Sainsbury's Supermarkets Ltd v (1) MasterCard Inc, (2) MasterCard International Inc, (3) MasterCard Europe S.P.R.L.

Day 3

January 27, 2016

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(10.30 am)

Opening submissions by MR BREALEY (continued)

MR JUSTICE BARLING: Good morning, Mr Brealey, Mr Hoskins.

I think you know that we have now made the order, or it is in the process of being perfected, for confidentiality ring. The terms are pretty clear, but I mean just to remind people that in accordance with its terms, although the names are listed of the current, as it were, candidates, I think you are still in the process of pruning them, but even when they remain there they won't be in the ring until they have signed the undertaking.

MR BREALEY: I have just signed something.

MR JUSTICE BARLING: Yes. Probably a cheque. So, right.

MR HOSKINS: Can I say something about confidentiality before we --

MR JUSTICE BARLING: Yes.

MR HOSKINS: Which is just Mr Smith referred yesterday to the fact that we have a set of rules and they were all blue. That's an error.

Apparently, what has happened is we had indicated to Mishcons documents we claimed were confidential, and where we were claiming part of a document was confidential, those redactions have been made. But it

has not always been picked up where we claim something is confidential, so the whole thing should be in blue paper. I'm afraid that is a process that's currently being corrected. But the rules are not confidential.

MR SMITH: Right. That's very helpful.

MR HOSKINS: They are published on our website. Sorry for that. I'm struggling with it as well. I understand it has been corrected. It is not ideal, but let's be honest, everyone has had to do an awful lot of work to try to get that right, so we will have to live with it. But I apologise for the practical difficulty it is causing.

MR JUSTICE BARLING: Right, well.

MR BREALEY: So for half an hour probably max, if I could just tidy up a little bit on the ex turpi causa, going back over some of the exchanges yesterday and just try and put it in order.

I don't think we need to change our skeleton argument, but it may well be on reflection I need to emphasise a few points as a result of the exchange.

Two general points. One is certainly a general point, which is that Lord Sumption stated at paragraph 62 of Bilta, as the Tribunal probably knows, he says the ex turpi causa doctrine is:

"... a perplexing mass of inconsistent case law."

So the perplexing mass of inconsistent case law, I don't believe the three judgments of the Supreme Court have necessarily clarified much.

But the second general point, which is something I do want to emphasise because it is teased out from the exchange we had yesterday, is that of course the application of the doctrine of ex turpi causa is primarily a matter of English law. There is no euro public policy as such. Ex turpi causa is domestic law, I don't say English law, but domestic law but of course with certain euro principles mixed up.

I think that is important to state as a general point before I go to some of the cases. But when one comes to, for example, attribution, the starting point and probably the end point is English law, but what the ECJ says will be of some assistance. And I think that is something that we hadn't teased out sufficiently in the skeleton.

With those two general points in mind, that as a matter of English law it is a bit of a mess, but secondly, ex turpi is a matter of domestic public policy, could I go to volume I7.1. It is the Servier case at tab 25.

So we can just highlight the passage that I think Mr Smith was putting to me yesterday about how the

Supreme Court has approached the doctrine of ex turpi causa, and it is at tab 25, page 771, paragraph 22.

Clearly we can't go through it all, but basically what Lord Sumption has said up to paragraph 22 is that Tinsley v Milligan applies.

At 22, he says:

"However, it does not follow that the court should be insensitive to the draconian consequences which the ex turpi causa principle can have if it is applied too widely. The starting point in any review of the modern law must be that we are concerned with the principle based on the application of general rules of law and not on fact-based evaluations of the effect of applying them in each individual case."

I just pause there. That bit is sometimes not applied by other law lords. They do say that in certain circumstances it is fact specific, particularly when it comes to attribution.

We just pass on that:

"However, the content of the rules must recognise that within the vast and disparate category of cases where a party in some sense founds his claim upon an immoral or illegal act, there are important points of principle."

Then we get I think what was being put to me

yesterday, which is the three-pronged test:

"The application of the ex turpi causa principle commonly raises three questions. What acts constitute turpitude for the purpose of defence? What relationship must the turpitude have in relation to the claim? And on what principles should the turpitude of an agent be attributed to his principal, especially when the principal is a corporation?"

I think those were the kind of three-pronged tests that we were debating about yesterday.

Again, so we are not into euro territory here, we are clearly focusing on domestic law principles. Now, there was no question of attribution in Servier, but Lord Sumption does give some guidance on the meaning of turpitude, and this is what we picked up in our skeleton. And essentially it starts -- just to flag the point, if one goes essentially over the page to page 773, right at the bottom of paragraph 25, I'm not going to go through the whole of 25, but one sees, for example, the last three lines of paragraph 25, the reference to competition law.

Therefore, a breach of competition law can in principle constitute an act of turpitude. However, he goes on, at paragraph 29 over the page, at page 774, page 15 of the judgment:

"It is right to add that there may be exceptional cases where even criminal and quasi-criminal acts will not constitute turpitude for the purpose of the illegality defence."

He refers to a case:

"This applies in particular where the act in question was not in reality the claimant's at all."

Without going into it in too much detail, what he is saying here, and one sees it in the sentence "in such cases":

"The fact that liability is strict and the claimant was not aware of the facts making his conduct unlawful may provide a reason for holding that it is not turpitude at all."

We will come onto a further passage in a moment, but having flagged that competition law can constitute turpitude, Lord Sumption is recognising that imposing strict liability, because breach is an objective test, imposing strict liability may constitute injustice, and it does not really fall within the category of turpitude.

So when one goes over the page, still continuing with paragraph 29, really, again, I rely on the whole paragraph, but it is, say, ten lines up from the bottom. If one takes the conclusion halfway down and then goes

ten lines up, just after all the cites of the cases, Lord Sumption says:

"The application of the exemption for the cases of strict liability [which competition law is] may require a court to determine whether the claimant was in fact privy to the illegality to the extent an inquiry into the claimant's moral culpability may be necessary in such cases before his act can be characterised in law as turpitude. This may be a difficult question, but it is not a question of degree. The conclusion will be a finding that the claimant was aware of the illegality or that he was not."

Then he is saying it is a long way from what some of the law lords have been saying, that Tinsley v Milligan give judges a certain discretion.

Certainly he is flagging there competition law may constitute strict liability, which it does. It is an objective test. But he is saying there that there may be cases where strict liability is not appropriate, and that is why we have mentioned that in paragraphs 482 to 485 of our skeleton and why we refer to the judgment of Mrs Justice Asplin in the Tesco v MasterCard case.

Just very quickly to go to that, that's at tab 27, the Tesco v MasterCard case. And really, I just want to highlight for the Tribunal's note the two main

paragraphs. So we are at tab 27, Tesco v MasterCard.

The first is really, if one goes to page 840 of the bundle, this is in the section one sees on the left-hand side, 839:

"Does the maxim of ex turpi causa apply to the claim?"

This is in the context of the submissions being made there.

(iii):

"Does the maxim of ex turpi causa apply to the claims?"

At paragraph 62, right at the bottom of page 840:

"Lastly, Mr Railton says that if he is wrong about this and that the infringement here is a quasi-criminal ... and if so, to the extent that negligence or intentional ... that there is such mens rea, it would also be ...(Reading to the words)... 29 of his judgment [that's in Servier v Apotex] that there may be exceptional cases where even criminal or quasi-criminal conduct will not constitute turpitude."

This is the submission that is being made about whether you need to be privy to the facts and be aware of the unlawful conduct.

The judge picks it up at paragraph 80. Again, remembering this is a strike-out application at 844, it

is the last page of the judgment.

Paragraph 80:

"Does the maxim apply to the claims?"

That is in the context of the arguments which it has been making, where her ladyship said:

"Once again, in my judgment the MasterCard defendants cannot show that the relatively low threshold necessary in order to avoid summary judgment strike out has been met. I consider it more than merely arguable that in order to fall within the category of quasi-criminal ...(Reading to the words)... negligent conduct. Lord Sumption himself referred to Safeway Stores as an example of such conduct, a case in which the company had been personally held liable for a fine. I regard it more than merely arguable that it is necessary to establish whether the claimants and each of them have their requisite state of knowledge."

Maybe that is something that this Tribunal is going to have to decide, and clearly we will make further submissions on this issue in closing. So we are looking at how the domestic court is trying to grapple with the meaning of turpitude.

That, we say, is right: it has nothing to do with European law as such, because European law is not imposing rules of domestic public policy on Spain,

Germany, France or the UK. So that is just a question of turpitude.

If I can come to attribution, which has really vexed I think everybody. Going through, again, the judgments last night, none of the Supreme Court cases seem to be particularly illuminating to the specific facts of this case, where you have a sister company suing a third party and the third party saying that that claim is barred because of the acts of another sister company.

One doesn't really get a flavour of that from these judgments. I will, for example, just go to the three situations that Lord Sumption referred to in Bilta. Bilta is at tab 26. It is one just before Tesco's.

So Bilta is at tab 26, page 814 of the bundle. I'm just going to refer to a few paragraphs here just to try to tease out a few principles. One is kind of an almost a negative principle. At 84 of Bilta, again another judgment by Lord Sumption, paragraph 87. This is concerning attribution:

"There are three situations in which the question of attribution may arise. First, a third party may sue the company for a wrong, such as fraud, which involves a mental element. Secondly, the company may sue either its directors for breach of duty involved in causing it to commit the fraud or third parties acting in concert

with them or, as in the present case, both. Third, the company may sue a third party who is not involved in the directors' breach of duty for an indemnity against its consequences."

I mean, if it is anything it is the third one, but even the third one doesn't really grapple with the sort of attribution that we are concerned with here. So when one is going through the judgments, it is about the analysis of a corporation, a company. It doesn't act on its own, it has to act through the directors or it has to have the mind or will. And the usual question is, if the directors have been naughty, the extent to which that naughtiness can be attributed to the company.

So that is a negative proposition. What I would like to do, however, is draw two things from Bilta. The first is from paragraph 7 of the judgment, which is the judgment of Lord Neuberger. I would like to emphasise two things that we get from Bilta. This is at page 786 of the judgment, under the heading "Attribution":

"So far as attribution is concerned, it appears to me that what Lord Sumption says in those paragraphs is effectively the same, in effect, to what Lords Toulson and Hodge say in their paragraphs.

"Both judgments reach the conclusion, which may I ...(Reading to the words)... then the wrongdoing or

knowledge of the directors cannot be attributed to the company as a defence to a claim brought against the directors by the company's liquidator in the name of the company and on behalf of its creditors for the loss suffered by the company as a result of its wrongdoing."

Paragraph 7:

"Even where the directors were the only directors and shareholders of the company."

I emphasise the next few words:

"And even though the wrongdoing or knowledge of the directors may be attributed to the company in many other types of proceedings."

Now, why do I say that's important? It is important because there are instances where the acts of directors may be attributed to the company for other purposes, but when it comes to the doctrine of ex turpi causa, the courts are looking at it with a different lens, and we would say with a stricter lens, because the turpitude is barring the claim, barring the remedy. So one has to be careful, in other words, that just because you say someone is an economic unit, then you have the sufficient attribution.

I'm just going to develop that very briefly. So I said there were two points. First is that it is a rule of domestic public policy, but secondly, we see

that Lord Sumption gets some guidance from Meridian Global at a paragraph 92.

If we jump from paragraph 7 to paragraph 92, here we are looking at the extent to which the acts of an agent can be attributed to the acts of the principal. Again, it is only a paragraph and it is not that illuminating, but what we get from all these judgments is that Meridian Global seems to be fairly well accepted.

But he says at paragraph 92, 816:

"The technique of applying the general rules of agency and then as an exception for cases directly founded on a breach of duty to the company is a valuable tool of analysis, but it is no more than that. Another way of putting the same point is to treat it as illustrating the broader point made by Lord Hoffmann in Meridian Global that the attribution of legal responsibility for the act of an agent depends on the purpose for which the attribution is relevant.

"Where the purpose of attribution is to apportion responsibility between a company and its agents so as to determine their rights and liability to each other, the result will not necessarily be the same as it is in a case where the purpose is to apportion responsibility between the company and the third party."

Again, we are slightly in unchartered territory, but

clearly when one sees, and we will hand up -- I do not think it is necessary to go through it now -- I'm not sure it is in the bundle -- but a copy of Meridian. We do see the Privy Council, Lord Hoffmann, at paragraph 23 -- I don't know if we want to hand it up now -- but paragraph 23:

"It was therefore not necessary in this case to inquire into whether ...(Reading to the words)... will of the company, but their Lordships would wish to guard against being understood to mean that when a servant of a company has authority to do an act on its behalf, knowledge of that act will for all purposes be attributed to the company.

"It is a question of construction in each case as to whether the particular rule requires that the knowledge that an act has been done or the state of mind in which it is done should be attributed to the company."

Again, and we will hand this up, but to a certain extent there are references there which say: are you one and the same person? This is why we say the economic unit point is important to attribution.

Again, just to emphasise the two cases that I went to yesterday, if one could just -- I know we went through them yesterday and I will only spend three or four minutes on it, but it is bundle I7, it looks like

17. Tab 6. We saw yesterday paragraphs 96 to 100. It is bundle I7, looks like 17. This is the Aristrain case, C-196/99P.

So the inquiry as a matter of domestic law is to work out whether the act of the Bank should be attributed to the Supermarket. That's essentially what we are trying to ...

Clearly we would say that 96 to 100 appears relevant in that inquiry. So in other words, domestic law may consider how EU law would treat the attribution of responsibility when it comes to a breach.

98:

"The court of first instance is wrong to rule that it is impossible to impute to a company all the acts of a group even though that company has not been identified as the legal person at the head of that group with responsibility for coordinating the group's activities. The simple fact that the share capital of two separate commercial companies is held by the same person or the same family is insufficient in itself to establish that those two companies are an economic unit, with the result that under community competition law the actions of one company can be attributed to the acts of the other and that one can be held liable to pay a fine.."

Again, we see the word "attributed" in

paragraph 100:

"The contested decision states no reasons in that regard, and even contains an internal contradiction since it suggests that ...(Reading to the words)... must be attributed to both companies."

We see the word "attributed" in Aristrain, and as we saw again yesterday in the judgment of Jungbunzlauer, which was at tab 9. Again, at paragraph 126 we see the word "attributed".

So if it is the case, so one is looking at the jurisprudence of the CJEU and if it is the case that one sister has decisive influence over the other sister, so that the second sister is not acting independently in the market, then one can see that if the naughty sister acts in a wrongful way, a naughty way, that that act of naughtiness may be attributed to the person who is controlling her. And it may well be that if the concept of economic unit was put to the Supreme Court, they may say, well, there are four situations where you would attribute, the three that Lord Sumption referred to and then circumstances in which you can attribute responsibility.

But the reason I want to emphasise these two cases is because they do emphasise decisive influence/control. We would say that is the benchmark for attributing any

act of the Bank onto the Supermarket. If Mr Hoskins wants to go further and come up with some other notion that says, well, the Supermarket is one economic unit with the Bank, then one would have to look very closely to see whether those other circumstances were, as a matter of English law, sufficient to attribute responsibility to the Supermarket for the purposes of turpitude.

That's why I don't think that we emphasised enough that you have got to go back to domestic principles just to double check that when EU law says you are part of the same economic unit, that is sufficient for the purposes of domestic law.

But we can see that if the two sisters are an economic unit because Sainsbury's Supermarkets is exerting that the requisite degree of control in Aristrain, then we can see that the Supreme Court would probably say that the act of the Bank would be imputed onto the Supermarket.

MR JUSTICE BARLING: Assuming they are the same unit, but for the purposes of the EU case law, so that, for example, as a matter of EU law they would have been a party to the infringement, let's assume that follows, where are you on sort of turpitude and whether things are sufficiently naughty in this case?

I can't remember now whether that's dealt with or not in your skeleton. It might be.

MR BREALEY: First of all, I will just say it would depend -- in a moment I will try and articulate what we say MasterCard have to prove.

MR JUSTICE BARLING: Yes.

MR BREALEY: But the straight answer to my Lord's question is that it would depend upon the basis upon which the bank and the supermarket were regarded as a matter of European law as one economic unit.

So let's assume for the sake of argument that today we see that the European Court has departed from Aristrain and said you don't need decisive influence or more control, it is sufficient (inaudible) that you can just simply impute knowledge, that the common shareholding, it is two sister companies, part of the same group, you can impute knowledge. So they get rid of Aristrain, and simply because you are a member of a whole group, you are one economic unit. Let's assume for the sake of argument that is how euro law pans out.

I would say that paragraph 7 of Lord Neuberger, well, that might be sufficient for you to be technically in breach of article 101, but when it comes to identifying turpitude and attribution for the purposes of this public policy test, it would not be sufficient.

Because we submit, and it seems to be -- this is what you get from these cases -- the agent must be under the directing mind and will of the company, or that the company is somehow controlling the agent in order for the act of the agent to be imputed to the principal. It must be more than just you are in the same class, you are a member of the same -- it must be more than you are just a member of the same group.

MR SMITH: Obviously you have quite rightly made the point that questions of attribution are extremely difficult, and so perhaps we need to devise a way of parking those questions.

Can we, in order to discuss the other two elements that comprise an illegality defence, assume that Sainsbury's and Sainsbury's Bank are actually just one company, in other words, a single legal entity is carrying on both the operations of the Supermarket and the operations of a Bank, so we don't have to worry about attribution acts or anything like that, we know it is the same entity doing both? And then approach the question of turpitude and the relation of turpitude to the claim that has been brought without having to worry too much about these very difficult questions of attribution?

MR BREALEY: Sure. I will do that.

I will do that in the context of what and then hopefully I will finish on this and then I will just mention turpitude and Lord Sumption's third.

But can I articulate what we say about attribution. I would like to say what MasterCard prove, and I think it is in a different order to Lord Sumption.

So attribution first. We submit that the question here is: should the act of the Bank be attributed to the Supermarket?

We would say that involves two considerations. I'm still on attribution. The first consideration is whether the Supermarket has decisive influence over the Bank, and the second consideration, which should not be forgotten, is that the Supermarket must have decisive influence over the Bank in respect of the restrictive agreement.

So if it was proved that the Supermarket had decisive influence over the Bank-- this is not the case, but over pay of the Bank's employees -- this is not the case but if it was -- that would not be sufficient to attribute the act of the Bank, when it includes a naughty agreement, onto the Supermarket.

I think we get that from the cases, but we get that from the Hydrotherm v Andreoli case that we saw yesterday. So even on the economic unit point, you have

to be at one for the purposes of the agreement.
MR JUSTICE BARLING: It has to be a decisive influence in respect of the MIF or just be part and parcel of the scheme?
MR BREALEY: This flows to quite a few of the conditions. We would say the MIF, why the MIF? Because as Mr Hoskins was I think submitting yesterday, or I accepted, the scheme in itself is not anything to do with turpitude. The scheme as a general concept is a good thing. So one would have to highlight the restrictive agreement.
That's the whole thrust of Mr Hoskins' submission on objective necessity. The scheme is a great thing --
MR JUSTICE BARLING: You can't be a member of the scheme without submitting to the rule about the MIF.
MR BREALEY: Precisely. That feeds into significant responsibility. So that is the attribution.
Now, I will take Mr Smith's point that there is now one economic unit, how does that then feed into the other conditions? Well, having seen that the act of the Bank is attributed to the Supermarket, one still has to identify Lord Sumption's first condition and the most obvious one is whether it is turpitude.
I don't want to go over old ground, but clearly Lord Sumption and Mrs Justice Asplin saw that a breach

of competition law could in principle constitute turpitude. But whether it is turpitude for the purposes of the ex turpi causa principle depends on, as she said at paragraph 80:
"I consider it more than merely arguable that it is necessary to establish whether the claimants, ie Tesco's, had the requisite state of knowledge."
So that is an inquiry that we will have to look at in the evidence. But whether, even if technically one economic unit, Supermarket, is in breach of article 101, whether it had sufficient knowledge if Lord Sumption is right and Mrs Justice Asplin, her instinct is right.
So that would be the question on turpitude. The last condition Lord Sumption referred to is, what relationship does the turpitude have to the claim. That was his third condition. I have tried to work through this, but it seems to me that that condition is very closely related to the overriding condition imposed by European law on this doctrine, that of significant responsibility.
So whether significant responsibility is a fourth condition, because we know from Courage v Crehan that significant responsibility is an overriding condition that is imposed on the national doctrine of ex turpi causa. So why? Because it was put to the European

Court that the strict application of the doctrine in Tinsley v Milligan precluded Mr Crehan's claim, and the European Court said no, only if Mr Crehan is significantly responsible.
So we know that the ex turpi causa doctrine is a matter of national law, but just as with the passing on defence, European law has a little bit to say about the strict application. And so whether Lord Sumption's third condition "What is the relationship between turpitude and the claim", is a free-standing condition to significant responsibility, personally I haven't quite worked out yet. But I think it is quite closely related.
It may well be that what is the relationship of the turpitude to the claim is no more than saying: are you founding your claim on the unlawful agreement? If that is all that Lord Sumption is saying, then there would be a fourth condition: even if you are doing that, as in Courage v Crehan, are you significantly responsible? And are you significantly responsible for the breach of competition law? And that's essentially what we are looking at.
It is not the fact that you have just signed up to what -- it could be a very benign or proactive scheme, a credit card scheme -- are you significantly

responsible for the breach?
MR JUSTICE BARLING: On which you rely.
MR BREALEY: On which you rely.
MR SMITH: I think, whether it is a third or a fourth element, but it seemed to me that when Lord Sumption was talking about the relationship between the turpitude and the claim, he was taking as given that there might be a wrongful act of turpitude for which the actor, the claimant, bore significant responsibility, but which was nevertheless so unrelated to the claim that it fell out of account.
MR BREALEY: Right.
MR SMITH: And that is in itself one of these very vexed questions, whether it has to be literally an element of the cause of action you are advancing which involves illegality, or whether it is broader than that, but the third stage, it seemed to me from Apotex, was that by that stage he was accepting that there was both a level of wrongfulness that triggered the public policy interest, and attribution of that wrongfulness to the claimant, but that the other question was: was it sufficiently attached or detached? Which is in itself --
MR BREALEY: That's why, heaven forbid I disagree with Lord Sumption, but if you apply significant

responsibility for the breach upon which you rely and you say that is the third condition, it is difficult to see what you get from the fourth condition because what you are trying to see is whether it is detached. And it is difficult to see that if you have been significantly responsible for the breach on which you rely, how you can then go on to say it is detached. But that's why I kind of --

MR SMITH: There may be an elision.

MR BREALEY: Yes. That is all I have to say.

I was trying just to kind of clarify what was a long day yesterday. It has been helpful.

The last thing that I just would like to do before I leave it to Mr Hoskins, and I don't make any submissions on it, MasterCard have in their skeleton handed up kind of some flowcharts about the damages which, frankly, again we will have to sort out probably with Dr Niels. We certainly don't agree the charts and we do not agree that when they say it is agreed, it is agreed, if you see what I mean.

MR JUSTICE BARLING: We can't believe anything anymore.

MR BREALEY: There are sort of shadings which say that Dr Niels and Mr von Hinten-Reed agreed, and Mr von Hinten-Reed says he does not agree.

MR JUSTICE BARLING: So we don't agree the charts.

MR BREALEY: We certainly do not agree the charts. If I could just hand up our own chart.

MR JUSTICE BARLING: Is it you don't agree the accuracy, or you don't agree -- sorry, I haven't got in mind what the --

MR BREALEY: We don't agree --

MR JUSTICE BARLING: Do they say they are agreed? The range of damages, if, on the basis of the MIF of -- the first chart is on the basis of scenario 1. Is it the figures that aren't agreed, or is it the --

MR BREALEY: We can't replicate the figures.

MR JUSTICE BARLING: You can't replicate the maths, as it were?

MR BREALEY: No. I'm looking at the scenario 1. I think Mr von Hinten-Reed -- just looking on the left "Effective competitive dynamics, volume migration to Amex only".

MR JUSTICE BARLING: I can't remember if this is confidential or not.

MR HOSKINS: We have been told this is all confidential to Sainsbury's.

MR JUSTICE BARLING: You haven't said anything yet.

MR BREALEY: Right, sorry. I'm grateful --

MR HOSKINS: It makes it quite difficult to deal with.

MR JUSTICE BARLING: That's why I thought I would interject.

MR BREALEY: It is not yellow. I'm confused.

I mean, I have -- I think the experts have tried to get together, and I think I would urge them again to get together to try to see if they can get --

MR JUSTICE BARLING: If it is just maths, it ought to be capable of being ironed out, oughtn't it?

MR BREALEY: It is. The lighter green Mr von Hinten-Reed does not agree.

MR JUSTICE BARLING: He doesn't agree that they represent his views?

MR BREALEY: Yes.

MR JUSTICE BARLING: Right, okay.

MR BREALEY: And that it should affect the damages. But he can't replicate the numbers.

MR JUSTICE BARLING: Right.

MR BREALEY: Very often these are helpful because it gives a range, but at the moment Mr von Hinten-Reed has some --

MR JUSTICE BARLING: Problems with the numbers.

MR BREALEY: I think he has been in contact with Dr Niels and they are going to be a few weeks away --

MR JUSTICE BARLING: That applies to all scenarios does it, one to four?

MR BREALEY: Yes. That percentage in the left-hand column is disputed so far as the damages is concerned.

Ultimately, we do not agree with the numbers.

MR JUSTICE BARLING: Right. Anyway, all will become clear in due course.

MR BREALEY: All will become clear when they try and sit ... what they have done, and I guess this is also confidential so I won't go through at the moment in open court, in opening, the range of damage estimates. All I will do is just indicate to the Tribunal what actually is happening.

If one looks at the MIT MIF and goes across, the first percentage is the calculation made by Mr von Hinten-Reed applying a MIT.

MR JUSTICE BARLING: This is the one you have just handed up?

MR BREALEY: Yes. I think there are some notes, I don't know whether it is on two sheets.

MR SMITH: It is on the back.

MR BREALEY: We will try and get it on two sheets, I think. And you have the notes. But one is the MIF that we say is correct. The other is the Commission MIF, and the other is the bottom of Dr Niels' range, the low scenario from his table 9.2. So all that's happening there is you have got three calculations relating to three different MIFs.

Then below the MIFs you have the way of

calculating -- and again, I'm told this is confidential, but we will tease this out -- at least two ways of calculating compound interest.

MR JUSTICE BARLING: Yes.

MR BREALEY: Then on the left-hand side, you have the degrees of pass-on.

As I said yesterday, MasterCard now say there is a 100% pass-on and that leads to the bottom right figure that they say we are entitled to. Whereas if you adopt what MasterCard have been arguing for the last 15 years, zero pass-on, you end up with a figure in kind of red shading on the left-hand side. But that's just to give the Tribunal an indication of --

MR JUSTICE BARLING: So that is the rival version of those --

MR BREALEY: It is totally rival, because if you take the --

MR JUSTICE BARLING: Yes, some of them. Where should we put that, then? At the end of your skeleton?

MR BREALEY: If you could, my Lord, thank you.

And that concludes my opening. I don't know whether that's convenient, unless there are some questions from the Tribunal?

MR SMITH: Yes, Mr Brealey, one question.

Yesterday in the course of your submissions you were discussing the various lawful MIFs, and you of course

call it the MIT MIF, and Mr Hoskins has his alternative proxy for what was a lawful MIF.

We wondered whether a proxy for a lawful MIF mightn't be the MIF that was actually charged in the case of debit cards, because that would, as I understand it, exclude the cost of providing credit to customers, but would include essentially everything else. So we thought we would float that with you.

There's no need to respond now.

MR BREALEY: I'm very grateful for that. I do see that point, yes.

MR JUSTICE BARLING: I have just lost sight at the moment whether part of your case is, or you are prepared to tolerate some additions that only apply to credit cards, such as an element of the cost of sort of purchaser default. I can't remember whether that was something --

MR BREALEY: Well, the answer to that would be probably no for the reasons that Mr von Hinten-Reed set out at length and we have tried to put in the skeleton, but obviously look at it. But to a certain extent in his calculation he looks at transaction costs and an element of fraud. So there is an element of fraud there.

MR JUSTICE BARLING: Yes.

MR BREALEY: But when it comes to default, again, without going into the cross-examination, but you do get a sense

from MasterCard, where they emphasise the competitive nature of the UK market and the issuing banks came along and threw money at people who couldn't afford to pay and there were defaults, the question is -- and they got interest from it and then they defaulted. So why should it be that the merchant should pay for the sins of the banks who are, on one view, irresponsibly lending?

You take that and then you actually analyse it under article 101(3). So that is just more or less a forensic point. Then you analyse it under 101(3), and say: what are the efficiencies that are being achieved which merit exemption under 101(3)? The guidelines I saw, the "what is the link two efficiencies from the MIF".

MR JUSTICE BARLING: So Mr von Hinten-Reed didn't come down in favour of any of that?

MR BREALEY: No. The reason --

MR JUSTICE BARLING: I have just forgotten that.

MR BREALEY: The reason for that is that, as I say, when one looks at the guidelines and how the European Court has said, so is the MIF indispensable for efficiency gain? When you actually analyse it, the answer to that must be no, we say. There is no efficiency gain that results from the MIF.

MR JUSTICE BARLING: I couldn't remember now, maybe you showed us a diagram of a shaded area, quite what the

shaded area included and what it didn't include. Don't worry, I can look it up.

MR BREALEY: That shaded area is purely and simply the transactional benefits.

MR JUSTICE BARLING: Right. Yes.

MR BREALEY: It is a little bit more than that. It is the benefits of accepting the card and, as I understand it, it is primarily transactional benefits, but there may be an element of fraud there because you are saving elsewhere on fraud --

MR JUSTICE BARLING: That's probably what I might have been thinking of, but there might be something else.

MR BREALEY: There is a something else and that's why when you take out the humongous bit of the cost of credit, really, it matters.

But I take the point about the debit card and I will discuss that with Mr von Hinten-Reed.

MR JUSTICE BARLING: Thank you very much, Mr Brealey.

MR BREALEY: Thank you.

(11.30 am)

(A short break)

(12.00 pm)

Opening submissions by MR HOSKINS

MR HOSKINS: I would like to do three things in my opening submissions. First of all, identify what are the

questions you need to consider with some degree of specificity, and in doing so I will follow the structure of the questions that we set out at paragraph 441 of our skeleton argument. You will see we have already adopted a structure.

It is A, tab 2, page 295. So that is the structure I'm going to follow, but obviously developing those points.

MR JUSTICE BARLING: Right.

MR HOSKINS: There is an awful lot of stuff in this case and unless one gives oneself a structure you get lost quite quickly, so that is the structure we propose.

The second thing I would like to do is establish the relevant legal principles, where it is relevant. The third thing I would like to do is identify what the differences are between the parties, and that can include on the evidence, whether it be factual or expert, we say X, Sainsbury's say Y. But for obvious reasons I'm not going to try to enter too much into the fray of the evidence, I'm just trying to identify the lines between the parties because one never knows what will happen with live witnesses.

So those are the three things I would like to do.

For a bit of variety, so you don't have to listen to me the whole time, you will be glad that Mr Cook is

going to deal with compound interest and ex turpi causa, and he will also deal with the association of undertakings issues because there is a certain degree of crossover between them. So at the appropriate moment you will be hearing from Mr Cook.

Let me plunge in: restriction of competition or, as we would say, no restriction of competition.

Our submission is that in the particular circumstances of the UK market, during the period of the claim, the MasterCard domestic UK MIF was either objectively necessary or it was not a restriction of competition that falls or fell within article 101(1).

There is a certain common legal base to both those questions, but one of the things I want to do is disentangle what the principles are in relation to each of those questions.

I start with what we say is the prize evidence in the case, which is the evidence in relation to Maestro. Because what the Maestro experience shows us is that the commercial impact of a material difference in the level of interchange fees offered by different payment card schemes was dramatically demonstrated by what happened in relation to Maestro.

Let me just show you the evidence that is before the Tribunal on that. First of all, can you go to

bundle C2, tab 2. This is a witness statement of a MasterCard witness, Mr Douglas. You have probably read it already, but just to refresh your memory in relation to paragraphs 28 to 37 of that witness statement, that's at page 29.

(Pause)

To summarise, paragraph 28, early 2000s, healthy competition in the debit card market in the UK. Paragraph 29, the bilateral rates, because there was a bilateral system, but in practice they were set at the level of the MIF. Paragraph 30, due to particular commercial background, MasterCard did not have power to set the MIF rates for Maestro; it was stuck with rates set by someone else. Paragraph 31, in the early to mid-2000s that meant that the Switch/Maestro/MasterCard debit interchange rate was significantly lower than Visa's. Paragraph 35, that disparity resulted in a collapse of the Maestro market share to below 3%.

Paragraphs 36 and 37, MasterCard tries to do something about it by launching its own debit card product, but it was too little too late. But that's important. I'll come back to it when I come to credit cards.

When it sticks at 3%, the reason it stuck at 3% is because MasterCard was able to launch a product with

a higher MIF to match Visa, and we will submit that's why it retained any market share at all. But I will return to that point when I come to credit.

Just to keep showing you what the evidence is on this, if we could go to bundle D3, tab 3, this is the first expert report of Dr Niels. If you could turn to page 265.

Again, I simply want to refresh your memory about looking at paragraphs 386 to 389, which includes something called box 3.1. But you will see it, there's a lot of drawn ... because it relies on Mr Douglas' evidence.

Then for a graphic illustration of what happened to the market shares, so if you can turn to page 249, you will see figure 3.3, which just plots the market shares for debit cards in the UK. And MasterCard are dark blue at the bottom and you will see the cliff that they fall off.

I should say this figure is reproduced in our skeleton argument at A, tab 2, page 172, and that's the one I showed you I think on the first day of the trial. But this is the same table.

Note the dates of the effect. A reduction begins, 2004, there is a little plateau and then it really goes downhill after 2008 because it takes time for banks to

switch. There is a degree of lag and that's why one sees that shape.

But what's important is that the cliff post-dates the Commission's 2002 Visa decision; the cliff post-dates the Commission's MasterCard decision in 2007. One theme I will keep coming back to, but it is important to remember, is that when one looks at the General Court and the Court of Justice's judgments, they are effectively a judicial review of the MasterCard 2000 decision.

So Mr Brealey was positing "I wonder if this could have been before the Commission?" Well, it certainly wasn't before the Commission because the cliff post-dates the decision, nor could it have been before the General Court or the Court of Justice because they have to review the legality of the decision on the basis of the material that was before the Commission.

So we say that the Maestro experience in the UK proves that if there is a material difference in the level of interchange fees offered by competing payment card schemes, the scheme offering the lower level will suffer a catastrophic loss of market share. Mr Brealey beat the drum and said "We don't accept this, we are going to challenge this", well, that's fine, you can do that in cross-examination. But there's no factual

evidence from Sainsbury's to challenge the relevance of what happened in relation to Maestro and why it happened, as Mr Douglas explains, as Dr Niels explains.

So the fight on that basis will have to be trying to poke a hole through our witnesses in cross-examination because they don't have their own factual evidence about what happened in relation to Maestro.

So the Commission has never considered the UK MIF at all, nor has it considered this evidence specific to the UK market. The only decision in relation to the UK MIF there has ever been was by the OFT, and you will be aware that that case collapsed when the OFT tried to change its case and the decision was overturned by the CAT.

There is a question of, well, to what extent, then, is the Tribunal bound by the Commission decision? We have set out the legal principles on the effect of Commission decisions in the statute and in the regulation. That's paragraphs 114 to 123 of our skeleton argument, bundle A, tab 2, page 198.

Our submission is that while the Tribunal of course may well be assisted by reference to the Commission decision, it's not bound by it. Mr Brealey accepted that yesterday. The reference is transcript Day 2, page 16.

So we say that the Tribunal's task is to determine the particular issues raised before it on the basis of the evidence presented to it, including the Maestro experience. Let me come back to the mechanics of what happened this Maestro. Why did a difference in interchange fees produce such a dramatic effect?

We need to go back to Mr Douglas' witness statement for this. So that is C2, tab 2, page 29. I'm sorry, I'm going to pick it up at page 25. You will see at paragraph 13, the heading:

"How banks decide which scheme's card to issue."

If you can refresh your memory on paragraphs 13 to 15, paragraph 18 and paragraph 20. So that is 13 to 15, 18 and 20.

MR JUSTICE BARLING: Thank you.

(Pause)

MR HOSKINS: So that is the evidence about the importance of rate of interchange fees offered in terms of issuing banks choosing which cards to issue, ie competition between payment card schemes to get issuers to issue their cards.

An important point at paragraph 21:

"This intense focus on ...(Reading to the words)... not cross-border rates since between 98% and 99% of card transaction volumes in the UK were generated by domestic

transactions."

This is a crucial difference between this case and the Commission decision because the Commission decision deals with, dealt with, intra EEA MIFs only and you don't have the same competitive dynamic for cross-border MIFs as you do for purely domestic MIFs.

Mr Brealey sort of rattled his shield, he is going to challenge this, fine. Let's see what Mr von Hinten-Reed said about this dynamic, his first report, that's D2, tab 2, paragraph 513. Again, if I can invite you to refresh your memory, paragraphs 513 to 523. (Pause)

There are two particularly important points made by Sainsbury's expert here in relation to competitive dynamics. The first one is the last sentence of paragraph 516:

"As noted by the Commission, issuers are members of both the Visa and MasterCard schemes and are therefore likely to choose whichever of the two brands of cards offers the highest interchange fees, competition between the schemes, based on the interchange fees offered."

And 520:

"In competing for issuers to issue their cards, Visa and MasterCard have a very strong incentive to increase interchange fees."

The schemes compete between themselves through the interchange fees they offer. That's Sainsbury's expert evidence and it confirms the competitive dynamic that I am talking about. The level of the MIF is a critical driver of competition between payment systems.

What's the significance of the fact that competition in this case puts an upward pressure on the MIFs? Because of course one thinks of the classic example of competition putting a downward pressure on prices of whatever, but here competition has the opposite effect.

Well, take a step back. It is not unusual for undertakings to compete by seeking to offer more attractive financial offers than its competitors. The classic example is an auction.

PROFESSOR JOHN BEATH: Yes, it is an auction for customers.

MR HOSKINS: An auction is by definition a fantastic example of competition, but what's the effect of an auction? You get a higher price. That's why people have them.

And this isn't me giving evidence, but it is anecdotal and you will put whatever weight on it you want, but a very good example of competition leading to higher prices is demonstrated by the position in relation to live football rights. Because in relation to live football rights what happened to many years is Sky bought them all and this was seen to be

a competition problem. I'm not going to go into pay TV, seeing everyone's faces.

So the Commission said "This is not good for competition because Sky is buying all the rights every time", so you have to actually set up a system where people can bid for the rights and not one person can buy all the rights. And that's what happened, and look what's happened: The most recent auction has created this astronomical uplift in the fees the television companies are paying for the rights. And again, forgive me if this is me giving evidence -- treat it as anecdotal -- I sit at home and watch, and the prices I'm paying as a consumer to watch Arsenal lose to Chelsea every season have gone up. But that is the effect of a competitive process that the Commission has insisted on, that it pushes prices up.

So one cannot simply say that because some sort of mechanism, here a competitive mechanism, results in a higher price, there is a competitive problem.

A higher price, a level of price is not in itself a competition law issue. It might be a reason why a regulator gets concerned and sees whether it should apply competition law or, indeed, regulation, but a high price for a high level is not in itself a competition law issue. What competition law is concerned about is

the mechanics by which a particular price is reached.

If one looks purely at a concern with the level of prices, as I have submitted, it is not a competition concern per se but it can be a regulatory concern. And that's actually now what's happened in relation to MIFs, as we know. Because we have had regulation, 2015/751 has been adopted.

If we can look at that. It is in bundle I1 at tab 6. You will see under the bold heading before we get to the formal recitals, there is:

"The European Parliaments ... the Council of the European Union, having regard to the treaty on the functioning of the European Union, in particular article 114(1) thereof ..."

Article 114 has nothing to do with competition, it is the legal basis for harmonisation for internal market purposes. So this is a harmonisation piece of legislation.

Recitals 1 and 7. 1:

"Fragmentation of the internal market is detrimental to competitiveness growth and job creation within the Union ...(Reading to the words)... of an integrated market for electronic payments with no distinction between national and cross-border payments is necessary for the proper functioning of the internal market."

7, I will ask you to read it rather than have me canter through it, if that's all right.

MR JUSTICE BARLING: Sorry, which bit do you want us to read?

MR HOSKINS: Recital 7.

MR JUSTICE BARLING: Yes.

MR HOSKINS: So you see it is the classic reason for needing EU harmonising legislation, otherwise there would be a disparity in legislation between member states.

Recitals 10 and 11 are interesting because they recognise and accept the competitive dynamic I've described of schemes competing by offering higher interchange fees. So if I can ask you to read 10 and 11, hopefully that point will leap out at you.

So the Commission accepts the dynamic I'm describing. The need for harmonisation, indeed the relationship between harmonisation and competition law, you will see that in recitals 12 to 14. Competition law hasn't worked so we are going to adopt a regulation. It is without prejudice to any competition law issues that may arise. That's 12 to 14.

The solution, recital 18: all debit and credit card based payment transactions shall be subject to maximum interchange fee rate.

20 then tells us how the Commission has gone about

coming up with a rate, the so-called merchant indifference test. I will take you through other examples, but here is the first example we have seen of the MIT being used as a proxy.

The Commission isn't going through every limb of 101(3), but you will see from the language of recital 20 that it reflects what one finds in the 101(3) conditions. But The Ommission, we will see, has on a number of occasions said if it is an appropriate proxy you don't have to go through 101(3). That's the way we satisfy ourselves.

Then those limits, pan-European limits, you find given effect to in articles 3(1) for debit cards and article 4 for credit cards. Then there's a particular concern, and it is something you will have seen in the evidence, that's strongly shared by MasterCard about, well, what about Amex and what about other three-party schemes?

There is a solution in the regulation. You see it at recital 28. This is important because, again, the experts continually clash on the extent to which it is relevant to look at Amex.

What the Union has decided in the regulation is that:

"To acknowledge the existence of implicit

interchange fees that contribute to the creation of a level playing field, three-party payment card schemes using payment service providers as issuers or acquirers should be considered as four-party payment card schemes and should follow the same rules as ...(Reading to the words)... to all providers."

Then there is a transitional period. That level playing field is given effect to by article 1(5).

So it is not all three-party schemes, but it is where they use licensees to issue and acquire, for example, Amex GNS scheme in --

MR JUSTICE BARLING: The 3.5 scheme.

MR HOSKINS: Correct.

MR JUSTICE BARLING: This would apply to Amex here?

MR HOSKINS: Then article 2(18), it is the same point we have seen in the recitals, you see how the definition of three-party payment card schemes are treated as four-party schemes where there are 3.5 schemes, if I can mix numerals.

Then the implementation date is at article 18(2). The common caps applied from 9th September 2015. Now, the difference between a regulatory approach such as this and a competition law approach is that the Maestro problem doesn't arise under the regulatory approach. The trouble with competition is if you go after one

person but not the other, you create the Maestro problem. With the regulation, everyone has the same rule in relation to MIF at the same time. Therefore, no Maestro problem. All payment service providers are subject to the same limit at the same time, including certain third party schemes.

Neither side, interestingly, has actually said the easy answer for you is take the rates here and apply them to the UK. The reason we say that is really two reasons: first of all, the case you are considering is a competition case. You have the Maestro problem. So what you have here is a regulatory solution which applies the same rate to everyone at the same time, and I will come on to the crucial point between us, which is the proper counterfactual as a matter of law.

But our submission is if we are right in our counterfactual as a matter of law, then you can't simply go to this and say "There you are, 0.3 and 0.2". But there is another problem, which is this is a pan-European level, and as we will see when we go through the materials, including some of the Commission materials, it is quite clear that the Commission contemplates that there can and should be specific consideration for particular domestic markets.

You will have seen from the evidence there is

a great deal of discussion about the differences between different member states, for example, credit cards are far more prevalent in the UK etc. So this is not, I'm afraid, an off-the-shelf answer, and neither party is suggesting it is, that you simply say "Aha, here is a regulation, it is 0.3 and 0.2, that's the answer". And that's the reason we say it is not. Sainsbury's haven't specified, and they equally do not say "Simply take this off the peg".

Let me then switch to the law. As I have said in relation to restriction of competition, the Tribunal has to consider two questions. First, was the UK MIF an ancillary restraint? Was it objectively necessary. Alternatively, if it was not an ancillary restraint, was a restriction of competition within the meaning of article 101(1)? That's almost tautologous, but you can have restrictions that don't fall within 101(1).

The legal framework. I will come onto exemption later, but on this issue is the MasterCard judgment of the Court of Justice of the European Union. Essentially we have had it bottom up because Mr Brealey took you in detail to the Commission decision, took you to the general law, but what matters on the law is what the Court of Justice said, so let's go to the Court of Justice. It is in bundle E1, tab 19.

First of all, I'm going to deal with objective necessity. What is the test for objective necessity? One finds that in paragraphs 78, 86 and 89 to 94 of the judgment. So it is 78, you will see the heading, this is dealing with objective necessity:

"The General Court carried out an assessment of the objective necessity of the MIF before addressing the question as to whether those fees produced anti-competitive effects. In those circumstances, it is appropriate to examine the plea concerning the ancillary nature of the MIF before addressing possibly restrictive effects."

This is what we are dealing with.

At 86, you get the arguments of the parties:

"The appellants [so including MasterCard] submit that the General Court misapplied the test of objective necessity over restriction. Instead of applying the test under which a given limitation on commercial autonomy is ...(Reading to the words)... applied in its judgment an incomplete test according to which a restriction is objectively necessary only if without it the main operation is incapable of functioning."

So that was MasterCard's argument to the Court of Justice.

Then the court's analysis is to be found at

paragraphs 89 to 94. I think, as long as you are happy with this, if you could read 89 to 94, then I will make submissions on it.

MR JUSTICE BARLING: Yes, we will read those.

MR HOSKINS: It is really for the shorthand writers as well, so they don't have any gabbling at speed.

(Pause)

Is it a high test? Oh yes, it is. We don't shy from that.

Paragraph 91:

"It is necessary to inquire whether that operation would be impossible to carry out in the absence of the restriction in question."

The fact that the operation is simply more difficult to implement or even less profitable without the restriction concerned is not sufficient.

Paragraph 93, the last sentence of it:

"The objective necessity test concerns the question whether, in the absence of a given restriction of commercial autonomy, the main operation would be likely not to be implemented or not to proceed."

I will come back to that because that actually is an echo. It is obviously a reflection of one of the classic and early community cases on ancillary restraint, which is Société Technique Minière, or STM,

which is from something like 1963, which dealt with ancillary restraints necessary to break into new markets.

I will come back to that in a bit. I put down that flag now that what you see here is the court saying in 2000, and whenever this was, I forget -- 2014 -- what it was basically saying in 1963 about ancillary restraints: The main operation would be likely not to be implemented or not to proceed.

But it is a high test. I don't shy from that. That's the test for objective necessity. What's the relevant counterfactual to see whether that test is satisfied? If we look at paragraph 96 you get the arguments of the parties. Again, if you could read that.

(Pause)

The big point from that is that the argument that was being made is that, in relation to objective necessity, the Commission relied on a counterfactual, a prohibition on ex-post pricing, which MasterCard said would never in fact have occurred. Then the findings of the court on this begin at 105, but if we could pick it up at 108:

"Irrespective of the context or aim ...(Reading to the words)... counterfactual is used."

Because we use a counterfactual both for an objective necessity and for restriction of competition. But regardless of what you are using the counterfactual for:

"It is important that that hypothesis is appropriate to the issue it is supposed to clarify and that the assumption on which it is based is not unrealistic."

That's clearly one of the main battlegrounds. I will make submissions to you in a little bit about why our counterfactual is in accordance with the law and is realistic. I will show you why and Mr Brealey's is not.

Then 111, this is dealing particularly with the counterfactual for objective necessity:

"The alternatives on which the Commission may rely in the context of the assessment of the objective necessity of a restriction are not limited to the situation that would arise in the absence of the restriction in question, but may also extend to other counterfactual hypotheses based inter alia on realistic situations that might arise in the absence of that restriction.

"The General Court was therefore correct in concluding in paragraph 99 of the judgment under appeal that the counterfactual hypothesis put forward by the Commission could be taken into account in the

examination of the objective necessity of the MIF insofar as it was realistic and enabled the MasterCard system to be economically viable."

Now, the language is difficult in its nuance, but hopefully it will become clearer when we come to what the counterfactual is for the restriction of competition. And the crucial difference, one sees it already coming in the language of 111, for a restriction of competition, you have to consider what would in fact have arisen in the absence of the restriction, whereas for an objective necessity, the counterfactual is not so limited. It still has to be realistic, but it can be a counterfactual that might arise insofar as it is both realistic and enabled the system to be economically viable.

I will flesh out what that difference means as best I can because it becomes a bit clearer in the case law. But you will see the court is trying to draw a distinction and you will see the language it uses to draw a distinction.

MR JUSTICE BARLING: You say in 111 that the court isn't there saying that it is realistic, that the Commission is right to say it is realistic. Are they saying that they were right to take it into account insofar as it was realistic and that was something the Commission

thought it was?

MR HOSKINS: I'm going to come onto what the court said about whether it fulfilled the condition, whether it was a realistic counterfactual which enabled MasterCard to be economically viable. But at the moment I'm just looking at what the test is, and then that's the next stage is, well, what did the court find in relation to that particular proposed counterfactual on objective necessity.

But what we say is that what this shows us, paragraph 111 shows us, is that the counterfactual for objective necessity must be realistic and must enable the MasterCard system to be economically viable.

Let me switch from objective necessity, the law on objective necessity, to what the law is on restriction of competition. Again, I will do it in two steps. First of all, what is the test, and secondly, how you identify the relevant counterfactuals.

First of all, what is the test. Mr Brealey referred to the O2 (Germany) case. I would like to take you to that. It is in bundle I3 at tab 9.

I'm not going to go into all the facts of the case, I don't think I need to, but just to see what the court was considering. If we go to page 349, you will see that this section of the judgment is in italics, is

concerning the first plea, alleging that there is no restriction of competition and that the competitive situation has been insufficiently analysed.

Then the findings of the court in relation to that plea begin at page 353 of the bundle, paragraph 66:

"In order to assess whether an agreement is compatible with the common market in the light of article 81(1), it is necessary to examine the economic and legal context in which the agreement was concluded, its object, its effects and whether it affects intra-community trade taking into account the particular economic context in which the undertakings operate, the products or services covered by the agreement and the structure of the market concerned and the actual conditions in which it functions."

I'm going to labour that, I make no apology for it.

And this formulation, one finds it again and again in the relevant case law. This is a standard type of language that one finds cut and pasted into judgments dealing with the same issue.

68:

"Moreover, in a case such as this, where it is accepted that the agreement does not have its object as the restriction of competition, the effects of the agreement should be considered, and for it to be caught

by the prohibition it is necessary to find that those factors are present which show that competition has in fact been prevented or restricted or distorted to an appreciable extent."

Again, it is the same point I'm labouring:

"The competition in question must be understood within the actual context in which it would occur in the absence of the agreement in dispute."

71:

"The examination required in the light of article 81(1) consists essentially in taking account of the impact of the agreement on existing and potential competition and the competition situation in the absence of the agreement."

Those two factors being intrinsically linked. So that is where the counterfactual comes in in order to determine where there is a restriction of competition you have to look at the state of competition as it is with the restriction and the state of competition as it actually would be without the restriction.

73:

"In order to take account of the two parts which this plea actually contains, it is therefore necessary to examine, first, whether the Commission did in fact consider what the competition situation would have been

in the absence of the agreement, and second, whether the conclusions which it drew from its examination of the impact to the agreement and competition are sufficiently substantiated."

So you have to consider what the competition situation would have been in the absence of the agreement.

Here that would be in the absence of the MIF, the MasterCard MIF, because that's the agreement we are looking at. So that is what we say the court has to do here, the Tribunal has to do here: it has to consider what the competition situation would have been in the absence of the MasterCard MIF.

You have seen already to an extent O2 deals with what the relevant counterfactual is, but it is also considered by the Court of Justice in the MasterCard judgments. So I can go back to that. That was E1, tab 19.

If we can pick this up at paragraph 127. This was an argument that was put by Royal Bank of Scotland. I acted for Royal Bank of Scotland in this case, not MasterCard, not that that makes any difference.

127:

"RBS maintains that in relying on general considerations and assumptions, the General Court erred

in law on its assessment of the existence of a restrictive effect on competition. First of all, in assessing whether an decision has a restrictive effect on competition, the Commission should have considered what the actual counterfactual hypothesis would have been in the absence of the MIF. By not penalising that omission and by thus relying solely on the economic viability of the ...(Reading to the words)... rather than on any consideration of the likelihood of such a prohibition actually being adopted, the General Court erred in law by confusing the legal conditions for objective necessity and those for effects on competition."

So that was our submission, and we relied on O2 because what the General Court had done was it just took the test for objective necessity and applied the same test to restriction of competition. And we said that's wrong, see O2. And the court agreed with us, agreed with the Royal Bank of Scotland. That's paragraphs 161 to 169.

Again, that's quite a long passage. Could you read that to yourself, please? 161 to 169. (Pause)

Royal Bank of Scotland was right, the General Court had committed an error of law by eliding the appropriate counterfactuals for objective necessity and restriction

of competition.

Just to unpick that, paragraph 163:

"The same counterfactual hypothesis is not necessarily appropriate to conceptually distinct issues. Where it is a matter of establishing whether the MIF have restrictive effects on competition, the question whether without those fees that by the effect of prohibiting ex-post pricing open payment systems such as the MasterCard system could remain viable is not in itself decisive."

So the objective necessity test is not the same as the restriction of competition test.

164:

"By contrast, the court should, to that end, assessing a restriction of competition, assess the impact of the setting of the MIF on the parameters of competition, such as the price, the quantity and quality of the goods or services. Accordingly, it is necessary to assess the competition in question within the actual context in which it would occur in the absence of those fees."

The MasterCard MIF fees.

166:

"It follows from this that the scenario envisaged on the basis of the hypothesis that the coordination

arrangements in question are absent must be realistic. From that perspective it is permissible where appropriate to take account of the likely developments that would occur on the market in the absence of those arrangements."

Having seen that, can I invite you just to go back to 111, which you read before, because I think the court is making the same distinction there. But once one has seen the passages we have just seen, I think that distinction the court is trying to make between, for objective necessity, a realistic hypothesis that might arise, and for a restriction of competition, a realistic competition that would on the facts arise absent the MIF. That is the distinction they are trying to draw.

And the test is therefore more difficult to satisfy for objective necessity than for restriction of competition.

There is one really important point that comes out of paragraph 167:

"In the present case, the General Court did not in any way address the likelihood or even plausibility of the prohibition of ex-post pricing if there was no MIF in the context of its analysis of the restrictive effects of those fees. In particular, it did not address the issue as to how [this is the important bit]

taking into account in particular to which the obligations to which merchants and acquiring banks are subjects under the honour all cards rule, which is not the subject of the decision at issue, the issuing banks ...(Reading to the words)... settlement of bank card transactions."

So what this tells you is that when you are carrying out the analysis, whether it is objective necessity or restriction of competition, you have to carry out the analysis taking the scheme as you find it.

The only thing that can switch between the counterfactuals is the alleged restriction. So, for example, here in both counterfactuals, whether it is objective necessity or restriction of competition, so the counterfactual for each, you have to assume that the honour all cards rule exists in each because it is not challenged.

We submit that must go for the rest of the scheme. For example, insofar as the scheme provides for guaranteed payment in event of default, or in event of fraud, you have to take the scheme as it finds it because they are not alleged to be restrictions of competition by Sainsbury's.

So the counterfactual, whatever it may be, and I will come to that, has to take the scheme as it finds

it, and the only thing that changes, as you are looking at the scheme, with UK domestic MIF, MasterCard domestic MIF, or a scheme without UK domestic MasterCard. And that's crucial, 167, for that reason.

It is 12.59 and that would be a good place for me to stop.

MR JUSTICE BARLING: Good. Thank you very much.

MR HOSKINS: Thank you.

(1.00 pm)

(The short adjournment)

(2.00 pm)

MR HOSKINS: Good afternoon.

MR JUSTICE BARLING: Mr Hoskins.

MR HOSKINS: The next point I wanted to look at on the law relates to restriction of competition, as opposed to objective necessity.

What I want to show you is as a matter of law, when you are considering where there is a restriction of competition, so when you are comparing the actual position that existed with the counterfactual, you have to take account of competition in both the issuing and acquiring markets.

That's not a market definition point. This assumes that there is a relevant market in acquiring and there is a separate product market in issuing. But even if

they are separate markets in that sense, for the competition analysis, you still have to look at both of them.

MR JUSTICE BARLING: Is that because even when you are looking at the effect on competition in the acquiring market, isolating that, you still have to look at --

MR HOSKINS: No. It is when you are looking at O2, you are looking at the actual state of competition with the MIF, what the state of competition would be without the MIF --

MR JUSTICE BARLING: But on which market?

MR HOSKINS: Let me show you the case and I think it will answer your question.

It is the MasterCard case again, so we are in E1.19.

(Pause)

Paragraphs 177 to 179. Again, if you could please read those. Actually, 176 to 179. You get the argument in 176. (Pause)

You see from 177 the court says:

"In order to determine whether coordination between undertakings must be considered to be prohibited by reason of the distortion of competition which it creates, it is necessary to take into account any factor which is relevant."

Then we get the recitation of the factors that we've

seen before.

Final words:

"... regardless of whether or not such a factor concerns the relevant market."

Then in 178, the Court of Justice notes that the General Court found that there was an interaction between the issuing and acquiring markets. So even although the General Court was focusing on the acquiring market, it was established that there was an interaction between the issuing and acquiring markets.

Then what the Court of Justice tells us in 179:

"In those circumstances, the economic and legal context of the coordination concerned ..."

Let's call it the O2 point, if you like. That is looking at the (inaudible) factors, each of the counterfactuals:

"... includes the two-sided nature of MasterCard's open payment system particularly since it is undisputed that there is interaction between the two sides of that system."

So when you are considering where there is a restriction of competition, you have to take account of the relevant factors in issuing and acquiring markets to judge whether there is restriction of competition. You are not just looking at the acquiring market.

MR JUSTICE BARLING: Yes, but it seems to be on the premise that what you are looking at is the restriction of competition on the relevant market, namely the acquiring market.

MR HOSKINS: Do you mean to find whether there is a restriction of competition?

MR JUSTICE BARLING: Yes.

MR HOSKINS: Sorry, yes. But in order to determine that, you need to look at both.

MR JUSTICE BARLING: Because there's a linkage.

MR HOSKINS: That is correct. This is a Pyrrhic victory, actually both of these points were, because whilst the Court of Justice agreed with the banks, with Royal Bank of Scotland and Lloyds, about the law, it then in the circumstances of the case said it didn't help them.

So here we see 180 to 181.

"In the present case, the arguments essentially put before the General Court, which are not contested in the present appeal, did not include the argument now advanced."

According to which, in order to assess a restriction of competition in its proper context it is necessary to take into account the two-sided nature of the system in question.

So the court agreed with the law. And that's quite

a good summary in 180 of what the legal position is, but said "But you didn't raise it before, so you can't win on it now".

So this point wasn't live in relation to the 07 decision. So what we get from the EC judge: this is the principle, ECJ didn't have to apply it because it hadn't been raised at the right time, if its raised before you then that is the principle you have to apply.

This is really important because when Mr Brealey says this argument, the Maestro argument, is a 101(3) argument, he is wrong because of this. Because what this tells us, remember the O2 restriction of competition, what's the actual state of competition that existed with the domestic MasterCard UK MIF? Compare it with the counterfactual that would have existed absent the MasterCard domestic UK MIF and see what the state of competition is. Is there a restriction of competition when you compare those counterfactuals?

And that's in order to determine whether there is a breach of 101(1). We are not talking here about 101(3), because 101(3) is about where you have a restriction which produces benefits and then you have to consider whether the benefits justify an exemption.

We are not talking about benefits flowing from restriction here. We are talking about MasterCard's

ability to compete without its domestic UK MIF. That is a 101(1) point, and that's what this judgment tells us.

MR SMITH: This necessity of taking into account the two-sided nature of the system, which is quoting from paragraph 180, the silent assumption is that this is a feature arising out of a two-sided market.

If you have got a single market, you've simply stolen the market definition of what is the market we are talking about, and you look at the effect on competition in that context.

MR HOSKINS: Yes.

MR SMITH: Whereas here, do correct me if I'm getting this wrong, you are saying that you have two markets and you need to be aware of the fact that they are both there, so you define one market, you define the other one.

How does one deal with a situation where there is a restriction on competition in market A, one side, but not in market B, or maybe even beneficial in market B? How do you trade the two off?

MR HOSKINS: I will come to what my submission is. I will tell you. I would rather take in sequence --

MR SMITH: I'm sorry, of course.

MR HOSKINS: This is complicated stuff. I'm trying to make it as simple as possible and I will get confused if I don't take it in stages. But what I will come to is

I'm going to apply these principles in this case and I will put the point to you.

But in a sense this is precisely what the Court of Justice had because remember the Commission in the General Court had found relevant market, acquiring market, restriction in acquiring market. Question: is this a restriction for the purposes of 101? And what the Court of Justice is saying is in order to answer that question, you have to look at the issuing and the acquiring market.

MR JUSTICE BARLING: Forgive me, I want to be absolutely sure about this. So the argument that they said wasn't raised was not an argument related to the definition of the relevant market?

MR HOSKINS: No.

MR JUSTICE BARLING: It was the question of what you could take account of?

MR HOSKINS: Yes.

MR JUSTICE BARLING: When deciding whether there was a distortion on the acquiring market?

MR HOSKINS: Correct. This is all on the premise that there is a separate relevant market in acquiring, there is an alleged restriction in the acquiring market.

MR JUSTICE BARLING: Separate market because relevant market has the baggage of being the market you are looking at

to see whether there is a distortion of competition on which --

MR HOSKINS: Yes, the classic "What are the relevant product markets?" And the Commission found an acquiring market and an issuing market, but as Mr Smith has just noted, as the court tells, these are actually linked and because they are linked the court says you have to look at both to see whether the restriction in one of them contravenes 101.

MR JUSTICE BARLING: Yes, it is part of the context --

MR HOSKINS: Yes, which we saw, for example, in O2.

PROFESSOR JOHN BEATH: Yes, you need to worry about if you do something, what's the knock-on effect in that other market to work out the overall ...

MR HOSKINS: That is right, absolutely.

Another aspect of this is of course, Mr Brealey repeatedly said that MasterCard's argument in this respect is about its profitability. But as I hope is clear, our argument isn't taking away the (inaudible) to make less money; our argument is that it would drive us from the market, objective necessity, or it would restrict our ability to compete in a material way. I will come to those two distinctions.

It is not simply about how much money we make. It is about whether we exist as a viable four-party scheme,

or it is about whether we are able to compete with another four-party scheme and, indeed, a third party scheme. It is a competition issue.

Let me come to the bit I said I would do, which is applying the legal principles we have seen to this case. And I will do objective necessity first.

Just to set out the argument, I'm going to take what Sainsbury's' proposed counterfactual is for objective necessity, because in a sense we say there isn't a workable counterfactual. We say we can only work with the MIF we had in the context of the UK markets. That's why I'm going to take Sainsbury's suggestion to show why it doesn't work. Our suggestion is there isn't a counterfactual that works.

It is his first expert report, so it is D2, tab 2, page 138, paragraph 93.

You see, he says:

"For objective necessity, the counterfactual is based on no MIF or a low MIF, plus a role prohibiting ex-post pricing or some other rule to avoid the gun-to-the-head scenario as played out between acquirers and issuers."

It is the hold-up problem.

Our submission, our case is that the Maestro experience shows that if MasterCard had applied a zero

or a low MIF, as suggested by Sainsbury's, by Sainsbury's expert, then Visa would have retained its MIFs at the higher level of the actual level they had, and this would have decimated our market share.

We say that's putting it as simply as possible. We say that it follows from that, if that's made out on the evidence, that it is clear that the actual rate of UK domestic MIF, which was applied by MasterCard during the period of the claim was therefore objectively necessary to allow the MasterCard credit card scheme to operate.

You remember the graphic presentation of the drop in market share in Dr Niels' first report. It is first Niels figure 343, but I am not going to take you to it again just for the record.

But you remember that that showed that if -- if you want the reference it is D3, tab 3, page 249 -- that the market share of the debit card market from MasterCard dropping from 3% or less.

But the scenario, the repetitive scenario in relation to credit cards is even worse. I took you to first Douglas, paragraphs 28 to 37. That was C2, tab 2, page 29. You remember that what he said was that the only reason why MasterCard retained even that tiny share of the debit card market was because it launched its own debit MasterCard, another separate debit product which

had MIFs comparable to Visa, and that's what kept its market share. It wasn't the Maestro with the lower MIF, it was the new product with the MIF comparable to Visa. That's what kept the market share.

Of course in the present case, under Sainsbury's counterfactual there wouldn't even be that crumb of comfort because under this counterfactual any MasterCard debit card has a zero or low MIF.

So in our submission you can't say, look, they have 3% in the Maestro experience, that's enough, because you don't get that here.

Second is that the switching effect in relation to credit cards would have been even more extreme than in the Maestro example because there was a greater disparity, or there would have been a greater disparity, in the level of the rates if MasterCard had lower zero MIF and Visa had its actual MIF. The best place to see this is from our skeleton argument. That's A, tab 2 and it is page 210.

I have to be careful. There is some confidential material here, so I will be careful. Paragraph 155(a) is not confidential and that tells you under the Maestro position what the disparity was between the Maestro MIF and the Visa MIF.

Then (e) and (f) explain how the differential would

have been materially greater if the MasterCard credit card MIF was zero while Visa had its actual level. And that's at (e) and (f), and you will see the magnitude of the difference in particular at (f). So the switching effect acknowledged by Mr von Hinten-Reed would have been even more extreme for credit cards.

The third point is that in the credit card market, unlike the debit card market, MasterCard faced competition not just from Visa but also from Amex. If we can look at Mr von Hinten-Reed's first report, so -- I am sorry to keep jumping around -- D2, tab 2, page 211.

Paragraph 441:

"I have estimated, based on UK evidence mainly from MasterCard disclosure, that MasterCard would lose around 5% of its market, as measured by credit card transactions, to Amex in a zero or low interchange fee environment. This is consistent loss of market share ... implicit in the estimates that BCG produced for MasterCard for the range of likely MasterCard revenue loss in a low interchange fee environment."

He is saying if Amex has its annual rates, MasterCard has lower zero, 5% swing, he says, from MasterCard to Amex. Put down marker, we disagree, we say the swing would be a lot more, but I don't need that

now because you take the Maestro where MasterCard is left with 3% at the end of the day, you take the two facts I have given you and you add on at least a 5% swing to Amex. It is not just Visa taking, it is Amex taking business as well. We say on that evidence MasterCard would have been driven from the credit card market.

Remember, I showed you in the MasterCard judgment in the ECJ, there is evidence about what could MasterCard have done and the way it could have changed the scheme. But the ECJ makes absolutely clear in MasterCard that the only thing you remove when you are looking at objective necessity is the alleged restriction. So what we are saying is that MasterCard, with an honour all cards rule and the other features of the scheme which are not challenged, could not have stayed in the market with a disparity of MIF that Mr von Hinten-Reed suggests.

Mr Brealey said it was crafty to talk about losing market share because he said, well, MasterCard wouldn't have had that market share without the MIF. I said I would come back to Société Technique Minière, and I want to do that now. It is at I3 at tab 1. 1966 it is. I was a few years out.

If you turn, it is page 250 of the report or 007.08

of the bundle. This was about restrictions in -- I think it was a distributor concessionaire agreement, but we don't have to get into the detail of it. It is the principle at the top of page 250 of the report, if you could read that.

One of the classic early statements in competition law, crucial words in the second line:

"In particular, it may be doubted whether there is an interference with competition if the said agreement seems really necessary for the penetration of a new area by an undertaking."

So let's take Mr Brealey's optic. Let's assume MasterCard is starting afresh, it is a new business, it wants to set up a four-party scheme with all the non-contested features of a four-party scheme, an honour all cards rule etc. It looks at the market and it says "Can I enter the market with a lower zero MIF given that Visa has a MIF at the actual level it has?"

Would MasterCard have gone to the bother of setting up the four-party scheme if it was going to get less than 3% of the credit card markets in the UK? Possibly nothing. The answer is obvious.

So that optic of Mr Brealey's, let's assume not that MasterCard is sitting on this market share it shouldn't have and it is going to lose, let's take his optic.

Would a business enter into the counterfactual world that Mr von Hinten-Reed describes? And the answer is no. Such a business would not be economically viable, to use the language of the ECJ in relation to objective necessity.

So that's why we say it is objectively necessary, and the suggestion that one gets from Sainsbury's as to no, no, no, it would be objectively necessary, doesn't work.

It hinges on what the counterfactual is. I'm going to come to what their argument is on that. But this is our case. So it's a case based on Visa stays as it is, and if the Tribunal finds that that is the correct counterfactual we say we win.

Bilaterals are not an answer either to objective necessity. Can we look at Mr von Hinten-Reed's second report at paragraph 185. That's D2, tab 3. It may be D2.1. Sorry. It is page 456 of the bundle. Mr Brealey confirmed this in an exchange with the Tribunal yesterday.

185, first sentence:

"Under bilateral negotiations, under the honour all cards rule interchange fees would be pushed so high that the scheme would collapse."

So bilaterals are not a way of making four-party

schemes viable if Visa has its (inaudible).
MR SMITH: You mean bilaterals without any default at all?
MR HOSKINS: Yes, that's what it is, because there's no break in the whole MIF.
MR JUSTICE BARLING: No MIF.
MR SMITH: Thinking about this, it occurred to me that because of the ease of switching from, let's say, MasterCard to Visa, the simple cost of an issuer negotiating a bilateral, even if it was very straightforward, might be sufficiently high to incentivise the issuer to jump ship from MasterCard to Visa.
MR HOSKINS: Possibly. Yes. I said I don't -- that is right. I'm not sure I have got the evidence to back it up, but as a principle, yes. I'm just hesitating because I'm not sure anyone has actually gone into that as an evidential matter, but yes.
That's objective necessity. That's the very high hurdle. Let's presume we fail on that for whatever reason yet to be seen, but that's not the end of the story here.
Return now to restriction of competition. If it is not objectively necessary, is it a restriction of competition within 101(1)?
Now, in the actual economic context that applied

during the period of the claim, there was competition between Visa and MasterCard for the credit card market. Again, let's look at what Mr von Hinten-Reed's counterfactual is for purposes of restriction of competition. So that is D2, tab 2 at page 139.
Paragraph 95:
"I have established that the counterfactual for article 101 may be no MIF or a low MIF which equates to the additional benefits of card usage."
So no ex-post pricing rule, just zero or low MIF.
Now, again, what's the counterfactual? What's our counterfactual? We say it is Visa would have retained its MIF at the actual level it had during the period and our market share would have been decimated.
MR JUSTICE BARLING: That's the same as you say for --
MR HOSKINS: It is, but the reason why it is not -- for objective necessity, the test is higher. I have to show it wouldn't have been economically viable, whether that is 0%, 1% or 2%. That is the hurdle.
This, of course, is now looking at restriction of competition. So let's just assume that our market share falls substantially and let's just look at what the competition would have been under Mr von Hinten-Reed's counterfactual, because that's the exercise we have to do. What was the actual state of competition with

MasterCard UK domestic MIF at the level it was? And then look at the counterfactual, and our counterfactual world is: Visa stays as it was throughout the period, we are at low or zero. And our market share therefore tumbles.
Under that counterfactual, on the issuing side, MasterCard would have been removed as an effective competitor from the credit card market in the UK. Amex and Visa would have been left as the only significant players for credit cards. There was already no material competition in the debit card market because of the Maestro experience; Visa ruled the roost. So the competitive position in the issuing market would have been materially worse under a counterfactual without the MIF than in the actual real world with the MIF. The level of competition would have been materially less.
On the acquiring side, the level of competition would be the same as it actually was because the allegation, the vice that is said to exist in the MasterCard MIF is that it set a floor for the MSC's charge to merchants. I have already explained why the actual level doesn't matter for competition purposes as such. The real competition vice that's alleged is that it set a floor.
But the position would have been precisely the same

if MasterCard imposed a zero or low MIF, which is Mr von Hinten-Reed's counterfactual. Because a zero MIF is a common floor. A low MIF, at whatever level it is, is a common floor. So the degree of competition between acquirers in the counterfactual would be exactly the same as it was in the real world as matters happened.
So when one has to apply the test that the Court of Justice has told us we must apply, O2, compare the counterfactuals and compare what the state of competition is in each, MasterCard, Court of Justice tells us you have to look at the effect on competition. The relevant context is issuing in an acquiring market.
The counterfactual suggested by Mr von Hinten-Reed means that competition in the issuing market is substantially worse, competition in the acquiring market is the same.
MR JUSTICE BARLING: I don't understand that. Sorry, it is me being thick, but if you have a zero MIF and a merchant -- can't the acquiring banks now, as it were, compete with whatever their own merchant service charge will be? I mean, they don't have this --
MR HOSKINS: But they can always compete on that because the merchant service charge is made up substantially of the MIF plus extra bits on top. They can always --
MR JUSTICE BARLING: The MIF is by far the biggest part of

it. That was the whole point, wasn't it, of what the Commission was saying? The MIF was -- I don't know, I forget what it was, I don't know if I'm allowed to say, but it was a very substantial part of it which the Commission took the view that what bit that was left, as it were, was -- because presumably once you start paying a merchant less than, I don't know, 90% or something, or whatever the thing might be of his sale price, you know, he starts to get upset. So there's only a limited amount you have got to play with, I assume.

MR HOSKINS: But it is the same limited amount because the MIF is just a set cost that MasterCard sets for taking part in the system. The bit you have to play with as an acquirer to compete are the costs above the MIF.

MR JUSTICE BARLING: But if there is no MIF or a zero MIF, then the thing that enters the arena is surely the size of the acquirer's own charge to his client? He can compete as much as he wants --

MR HOSKINS: But they are trying to get the matter as low as possible. They still have to cover their costs, because the whole point of the MIF is that it is going from the acquirer to the issuer to cover the issuer's costs. But the acquirer, in terms of an acquirer being able to compete, has its own cost issues and they are nothing to

do with the MIF.

PROFESSOR JOHN BEATH: That is right. What you are saying is that what's charged to the merchant is simply a mark-up on the MIF?

MR HOSKINS: Yes.

PROFESSOR JOHN BEATH: And that mark-up is to cover the costs of the acquisition side of the business and these costs are unchanged?

MR HOSKINS: Correct. That is right.

MR SMITH: Mr Hoskins, let me make sure I have understood this. What you are saying is that the mischief, the anti-competitive effect that is said to occur, is a common floor that is applicable to all acquirers and that is passed on to the merchant market?

MR HOSKINS: Yes. The vice is that acquirers do not compete in relation to the level of the MIF because the MIF as in effect imposed on them by the scheme is at a common level.

MR SMITH: You say the position is exactly the same as regards mischief because there is still a common floor, it is just the level of the common floor has changed.

MR HOSKINS: Yes, absolutely.

MR SMITH: And so therefore when one is sort of trading off effects in the two markets, you say there is a significant issue in the issuing market?

MR HOSKINS: Yes.

MR SMITH: And there's no difference in acquiring market?

MR HOSKINS: Correct.

MR SMITH: Okay, I think I follow that. But let's suppose the mischief is much more focused on the level of the floor. I know that's not the position, but let's hypothesise that the complaint is that the MIF is at whatever level that the acquiring bank must pay to the issuing bank and that really it should be set lower.

Now --

MR HOSKINS: It is not a 101 issue, sir. I'm sorry, sir, to interrupt. Excessive pricing can be a problem, abuse of dominance, but what 101 is concerned with is the restriction on the ability of companies to compete with each other because of consensus rather than competition.

But if you have a cartel and the cartel agrees "We are going to give away our stuff because we are humanitarian, we want to do good, we are Robin Hood", it is still a cartel. If they are venal cartelists and they want to make as much money as possible, it is still a cartel.

The level has nothing to do with the 101 analysis. It is a reason why it might attract a regulator's attention, but actually it is irrelevant to finding of the legality or not under 101.

MR SMITH: Let me approach it another way. What I'm interested in is in a case where there is two markets, there is an anti-competitive effect or an effect on competition in both.

Now, what you have presented to us is a case where in the issuing market there is an effect and in the acquiring market there is none because there is a floor either which way. What I want to postulate, and I don't really care what the effect in the acquiring market of our hypothesising is, what I want to postulate is that there is in fact such an effect. What is the court to do when there is such an effect? How do you trade the two off? How do you balance the two effects in the two different markets?

MR HOSKINS: Assuming we are in the counterfactual -- and let's stick to acquirer and issuer -- and there is a negative effect, competition is worse in the acquiring market -- not my case, but competition is better in the issuing market in the counterfactual --

MR SMITH: Yes.

MR HOSKINS: -- you have to exercise your judgment. But it is not this case.

MR SMITH: Okay.

MR HOSKINS: Because that's what the Court of Justice tells you you have to do. If the detriments in the acquiring

market were slight and the benefit in the issuing market was large, overall competition is better.

You can only then exercise your judgment. That's where the Court of Justice test leads you.

MR SMITH: What I'm wondering, though, is whether we don't have to consider the nexus between two markets, because if we follow the logic of what you say the effect is in the issuing market, which is that there will be a flood of issuing banks moving away from MasterCard and towards Visa, won't that, because of the two-sided nature of the market, mean that actually the MasterCard product will be less desirable, of less interest to acquiring banks because there will be fewer people wandering around with a MasterCard in their pocket prepared to use it to pay for their transactions?

MR HOSKINS: Yes, that may follow.

MR SMITH: Would that be the way in which we seek to in the counterfactual balance the two markets?

MR HOSKINS: That is a better argument than the one I have put. Because the competition would be worse in the issuing market and there would be less interest in competition in the acquiring market because nobody wants to acquire MasterCard because nobody has a MasterCard in their pocket.

This isn't my test. It is what the Court of Justice

has said one must do.

MR SMITH: You have got to explain it to us.

MR HOSKINS: I understand.

MR JUSTICE BARLING: I'm still troubled, Mr Hoskins, by your suggestion that levels are only to do with 101(3). I'm still --

MR HOSKINS: Sorry, to do with ...?

MR JUSTICE BARLING: Article 101(3).

MR HOSKINS: No, they are not.

MR JUSTICE BARLING: I thought you said levels had nothing to do with 101(1)?

MR HOSKINS: No, levels -- I interrupt, but I don't follow you so far, sorry.

MR JUSTICE BARLING: All right. I will start again.

I thought that you were saying that the level of the interchange fee, if it is agreed, cannot be a distortion of competition between acquirers because by fixing it, as it were, nothing changes between them and they can still compete between each other in relation to their own charge.

MR HOSKINS: Yes.

MR JUSTICE BARLING: And which they are free to fix at whatever they choose. Am I right in saying that?

MR HOSKINS: If there is a restriction of competition --

MR JUSTICE BARLING: Yes.

MR HOSKINS: -- a relevant one that falls in 101, then you get to the question of the exemptable level.

MR JUSTICE BARLING: Yes, that's what I thought.

MR HOSKINS: But you only get to that question, so the level becomes relevant if the MIF is a relevant restriction of competition.

MR JUSTICE BARLING: Yes, but you are saying that the MIF can't be because it is fixed, it is the same for all of them. And therefore, there is no question --

MR HOSKINS: In the counterfactual it is fixed.

MR JUSTICE BARLING: At the same level because it is zero, zero level.

MR HOSKINS: Yes.

MR JUSTICE BARLING: I appreciate that, but I wasn't sure whether you were saying at whatever level, whether it is zero in the counterfactual or whether it is the current level, or the level that Sainsbury's complain about, it can't be a distortion for the same reason.

MR HOSKINS: On my case, the actual level of the MIF is irrelevant to the 101(1) --

MR JUSTICE BARLING: I thought that's what I started by saying.

MR HOSKINS: And I agree with you. I didn't understand the question.

MR JUSTICE BARLING: I'm sorry, that is my fault.

MR HOSKINS: That was me being slow. Yes, that is the logic of the submission.

MR JUSTICE BARLING: So you really attack the whole concept that is the basis of the Commission's decision, which is that by setting a positive floor, presumably there was an effect on competition between acquirers? Forget the actual level, but by setting some level that is more than zero, I don't know what they said about zero, but by setting some level above zero, there was a distortion because it set a floor, and you question that?

MR HOSKINS: The Commission decision had three vices. Mr Brealey called them the three vices. I have still got two answers. One is the Commission isn't dealing with the UK specific market. And the second point is that when one comes to look at what 101(1) is about, that's why I have taken you painstakingly through the Court of Justice in MasterCard, because forget what the Commission saying, with respect, we have the Court of Justice telling us what the legal principles are. And whatever the Commission says, one has to go by what the Court of Justice says. And my submission is simply based on what I -- I may not have made it clear, but if you go away and put the cold towels around your head it is perfectly clear, in my submission, what the Court of Justice is saying. And the level of the MIF -- it is

the auction example we talked about earlier.

If 101(1) is about the level of our price, you couldn't have auctions.

MR SMITH: Just going back to the Commission decision. You say that the mischief aimed against is a floor-setting MIF, but I'm wondering really whether the Commission wasn't saying: we are opposed to a MIF set at this particular level --

MR HOSKINS: The Commission was saying that.

MR SMITH: You are saying that's simply wrong.

MR HOSKINS: I'm saying it is not supported by the laws as set out by the Court of Justice, and any competition law. Just because the Commission says something doesn't mean it is right.

We have already established you are not bound by it. What you are bound by is the law. So if you are satisfied, and I have not seen any attempt to do it yet, that the level of the MIF is a problem for 101(1), then, you know, go ahead, if you find that's the law. But nobody has actually put forward a case to you yet to say that 101(1), the level itself, is a problem.

The law, in my submission, has to be based on the lack of consensus between acquirers in terms of the charge of the MIF to merchants. That's what 101(1) is about, not about the level they happen to charge.

MR SMITH: Okay, going back though to the Commission, I hear what you say about what the Commission says may not necessarily be the law, but just to try to understand the reasoning in the Commission's decision, would you agree that they were concerned with the level of MIF, which is why they approached it in terms of their counterfactual with an ex post facto negotiation band so you could effectively have a MIF of zero?

MR HOSKINS: Yes. The reason why the Commission got interested in this was because there was lots of complaints that the MIF was too high, and that's why they came in and that's why when they are running a competition case they have to get to a situation where the MIF is law. And that is the way the Commission came at it.

MR SMITH: That's the way they approached it.

MR HOSKINS: But please remember that the Commission at legal analysis was found to be flawed in at least two respects by the Court of Justice. And I have shown them to you.

MR SMITH: I'm with you. I want to be clear first of all what the Commission reasoning was, and I think we are clear about that.

MR HOSKINS: Yes, it is one of the three vices Mr Brealey recognises --

MR SMITH: Also, to be clear, I think it is clear on the transcript, you are saying that's simply wrong in terms of competition law.

MR HOSKINS: Legal analysis.

MR JUSTICE BARLING: One of the things they alleged, but they didn't make a final decision of course, was that this was price fixing and it was therefore a by object infringement. In the end, of course, they didn't. You took issue, your clients took issue then.

MR HOSKINS: They were not my clients then.

MR JUSTICE BARLING: Your current clients took issue with it. I'm not absolutely sure, and certainly it has not been -- the accelerator hasn't been pressed very hard by Mr Brealey --

MR HOSKINS: I think it has disappeared down a hole. We dealt with it in our skeleton argument.

If you go to Carte Bancaire and you see what the test is for object, it has to be screamingly obvious. Seven weeks, half of it on quantum. But it is trite, but you have seen the issues involved here. You understand why Sainsbury's has basically pulled away from objective necessity. It's got no legs.

The proof of that in a sense is in the arguments I have just made. Because an object case is so obvious you don't need to look at the context, but --

MR JUSTICE BARLING: Forget object for the moment.

MR HOSKINS: That is a dead parrot.

MR JUSTICE BARLING: Well, Mr Brealey hasn't leapt to his feet, but again, I will obviously put the cold towel round my head on this, but if you reach the stage where, if there is an economic and commercial limit to a merchant service charge simply because merchants won't tolerate something beyond a certain level being deducted, and if 90%, say, for the sake of argument of that commercial limit is taken up in a fixed charge, why doesn't that affect the ability of acquirers to compete?

MR HOSKINS: There is no evidence to that effect. Nobody is suggesting that. It has not been suggested.

MR JUSTICE BARLING: I thought there was a general subscription to the reasoning of the Commission by analogy in the --

MR HOSKINS: I will meet that point when the evidence is brought forward, but with respect, this is the point, this is part of the trouble, if you keep going back to the Commission. You can cherrypick bits, and I understand -- hang on -- and of course you are going to refer to it, I understand. But that's why I sort of painstakingly showed why you are not bound by the Commission decision.

Mr Brealey accepts that, that's a matter of law, and

that's why I laid store on the Maestro example because when you are talking, for example, about the levels etc, and I will come to it when I come to deal with why our counterfactual is the correct one, ie Visa being actual rather than Visa being low, the vice, if it be one, of a MIF being too high, in the UK context competition law can't deal with it because there is not restriction of competition for the reasons I've explained and will further develop when I come to why their counterfactual doesn't work.

So if the policy concern is levels too high, what do you do? You adopt a law that applies to everyone to avoid the Maestro problem. That's what you need and that's what's been done.

I'm not running a case in which I say the level in this is relevant, MasterCard can do what it wants, Visa can do what it wants, nobody can stop them. Regulation will step in. The issue you have to decide is, given the specifics of the UK market and the Maestro evidence, does competition law bite? And that's what we are dealing with. It is a much narrower issue. It is a different framework of analysis.

So can you be concerned about level? Yes. Does it get you home on a competition case in the UK specificities? No.

Let's switch, because all the arguments I have put to you so far are our arguments based on our counterfactual, which is Visa staying as it is while we are at low or zero.

This is really, when it comes to the difference between the parties on objective necessity, restriction of competition. This is the big issue between the experts and the way they put together their expert reports, for example, on this issue because Dr Niels adopts our counterfactual, Mr von Hinten-Reed adopts the other, and then they sort of go like that from each other.

Let's look at what Sainsbury's position is. It is explained at first von Hinten-Reed, so that is D2, tab 2. It is page 71 of the bundle. It is paragraphs 89 to 91.

If I can invite you to read that, you will see what the position is. I'm told there are two 89s, and I have gone to the wrong one, I'm very sorry. There is another 89, and the relevant one is at 138. I'm so sorry.

MR JUSTICE BARLING: Page 138?

MR HOSKINS: Page 138 of the bundle.

MR JUSTICE BARLING: So we want 89 --

MR HOSKINS: Still 89 to 91. (Pause)

That's the difference. He explains, he gives an explanation of why he has adopted that approach in his second expert report. So that is D2.1, tab 3 at page 461. It is paragraph 210 to 214.

You see it is really the point Mr Brealey made orally which is: it is not fair, we can't catch you unless we have this counterfactual. Such a counterfactual would clearly be unrealistic as it does not facilitate the assessment of whether there has been an infringement of competition law, so that it is not fit for purpose.

But, with respect, it is the Sainsbury's counterfactual that is wrong as a matter of law because it is that counterfactual which is contrary to the principles which are set down in the consistent case law of the CJEU, including the MasterCard judgment, which I showed you.

According to the case law, a counterfactual must be realistic and it must take account of the actual conditions in which the market functions. And an assumption that Visa would have dropped its credit card MIFs to the same level as a MasterCard MIF, at zero or low, neither reflects reality, nor does it take account of the actual market conditions in which the MasterCard system functions.

It actually creates a whole new market, because in the credit card market you have got Visa, MasterCard and Amex, and they are actually asking you to make assumptions in relation to two of them. The only person that's left in the real world is Amex. But it goes further than that. Let's look at it as a matter of regulatory constraint.

What was Visa faced with in terms of regulatory constraint? Well, first of all, it was under no obligation in respect of the level of its domestic UK credit card or debit MIFs during the period of the claim. The first time there is a legal constraint is when the regulation comes in at the end of last year, because the Commission decisions, commitments etc, exemption decisions never relate to the UK MIF.

You get the history if you want it. It is our skeleton argument at paragraphs 90 to 111. It is highly artificial, therefore, to assume that Visa would have been subject to specific action by the Commission or the OFT during the period of the claim when in fact it was not.

So you can't get to this counterfactual, we say. It is just not realistic to assume somehow that there's regulatory constraint on the Visa because there wasn't.

But also it is clear, we know -- and I will show you

the facts -- that Visa didn't feel obliged by any regulatory threat. Mr Brealey said, well, the heat was on and all of this, of course it would have gone down to MasterCard. But actually what we see from what actually happened is that they didn't, in light of any potential regulatory threat, slavishly follow MasterCard or vice versa or, indeed, what the Commission did to MasterCard or vice versa.

If we can go to our skeleton for this, it is bundle A, tab 2, page 191. That's 191 of the bundle. Let's see what actually happens when the authorities did step in. Paragraphs 93 and 94. In 2002, Visa offered undertakings to the Commission in relation to the level and setting of its intra EEA MIF. You have seen that. That's culminated in the 2002 Visa decision. What did MasterCard do? Did it follow it? No.

Paragraph 94:

"MasterCard did not agree with the Commission's analysis, which Visa had not tested because it offered undertakings."

MasterCard did not offer the same undertakings. We went to court and that's what led to the 2007 Commission decision and the appeals that followed.

But also, paragraphs 100 to 101, what happened at the end of that process when MasterCard was dealt with,

by that time the exemption, the Visa exemption had expired, so Visa was sort of floating. It had been subject to Commission regulation, so MasterCard has the Commission decision against it.

And 100:

"MasterCard offered temporary undertakings to the Commission in relation to intra EEA MIFs."

And that was 0.3% credit card, 0.2 for debit cards.

What did Visa do? Did it follow that? No, it didn't.

Paragraphs 102 and 103:

"Visa didn't offer commitments in relation to debit cards ..."

This is all intra EEA and member states other than the UK:

"... until 2010."

So about a year later.

And over the page, 104, visa didn't offer commitments in relation to credit cards until 2013. So that is about four years after the MasterCard intra undertakings. And that's six years roughly after the adoption of the Commission decision against MasterCard.

You have seen the graph in Dr Niels' statement. Imagine a gap of four or six years before Visa is forced to fall into line. The damage is done and MasterCard's

market share has been decimated. So as a matter of fact, it is not enough to say: well, the Commission was all over Visa about this, because the facts show that Visa fought its own corner when it suited it, MasterCard did the same. They didn't slavishly follow each other, nor did the authorities seek to coordinate the action against them.

That's the regulatory position. As a matter of commercial choice, what did Visa do when faced with a situation in which MasterCard's UK Maestro debit card MIF was low, or materially lower? As a matter of commercial choice did Visa follow it or did it maintain the high one and drive MasterCard from the market? No surprise. Visa retained its higher MIF because it wiped the floor with MasterCard as a result.

So Sainsbury's proposed counterfactual has no basis in either the regulatory reality of what happened during the period of the claim, nor commercial reality. It is a wholly artificial construct which rather than reflecting the actual structure of the UK market during the period of the claim, paraphrasing the legal requirement, it expressly ignores it. It re-writes the reality and it is therefore inconsistent with case law.

Really Sainsbury's approach is nothing more than a legal fiction which it claims is necessary for the

effective application of competition law. But it is not correct to say that it is not possible to assess whether there has been an infringement of competition unless you adopt their counterfactual.

My submissions show that it is entirely possible to apply competition law, but you get to the conclusion where there is no infringement. It is not that it renders competition law inapplicable, it just means you don't show an infringement. What really Sainsbury's are saying is: unless you adopt our counterfactual, we can't show a restriction. But that's not the test.

MR JUSTICE BARLING: Mr Hoskins, we need to take a break fairly soon, so just choose --

MR HOSKINS: I'm aware of that, and I have got about two or three minutes left and then I'll stop, if that's okay.

There's another problem with Sainsbury's suggested counterfactual, which is that it requires one to assume that Visa's MIF was unlawful during the period of the claim. And what they are actually saying is you have to assume the very thing that they are trying to prove against us also applied to Visa.

So there is a presumption of innocence problem potentially in relation to Visa, which will be fairly obvious. You can imagine Visa won't be very happy if a judgment comes out and says: actually, we find that

the MasterCard MIF is unlawful, and because it follows that the Visa MIF was unlawful, they would have been at the same level. Circularity and presumption of innocence problem.

That is the problem. You have to effectively assume illegality on the part of Visa in order to establish illegality on the part of MasterCard.

As I said, this isn't an argument that leads one to say there is no legal mechanism to deal with a concern about the level of MIF. But the proper way to deal with the problem is not competition law, for the reasons I have described. It is legislation. And that's what's happened in the regulation, and the reason it is the proper way is that it gets rid, for the UK, of the Maestro problem. The Maestro problem is why there's no competition law problem in the UK and the way in which it is now dealt with is by regulation which applies to everyone at the same time.

If the Tribunal agrees with any of this analysis leading to a conclusion of the UK domestic MIF was objectively necessary, or there is no relevant restriction on article 101(1), then that's the end of this case.

We should have a break and then we will come back, because if you are against me on that, we move on.

(3.10 pm)

(A short break)

(3.30 pm)

MR HOSKINS: Before we get into economics, let's do a wee bit more law. Let's do a wee bit more law.

So I'm moving into exemption, which only arises if you find a restriction of competition. There is an odd situation which arises because the Tribunal will then have to consider what the exemptable level of the MIF was, but you will have to do that for two reasons.

The first reason is that if the UK domestic MIF applied by MasterCard during the period of the claim was the same or less than the exemptable level of the MIF, so if the actual one is below the exemptable level, then it is 101(3), it is exempt. And in relation to that, the burden of proof is on us, and as Professor Beath pointed out in Mr Brealey's, we already knew the tests and the guidelines is robust empirical evidence. So burden on us and robust and empirical evidence.

However, there is a second function for which the Tribunal have to investigate the exempt level of the MIF, because if the actual MIF was above the level of the exemptable level of the MIF, then the difference between the exemptable level and the actual level is the basic overcharge fee.

In that regard the burden of proof is on the claimant, it is on Sainsbury's to establish the extent of its loss. So just imagine a cartel case about widgets, a follow-on damages claim. The claimant has to show what the price would have been, and the burden is on them.

So there is a difficult legal issue about --

MR JUSTICE BARLING: So who goes first? I suppose logically you do, do you, because --

MR HOSKINS: The more interesting issue, really, is who the burden is on. My point is this is going to fold together because we are both having to argue, we say that exemptable level is X, Mr Brealey says it is Y and it is really completely artificial to say for one purpose -- because actually, assume that by some good fortune we both said the level was the same, are you going to say there is a different standard of proof on us than there is for him?

MR JUSTICE BARLING: I suppose theoretically, logically, you know, the question of exemption arises before the question of damages.

MR HOSKINS: It does.

PROFESSOR JOHN BEATH: Yes.

MR HOSKINS: But you are not going to decide two different exemptable levels.

MR SMITH: Yes. Indeed. I mean, presumably you would not --

MR HOSKINS: One is bad enough.

MR SMITH: Neither of you would be contending for one level of exemptable MIF for 101(3) purposes and a different level for damages purposes. Presumably you would both be saying that we should reach a view on the evidence and conclude with one level of counterfactual MIF?

MR HOSKINS: My guess theoretically you could have two, you could apply a high standard and say you failed to prove it and then move into the overcharge, and then the burden switches and then the standard is different. Probably not because it is all civil standard really, but you have the point. I don't know the answer. But I think the truth is the answer is it all comes out in the wash.

MR JUSTICE BARLING: Let's hope so.

MR HOSKINS: Let's move from the washing to the broad axe, because as we are entering into issues relating to the assessment of damages this is an appropriate time to consider the legal principles applicable to such an assessment. Both as a matter of EU and domestic law, the law is pretty clear that the court has a broad discretion as to the assessment of damages. It is sometimes called the broad axe, but I would like to show

you where we get that from.
First of all, can we go to bundle E5, tab 53.
MR JUSTICE BARLING: You are on damages, not exemption now? Or is this a crossover?
MR HOSKINS: I need to go here because when I'm looking at exemption I'm looking at it both for 101(3) and for a potential overcharge. And insofar as you are looking at potential overcharge, this broad axe principle becomes relevant.
MR JUSTICE BARLING: Right.
MR HOSKINS: Sorry, I have the wrong reference then. I'm looking for the Commission's practical guide to quantify harm and actions to damages. If anyone in the room knows where it is? I'm told E5 is not right.
MR SMITH: Would it be E5.3? (Pause)
MR JUSTICE BARLING: 53 I think is in E5 --
MR HOSKINS: It is, it is E5.3. Thank you very much. And it is tab 53 of that. I'm grateful, thank you.
So this is the Commission staff working document. It is the Commission's practical guide on quantifying competition damages.
If we could look first of all at paragraph 16. It tells us it is generally very difficult to deal with these sorts of overcharge issues, and that's what you have here when looking at the exemptable level of the

MIF for damages purposes, if we get to that.
But then footnote 15 is important:
"The limits and implications of such assessment of a hypothetical situation have been recognised by the Court of Justice in the context of quantifying loss of earnings and an action of damages for the community in the agricultural sector."
And then there is a quote:
"The loss of earnings is the result not of a simple mathematical calculation, but of an evaluation and assessment of complex economic data. The court is thus called upon to evaluate economic activities which are of a largely hypothetical nature. Like a national court, it therefore has a broad discretion as to both the figures and the statistical data to be chosen, and also, above all, as to the way in which they are to be used to calculate and evaluate the damage."
That is a quote from the Court of Justice in Mulder.
So that is EU law, assessment of damages, and the Commission says it should apply in relation to competition damages.
Then paragraph 17:
"For these reasons quantification of harming competition cases is by its very nature subject to considerable limits. As to the degree of certainty and

precision that can be expected, there cannot be a single true value of the harm suffered that could be termed but only best estimates relying on assumptions and approximations."
I should point out that the CAT gets an honourable mention, footnote 16, for dealing with such issues.
I quoted this far because it is the law. I could have come to you and said: Mr Brealey has to show great precision. That's not the law. Of course this helps me when we come to pass-through, as we will come and see, but this is the law.
Then in the English courts we have Devenish, which is I4, tab 8. The headnote, this was a follow-on action arising from the vitamins cartel, and the claimants sought exemplary damages, restitution in respect of unjust enrichment and an account of profits.
We see opposite F:
"On the preliminary issue as to whether the claimants were entitled ...(Reading to the words)... in addition or as an alternative to compensatory damages, the judge [who was Mr Justice Lewison] ruled inter alia that neither exemplary damages nor a restitutionary award nor an account of profits was available as a remedy."
The big issue in the case was whether compensatory

damages would be an adequate remedy because if not, that could potentially trigger an account of profits or some form of restitutionary relief. That really was compensatory damage and adequate remedy.
What the claimant was saying was this is all so complicated that it is not an adequate remedy. That's rejected because of the broad axe principle.
So Mr Justice Lewison's judgment, it is paragraph 19 which I want to start at, which is on page 160. This is where he considers compensatory damages. So he is assessing whether compensatory damages can be an adequate remedy.
19 says:
"Common ground at least for the purposes of this trial of preliminary issues, the claimants are entitled to compensatory damages."
Then he summarises the claimant's expert evidence at that stage.
23:
"Mr Layton, who was for the claimant, put the difficulty of proof in the forefront of his argument in favour of the availability of exemplary damages and a restitutionary award for a claim under article 81(a)(c)."
A bit further down, just above G:

"The important point [according to Mr Justice Lewison] is that the difficulties on which Mr Layton relies are not factual difficulties in the sense that the facts necessary to amount to ...(Reading to the words)... but evidential difficulties in the sense that it may be difficult to prove to the satisfaction of the court the facts that do exist or would have existed in the no cartel world.

"It is necessary, therefore, in my judgment to examine ...(Reading to the words)... to effective compensation. I will do this first by looking at the position in domestic law."

Then 27, if I could ask you to read 27.

MR JUSTICE BARLING: Yes.

MR HOSKINS: Actually, if you read between E and F, and then you read the citation from Lord Shaw's judgment in Watson Laidlaw, it begins below G. That is sufficient and it will introduce you with the concept of the broad axe, if you are not already familiar with it.

The important point is really just above B on page 407 of the report:

"The restoration by way of compensation is therefore accomplished to a large extent by exercising a sound imagination and the practice of the broad axe."

Then if I could ask you to read 29 to 32, the

principle of the broad axe is expanded upon.

MR JUSTICE BARLING: 29 to 32.

MR HOSKINS: Paragraphs 29 to 32.

What happened therefore was the judge said, well, using the broad axe, compensatory damages are adequate so you don't get the other remedies you are seeking. It went to the Court of Appeal and the Court of Appeal proved the first instance judgment. If we can see Lady Justice Arden's judgment, it is 468 of the report, 174.051 of the bundle.

It is between G and H where she refers to the broad axe and approves the wielding of it. Between G and H.

Likewise Lord Justice Tuckey at paragraph 159, it is the last page of the report, 480.063 of the bundle:

"A judge wielding the broad axe is capable of doing justice in such a case."

So I hope that makes your task seem a bit less daunting than it might seem at first blush. You are to wield the broad axe and that will hopefully make your task easier.

There is an important aspect though because with the benefit of the broad axe, what the courts have made clear is that when you wield it, the court should err on the side of under-compensation. If you like, a claimant gets the benefit of the doubt, but then the Tribunal and

the court has to be careful to err on the side of under-compensation.

There is a very important point. I would like to take you to those judgments. First of all, I6, tab 9.

This is a case, SPE International Limited v Professional Preparation Contractors. It is a judgment in the Chancery division, Mr Justice Rimer of May 2002.

If I can ask you first of all to look -- it is pretty complicated -- at paragraph 10:

"I find against PPC on liability for infringement."

It was a patent, copyright infringement case, I forget which:

"I find established the allegations of infringement by copying ...(Reading to the words)... SPE's drawing."

So the defendant had breached copyright by creating machines using someone else's plans.

Then the important bit for present purposes, 85 to 87. If I could ask you to read those.

Again, I will save you some time. 86 refers to Watson Laidlaw; you see the broad axe is about to be wielded at the bottom of the page?

MR JUSTICE BARLING: Yes.

MR HOSKINS: Then in 87:

"In this case my rejection of Mr Dean's evidence means that SPE is left seriously short of material by

way of proof of its loss under this head."

But he wields the broad axe to help them, but then he says five lines up from the bottom of paragraph 87:

"That may work to SPE's disadvantage since I also consider that I should err on the side of under-compensation, for inadequate compensation is better than none."

So the claimant doesn't have very strong proof, so he wields the broad axe, but says "I'm going to therefore err on the side of under-compensation".

That is approved later by the Court of Appeal. That's tab 10, it's a case called Blayney (trading as Aardvark Jewelry) v Clogau St David's Gold Mines Limited.

It is the Vice Chancellor, as he was, Sir Andrew Morritt at 55. If you go into the detail you will see he approves the wielding of the broad axe. It says at the end of paragraph 35:

"I put it that way because it is in my view necessary to guard against over-compensation."

Just to show the reference to the Mr Justice Rimer judgment is at paragraphs 31 to 34 of this Court of Appeal judgment. You see he refers to SPE, he sets out certain parts of it.

34:

"In my view the approach of Mr Justice Rimer is correct."

So two instances of the broad axe being wielded, and both, one High Court and one Court of Appeal, the court says yes, but you must err on the side of under-compensation if that's the approach to be adopted.

PROFESSOR JOHN BEATH: But in the case we have looked at, the Vice Chancellor case --

MR HOSKINS: The which, sorry?

PROFESSOR JOHN BEATH: In the case we looked at, the one to do with the Vice Chancellor Sir Andrew Morritt, the basis of the reasoning for not over-compensating was there was a loss and a gain to be weighed against one another, and that's why you would --

MR HOSKINS: Yes.

PROFESSOR JOHN BEATH: Both are going to be hard to measure.

MR HOSKINS: Yes, I understand. There are details within the case, that's why I put it, two examples of the broad axe being wielded, and in both instances the judges saying "But we need to err on the side of under-compensation".

MR JUSTICE BARLING: To be fair, he says I should guard against over-compensation because, as Professor Beath says, there is a set-off so that might not be quite so helpful.

MR HOSKINS: I understand.

PROFESSOR JOHN BEATH: You are not going to argue this case that there might be --

MR HOSKINS: No, not at all. The point, I'm referring these to you as examples of the broad axe where the court said "But I'm going to err on the side of under-compensation". I accept that neither of them says "This is a legal principle", if you like.

You understand why both of them did it. I say here is the High Court doing it, here's the Court of Appeal doing it, you should do it.

Can I move on to how to deal with the exemption criteria. So I'm moving out of the general approach to assessing damages.

Article 101(3). We know there are four cumulative conditions. What's apparent in the field of interchange fees is that the Commission has relied on economic proxies on a number of occasions in order to assess exemptions and in order to find that the level of particular MIFs has been acceptable.

It is interesting the Commission has actually used these proxies on occasions when it wants to justify its own approach. So, for example, when it is accepting commitments or granting exemption to Visa, it adopts a proxy. Actually, the only time I think -- I may be

over egging it, but the most notable time it has actually tried to do a full 101(3) analysis was the MasterCard case where it was actually trying to reject MasterCard's exemption. Nothing probably particularly turns on that, save to point out when the Commission wants to justify a level and if it is happy to use a proxy.

Let me show the examples. First of all, the Commission relied on the costs-based proxy, so that is an assessment of the costs of supplying payment services, the costs of processing transactions, costs of providing the payment guarantee, cost of the free funding period in its Visa 2002 decision.

If we look at -- Mr Brealey showed it to you, but look briefly at it -- E1, tab 2. I'm sorry, is there an E1? I'm sorry, just let me check my reference. I'm right, E1, tab 2, page 90.

Then recitals 83 to 85. In particular 83:

"The Visa network, like any network characterised by network externalities, will provide greater utility to each time of user, the greater the number of users ...(Reading to the words)... the greater the utility to cardholders etc.

"The maximum number of users of the system will be achieved. The Commission accepts it is not necessary to

achieve," etc.

Then the last sentence:

"Given the difficulties of measuring the average marginal utility of a Visa card payment to each category of user, some acceptable proxy for this must be found."

84:

"To this end, Visa has, in its proposal for a modified MIF, identified the three main cost categories."

We see them: (a) the cost of processing, (b) the cost of providing the payment guarantee, (c) the cost of the free funding period.

85:

"The Commission sees no reason to contend the relevance of these three cost categories."

Then there is some consideration under the heading of the 101(3) criteria, but for the first two it is the proxy that's used.

Then article 1, the exemption is granted. So in this case the proxy is used to satisfy the first two conditions. In the MasterCard 2007 decision, the Commission applies 101(3), it didn't apply a proxy. Remember then that's what the General Court -- as I explained earlier, because it is a review of the Commission decision, that's what then went for the

General Court in the Court of Justice. And they are looking at a straight vanilla 101(3) approach. But what happened after was the Commission went back to using a proxy, but it was a different one. It was the MIT test.

So let's see where the Commission has used that as a proxy. The first time was in 2009, so that was after its 2007 MasterCard decision. And that was in relation to the interchange undertakings that MasterCard had to offer following the Commission decision in order to tide itself over during the appeal process.

If we can go first to the MasterCard undertakings, that is E3.5, tab 110, and paragraphs 1 to 8 set out in a sense the procedural history that led to the acceptance of the undertakings. But that's effectively the adoption of the decision pending the appeals, the Commission sought these undertakings to hold the position.

Then at paragraphs 11 to 13 MasterCard gives the following undertakings:

"(a) Interim interchange fees.

"Methodology. During the interim period, MasterCard will use the tourist test methodology, including a two-party interchange fee as described in MasterCard's letter of 20th January."

12:

"During the interim period MasterCard will ensure the weighted average of ...(Reading to the words)... exceed the weighted average of 30BPS."

Then 13 is the same limit in relation to debit cards. So the methodology is tourist test or MIT. The letter -- there's actually a different letter -- the letter of 31st March is at tab 111. This is a Commission letter to MasterCard.

You will see in the third paragraph:

"As explained in your letter, calculation of these weighted average rates have been applied ... takes into account the interchange fees for all cross-border ...(Reading to the words)... including those over the internet.

"It is the view of the Commissioner for Competition Policy and DG Competition that the tourist test, given the specific characteristics ...(Reading to the words)... reasonable benchmark for assessing a MIF level for the purposes of article 81(3) EC treaty."

It is a proxy. To satisfy MIF, you satisfy 101(3).

Then there is a relevant Commission memo, which is in a different bundle, E1, tab 9, which relates to these undertakings again.

This relates to a different point because I have

shown you that the Commission accepted the MIT as a proxy for 101(3). What this shows you is what information that MIT was based on, and you get that from page 3. Why are MasterCard's undertakings temporary? It is because of the appeal.

But then it goes on:

"Commissioner Kroes notes that MasterCard's undertakings are without prejudice to a further assessment should new information come to hand. In particular, the Commission's competition department has commissioned a study with a view to collect data in order to improve the factual basis for the assessment of what level of MIF would be in accordance with the tourist test."

That is the Deloitte exercise that we will come to.

Then bottom of that page:

"How has the ...(Reading to the words)... been calculated."

You will see second sentence there:

"MasterCard has based its calculations of this balancing fee on tourist test MIF ...(Reading to the words)... card with those of cash."

So this is pre-Deloitte. This is an early stage.

Mr Brealey referred you to the figures which were reached in these discussions. He said MasterCard has

done a MIT test and these are the figures it reached.

But with respect, you have to bear in mind a couple of factors. First of all, we have put in evidence about how these discussions progressed. It is confidential, that is the discussion we had yesterday, so I'm not going to say it out loud now. But it is first Koboldt, which is C2, tab 3, about the nature, how MasterCard arrived at those figures. And what's very important to remember is that at this stage, first half of 2009, MIT MIF was in its infancy because the Rochet and Tirole article, which is where the Commission got the idea from, was only published in 2008.

MR JUSTICE BARLING: What date is this?

MR HOSKINS: This is all first quarter of 2009.

PROFESSOR JOHN BEATH: Be careful. Rochet and Tirole were putting forward that tourist test argument in discussion papers back in 2004.

MR HOSKINS: You are ahead of me then.

PROFESSOR JOHN BEATH: I think in the professional literature it was already there, and I could imagine the Commission economists were probably aware of that.

MR HOSKINS: Where I got that date from is where the Commission refers to the economic literature that it relies on for the MIT test, it is the Rochet and Tirole 2008 article.

MR JUSTICE BARLING: Were you going to give us the paragraph for Koboldt 1 or not?
MR HOSKINS: The whole thing is the story of the negotiations. He will be cross-examined on it by Mr Brealey, so we will be coming to that.
But MIF was in its infancy because let's say Rochet and Tirole had formulated the idea of --
PROFESSOR JOHN BEATH: It hadn't become mainstream.
MR HOSKINS: Exactly, and it was a long time before the Deloitte survey, so it was based on the Central Bank studies.
Therefore, you can't, I think, as Mr Brealey might -- I think what he suggested was, well, look, here is what MasterCard did to get to these interim undertaking levels, you can rely on that. That's not appropriate, for the reasons I have just described. We say that's really of no evidential value in this case, we have got far more up-to-date evidence about what an appropriate MIT MIF should be; for example, the Deloitte survey amongst other things. So it would be wrong to rely on that historic interim undertaking.
The second place that the Commission used the MIT as a proxy is its 2010 commitments decision in relation to Visa debit cards, which related to intra EEA MIF and certain countries, but not the UK. That's at E1 at

tab 13, but I think an easier way to get into it is E1, tab 14, which is the Commission press release.
So again, you see the heading "Introduction". The third paragraph begins:
"These commitments are offered by Visa Europe, taking into account the Commission is currently conducting a pilot study on the costs and benefits to merchants."
So that is pre-Deloitte information that is being used.
Paragraph 1.1 and 1.2 you get the figure that was arrived at and accepted by way of commitment. But then at 317, you get a definition of the merchant indifference test, and there's the reference to the 2008 Rochet and Tirole article. So that is what the Commission is relying on.
MR JUSTICE BARLING: Sorry, which paragraph is that?
MR HOSKINS: It is a definition section, and there is a heading "Merchant indifference test involved". So it is page 317. And they refer to the 2008 articles.
That is the source, if you like, that the Commission is relying on for the legitimacy of using MIT as a proxy.
MR JUSTICE BARLING: Yes.
MR HOSKINS: Then it used the MIT as a proxy again in its

2004 Visa decision, which was for Visa credit cards. Again, intra EEA and certain domestic MIFs, but not the UK. That's E1, tab 18A. 2014, I misspoke, sorry. This is a 2014 decision.
MR JUSTICE BARLING: E1, tab 18A?
MR HOSKINS: 18A. If I can pick it up at recital 41 at page 11 of the document, you will see again that this MIF was based on the Central Bank's studies, not Deloitte. It pre-dated Deloitte.
Recital 50:
"Assessment of other observations from the payment industry.
"Domestic MIF rates set by local ...(Reading to the words)... Therefore, the Commission is not in a position to demand commitments on those rates. In any case, cross-border acquiring is expected to bring MIFs down to a comparable level domestically. In addition, national competition authorities or national courts are well placed to assess MIFs set by local members domestically."
So what the Commission is saying is: we are doing this with MIFs, but when it comes to domestic MIFs, national courts and competition authorities are well placed to do their own job for obvious reasons, to take account of national conditions.

So you can't just take the Commission approach and the Commission's conclusions and just transplant them into domestic context.
Then recital paragraph 104:
"When analysing MIF levels, the MIT methodology originally developed in economic literature ..."
The footnote references to the 2008 Rochet and Tirole article:
"... but then further developed by the Commission to ...(Reading to the words)... is used by the Commission as a benchmark or proxy for assessing compliance with article 101(3) of the treaty as a methodology that is economically robust enough to ensure that merchants benefit from card acceptors."
Then finally, the regulation which we have looked at, but if we can go back to for this point. It is I.1, tab 6. We have seen recital 20 on page 88. Sorry, it is I.1, tab 6.
We have seen recital 20 explains that the caps to the regulation were based on the merchant indifference tests, and I noted that when we saw that first. The language then reflects really 101(3), and in the proposal that was submitted by the Commission to the European Parliament in July 2013 in relation to this regulation, page 16 of that proposal stated that the

caps were calculated on the basis of the data gathered by the four national banks.

So even in the regulation we are still not using Deloitte. I can give you the reference for the proposal. It is E1, tab 17 at 381.

So the regulation is based on MIT and uses the Central Bank's, not Deloitte.

Mr Cook is concerned to point out that the national banks don't include the Bank of England, but I think you have probably picked that up. He is right to be cautious with me.

Okay, Rochet and Tirole, Professor Rochet in particular. We have seen that the Commission has cited the 2008 Rochet and Tirole article as the justification for using the MIT test as a proxy for 101(3). Let's look at it. E3.5 at tab 99A.

Page 1, the abstract:

"Anti-trust authorities often argue that merchants cannot reasonably turn down payment cards and therefore must accept ...(Reading to the words)... The paper attempts to shed light on this must-take-cards view from two angles.

"First, the paper gives some operational ...(Reading to the words)... it analyses its relevance as an indicator of excessive interchange fees."

Then second:

"... identifies four sources of potential biases."

Pages 2 to 3, the introduction. I will try and take this as quick as I can because you can go and put the cold towels on if you haven't done already.

On page 3 you see the paragraph that begins:

"Second, the paper provides an alternative benchmark for regulatory intervention."

Then at the bottom, five lines up in that paragraph:

"The paper analyses the test's relevance as an indicator of excessive interchange fees. We show that when issuers' margins are constant, the tourist test is an exact test of excessive interchange fees ...(Reading to the words)... is social welfare."

So if the criterion is social welfare, the test indicates a MIT MIF which is too low. And the MIT MIF in any event is based on an assumption of issuers' margins being constant, which is not, I submit, likely in the real world.

What is meant by "social welfare", vis-a-vis producer welfare? There is a neat encapsulation of it if you go to I.1, tab 2. We are going to keep the Rochet and Tirole out. We are going to come back to it.

There is no title page to this, but it is a work by M Motta, 2004, "Competition Policy, Theory and

Practice". It was published by Cambridge University Press. We cite it in our skeleton.

It is pages 18 to 19 and it is the first paragraph:

"Economic welfare is the standard concept used in economics to measure how well an industry performs. It is a measure which aggregates the welfare or surplus of different groups in the economy. In each given industry, welfare is given by total surplus, that is the sum of consumer surplus and producer surplus. The surface of a given individual consumer is given by the difference between the consumer's valuation ...(Reading to the words)... of all consumers.

"The surplus of an individual producer is the profit it makes by selling the good in question. Producer surplus is therefore the sum of all profits made by producers in the industry."

So social welfare, or total welfare, is the sum of consumer welfare and producer welfare. And that's where producer welfare or surplus is understood to be the sum of all profits made by producers in an industry.

I hope that's a fair summary of that paragraph.

Under Rochet and Tirole's framework the social or total welfare would refer to the aggregate surplus of all the players involved in the four-party scheme: Merchants, cardholders, issuing banks and acquiring

banks. And Rochet and Tirole tell us that the MIT would give a result which is too low, a false positive, if the goal includes consumer welfare.

Which leads us to the question: is the aim of article 101 limited to consumer surplus or does it include social welfare? And the answer is the latter, and you get that from the Commission's exemption guidelines, E.1, tab 2A. I know this is tough going on this time of day, but it is on the transcript and hopefully you will have time to go back to it at your leisure.

So you have seen this. Mr Brealey took you. It is the Commission exemption guidelines. It is paragraph 33:

"The aim of community competition rules assist to protect competition in the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources."

It is not limited just to consumer welfare.

It follows, therefore, that according to Rochet and Tirole's own article, the MIT will produce a MIF which is too low for the purposes of EU competition law. Of course they weren't specifically addressing EU competition law. That, from what they say themselves, comparing it with what the aim of EU competition law is,

on its own face will produce a result which is too low.

If we go back to the Rochet and Tirole article, it is E3.5. It is pages 18 to 19, but again, try and take it as quickly as possible.

On 19, you will see halfway down, there's a paragraph begins:

"Under imperfect issuer competition, the tourist test threshold again coincides with the ...(Reading to the words)... interchange fee is higher."

Then I will skip a sentence:

"If competition authorities aim at maximising consumer surplus, a cap based on the tourist ...(Reading to the words)... That is not the case if the objective is to maximise social welfare."

It is the point I have just made. It is spelled out again by Rochet and Tirole.

Page 26, this is going to come up later, you will see some equations again. The paragraph begins:

"In this case the average merchant ..."

Halfway down the page.

Then the third sentence:

"Efficiency cannot require that the tourist test be met by all participating merchants because cardholders must internalise the welfare of the average merchant and not of the marginal one who values card payments less

than the average merchant. Capping merchant discounts at the convenience benefit of the most reluctant merchants provides the cardholder with an incentive for under-consumption of card payments."

So the important point, which we will come back to, is the MIT test needs to be based on the average merchant.

Then page 29, second paragraph:

"When issuer margins are constant and merchants are homogenous ..."

You see the theoretical caveats there:

"... the tourist test is a proper and practical policy tool."

There is a bit of a tension there, being a practical tool when you are assuming issue margins are constant and merchants are homogenous:

"By definition, the tourist ...(Reading to the words)... by a non-repeat customer with enough cash in her pocket.

"This implies that IF lies above the level that maximises ...(Reading to the words)... aim at maximising short-term total user surplus."

Again, very limited. There is no criticism, this is a theoretical paper. They recognise the limitations and the assumptions it is based on, but you will hopefully

see pretty quickly that this is not actually fit for what the Commission is then using it for. You can't just lift this across into the real world.

Then the next paragraph begins:

"First, in the short run ..."

It is the sentence in that paragraph that begins:

"Third, merchants are heterogeneous, and an IF ...(Reading to the words)... not the marginal merchant benefit. This implies that the merchants who benefit least from the card, say the large retailers, are likely to fail the tourist test at the social optimum."

So a caveat: danger, a red flag in relation to large retailers.

Again, you will probably already see how this is going to be an issue because when we come to the Deloitte survey, the data is all for large retailers. And Rochet and Tirole themselves -- and the Commission do, to be fair, in 2015, put a red flag up about relying solely on large amounts.

But just to finish on the Rochet and Tirole. Professor Beath may know; Rochet and Tirole, I don't know if they fell out or had a difference of view because the next time we see Professor Rochet resurfacing he has a different partner, Rochet & Wright. There's an article; it is published in a number of

places. It is published in 2009 and 2010, which is why I think we see references to it in different years but it is the same one. We will look at it because what it shows is that Professor Rochet has moved away from a MIT test, but we will see in the 2009/2010 article he is actually advocating a cost based approach. That's E3.6, tab 130A. We see the title is --

PROFESSOR JOHN BEATH: 3.6?

MR HOSKINS: E3.6 tab 130A. Sorry, it is the Scottish accent.

PROFESSOR JOHN BEATH: I was looking at blue papers.

MR HOSKINS: Turn over the page to 2562, and you will see the heading:

"Jean Charles Rochet, Julian Wright."

Then it is at 2569A.5 is the introduction to 2569A.7. An easy way to do this, my Lord, if you are getting tired, do you want to read this overnight?

MR JUSTICE BARLING: We could do, yes. I do suffer from insomnia so it will be a great cure for it.

MR HOSKINS: I need you to read 2569A.5 to 2569A.7. I was going to say --

PROFESSOR JOHN BEATH: It is the introduction you want us to read?

MR HOSKINS: Yes, the introduction. I was going to say I will test you on it tomorrow but probably you will

test me.
MR JUSTICE BARLING: We will take your suggestion I think in that case and take it out and ...
MR HOSKINS: There is a bit of housekeeping. If you don't mind it might be a good time to do that now.
MR JUSTICE BARLING: Yes.
Housekeeping
MR JUSTICE BARLING: Is that to do with confidentiality rings?
MR BREALEY: No, it is just witnesses.
MR JUSTICE BARLING: Yes.
MR BREALEY: I don't know if you have got the --
MR JUSTICE BARLING: Yes, the timetable.
MR BREALEY: The timetable. So essentially for next week, the week beginning 1st, if we can just -- you see on Thursday the shaded day, which is a non-sitting day but it is reserved for continuation of witnesses?
MR JUSTICE BARLING: I don't think it is any more.
PROFESSOR JOHN BEATH: I'm afraid I have an appointment at the Palace.
MR BREALEY: On the Thursday?
MR JUSTICE BARLING: I'm afraid it has become rather less contingent now and is now completely a non-sitting day.
MR BREALEY: Okay. I think we need to re-group overnight. It is just Mr Coupe, Mr Rogers were hoping to give

evidence on that day. I see that's out. It may well be that we can do it on the Friday? The reason is, I mean they, as you may have read in the press, there is a Sainsbury's and Argos, there is an issue, and so it is quite important that they --
MR JUSTICE BARLING: Look, you know our position. We will be as accommodating as we can be for other days.
MR BREALEY: If we could go into -- I will obviously talk with Mr Hoskins but if we could have Mr Coupe and Mr Rogers on the Friday, and I will flag that with that with them --
MR JUSTICE BARLING: Mr Coupe and Mr Rogers you think are likely to be Friday?
MR BREALEY: That might just eat into my cross-examination time which is pretty healthy anyway.
MR JUSTICE BARLING: Yes.
MR HOSKINS: We have a potential -- because Mr Abrahams has to be Friday.
MR BREALEY: Mr Abrahams has to be Friday?
MR HOSKINS: Mr Brealey and I can talk but --
MR JUSTICE BARLING: You mean he has to be not before Friday or he has to be --
MR HOSKINS: The only time he can come in that window is Friday.
MR JUSTICE BARLING: How would Mr Coupe and Mr Rogers be

fixed if they had to go after him on say the week of the 8th?
MR BREALEY: I would have to check but they have got to -- I know they have got busy diaries but at the end of the day they have got to --
MR JUSTICE BARLING: Speaking for myself I have got no objection if witnesses, even if your witnesses come after an expert -- sorry they are a witness of fact.
Unless, as it were, there is some particular reason why Mr Abrahams should go after them, then that could be done that way round. Have a think about it.
MR BREALEY: I will have a think about it overnight.
MR HOSKINS: I think there is a potential problem with that because they all deal with pass through. I'm slightly uncomfortable with reversing the order of factual witnesses on pass through where we go first.
MR JUSTICE BARLING: Have a conversation --
MR HOSKINS: I will have a conversation with Mr Brealey. We will try and come up with an agreement rather than requiring you to decide it. I'm slightly uncomfortable about that, sir.
MR JUSTICE BARLING: Okay. We will revisit that tomorrow. Anything else?
MR BREALEY: No.
MR JUSTICE BARLING: See you tomorrow.

(4.30 pm)
(The court adjourned until 10.30 am on Thursday 28th January 2016)

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