOLANEY: I think we do not know at the moment, but I will look behind and see if we can do any better than that. What we do know is that it is a step that has to be accounted for in the methodology.

DR BISHOP: Let me just ask one -- have I understood it correctly, these are transactions which take place in the UK but where the merchant is outside of the UK?

MS TOLANEY: That is right. Non-UK merchants occurring at points of sale within the UK.

DR BISHOP: Point of sale in the UK, but the merchant is outside the UK. Can you give me an example?

MS TOLANEY: Airline, hotel.

DR BISHOP: I see, okay.

MS TOLANEY: It could be quite a large scale, it is just we do not have a percentage, I am afraid. But we can see if we can do any better.

DR BISHOP: Right.

MS TOLANEY: But it is not just some very tiny proportion, which is what I think you were saying, does it really

matter? The answer is it does really matter.

So there ought to have been a step that excludes those transactions, and we are left with a mismatch between the class members, UK-domiciled merchants, and the data being used at step 1 by Mr von Hinten-Reed whether or not these are with UK-domiciled merchants.

Now, my learned friend now says, well, non-UK merchants could opt-in to be part of the claim contrary to the way the order was framed and our understanding. But if non-UK merchants do opt-in then we are going to have to have a methodology to address the position of those merchants, and if, because it is not automatic, they have to -- so we cannot just include all of them on the basis that they should be taken to have opted in, they have to actively opt-in, and if they do we will need an analysis of the acquiring market in other jurisdictions, merchant pass on in other jurisdictions and other points, and we have got none of that.

So, with respect, the throw away line from my learned friend, oh, well, we could have them in contrary to what has been said before, introduces a huge number of complexities that his expert's methodology simply does not engage with.

THE PRESIDENT: The acquiring market would still be the UK acquiring market?

MS TOLANEY: As Mr -- is saying, they have included foreign acquirers as well.

THE PRESIDENT: That is a different point and no doubt we are coming to that. But just on this point, assuming French airline using UK acquirer.

MS TOLANEY: Yes.

THE PRESIDENT: Because it is -- presumably the premise that you are exploring with Dr Bishop is there is at least some location you can buy it from here, whether it is online or --

MS TOLANEY: Exactly.

THE PRESIDENT: It could be online, in which case it might be the foreign acquirer's business.

MS TOLANEY: It might.

THE PRESIDENT: But if it was -- I do not know, in fact, if Chanel is a French company, but if Chanel was a French company and you walk into the Chanel shop in Knightsbridge then obviously it is a transaction that is being acquired here.

MS TOLANEY: Exactly, but the problem is that the way this has been floated, if I may say so, in oral submissions has opened up a can of worms, and what it demonstrates is that further thought would need to be given but the methodology just does not engage with it, and it is a point that we have made.

THE PRESIDENT: Can you give me the reference, just going back to you said the legislation deals with this, and I remember that is right, but do you have the reference point for where in the legislation we could find that, about the domiciled -- it is in the rules, is it, rather than -- or it was in the Act?

MS TOLANEY: I think it may be in the rules. Can I ask someone behind to get that for you and then I will carry on, if I may.

THE PRESIDENT: Thank you, that is helpful to have.

MS TOLANEY: I am quite worried for my safety, because Mr Kennelly may kill me if I take up too much of his time.

THE PRESIDENT: I will stop asking questions. We do not want that to happen.

MS TOLANEY: The fourth defect is the methodology to exclude transactions that merchants that opt-out.

Now, it is self-evident that the aggregate damages calculation has to not include MIFs on transactions at merchants that opt-out. The methodology proposed does not engage with this, and it is another point that we raised in our CPO response at paragraph 4.58. It was ignored in the Reply and in the PCR's skeleton.

There are many cases in which, following the theme from Dr Bishop, that the Tribunal may fairly anticipate

that there are a number of opt-outs might be immaterial in, say, consumer class actions. The present case is very different. The opt-out class includes merchants that have a turnover of up to 100 million, and we know that many thousands of merchants have brought individual claims. So it is easy to see why some merchants might decide to opt-out and bring their own claims, not least because of the problems with the methodology, and it is unlikely they will want to spend time helping the PCR. So it is not a permission that can just be dismissed.

All the PCR said about it was by way of oral submissions yesterday at pages 122-123, which is we think it is unlikely there will be many merchants that opt-out, but they may have -- if they do so, they will have discussed internally and considered their approach to quantifying the value of the proceedings, and they will tell the PCR.

Now, there is no evidence or analysis standing behind this, and the assertion made at page 122, lines 1-3 that there can be a process for making sure "the correct information is obtained" is all that has been said. No explanation. No consideration as to how it would work and no methodology.

The fifth defect is the absence of a proper methodology to deal with the countervailing benefits,

and the Tribunal asked Mr Bowsher why this point arises at all and he said it was simply an aspect of Article 101(3). That was at page 138 of yesterday's transcript.

But it is part of his own expert's report and this methodology. So that's not correct because Mr von Hinten-Reed has accepted the aggregate damages calculation would need to be reduced on account of the countervailing benefits the merchants obtain from the commercial card MIFs, and we have set out in our evidence and skeleton the wide range of benefits that may arise and we have, as Mr Tidswell will know, had a very lengthy debate about this in the last few weeks.

But what I can tell you is we set all this out in our original CPO response at paragraph 4.65, which, for reference, was {L/1/42}, and there has been no proper engagement with it. The response was that on the first iteration the PCR did not put forward any methodology, and this was recorded in the judgment at 176-177. They have now put forward a purported methodology on one benefit, which is Amex, but ignored all the others, and what we say on this point is the others cannot just simply be ignored and there ought to be a proper methodology to deal with it.

So the upshot of this is that what we have is

a methodology that starts from the wrong place with a massively over-inclusive step, contrary to the relevant principle of law as to compensation, and that is the purpose behind aggregate damages and it starts in a very flawed way.

It then failed to properly have a methodology in the fifth report as to exclusions on two very obvious categories, apportionment to the opt-out and also the existing claims and settled claims. The sixth report then produced a revised methodology that was not very well developed, if I may put it that way. But the consequence of that revised methodology, which is what is before you, is a massive fall in the value of the claim, which gives rise to two concerns, as I have said. One is how reliable is it if it can go from half a billion to the sort of level it has fallen to and will it really be the methodology that is put forward, and secondly, it completely changes the landscape of the assessment of cost benefit.

You couple that, so you are starting with that very low value claim using the methodology put forward by the PCR's own expert, albeit not set in terms, and then you look at at least three other quite significant areas where there is no methodology at all. Stepping back from this, this is, as I said, two years into these

proceedings, the second go, after the Tribunal gave an incredibly detailed judgment as to what was required, the blueprint, to deal with the points that would be raised by the defendants and have been raised since the original CPO response, and there has been a complete failure to engage with them. Where there was an engagement yesterday it was inconsistent at times with what had been said in all the documents so far.

So none of this suggests that there is a "blueprint" for trial. We are so far from that. Also the way in which these figures have been produced and the difference in their quantum suggests that there is never going to be an appropriate methodology. They have had their chance, they have had a go, they have not produced one, and again, a bit like the class definition, that is really the end of it.

The Tribunal has given huge indulgence and actually set out in terms what was required and they have not done it.

So those are our submissions.

I am just being told before I sit down that in response to your question about the statute, it is the Competition Act 1998, section 47B. The reference is {P/23/6}, and the subsection provides, as you will remember, opt-out collective proceedings will be brought

on behalf of all persons to the class other than persons not domiciled in the UK who do not opt-in.

So my learned friend's fix actually depends on the new non-UK merchants all opting in, which is, we would suggest, fanciful.

THE PRESIDENT: Can I ask you, you have not mentioned exemption, merchant pass on and I think acquirer pass on was a Visa point.

MS TOLANEY: Yes, and these are going to be covered by Mr Kennelly.

THE PRESIDENT: They are still being pursued?

MS TOLANEY: They are. But I would boldly say you may never need to go there. It is enough already to demonstrate the problems so far.

THE PRESIDENT: I am sure that is not going to stop Mr Kennelly telling us about it.

MS TOLANEY: No. If there are any other questions?

THE PRESIDENT: No. Thank you very much.

MS TOLANEY: Thank you very much.

Submissions by MR KENNELLY

MR KENNELLY: I will deal first, if I may, with identifiability, and I will be dealing only with the specific Visa points. But before I do, in view of the debate between the Tribunal and my learned friend Ms Tolaney, it is in my submission worthwhile for

the Tribunal to step back.

The PCRs are asking you to authorise them to prosecute these claims on behalf of vast numbers of merchants without their consent, and the only reason that is acceptable under the Act is that the merchants have a fair opportunity to opt-out if they wish to.

The point of the identifiability requirement is to ensure that they really do have a fair opportunity to opt-out, and that is why it is not good enough for the PCRs to say that it is theoretically possible for a merchant to go away and do potentially large amounts of work to figure out whether it is in the class or not.

In every class certified to date, there was such a fair opportunity, *Merricks* is a good example of that, and it is not true here. There is a very large number of merchants in these proposed claims, and taking the PCRs' case at its highest, assuming my learned friends are correct about their interpretation of Article 12, it is still necessary for a merchant who has not retained the statements which they are supposed to have received to seek them from an acquirer and to comb through them, documents from 2016, to find one or two commercial card transactions that will justify or will explain that they are in the class. For small merchants, which constitute the vast majority of merchants in the opt-out class by

number, there are unlikely to be large numbers of commercial card transactions, but that will be a significant task, to comb through the information to find commercial card transactions which will inform them as to whether they are in the class or not.

So with that principled background to the broad approach to identifiability, I will move on to Visa, because the point I have just made is a fortiori where, to understand if someone is in a class, they need data or information from the schemes, which is even more difficult for them to obtain.

Looking at the Visa points in particular and what might be done by Visa in order to link merchants to commercial card transactions, the PCRs' skeleton claims that it would be straightforward for Visa to link merchants's individual card acceptor IDs, or CAIDs, to particular commercial card transactions.

Mr Ross in his seventh statement, I am not going to turn it up, suggests that Visa's own rules might require CAIDs to be configured by an acquirer strictly per merchant and that commercial card transactions cannot be processed by Visa at all without a MID or a CAID.

Mr Ross filled in his exhibits two lever arch files-worth of rules and data standards, but he cannot point to any rule that actually says that.

I will show you what he does say, and that is in {G/6/10}, his seventh statement, {G/6/10}, paragraph 45. The second line, Mr Ross says:

"However, it is my understanding that the MID and CAID fields are configured by the acquirer at the time of Merchant onboarding and then automatically populated as part of each transaction authorisation request."

Then he says:

"If an incorrect code (or no code at all) is registered, then no transaction will be successfully processed, as this is a mandatory transaction data field."

He says:

"This is confirmed by the 'Quick Reference Guide for Common Point of Purchase Reporting ..."

That he refers to at paragraph 32 above.

So we go back to paragraph 32 on page 8, and he quotes from this Visa document. He says that it provides -- end of the second line:

"... that the 'Card Acceptor ID' [or CAID] field is 'Field 42 in Authorisation Message: Card Acceptor ID -- up to 15 digits -- Alpha Numeric', and that the field should be formatted 'as text in the reporting form to maintain the entire unaltered ID'."

Then this:

"The full unaltered contents of the Card Acceptor ID must be provided without truncation or modification for Visa to process the transaction." {G/6/8}

At footnote 4, he relies on his exhibit TNR-9. If we go to that, please, that is in {G/17/1} TNR-9, and at page 2 {G/17/2} we see what this is: the 'Visa Quick Reference Guide for CPP Reporting'.

On page 3 {G/17/3}, we are told what CPP reporting is under the heading "Introduction":

"Issuer Common Point of Purchase (CPP) reporting is critical intelligence to help monitor the security of the payment ecosystem.'"

CPP is defined, next heading:

"A [CPP] is determined when clients identify a subset of accounts with legitimate cardholder usage, containing a single common merchant identifier prior to fraudulent activity and not associated with a previously reported data compromise event."

So you see this is not about processing transactions at all; this is a fraud prevention tool for issuers to use when they want to commence a fraud investigation.

Over the page, if you go two pages ahead to page 5, {G/17/5} you see under the heading "CPP Data Requirements Fields and Examples", we see the table from which Mr Ross was quoting in his seventh statement, and

we see the data field card acceptor ID, we see the data field description and then the data field overview, and we see the text from which Mr Ross was quoting. It is the second sentence:

"The full unaltered contents of the Card Acceptor ID must be provided without truncation or modification for Visa to process the CPP."

This document is not about information that acquirers have to provide in order to process a transaction, it is the information that issuers have to provide in order to set up a CPP.

If you go back to {G/6/8}, what Mr Ross said in his statement, we see that he correctly quoted from that box we have just been reading, especially that second sentence. He quoted it all correctly except for the last word. He quoted it as necessary for Visa to process the "transaction", when in fact it said for Visa to process the "CPP".

That was a very material misquotation; worse, it may be said, than artful misdirection, to use Lord Wolfson's expression.

Lord Wolfson cited a different Visa rule concerning CAIDs -- he did not take you to it; he gave you the reference -- that needs to be read with Mr Steel's second statement who addressed that very same rule.

I will give you the reference, {F/2/8}, and when you come to look at that you will see that the information that is said to be provided was only provided from 2021 and did not link CAIDs to specific commercial card transactions, because Visa's evidence is that an acquirer can submit transactions without a CAID and still have them processed. Visa does not need the correct identity of the merchant to successfully process transactions.

Could I ask you, please, to go to {F/2/4} and Mr Steel's second statement. Paragraph 10, just the very end of that paragraph, about four lines from the bottom:

"... in order to settle and clear transactions entered into by members of the Visa Scheme, Visa does not use the data fields which identify specific Merchants (such as the Merchant name field and the CAID field)."

If you skip ahead, please, to page 8, paragraph 21 {F/2/8}:

"... Visa does not need to identify individual merchants for the purpose of the clearing and settlement process. The same is true for the authorisation process."

To make this good, Mr Steel exhibited documents to

his statement, but they are confidential and so I have not got time to show you the documents themselves. But I do need to show you Mr Steel's statement in the confidential version, which you should have.

The reference is {ZA2/2/13} and it is paragraph 34.6 at the top of the page:

"When the Acquirer inputs the CAID," says Mr Steel, "there can be data entry issues which flow through to the data they submit to Visa. In some cases, an Acquirer may not even include a value in the CAID field."

Then he gives an example in the spreadsheet exhibited to this of the number of instances that he can identify straight away about the CAID field being -- well, you see what he says, and that gives you an example which he has evidenced by way of his exhibits of the point he has just made.

Mr Ross's second point, the PCRs' second point is that once provided, the CAIDs could be matched to commercial card transactions with little effort using Visa's automated tools and software. Mr Steel and his team have been matching merchants to transactions for years in the ongoing litigation against Visa. If Visa had the tools and software that Mr Ross is imagining, which could make this matching process automated and

swift, Visa would be using them, and gladly. Unfortunately for Visa, Mr Ross is wrong.

Matching merchants to transactions using the transaction data is a manual process even if Visa has the CAIDs.

Now, my learned friend said it is a misdirection to speak of merchant names in this context, which we struggle to understand. For a merchant to know it is in the class, it needs to have its individual CAID and then that CAID needs to be matched to that merchant's commercial card transactions, and it is not in dispute that the scale of the matching task is vast. There are potentially up to 35 million CAIDs to be checked; that is Mr Steel's second statement at paragraph 36, and he is well placed to speak to this. His senior role, Mr Steel's senior role, in Visa is well known to the Tribunal. He explained in his first witness statement that he is also responsible for disclosing interchange fee data to regulators and in litigation. That is his first statement at paragraph 12.

To show the point that even with the CAIDs this matching exercise is extremely complex and uncertain, I need to show you again the confidential version of his statement {ZA2/2/11}.

I will begin, if I may, with a couple of

non-confidential paragraphs before going to the confidential information. Paragraph 31, if I may, to begin:

"... when Visa is seeking to match transactions to a particular 'Merchant', a task my old team was often required to try and complete ..."

Skipping down:

"... there is no single data point that matches 'one-for-one' to a particular Merchant. Visa uses a number of different data points to analyse the data, with each different data point acting as a 'clue' that takes Visa one step closer to being able to identify [the] merchant ... to a certain degree of accuracy ... not necessarily entirely accurately)."

Paragraph 32, he explained:

"... the issues which arise from the fact that Visa is only a data recipient and the Acquirer provides the values for [the] fields."

Skipping down:

"... Merchant names are often the starting point for identifying a merchant in the transaction data when you have no other information. Even if a Merchant were to provide its CAID ... many of the same problems would apply to CAIDs."

To make that point good, skipping down to

paragraph 34, he says:

"There are many issues that flow from the fact that CAIDs are set by Acquirers, which impose limitations on the usefulness of each as a standalone data point. Exhibited to this statement is a spreadsheet that [he] asked [Mr Hester] to prepare that contains ... a sample of Visa's clearing and settlement data which shows ... examples of these [problems] occurring in practice."

At paragraph 34.1 he gives instances where acquirers assign the same CAID for multiple merchants within a corporate group, including those in the UK, and you see the examples he gives in paragraph 34.1.

You see, and he has exhibited the documents which the Tribunal can check if you ever have the time to actually check any of the submissions by reference to the documents themselves, that the same CAID in his sample has been applied to hundreds of different merchants who appear to be in the same, or some of them at least are in the same corporate groups.

Then on page 9 {ZA2/3/9}, we see the same merchants again, but this time with a different CAID applied to them, and that again happens in hundreds of instances. Then from page 14, {ZA2/3/14} the same CAID is applied for a large number of completely unrelated merchants, thousands of them, to page 110. {ZA2/3/110}

Now, faced with that, the PCRs fall back on the argument that the schemes are big businesses, they sell data analytics capabilities in other areas of their business and they should be able to undertake this exercise even if it is complex. There is even, if I may say so, a hint that Mr Steel may not be telling the whole truth in the evidence he has presented to the Tribunal, but of course there is no evidence to actually support such an allegation.

The reality is that the PCR's suggested approach is not feasible even though the schemes are billion dollar businesses. We are in the same position as we were in the first certification hearing, and it is useful in my submission to go back to your judgment in {N/3/61}, paragraph 187.

If you re-read to yourselves your own judgment from 187-190. (Pause)

THE PRESIDENT: Yes.

MR KENNELLY: If the PCRs wish to infer that Mr Steel is now not telling the whole truth, they should have put that to him and cross-examined him, which is of course possible even in a certification hearing, and that has not been done and there is no reason why the Tribunal should disbelieve what Mr Steel is explaining to you in these statements.

Finally, the PCRs' claim that it is for the defendants to perform this extremely complex task but for the purposes of identification for the identifiability requirement, that makes no sense at all. The class members need to be able to identify themselves without the schemes doing this work. It may be a different question of distribution, we will come back to that, but for identifiability, it should be a straightforward process which they can do without accessing schemes' data.

Those are my submissions on identifiability, and I will move on if I may to methodology; methodology, first in the area of Article 101(3) and countervailing benefits.

The PCRs' starting point is that this Tribunal erred in law in requiring them to produce a methodology in respect of matters for which the Respondents bear the burden of proof. Their position on Article 101(3) and countervailing benefits is that they can properly decline to produce any methodology at all, and they rely for that legal proposition on the Court of Appeal's judgment in *Trucks*, at paragraph 102.

In the time available, I do not propose to go to it; that point was not argued as far as I can tell from the judgment. It is true in that case the Chancellor said

at paragraph 102 that the PCR is not normally expected to address each and every point that the defendants could raise, but there was nothing to suggest the PCR was relieved from the duty to produce a methodology simply because the defendant bore the burden of proof on the issue in question.

Of course, in the context of interchange, and commercial cards in particular, Article 101(3) and the linked factual question of countervailing benefits are very important issues.

THE PRESIDENT: Mr Kennelly, are you now using countervailing benefits in the sense you have indicated yesterday, or are you using it back in the Article 101(3) box?

MR KENNELLY: No, they are quite separate, as I said yesterday.

THE PRESIDENT: I wonder when you say they are linked, they may be linked factually but they are not linked analytically, are they?

MR KENNELLY: I hope I said factually when I was characterising them.

THE PRESIDENT: Maybe you did, in which case it is my fault. I just want to be absolutely clear about where you are.

MR KENNELLY: To be absolutely clear, they are distinct.

THE PRESIDENT: Yes.

MR KENNELLY: But even if you are against me on Article 101(3)

I would hope, hopefully we will not get there at all, but if you are against me on Article 101(3) the same factual questions can come back for the purposes of countervailing benefits and the assessment of damages.

THE PRESIDENT: Well, for the purposes of this argument, I would have thought it was more obvious that Article 101(3) was something that required at least some form of methodology, because as you say it is very obvious that it is going to be raised and it has been rehearsed before.

MR KENNELLY: Yes.

THE PRESIDENT: I am not completely sure how countervailing benefits actually plays out because I am not sure -- unless you tell me otherwise -- I am not sure it has been played out in any of the other cases. But if it had, that would be interesting, but I am not suggesting it is not a perfectly legitimate point for you to take. But certainly -- and I do not want to get into a particular debate about the different merits and the different arguments. It just seems to me that I think it was pretty clear after -- I think it is *Meta*, probably, that to the extent that it was obvious that something was coming, the expert should have a go at it. Obviously that depends on the context, and what needs to be done will depend on how obvious it is and how

feasible it is to do anything about it. I think that is probably where we got to yesterday with Mr Bowsher.

So I do not know if that is controversial as far as you are concerned, but if it saves you some time that is where we are.

MR KENNELLY: It does save me time. The point I am making may be stronger for Article 101(3) than for countervailing benefits. The point that the PCRs know what is coming and it is incumbent upon them to deal with it is even clearer for Article 101(3).

THE PRESIDENT: Yes.

MR KENNELLY: I do rely on the *Gormsen v Meta* judgment. The not my problem paragraph is squarely on point and that paragraph, as the Tribunal said, specifically cites issues where the defendant bears the burden of proof.

The question is was it clear that these are the kinds of arguments that Visa and Mastercard would be making, and it is crystal clear from the umbrella proceedings and from our arguments at the last certification application that we would be pursuing arguments of the type that I will come to under Article 101(3) and countervailing benefits.

The PCRs know, know they will need to deal with these issues and you gave them a generous period of time to prepare a methodology to deal with them.

There is no reason to say now that it is sufficient to produce something really thin because the PCRs are not required really to deal with these at all.

On countervailing benefits, Mr von Hinten-Reed has been on notice about the point since the last excursion to this Tribunal in this application for a collective proceedings order. The reference is Mr Holt's first report, paragraph 69 {L/13/24}.

But turning to what the PCR says about Article 101(3) and Mr von Hinten-Reed's fifth report, could I ask you to turn that up, please. That is {D/33/54}.

Before we get into what he does say, you will see that Mr von Hinten-Reed completely ignored the major countervailing benefit that Mr Holt had previously raised in relation to commercial cards: the fact that many of these proposed class members, these merchants will have used commercial cards themselves, and therefore to the extent that MIFs are passed through to the card holders, they would have received those benefits themselves, and that is a countervailing benefit from card usage. Mr von Hinten-Reed does not address it at all.

Turning to what he does say at page 54 and paragraph 158, he notes that for the purpose of

Article 101(3), I am looking at the very bottom of 158, the process necessarily requires empirical evidence. Therefore he will review and assess the validity of the empirical evidence. Where is it going to come from? Provided by the schemes in support of its efficiencies claims.

Then page 56, and I will move through this quickly if I may, for countervailing benefits, paragraphs 169-171, about halfway through 170 he gives an example that {D/33/56}:

"... due to lower MIFs, issuers and/or cardholders would switch to the more expensive payment scheme such as ... Amex ..."

Then 172, he says:

"At this stage of the proceedings, beyond the possible Amex example ... I am not aware of any claims that there are countervailing benefits."

So the only countervailing benefit that he can think of is Amex, and that is, in view of the evidence that he would already have seen, just not credible.

The costs that merchants save when customers use cards are not limited to Amex issues.

Mr von Hinten-Reed himself is aware of the arguments we have run about the higher costs of cash and the higher fees charged by PayPal, Klarna, Clearpay, all of these

costs merchants save when cardholders use cards.

Then the methodology itself, page 75, paragraph 284. Mr von Hinten-Reed sets out the conditions under Article 101(3) at 284. Page 76, paragraph 288-291 he sets out what the Supreme Court said about those requirements for Article 101(3).

But up to 291 we still have not got any methodology. These are just the requirements, the legal requirements that would apply to any methodology. He has not yet told us what methodologies he would apply in order to comply with these requirements.

Let me move on to page 78, and we see finally the actual methodology at paragraph 297 under the heading:

"Methodology for assessing a claim that the commercial card MIF could satisfy the exemption conditions."

We look to see what he says, but again, it is just the requirements, as I think Mr Frazer observed yesterday.

So how does he propose to test whether the MIFs created these incentives or not, whether the issuers would have acted in the same way absent commercial card MIFs, whether the commercial card MIFs were indispensable? He does not mention at all how he would deal with claimed efficiencies that the schemes will

raise, will certainly raise in relation to these MIFs.

It is not a secret that this debate will happen if there is to be a trial of the Article 101(3) issues. The exemptable level of MIF is a major area for debate, and he suggests the evidence lies with the schemes exclusively, and that is true up to a point. The schemes or the issuers will have important evidence on the link between the MIFs and the various actions that issuers take, which we say ultimately benefit merchants. But if we are right that there is such a link, the merchants are the critical source of evidence as to the extent to which they benefit: what more expensive payment methods they would confront if cards were used less, what benefit is to be obtained from contactless payments, for example, as opposed to the alternative methods that cardholders would employ, and the Tribunal will have well in mind Mr von Hinten-Reed really does not propose to obtain any evidence from the opt-out class members. It will all have to come from these illusive opt-in class members to which I will return.

Turning then to the countervailing benefits at page 79, skipping back, I am going paraphrase para 303-306. He notes that the schemes say absent commercial card MIFs, issuers have made these less attractive, and Amex would benefit to the overall

detriment of class members.

He does not address here either the other claimed benefits that the schemes say merchants receive and he does not address the fact that these proposed class members are themselves users of commercial cards and get rewards and other benefits.

At paragraph 307, we see what he says about the key issue, but he sets out here the most basic questions: whether the Amex fee would remain changed, whether switching would occur, whether the Amex fee would fall in line with reduction in the MIF. But this is a methodology statement. How does he propose to answer these questions? There is nothing.

Then at paragraph 209 he refers to the Australian experience as a good natural experiment because commercial card MIFs were reduced in Australia. It is not a good natural experiment, for the reasons set out in Mr Holt's second report.

I would ask you to go to that briefly, if I may, {F/43/25}, paragraph 75. At paragraph 75 Mr Holt is addressing Mr von Hinten-Reed's reliance on the Australian interchange fee regulation. He says it does not work for assessing countervailing benefits for three at least reasons. 75(a):

"[it] did not apply solely to commercial cards but

to weighed average interchange fees for credit and for debit cards;

"[It was a] reduction rather than the elimination of weighted average MIFs; and

"[It] was followed by the introduction of high commercial card MIFs, [because] the weighted-average nature of the cap allowed for some MIFs to be higher than the cap ... "

The average commercial MIF in Australia actually went from 0.91 to 1. 80, far above the weighted average benchmark.

At 76, halfway down:

"With the introduction of ceilings, commercial credit card MIFs were capped along with all other credit card MIFs ..."

But that was only moderately above the typical commercial card MIFs.

Then 77, importantly, the Reserve Bank of Australia eventually regulated part of Amex's business.

This is not nitpicking with the validity of the Australian comparison, it just does not work at all. This is the only concrete example Mr von Hinten-Reed offers in the absence of any methodology of his own.

Moving on then to what he did in his sixth report, Von Hinten-Reed 6, {G/33/35}, "Responding to Dr Niels

and Mr Holt: exemption", under the heading there.

To paraphrase, he is suggesting in the paragraphs that follow there is no need to deal in any detail with Article 101(3) or countervailing benefits because he says the schemes' arguments are hopeless, having failed before in the European Commission and the English courts for lack of evidence; a point you have seen again in PCRs' skeleton argument. That is the thrust of what he goes on to say up to paragraph 183.

These decisions which he cites here did not concern commercial cards, but in any event his analysis is obviously wrong. In 2002, as this Tribunal knows very well, Visa actually obtained an exemption decision for its EEA MIFs, each of the Commitments decisions that we discussed at length in Trial 1 2010, 2014, involved an acceptance by the Commission that the Article 101(3) arguments were at least strong enough on Visa's evidence to take no further action. In England in the Court of Appeal in *Sainsbury's*, which is positively cited by Mr von Hinten-Reed in paragraph 183, that does not support his argument against Visa at all, and could I ask you to go to that.

We positively rely on that judgment for this point -- that is {J/5/62} -- because my learned friend Mr Bowsher says, oh, well, we have got no idea what is

coming, we have no idea what is coming, so you cannot expect us to deal with it.

Mr Bowsher may be forgiven for saying that, but Mr von Hinten-Reed was in this trial, in *Sainsbury's*. He had to deal with these points himself. He can hardly say he did not know what was coming.

Page 62 deals with, at paragraph 279, Mr Justice Phillips' approach to the evidence, and I would ask the court, the Tribunal to read from 279 to 281, then 284 and 287, please. (Pause)

THE PRESIDENT: Yes.

MR KENNELLY: Then page 67, paragraph 305. So {J/5/67}, paragraph 305.

THE PRESIDENT: Yes.

MR KENNELLY: So it will not surprise the Tribunal that I positively rely on this. Far from the Court of Appeal in *Sainsbury's* saying that the exemption argument fails for lack of evidence, the opposite was the conclusion. They referred to all of the Article 101(3) evidence that we had before the first instance and they said that it needs to be tested on a remitted hearing and it had not been fairly summarised by the trial judge. Perhaps I was unnecessarily generous to Mr Bowsher to say he might be cut more slack than Mr von Hinten-Reed. This judgment has been around for some time. Anyone reading it could

see precisely the kinds of arguments Visa was going to run in an Article 101(3) trial and instruct their experts to address it for the purposes of the methodology in a collective proceeding application.

Back to Mr von Hinten-Reed then in his sixth report, {G/33/38}.

THE PRESIDENT: We should take a break at some time, Mr Kennelly.

MR KENNELLY: I am happy take a break now.

THE PRESIDENT: It depends where you are with this. I do not want to stop you.

MR KENNELLY: Not at all. This is a perfectly appropriate place to stop and I am doing okay for time.

THE PRESIDENT: Good. Excellent. We will rise for 10 minutes.

(3.08 pm)

(A short break)

(3.20 pm)

THE PRESIDENT: Mr Kennelly.

MR KENNELLY: Thank you.

So we were in Mr von Hinten-Reed's sixth report, {G/33/38} and at paragraphs 185-187 he sets out the requirements, at 189 he quotes from the Supreme Court and refers to two critical stages for establishing the causal link; first, that the default MIFs incentivise

issuers to take the steps they would not otherwise have taken; and second, that the steps taken did indeed increase usage or increase efficiencies.

Then he goes on at 191 and 192 to describe what the evidence might show, but the meat is in 192. Before we get into paragraph 192, this is obviously the question of whether the issuers' actions generated efficiencies for the merchants and to what extent, and you have my point that this is all based on evidence that the merchants hold, the benefits they obtain and the costs they avoid. So we ask ourselves what methodology does Mr von Hinten-Reed propose for this.

Skipping about three lines down, he says {G/33/39}:

"I can only make a number of suggestions, although I could not be confident that these suggestions would provide the standard of evidence that is required:

"It might be possible to obtain evidence of what happened to card use following the IFR. I am not aware of any studies, however, Dr Niels and Mr Holt may be. If this was the case, experts could assess the evidence and seek to determine if it could be applied in the context of commercial card MIFs.

"I am aware of analysis of effects of the reduction in interchange fees in Australia. Again, experts could review this evidence to assess the extent to which any

inferences could be drawn about the effect of lower commercial card fees in the UK."

At 193 he says they are only suggestions.

Then he mentions that MIT-MIF as an issue under Article 101(3) on paragraph 197 on page 40 {G/33/40}. So he sets out what the MIT-MIF is and he refers at paragraph 197 to the European Commission's report of 2015 estimating a MIT-MIF for the purposes of its enforcement cases. So we ask ourselves again what methodology does he propose for the MIT-MIF, and we see it at 198 although he describes it here in the context of countervailing benefits:

"To estimate the transaction cost savings in the context of a [countervailing benefit] for opt-in claimants, a single merchant, or a sample of merchants, could be selected to estimate their MIT-MIF. Evidence on the cost of card and cash transactions could be obtained ... Alternatively, the original Commission estimates could be used ..."

At footnote 114 we look to see what he is referring to and it is a survey of merchants' cost of processing cash from. 2012. 2012 tells you how old those Commission figures are.

Again, in the context of taking material from the opt-in class, that is it. A single merchant, a sample

of opt-in merchants, and we will come to what that is likely to involve, or the Commission's figures from a study that was made in 2012 and, of course, focuses on cash and in a period which largely pre-dates the growth of contactless payments.

Then at paragraph 200, for the opt-out class members, remember a class of about a million merchants according to Mr von Hinten-Reed, he says there will be a proxy estimate of the transaction cost savings when a card is used and these could be provided from, the proxy for the million merchants will come from, the opt-in class, the Commission estimates discussed above, or (iii) an estimate from the Umbrella Proceedings.

So beginning with the idea of taking a proxy from the opt-in class, there is obviously a tiny number of those, a tiny number of merchants even expressing an interest in being in the opt-in class, and I will come back to the significance of that when I look at suitability.

But in any event, these opt-in class members when they arrive, if they do, not come close to covering the different sectors of the economy needed for the opt-out class, and they are of course generally totally different in size from the opt-out class members. He proposes no information or disclosure from the opt-out class

members, and then as an afterthought, in my submission, he mentions an estimate from the Umbrella Proceedings, and I will come back to that when we look at suitability and the role of the Umbrella Proceedings.

But that is it, and in our submission it does not come close to a blueprint to trial for the purposes of Article 101(3) or countervailing benefits. What you see here is not, in our respectful submission, credible and in particular the idea that a MIT-MIF could be derived from the evidence of a single merchant or that it would be appropriate to rely on studies that are entirely out of date does not satisfy even the low bar set in the process test.

I will move on then, if I may, to methodology and merchant pass on. For this I would ask the Tribunal to go back to its own judgment {N/3/41}, and the Tribunal's analysis begins on page 42 from paragraph 111, where you cite criticisms made by the schemes to what Mr von Hinten-Reed had proposed on this question, albeit at a late stage. Our criticisms included the fact that participation in the proposed sampling process would be onerous for the opt-in class members. The number of merchants required to participate, at least at the first more general sampling exercise, would be significant. You referred to a thousand class members. Merchants

will be unlikely to commit to participate in this way. That would in itself undermine the collective proceedings by disinclining merchants to register to join them and the sample approach was disproportionate and inconsistent with the approach which the Tribunal had indicated it favoured in the Umbrella Proceedings, which were more generic and expert-led.

At page 51 of the same judgment {N3/51}, could you go, please, to paragraph 147 where you refer to what the Tribunal had said in the Umbrella Proceedings. At paragraph 148, you refer to, the second line:

"The PCRs have in fact produced a methodology for both aspects of pass on (acquirer and merchant). The problems with those methodologies, as we discuss further below, are more about the likely consistency with the Umbrella Proceedings, and the degree of realism and practicality in the proposals".

I will make the submission that those problems have not gone away.

If you go, please, to page 57, and paragraph 172, {N/3/57} you said the merchant pass on is an issue of considerable complexity. Skipping down:

"It is however notable that the methodology produced by the PCRs [by Mr von Hinten-Reed] for the Umbrella Proceedings is not entirely consistent with the approach

that the Tribunal has indicated it favours in the MIFs Pass On Judgment ..."

Where the Tribunal endorsed the schemes' proposal to demonstrate pass on, Visa's proposal was to demonstrate pass on by the use of econometric evidence and by relying on existing studies of pass on.

The Tribunal expressed scepticism that the pass on defence can be established by claimant-specific evidence adduced from a sample of many thousand claimants, which approach it described as a disproportionate and frankly hopeless way of deciding the question of pass on and indicated it would be sympathetic to tightly controlled expert-led disclosure.

So with these words ringing in his ears we turn to see what Mr von Hinten-Reed proposed in response to this judgment, and we can go to his fifth report first {D/33/118}. At paragraph 507, concluding on the role that he -- the role of economic theory, he says:

"The question, therefore, which needs to be addressed using empirical evidence is which of the options, or combination of options, a merchant (or merchants) chose when responding to the cost pressure created by the MSC overcharge."

At page 122, paragraph 530, he says, first bullet:

"Economic theory does indeed predict that variable

costs are passed on ... it is reasonable to describe the MSC as a variable cost. But as demonstrated above, what matters is not how economic theory classifies costs, but how merchants treat costs.

"The relationship between prices and variable costs is a strong theoretical and empirical proposition, but it is a proposition that needs to be tested in the specific context of the MSC overcharge."

I add per merchant.

At 532, the same page, he says:

"It can be seen that this line of reasoning [the theoretical line of reasoning] is dependent on the unproven (implicit) assumption that the MSC and wholesale costs have the same impact on price as both are variable costs ... while this may be a valid assumption for some merchants; it would need to be established using (relevant) qualitative class member evidence."

At 533, reference an example, a hypothetical example:

"... reference was made to a series of econometric studies. This highlights another area where there is scope for misunderstanding: that there are numerous studies of wholesale costs being passed on does not change the fact that no inference can be made about

whether the MSC was passed on. In each case, the study is of a different cost than the MSC ... so in each case, no inference can be made about pass-on of the MSC. It follows that no inference can be made about pass-on of the MSC despite there being multiple studies showing pass-on of a different costs"

Page 125, paragraph 546. Therefore in the absence of relevant and, in many cases, detailed class member evidence it is not possible, it is impossible, he says, to assess either the fact or extent of pass on under the MSC. No one can accuse Mr von Hinten-Reed of being ambiguous in what he is saying here.

Paragraph 548, the same page {D/33/125}:

"Class member evidence is likely to be of critical importance when assessing the fact of pass on, and depending on the nature of the causal link from the identified pass-on mechanism, it may be necessary for the assessment of the extent of pass-on."

Page 126, paragraph 56, near the bottom {D/33/126}:

"In relation to proportionality, what I am proposing is a methodology which could be used to provide an assessment ... of pass-on that could be applied to each member of the opt-in class. This in turn could be used to assess pass-on for the opt-out class. This will inevitably involve both: (i) some degree of sampling

with inferences drawn for one group of class members on the basis of evidence collected from separate groups of class members ..."

Then at para 558 he goes on to contrast the work involved in getting evidence from individual merchants and the costs involved in providing updated econometric studies, and he, to paraphrase, says that it is cheaper and more effective to get individual class member evidence rather than updating the econometric studies.

At paragraph 559 {D/33/127}:

"... in contrast to a class member evidence approach [this is on page 127], where the evidence is available, it seems unlikely that the gaps in the econometric evidence could be addressed in any practical timeframe (and ... without substantial cost)."

564 on the same page:

"... it is not necessary to rely on one evidence source only."

This is important because he is addressing the criticism that it is crazy to rely primarily on individual class member evidence, and he says, well, class member evidence and econometric evidence should not be viewed as substitutes, but rather as complements. But let us see how he complements, how he sees them interacting:

"... where it can be established on the basis of class member evidence that a class member (or group of class members) treated the MSC as a direct input into pricing in a given market it may well be that econometric evidence could provide the most appropriate evidence to assess the extent of pass-on."

So it has a role but it is in relation to extent, not the fact of pass on.

So the subjective evidence as to how the merchants themselves treat the costs is critical, indispensable for the exercise.

That is all consistent with what Mr von Hinten-Reed said in the pass-on eventual hearings in the umbrella proceedings, how the merchant treats the cost is the critical factor in the assessment of merchant pass-on.

The Tribunal has the point that we made in the first hearing that such evidence just is not informative. There are too many mechanisms through which pass on can occur, and witness statements from individual merchants about how they chose to treat costs will contain subjective views necessarily, and in any event business can pass on a cost without making a conscious decision to do so.

The Tribunal has the point from a legal perspective. There is no need to prove that a conscious decision was

taken to pass on a cost. In that context, legal causation is straightforward.

Now, I appreciate that the Tribunal is still deciding exactly what approach to take to evidence on factual causation. But as you see here and as we will go on to see, and from Von Hinten-Reed 5, his evidence is miles away from where that debate has moved.

THE PRESIDENT: Can I ask you a question that I asked Mr Bowsher, I think, about what the output of a merchant Pass-on analysis should be in these collective proceedings if they were certified.

Do you agree that -- I think this is probably playing to the crowd, but do you agree this is more likely to be a market-wide figure, or at least a sector-wide figure for the sectors that are weighted under the -- I mean, there is no sense here that we are trying to work out, as we are in the umbrella proceedings, what is a proxy for individual positions. This is about what is the right number to apply to the aggregate damages, is it not?

MR KENNELLY: Of course, which is why it has to be market-wide for the opt-out class. Obviously. That is such an obvious statement that the fact that it is not accepted by Mr von Hinten-Reed at this stage does question whether he has put forward a credible

methodology for merchant pass-on even by the lower standards set in the process test.

This is one of those rare cases where it is necessary to go through the expert report, and it was telling Mr Bowsher did not do so, and see just what is said. Because particularly when we come to umbrella proceedings, it is not a realistic way to proceed and it is not an efficient one. It is precisely flawed for the reasons that the Tribunal gave in the first judgment.

THE PRESIDENT: I think probably it is fair to say that there are some elements of what Mr von Hinten-Reed is saying which reflect some of the approach in the Trial 2 preparations, in the sense that we are trying to -- triangulate is the expression the President has used, between some very high-level econometric studies and then some more specific studies if they can be obtained. But what we are not doing is seeking subjective individual merchant evidence unless that is necessary in order to understand the data.

MR KENNELLY: Indeed, which is why I said even though those kinds of questions are still up in the air, Mr von Hinten-Reed is miles away from that. He is saying that merchant-specific evidence as to their conscious choice as to how to treat costs is critical, indispensable for the merchant pass on analysis. Look

at the evidence that he says he needs for that, because my learned friends understandably try to do a -- I think a soft shoe shuffle away from what Mr von Hinten-Reed is saying here. But they are stuck with the words he is using, and we look to see what evidence he says he needs and we see at page 132 at paragraph 599 {D/33/132}:

"... I propose to create a questionnaire that explores the opt-in class members' approaches towards price and budgeting. The sample of class members is constructed such that it covers a wide range of class members ..."

We will see if that is realistic in view of what we know so far about the opt-in class.

Then basically insights from the questionnaire:

"... key factors that influence merchants' pricing decisions and [must be individual] cost management processes. Using these factors, I will group respondents based on commonalities of factors and select a subset of respondents from each group to provide further information. The selected merchants will be asked to provide more extensive information.

"Third, based on insights from [those stages he wants] categories of documents that are the most likely to contain evidence that enables a full assessment of the fact and the extent of merchant pass-on."

We know what kind of evidence he has in mind from what he said. Then a subset of that will be the test claimants, and from them he wants targeted disclosure and witness statements to allow their subjective conscious choices to presumably be tested.

Then --

THE PRESIDENT: Mr Kennelly, I do not want to rush you but I do not think you need to get into the detail of what he says. We can go back and read it. I think the point you have made is very clear. I do not want you to dissuade you from picking out anything you think is particularly important, but --

MR KENNELLY: There is much more.

THE PRESIDENT: -- I am just conscious of the time, and I know you want it deal with suitability and I do not want to end up with Lord Wolfson being unduly pressed. I am in your hands, but I do not think you need to do this in order to make the points you have already made. By all means keep going if you wish.

MR KENNELLY: First of all, I certainly will finish with enough time for Lord Wolfson to make his reply. He has earned his reply and he will not be squeezed. I will be finished on time.

THE PRESIDENT: If that is all common ground, I am not going to push you at all. I do not think you need to get into

too much of the detail. I think you have made the point, and if you want to give us references we can come back and look at it.

MR KENNELLY: I will give you the references because my submission is that this is it. In a way, in order to say to you that this statement fails the process test I do need to show to you in detail, because it really is for me to explain to you where the failings lie and that is why I have taken you to it in some detail.

THE PRESIDENT: I think the key points you make, as I understand your submission, I think there are two points really, are there not? One is he is embarking on a type of analysis that might be appropriate if it was one single claimant like Sainsbury's bringing a case. But it is not appropriate if you have hundreds of thousands of claimants bringing a collective action. I think that is your first general point.

MR KENNELLY: Yes.

THE PRESIDENT: The second is that it so happens that is completely inconsistent with the Umbrella Proceedings, which is where the action ought to be in relation to this, as per my discussion with Mr Caplan.

So if those are the submissions, I have those and you are very welcome to give us extra bits or pointers to them, but I just want to make sure you are clear we

have got those.

MR KENNELLY: I am obliged and I will skip ahead and pick out a few highlights.

THE PRESIDENT: Yes.

MR KENNELLY: Page 138, you see the kinds of documents that he intends to get; {D/33/138}, paragraph 637. I shall not read. The Tribunal can see the documents that he wants to obtain. Again, this is all relevant to the burden that will be placed on the -- echoing the observation which the Tribunal made in your own judgment, the burden that would be placed on opt-in class members to produce this, this has to come from them, they will be deterred by this, is it even realistic, is it consistent with where the action is on merchant pass on in the Umbrella Proceedings?

Then moving on to page 147 {D/33/147}, there are numerous places where he says that class member evidence is critical, indispensable; econometric evidence might be useful to the extent, not for the fact of pass on.

147 he says at paragraph 709, because he is pressed to consider alternatives in view of the criticisms made by Mr Holt and Dr Niels, and then he says at 709:

"An alternative approach that could be considered where there were gaps in the evidence ... is to assess whether insights could be gained from econometric

studies."

It is useful to see this because of the inconsistency with the approach he has taken in the earlier very detailed sections on the necessity of having evidence as to the individual merchants' choice. He says:

"Suppose it is found that:

The MSC is treated as an overhead cost for opt-in class members in sector A and the fact of pass-on can be established based on the provided evidence. Sector B is represented in the opt-in class."

So he is explaining, and the Tribunal has this from him in another context already, if it is treated as an overhead cost it is less likely to be passed on.

Then he says:

"Based on this evidence, it is possible to estimate the extent of pass-on in sector A, but not for sector B."

Then he says:

"Existing econometric studies for sectors A and B find that pass-on is, on average, 10% higher in sector B than in sector A," and he uses that to estimate the extent of pass on in sector B.

But he says himself:

"... ignoring that these estimates were likely found

for costs that were treated differently to the MSC."

So in this example he is entirely ignoring the question of whether the merchants in sector B treat the MSC as an overhead cost or input cost. So the factor that he says is the key factual question for merchant pass on he will put aside in this example. It is entirely inconsistent with this analysis which goes before it. On his own approach this alternative makes no sense, and he does not address that conflict himself in any way.

You have my point that the whole methodology depends on a huge number of merchants opting in to give him a starting point and it needs sufficient opt-in class members from a sufficiently diverse set of sectors that will allow him to determine merchant pass on for every single separate sector of the economy. That is his approach.

Now, what is the prospect of getting thousands of opt-in class members that will allow him to do these assessments for each sector of the economy which then will be mapped on to the opt-out class? I would ask to turn to Ms Williams's third statement {F/5/24}, paragraph 78. This is the latest position, the latest list of merchants the PCR described as having expressed an interest in joining the opt-in collective proceedings

is in a schedule. The Tribunal will recall that 24 of the 47 -- there were 47 merchants which had expressed an interest, 24 of them have settled. When we got their identities thanks to the Tribunal's order we found that a further three had active claims in the umbrella proceedings. So there are 20 merchants who might potentially sign up, although none of them has actually, actually signed up or even said that they remain interested despite the large changes to the scope of the claim and the criticisms of the PCRs made in the Tribunal's initial judgment.

You see at paragraph 79 that these merchants are concentrated in the travel and hospitality sectors, and obviously those are sectors where the interregional MIF claim might have been particularly interesting. Now dropped.

It is common ground that since the judgment in June 2023, zero additional merchants have even expressed an interest in taking part in the opt-in class, and even those few who have expressed an interest have not been, as far as we can see, provided with a consolidated update about the changed scope of the claim. There has been no mailshot sent out to them explaining that interregional MIFs have been dropped. That is Ms Williams' paras 49-51.

1 The future hoped-for group of opt-in class members
2 is indispensable, as he says himself, to
3 Mr von Hinten-Reed to enable him to assess individual
4 cost decisions by individual merchants across each
5 sector of the whole economy. He proposed to extrapolate
6 this tiny group of merchants, and our submission is
7 that, as I will come to on suitability, it is likely to be
8 a small group that ever opt-in, he needs them for the
9 purpose of mapping on to cost decisions taken by up to
10 a million merchants in the opt-out class. As I say,
11 that is hopeless even by the lower process standard.
12 Going back to Von Hinten-Reed 6, please, we will see
13 what he says in response to this. {G/33/66}, para 337.
14 THE PRESIDENT: I think we need 66.
15 MR KENNELLY: {G/33/66} and paragraph 337 and 338.
16 So he is referring here at 337 -- I will skip ahead
17 to what Mr Holt says and the relationship between
18 Mr von Hinten-Reed's analysis and the umbrella
19 proceedings. If you go to page 68, about halfway down
20 the first bullet he referred to the fact that Mr Holt
21 alleges that Mr von Hinten-Reed's approach is not
22 aligned with the position of the Tribunal.
23 He says this {G/33/68}:
24 "I would note that while it is reasonable for
25 the Tribunal to expect me to take account of

developments in the Umbrella Proceedings, it would not be consistent with my responsibilities as an independent expert to simply provide playback to the Tribunal what I thought their preferred approach was."

Then he says it is also not clear that his methodology is inconsistent with the approach being taken in the Umbrella Proceedings, and the Tribunal is best placed to assess that claim.

Then page 69, he promises to consider further development of his merchant pass-on methodology.

Paragraph 343, for the reasons set out in his fifth report, which he maintains, it is necessary to first establish how the MSC is treated, and specifically if it is treated as a direct input into pricing or as an overhead before it is possible to analyse whether and to what extent an overcharge is passed on. Once it is established how it is treated, there is a range of approaches to assess pass-on, the extent of pass-on, and he lists them there.

He says at 345 {G/33/69}:

"I have acknowledged that it would not be possible to conduct the same level of detailed analysis for every claimant in an opt-in class ..."

He describes his process for gathering evidence.

346, his view remains that:

"... the pass on estimates derive from opt-in claimants can be used as proxy estimates of pass-on for the opt-out class."

He stands by his position, and he says at 347:

"I will, as noted above, continue to monitor developments in the Umbrella Proceedings, and as new evidence and methodological insights emerge, I will, where appropriate, adapt my methodology to take account of these. In addition, if I am instructed to adapt my methodology to take into account developments in the Umbrella Proceedings, for example by placing either more or less weight on a particular type of evidence, I can readily do so."

So stepping back, we take from these paragraphs in section 8.7 first that he stands by Von Hinten-Reed 5 and that is fundamentally flawed for all the reasons that I have explained. But in this final paragraph, the language needs to be examined very closely because heavy reliance is now placed upon it by the PCRs because it suggests a willingness to adapt following decisions in the Umbrella Proceedings. But Mr von Hinten-Reed's language, as I say, is carefully chosen. He does not commit to adopting the determinations in relation to a proper approach to methodology for merchant pass-on in the Umbrella Proceedings. He reserves the right, in my

submission, to not adopt those determinations and to insist on his own preferred methodology even if it is rejected in the Umbrella Proceedings, and that is consistent, and I will come to this, with the PCRs' position before you in this hearing. I will come to this on suitability, but they are, like Mr von Hinten-Reed, hedging their bets.

In our submission, the concern is that they want to be able to cherry-pick what the Tribunal decides in the Umbrella Proceedings and run a modified and different case, if necessary in a separate trial. They want to have that option and they are reserving their rights to do so.

That is all I need to say, or all I can say in the time on merchant pass-on and methodology, and I will move on, if I may, to suitability. For suitability I am going to make some short points about the opt-in class only, then some points about the opt-out class only, and then address the Umbrella Proceedings, because there are suitability issues that arise for both the opt-out and opt-in class when we come to look at the role of the Umbrella Proceedings.

For the opt-in class, I will address you, if I may, on the relative suitability of the opt-in collective proceedings in view of the reduced scope of the claim

and the extreme lack of interest and the failure to demonstrate any interest on the part of potential class members. Because there really was very little interest by potential class members even when the interregional MIFs were included, and even that little interest, as you have seen from paragraph 79 of Ms Williams' third statement, came from merchants concentrated in the travel and hospitality sectors.

We can recall what is envisaged for the opt-in collective proceedings and how many are estimated to be in that class, and for that we need to go back to Mr von Hinten-Reed's fifth report, {D/33/32}.

So he is estimating the potential scale of the opt-in class, and what numbers are we looking at for the purposes of the opt-in class? At page 33 we see estimated figures at paragraph 74, halfway down the paragraph {D/33/33}:

"Based on the information I reviewed, it suggests a range of 1,471 to 1,940 potential class members," depending on the factors that he sets out in the rest of that sentence.

Now, the short point that I wish to make is that if these merchants wish to recover in respect of commercial card MIFs, they certainly could and would do so through the Umbrella Proceedings. For that, I would ask you to

go to Ms Williams' third statement again {F/5/4}, paragraph 13, because it was suggested, I think by Lord Wolfson, that really any claimant that was going to join the Umbrella Proceedings has done so long ago and there is little prospect of any more joining.

But we see in paragraph 13 that claimants can still join Umbrella Proceedings, that has not changed, and since Ms Williams' second statement the iHerb claim became a host case in the Umbrella Proceedings. The most recent additions to the list of host cases are five claimants which were added to the umbrella proceedings on 30 November 2023, and they have had their claims stayed according to the procedure developed by the Tribunal.

At paragraph 16 over the page, we see the updated list of active claimants and there are, we see at the bottom of paragraph 16, 1,591 UK entities in the active list up. At paragraph 19:

"Since [Ms Williams' second statement], Visa has resolved claims relating to commercial card MIFs made by ... a further 1,134 entities," including 987 UK entities.

In fact most of these current claimants are UK businesses that would fall within the opt-out class because of their size. They have joined the umbrella

proceedings, they were able to do so and did so even though they are in fact smaller than the merchants envisaged for the threshold for the opt-in class.

We see the types of merchants. It is an important point, because the story that you are being told by the PCRs is that the opt-out class is designed to capture small merchants or merchants who could not otherwise sue; the opt-in class are for the merchants who cannot be expected to know enough and be willing to act positively in their own interest.

But that is belied by what has happened in the Umbrella Proceedings. If you look at the table of merchants that have joined recently in the umbrella proceedings and merchants that are still in the active list, you see in {F/6/10}, and just taking random examples, substantial businesses, hotel businesses. We see Chewton Glen, there are some more familiar hotels like the Strand Palace, that is on page {F/6/22}.

Now, they are likely to fall within, well, we know because we have their financial details in the bundle, they would fall within the opt-out class on the PCR's approach even though they are obviously very substantial businesses, and there are businesses here, UK businesses, that would seem to be big enough to fall within the opt-in class. {F/6/15}, near the top of that

page, we see Jet2, we know them because we had them in the Trial 1 proceedings.

They seem to have a turnover of above £100 million based on public information, and on page 22 {F/6/22}, the top of the page, about three rows down, we see Sony, Sony Interactive Entertainment Europe Limited, and a sister company and they are all pursuing commercial card claims, among other claims, in the umbrella proceedings.

The question that the Tribunal needs to ask is why would a UK business with a turnover of more than £100 million, which is very large indeed, want to opt-in to the PCR's proposed proceeding for commercial cards only? Any, any card accepting business of that size is likely to accept not only commercial cards but also consumer cards, and consumer cards are likely to be a very large, if not larger part of their business. Why would they sign up to a claim that is focused only on commercial cards? If they wanted to do something positively they would join the Umbrella Proceedings and have a claim in respect of all of the cards they receive.

The PCRs have put forward virtually no evidence to answer that question. In Mr Allen's fourth statement -- I will not go to it; I will just give you the reference

{G/2/13} -- he explains that the PCRs waited until January of this year to restart what they call their book building efforts. Ostensibly that was because they wanted to wait until their funding position was clear.

That was three months ago. Mr Allen's witness statement was filed on 20 March and there is no further update in my learned friends' skeleton as to any other merchants expressing an interest, even an interest, in joining the opt-in claim.

All that Mr Allen can say, repeated by my learned friends, is that in these months he has compiled two databases of prospective opt-in members and he expects, I quote, "that this will lead to active discussions".

We infer from that that there have been no active discussions with any potential opt-in class members for these newly defined opt-in claims, and -- other than the webinar. Mr Piccinin reminds me other than the webinar, which we did ask about and heard about from my learned friends, and we received zero clarification as to what actually happened or was involved in that in the response that we received last night.

For the few who have originally expressed interest in the claims, you have my point that they have not been updated about the scope of the claim and the fact that

interregional MIFs have been dropped.

This is all extremely unsatisfactory in view of the indication that the Tribunal gave the PCRs in the judgment as to what you expected to see when they came back before you today. They cannot just turn up and ask the Tribunal to bless the creation of an opt-in claim without showing there is substantial real interest in it.

My learned friend Lord Wolfson said, well, we cannot formally book build until the matter is certified and it would be odd, he said, to do so before certification. That is, with respect, not right and we know that from the *Trucks* case, and the contrast with the *Trucks* case is striking because, as the Tribunal knows, in that case by the time the CPO application was filed, at the point of filing the RHA had formally signed up three-and-a-half thousand operators. By March 2021, just before the applications were heard, that had risen to 15,000 committed merchants and operators. That is paragraph 25 of the Court of Appeal's judgment in *Trucks* {P/14/10}.

In truth, it should be easier not harder to reach UK card-accepting businesses with turnover of more than £100 million. It is not hard to find them or contact them. It should be very easy to reach them and

discuss their interest if the PCRs are generally committed to doing that.

The fact they stand before you today at a second CPO hearing without a single class member formally committed is truly telling. That is, we say, below the certification bar and we say we have some sympathy for the PCRs in that respect. It is not hard to see why it has been so difficult to generate interest among potential class members for the opt-in class. Anyone who wants to pursue a claim can do so through the Umbrella Proceedings. They have been well publicised, and claimants continue to join them and they are proceeding, as the President noted at the end of Trial 1, according to the Tribunal's plan.

There is no need for an expensive add-on through the opt-in collective proceedings. Even if it tracks the Umbrella Proceedings, which my learned friends were hinting at in their submissions, even if it did that, it still does not add anything material to the umbrella proceedings.

I will move on, if I may, then to the suitability, the specific suitability issues for the opt-out class and I will focus, if I may, on the revised class definition.

Before I get into the suitability issues, I just

want to note that for the avoidance of doubt we adopt my learned friend Ms Tolaney's submissions on behalf of Mastercard as to the legal point, the fact about the Act requiring class members to have a claim, the point that was extensively canvassed and discussed between the Tribunal and Ms Tolaney. Visa adopts those submissions and we are splitting the advocacy. I think unless we say otherwise, I think you can assume the points we make, unless otherwise indicated in our submissions, they are to be taken as submissions on behalf of both schemes.

Turning to the suitability considerations though, even if you are against us on the legal point you have Mr Steel's evidence that under the revised class definition the overwhelming majority of the class will have suffered no-loss, and I would ask you to look at Mr Steel's evidence, please, {F/2/14}, paragraph 40.

By reference to the data which he sets out at paragraph 39, he says it suggests that between less than 10% and 25% of merchants in the period between June 2016 and June 2022 have accepted commercial card transactions in the UK. Whereas between 75% and more than 90% have never accepted a transaction with a commercial card in the UK.

As my learned friend Lord Wolfson said, this is not

common ground but the PCRs do not dispute this with any positive evidence of their own. The PCRs say that the fact that even if it is right that only 10 to 25% of the proposed class have suffered any loss, even if that is right, they say it is irrelevant to certification because it can be addressed at the distribution stage.

At distribution they say merchants could be required to provide information as to whether they have engaged in a commercial card transaction. But that massive no loss proportion of the class renders it unsuitable for certification for the following reasons. First, that 75-90% of the class with no conceivable possibility of loss could well be required, certainly on Mr von Hinten-Reed's approach, to provide disclosure or information. Because if his approach is adopted and he receives the, what we would say, unsurprising news that he has not got sufficient option from opt-in class members, he will need it on his approach from opt-out class members.

You have seen in his approach for merchant pass-on places a significant premium on data and evidence from merchants. He said, as you saw in his fifth report, that econometric evidence could never be sufficient in the absence of merchant evidence.

Now, there are two major problems, as I have flagged

already, with Mr von Hinten-Reed's approach in mapping opt-in class members' pricing decisions or costs treatment decisions on to the opt-out class.

First, there is likely, as I said, to be very little interest in the claim from the opt-in class, and second, the small number of merchants who may well sign up will not cover the categories of merchants that Mr von Hinten-Reed needs, and that is just merchant Pass-on.

We will need disclosure on exemption and countervailing benefits too. As you have seen from my submissions and from Mr Holt's evidence, we need those to assess the benefits of card usage experienced by merchants. They will differ between large and small merchants, and that will also ultimately require, if these are certified, at least the possibility of disclosure from opt-out class members.

In view of the proportion of no-loss class members, you are facing a situation where merchants who have no possibility of a claim are having to give disclosure in order to support the methodologies of Mr von Hinten-Reed and, in any event on our proposed methodologies, the need for a Article 101(3) assessment and countervailing benefits.

The second problem -- sorry, and the significance of

the massive no-loss proportion is that even if, as the PCRs say, that is likely only to be required for a sample of merchants that need to obtain disclosure information, where 75 to 90% are in the no possible loss category, it is much more likely they will be among the number required to give disclosure and they will suffer that burden with no possibility of any countervailing gain.

The second problem, and it goes to the point that was made, is dilution of the recovery for the class members who have suffered loss. On Mr von Hinten-Reed's evidence there are about a million merchants in the opt-out class. In the event that the claim is certified and the PCR wins, how are those damages to be distributed? The PCRs say do not worry, we will just make the merchants come forward with a MID or a CAID and that will demonstrate who actually made commercial card transactions, and we can work out how many they made from the information they get from their acquirers. But that process is just unrealistic. For the reasons that Ms Tolaney and I have explained, that information is not easily obtainable.

In order to match merchants to CAIDs and CAIDs to the commercial card transactions, it requires a manual, complex and expensive process. The idea that that can be done for hundreds of thousands of merchants is

completely unrealistic.

In practice, the other route which has been suggested is that a large aggregate award of damages or a settlement sum is reached, and at that point the PCRs will decide how to distribute it. It cannot be by reference to specific numbers of commercial card transactions; you could not work out the volume of commerce for each merger because of the matching problems that Mr Steel described. But also, again, my learned friends will say this if they agree in reply, that we know from the evidence that it is not always the case that larger merchants have larger commercial card volumes of commerce. A large merchant like Tesco may receive fewer commercial card payments, whereas a hotel may receive a lot. So the size of the merchant does not tell you necessarily how many commercial card transactions they receive, and in any event all the practicability points that Mr Steel explained remain valid there too.

So what that leaves as the only realistic outcome is that some general divvying up would have to be imposed, that there will be a pot of money and every merchant will get their millionth or something of that effect, but that outcome does involve dilution. In that process the merchants that had genuine commercial card

transactions will receive far less than they deserve and the merchants that never did any, a fairly large number on the PCR's approach, will receive money they do not deserve and that will be taking damages away from the deserving class members and giving them to the undeserving class members and that is dilution. That is inherent in putting together an opt-out claim for commercial card MIFs.

There is, in our submission, a middle ground because we paid attention to the exchanges between the Tribunal and my learned friends and we know the Tribunal is concerned about access to justice for smaller merchants. That is not a concern we submit because small merchants also have access to justice through the umbrella proceedings, but if you are against me on that point the problem really is the boundary between the opt-out/opt-in classes. It has been set at what we say is a manifestly inappropriate level, 100 million turnover per annum is still even in this day and age a very large sum of money and there is no reason why a business that is turning over even tens of millions or just millions per annum needs the opt-out collective action regime and that is especially true for businesses in the hospitality sector, for whom commercial card transactions will be particularly important and that is

something they are likely to know, they are likely to know that commercial card transactions are an important part of their business.

They should all bring their own claims, businesses earning tens of millions of revenue should be bringing their own claims as those hotel companies have done that I showed you in the table annexed to Ms Williams' third statement. So if you are against me on opt-in suitability, these larger merchants should be in the opt-in class. You need to lower the threshold. Lowering the threshold would have many benefits or at least it would make the PCRs' proposal less bad. It would increase the number of merchants who are available to give disclosure, both particularly for Article 101(3) and countervailing benefits, it would reduce the size and the heterogeneity of the opt-out class which is a real problem in the opt-out class as currently proposed and that would mean the broad axe could be applied more fairly if the opt-out class was less heterogeneous.

So although our primary submission is that you should still not certify any of them, if you certify one it should be the opt-in class obviously and if you certify both, in our submission you should change the threshold and the Tribunal will then ask: well, where do we draw the line and the point that we have put forward

previously and we maintain is our suggestion at least, it is a matter ultimately for you, is the audit exemption threshold which in turnover terms I understand to be £10 million per annum.

Those were my submissions on the specific opt-out class and I will move on then if I may to the suitability considerations and the relationship with the Umbrella Proceedings.

THE PRESIDENT: I want to ask you about timing, what is your timing?

MR KENNELLY: I would say I am certainly -- I have been aiming to finish by 4.30 to give my learned friend half an hour to finish in reply.

THE PRESIDENT: Has that been discussed, that timing?

MR KENNELLY: Yesterday Lord Wolfson said half an hour was what he had in mind --

THE PRESIDENT: You are not going to object violently if it is half an hour?

LORD WOLFSON: No, I think to be fair we left ourselves roughly half an hour but we are not going to fall out over 10 minutes.

THE PRESIDENT: That is very helpful, thank you.

MR KENNELLY: So just to complete for the transcript and to complete the record, Mr Piccinin reminds me to make the point, which is an important one: when you look at the

viability of the opt-in proceedings the scope has been reduced not just by reference to the interregional transactions but also the removal of the non-UK transactions and again one could see a case for including -- if you include non-UK transactions, that might make the opt-in scope more attractive, but that is not the case today. So you have to look at the opt-in class and the opt-in claim with its fresh scope well in mind when asking: is it really realistic and viable?

Looking then at the Umbrella Proceedings and this really critical question which generated debate between the PCRs and the Tribunal at the end of my learned friend's submissions, the pleadings and evidence of the PCRs has made plain that they have not committed to aligning with the Umbrella Proceedings.

I want to begin, if I may, with what the Tribunal said about this and expected because where I want to go with this is what in our submission the Tribunal ought to expect from the PCRs on this issue and nice words will not cut it for a point as important as this.

The Tribunal was very clear about what it expected in your judgment {N/3/73}, at paragraph 241, skipping down to subparagraph (iv) and the Roman numerals (i) to (iv), in particular (iv). In principle, we consider the existence of separate proceedings, the umbrella

proceedings, is a point in favour of all of the proposed collective proceedings but I emphasise this: providing it is clear how the collective proceedings are to be integrated into the Umbrella Proceedings. That is not the case at present and the budgets for the proposed collective proceedings are not aligned with that outcome.

The Court of Appeal made a similar comment at paragraph 42 {N/8/15}, so what the PCRs explain about this, we need to go to Mr Allen's fourth statement {G/2/2} at paragraph 8, and I ask the Tribunal to note his very careful language:

"The PCRs are fully alive to the cross over in issues and the need to consider on an ongoing basis how best to manage these proposed collective proceedings alongside the Umbrella Proceedings. However, there are degrees of uncertainty which would make any firm decision on how these proposed collective proceedings are to be aligned, integrated or managed with the Umbrella Proceedings impossible to make at this stage. All the PCRs can responsibly do is recognise where opportunities to integrate, align, manage alongside or otherwise adopt decisions in the Umbrella Proceedings when they may arise we will consider them on their merits at that time."

In my submission, this leaves open and is intended to leave open the possibility of deviation, even if the Umbrella Proceedings proceeded to trials 2 and 3, putting to one side the risk of settlement that was raised by my learned friends.

Paragraph 9 at the top of the page, PCRs' intention is to take full account and where possible -- where possible -- work closely with the Umbrella Proceedings and a substantial amount of work has been carried out already to gather relevant information to enable the PCRs to take appropriate advice and make planning decisions.

There is a discussion of the desire to participate as much as possible in the Umbrella Proceedings. Work closely, gather information, all very vague and deliberately so. Our concern as I said earlier is that they are hedging their bets. They want and we are concerned that they want to be able to cherry-pick that where the Tribunal decides something in the umbrella proceedings in their favour, but run and modify a different case if necessary in a separate trial where they do not agree with the Tribunal's decisions in the Umbrella Proceedings and they have been very careful to reserve their ability to do that and to do what is currently proposed to be a massive second trial, with

their preferred methodology, if the Umbrella Proceedings go against their approach.

Now, again, yesterday my learned friends declined to be bound, they adopted a more emollient tone. But in my submission, nothing that you see in Mr Allen's evidence has been disavowed. Mr Caplan, my learned friend, said he could not commit to a course which might be detrimental to the class. They were happy to participate but again not to be bound and the proposal from the PCRs, the truth of their proposal is reflected in their revised litigation plan and budget. In the time available I am not going to go back to it. You have the plan.

THE PRESIDENT: We have seen that, yes.

MR KENNELLY: You have the plan and you have seen the budgets and they now say what Mr Allen says at paragraph 14 that they want to see the result of Trial 2 before being bound. That is what he says at paragraph 14 of his statement. Instead of emollient words, the Tribunal ought to look closely at what is put before you in writing and what they put before you is the proposal to run the CPO proceedings separately from the Umbrella Proceedings. The litigation plan refers to the three-month trial commencing September 2026, there is no reference to them attending Trial 2 or Trial 3,

obviously important if they are to be bound by those trials.

They say all of this is provisional but you only have one provisional plan before you contemplating one outcome, that is a separate trial and that is reflected in the cost budgets. The figures in the cost budgets have been reduced but not reduced to reflect alignment or adoption of the results in the Umbrella Proceedings. If that was contemplated, the budgets would look very different indeed. Those budgets make no sense if the collective proceedings are to align with the umbrella proceedings. They say now those budgets can all change, they are all provisional.

But that suggests they could change completely and therefore they provide no guidance at all as to what will actually be spent. You have budgets before you which is on the PCRs' own submission could be of zero utility and provide you with zero indication as to what is intended.

The PCRs say what concern is this of yours, Visa and Mastercard, we are assuming the most expensive possibility, that is conservative and prudent but it is a major problem for the Tribunal and Tribunal users if these costs budgets come to be used because they are premised on a massive duplication of work and cost

Tribunal time and with the risk of inconsistent judgments.

So we say in conclusion that these are not suitable for certification in their current form. Alternatively, if the Tribunal is against me on everything but you are minded to certify on the basis that you are reassured that these collective proceedings will be aligned with the Umbrella Proceedings and the results in the Umbrella Proceedings will be adopted by them, then the proper approach is to stay the certified collective proceedings. The logic of aligning and adopting the Umbrella Proceedings is that the collective proceedings could be stayed and the results of Trial 2 mapped on to the classes certified by the Tribunal and that would avoid the risk of waste, duplication and inconsistent judgments because the alternative, if you certify without that guarantee, the schemes will have to respond in pleadings and with disclosure and evidence to what is currently put forward as Mr von Hinten-Reed's methodology and we would do that in parallel to our engagement with a potentially different methodology approved in the Umbrella Proceedings and worst of all, after Trial 2, face a second trial on merchant pass-on in the collective proceedings because the PCRs in the end decide not to adopt-in the best interests of the class

what has emerged from the Umbrella Proceedings and that risk ought to be blocked by the Tribunal now in any certification decision you adopt but that is very much in the alternative. I raise that only because my time is short and the Tribunal will have to make a decision. But it is not a binary decision between certifying in the form presented to you and not certifying at all, the Tribunal has a broad range of options.

I have made no submissions on authorisation, I am not going to develop them, you have them in writing.

If the Tribunal is with me on all the flaws and errors in the PCRs' approach and their failure properly to follow the indications you gave in your initial judgment, all of that goes also to the authorisation criterion, that is a further reason not to certify and we submit that that is an important reason too, to bear in mind the failures on part of PCRs to do the bare minimum required of them to make this ready for certification following indications given by you in the first judgment.

I have no further submissions unless I can be of any further assistance to you.

THE PRESIDENT: Thank you very much, Mr Kennelly.

Reply submissions by LORD WOLFSON

LORD WOLFSON: I will just get the box, if I may.

THE PRESIDENT: Yes, of course.

LORD WOLFSON: We are going to try and do another relay race, so to speak, although it may be something like a 50 metre dash, but we will try and cover the relevant points, although I hope it is fair to say that it was apparent to us from the interchanges, if I can use that word, between the Tribunal and my learned friends that the Tribunal has plainly got our case, you plainly have understood the way we are putting it and I think that means I can be relatively brief in reply and I am going to try and pick up the central points which have been put against us.

First of all on class definition, which I will deal with, what is telling about the submissions from my learned friend Ms Tolaney about class definition was that plainly she wants to try and corral us into the revised class definition and at times the submissions did have, I say respectfully, somewhat of an air of unreality about them.

Mastercard knows very well what goes on in this industry better than most and the submissions were very carefully tailored, focusing very much on what we have shown or what we can show and not what could be shown based on the actual data held by the schemes. Now, with that, let me focus first on the original class which it

was said we cannot pursue.

It was clear, and I showed the Tribunal the information, what we were doing and what we are doing from the outset of the revised definition that we were pursuing and are pursuing what we have called our two-pronged approach, that includes dropping interregional and EU transactions from the original definition. I think it became clear that the issue as to centrally acquired transactions was something of a confected point based on a lack of clarity perhaps in one footnote but it is very clear what we mean and where the transactions, as I think the questioning from the Chair showed up, the issue is where the transactions originate and they know precisely what the definition would say.

As to the notice point, there is no prejudice of any kind. The wider version has been publicised; to publicise two versions, I would suggest, would be more confusing than the choice that was actually made and that point really goes nowhere.

So far as rule 75 is concerned, for the Tribunal's reference that is at {P/25/7}, subparagraph 3 states that you need a description of the proposed class. Well, we have the draft amendment, the original is, as we stand now today, the one in play at the moment,

unless and until the amendment needs to be considered and is permitted and the same point goes for the draft class definition appended to the claim forms. So those are the points of as to formality.

As to the evidence, I do say that my learned friend Ms Tolaney is simply wrong in her approach to and construction of the IFR and at times it was extraordinary, some of the submissions that Mastercard were making about that regulation. Article 12 -- I will not go through it again now -- is clear on its face as to what it says and I would invite the Tribunal to take down the reference of {O/40/32} which is the IFR guidance and the paragraph 4.67 on page 32 which sets out what this is all about.

Now, if they need to show -- if somebody needs to show the interchange fee for each transaction, we accept it can be aggregated in the manner that Article 12 permits. But if you need to show the fee, you cannot not do that, you do not escape your legal obligation just because there is a fixed price arrangement such as an entirely blended MSC. Now, those are the contracts on which my learned friend concentrated, suggesting that their obligations are different and they did not need to show anything other than effectively a single rate but that is flatly inconsistent, in my submission, with the

IFR which has no exceptions. Again you can choose to arrange your business how you like but you cannot arrange your business to avoid your regulatory requirements.

THE PRESIDENT: Is that -- if the charge you are levying on the merchant is actually the blended rate, then is that not the only thing the IFR requires you to disclose?

LORD WOLFSON: No, it is the interchange fee you have got to disclose.

THE PRESIDENT: Well, there is no interchange fee being charged the merchant, the merchant is being charged the blended rate, so the merchant is being charged a percentage rate on a transaction and that is the charge to the merchant. It is not being charged the interchange fee.

LORD WOLFSON: This is -- if I am buying an apple and an orange and I am charged 83p, it is not -- the fee is not 83p, it is a combination of the apple and the orange and these -- the purpose of these regulations is to enable you to see what you are being charged. You cannot avoid or evade it; certainly arguably you cannot avoid and evade it by putting in terms of a blended fee.

The phrase from 1C, Article 12(1)C:

"The amount of any charges for the card-based payment transaction indicating separately [important

word, separately] the merchant service charge and the amount of the interchange fee".

That word separately is an important word.

THE PRESIDENT: Yes, but so the way that as I understand it, the way that blended contract would work is that instead of charging the individual interchange rates for the different transactions, the acquirer says: look, we are not going to bother with all that, I will just give you a rate for every transaction and sometimes it will be higher, sometimes it will be lower than if I charge you individually, but that is what I am charging you and I think what is being said is that that is the charge that is then levied and then must be the charge that transparency is required of.

LORD WOLFSON: But the regulations are premised on the basis which is the reality, which is that there is an interchange fee and it is telling you that you have got to identify it separately.

Now, if you want to, for your purpose of your own business to roll that up with other things and say: here is a blended charge, fine, you can do that, but you have to identify separately the merchant service charge and the amount of the interchange fee and I mean obviously we understand why it is in those terms, there are for very good reasons for the IFR to be in those terms.

Otherwise you simply do not see the information which the whole purpose of the IFR is that you see.

THE PRESIDENT: You are told how much you are being charged for every transaction.

LORD WOLFSON: But you do not know what the add-on is.

THE PRESIDENT: But there is no add-on, you are being charged, you are just being charged what you are being charged.

LORD WOLFSON: Well --

THE PRESIDENT: If you mean you do not know what you would have been charged if you had been charged the interchange fee separately from the schemes --

LORD WOLFSON: Exactly, exactly, that is what I am saying, exactly.

THE PRESIDENT: So you are saying that the interchange fee regulation requires you to show?

LORD WOLFSON: Separately the interchange fee, which is precisely the words in the regulation.

THE PRESIDENT: Well, even though you are not being charged it, so you are trying to work out what you would have been charged if you did not have a blended contract?

LORD WOLFSON: I --

THE PRESIDENT: I am not suggesting that is an unreasonable position because a lot of the point of the legislation is transparency and obviously people on a blended rate

they might -- it might be thought sensible that they should be able to compare that, but I do not -- I think that if you were strictly looking at the charge that is being levied on the merchant it is the blended rate, it is not the interchange fee.

LORD WOLFSON: Well, is there an interchange fee as part of the blended rate? Plainly yes, it is in the mix.

THE PRESIDENT: I am not sure there is, I think that is the acquirer taking a view on the economics of the transaction, I think that is how it works.

LORD WOLFSON: Yes, if you look at it like that, in which case you can say there is never an interchange fee.

DR BISHOP: Well, look, what has happened it seems -- maybe I am wrong about this, but it is a very important point -- is that the acquiring bank has decided to take the risk on its costs. It is bearing the costs of what is called the interchange fee. From the -- from its customer's point of view, it is being charged whatever that contractual rate is. Now, it may be that the acquirer bank will lose money on the whole thing and on many transactions maybe.

THE PRESIDENT: It is a bit like Pret A Manger saying you are going to have your coffee if you pay £20 a month and they are taking the risk as to whether they are doing better or worse on the £20 and the number of coffees you

would have bought at £3.10 a pop, if that is the right ...

LORD WOLFSON: In one case I remember Lord Justice Stanley Burnton saying to me that the problem with analogies is that they are different. So, with respect, I may not get into the Pret A Manger coffee.

DR BISHOP: All analogies run out in the end, it is true.

LORD WOLFSON: Precisely.

DR BISHOP: But the basic point though is that the acquiring bank is taking the commercial risk that they may lose money on it. It is paying what otherwise would be the interchange fee that it might pass on but is not passing it on.

LORD WOLFSON: But the central purpose of the IFR is to show people what charges out there are driving their costs, to put it neutrally and you have to show separately the MSC and the interchange fee.

Now, as I say it is no part of my case that you cannot have a blended fee. What I am submitting is the fact that you have a blended fee is not a -- with one band he was free out of the IFR.

DR BISHOP: Fair enough are you saying that the acquiring bank is in violation of its legal obligations under the legislation in not, when it sends its bill, saying to them: here is the fee that you would have had but for

your blended rate? Is that what you are saying?

LORD WOLFSON: Well, I am saying you would have to identify the interchange fee, so in circumstances where there is a blended rate and you are not telling -- you are not giving any information about the interchange fee, then you are in breach of the IFR.

DR BISHOP: I mean, it is an interesting and important point, one would have thought it had been clarified by now before it got to this proceeding.

LORD WOLFSON: Otherwise how does a merchant know, so to speak, whether the blended rate is good bad or reasonable?

THE PRESIDENT: Well, by the market because they go down the road to the next acquirer and that is where the competition happens.

LORD WOLFSON: Well, yes, but I mean the point about the IFR is to give the merchant information. I mean, any merchant can always knock on the next door and ask how much are you paying, you can do that without the IFR. The IFR is doing something else, the IFR is saying: you have got to tell people the information which they want and need to know which the regulation is saying they ought to know, that is the purpose of it.

MR FRAZER: It is. I am looking at 466 of the Guide which you alerted us to. It simply says that you have got to

disaggregate the two parts of the fee, the MSC and the interchange fee, for that transaction, disaggregated from and displayed separately from the MSC. But if the interchange fee for that transaction is the same notwithstanding the type of card that was used, would that indicate -- how would that indicate whether or not a commercial card had been used?

LORD WOLFSON: Well, the interchange fee is charged between the scheme and the acquirer, not between the merchant -- the issuer rather, not between the acquirer and the merchant, ever. So, I mean, taken to its --

DR BISHOP: That is right.

LORD WOLFSON: So taken to its logical conclusion, what the Guide is doing is saying we want to provide as much information as reasonably possible to the person at the end of it, the person at the end of the chain. I mean, that is essentially the point. I do not want to take up a lot of time on this.

DR BISHOP: I take the point and really it is a question for the people on the other side of the room representing these two gigantic worldwide credit card schemes, you must have addressed yourself -- that is your clients must have addressed themselves and their lawyers -- to this question of what are our obligations, do we have to state what interchange fee was incurred by the acquiring

bank or not?

LORD WOLFSON: All we got, with respect, from the other side on this was the proposition that for a period of time Barclays was not doing it right. Now, I mean, we make a number of points on that, first of all the obvious point the exception generally proves the rule, that is a good proposition. Secondly, when you look at the enforcement notice, if I call it that, at {O/38/1}, paragraph 2.1, that is clearly against the schemes on their approach to what the IFR requires.

It does not say Barclays -- 2.3 to 2.5 show the nature of the problem and what we would say about it is that this was a very good example amongst some others of effectively smoke and mirrors: never mind the issue, let us have a look at Barclays. Well, the Barclays issue if I need to deal with it is a time-limited issue, it does not say Barclays did not have the information, it does not say Barclays did not subsequently make it available or they cannot make it available now, it does not say anything about the other four big acquirers who plainly do have the information.

Now, and to come back to the point we were just on, paragraph 2.9 says this:

"Barclays' compliance failure undermined the purpose of Article 12 ..."

Purpose of Article 12.

"Failure to provide Article 12 Information for a prolonged period has the potential to impede transparency and thereby merchant customers' understanding of the transaction fees associated with particular types of cards."

Now, it goes back to the point: the IFR was all about transparency and on the schemes' approach this really would be rendered otiose and redundant.

The PSR notice point -- if I can deal with this quickly, because I know Mr Bowsher wants to say a word about methodology, the PSR notice does not show the interchange fee information was not being provided before that. It is all about acquirer charges and one paragraph you were not taken to was the paragraph before the paragraphs you looked at, paragraph 1.3. When you look at paragraph 1.3 you will see the purpose of that report and also look at the explanation in the direction that Ms Tolaney took you to at {G/15/12}.

On the data point -- I will deal with these fairly quickly -- we had a disavowal of our proposition that we said that they were misdirecting you by saying that we were talking about matching MIDs to merchants. Then both my learned friends spent some time talking about matching MIDs to merchants. Well, we are not

talking about that; we are talking about whether you can match a MID or a CAID to a commercial card transaction and this ultimately resolved itself into points about the practicality of us getting a list of MIDs. But that is to misstate the exercise. As I tried to submit yesterday, the starting point is that most merchants will know the position because they will either have taken a view on the point or they will have access to the relevant information from their payment services provider.

Those who do not or want some more information, which will be a limited number, will be interested enough in the claim to engage with us, we can ask for their MIDs or say they can check the position by giving it to us on the claim website. So this is just not a practical problem.

A word on revised class ID -- sorry to canter through these points but I do not want to take up all the time. Revised class ID in my respectful submission did resolve itself in my learned friend Ms Tolaney's point that there is a hard-edged problem of having no class members. That was ultimately the central issue. We say there is no basis in the statutory language for that. Mastercard or Visa on this approach would just have to get one witness statement from one market

stallholder explaining why he or she did not suffer any loss, then you would know: well, this class includes a no-loss class member and it is game over. All of this is utterly unreal, in particular in light of the comments of the Court of Appeal in *MOL*. Let me give you the reference. It is paragraph 35, {P/12/18} where of course the issue there was that no-loss class members can actually receive some money by way of damages. Well, this will be very odd indeed.

We made realistic submissions as to the proportion of no-loss class members in the revised class definition. We do not accept that they are going to have to give disclosure or anything else and when it comes to damages, that is where you have unparalleled flexibility and I have just referred to the *MOL* case.

What is the alternative? I mean, just to get real for a moment, what is the alternative here if we are in the revised class definition that is because you are against me on my original class definition? So if the revised class definition fails for the no-loss class members, that means we do not have any collective proceedings at all and, while there may be dribs and drabs who are joining umbrella late, there are thousands upon thousands of people who will receive absolutely nothing at all and of course that is really what the

schemes would prefer, that is also the short answer to dilution, I mean, -- on our case, they will receive something; on their case they will receive nothing.

The final point I should make before I hand over to my learned friend is the boundary point which was a totally new point which came right at the end. I did not have any notice it was going to be suggested that the boundary would be something other than 100 million. I am not quite sure how to deal with it. If I had been given notice of it, we could have taken some instructions.

I think our essential submission is this: if you are with me on either class definition but you think the boundary should be something other than 100, obviously you have the ability to tweak it up or down as you see fit and you have got jurisdiction, frankly, to do anything.

It was not entirely clear to me what the evidence was, why it should be 80 or 90 or 73.5 rather than 100, but the critical point is to provide compensation to as many people as possible. Of course, again, what underlies really that submission is that what they hope is that the lower the number, the fewer opt-ins there will be and therefore the lower the amount of compensation. So again let us not think that this is some submission given without an ulterior motive; the

ulterior motive is a very clear one. Unless I can assist further, I was going to hand over.

THE PRESIDENT: One quick question and I am sure we can go a bit longer, so I do not want you to feel like you have had to miss anything you really wanted to say.

LORD WOLFSON: I am grateful.

THE PRESIDENT: Mr Kennelly also suggested we might end up in a situation where we only certified the opt-in case rather than the opt-out and I know when you -- and I do not want to give you any sense that is where we are -- I just want to explore the possibility with you in a hypothetical.

LORD WOLFSON: Yes.

THE PRESIDENT: I think -- earlier on I think you were indicating you saw the two as being quite complementary, is that the position if push came to shove -- I am not saying it does, but if it came to that what would your position be?

LORD WOLFSON: The problem with this is that you now have a number of permutations, i.e. which is being authorised and which is not --

THE PRESIDENT: Yes.

LORD WOLFSON: -- and on which definition and perhaps what the cut-off number is, if the 100 million is in play as well.

THE PRESIDENT: Maybe let me make it a little bit easier.

Let us just take the hypothetical situation that Ms Tolaney is right in the revised definition, it does not work, and therefore your preference is that it is the original definition anyway and let us say we were also persuaded by Ms Tolaney that the old definition did not work for the opt-out but it actually works perfectly well for the opt-in, because of course if you are opting in you are going to have to turn up and say: look here is something that tells you.

So in that world the question I think is a brutal question is: would you prefer an outcome where we said you can do the opt-in or would you prefer if we just said the whole thing hangs together and falls together?

LORD WOLFSON: Well, I think I probably would have to take some instructions on that.

THE PRESIDENT: I appreciate it is.

LORD WOLFSON: It is not the sort of question I would be comfortable answering on my feet.

THE PRESIDENT: It may be there is no sensible answer to it and that actually we in a sense, we -- if we were to get to that situation, I am not saying we will, but maybe the answer is you then decide what you want to do with it.

LORD WOLFSON: I think that is where we get to. It may also make a difference, of course another permutation is to

pick up the point where it was suggested, well, you could certify instead, of course you might be saying: what we will do is sort of certify and go with one part, certify and stay with another part, that would be another way of slicing this particular issue. I think there were a number of permutations and of course this has very important effects on funding and everything else.

THE PRESIDENT: Yes, I am very conscious of that, yes.

LORD WOLFSON: That means there are more people I would need to speak to about this than people in court today.

THE PRESIDENT: I understand. Effectively we should not take from the fact we have been given distinct budgets for the opt-in and opt-out that they are not interlinked in some way economically.

LORD WOLFSON: I think realistically one should work on it on the basis that they are interlinked in some way, the nature of the interlinking may well differ on different definitions and everything else.

THE PRESIDENT: Yes.

LORD WOLFSON: If that is the only question, I will hand over to my learned friend and I will come back, so to speak, for a quick reprise after Mr Caplan.

THE PRESIDENT: Yes, of course, Mr Bowsher.

Submissions by MR BOWSHER

MR BOWSHER: Let me try and do my lap as quickly as possible and I apologise if that means just calling a few references that I might otherwise want to take you to in greater length.

Methodology, can I just deal with apportionment first, the criticism. I think most of what has been said I had already anticipated in my submissions yesterday. The short starting point there is that the attack on Mr von Hinten-Reed's methodology starts with the wrong place. It consistently starts variously with saying that he has accepted that his first approach is not reliable or not workable. That is simply not what he says in his sixth report when he takes on board the criticisms and comments that are made of his first approach. He says yes, I know that is not accurate, you have given me another approach and he explicitly -- he goes through the process of setting up another measure and then explains -- I think it is paragraph 71 {XG/33/18}, that he is not disavowing the first, he is saying yes, you have now given me a methodology which is to provide two bounds and then explains from paragraph 73-81 how you would refine those bounds. Now, how far they are refined as he says will depend on the quality of the data. I do not think I can really take

that much further on than that.

On existing claims exclusion of, again I think I have dealt with that mostly yesterday. We say it is somewhat artificial to say that someone -- this is somehow some impossible task. The information is there and I walked you through the methodology, it is in his report I am not sure there is much more I can take on that.

The non-domiciled transaction is -- I need to take you to a couple more references. Just to restate the position, for opt-in we say the coverage is proposed to include non-domiciled merchants with transactions made with a UK acquirer and the data must exist to enable that -- and that would be excluded for the opt-out. The data required for that filtering process must be available. It takes a bit of reading because there is quite a lot of text so if I can give you the references. The Visa core rules at {G/19/103} rule -- I think it is 1.5.1.2 explain that an acquirer must assign the correct location of its merchant's outlet so there has got to be some data as to where the output is produced.

An acquirer must not misrepresent or allow its merchant to misrepresent that location.

This was a point taken by Mastercard so perhaps the Mastercard rules are more pertinent because that is

covered at {G/20/104-105}, and that sets out in considerable detail how the merchant location is to be fixed.

THE PRESIDENT: That is not really the issue though, is it, because we know the location is here --

MR BOWSHER: We know it is here but the data has to exist and has to be noted against the transaction, so --

THE PRESIDENT: Sorry I am not sure I understand that. I think the challenge is that by definition under the Act, your non-domiciled merchants are excluded unless they opt-in. So I am not sure whether you are assuming they are opting in or out, but let us assume they do not opt-in, therefore they have to be taken out of the aggregate damages; is that the point you are making?

MR BOWSHER: What I am saying is you can identify where they are, the data exists.

THE PRESIDENT: Before you get to that I just want to be clear that is the world we are in. You are assuming they have not --

MR BOWSHER: Yes, there will be some --

THE PRESIDENT: There will be some and we have to take them out.

I see. Then you are saying that the schemes will have the data to do that. I was not quite sure why you were saying that.

MR BOWSHER: Well, because you need the data to be able to make that exclusion process.

THE PRESIDENT: I was not sure why you were saying how do we get, how do we find out what commercial card transactions are associated with that non-domiciled non-UK domiciled merchant? How do we work out how many transactions they have done that involve commercial cards and taken out the aggregate damages, that is the challenge I think that has been put up.

MR BOWSHER: Because where you have a card present, you -- if you go to a Mastercard rule -- sorry, I am not sure I am quite --

THE PRESIDENT: It may be my fault. It may be the rules are helpful. It may be that the rules are the answer. What I am not clear about is why you say the Mastercard rules help you work out how many commercial card transactions a foreign merchant has conducted in this country. Because obviously we know that Mastercard have got a record of all of the commercial card transactions but they are not associated with merchants. We also know that I think there is this dispute about whether it is practical to turn up with a MID, but on the assumption you could do that, fine, you could say: well, we will get all the foreign merchants to help with the MID, but we do not know who the foreign merchants are. So you

are back into this difficult question of how on earth are we going to work out how many transactions have taken place that we need to deduct? Does that make sense?

MR BOWSHER: Maybe we are at cross-purposes. If the transaction is made on a UK acquirer then it is in our class.

THE PRESIDENT: No. I do not think it is because if it is non-domiciled UK – if it is a non-UK domiciled merchant then you cannot include it in a class unless they opt-in.

MR BOWSHER: Yes.

THE PRESIDENT: Under the Act, the Act says that.

MR BOWSHER: But they will have opted in.

THE PRESIDENT: So you are assuming they are opting in.

MR BOWSHER: You can identify that but if they are not, you will identify then you know – I mean, my point is that the – you can see what is – you will be able to identify that there are transactions that are not that are done on a UK acquirer, that are non-domiciled because the data will exist, so you will be able to make the allocation.

THE PRESIDENT: I am not sure I follow that. Anyway, keep going.

MR BOWSHER: Maybe it helps.

THE PRESIDENT: I do not want you to feel constrained on it.

MR BOWSHER: If we go to the Mastercard rule --
THE PRESIDENT: I do not want to look at the rule unless you can tell me why it matters.

Let me put it another way. I am very happy to look at the rule but I would like you first just to explain to me what it is you are going to go show to me and why it matters, that is the bit I am missing at the moment.
MR BOWSHER: There are two kinds of purchase you might make with a non-domiciled merchant.
THE PRESIDENT: Yes.
MR BOWSHER: Either the card is present so if you -- which probably there are not that many and it is probably slightly artificial, they are here, so if it was card present, but it is at least theoretically possible that there would be a purchase. But it is highly unlikely but where the card present transaction -- the country where the transaction takes place is where --
THE PRESIDENT: I see. Are you saying if it is card not present, that is going to be a foreign acquirer?
MR BOWSHER: Yes, if the card is not present the merchant has to show, then that is where you get to the rules and the rules are long, the Mastercard rules. There is a long discussion -- not discussion, there is a long set of provisions about how the non-domiciled merchant establishes where it is domiciled, all to do with local

United Kingdom permits, how it is trading and so on and forth. So a UK customer making a purchase on a French website if you look at it is probably going to be a French purchase but --

THE PRESIDENT: So you are saying, the point you are making it is not a big deal because there are going to be relatively few card present transactions, that is the point --

MR BOWSHER: There are few card present and then --

THE PRESIDENT: Card not present then it is unlikely to fall into the --

MR BOWSHER: The card not present probably does not, but there are rules for telling you if it does.

THE PRESIDENT: I see, right, okay. We can certainly look at the rules.

MR BOWSHER: I am not sure it takes you --

THE PRESIDENT: That is what I am trying to understand --

MR BOWSHER: The point is there is a rule, is it is very clear that obviously there is in fact a dispute mechanism because you can have a dispute about where the purchase should have been allocated.

THE PRESIDENT: With the transaction --

MR BOWSHER: Where the transaction should be treated as taking place.

THE PRESIDENT: We can look at the rules. That is helpful,

thank you, I do understand. That is very helpful.

MR BOWSHER: I have given you the reference. That is what it does, and it provides a very clear formula for deciding where this purchase is going to happen. But it will be reasonably clear in principle whether a card present or a card not present transaction is likely to be to start with.

CVBs, there is probably a lot more -- this is probably a topic on which one could see a great deal. Something gets back into the debate which we slightly cut short yesterday about what the theoretical basis for the CVBs are. Let me focus on what Mr von Hinten-Reed has done.

THE PRESIDENT: Before you do that, when we are talking about benefits I think it much easier if, as Mr Kennelly says, they are more or less the same things that would be dealt with in a Article 101(3) application, or exemption argument, then it is much easier I think to treat them -- I think the whole question of how they fit and the question of quantum further down the track is quite difficult and we have not really addressed that in any detail as far as I can see.

But if it is the same material, let us talk about it in the exemption context. Hopefully that makes it easier for you, because if it is the same material then

the question is regardless of where it sits, assuming it is an exemption, how difficult is it and how much do you need to say about it. I think it is the same principles probably.

MR BOWSHER: I am very happy to deal with it that way.

Some comment has been made, criticism is made that Mr von Hinten-Reed has accepted the need to value CVBs as a separate distinct concept, but then has not somehow gone further in dealing with them as a separate distinct concept. But for the purposes of today, in terms of, to use Mr Kennelly's phrase, providing a blueprint to trial -- not his phrase, it comes from elsewhere -- it is the same concept as a Article 101(3) element. Because as you say, if anyone can ever work out how these concepts become relevant to the quantification of damage, that is a very long way down the track.

The short point is the starting point for any of these points is an assertion of an issue raised by the defendants. To take one example, Mr Kennelly dives in and focuses on the paragraph in the Court of Appeal in *Sainsbury's* to say, look, I have all the material the Court of Appeal said should have been read more closely and says that somehow that has not been addressed.

But that judgment itself highlights the problem, because if you go further back in the same judgment, and

it is at paragraph 244 at {J/5/56}, you will recall from having looked at it that is the long section where the Court of Appeal says, well, this whole section of the Article 101(3) analysis suffers because it lacks the sort of evidence that the issuers could have been expected to produce.

Mr von Hinten-Reed in a methodological sense has focused on the arguments that have been raised by the Commission which you put to me yesterday in the earlier cases, and in *Sainsbury's*. He has focused on them in his report, he has not focused on the Court of Appeal but he has focused on the judgments of Mr Justice Phipps and Mr Justice Popplewell, as they then were, and those of course are -- that is what has to be addressed methodologically.

But one of the problems which he identifies is that even there, you have different points sometimes used. It does not necessarily come out of his report, but of course even there you have points sometimes used with the same label, but actually framed in a different way. The fraud prevention title for a Article 101(3) defence is applied to different points. In one case it is about the counterfactual, well, you have a benefit about the way the rules work. There are different points to test.

So it simply is not feasible or sensible in terms of providing that blueprint to trial, given that that first step lies with the defendants, for Mr von Hinten-Reed to be expected to provide a methodology that, as it were, drills down on every single possible point that has ever been taken. What he has done, and with respect he has gone a great deal further in his fifth and sixth reports on this than just set out what Article 101(3) says, he has gone through and analysed how you might apply that and used Amex switching as a worked example and considered its application.

Now, certainly more can be done, but in a sense in terms of providing a blueprint, if the test is does it provide a blueprint to trial, then yes, it does. Because one can understand that you at that point plug in whatever it is that the defendant issuers choose to plead at some point as their defence in this case, and one considers, well, is there evidence, are there natural experiments, is there old material of the type that comes out of *Sainsbury's* and so forth? We know that is fairly old stuff and hard to apply today. Is there anything else?

THE PRESIDENT: I think we have got the point.

MR BOWSHER: You know the point.

THE PRESIDENT: Yes.

MR BOWSHER: If the test is, is this a blueprint to trial,

yes, it is. Plainly it is difficult, it is a point that is difficult to deal with in a generic way.

Then finally, MPO. I think on MPO we are probably getting -- much of the criticism here is really about the relationship between these proceedings with Trial 2. I mean, one could spend quite a lot of time analysing about how comforting or otherwise Mr von Hinten-Reed's language was or was not, and who said what. But the short point is that he has made plain in his reports that, yes, he has a view and if he were involved in putting forward evidence he would obviously want to, at a case management stage, put forward a view as to how this could be done better. But if we are --

THE PRESIDENT: Sorry to interrupt you. As I put to Mr Kennelly, I think the two arguments that crystallise are that. So there is a question about whether he is really woken up and smelled the coffee in relation to what is happening in Trial 2 on the assumption that there is going to be at least some association of the collective proceedings with Trial 2, and obviously that is, as discussed with Mr Caplan and no doubt we are about to discuss again. The other point is does his approach actually give sufficient recognition to the nature of these proceedings as collective proceedings.

So those are the two points, and in both cases the

challenge, as I understand it, is that is inconsistent with the approach in Trial 2 to a large extent, and actually not necessarily consistent with it being collective proceedings, it involves quite a lot of getting into the detail of what merchants actually think about their costs and how they pass them on.

So, I mean, that is the complaint and it is quite difficult. Mr von Hinten-Reed is entirely within his rights to set out how he thinks it should be done, and he has done, how it should be done in ordinary circumstances as a matter of principle. There may well be some merit in the point that he has not quite cut his cloth to either of those points.

MR BOWSHER: But he has made clear, and he goes through at the end of 6 to make clear that it is not the case that he is somehow trying the bind the PCRs to his view of the world on MPO methodology. He has a view, and it is not the case, as Mr Kennelly sort of said, that we are somehow stuck with what he says. If we are stuck with anything, if this is certified and we are associated with the Umbrella Proceedings in whatever way it is, what we will be stuck with is the Tribunal's directions as how it is to be done.

THE PRESIDENT: Look, absolutely, and I understand that, and perhaps one can say at the least he could have been

a little bit more helpful about the realities of the situation as opposed to the principle, and I hesitate to be critical of him because he has set out his views and he is entitled to do that.

Obviously Mr Kennelly is more critical of him. But I do not think there is much more that one can say about that. I understand what you are saying. He has given his views and he has made it plain he is willing to accommodate. Is that the most helpful thing he could have done? Possibly not. But does it get you to where Mr Kennelly has? Well, that is obviously for us to consider further.

MR BOWSHER: Just to pick up one last point. There is a certain artificiality here because it is Mr Coombs' position that is perhaps the most important counterparty to his position there, and at the end of the day the Tribunal will just have to decide what is enough for it to take a view as to how to deal with the MPO. If it is just a UK figure and how it reaches that UK figure we know is going to be a difficult question. All Mr von Hinten-Reed is simply saying is I think there are other things you could do to improve the process.

Sorry, I have gone on way longer than I --

THE PRESIDENT: I do not want you to feel -- and the same, Mr Caplan. If you have things to say we should hear

them.

Submissions by MR CAPLAN

MR CAPLAN: Thank you. I appreciate that. I think I can be very brief because I think the points on suitability I can deal with very, very quickly.

The first point is just to remind you of the test. It is a relative suitability test and that sometimes fell out, I think, of the submissions. So just some very, very straightforward propositions which will not take long at all.

The first one is that Mr Kennelly, who primarily dealt with this, dealt with opt-in and opt-out separately, and I made the point yesterday by reference to the Court of Appeal judgment that that is not the right approach. One has to treat these as package. It is artificial to analyse them separately. That is {N/8/12}, paragraph 32. The point has been made. I do not think I need to elaborate on it.

The next point, and it is one that although Mr Kennelly mentioned, some of the detail was filled in earlier by Ms Tolaney, it was about the reduced scope of the claim and whether the game is worth the candle given the figures that are said to represent the theoretical maximum value of the opt-out claim.

Now, I hope I dealt with this yesterday, but if

I was not clear, and I think I was, let me be clear now. We do not accept that the figures given in Dr Niels' supplemental note represent even a realistic lower band for the range. You will have the point, but Mr von Hinten-Reed's approach involves a range. There is a debate about how to get to a lower bound. I went through all that yesterday. We do not accept we are talking about figures like 30 million to 50 million. We are just not in that lower territory. The lower bound would be much higher, and obviously the higher bound is very, very significant indeed. So these remain very, very potentially valuable proceedings.

Then Mr Kennelly made a point, well, we know that opt-in claimants can participate in the umbrella proceedings, and I think that submission bled through into opt-out as well to a certain extent. I went through that yesterday, it was looked at last time, it was looked at again by the Court of Appeal, and it is no better third time round.

We know it is possible. The point is that the vast majority of merchants have not, and in reality will not. So it really is a choice for most between collective proceedings and no proceedings. I suspect most of them are not either lunatics or fanatics. Maybe some are, but some probably are not.

Then there were various points taken on the book building process. I will not go through this in detail, but in my submission they were some rather unfair points taken there were.

The evidence just for your note is in Mr Allen's fourth statement. It is paragraphs 37 onwards {G/2/11}. It is not the case that we have not told people about the revised scope of the claim. It is not the case that there were no reasons for book building having proceeded when it did and in the way that it did, and one of the obvious points is that if your funding is put in doubt that obviously poses a challenge as to what you can say to potential class members.

One of the things that they will obviously be interested in is, well, can you bring this claim, do you have solid funding? That is one of the obvious questions that they would have.

The *Trucks* case was mentioned. Now, that is a very different case in terms of figures. First of all, it was all opt-in, so you are not talking about just a trivial small group of very high value businesses, which is what the opt-in clause in this case relates to. So the figures are just not comparable. You cannot just say, well, there were 3,500 there, much less here. It does not really work, and there are other differences as

well. Obviously the PACCAR issue was not floating around then, and I think the RHA is actually an industry body, so it had a built-in client base, if I can put it like that.

So in my submission, really those are the points I think that were taken on the suitability of the opt-out class. As I say, wrong approach to look at opt-in in isolation, and the points I think are no better now than they were having been recycled twice.

On the opt-out class, I think I am right on this, the only points taken related to the suitability question vis-a-vis no-loss class members. So it is all about revised class definition. I do not think there was any point specifically developed that would apply on the original class definition.

Now, on the revised class definition and the no-loss class members point, my learned friend Lord Wolfson dealt with that yesterday, we do maintain the point that these objections are all highly theoretical disclosure requests, information requests and so on. We do not accept that even if the revised class were to be adopted and certification were to be granted on that basis, there would not be a sensible way of targeting information and disclosure requests to those that had suffered loss. The production of a MID or a CAID would

be one way of doing that.

Dilution, my learned friend Lord Wolfson has already dealt with.

Obviously at the distribution damages stage you are dealing with a very, very flexible regime, and one of the points in *MOL*, Court of Appeal, to which my learned friend referred, that was made in that case was that, well, there can in fact be distribution regimes where there is dilution. So in that case it was contemplated that there might be a proportion, a substantial proportion of the class that had no-loss but would participate in the distribution.

Now, that was not seen as objectionable as a matter of principle. Obviously at that stage the Tribunal is going to do what it considers just and practicable, and here again one needs to step back and get real. We are not talking about dilution of something. We are talking about either a claim going forward and class members of whatever scope getting something, or no claim going forward and the vast majority getting nothing. So once one keeps that in mind I think the dilution point really falls away.

I think my learned friend Lord Wolfson dealt with the boundary between the opt-in and opt-out claim, so I will not go over that again.

On the Umbrella Proceedings I think we have been rather reasonable, and I think the discussion we had yesterday I would hope showed the appropriate amount of willing, if I can put it like that, as to integration and as to participation.

However, it is simply not responsible and, frankly, not fair to ask the PCRs at this stage, when we do not know the outcome of Trial 1, to commit to be bound. It is not something that any conscientious PCR in this situation would be willing or properly able to do, and I think the debate really resolves down to that.

My learned friend criticised some of the language in Allen 4. I think some of that was, with respect, nitpicking or a rather sceptical reading of the evidence. There is no intention to be difficult here or to be tricksy. I have made our intentions very clear: if we can, we will.

Then on the budget and litigation plan, I explained yesterday why they were set in the way that they were. I took you to the Guide on the function of the budget. My learned friend Mr Kennelly said, well, it provides no guidance at all, what is the point? The obvious point in accordance with the Guide is to show you that we can fund this claim.

We have funding. If we need to, we hope we will not

need to, but assume the Umbrella Proceedings go away tomorrow or after Trial 1 or after a settlement, we can bring this claim. Obviously we want to bring it on a far cheaper basis, and if we can integrate with the Umbrella Proceedings so much the better. But we have the resources to do it on our own if we need to, and that is the value of the budget and I am sure, and I think the Tribunal can probably be sure as well, that if we had gone the other route and budgeted on the assumption that we would free ride off the umbrella proceedings, we would be getting some very different but equally vociferous complaints. So I think those are really the points on suitability.

My learned friend Lord Wolfson did deal to some extent with this latest suggestion that there should be certification as an alternative, but a stay. That, in my submission, would be an odd result. We would like to participate in the Umbrella Proceedings. If there is going to be a trial that binds us, we would want the opportunity to participate, and I think in fairness we would be entitled to that opportunity.

So I do not think that is really a viable proposition at all. It is not something that would ever be required of an individual litigant. They would always have the option to actively participate.

So I think that is all of my section, so unless there are any questions.

THE PRESIDENT: No, thank you very much.

MR CAPLAN: Thank you.

Submissions by LORD WOLFSON

LORD WOLFSON: I promised I would be very, very short. There were four points. I think each is a sentence.

THE PRESIDENT: Yes.

LORD WOLFSON: First, as I said yesterday I would underline that we are now in a radically different position than we were a year ago for the reasons we have set out over the last two days. That is the first point.

The second point is, as I again submitted at the start of my submissions yesterday, what is apparent is that there is no class or proposed collective proceedings which will meet with the consent, let alone the approval, of the schemes. I mean, anything which is proposed in this litigation will be hard fought; that is absolutely clear after two days.

Third point, and that means that there is no effective alternative means for many merchants to vindicate their legal rights other than these collective proceedings for the reasons in particular as my learned friend Mr Caplan just set out. So those are the three substantive contentious points.

The last point is not contentious and I think on this point I do speak for my learned friends as well. I am conscious that we have had two long days, so I wanted to thank, I think on behalf of all of us, the court staff for sitting so late, the transcription writers for putting up with us and also the Tribunal for concluding the hearing in two days. We are very grateful.

THE PRESIDENT: Well, that is kind of you, thank you very much.

I echo my thanks to the transcriber and the Opus team as well. Thank you all for your hard work. A lot of hard work has gone into the submissions and they have been extremely helpful and we are very grateful for the efforts you have made. We have run slightly over. Perhaps it was always slightly ambitious to do it especially with a late start, but we are very grateful you have made the efforts to make it work.

We will reserve our judgment.

(5.26 pm)

(The hearing concluded)