IN THE COMPETITION APPEAL TRIBUNAL

Case Nos. 1266/7/7/16

Victoria House,
Bloomsbury Place,
London WC1A 2EB

19 January 2017

Before:

THE HONOURABLE MR. JUSTICE ROTH
(President)
PROFESSOR COLIN MAYER CBE
CLARE POTTER

(Sitting as a Tribunal in England and Wales)

BETWEEN:

WALTER HUGH MERRICKS CBE Claimant

- v -

MASTERCARD INCORPORATED & ORS Defendant

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CPO APPLICATION HEARING

MR. HARRIS: Sir, two minor housekeeping matters, one that I wish to address you on and one is for Mr. Williams.

Mine is simply that Mr. Merricks is available and in Tribunal all day today, should the Tribunal wish to hear from him or speak to him or whatever. The reason I mention it is that he has got a two-day hearing -- meeting -- at the gambling commission, the first of which is today which he is avoiding but he has to attend for tomorrow morning so he will not be available tomorrow morning. I thought it polite and fair just to mention that.

THE PRESIDENT: Yes. Thank you.

MR. HARRIS: Mr. Williams wants to address you on the point from their skeleton.

MR. WILLIAMS: Sir, yes, you asked yesterday about the status of point as to which there was some sensitivity between paragraphs 166 and 170 of our skeleton. I am pleased to say that has been resolved in correspondence overnight. The resolution was only reached close to midnight and there has not been time to amend the skeleton so it is immediately available in a public form but we shall attend to that as soon as possible and refile it in a form that can be released.

THE PRESIDENT: Yes. Thank you very much. I am pleased to hear that. Thank you.

MR. HARRIS: Sir, actually, there is one final matter, rather mundane. Does the Tribunal each have a copy of the transcript from yesterday? I was told that you did.

THE PRESIDENT: Yes.

MR. HARRIS: I have two more copies, one for each of the experts, should the need to arise. I am happy to hand them up now, just in case. Unless I can be of further assistance, it is back to Dr. Veljanovski and Mr. Dearman.

DR. VELJANOVSKI and MR. DEARMAN (Continued)

THE PRESIDENT: Yes, Dr. Veljanovski, if we go back to your report which is in Bundle A at tab 5, and we were talking about the breakdown as between sectors, and, indeed, the need, I think you recognised, to look within some of the sectors at very different markets which they comprise because of potential significant variation in pass-through. One sees from the right-hand side of that table that prior to 2002 there was no breakdown between financial and other services -- financial was included in other services -- that is in the data that you got from the UK Payments Council. Is there a source of the breakdown prior to 2002? Is that data available somewhere?

DR. VELJANOVSKI: We do not know at the moment. We are making enquiries as to the breakdown of this data, but I am sure -- well, I am not sure -- but, you know, this is what we have at the moment.

THE PRESIDENT: Did you not make some -- as part of the work you undertook -- some investigations to see what data might be available?

DR. VELJANOVSKI: I think that is a question for --

MR. DEARMAN: We did, and I was looking, again, at working papers overnight, and there is a greater breakdown, certainly from 2005 onwards into those sectors, and as a result of looking at that it shows me that, "Mixed Business", includes Department Stores as one of the principal categories within, "Mixed Business", so we had originally categorised Department Stores, I think, as, "Other Retailers", so it actually means that the coverage is greater than 74 per cent, it is 81 per cent, but taking that aside, yes, we have explored where there is greater granularity. I don't recollect whether we have explicitly asked that question about financial services, but certainly for 2005-2008, albeit that is at the latter end of the infringement period, there was greater granularity readily available. We obviously need to explore getting that level of granularity going back to the beginning of the infringement.

THE PRESIDENT: Well, the question is whether it is possible. I mention those two because when you add them up they are, at least in the later years, or in the aggregate, they are the second-highest category. How is one going to deal with this if there is not, pre-2005, greater granularity?

MR. DEARMAN: Well, it is not an exercise we have done yet but we can certainly look at the granularity we have in 2005-2008. We can look at the split between the various subsectors to establish if there is a trend and a pattern in that granularity, such that we can extrapolate backwards from 2002 for Financial, for example and, indeed, to see if there is a correlation between the other subsectors in the other categories.

THE PRESIDENT: Yes, because it is quite a long period and patterns of credit and debit card use may have significantly changed.

MR. DEARMAN: They have done and there is a lot of data, obviously, on debit card and credit card usage that we would be also looking at, exploring and analysing to look at these sectors in greater detail.

THE PRESIDENT: Yes. Is this appendix, these figures, "Card Expenditure", is this only credit cards or credit and debit cards together?

MR. DEARMAN: From memory this is credit and debit cards. I would have to check to the document that supports it.

THE PRESIDENT: Well, is it not fair to say that the sectoral distribution of credit cards might be significantly different from debit cards?

MR. DEARMAN: My recollection, actually, having looked at it again last night, is that it is credit cards and debit cards.

THE PRESIDENT: Together?

MR. DEARMAN: Yes. There is a breakdown, it does give it by sector between credit cards and --

THE PRESIDENT: There is a breakdown. Yes.

I just wanted to make sure how I have understood how the aggregate damages would be calculated from the method you have put forward. We are told by Mr Harris that it would be done on an annualised basis and not on a lump sum for the whole period, as I understood his explanation yesterday.

MR. HARRIS: Sir, I am sorry, I was talking -- on the annualised, as -- regards the distribution method.

THE PRESIDENT: Oh. The loss --

MR. HARRIS: So the way that the VOC works, that is Step 1, the way that it works -- well, the way that it works is you have regard to all of the Mastercard transactions for the entire period and then you -- having looked at -- that is what we say is the, if you like, the amount of commerce upon which there will have been charged an, "IF", an Interchange Fee, and of course we say that has got an overcharge in it, so it is a very, very macro approach. All transactions in all Mastercard-accepting merchants --

THE PRESIDENT: For the entire period?

MR. HARRIS: For the entire period.

THE PRESIDENT: So the loss is not being computed annually and added up.

MR. HARRIS: Not at this first stage, no. The way it is being done is it is the entirety of those transactions and then what you do is you have regard to, as you know, we have a trial about what the counterfactual Interchange Fee would have been, and then you apply that to the aggregated amount of overall VOC.

THE PRESIDENT: The Interchange Fee, the counterfactual, and, indeed the actual will change year-by-year.

MR. HARRIS: That is right. Yes.

THE PRESIDENT: I think at certain points --

DR. VELJANOVSKI: I think, if so I may say so, you are correct, because if you turn to paragraph 624 we say we are doing it on an annualised basis.

THE PRESIDENT: That is the way we understood your report. It is not the way the claim has been put in the Claim Form, but we thought that was a sort of shorthand, but we understood your report that you are proposing that it would be done, as you say there, during each year.

DR. VELJANOVSKI: Yes, because it is a long period where circumstances change quite considerably.

THE PRESIDENT: Yes. I mean, it would be wholly misleading, it seems to us, if you took some average over the years, would it not.

DR. VELJANOVSKI: Well, correct. As to the data, I mean, in one sense, compared to a lot of other sectors, card expenditure is a very data rich sector because it is a transactional thing. We are not talking about buying kits or, we are talking about a transactions which is electronically monitored and data is collected and transferred between the parties. So, I mean, if you look at the Financial Services -- if I had to interpolate the data, I see that when the split comes out we can make an estimate, but my suspicion, having worked on a lot of these cases is the more you delve into it, the more data starts to appear, and I remember graphically, I remember Wightlink Ferries where they told me that the data on fares and passengers did not exist. By the time we finished the case we had data going back to 1870 on that, so the more you get into a case, obviously, as you know, the more data appears and the more information is available, so -- correct me if I am wrong, David -- we have constantly had to go back to the Payment Council and to other bodies because they have changed the websites, they have changed the organisation. The data exists somewhere there but it is not publically available or it is too hard at the moment for them to collect, so I am not particularly concerned that, you know, the data is not of a granular nature or there is some gaps in the data, because that is -- you know, we will have to fill the gaps, and people say whether filling that gap is reasonable or unreasonable in the way we have done it.

THE PRESIDENT: No, I understand. So, just pursuing, to make sure I have got it right, you would be first of all calculating an average overcharge each year separately for credit and debit cards because it is materially different as we know from Sainsbury's -- that is right is it?

DR. VELJANOVSKI: Yes.

THE PRESIDENT: Then you would also be producing a weighted average pass-through having regard to the sectoral distribution or market list of expenditure for each year, separately for credit and debit cards. Is that right?

DR. VELJANOVSKI: Correct.
THE PRESIDENT: Then you would be applying the percentage pass-through times the percentage overcharge to the value of commerce each year, separately for credit and debit cards. Is that right?
DR. VELJANOVSKI: Yes.
THE PRESIDENT: That would give you the total pass-through of the overcharge each year.
DR. VELJANOVSKI: Yes.
THE PRESIDENT: Then you would take the number of over-16s in the population that year which we have got in your table, and divide your total overcharge pass-through by that number to get the average individual loss that year.
MR. DEARMAN: That, then, goes into the distribution point --
THE PRESIDENT: No, sorry Mr. Dearman, I am not talking about distribution, I am talking about how you get your average loss, the aggregate loss that you would get -- perhaps bear with me and then tell me if I have got it right.
MR. DEARMAN: Yes, of course.
THE PRESIDENT: You would calculate the average individual over-16 loss in that year, and then you would multiply that by the number of people in the class today who are, that is to say, who were, that is to say, people who are in the UK on the domicile date, or have opted in, because some of the people who were over 16 that year may have moved away, died and so on, to get the aggregate loss in that year.
MR. DEARMAN: So the total overcharge divided by the --
THE PRESIDENT: The number of over-16s in that year would give you the average individual loss that year, but to get the ingredient for that year to go into the claim, which is only made by people in the class, that is to say people domiciled in the UK today, which will be a different number because some will have moved away unless they opt in, and some will have died, so you have multiplied out that individual and that would give you the aggregate loss for that year. Is that the method?
MR. DEARMAN: That is a method. It is not the method that we have centred on in the report.
THE PRESIDENT: Right. What is the method you are using in the report?
MR. DEARMAN: We have not -- what we have not set out is the last stage, that you are proposing that you then get to an average loss per member of the class who is over 16 and domiciled for three months in that individual year, and then multiply that out by the number of individuals.
THE PRESIDENT: So how do you get the aggregate loss in a year?

MR. DEARMAN: That we have not fully explored in this report in terms of getting the aggregate loss for the year. What we set out in 6.2.4 is that we may be able to do that. What we have -- where we stopped is getting to the aggregate loss over all years on aggregate, rather than looking at it an individual year-by-year basis.

THE PRESIDENT: But you are going to do it year-by-year. I am just trying to understand how you do it.

DR. VELJANOVSKI: I think the resolution to this is that when we do the actual report we will be doing it, going back to the previous discussion, on an annualised basis, year-by-year.

THE PRESIDENT: Yes.

DR. VELJANOVSKI: In this exercise we have taken a percentage overcharge and a percentage pass-through rate for the entire period, so it has not been annualised. I think that is the resolution to it. We have assumed constant overcharge and constant pass-through rate. When we come to doing it in a more detailed fashion we will do it on a more detailed basis because of the changing market circumstances over the period, and some assumptions about that or some accommodation to that, but I think that is why we have not done it in this, because we have assumed for the purposes of this exercise that it is just constant each year going on, and I think that is perhaps why there is a bit of confusion about what is happening here.

THE PRESIDENT: Yes, but you have considered, and you have explained that a little bit already, whether there is data available for you to do all those various estimates with respect to credit card/debit card year-by-year, you say there may be some gaps but you can extrapolate.

DR. VELJANOVSKI: Yes. We can extrapolate or interpolate, whatever the word is you want to use, in order to make some reasonable assumption. If you take this category here, "Financial and Other Services", and the Financial in the early '90s may have been embedded in the Other Services, we can look at the break up later on and then come to a conclusion on how much of the financial services were actually retained in the Other Services to create a series of data points for the period which is missing now.

THE PRESIDENT: Yes.

PROFESSOR MAYER: Could I just come back to the first part of what the President was talking about in relation to paragraph 5.3.20? As I understand it, the weighted element is what you are describing there.

DR. VELJANOVSKI: 5.3.20.

THE PRESIDENT: Page 26.

DR. VELJANOVSKI: Thank you. Yes?

PROFESSOR MAYER: So is that where you describe what the President was talking about in terms of taking the overcharge and weighting it together by the transactions on different cards?

DR. VELJANOVSKI: I think there are probably two issues embedded in that paragraph. One is the fact that we do not have one MIF, that they are different cards and there are a variety of MIFs in any one year, and I believe that -- I think it was the OFT that said that there were 225 MIFs when they were looking at the period, so we have got a situation where --

THE PRESIDENT: IFs not MIFs.

DR. VELJANOVSKI: MIFs or IFs.

THE PRESIDENT: I think there is only one MIF, probably.

DR. VELJANOVSKI: No. There is more than one default rate.

THE PRESIDENT: I see.

DR. VELJANOVSKI: It varies by card and it may even vary by merchant.

THE PRESIDENT: Yes. Sorry.

DR. VELJANOVSKI: In order for -- you know, in the past when regulators have looked at this, in order to get a handle on it, and for reasons of confidentiality, they have said, "Well, this is the average MIF", or, "It ranges between 1.2 and 1.3", or whatever they may say, because they are confronted with a situation where there is a variety of charges being made.

Now, that is slightly different from the situation where those MIFs change over time, because we know there is certain variability of the average MIFs, and so the blended average thing was to do what the competition authorities had done in the past, which was to say, "Well, when we are considering this, and whether we consider this as an overcharge we are going to take a weighted average of those MIFs in those particular years", or over those years. It is just like the Tribunal did in Sainsbury's. They had cost data that varied between different years and they took some average of that cost data or they took one year rather than another because they preferred it, and same with their particular MIF charge. What they did was to take all of Sainsbury's MIF revenue that was supplied by Sainsbury's, I mean, we have people who probably know more about this in the room than I do, and then they just took an average of that, and then they said that that is what Sainsbury's was paying per transaction.

PROFESSOR MAYER: Which sounds fine, and presumably that is where the President's difference between debit and credit card would come in insofar as you would have observations on transactions in relation to both cards.

DR. VELJANOVSKI: Yes.

PROFESSOR MAYER: You can observe the different overcharge associated with each of those cards.

DR. VELJANOVSKI: That is correct, and debit and credit cards are a charge in a different way. There is a percentage in credit cards. In debit cards it is either a fixed fee or a mixture of a fixed fee and percentage, so they have to be treated differently. In our calculations debit cards are not that significant. The whole thing that drives it is the credit card situation and the credit card MIFs and overcharges on credit card.

PROFESSOR MAYER: Now, if that is the case that there is also a variation of the pass-through across sectors, then presumably you should include that variation here because as you were just saying there is a sectoral variation in terms of the impact of the use of different credit card and also by merchants.

DR. VELJANOVSKI: We are not going to get that level of detail about what card was used in what circumstance and what the Interchange Fee was on that particular card, or the MIF was on that particular card, and no one is really -- even in the single claimant cases -- have gone to that level of granularity. That is just -- that may be an impossible task to do it by merchant, by type of card, by what transactions and linking them altogether would be impossible.

PROFESSOR MAYER: I understand that and as long as it was the case that you were presuming that the pass-through was 100 per cent in any event, you didn't need to take consideration of that.

DR. VELJANOVSKI: No. Not in this particular exercise.

PROFESSOR MAYER: I am just saying that it is something that you might need to bear in mind if one wishes to introduce a variation in terms of the pass-through across.

DR. VELJANOVSKI: Yes. I mean, if we could get good data on aspects like that, then we probably wouldn't be having this debate, you know, if the data existed then we would take it into account, but we are dealing with a situation which is recognised in this class action that pass-through is a very complex issue and there has to be assumptions, estimations, interpolations and speculations in order to get to the position. I mean, that is embodied in the damages directive, it is embodied in the law on this thing, as it is starting to evolve, but, you know, we can't ask for a level of analysis that makes rendering a claim practically impossible and so complex that you can't. We will search for the data, I believe that the data exists, and it is not as if we are dealing with a sector where inherently we do not think that type of data would be present, this is a data-rich area, financial services, so that we have got the wind behind us on that aspect of it but as we get to certain other aspects of it, of course the data is a

bit more sparse, and we have got the added complication of the historical length of this period.

THE PRESIDENT: We wanted to move on to the question of distribution.

DR. VELJANOVSKI: Right.

THE PRESIDENT: We understood that from the Reply filed that is something that has been discussed with you.

DR. VELJANOVSKI: I am going to hand over to --

THE PRESIDENT: I am looking at both of you.

MR. DEARMAN: I do not think that is right, that distribution has been discussed with us, either Dr. Veljanovski or me. Mr. Merricks has instructed distribution report specialists.

THE PRESIDENT: Well, I think they handle the distribution and they might advise on what is feasible and practical and what may be the likely take-up, but I thought in -- obviously I was wrong. You have not been involved in discussion of what would be a fair method of -- as a method, never mind the practicalities, but just in producing and corresponding to loss of the individual what might be a fair method of distribution?

MR. DEARMAN: Not at this stage, no.

THE PRESIDENT: Right. Well, I think we still would like, as you are here to assist the Tribunal, some help on that. You heard yesterday, I think you were both in the Tribunal when Mr. Harris outlined various possible methods and everyone recognised as asking people to produce receipts is a non-starter and, equally asking people to say, for each year, "My expenditure was X per cent on clothing and Y per cent on travel and Z per cent on financial products", that is not practicable, or if one did, very few people would respond, so that is a non-starter either, so one is left with various methods, and the one that -- the two that have been sort of suggested, I think, one is just dividing the total for each year by everyone in the class who was over 16 that year and the other is doing some age breakdown because anyone applying for distribution will have to give their age to show -- and some proof that they are over 16 -- so they probably have to state their date of birth and prove it in some way in order to show that they are in the class.

MR. DEARMAN: Yes.

THE PRESIDENT: So those are the two. If it is just done by simple numbers, and that is not going to reflect in any way individual marks, is it, both because levels of expenditure hugely vary between individuals. We are talking about the whole adult population of the UK, that is one

reason, clearly, that there are -- it is almost stating the obvious, is it not, that there are wide differences in expenditure. You are nodding but you need to say, "Yes", for the transcript.

MR. DEARMAN: Sir, yes. As a matter of common sense there will have been wide -- or different -- spending patterns. I mean, when you get to the distribution level, obviously the distribution on an individual basis is much more modest than on the collective basis, so, you know, I am not holding myself out as an expert, but the differential between, you know, the highest and the lowest, if one could do this on an individual basis, is reasonably narrow, I would imagine, if it was possible to do that calculation in the sense that, you know, if you just divide by 46.2 million or whatever the size of the class is, that would give you a number per consumer, if you were able to do it individually for those 46.2 million you will get a range around that weighted average which is essentially what it is, a vast weighted average amount.

THE PRESIDENT: Well, you say it is a weighted average. What way is it weighted?

MR. DEARMAN: It is weighted by the is sector expenditure, by age, I think demographics was also talked about, I mean, it is weighted by the parts -- on everything that we have been discussing.

THE PRESIDENT: Sorry, I have not followed. If you just divide your aggregate loss in the year by the 46 million to get a figure, an average, is that average weighted by age?

DR. VELJANOVSKI: No, it is not weighted by age, but it will be weighted by the sectoral split in each year of your pass-through rate, even though you are dividing by population, and in that sense it is a weighted average of the overcharge pass-through, not weighted by the expenditure of the individual seeking to claim, but going back to the -- your previous question, I think what I understood Mr. Harris was saying in responding to you was that a tension between compensatory -- I am not quite sure what word he used, he developed a new word for it -- between that principle in law that full compensation is what is required, and the practicalities of getting distribution and maximising the distribution, and one can think of all sorts of -- you know, a 16 year old who might be entitled to compensation does not have the expenditure pattern of a 40 year old who is presumably funding a 16 year old in the process, and you could work out consumption patterns from, you know, the Consumer Price Index, how much people are spending on various -- but then you get into the practicality, that they have to prove that they are the person that you have profiled, and then as I understand it, the experts in this area say you start playing around with different parameters of compensation, and people start either not claiming or there is a high degree of fraud, people claiming to be something --

THE PRESIDENT: We understood that. I am just trying to understand, as an economist and accountant, to understand if we took the simple approach, how divergent that would be from the reality. You are never going to get precise figures, and it is a question of is it going to be -- so how divergent would it be? If it is simple numbers, you say it would -- people would be around the average. Well, I suppose that is what an average is, but they could be very high above in some cases, and significantly below in others, could they not?

DR. VELJANOVSKI: The example was given of a billionaire, and someone who has used their card twice in the period.

THE PRESIDENT: Yes.

DR. VELJANOVSKI: So there is going to be a relatively large disparity.

THE PRESIDENT: Well, it is not just use of -- it is not use of card because this is calculated on all your expenditure, is it not? The use of card is a bit irrelevant it seems to me.

DR. VELJANOVSKI: Yes.

THE PRESIDENT: This is calculated on just consumer spend, is it not?

DR. VELJANOVSKI: Yes. The cash purchases.

THE PRESIDENT: The cash purchases.

DR. VELJANOVSKI: If I think about it, the disparity is probably going to be -- well, I think one would have to look at it more systematically because the proportion of cards used in 1990 was very small in relation to their ubiquity now, and how that -- the use of cards obviously has an impact on what the overcharge is and the pass-through rate and then it gets disbursed amongst all customers.

THE PRESIDENT: Yes. I mean, I appreciate you have not, contrary to what I thought, been asked to assist on that and therefore have not considered it in any detail, but it just seemed to us that it is a simple process. Of course you would have the advantage of practicality, we can all see that, but it is going to produce individual compensation, but in looking at what actual loss is likely to be is going to be very divergent from --

DR. VELJANOVSKI: I am sure if we looked at it we could develop some more compensatory approach, but that will probably hit the buffers of, you know, the practicalities of it, because it might become so -- might require a number of parameters to be flagged for the potential claimant.

THE PRESIDENT: Because the loss is going to be a function of (a) level of expenditure, and (b) the mix of how that expenditure has been spent as between different markets, different sectors. Is that not right? That is what is going to create the market.

DR. VELJANOVSKI: Yes.

THE PRESIDENT: That is the expert sort of economic evidence, it seems to me, that I am asking about.

MR. DEARMAN: Yes, because every individual will be spending in a range of retailers with a range of different pass-throughs, whether they are large retailers or small retailers. I do not think it is necessarily the case, you know, this is why an approach like this is necessary, because, you know, the small corner shop could be passing on proportionally a lot more than the larger supermarket, and it will affect people in different ways.

THE PRESIDENT: To take an obvious example, people aged 16 will not be incurring any expenditure on motoring, or at least they should not, and that is a significant part of the loss, so it is that kind of factor, is it not?

MR. DEARMAN: It is, yes.

PROFESSOR MAYER: Could you get any evidence on this and provide any assurance by, for example, looking at the household expenditure surveys to look at the breakdown of people's expenditure behaviour?

DR. VELJANOVSKI: Yes we could. We have to match it with the card expenditure which might be -- there will be disparities because of using cash, but at least we can see what sectors they are in, but tying it back to the overcharge is going to be problematic at this stage because we have not done the research necessary to work out what it is. I mean, if we assume 100 per cent then we can do a bit of this sort of calculation, but ...

PROFESSOR MAYER: Because one of the questions one might be posing is; if one does a rough and ready approach, is it better than doing nothing at all? To answer that question you could look and see whether, by doing the rough and ready approach, you are, in essence, getting closer to what the compensation would be, or an appropriate compensation would be, for a large segment of the population.

DR. VELJANOVSKI: Can I just ask have you to clarify what you mean, "Nothing at all"?

PROFESSOR MAYER: Well, if one is looking to establish a mechanism that is going to be acceptable as a distribution means, then is that preferable to essentially making no compensation at all?

DR. VELJANOVSKI: I find it a bit difficult to view that as the two alternatives, you know, either -- we have got a proposal from the distribution people that, you know, the best way to do it is to give an average sum to everybody, so that would seem to me to be the benchmark, and the alternative would be to have a differentiated approach based on expenditure patterns, or

classes of consumers, and that, you know, in principle that can be done, the question is -- not to rehash what everyone understands to be the case, there may be practical problems with it, but if you are asking me can we do that, I am sure we can.

THE PRESIDENT: Yes. Just one moment. (Pause).

Well, contrary to what we had understood, you had not assisted the Applicant on considering distribution options, I do not think it is right to ask you more about it. We have no more questions. Mr. Hoskins, if you want to ask brief questions? QUESTIONS FROM MR HOSKINS

MR. HOSKINS: Few questions, please. Good morning gentlemen.

Can we go to your expert report? That is Bundle A, tab 5, and turn it page 54. It is the well-trodden path that is your Appendix 3. Just to establish what I think is now common ground in response to questions from the President yesterday and today you accepted that there will be different pass-on rates within these sectors, so one of the examples that was put to you which you agreed was, for example, take the Motoring category, there is likely to be a difference between the pass-on rates for a car hire company and a car repair garage, and this morning Mr. Dearman gave the example that the pass-on rate for a small corner shop is likely to be different from that of a supermarket, so have I understood that correctly? You accept there is likely to be difference in pass-on rates within these sectors that you have identified?

DR. VELJANOVSKI: There may be, yes.

MR. HOSKINS: The way that the President put it was what would then have to do is, within these service categories, is to identify different -- to use the term the President used -- different, "Markets", within those sectors. For example, one market in motoring might be car hire, another market might be car repair, et cetera, and there will be different markets within each of those sectors. You understand that terminology?

DR. VELJANOVSKI: Yes.

MR. HOSKINS: Before the hearing started yesterday, had you done any work to consider what markets might make up each of these sectors, before yesterday?

DR. VELJANOVSKI: Even today the position is the same. No, because we are working on a level of aggregation in this preliminary proceeding to -- well, in this case to identify the sectors with respect to the litigation that is occurring, to say, "Well, what is the coverage of that litigation?" this is not intended, and does not drive any of our analysis at the moment, this table. This table is only for the purposes of saying that the litigation that is proceeding in the High Court and in this Tribunal covers, as we revised, 81 per cent of the sectors which card

transactions took place, so if you are trying to imply that this is some sort of market analysis or basis of our calculations, it is not.

MR. HOSKINS: If you go back to paragraph 6.2.3 of your report on page 31, this is the methodology that you set out.

DR. VELJANOVSKI: 6. --

MR. HOSKINS: 6.2.3. You say:

"We have undertaken independent research to determine the most likely pass-on rates based on past research studies and data".

At (a) you refer to:

"Market studies, competition authorities and other research".

DR. VELJANOVSKI: Correct.

MR. HOSKINS: At (b) you refer to:

"Evidence and analysis ... (Reading to the words) ... claims against Mastercard".

Then you go on to say:

"Assuming the MSC pass-on rate is consistent ...(Reading to the words)... period".

So my understanding was that you were not simply saying, "We have done some particular exercise for the purposes of the CPO", what you are doing in this report, and what you are explaining in paragraph 6.2.3 and 6.2.4 is the methodology that you are intending to adopt if the CPO was granted.

DR. VELJANOVSKI: Yes. Is it says, "Assuming", and it says, "If it is the same", and if we find differences then we would deal with them. 6.2.3 says how we are going to approach this.

MR. HOSKINS: Yes.

DR. VELJANOVSKI: And it starts with (a), we are going to look at the available evidence, we are going to look at the data, and then with respect to these cases that are occurring, we are saying that these cases, in this particular draft of it covers 70 per cent of the sectors, and by reference to the annex, that is how we calculated the 70 per cent. We said those firms were in those particular sectors, but that is not then saying, well, that is our sole analysis of the situation. We have not done the analysis. We do not know.

THE PRESIDENT: But as we understood it, Mr. Hoskins, I know it says, "That is what we are going to do", that it is a reasonable assumption that the pass-on rate is consistent in the same sector, we moved a bit beyond that yesterday, Dr. Veljanovski recognised that it is actually not a reasonable economic assumption because there is going to be a variation within sectors, and he explained how we would have to look at that. I think we have got beyond that now.

MR. HOSKINS: Is it common ground that you have not, in this report, set out what methodology you would adopt if a CPO were granted?

DR. VELJANOVSKI: No. It is not common ground at all.

MR. HOSKINS: Show me in the report the methodology you intend to adopt if the CPO is granted. Show me in the report.

DR. VELJANOVSKI: What do you mean by that?

THE PRESIDENT: It is really not helpful, sorry, to cross-examine that way. You can say that the report is not as helpful as it should have been, because we have had an explanation yesterday on some fairly basic questioning which has produced a rather more refined methodology, and it certainly would have been helpful, I would have say, if that had been explained in the report, it would have also saved some time, but we are there now, so that I think there is recognition by the experts that it is not a reasonable economic assumption. You do have to look within sectors, and that is why we were somewhat concerned as to whether there is data available that makes this feasible, but, yes, you can criticise the document, but I do not think that is helpful.

MR. HOSKINS: Sir, you have saved me a lot of time because if that is where the Tribunal is that is where I am.

THE PRESIDENT: We do not think that approach has likely worked and I think Dr. Veljanovski has really put forward a more sophisticated approach.

MR. HOSKINS: So I go back to the question I asked before we set down this path, which is if the approach you intend to adopt is more nuanced than this, which is your evidence now, have you conducted any analysis yet of what markets, in the way I have defined that term and the way the President used it, make up all the aspects of the economy that you would have to look at?

DR. VELJANOVSKI: Not at this stage, no.

MR. HOSKINS: Mr. Dearman, you said you have looked at something overnight in relation to the period 2005 and 2008, so I just was not quite clear what you had been looking at. Was that in relation to financial services alone? What was it you looked at?

MR. DEARMAN: I was looking at my files and I identified a further breakdown from 2005-2016 of the numbers which are in the UK payment statistics report, so there was some overlap between the 2009 report and the data that I was looking at last night.

THE PRESIDENT: This is regarding the figures in Appendix 3? Is that right?

MR. DEARMAN: That is right, yes. There are some differences in the total. I have not had the opportunity to explore what they are, but in broad terms from 2005-2008 the totals are really by sector.

MR. HOSKINS: Sorry, the breakdown was of what nature? Broken down into what?

MR. DEARMAN: It provides further details as to what types of business fall into each of those sectors.

MR. HOSKINS: Do they give the figures for each of those?

MR. DEARMAN: Yes.

MR. HOSKINS: So you have those figures for '05-'08, the claim period is 1992-2008. The possibility of extrapolation, have you done any work as to whether that extrapolation is going to be possible and, indeed, robust? Have you looked at that yet?

MR. DEARMAN: Not at this stage, no.

MR. HOSKINS: Do you accept that at this very high level, given that none of us have looked at it, it is unlikely, is it not, that you are going to extrapolate a three-year period at the end of the Claim Form back for a period of sixteen years. That just sounds inherently a very difficult exercise. Would you agree with that as a premise?

MR. DEARMAN: Well, I would not no, because I am not suggesting that this is the only information that would be available. You know, I have looked at it -- and we will explore further, subscription databases and paying for more information, to get to the more granular detail that we have for 2005-2008 for earlier years.

MR. HOSKINS: So you would need more granular information? You would want more granular information?

MR. DEARMAN: We would want more information, I think, full stop in terms of data, in terms of this exercise.

MR. HOSKINS: You would need that data in relation to each of the markets that one would have to look at?

MR. DEARMAN: It depends on the exercise that we are doing. Obviously more information is better.

MR. HOSKINS: Go back to your expert report please, and we just looked at 6.2.3 on page 31. You refer to two categories of information here, in particular, that you would look at. The first is market studies, Competition Authority decisions and other research. Go, then, to paragraph 6.3.10(b) you refer to two Competition Authority decisions, one OFT analysis of the petrol

sector and one a Competition Commission grocery investigation. Is that the sort of studies that you would be looking to rely on?

DR. VELJANOVSKI: Those type of studies, yes.

MR. HOSKINS: Have you produced a list of what market studies and decisions are available that might assist? Have you systematically gone through and seen what there is?

DR. VELJANOVSKI: Not at this stage, no.

MR. HOSKINS: The United Kingdom competition report you say based its analysis on the econometric analysis of 14 products. I was not quite sure from your evidence yesterday whether you were intending to carry out any form of econometric analysis at all. Would it be your intention to do that?

DR. VELJANOVSKI: If the data was available, yes.

MR. HOSKINS: And econometric analysis is generally very data heavy, you need sufficient data?

DR. VELJANOVSKI: Yes.

MR. HOSKINS: You intend to do that, if possible, for each of the markets you would look at?

DR. VELJANOVSKI: No. It really depended on the data. I mean, I am not going to say that -- well, I can pretty much guess that the data is not going to be available for every market, and we are going to work at a higher level of aggregation then.

MR. HOSKINS: Well, in the Competition Commission report you report, it is the bottom of page 36, you say:

"Based on that econometric analysis ...(Reading to the words)... such as meat".

But that, of course, is not consistent with the findings of the Tribunal in relation to Sainsbury's, is it, because it found that no pass-on was proved.

DR. VELJANOVSKI: They found that no -- well, you can go through all the evidence in the Sainsbury's case. I may not necessarily agree with some of the way they handled that evidence, or they did not look at the market, but if you are saying that the Sainsbury's said there was no pass-on, Sainsbury's case, that is not correct, for the purposes of the --

MR. HOSKINS: You are referring to 50 per cent in relation to the interest?

DR. VELJANOVSKI: Yes.

MR. HOSKINS: But in relation to the question of loss the Tribunal made no deduction for pass-on because it found it was not proven by Mastercard.

DR. VELJANOVSKI: As a defence. I think there is a very significant difference --

MR. HOSKINS: We will come to the law because I can make submissions on the law --

DR. VELJANOVSKI: You are asking me then to interpret a case.

MR. HOSKINS: No, I am not, the simple question I am asking you, and I will repeat it, is that the Competition Commission finding is inconsistent with the finding of the Tribunal in Sainsbury's. The Competition Commission, as you report, on full and rapid pass-on on all products except primary food products, whereas the Tribunal in Sainsbury's found no pass-on in relation to --

DR. VELJANOVSKI: If you are asking me as an economist --

MR. HOSKINS: No, I am just asking a simple factual question. Is there an inconsistency between the Competition Commission finding in your report and what the Tribunal found in Sainsbury's?

THE PRESIDENT: Well, on the simple basis that one said no pass-on and the other said yes, the answer is obvious. If the question is how one interprets the reasoning and how would one assess the comparative reasoning to reach a view, clearly that is something Dr. Veljanovski at some course would do, and it may be I think your clients are seeking something to appeal Sainsbury's, and one of the arguments is that there is an inconsistency in the judgment and that it ought to be 50 per cent on the Tribunal's approach, so there we are.

MR. HOSKINS: Sir, I am grateful you have my point. One cannot simply look at the materials. There may be contradictions in them so I can, again, move on.

The second category you refer to at 6.2.3(b) is evidence and analysis filed by the different businesses that are bringing similar damages claims against Mastercard.

We have dealt with the fact that 6.2.3(b), you say:

"Assuming the MSC pass-on rate ...(Reading to the words)... the same sector".

As the President has indicated, I think you agree that no longer holds good so we are into a different territory, but over the page at 6.2.4 --

DR. VELJANOVSKI: Can I just clarify, when we say that there might be differences between each sector, we have accepted that we will look at markets, but if there is a difference in it, we may still come up with an average overcharge, a weighted average overcharge for that sector, take a simple case, the food sector. If it is the case that 85 per cent or 90 per cent of those products are sold by the big supermarkets, and 15 per cent sold by corner shops, and their pass-through rates differ, we will average that out. We need to, if we cannot get very specific information, and if we do a deep analysis on the 85 per cent or a considerable analysis on the 85 per cent, that will overwhelm whatever the pass-on rate is on the minority shopkeepers or retailers in that sector, so it is not as sort of black and white as I think you are sort of projecting.

MR. HOSKINS: So you will look at the specifics of each market and come up with what you think is a reasonable approach for each market?

DR. VELJANOVSKI: That is precisely what we do, yes.

MR. HOSKINS: 6.2.4, again, this is something that has come up in questioning already so I can probably take it quite quickly, you say that you are going to look at pass-on rates, you are going to try and, sorry, calculate a weighted average MSC pass-on rate for each year of the infringement period. You say:

"This approach will depend ...(Reading to the words)... full infringement period".

So just potentially unpack that, you will be looking for data in relation to each year of the infringement period for your analysis?

DR. VELJANOVSKI: We will be looking at the data for the whole period, yes.

MR. HOSKINS: But then you have to look at each year on its own terms.

DR. VELJANOVSKI: We will attempt to do that. If the data is available we will break it up by year, but if the data is not available we cannot do that.

MR. HOSKINS: The reason for that, again, you see it is in your language at 6.2.1:

"In our opinion ...(Reading to the words)... pass-on".

So you accept, don't you, that the pass-on rate in each market for each firm may vary over time. I mean, that is the point you are making. Your point is if you can take account of it you will, but you may not be able to.

DR. VELJANOVSKI: Yes. I think that is my point.

MR. HOSKINS: At the end of 6.2.4 you also say that:

"The approach will depend on whether ...(Reading to the words)... full infringement period".

Why is it important that the evidence you base your analysis on should relate to the same period as the full infringement period as the claim period? It is the final part --

DR. VELJANOVSKI: Yes, I see that. Evidence related to the same period -- I am not sure that is a very significant -- not --

MR. HOSKINS: What is the point you are making? Help us.

DR. VELJANOVSKI: Well, I think the point I am making is looking for evidence in the infringement period but I think it probably could have been better expressed.

MR. HOSKINS: Would you like to express it better now?

DR. VELJANOVSKI: I have just expressed it. We are looking for evidence for the period of the infringement.

MR. HOSKINS: But if pass-on rates may change over time, then obviously it is preferable to have information that relates -- that comes from the period 1992-2008 rather than, for example, information that relates to 2015. That is the point you are making.

DR. VELJANOVSKI: Yes. Simply.

MR. HOSKINS: Just turn back a page to 6.2.3(b), remind yourself, the second category of evidence you refer to is evidence and analysis found by the different businesses that are bringing similar damages claims against Mastercard. Have you yet seen any of the evidence that has been filed in those claims?

DR. VELJANOVSKI: In the Mastercard one and the Morrisons one. Yes.

MR. HOSKINS: Sorry, the Mastercard one does not narrow it down.

DR. VELJANOVSKI: Sorry, Sainsbury's. You have got so many, I know. Yes. To clarify, the Sainsbury's case, I have read the expert economist evidence.

MR. HOSKINS: You have read the expert report?

DR. VELJANOVSKI: Yes.

MR. HOSKINS: And in the Morrisons one?

DR. VELJANOVSKI: I think I read some transcript or something like that, not in the --

MR. HOSKINS: Have you actually seen the hard evidence, the disclosure of the documents --

DR. VELJANOVSKI: In the Morrisons one, no.

MR. HOSKINS: And in Sainsbury's?

DR. VELJANOVSKI: I have seen the expert reports.

MR. HOSKINS: But not the underlying documents.

DR. VELJANOVSKI: No. No.

MR. HOSKINS: Do you know what period the disclosure in Sainsbury's relates to?

DR. VELJANOVSKI: Well, that period only overlaps about 18 months of our infringement period.

MR. HOSKINS: The disclosure in the Sainsbury's covers the period from December 2006 onwards, does it not?

DR. VELJANOVSKI: Yes.

MR. HOSKINS: And the disclosure in the Arcadia case -- Morrisons, sorry. There are a number of claimants. Did you call it "Morrisons"? You know the case I am referring to?

DR. VELJANOVSKI: I call it, "Morrisons".

MR. HOSKINS: That is fine. I want to try and make your life easier, the disclosure in the Morrisons case covered the period from April 2006 to the present date.

DR. VELJANOVSKI: Right.

MR. HOSKINS: So, again, a limited overlap --

DR. VELJANOVSKI: Yes. My underlying thinking about this is that data that may be useful will be revealed in these cases. I recognise that the overlap period is limited.

MR. HOSKINS: Go back to Appendix 3 at page 55. You say:

> "We have been instructed that claims already issued against Mastercard ...(Reading to the words)... for example ..."

Then you list some of the claims that have been brought. Just to check, when you say, "We have been instructed that", have you seen copies of the pleadings in those cases?

DR. VELJANOVSKI: No.

MR. HOSKINS: Do you know what periods are covered by those claims?

DR. VELJANOVSKI: Not specifically, apart from the Sainsbury's.

MR. HOSKINS: Okay. Have you got a pen with you?

DR. VELJANOVSKI: Yes.

MR. HOSKINS: You might want to jot this down. If I tell you that in the best case scenario in all the Other Retailer actions there would only be disclosure in relation to pass-on in the United Kingdom prior to 2006 in relation to Dixons in the electronics sector, and then in relation to car hire, Autoeurope, Hertz and Europecar, in relation to transport, TfL and British Airways, and in relation to clothing, Inditex, which the most famous brand is Zara, as know, and Asos, which is an online clothing retailer, so imagine that you have got disclosure from all those retailers in relation to prior to 2006, again, I think it is stating the obvious and I am sorry if most of my questions are obvious, that would not be anywhere near sufficient for you to carry out the analysis you have been discussing with the Tribunal --

DR. VELJANOVSKI: Not using that data source.

MR. HOSKINS: So what you would have to do is to obtain sufficient evidence by other means in respect of the period from 1992-2008; correct?

DR. VELJANOVSKI: Correct.

MR. HOSKINS: You would need evidence in relation to each of the different markets that exist within the sectors we have been looking at, would you not?

DR. VELJANOVSKI: Well, we would be looking principally at the main markets and whether -- if you take British Airways, the airline sector is pretty much well-researched. We do not need to go to the British Airways case to discover what the elasticity of the amount is for air travel and how they are pricing and whether they charge surcharges for cards.

MR. HOSKINS: As I think we have already established we would have to look at each market separately to see what the appropriate approach was; yes? Some may be easier than others.

DR. VELJANOVSKI: Some may be easier. As a first cut we would be looking at markets, and then we would decide which ones to explore in depth.

MR. HOSKINS: You do not yet know how many markets you would need to look at. You have not done that exercise.

DR. VELJANOVSKI: Not at this stage, no.

MR. DEARMAN: On the breakdown of this data there are individual markets which are -- if we are talking about markets as being subsectors -- there are individual ones which are substantial. There are a large number that represent less than half a percent of the total volume of commerce, so there are some very small ones in there, and it would be, you know, selecting those to give the best coverage.

DR. VELJANOVSKI: We will be able to identify which ones are more significant to the value calculation.

MR. HOSKINS: You have accepted, I think, that because pass-on rates within a market may change over time, you would need evidence to cover the period as a whole, a snapshot is not going to be enough for most of these.

DR. VELJANOVSKI: Ideally, yes.

MR. HOSKINS: Again, apologies for asking the obvious; you have not yet made any assessment of the actual evidence that you might need for the markets you want to look at? Just the evidence that you would have to go and get, or try and go and get, the sources, et cetera, you have not done that yet.

DR. VELJANOVSKI: Not at this stage, no.

MR. HOSKINS: You have not obviously, then made any assessment of where -- how you might obtain the sort of evidence we are talking about, beyond what we see in the report.

DR. VELJANOVSKI: Well, that is putting it a bit extreme because I have worked in various sectors, I know what type of data would tend to be available in those sectors, but, you know, as a specific enquiry to every potential -- we have not gone to that level of detail at this stage.

MR. HOSKINS: In your experience in dealing with various industries, it is correct, is it not, that most companies have document destruction policies, do they not?

DR. VELJANOVSKI: I cannot answer that question. I am not aware of that.

MR. HOSKINS: Some companies have destruction policies or they keep documents for a set period, say of six years. That is a fairly common commercial practice, is it not? You have never seen that?

DR. VELJANOVSKI: I will take your word for it. In a lot of the cases I have worked with we have had data for more than six years, but it is a question I cannot really answer.

MR. HOSKINS: The claim period here is from 1992-2008, so that is a period from 9-25 years ago, if I can put it like that.

DR. VELJANOVSKI: Yes.

MR. HOSKINS: Again, apologies for stating the obvious, the prospects of finding data going back 16, 17, 18, 25 years is problematic. It is in any case. It must be in this case. Do you accept that?

DR. VELJANOVSKI: Well, any historical data or fact is problematic, but, you know, you search for their propriety, there are databases that go back to the last century. I mean, as you say, you are stating the obvious that in some cases it is going to be problematic, in other cases there will be good data.

THE PRESIDENT: Do you envisage, Dr. Veljanovski, that you would have to go to a lot of companies? I appreciate British Airways may be typical of the airline sector, you don't have to go to other airlines, that tells you about airlines, and if they have a case and if there is a bit of overlap, that will cover a few years, but otherwise, and there are a lot of markets where there is no case, or, indeed, where there is a case but not much information has been produced yet, are you expecting to have to ask for information from a whole lot of merchants -- companies -- or are you expecting that this will be in various studies, competition reports, analyses, in other words, that does not involve getting data from individual companies?

DR. VELJANOVSKI: I mean, I think if we decided that a survey of companies would be useful for the purposes of trying to work out whether they were passing through the costs in particular sectors, I am sure we would do that. As to going to specific companies, we have not thought about it in what particular way, other than to look at what evidence they are giving in court, which may, as counsel has pointed out, exceed the period that we are considering, but, obviously, companies do not suddenly -- are not suddenly created in 2006, they have a history, and their pricing practices, as, no doubt, the Competition Commission -- persists over decades, and how they price their products, so the fact that the contemporaneous evidence that they are presenting to the Tribunal in a particular proceeding may give us hints as to how they are behaving, and that information may be coloured by the fact that, you know,

in the Sainsbury's case the Tribunal was at pains to point out, okay, the evidence was not there in terms of their pricing practices, but they were constrained by competitive forces so we have to look at the market rather than the specific evidence given by the firm, because the firm is buffeted by the market. It might say it is doing something like it is marking up prices, but in fact it is not actually marking up prices fully because the competitive constraints lead to the total price coming down over time, so, you know, I think what I am telling the Tribunal is that I would do an economic analysis to the best of my ability, given the data available, and explore as many avenues as possible, given the budgetary constraints and proportionality. I cannot do more than that.

MR. HOSKINS: It sounds very reasonable, Dr. Veljanovski.

DR. VELJANOVSKI: Sorry for mentioning the obvious.

MR. HOSKINS: I have been doing it all morning.

Can I move on to a different topic? Can we go to the Sainsbury's judgment that is in Bundle D4 at tab 49? If you could turn to page 1290? I think the quickest thing is if you wouldn't mind just reading paragraphs 70 and 71, you will see the heading, "Two-sided Platforms"? Just refresh your memory if you have not seen this, or read it for the first time.

DR. VELJANOVSKI: I am familiar with that approach.

MR. HOSKINS: So I assume you would agree that the Mastercard scheme was a two-sided market. That is not controversial, is it?

DR. VELJANOVSKI: Probably -- yes. It is not controversial as an analytical concept, yes.

MR. HOSKINS: That means that the more cardholders that Mastercard has, the more attractive the scheme is to merchants. That is one aspect of a two-side market.

DR. VELJANOVSKI: As a general statement.

MR. HOSKINS: And the flip side is that the more merchants who accept Mastercard cards, the more attractive the scheme is to cardholders, right?

DR. VELJANOVSKI: Yes.

MR. HOSKINS: Could we go back to your expert report, so that is A, tab 5 at page 9? Paragraph 2.5.1(a):

> "A four-party scheme may involve the following payments ...(Reading to the words)... incurred and paid".

One of the ways, therefore, in which an issuing bank, an issuer, might seek to compete to attract cardholders to it is by offering a card which is free or has a low annual fee. That is one of the main competitions, is it not?

DR. VELJANOVSKI: Yes.

MR. HOSKINS: Another form of competition that issuers use is to offer rewards or cash back or that sort of incentive to cardholders; yes?

DR. VELJANOVSKI: Yes.

MR. HOSKINS: Can we go to Bundle D4, tab 54? You said you have seen, I think, the expert report of Dr. Niels in Sainsbury's.

DR. VELJANOVSKI: Yes.

MR. HOSKINS: Have you seen this document before? It is the joint experts statement. That is a type of document you will be familiar with, obviously.

DR. VELJANOVSKI: Yes.

MR. HOSKINS: This is the joint expert report in the Morrisons claim. Have you seen this before?

DR. VELJANOVSKI: No.

MR. HOSKINS: The experts in that case were Mr Dryden for the claimant and Dr. Niels for Mastercard. If I could ask you to turn to Issue 32, there are so many numbers going on in this document, there is 1100 at the bottom right of the page. Do you have that, Issue 32?

DR. VELJANOVSKI: Yes.

MR. HOSKINS: It is stated:

"In the issuing market ...(Reading to the words)... pass on the MIF".

You see Mr Dryden says:

"Agree. I would expect ...(Reading to the words)... pass-through".

He makes a point about debit cards over the page, and Dr. Niels is a bit more succinct, he says, "Agree".

DR. VELJANOVSKI: He would. Yes.

MR. HOSKINS: Well, both the experts agreed with this, having looked at it in Morrisons. Do you agree with that as a premise?

DR. VELJANOVSKI: Sorry, you said, "Having looked at it". They had evidence of this or they are just agreeing as a matter of theory?

MR. HOSKINS: This is what they -- each having produced their report and each having access to the evidence.

DR. VELJANOVSKI: And they are saying that as a result of what reduction in the MIF resulted in that?

MR. HOSKINS: I will not put words in their mouth, they are saying:

"In the issuing market a higher MIF ... (Reading to the words) ... lower cost or greater level of benefits to cardholders as issuers pass on the MIF".

That is what they agreed. Do you agree with that premise?

DR. VELJANOVSKI: Not necessarily, no. First of all, I want to know on what basis it is agreed? Is it a matter of principle or theory? In your response you gave a number of studies that seemed to substantiate that proposition, but those studies are questionable in themselves, and --

MR. HOSKINS: So do you think it is possible that that may be correct?

DR. VELJANOVSKI: It is possible that it may be correct, but the fact that they have agreed it in this case, I mean, I don't know in what context they are agreeing to this.

MR. HOSKINS: Have you looked at this issue for the purposes of this case?

DR. VELJANOVSKI: I have actually looked at it. You have stimulated me to look at it.

MR. HOSKINS: Have you reached a firm conclusion or are you still in the process of forming a view?

DR. VELJANOVSKI: No, I have reached the conclusion that, first of all, in relation to this case, we would have to establish a counterfactual, what would have happened had the MIF not been as high as it was. With respect to an analysis, because I would imagine these economists are basing their analysis on a number of theoretical articles, because there is very little hard -- at least economic empirical evidence of the impact of reduction in the MIF, and we can go to the issue of whether looking at whether regulatory reductions to MIFs are relevant to a counterfactual extending over our period where there should not have been a high MIF, and in respect of a proper analysis of how benefits would be reduced, I understand is that the Interchange Fee only constitutes about 10 per cent or 15 per cent of the revenue of card issuers, that 65 per cent come from interest payments, so there is a big question there about what the banks are actually doing, or the issuers are actually doing with the -- whether they are passing on the IFs to their customers, or whether they are passing it on to their profit line, and the European Commission interim study on retail banking said that even if you abolished the Interchange Fee, 63 per cent of the issuers would still be profitable, so the way that this theoretical analysis is presented is that the Interchange Fee is really principally the only source of income, and that is a balancing between the parties.

Now, I am not -- you know, as a matter of fact, that is not the case, and when you look at the studies, you have given a number of studies in response, criticising on the point of not taking this into account, the Australian study, there is another study that shows that a lot of these

benefits were being reduced, irrespective of the cap on the Interchange Fee, and the other ones are for other jurisdictions of debit cards not credit cards, so there is a big area of analysis to be done if it is decided as a matter of causation that these benefits are to be offset against the overcharge, and we didn't look into that when we wrote our report, because we didn't consider that would be the principal area of focus, but I do not agree with this, and certainly not, you know, as a bland statement, because these chaps do not have -- have not themselves done the analysis. I note you quote Dr. Niels saying that he thought that that would be the case on the Sainsbury -- wherever you quoted him from, and that did not seem to be very strong evidence of what he thought might be the case.

MR. HOSKINS: But there is a real issue here, is there not?

DR. VELJANOVSKI: There is an issue. I am not resiling from the fact that if it is decided that there is a causation for this, then it will have to be investigated and there may necessarily be an offset. I am not denying that, but I am just saying that I am not accepting it as a bland proposition that there is going to be a significant offset and this is inherently what is going to happen.

MR. HOSKINS: Sir, I do not have any further questions. Thank you very much for your time.

DR. VELJANOVSKI: Thank you.

THE PRESIDENT: Mr. Harris, before we break, do you have many questions?

MR. HARRIS: Sir no, but perhaps it would be an opportune moment to take the five minutes and then I may have fewer or none.

THE PRESIDENT: Yes. Fine. We will take our five-minute break now.

(11.24 am) (Short break)

(11.33 am)

MR. HARRIS: Sir, I do not have any questions in re-examination.

THE PRESIDENT: Before the experts leave the witness box, can I ask about something that slightly troubled me? If you look at Bundle C and tab 3 -- this is a question for you, Mr. Harris -- which is your response, if you have that, tab 3 in the core bundle, go to page 27 in the document, page 151 in the bundle, paragraph 60 -- do you have that?

MR. HARRIS: Yes, sir.

THE PRESIDENT: About halfway down the paragraph there is the sentence:

"The Applicant, working with his experts and Claims Administrators, considered many different options for how to undertake the distribution of damages and came up with the option currently presented".

Who are the Claims Administrators?

MR. HARRIS: Epiq Hilsoft, sir.

THE PRESIDENT: And who are the experts who were consulted?

MR. HARRIS: Well, this is, I am afraid, a slightly loose use of language. It does not mean Dr. Veljanovski and Mr. Dearman, it means in terms of the distribution obtaining expert input from Epiq Hilsoft who are experts in distribution.

THE PRESIDENT: But they are the Claims Administrators.

MR. HARRIS: Yes, sir, so I accept -- it is as the position was explained to you by Dr. Veljanovski, that they have not been consulted in any detailed sense about distribution aspects.

Sir, can I just obtain some further instructions? (Pause).

Sir, these two gentlemen who are still in the box have been involved as experts in the manners that they have addressed you on this morning, including as regards aspects of distribution. It depends quite how we use the word, "Distribution". So, for instance, as Dr. Veljanovski and Mr. Dearman were explaining to the Tribunal, they have provided input and given thought to, and explained this morning, aspects of annualised analysis, for example, and that bears upon distribution as well as making up the -- how the overall losses are put together, so it depends quite how we are using the word, "Distribution".

THE PRESIDENT: Well, what is said here is very clear, that the Applicant, working with his experts, has considered many different options for how to undertake distribution of damages. Well, Dr. Veljanovski is very clear, they have not been involved in that, so it is not Dr. Veljanovski who has been asked to consider different options for how to undertake distribution.

MR. HARRIS: Well, as I say, sorry if this sounds slightly repetitious, there is a difference between, if you like, detailed, practical measures and how that impacts upon take-up rates, and that is more properly the province of Epiq/ Hilsoft, but in the manner that we have been exploring this morning, how the claim is put together, if you like, on an annualised basis bears, as well, upon the method of distribution.

THE PRESIDENT: It is nothing to do with distribution. It is how you calculate the aggregate loss. You explained to us very helpfully the various options that were considered, and you went through the category of options. Those are the different options for how to undertake distribution. Well, clearly they were considered with Mr. Merricks, you said, they were considered, I understand, with Epiq, but they were not considered with Dr. Veljanovski, and

that is the impression, I have to say, "Experts", with a capital E, as used here, clearly it seems to refer in this document to Dr. Veljanovski and Mr. Dearman.

MR. HARRIS: Well, sir, it may be that Dr. Veljanovski can be asked another question about it, but there are -- there was consideration to some degree, as Dr. Veljanovski has explained, about things like can you approach distribution on a aggregated high-level basis, or on a more disaggregated basis, in the same way that there was some discussion about the other annualised aspects of putting together the overall figures, but there is at some point -- you look puzzled, sir, and I can understand that in this sense, that at some point the line moves from being -- into more of a series of practical considerations where Epiq/ Hilsoft have got more knowledge and experience.

THE PRESIDENT: They are two quite different things, calculating the aggregate loss, you can do that annualised, you can do that for the whole period, you can do it by -- there are all sorts of different ways, and on that, clearly, these two gentlemen did a lot of work and provided advice. There is then, when you have got your aggregate loss, then there is a quite separate stage of saying, "Well, how are we going to distribute that to this class of 46 million?" You explained the various options. It is a completely different question. That is why we have, indeed, stopped asking these gentlemen about that question because they said, I am sure entirely honestly, "We were never asked to consider it". That is what this is addressing, "Proposals for distribution to individuals". I just find it very concerning that it said it was considered with the -- working with the experts, when apparently that is not right.

MR. HARRIS: Sir, may I just take one more moment? I apologise if this now appears not as fully --

THE PRESIDENT: Well, I don't want to pursue it further with you now because the experts -- I just wanted to clarify whether there are any other experts that are being referred to there, other than these two gentlemen.

MR. HARRIS: No. The division, as you know -- we have got as far as I think we can get. The division is experts, these two gentlemen and claims administers, Epiq/ Hilsoft and I apologise if and to the extent that we have given a wrong impression in this sentence about the division between the two, and I can see how that has arisen, and we now know the correct -- well, we know the correct position and this suggests a different way of approaching it, and that is wrong, then I am sorry for that.

THE PRESIDENT: Yes. So Dr. Veljanovski, we appreciate that you were not involved in the discussion of options for distribution, and I am sorry if we had got the wrong impression, but

-- and we know that the proposal that is being put forward is a simple, per capita average each year of number of people over 16 per year, and we know that clearly diverges from the reality which is of individualised loss, and the sort of perfect reality is you would know exactly what everybody spent and how it was split between different sectors, so there is going to be that divergence. Can you help us on this, if you can't, please say so; for most people in the class, "The class", being everybody over 16 now, and over 16 in the relevant year that they are getting money for, would distribution on that basis, the simple per capita division, would they get -- would most people, can you say, get more than 50 per cent of their actual loss? Do you understand the question?

DR. VELJANOVSKI: I perfectly understand the question. It is the answer that I am having trouble with.

THE PRESIDENT: You may not be able to help us on that.

DR. VELJANOVSKI: I mean, you have looked at those figures more. I do not think we can answer that.

THE PRESIDENT: If you cannot, I do not want to -- the last thing I want you to -- is to push you into a position of giving expert evidence where you do not feel comfortable doing it on something you have not considered.

DR. VELJANOVSKI: If you are going to make the statistical point that Professor Mayer can make for you much better than do, you know, what is an average, what is a mean, median, and what is the distribution of losses, and we have got two distributions one distribution is card users, and the other one is the expenditure patterns of cash purchasers which may be quite different, so I do not think that can be answered as a matter for, let's say, theory or hypothesis. I think one would have to look at the data -- and I think it would require a significant analysis to come to the answer.

THE PRESIDENT: Yes.

PROFESSOR MAYER: Is that something that you think, for example, looking at expenditure data might allow one to answer?

DR. VELJANOVSKI: I think it is a possibility, because there is average card expenditure, as we have seen, and in what sector it is happening, so I think some analysis could be done to address that. I am not going to give an ironclad guarantee at this stage.

PROFESSOR MAYER: Thank you.

MR. HARRIS: Sir, there is one question that arises, can I just put it like this, for either or both of you gentlemen; have you considered the feasibility, if the data exists, of having more granular

distribution models, for instance, by reference to demographic data of which an example is age and/or region. Have you considered the feasibility of doing that if the data exists?

MR. DEARMAN: Not in any detail. I mean, if the data exists, obviously if the data exists, it should be a possible exercise but we have not explored (a) the availability of the data or how feasible and plausible that would be in practice.

MR. HARRIS: Sir, thank you. No further questions.

THE PRESIDENT: Anything arising out of that?

MR. HOSKINS: No.

THE PRESIDENT: Thank you very much, both Mr. Dearman and Dr. Veljanovski. You are discharged. Released.

MR. HOSKINS: Sir, I would like to begin with the --

THE PRESIDENT: Could you give me just a moment?

Just before you begin, can you just help us on the timetabling issue having regard to the quite separate funding argument, if I can put it that way in a generalised heading? You are going to now address you on --

MR. HOSKINS: On the non-funding issues.

THE PRESIDENT: -- on the non-funding issues. You expect to take, obviously subject to our interruptions and so on, about how long?

MR. HOSKINS: Couple of hours.

THE PRESIDENT: So you are reasonably hopeful, then, that Mr. Williams will be able to start mid- afternoon?

MR. HOSKINS: I think Mr. Harris wants to follow. He wants to reply to my submissions before --

THE PRESIDENT: Then the idea is that Mr. Williams will begin.

MR. HOSKINS: That is right so we are getting a bit tight because we are half a day behind where we said we would be.

THE PRESIDENT: That is what I am trying to work on.

MR. HOSKINS: We are half of a day behind.

THE PRESIDENT: Yes, because the problem is that Mr. Bacon is back tomorrow.

MR. HARRIS: That is right sir.

THE PRESIDENT: Is that right?

MR. HARRIS: Yes.

THE PRESIDENT: But only until lunchtime or something?

MR. HARRIS: I am afraid so, yes.

MR. HOSKINS: We may be in a situation where actually Mr. Bacon has to open the funding issues and then he has to leave and then --

THE PRESIDENT: Well, we will have to do the best we can. Yes.

SUBMISSION BY MR HOSKINS

MR. HOSKINS: I would like to begin by a brief look at the applicable legal submissions because I want to frame my submissions in terms of, well, what is the legal framework the Tribunal has to follow, and I will just take you to the most pertinent ones. I am not going to traipse up and down the legislation, but let us just remind ourselves of what the conditions are that have to be satisfied before the Tribunal can exercise its discretion whether to make a CPO or not. I will show you how the language works.

If you could pick up D1 at tab 10 which is the Competition Act as amended, page 50, first of all we can remind ourselves, and I will come back to this point as the from a, sub 1, section 47(b) sub 1:

> "Proceedings may be brought before the Tribunal combining two or more claims ...(Reading to the words)... applies".

So what we are doing is looking at the individual claims which exist, and we are asking whether they should be combined into one proceeding. Very simply what we are doing.

Then at sub 5:

"The Tribunal may ..."

So there is a discretionary element in the sense that you consider various facts, et cetera:

> " ... may make a collective proceedings order only ..."

And then you have two conditions:

> "If it considers that the person who brought the proceedings is an appropriate representative".

If I can just paraphrase, and (b):

> "Claims which are eligible ...(Reading to the words)... proceedings".

So 5(a) and (b), you have to be satisfied are fulfilled, and if you are satisfied they are fulfilled you then have your, "May", given that they are fulfilled should you, nonetheless, make an order or not, but those are legal pre-conditions, and the eligibility condition itself has two subconditions, and that is sub 6:

> "Claims are eligible for inclusion in collective proceedings only if the Tribunal considers that (i) ...(Reading to the words)... proceedings".

So when we are looking at the representative condition, that is what Mr. Williams is going to deal with because it's essentially funding costs, conflicts, et cetera, and I am going to be looking at the eligibility condition, but there are two subconditions there, first of all, same, similar or related issues of fact, it has to be a common issue, to give it a shorthand, and must be suitable.

Both of those subconditions have to be satisfied before a CPO may be made.

Then if you go to page 53 you have the provision allowing the grant of an aggregate damages award, 47(c)(ii), the heading is, "Collective Proceedings, Damages and Costs", (ii):

"The Tribunal may make an award of damages in collective proceedings ...(Reading to the words)... unrepresented person".

So what that means is that if the necessary conditions for the grant of a CPO are met, and the Tribunal believes it is appropriate to make a CPO, then, but only then the Tribunal has power to make an aggregate damages award.

That is important because one of the main themes of submissions on behalf of the Applicant by Mr. Harris is: he says, "Well, the only way that a consumer claim could be brought against Mastercard is by a collective action because aggregate damages is the only way that any money is going to be produced". That is not sufficient to justify a CPO.

As we will see, while the question of whether an award of aggregate damages is suitable is one of the questions for the Tribunal to consider, it is not determinative on its own. The question of whether an award of aggregate damages is suitable or, indeed, desirable, is a necessary but not sufficient condition for the grant of a CPO.

I am afraid, then, what that then demonstrates is that Mr. Harris' approach is the tail wagging the dog, because he starts with desirability of aggregate damages and then says, "Therefore you must grant a CPO", but that is wrong. The question is: have the CPO conditions been fulfilled, and only then one gets into the possibility of aggregate damages.

So let me look at the eligibility condition. I am going to split it up. I am going to lack at the common issue subcondition first.

The guide, paragraph 6.37, second bullet, if you want to look it up, it is in D1, tab 14.

THE PRESIDENT: Yes, we have it loose.

MR. HOSKINS: Okay. It is paragraph 6.37.

THE PRESIDENT: For us, page 7.

MR. HOSKINS: That is right. I am going to pick it up at 75, so it is it the bullet headed, "The claims must raise common issues".

What the guide tells us is:

"The core notion of collective proceedings is that they group together similar claims which raise common issues".

So that is the core notion of collective proceedings. This is, in a sense, the most important part of whether to grant a CPO. Now, you know -- this is the bold figures -- the application here seeks to group together claims by an estimated 46.2 million claimants over a period of around 16 years and you know that the claims are said to arise on the basis that every business that accepted Mastercard cards in the UK during that claim period will have passed on the unlawful cost of the MIF to its customers by way of an increase in their retail prices. That is the case in a nutshell that is put.

The Applicant suggests, this is in their Reply at paragraph 54(b) they suggest that:

> "During the claim period there were over 500,000 merchants in the United Kingdom that accepted Mastercard cards".

We do not have data on that, so we are quite happy to go with that as a working hypothesis for today, 500,000.

THE PRESIDENT: Before it was 500-800,000. I thought the figure was 500 rising to 800,000. I thought I saw that somewhere.

MR. HOSKINS: I took it from the Reply, that is C3, 148.

THE PRESIDENT: Yes. Well, there is that figure. I think it was said that it went up over the period.

MR. HOSKINS: Sir, for the purposes of my submissions we get somewhere between 500,000 and 800,000. There were a lot of merchants. I am grateful for the assistance.

Now, as we have seen, one of the subconditions that has to be fulfilled before the power to make a CPO arises is that the is individual claims which the Applicant seeks to group together, and here I am quoting:

> " ... raise the same, similar or related issues of fact or law".

Now, let us quickly burn the straw man. It is obvious that the issues raised by the individual claims need not be identical, but it is equally obvious that they must be sufficiently similar for it to be appropriate for them to be combined into one procedure. I think the truth is that applications that come before this Tribunal for CPOs will be on a spectrum of similarity. At one end of the spectrum there will be cases where all the issues are near identical, it is difficult to imagine a case where they would be absolutely identical, but let us say they would be near identical as between individual claims, so -- this is quite a difficult -- but let us

imagine a case where a dominant company has refused to supply a number of its competitors, and for some reason they want to bring that as a collective action. You would see that as a sort of -- at one end of the spectrum, a lot of commonality, and then at the other end of the spectrum, you will have claims where you just get less and less similarity.

THE PRESIDENT: Well, an obvious one might be if one read the Ofcom decision the other day, if a telecoms company had overcharged all its consumers, subscribers, by X percent.

MR. HOSKINS: The EE --

THE PRESIDENT: Yes.

MR. HOSKINS: Absolutely. So, there will be a spectrum and the degree of commonality will depend on whether it is a claim for direct purchasers or indirect purchasers, whether it is a claim in respect of single product and the nature of that product, it might be different if it is milk as opposed to whether it is a very expensive piece of computer kit or something, there would be a whole spectrum, but what is pretty clear is that whilst at one end of the spectrum you will have cases where the individual claims are very similar, at the other end of the spectrum you will have this case, individual claims by 46.1 million claimants and, as I will show you, a myriad of differences.

Now, the requirement of sufficient commonality in the Act, in the statute, must have some substance. It must be there for a reason, so there must be cases where the Tribunal can and should say that the individual claims before it are not sufficiently common to justify a CPO. As you know, our submission is this is one of those cases.

I will do my interrorem bit and then I will meet Mr. Harris' interrorem bit, if a CPO is granted in this case it is hard to see where the line would ever be drawn, but refusing this CPO will not defeat the purpose of the legislation because there were plenty of other cases on the spectrum where it will be appropriate to grant CPOs. I will just get those sort of interrorem arguments out the way so we can move them to one side.

Now, when you go through this, you could come up with hundreds of differences, but there is diminishing returns, and it would not serve my client well just to try and pick on every difference that might exist. What differences matter? What are the principal differences that mean that this is not suitable? We have focused on three such issues. First of all, the purchasing history of the individual claimants whose claims are sought to be collected together, secondly, the pass-on rates of the different merchants, of the 500,000-plus merchants that they would have bought from, and, thirdly, the question of benefits to Mastercard cardholders arising from the MIF, and I will take each of those in turn. We say in

relation to each of those there is not sufficient similarity between the 46.1 million claims for this to satisfy the test.

Can I ask you to go to the Claim Form? That is Bundle C, tab 1 at page 15, paragraph 46, so this is the Applicant's Claim Form. There they say:

"The claims are suitable for an aggregate award of damages ...(Reading to the words)... impracticable".

What is important is they then describe what would have to happen if the individual claims were brought separately, so if they were brought separately -- I am sorry --

THE PRESIDENT: Just one moment. Page 15. (Pause).

MR. HOSKINS: If these claims were brought individually what issues would arise? This is according to the Applicant.

Well, first of all, you would have to determine the actual purchases of goods and/or services made by each member of the proposed class during the infringement period, and that is what I refer to in shorthand as, "Payment history", of each of the claimants, and, secondly, according to the Applicant, you would have to assess the extent to which each of the businesses from which those purchases were made passed on the higher charges resulting from the proposed defendants' infringement of Article 101, TFEU, so those are the things that would have to be determined if the claims were brought individually, and what they then say is the only practical way of proceeding is by way of an aggregate award of damages.

It is therefore common ground, because remember the test here is should -- are they individual claims sufficiently similar to be grouped together? So let us take the individual claims.

It is common ground you would have to look at the purchasing history. It is also common ground, and you can get this from paragraph 51(a) of the Applicant's Reply -- we may as well look at it while we are here -- it is tab 3, page 145, paragraph 51(a). It is the penultimate sentence. I will ask you to read 51(a), but it is the sentence that begins, "In common with each other", that I am relying on for this purpose:

> "Consumers will have made purchases ...(Reading to the words)... within those categories".

It is obvious but it is accepted. It is not in dispute. It is common ground. So it is common ground that the determination of an individual claim would require a consideration of the purchasing history of the claimant throughout the claim period -- 16 years. The purchasing

history of each and every claimant in the proposed class will be different, both in terms of how much they spend and where they spend it, so let me give you some sort of trite examples. A single twenty-something in Chelsea is likely to have a very different spending profile from a married mother of three in Aberdeen.

Another important point is that the spending profile of each individual is likely to change over time, over the sixteen-year period, sometimes dramatically. If the single man in Chelsea got married and had children during the claim period, then he might not be able to spend so much of his money enjoying the highlights of Chelsea as he did when he was a single man.

Now, on a more serious note, if a person lost their job during the claim period, their spending profile is very likely to have changed.

So what is clear and cannot be disputed, is that every individual in the class will have a different spending profile, and each of those profiles is likely -- well, almost certainly -- will have changed over the 16-year period of claim.

Now, the Applicant has not denied these points, he cannot -- they are obvious -- but nor has he suggested any means for dealing with this issue, of addressing this issue.

The way in which he has tried to address this point is to push these differences to one side on the basis that it would be impracticable -- his word -- to carry out such an assessment for each member of the proposed class, and, therefore, it is said that aggregate damages should be awarded to the class as a whole.

THE PRESIDENT: In a sense, it is standing -- paragraph 46 -- the requirement of the rule, which is dealing with suitability, not with commonality, in a sense, on its head. The question is whether the claims are suitable for an aggregate award. The fact that it may be impracticable as a matter of cost and evidence to have individual assessments does not necessarily mean it is suitable for an aggregate award.

MR. HOSKINS: That is right.

THE PRESIDENT: The one does not prove the other.

MR. HOSKINS: That is why I insist on actually looking at what the law requires to be fulfilled as conditions. My submission is that Mr. Harris, the Applicant's approach, is tail wagging dog, and it does not actually meet the legal requirements.

For the point you have just put to me, sir, equally for the point that I have been developing separately, which is it is not enough to say because there are so many differences between the individual claimant's purchasing histories that we would need an aggregate award of damages to get some money, that does not address the question of the dissimilarity, the very dramatic

dissimilarity, between each of the claims that are sought to be grouped together, and that is the legal test.

THE PRESIDENT: The question has to be whether, on the aggregate award, notwithstanding these differences, there is a reasonable method, and workable method, of coming up with a figure that corresponds to, and is a good proxy for, the aggregation of all these various individuals.

MR. HOSKINS: Absolutely. Sir, I will come to that. That is one of the issues which seems to us to go to the question of the second subcondition.

THE PRESIDENT: Yes. I mean, this is dealing with this particular subrule.

MR. HOSKINS: Exactly. Almost all the issues that I deal with have the same problem at base, which is how did you deal with a claim by 46.1 million people with vastly different purchasing histories and the population rate. They pop up in different ways. One is the way I am doing it now, there is no commonality in purchasing history and they crop up all the way to the question of distribution at the end, but it is the same problem all the way through: You are trying to bring together too much, and that is the theme of my submission.

So that is number 1. We say that has simply not been addressed by the claimant, the fact that there are these differences. They immediately jump to aggregate damages and how they might smooth them all out, but that is not the point. It is effectively common ground that there is a wide disparity in the purchasing history between each of the 46-odd million claimants.

The second area I want to focus on to show that these are not sufficiently similar is pass-on. Things have moved on quite dramatically from the report in the last couple of days. It is now common ground that pass-on rates will vary between -- I will go back to the sectors -- between the sectors identified in Annex 3 of the expert report, and within those sectors, so the example, Sir, that you gave, with respect, was a good one, just for a different colour to the point, within the Motoring sector, the pass-on rate for a car hire company likely to differ for the pass-on rate for a car repair garage. Mr. Dearman's point in the box, small shops likely to have different pass-on rates from large shops, whether they be grocers, retailers, general stores, but generally you will have that difference and that will go throughout the economy.

Now, if you wanted, rather than it just being common ground, some hard evidence of that, one finds it in a report which is cited at footnote 49 of the expert report the Applicant has put in. I will not take you to that, I will just take you to the report that is cited. That is at D12. It is at tab 152. You will see that it is a report by RBB Economics, entitled, "Cost pass-through,

theory measurement and potential policy implications". It was prepared for the Office of Fair Trading. It is dated February 2014, so fairly recent.

If I could ask you to turn to the foreword, page 4960, and just take it quickly, perhaps if you could read the first two paragraphs you will get a flavour of what this is for and what it found. (Pause).

You will see it is described by RBB themselves as a, "Comprehensive and up-to-date review", but it is also intended to be a practical tool to inform it when it is exercising its various powers. It is not simply some theoretical exercise. It is supposed to help the OFT actually exercise its powers.

Then on the next page is the executive summary, top of the page:

"Cost pass-through arises ...(Reading to the words)... change in its costs".

Again, it explains what RBB has been asked to do by the OFT and it deals, then, firstly -- it summarises the findings, "Insights from the theoretical literature", if I could just pick out some excerpts, the third bullet:

"The extent of industry-wide cost pass-through..."

Of course, the MIF is an industry-wide cost so this is relevant:

"The extent of industry-wide cost pass-through in a perfectly competitive market ...(Reading to the words)... all else being equal".

So, pass-through rates can vary even between perfectly competitive markets, and then the next bullet:

"With other market structures ..."

Ie not perfect competition:

"... economic theory indicates that pass-through will vary with a number of issues, pass-through depends on the curvature of demand, pass-through is smaller when margin ...(Reading to the words)... possible".

A point that is made by Dr. Veljanovski in the box, and then the bullet at the bottom of the page:

"Many theoretical models indicate ...(Reading to the words)... perfect competition".

So even in the extreme cases you still may find wide ranges of pass-on. It gives some context to the sorts of questions and answers we were hearing yesterday and this morning.

Then the empirical evidence is summarised at 4965. You see what they say in the first bullet is that there is not actually much empirical evidence available on this:

"Empirical work and ...(Reading to the words)... is scarce".

That is obviously very, very important. When you heard from Dr. Veljanovski about, you know, the sorts of information they might go and get and what might be available, well, RBB has been out and looked at what is available, and there is not very much in terms of empirical evidence:

"Most notably we have identified ...(Reading to the words)... and compare".

You had the point I made about the contradiction between the CC's grocery investigation and the judgment in Sainsbury's. Then they say:

"Nevertheless there is a small body ...(Reading to the words)... appear significant".

Over the page, "Policy considerations":

"Consideration of cost pass-through ...(Reading to the words)... for example".

It is the last bullet:

"In settings where damage claims from excessive pricing ...(Reading to the words)... may be a relevant factor".

So the sorts of issues that are considered in this report, one is where it is relevant and the findings can be relied upon and applied, precisely the sort of issue we have here.

Then 4967:

"Obtaining estimates of pass-through and practice. The findings from the theoretical ...(Reading to the words)... is required".

Now, that, in our context, would be case-by-case assessment of, for example, the markets as we have used that label in the last couple of days. Just look down, I am not going to go through this in detail, the bullets, you will see the sorts of exercise, the sort of information that would be required to carry out the sort of case-by-case assessment that RBB suggests is appropriate. I will just leave you to glance through those. I don't need to go into the detail. You will immediately get the point. I am not saying this is a checklist, you would have to go through this and check off everything, but I am relying on it as an indication of the sorts of exercise that RBB thinks would be appropriate for carrying our assessment of pass-on. There obviously is not an exhaustive list, but you have to take -- this is the sort of thing you would have to do to get robust answers.

So, I showed you paragraph 46 of the Claim Form, and that accepted that if you were looking at these claims on an individual basis, then determination of each of the individual claims which the Applicant is now trying to group together, would require assessment of the pass-on rates of the businesses from which each claimant bought goods or services, because of the 500,000-plus-odd merchants, some will be common, like they might all, over a 16-year

period, have popped into Boots at some stage, but not everyone in the population will share my fascination for vinyl records, and I am sure we have all got our own things we like to spend money on, but you have the simple point. Of course there will be an overlap, there will be some common merchants between all or a large part of the class, but equally there will be enormous spread of different merchants, all with different pass-on rates.

The identity of the businesses, the relevant businesses, will vary between the claimants in that way and the way I have described.

Now, of course, that lack of commonality, when you are looking at the individual claims seeking to be grouped together, people have all bought from different merchants, each of the merchants have different pass-on rates, it is further compounded by what, again, is a common ground given that the evidence we have heard yesterday and today -- pass-on rates may also vary over time, and further be exacerbated by the fact that pass-on rates may vary between regions. I could go on, but I do not have to. You see these are serious material issues. I do not have to fine tune.

Now, confronted with these fundamental differences, the approach which was suggested in the report, and I think it is still suggested, albeit intended to get to it by a different way, is to come up with a single but not necessarily constant over time weighted average MSC pass-on rate across the United Kingdom economy. That is still, as I understand it, the proposal. That is paragraph 6.2.1 of the expert report.

THE PRESIDENT: I think that is right save that there would be one for debit cards and one for credit cards. Two.

MR. HOSKINS: Sorry, yes.

I will come on to deal with whether that approach could produce a sufficiently reliable assessment of aggregate damages. I want to take that as a different point but I will do that later, but the point I want to make now is this: applying a class-wide average cannot cure the fact that there are material factual differences between the individual claims which the Applicant is seeking to group together in one class.

It is the same problem that we saw with purchasing history. The Applicant's answer to this is just wrong in law. One cannot rely on the contention that aggregate damages are the only appropriate remedy, as they put it as a means to side step the legal pre-conditions that must be satisfied for the grant of a CPO, and it is a necessary pre-condition for the grant of a CPO that the individual claims, which are to be grouped together, raise sufficiently common issues, and

that is not the case here except in relation to purchasing history and I hope I have also just proven that it is also not the case in relation to pass-on.

Now, Mr. Harris spent a long time trying to persuade you that he has a plausible case that there is likely to have been pass-on, and that it is likely to have been high. You remember that frame, but, with respect, that submission simply misses the point. The issue for the Tribunal is not whether there is likely to have been pass-on by the 500,000-plus merchants that accepted Mastercard cards but rather whether the rate of pass-on is likely to have been sufficiently common across the individual claims. You cannot ignore the commonality subcondition.

Mr. Harris also referred you to the various Mastercard proceedings in the retailer actions, Ocado, HMV, etc, and he tried to suggest that somehow there is common ground between the application and Mastercard on this issue but that is patently incorrect. You have had our supplemental skeleton so I will just summarise the two short points for you.

First of all, as you have seen, Mastercard's consistent position is that the issue of pass-on is a matter to be determined on the evidence in each case.

The second point is that the fact that Mastercard has argued for a high rate of pass-on in the retailer markets cannot bind it in this Tribunal. That is because the question of pass-on is a matter to be determined by the relevant court or Tribunal, not by Mastercard. You have the point, in Sainsbury's the Tribunal found that no pass-on had been proved, so looking at our pleadings, really, is neither here nor there. There is no basis to suggest that there is common ground between the parties and therefore this Tribunal can simply ignore all the differences on pass-on that I have identified.

Mr. Harris also submitted that if a CPO were granted then the task that he would face in proving pass-on was somehow different from the task faced by Mastercard in Sainsbury's. With all due respect, that is patently wrong, and let us go to the Sainsbury's judgment. That is at Bundle D4 at tab 49. I will ask you to turn to page -- it is 1513 of the bundle, paragraph 484, so if you pick it up on the previous page, 1512, you were shown this page by Mr. Harris yesterday where the Tribunal says:

> "We consider the following points represent the position under English law ..."

In relation to pass-on, and I asked you to read, in the course of Mr. Harris's submissions, sub 3:

> "We agree with the ...(Reading to the words)... all of the potential claimants".

So, contrary to Mr. Harris's submission there is no such thing as a pass-on defence. There is just the need to respect the basic compensatory principle of damages. In Sainsbury's it was Mastercard who was asserting that Sainsbury's had suffered no loss to the extent that Sainsbury's had passed on the MIF to consumers. It was Mastercard's allegation, and it bore the burden of proof, but in this case if it goes forward it would be the Applicant who is asserting pass-on. They have to; otherwise they have suffered no loss, and it is the Applicant who will have to prove it.

If you go to paragraph 485 of the judgment you get the sort of conclusion in a nutshell:

> "It follows that Mastercard's pass-on defence must fail ...(Reading to the words)... the UK MIF".

Pausing there, the Applicant would have to prove that on this test, and, secondly:

> "Nor can Mastercard identify any purchaser ...(Reading to the words)... in a position to claim damages".

That is not a different test because that is exactly what the Applicant would have to prove, that the MIF had been passed on by all the 500,000-plus retailers, there might be a difficulty at what rate it is, but passed on to the claimants. That is what they have to prove, so therefore there is no difference in the legal test depending on whether pass-on happens to be asserted by a claimant or a defendant in a particular case, and, indeed, it would be illogical if there were such a difference because it immediately opens up the possibility of double jeopardy which may well arise in this case if a CPO is granted because you cannot have a case in which, on a retailer action, a particular approach to pass-on is adopted which might lead to the Tribunal saying, "No pass-on", to consumers, and then in a CPO, in a collective action, a different pass-on test be applied and coming up with a different conclusions and Mastercard ending up paying twice, once to the retailer and once to the consumer for the same loss. There is a double jeopardy point which means that you cannot have a different --

MS POTTER: Mr. Hoskins, can I just get you to comment on paragraph 525.1 of the same judgment?

MR. HOSKINS: This is probably the interest point.

MS POTTER: Yes. Slightly more than the interest point.

MR. HOSKINS: Do you want it put it in context or do you have a particular --

MS POTTER: So I think the second sentence is probably the key one here.

MR. HOSKINS: That is right. The situation is that pass-on was considered in two contexts by the Tribunal in Sainsbury's. First of all, there was the general assessment of the quantum of loss

by Sainsbury's, and it is in that context you saw the paragraphs I have just taken you to where the Tribunal said, "This is the test we are applying", and, "We find that Mastercard has not proved any pass-on by Sainsbury's".

We then have the separate section of the judgment which is given the loss which has been established, what interest should be awarded on that loss, and Sainsbury's claim compound interest. For the purposes of calculating compound interest, the Tribunal said, "We will work on the basis of 50 per cent pass-on", but they did say, you will see in that sentence:

"We consider that a substantial amount ...(Reading to the words)... defence of pass-on".

So Mr. Harris took you to the contradiction, and you will understand that the contradiction is something that Mastercard is acutely aware of, and I don't know if you saw we supplied you with an excerpt from our application to the Court of Appeal for permission to appeal, and we made the point, one of our grounds of appeal is on the one hand you have got a finding of no pass-on for quantification of damages, and on the other hand you have a finding of 50 per cent pass-on for calculating compound interest. That just simply cannot be married. Our submission is you should quash the finding of no pass-on for compensatory damages, and you, the Court of Appeal, yourself, should then say 50 per cent pass-on is appropriate for compensatory damages. Now, whether we get permission, whether it is in that point, I don't know.

The point is on the actual quantification of damages the finding was no pass-on. Insofar as the Tribunal did make a finding of pass-on, it was different, there is zero on the one hand, there is 50 on the other, and the further big point is, is of course, whatever the right answer is in relation to Sainsbury's, whether it is 0 per cent or 50 per cent, you would have to do the same exercise to find out what the right rate is, for example, for other supermarkets, other markets, other sectors, so clearly there is the tension, and that is the basis of our appeal, but it does not really help the Applicant, because it does not show that there is commonality on the pass-on issue between all the individual claimants which is actually the issue we are concerned with.

THE PRESIDENT: When you say, "For other supermarkets", looking back at the RBB considerations, you might say, applying those parameters, the supermarket sector is competitive, other multiple supermarkets one could reasonably say --

MR. HOSKINS: That might be -- I accept -- that is why I do not want to be too granular because I will get hung for it, but, for example, in the supermarket sector itself, yes, competitive, but it has also changed over time, because one of the things that we have seen and it was dealt with

in some of the retailer trials is that Aldi and Lidl have entered the supermarket sphere, and very dramatically changed, actually, the nature of competition.

THE PRESIDENT: I think the experts accepted that pass-on has to be looked at over the period, it may change.

MR. HOSKINS: Exactly.

Sir, that is all I wanted to say -- I am still on the question of sufficient commonality, and I have shown you no sufficient commonality between individual claims on purchasing history, no sufficient commonality on pass-on, and the third category I would like to focus on is what we have called, "Relevant benefits". That is the question of benefits that Mastercard cardholders will have obtained as a result of the MIF being at the level it was.

You know that our submission is that insofar as an individual claimant was a Mastercard cardholder during the period of the infringement, we say they would be required, as a matter of law, to give credit for the benefits that they received as a result of the MIF, for example reduced fees or charges or interest on the one hand, and increased rewards on the other. The point, of course, is this issue only arises in relation to claimants who are Mastercard cardholders. It does not arise in relation to the rest of the class, and that is why this issue, again, is not a common issue as between those members of the class who were Mastercard cardholders and those who were not.

Our submission, again, is not sufficiently similar to group these two class of claimants together.

Mr. Harris made a number of points in this regard. First of all he said, well, he did not accept that we were right on the point. He said, well, we, Mastercard, might be wrong as a matter of law. We might be wrong when you look at the evidence, but that is not the point. At this stage the question is: is this a real issue between the parties, and Dr. Veljanovski, you will remember in the final questions I put to him, accepted it is a real issue. There will be different views on it, but it is a real issue, and it is certainly one that Mastercard will raise and rely on if this case goes forward. You can be in no doubt about that, and it is a real issue.

So when one is considering the appropriate question -- is it a common issue between the whole of the class, the answer is no, it is not a common issue, whatever the ultimate answer may be.

Mr. Harris' second point was that this issue could be addressed at the end of the whole process by a reduction in the quantum award of the class as a whole, and he also said, "If appropriate,

distribution be modified so that the reduction is then borne differentially by the members of the class".

Again, that fails to address the particular point we are looking at which is: is this a sufficiently common issue between the class. I have shown you again and again, I don't want to overstay my welcome on the point, the answer to, "Is it sufficiently common", is not to say, "We can award aggregate damages". The question is: is this sufficiently common.

Before one even gets to the stage of assessing aggregate damages, the Applicant must show that the individual claims that he wishes to group together raise common issues. Remember, it is all very well to say, "Oh well, we can sort this out at the aggregate level and then we can sort it out with distribution", I will come on to this point, but when Mr. Harris addressed you on the distribution mechanisms, he said anything beyond their granulised approach, not appropriate, because it puts people off or too expensive, so the idea that you are going to get this sort of information from --

THE PRESIDENT: I do not see how it can be addressed only at distribution, because if it is right, it may not be, but if it is it reduces the aggregate damages.

MR. HOSKINS: That is right, but then there would be a question of whether you are overcompensating members of the class, because members of the class who are Mastercard holders should not be benefiting at all, and if you actually take account of this issue, just at the amount of aggregate damages, then the distribution mechanism does not take account of the fact there will be Mastercard holders and non-Mastercard holders, you get the distribution problem. It takes you further away from compensation again.

THE PRESIDENT: Yes.

MR. HOSKINS: This, in a sense, leads me on to my final point which is the suggestion by Mr. Harris that, if appropriate, a subclass could be created for Mastercard cardholders. As with many of these suggestions no details given as to how this might be done, but in any event, the suggestion of subclass does not assist because the amount of benefits received by each individual Mastercard cardholder will have differed according to the extent of the individual spending levels, or, indeed, borrowing levels. You have all the sort of similar points, well, people may have held a Mastercard for part of the period and not others. People's use of the Mastercard to spend may have varied over the period. People's borrowing as revolvers on Mastercard may have varied over the period. You get into the similar points again. This is a material point. Do not think this is just a minor point. There are tens of thousands -- sorry -- tens of millions -- I am glad Mr. Cook is here to kick me -- tens of millions of Mastercard

cardholders during the claim period and you will readily understand why that is the case, because in the four-party payment card market in the UK, you have Visa, you have Mastercard. Around the edges you have AmEx, Diners, et cetera, but they are the two big players, so this is a very substantial part of the class.

THE PRESIDENT: Do we find the figure anywhere?

MR. HOSKINS: No, you do not have it in front of you. If you want it I could produce it, so that is why I say I hope it is a fairly obvious point. It is a substantial point.

THE PRESIDENT: Well, I mean, we have checked that there are many, many --

MR. HOSKINS: Exactly.

THE PRESIDENT: -- I just wondered if we have an actual figure.

MR. HOSKINS: You do not have it in front of you and it is not in evidence.

Just to sum up this point on commonality, you know our submission. We submit the Tribunal should refuse to grant a CPO because the 46 million-odd individual claims which the Applicant seeks to group together do not satisfy one of the necessary statutory pre-conditions, ie sufficient commonality.

The individual claims do not raise the same, similar or related issues of fact or law, as that must be interpreted to give it any practical effect, and on the contrary, as we have seen, there is a myriad of different factual issues, and, in a sense, I have just focused on the main ones because we are only interested in things that are material.

Before I leave this aspect, can I just deal with the issue of subclasses? Our submission is that this fundamental defect in the CPO application cannot be cured by the adoption of subclasses, and, indeed, the Applicant has not suggested, beyond Mastercard cardholders, and compound interest, that this can be solved by subclasses, so there is no suggestion you can solve purchasing history or pass-on by subclasses. If that is the case, in a sense, I can stop there. There are not any. If nothing is put forward -- I do not want to push it and say it is common ground, but I understand why they do not put them because they clearly would not work.

Could I go to, just quickly, because I want to show you a quote, our skeleton at paragraph 41? I am not sure if you have it loose, but it is in Bundle C, tab 14, page 310 of the bundle, or page 11 if you have it loose. Paragraph 41. I am sorry to do this to you because it is one of your quotes but it is from the mobility scooters hearing, but again, without crawling too much we put it in because we think it is absolutely right and on point so I hope you will not mind me quoting it back to you:

"The point is we have to be satisfied that there are common issues ..."

Which has been the theme of my submissions so far:

" ... there may not be common issues ...(Reading to the words)... justify a CPO".

So stopping there, it is not enough, as has sometimes been suggested, to say, well, for each of the individual claims you would have to look at overcharge, that is a common issue, you would have to look at pass-on history, that is a common issue, you would have to look at pass-on, that is a common issue, that is just too high a level to say that they are common issues:

" ... but you can overcome that by saying ...(Reading to the words)... aggregate award on that basis".

Again, you will see how that resonates with the submissions the Applicant has been making, you can't just say, "We want aggregate damages on a generalised basis", and ignore the legislation:

"You have to be satisfied that there is a common issue ...(Reading to the words)... too many of them".

You will have our point. It has not been put forward but you see immediately you start trying to say, "Well, how would a subclass work given the 46.1 million different purchasing histories? How would subclasses work given the 46-odd million different pass-on matrices?" You see why it breaks down and that is why we submit you cannot solve this problem by subclasses. It is everything or bust.

THE PRESIDENT: That was a case, just I mention for the benefit of my colleagues, where four subclasses were put forward, purchasers of mobility scooters, those who had bought from the eight infringing retailers, those who bought from others, those who bought certain particular models, and those who bought other models, so that was the way the case was put for the Applicant.

MR. HOSKINS: That is what I wanted to say in relation to sufficient commonality, so this first eligibility subcondition. I would like to turn now to the second eligibility subcondition which I have colloquially said, "The suitability subcondition". Could we pick that up, just to give it a bit more detail, at bundle -- sorry, just let me check the bundle number -- D1, tab 13.

THE PRESIDENT: This is the statute, is it?

MR. HOSKINS: This is the Tribunal rules.

THE PRESIDENT: I think we have those loose as well.

MR. HOSKINS: It is the Tribunal rules. It is Rule 79:

"Certification of the claims is eligible ...(Reading to the words)... Rule 79".

You will see resonance back to the statute here:

"The Tribunal may certify claims ...(Reading to the words)... brought in collective proceedings".

That is the particular precondition I am looking at now, and then (ii):

"In determining ...(Reading to the words)... thinks fit".

So there you have -- you are at liberty to look at anything you think is appropriate:

"Including ..."

I will just highlight (a):

"Whether collective proceedings are an appropriate means for the fair and efficient resolution of the common issues ... (d) the size and nature of the class ... (f) whether the claims are suitable for an aggregate award of damages".

Just to show you the points I am going to make in response to -- in support of our submission why this suitability subcondition is not satisfied, we submit three reasons, first of all the claims are not suitable for an aggregate award of damages, secondly, the Applicant's distribution proposals are inadequate, unsatisfactory, unacceptable, whichever word you prefer, and 3) which is a point of lesser order, the majority of the claims are far from straightforward, it is a point about the strength of the claims, but it is of a second order nature.

So let me take the first of those submissions on our behalf, the claims are not suitable for an aggregate award of damages. Let me just establish with you some of the applicable principles when one is looking at that issue.

First of all, section 47(c)(ii) of the Act tells us that an aggregate award of damages is one made without undertaking an assessment of the amount of damages recoverable in respect of the claim of each represented person. You have seen that so I will not take you to it again.

Then the guide, paragraph 6.78 tells us that:

"An aggregate award determines the amount the class as a whole is entitled to".

Sorry, if you want to look at the guide, it is paragraph 6.78. What that means is for an aggregate award of damages you do not have to establish and then add together the loss suffered by each individual member of the class. It is the top down against bottom up approach.

If we can go to the guide, paragraph 6.3, it is a very important point which is made there, it is page 67 of the guide, if you have it:

"However, collective proceedings are a form of procedure ...(Reading to the words)... new cause of action".

So it is slipped in there but it is very important and it is right. I do not understand that to be in dispute. Next point:

> "Establishing loss is an essential ingredient of breach of statutory duty. There is no claim unless the claimant can prove that the alleged breach caused him or her loss".

We have given you reference to that in our response and skeleton argument. We have given you reference to the relevant passages of Clerk & Lindsell.

Next point:

> "As a matter of general principle damages for breach of statutory duty are compensatory in nature".

Again, we have given you authority for that, and yes, there are instances somewhere it is flexed, etc, etc, you have had Mr. Harris put to you, but the bottom line is damages for breach of statutory duty are compensatory in nature, and we are not dealing here with, for example, a restitutionary claim, etc. Let us not get side tracked by that.

In relation to the broad axe which is something we brought up because it is our duty to do so, we need to inform you fairly of what the law is, can I go to our skeleton at paragraph 52? So that is Bundle C, tab 14, page 313. It is paragraph 52. This is just our summary of the law but this is a paragraph I have now produced in a number of claims over a number of years, and I hope it is not controversial. Mr. Harris will come back if he disagrees with any of it:

"The fact that it is not possible for a claimant to prove the exact sum of his or her loss is not a bar to recovery ...(Reading to the words)... damage is done".

Now, that is the legal premises, and the last couple of sentences are what we say you draw from that:

> "However, the fundamental premise remains untouched ...(Reading to the words)... and in the court's discretion".

You have to be satisfied there is a reasonably accurate methodology. I will come on a bit to some of the law, et cetera, on that. That is our description of the broad axe, and I hope it is a fair one. We put it forward so that it is important that when we are making submissions about whether the methodology is suitable for aggregate damages, we have to accept, of course, that there is this broad axe principle and we do entirely. We have brought it to your attention.

THE PRESIDENT: Yes. This metaphor of the broad axe is wielded and used in all these contexts, actually, what Lord Shaw was talking about was a case where it is not actually even a theoretically quantifiable loss at all, such as personal injuries, somebody makes -- they suffer a very serious injury and loss and pain, but it is not something that is quantifiable in money by

any calculable process, and so, therefore, the law has to use imagination, and I think the other example is defamation, injury to reputation is a loss but it is not something you could ever calculate, even with all the best information, and there you have got to imagine -- and then it is applied in sort of infringement of patent or copyright where the -- I think the example he gives is of somebody taking your horse and giving it back, and saying, "You have not lost anything, but the horse has got the benefit of some exercise".

MR. HOSKINS: Had some exercise, that is right.

THE PRESIDENT: There the law has to come up and does come up with some sort of compensation, but you can't do it -- it is a rather different thing, it seems to me, for where you have a financial loss and you cannot calculate it precisely so you have got to estimate. You can say, well, that is a different kind of -- it is a broad brush, is the other metaphor that is then used, and that is a rather different thing than saying, well, you cannot get the exact figure, there is a figure, and so you estimate doing the best you can. I think there is quite a difference between that --

MR. HOSKINS: It has been used in different contexts, but again, to be fair against myself, the broad axe was picked up, admittedly probably at my instigation as one of the counter cases, by Mr Justice Lewis in *Devenish* and then in the Court of Appeal in *Devenish* and was used in the context of competition damages, so I bear the responsibility, perhaps, for setting the broad axe loose in a wider context.

It boils down, you are absolutely correct, sir, to the point, you have to look at the evidence that is before you and say is it reasonably satisfied that it establishes a certain loss at a certain level. It is common sense at the end of the day.

THE PRESIDENT: Where I suppose it does apply in competition damages is the counterfactual. Nobody knows what the counterfactual is, so it is not like pass-through, it has happened, you try and estimate it, counterfactual, it is a hypothetical so one has got to try and imagine and do one's best to -- there you get sound imagination.

MR. HOSKINS: However one wields the broad axe, for whatever purpose, one thing does not change, the fundamental premise remains the same, damages are awarded to compensate for losses actually suffered.

Sir, if I could just finish this point, I notice the time, but just a short point and then I can conclude on this particular -- if that is suitable, if you could give me another few minutes, could we go to the *Process v Microsoft* Canadian case? You have seen the passage but I just want to emphasise some aspects of it. That is at Bundle D8, tab 83, paragraph 118. Just to say

at the outset, we also agree that this is a good starting point, albeit it is a Canadian law authority, but let us look at paragraph 118. This is the sort of thing that you have to be satisfied before you grant a CPO:

"In my view the expert methodology must be ...(Reading to the words)... requirement".

I emphasise the words, "In fact":

" ... this means that the methodology must offer ...(Reading to the words)... to be applied".

That is why I questioned the way I did, because it is quite clear, and it is not a criticism of the two experts, that they have not addressed their mind in any systematic way to the availability of the data that would be necessary to offer a realistic prospect of coming up with an acceptable methodology for aggregate damages.

All we have, again, no criticism, is, "Well, I am aware from previous work that there might be this, there might be that", they were very fair, "But we would need to go and look at it. We would need to go and look at it again". So before you, you simply do not have sufficient evidence, there is barely any real evidence as to the availability of the data of the methodology which might be applied to come up with an aggregate damages figure, and that is of fundamental importance.

Sir, that is a good point to break, if that is convenient for you.

THE PRESIDENT: Thank you. So 2.05 pm.

(1.05 pm) (Luncheon adjournment)

(2.06 pm)

MR. HOSKINS: Just before lunch we were in Canada, I will bring us back to the hearing now in this room.

Our submission, there are two main issues for the Tribunal in relation to this.

THE PRESIDENT: Can we put -- have we left Canada? Can I put away D8?

MR. HOSKINS: Famous last words ... yes.

So, on the question of, "Is this case suitable for an award of aggregate damages", we say there are two main issues for the Tribunal. First of all, is the methodology proposed by the Applicant likely to produce a sufficiently accurate assessment of loss, and, secondly, is the necessary evidence for that methodology likely to be available and on a proportionate basis? Our submission is that the Applicant's proposal for -- fails both those hurdles.

It is a well-trodden path so I probably do not need to take you back to it, the expert report, paragraphs 6.2.1 and 6.2.4, the reference, if you want it, is A5, page 31, but you will remember there that this is where we have the approach suggested, and I am quoting:

"To assume ...(Reading to the words)... economy".

And the way it was phrased in the report, paragraph 6.2.3(b), said that that was based on the assumption that the MSC pass-on rate is consistent across businesses operating in the same sector, and of course we now know, because of the oral evidence that has been given, that that assumption is not appropriate. Dr. Veljanovski fairly accepted that the pass-on rate will differ between the sectors and within the sectors, more importantly, and now it is established, I think it is fair to say it is common ground, that any reasonable approach would have to take account of the different markets within those sectors.

The problem is, again, no criticism of either of the experts is that understandably, because of the way the case developed in the last two days, the methodology they put forward in the report has been shown to be not to be sufficiently reliable so we come up with a new exception, you have to look at markets, but the work has not even begun on, for example, what the relevant markets might be, there is likely to be a substantial number of them, I accept the fact that in some areas we have to look at some more important elements instead of others, et cetera, but there is likely to be a substantial number of markets. That work has not begun and the work has not begun to identify what evidence might be available or needed in relation to each of those markets that would have to be considered. It has simply not happened.

The best we have from the oral evidence are a few acorns, if I can put like that, "Well might be able to go and speak to these people, there might be this", but again, very fairly accepted by both experts, a lot more work would have to be done to see what the markets are, and what evidence might be available, and what could be done with it.

In terms of a market-based methodology, the work simply has not begun.

So that means that for the purposes of this hearing, and go back to Canada in the *Microsoft* case, there actually is no coherent methodology currently before the Tribunal. If you are being asked to assess is the methodology proposed, is it going to be capable of currently coming up with a reasonable estimate, beyond saying, "Yes, we are going to have to look at it on a market-based level", that is all you have. There is no coherent methodology put forward.

Let us just take it a bit forward and look at my second test I said which is the evidential one. If one were to seek to carry out some sort of market-based approach, whatever that may be, we

say that evidential difficulties would be insurmountable, disproportionate, again, choose your adjective. You will see what the submission is.

Now, clearly, whilst there might be some relevant market studies and Competition Authority decisions, again, it is also obvious they are not going to cover all the markets, and they are not necessarily going to cover markets for all -- when they do look at particular markets, they are not going to cover the market for all of the relevant period because we are dealing with a 16-year claim period, and I flagged-up the example of the Competition Commission supermarket report in 2000 founding full and quick pass-on in relation to many products but then when it comes to the Tribunal in Sainsbury's, finding no pass-on proved. I do not know why there is that dichotomy, it simply shows that pass-on rates may change over time, even within markets.

So the fact, for example, you have a report on motoring, you have a report on supermarkets, is not the end of the story, and, of course, you will not have reports for most of the markets.

So that is one category that was identified, existing investigations, reports, decisions.

The second category that was identified in the expert report was the disclosure that might be provided in the retailer claims against Mastercard. It became obvious quite quickly, most of those claims do not relate, certainly, to the entirety, or to most of the relevant period, so Sainsbury's and the Morrisons case, the disclosure evidence starts to run from 2006. I remind you of the claim period here, 1992-2008. Of all the other ones, if anyone disputes it they can go through the pleadings, but I gave you the list of the ones where, even on the pleadings, if they were to get to the disclosure stage, that would cover a period pre-2006, and it is -- "Handful", is not quite right, but about six of them, I think, off the top of my head, but they will not all get to that stage, et cetera.

That is the best case scenario for evidence coming out through the other retailer.

THE PRESIDENT: Of course if you are right on limitation, we are not deciding today the very early part of the period.

MR. HOSKINS: Well, that is what has actually happened in a lot of the retailer claims because people started claims way back to the period covered by the commission decision, and then the limitation point was taken, it was actually determined in relation to Visa, Mr Justice Simon, I think it was, who gave a judgment on that, and limited disclosure, and what has tended to have happened is that the people who already had claims either agreed to limit them in accordance with that judgment of Mr. Justice Simon, or the people that brought new ones just limited them, but there are a few hanging around ie. the ones I mentioned, Dixons, etc,

where they have gone further, but absolutely they will meet that limitation hurdle, and Visa won that hurdle and we have taken the benefit of that on a number of occasions.

THE PRESIDENT: But even if you -- assuming you win it, and you say you will, then you still start -- the claim still starts in 1997, does it not? I think that is --

MR. HOSKINS: I am not sure -- oh sorry, this claim. Our limitation. Absolutely. I am sorry. Yes. Absolutely.

THE PRESIDENT: We would not be worried about lack of data from 1992, 1993, because you would have knocked it out.

MR. HOSKINS: Yes.

THE PRESIDENT: But you would say, even going back to 1997 there was going to be a problem.

MR. HOSKINS: That is right. A substantial shortfall, absolutely, in terms of material.

The other obvious source, then, of information is third party disclosure by way I mean actually making an application to this Tribunal to order a third party to provide disclosure, ie the relevant merchants.

A number of problems with that. How many of these applications are going to have to be made? We do not know.

Next point, trite, 1992-2008, it is a long time ago. It is very unlikely that sufficient records will still exist, I appreciate there will be some instances where you will have someone who has got fantastic records, but let us be honest, it is fairly obvious that the chance of getting records all the way back to 1992 for all the relevant markets is slim. Of course, the problem is exacerbated by what is now common ground, the pass-on rates will -- it is likely they will have changed over the period, so as I said before, and I think I have said on a number of occasions, a snapshot is not enough, what was your pass-on rate in this year, you need to actually have evidence that relates to the period as opposed to just a snapshot.

Now, if it is right that third party disclosure is to be where this is to go, it is likely there is going to have to be multiple applications given the shortfalls identified in the other categories.

Now, what is going to happen? Well, they are going to be resisted, because they are very onerous, particularly with this sort of pass-on, sir, you referred to the sort of evidence that the Tribunal had in Sainsbury's. This is a very onerous task. A third party is going to be very keen not to have to perform that exercise but even if the applications were successful, then the Applicant is going to have to pay, not just for the making of the application, but for the conduct of the exercise. That is the basic principle, and the current budget does not expressly provide for the very high sums that would be involved if you had a number of those types of

applications. Yes there is a contingency fee, but you can imagine if we are talking about disclosure applications against major companies in relation to pass-on in the period 1992-2008, the costs quickly go absolutely sky high. It is not proportionate, but there is another point, because if the relevant businesses, if it is Sainsbury's, if it is Morrisons, if they themselves have claims against Mastercard, then they will want to be heard on the issue of pass-on in this case, because there is a directly contrary contradictory interest to that of the Applicant. The retailers will want to prove a different pass-on situation to the claimant, because the retailers want the loss to rest with them, ie no pass-on, "We suffered all the loss", and the claimants want to say, "No, no, no, the loss was passed on to us", so there is a tension between the positions, and so there would have to be a mechanism of some sort, if we were getting disclosure from companies who were also suing Mastercard for dealing with that problem, because, again, it would be very unfair to have a situation where you have, for example, in the retailer claim, a decision being taken on pass-on and the claimant not having a chance to comment on that, and equally, vice versa, a decision taken here on pass-on across the whole of the United Kingdom economy, potentially, and that impacting on a particular retailer claim without them being heard. There is a real practical issue in relation to that.

So those are the three obvious possibilities, and none of them look very promising, and certainly if we are going down the route of a material number of third party disclosure applications, it is not proportionate, not just for money reasons, but just for the effort and the work involved.

Now, Mr. Harris suggested again -- the way he deals with this, a common theme, you jump to the end -- he says, well, do not worry, because if we go to trial, if you give the certification, and we go to trial, and, having heard all the evidence, the Tribunal concludes that there is not sufficiently robust evidence for a particular sector, or he would have to say now a particular market, then you just exclude that sector or market from the calculation of aggregate damages, but it is no answer to say that these sorts of issues can be dealt with in that way if the Applicant fails to prove parts of its case at trial. The question now is whether a CPO should be granted that would require or permit the Applicant to set off on this voyage of discovery, pursuing a third party application. You can imagine a situation where they do a great deal of work, pull together all the information they can, make third party applications, and that is going to be very onerous, and it is not satisfactory to say, "At the end of the day, if we do not get enough, do not worry, you just give us less money", because there is -- that is a completely disproportionate approach, and the whole purpose -- sorry -- one of the purposes of a CPO

hearing is precisely to deal with these sorts of evidential issues; is this an appropriate case to be taken forward? That is why there is a requirement to obtain a CPO before you can pursue this procedure, and it is not good enough to say, "It will all come out in the wash at the end". That is why we are here now, it is to deal with these sorts of issues now.

Another example of an evidential problem arose during the Tribunal's questions yesterday, and that relates, for example -- this is just another example of evidential problems that would come up -- the means by which the Applicant would seek to distinguish between UK and non-UK purchasers, and Mr. Dearman suggested that that would be done by getting information on whether transactions were cardholder present or cardholder not present.

If I could just take you to that exchange at transcript page 73, perhaps you could refresh your memories by reading page 73, line 28:

> "Mr. Dearman again it does not ..."

And then down to 25 on the next page. (Pause).

Sir, I draw attention to the point you made:

> "So the disclosure would have to come from the various issuing banks, yet the information we were just talking about ..."

So sentence not just looking at retailers' merchants, we are also having to look at issuing banks. Now we do not know, I do not know whether the work has been done, whether issuing banks hold that sort of information in the relevant form, we do not know if they hold the information for the whole claim period or even part of it, 1992-2008, and, again, you are into third party disclosure applications again, so we are not just going to have a series of applications in relation to merchants, apparently we are going to have a whole load of applications in relation to the issuing banks. Not proportionate.

THE PRESIDENT: Well, these are less onerous applications because it would be straightforward information.

MR. HOSKINS: I accept that.

THE PRESIDENT: Information from retailers about pass-through might be quite complex because they might not just keep it in that form, "Our pass-through is X", certainly Sainsbury's did not, or there would have been no real issue about it. This would be relatively straightforward information, that they either have or they do not.

MR. HOSKINS: Can I just ...

THE PRESIDENT: Yes. (Pause).

MR. HOSKINS: Sir, I accept that it is not likely to be of the same order, but it is an example of another difficulty.

Another way in which the issuers might have to be involved, of course, is the question of benefits. If one goes forward, if one is going to deal with the cardholder benefits point, whether by subclass or at all, you are going to need the information. Where is the information going to have to come from is this Dr. Veljanovski is very clear. He said: well, I appreciate there is lots of theoretical work on this but I haven't seen much in terms of hard facts. Well, where do the hard facts come from? The issuing banks. That is an exercise which is akin, probably, to the pass-on-type issues. It is not going to be straightforward. It is unlikely, as you said, to be a bit of paper sitting there which says, "We get X from the MIF, we are going to use it to reduce interest rates by ..." this is a very difficult exercise but one we are going to have to do if this goes on.

So we say, for those reasons, if I am right about the two questions that have to be asked, the two main questions that have to be answered in order to determine whether this claim is suitable for an aggregate damages award, this application fails both. You have not had any coherent methodology put forward before you, let alone one that is likely to produce a sufficiently accurate assessment of loss. You fail that question because you do not have the proposal, and it fails the second hurdle, is the necessary evidence likely it be available on a proportionate basis.

Before I leave aggregate damages, I would like to just, having been to Canada, take a little detour to the US because you were shown some US authority on this issue. Mr. Harris referred you to the polyurethane foam judgment, but it does not help him at all, and let me show you why. I am happy to go to the extract in the Applicant's CPO Reply, so that is Bundle C, tab 3, page 206.

Bottom of the page, 206, 213, you see the reference to the polyurethane foam antitrust litigation.

Now, the point that Mr. Harris sought to get from this was it is permissible, it should be permissible to have a generalised approach to assessment, and he wanted you to focus on the paragraph that begins at the bottom of 207:

> "Defendants' sustained attack ...(Reading to the words)... this contention is wrong".

We have not made that submission, so that does not take us anywhere:

> "The court's job at this stage is simple ...(Reading to the words)... class members".

So not as detailed as the *Microsoft* quote from Canada, but you see the same sort of concern in the US understandably at the certification, is there a reasonably accurate method being proposed.

Well, let us see what was proposed in that case. You need to go back to page 207 for that. You will see a summary of the methodology that was proposed, you will see it against, "Two individual indirect purchasers present", if you could read that please? (Pause).

You see two parts come out of that. This is a very different beast from what you have had from the Applicant. Even in their report which is now disavowed, the methodology here is coherent and detailed. You have nothing of that sort in this case.

The second point is you will see the sorts of evidence that was produced at the certification stage in polyurethane foam. Again, you will see that chimes with the Canadian approach in *Microsoft*. It is expected that it will be an evidential-based submission.

THE PRESIDENT: Well, they expect rather more in the United States than in Canada.

MR. HOSKINS: We are into the sort of territory where it is useful to look at the themes that have arisen, but are they the test? Absolutely not, but I do make the point that this does not help Mr. Harris, and equally, if we are looking at how other jurisdictions do it, you will see the sort of evidential-based approach that is required in the US. That is just for polyurethane foam. Again, if you are going to have an evidence-based approach in this case by market, we just have not had the material. you have not been given what you need to decide if the statutory condition has been fulfilled or not.

What you have not seen yet, though, is that US cases were actually closest to this claim, and again with the caveat we are not applying US law, I think it is useful to see, just by way of comparison, what the US courts have done when faced with similar cases, not identical, but similar cases to this.

If I can ask you to go to Bundle D9 at tab 116? This is from the Court of Appeals in New Mexico, that is Romero on behalf of herself and all others similarly situated v Visa and Mastercard, and this was a decision on standing which is a particular aspect of US law, but the nature of this proposed class action, you can get it from page 3936 of the bundle, page 4 of the report, background, this is the top of the second column:

"We begin by ...(Reading to the words)... debit card".

So the alleged wrong is Mastercard and Visa safe. "You are going to accept our credit cards you also have to accept our debit cards". That was by the merchants, but then a claim was

brought on that basis by consumers, and you will see that at paragraph 3 in the second column:

"On the heels of that massive lawsuit ...(Reading to the words)... laws".

This is the important bit:

"The consumers claimed that ...(Reading to the words)... subsequently sold".

So you will see the difference, it is based on the time point rather than the MIF, but you will see the similarity; it leads to higher charges for the merchants and it is passed through to consumers.

All of the US courts which dealt with these sorts of claims, as far as we are aware, threw them out on the grounds of standing, and there are a number of reasons that go to standing. I just want to pick up two of them, because they are the ones that particularly help in our case.

Page 3940, and again, if I could just get you to read these paragraphs rather than me reading them out, you will see column 1, "Speculative damages", paragraph 14, "We could now evaluate", if you could read that paragraph, and then directly opposite that, the one that begins 718, "Knowles", if you could read that paragraph please? (Pause).

THE PRESIDENT: Yes.

MR. HOSKINS: Sir, I am not suggesting you apply American law. What I am drawing from this is that when the American courts have been faced with similar cases raising similar evidential difficulties they have ruled that they were not fit for pursuing through collective action, and it is maybe a sort of rather simplistic point, but I say you can take inspiration from that, when you are applying our law, our submission is, given the evidential complexities in a case of this type, it is not fit for collective proceedings. It is simply overblown. It is unmanageable.

I should say that that approach was adopted consistently in the other states where the claims were brought, and I will not take you to them, but you have the references, we put them all in the bundles, to the other state decisions, it is our CPO response, paragraphs 138-139 and footnote 40, so you have all the references to the other cases. Standing refused in all of them.

For those reasons we submit that the claims here are not suitable for an aggregate award of damages.

I move to the second reason why we say the second precondition of suitability is not fulfilled and that is the distribution proposals, and we say the distribution proposals are inadequate.

Sir, there is a prior timing point which I think has gone away so I will deal with it very quickly, Mr. Harris opened his submissions making arguments as to why the Tribunal should not make any assessment of the distribution proposals at this stage, but we submit that the

approach you put to him was the correct one, if I may say so, and it is effectively that if the Tribunal is not satisfied that the Applicant has identified, and here I am quoting from the transcript, "A methodology that can produce fair distribution, and therefore proper compensation, then that is something that must be relevant". That is transcript Day 1, page 44, lines 5-8. Mr. Harris actually, when you put that to him, agreed with the proposition, so we can and should look at this issue now.

THE PRESIDENT: Can you just give me the reference? Day 1?

MR. HOSKINS: Transcript 1, page 44, lines 5-8.

THE PRESIDENT: Yes. Thank you.

MR. HOSKINS: Now, the proposal that you actually have from the Applicant at the moment is as follows -- and there are aspects of it, I will give you the references, but it is made up of a number of propositions, a number of proposals. First of all, it is not proposed that there be an individualised assessment of damages for each member of the proposed class, and you get that from Claim Form, paragraph 39.

Secondly, it is not proposed that any class member will be required to prove the amount spent by him or her during the claim period and on what goods or services. That is litigation plan paragraph 79.

Third point, it is not proposed to distribute any aggregate award of damage by reference to individual spend of the proposed class members. That is litigation plan paragraph 64.

Fourth point. It is intended that each class member will be entitled to claim an amount for each year that he or she was in the class with no further distinction being made. That is litigation plan paragraph 81.

Now, that is the proposal that the Applicant has put his money on. I will come to the other ones that have been floated in a minute, but that proposal clearly fails the test, because, sir, as you said this morning, it was an exchange with Dr. Veljanovski, if a split is made simply by simple numbers of this sort, for example, by year, that will not reflect individual loss, and Dr. Veljanovski very fairly said he thought you would get a relatively large disparity. To be fair, you gave them both the opportunity to say, well, I think this might be right, and they both said, well, no, we cannot speculate any further, so the proposal that you have does not, we say, come anywhere near close enough to being compensatory.

Now, I fully appreciate that the way that the Act is set up is that you do not have to have a neat fit with compensation, but you have to have a reasonable relationship with it, and this proposal does not have that reasonable relationship.

Now, when repeatedly pushed, he was not very keen, but Mr. Harris did come back with a number of possible distribution methods, but ultimately he disavowed them all. Those were not the ones that they wanted to put forward. These are the ones that they have considered and rejected, but with respect, all the list that he produced does is to show how unmanageable this claim is. There is a real tension in it, and let me explain why.

As Mr. Harris explained, any attempt to introduce some sort of reasonable relationship between the right of a person to claim at all and to establish what level of damages they might receive, founders, on Mr. Harris' own submission, because either it will dissuade consumers from coming forward -- it is his cliff point -- and/or he said it would be too expensive to administer. That is why they rejected them. Too dispersive and/or too expensive to administer.

THE PRESIDENT: I think the only different one, if I am right, and I will be corrected if I am wrong, was the age bracket. That would not be expensive to administer, but it was -- or dispersive because you have to give your age anyway, but it is said it would create results that in terms of reputation would be inimical, saying that old age pensioners get less, whatever. Is that right Mr. Harris?

MR. HARRIS: Sir, that is right, but Mr. Hoskins does me a slight disservice because he says I dismissed them all but you will recall that what I said was that it is a question of proportionality as well, and it partly depends upon the budget, and we looked at part of the funding arrangements, so they were not dismissed in limine, it was a proportionality equality.

THE PRESIDENT: I thought you said that most of them, on the advice you had got from, I think, Epiq, were going to be dispersive, and less people are going to claim, and then that is something Mr. Merricks is very alert to.

MR. HARRIS: I did submit that sir and I also submitted that it is a balancing act, and one part of that is how much you want to get -- how much you are prepared to suffer dissuasion versus greater compensatory-ness, my favourite word, and on the other hand you also, as part of that balancing act, have to look at the amount of money that you have got in order to perform the task, so Mr. Hoskins slightly over states the matter. Thank you.

THE PRESIDENT: Yes.

MR. HOSKINS: Well, I am sorry if I have done a disservice but I think it is quite clear that the one that Mr. Harris settled on was the annualised one. He gave you a list of the other ones but the one he came back to and said the one that they are proposing is the annualised one. Now, the age point I put in the same bracket as the annualised one. Again, it is not going to have any

reasonable relationship, because you can have old age pensioners who live the high life, and you can have old age pensioners who struggle to get by. You can have 40 year olds who live the life of Riley, you can have 40 year olds who struggle to get by. Age is not something that can give you a reasonable relationship to compensation. It is simply a number to split up, but it does not actually get you near a compensatory figure, so if we are doing age, I have put it in with annualised. It suffers from the same defect.

Dr. Veljanovski actually put it very nicely, this is where the dichotomy comes in, because either you do something that bears no reasonable relationship to compensation, or you do something which is either impractical or overly dispersive. That is the tension. That is the problem. There is not much point, I agree with Mr. Harris, why would you adopt, say -- we are going to bring this class action at enormous expense and time and then adopt a distribution mechanism that very few people will actually want to come forward. Absolutely there is no point, but the problem is, then, they cannot come up with a proposal which has a reasonable relationship to compensation, and which is practical, and they need to have both.

Again, it comes back to the point of the fundamental flaw in this case. I said there is a same sort of problem underpinning each of these issues, and it is the same one. This attempt to bring together 46.1 million claims is simply too overblown, and that is the problem, and you can analyse it through the various ways I have done it, you come back to that same problem all the time. That is really what is at the heart of it.

That is not to say, again, the interrorem argument, that just does not work. You can see how, in a case like football shirts or a cartel and a single product, you can have mechanisms -- there is no interrorem argument here.

The third point on why we say this proposal does not satisfy the suitability subcondition I can take very shortly because it goes to the strength of the claims, and what the guide has is some consideration of, for example, if it is a straight follow-on claim, then that is something that might be considered relatively straightforward, you are just looking to calculate what the loss is. The point we make is a simple one.

The Commission decision only found an infringement in relation to the EEA MIF. Around -- this is rough but it has not been contested -- around 95 per cent of the value of this claim is based on the UK MIF. What the claimant actually has is then what is sometimes called an, "Umbrella claim", in respect of the UK MIF, because what they allege, and what they will have to prove, is that the level of the EEA MIF had a causative effect on the level of the UK

MIF. As Mr. Harris rightly said, that would be a complex issue that will have to be determined on the evidence.

Now, you are not going to determine that now, I am not asking you now to say whether you think we are going to win or whether Mr. Harris is going to win because that would be futile, I am simply noting the fact that 95 per cent of the value of this claim is not a straightforward follow-on claim. That is it, that is the point.

THE PRESIDENT: Yes.

MR. HOSKINS: We say that for all those reasons, or some of them, some of them are strong enough individually to actually knock the thing out, but our overall submission is no CPO at all.

That brings me on to a subsidiary matter, which is if you are against me on that and you think no, no, there should be a CPO, we say, in accordance with what is anticipated by the rules and the guide, there should not be a CPO in relation to compound interest because you can make a CPO in relation to some issues but not all. We say compound interest should certainly be carved out, and you can see that it is in a special category just from reading the Applicant's own submissions on this, the written ones. They have clearly recognised there is a problem here. They are not strong on compound interest as on everything else, but we say compound interest is clearly not fit for a CPO. Again, remember, you are asking whether it is appropriate to bring together the claims of 40-odd million people for compound interest into one action, are they sufficiently common.

Now, on its face, the claim for compound interest starts with two very different types of claim. On one side, it is said that some class members will have had to increase their borrowings as a result of overpaying retail prices, and on the other hand it is said that some class members will have earned less interest on their savings on investments because of any overpayments as a result of the MIF.

Now, first point on commonality is those two suggested categories of alleged loss are very different in nature. It is obvious that the charges for increased borrowing will be different from rates of interest foregone and investments, you get charged more to borrow generally than you do to save. You get back in saving, you see the point, the rates of interest will be different.

But again, second point, the interest rates for borrowing and the interest rates paid on savings will be different, and they will have altered during the period, and you have different types of

saving. Have you got a bank account that attracts interest? Have you got it in shares? Have you got it in -- you see the problem.

The third point is the borrowing profile, the savings profile of each claimant will have fluctuated throughout the claim period. I might have more savings, my savings will fluctuate, any borrowings I have will fluctuate, so throughout the period they are changing all the time, and just to compound the difficulty, the fourth point is that it is accepted by the Applicant that some proposed class members may have fallen into both categories, ie it is possible at some stage you will be revolving on your credit card but you may well have savings elsewhere, and that might change over time.

So we say the compound interest issue certainly does not satisfy the commonality test, and should not be certified, even if anything else is.

Mr. Harris suggested, again, a familiar theme, well, that can be dealt with by creating subclasses at a later date, but yet again, again, common, no suggestion how that might be done, and our submission is that it is simply not practical, given the differences I have identified, particularly points such as the borrowings and savings of each claimant will have fluctuated throughout the period, each claimant could well fall into both categories and that relationship could have changed over time. There is not a subclass for this. None has been suggested, just the possibility of having subclasses.

I can then just deal with some minor matters I need to sweep up. You have our submission that there should be no CPO at all. You have our note, if you are against me on that, you have the note on how deceased persons should be dealt with within the class. I don't intend to speak to that orally, that is why I handed the note up, but if you have any questions obviously we will happily deal with it, and if, again, if you are against me, a CPO is granted, there is two other issues that arise. First of all there is a costs issue for this hearing. I would simply refer you to our skeleton argument at paragraph 177, and the second point is if a CPO is granted what should happen next, and we say there should be a preliminary issue on --

THE PRESIDENT: Well, I think we can deal with that after the judgment.

MR. HOSKINS: That is -- it is dealt with in the skeleton.

THE PRESIDENT: I don't think we would address it until after we have given judgment.

MR. HOSKINS: Sir, unless you have any other questions for me that is Mastercard's submissions on the non-funding issues, and I think the intention now is that Mr. Harris would have his reply on those issues.

THE PRESIDENT: Yes. Just a moment. (Pause).

PROFESSOR MAYER: If I could just pick up on the point you made about interest, and while I accept that, of course, people are in different positions regarding borrowing or saving, and how that may vary over time, it is still the case that there is a conventional time preference rate that is thought to apply, and that therefore it is reasonable to, at least in some respects, to take account of the time and value of money, so the notion that one is making some adjustment for that would, prima facie, seem to be a reasonable one to be putting forward.

MR. HOSKINS: Sorry, the reason I laugh is that I have had this debate, or discussion, with economists on a number of occasions because I absolutely agree as a matter of economic principle the position you have put to me is correct as a matter of economic principle. The question then is whether the economic principle is the same as the legal principle, because the legal principle is established in *Sempra Metals*, if a claim is for compound interest it must be pleaded and proved as an actual loss, and the question there would be is whether -- well, if I come to court seeking compound interest and rely purely on the economic principle, will that be sufficient for the court.

Now, sir, just -- I apologise but from personal experience, parties who come and claim compound interest do more than that, and it is a case that is based on evidence, and if it is a case based on evidence as opposed to economic principle, then one gets into the sorts of issues I have described, but I absolutely identify, and I recognise, the point you make to me as an economic one.

PROFESSOR MAYER: Thank you.

THE PRESIDENT: Thank you very much Mr. Hoskins.

MR. HOSKINS: Thank you.

THE PRESIDENT: We are very much -- thank you -- in your hands, in the parties' hands. We do not want to get in a situation where there is a problem in hearing the specialist counsel who has come here to deal with funding. We can hear you reply now, which would obviously be the logical thing to do, or, if you think that will cause us difficulties or cause you difficulties, really, because it is your cost counsel who is the one who has constraints, then we are quite ready to park that, obviously you will have your right of reply, to go into funding now, and that you give your reply tomorrow. You know how long you are likely to be, and what the situation is. As I say, it is your cost counsel who I see is here who gives rise to this, so it is a matter, really, for you. We will fit in whichever way you prefer.

MR. HARRIS: I am very grateful. With your permission our preference is for me to do my reply now, and, subject, of course, to questioning, I would aim -- and I know we have to have a few minutes, possibly now, possibly, say, perhaps after ten minutes, we have a few minutes, we will be no later than 4 o'clock and that will have to be including all questioning, and then that would give, because I think the indication was there might be a possibility of slightly late sitting tonight, Mr. Williams the opportunity to have an hour, which may or may not be enough for him, and that has the advantage of following the structure that the Tribunal had indicated which, if you like, he opens with his objections, and I know he is ready for that. Mr. Bacon is of course now here, so he has the advantage of being here and then at the end, say 5 o'clock or thereabouts, we take stock, how far has Mr. Williams reached, will he need any time in the morning to finish, if so do we start early, if so at what time, and then, of course, Mr. Williams will reach his conclusion if he has not done so tonight, and then Mr. Bacon can respond, and then we can have the debate if we need to about whether there is a right of reply or not, and on that view of the world we ought to be rather finished by tomorrow lunchtime, which is when -- which, as you know -- and I do apologise, again, that we have caused --

THE PRESIDENT: These things happen. We will proceed that way then. (Pause).

Yes. We will proceed like that.

MR. HARRIS: I am grateful, sir. With your permission what I propose to do is to spend five or ten minutes with some high level points of reply, and then in the slightly more traditional sense work through some of the more detailed points.

THE PRESIDENT: Yes.

SUBMISSION IN REPLY BY MR HARRIS

MR. HARRIS: So, Mr. President, members of the Tribunal, heavy focus in the first part of my learned friend's submissions is upon, obviously, common issues, commonality, is it sufficiently common, and, of course, what we know is the words in the legislation are, "Same, similar or related", and as I submitted in opening, the danger with Mr. Hoskins' submissions at all times is that he shies away from two of the critical words, "Similar or related". They have to be sufficiently similar or sufficiently related, and what he -- effectively the gist of his submissions is that they have to be sufficiently the same and when they are not sufficiently the same that goes too far away from commonality and you should not give permission for certification, but let me just start with some founding principles about where there is considerable identicality, let alone similarity or relatedness in putting together this claim on behalf of a group putting together an aggregate damages claim on behalf of a group, and the

reason I do this is because they have been silent, these first two stages, in Mr. Hoskins' attack on my CPO application.

The first one is volume of commerce. Is it common? Absolutely, because the volume of commerce is the first stage in ascertaining what damage has been suffered across Mastercard's transactional behaviour as a whole. Does it apply to the whole of the group for who we are claiming? Yes. It is common, and next point is does the data exist? Yes it does exist. Does it exist with accuracy and detail? Yes it does. Those are fairly good expression of what that VOC has already been obtained, using publicly available data, towards the back of our Claim Form.

Now, we analysed --

THE PRESIDENT: The Volume of Commerce is not an issue on an individual claim, is it?

MR. HARRIS: No, but what I am saying is -- that is right, sir, but the point is that what we have to ask ourselves in our submission for the purposes of going forward today is: as regards the computation, or putting-together of the aggregate damages class, does it apply across the class as a whole?

THE PRESIDENT: The common issues are -- and related issues, saying what are the issues for each individual claimant, and to what extent are they similar or related, so, for example, overcharge, that is an issue for each individual claimant, and they may not be identical because they might have had different cards but they are related.

MR. HARRIS: Yes.

THE PRESIDENT: So that is a related issue, or similar issue, but Volume of Commerce, for an individual claimant, is not an issue at all, if you had an individual claim they would be just looking at how much they spent. It is only an issue when you are asking what are the aggregate damages.

MR. HARRIS: Well, let us take a step back. What is undisputed is that we can create an aggregate damages award by reference to three steps. The first one of which is Volume of Commerce, and that one does not suffer from any difficulties arising out of the fact that there may be different spend between individuals.

THE PRESIDENT: Yes. I understand that.

MR. HARRIS: I will rephrase it like that. It is an issue in respect of which we do not have a difficulty as regards same, similar or relatedness. That, of course, is the first stage in our analysis of reaching what the legislation permits us to do expressly, namely an aggregate damages award. Obviously, if it is suitable in the sense that Mr. Hoskins also addresses.

So we say no difficulty at stage 1, and, indeed, does the data exist? We say, well, we have already been able to do a very good job on existing public data, and, obviously, since it is Mastercard transactional data, then we are only likely to get better as we go forward, so -- far, no problem, stage 1, and, of course, that is not assailed at all. That is why we did not hear anything about it.

Number 2, overcharge, likewise. Sir, I can simply repeat back to you the words you gave to me a moment ago, no difficulty there, certainly for today's purposes, about it being a common issue across the class as a whole. It is certainly, if not the same, possibly because of card reasons -- stage 2.

THE PRESIDENT: Yes.

MR. HARRIS: Okay. So far so good and again, is data available? No particular difficulty with that because this is all essentially Mastercard data.

Okay. So where have we reached at this point? We have reached a situation in which there has been a proven wrongdoer, and we can get past stage number 1, stage number 2 of the aggregate assessment of the damages without any difficulty, leading to as likely as not -- one does not have to accept the exact figures in the end of the Claim Form -- but as likely as not, very considerable loss. We are talking billions here, because even if you accept a counterfactual, IF or MIF at X per cent rather than X minus 0.1 of that, you can see at the end of the Claim Form, we are still talking very considerable figures.

What does that mean in the round? What it means is that you have been able to identify probably billions of pounds worth of loss, and who has suffered that? At this stage of the analysis, at step 1, VOC, multiply through by whatever you, at the end of trial, ascertain is the correct counterfactual, perhaps blended, it has been suffered by either merchants or by consumers or by a combination of the others, a combination of the two, and the question there is simply pass-on, but, critically, you, members of the Tribunal, know, at that stage, with accuracy on data that cannot sensibly be impugned on a, "It is not good enough", basis is that there will have been billions of pounds worth of loss suffered by either the people on whose behalf I claim, or to some extent by somebody else who is slightly before me in the chain, so what we say at this overview level is you have to ask yourself the question there by reference to the purpose of this new legislation, which, as I said in opening, one of the consultation papers said inter alia, it is designed to facilitate mass consumer actions across the economy so as, amongst other things, to act as a deterrent, and to make sure that you do justice to them,

and, members of the Tribunal, you have to ask yourself, what do I do then? I have to do justice.

I accept that an aspect -- obviously I accept that an aspect of doing justice is that there has to be, as well as you can in the context, adherence to the compensatory principle, but if you accept Mastercard's submissions, what justice are you doing to the people who, by this stage, you know, and I am going to develop the pass-on point in a minute, but you know will have suffered billions of pounds' worth of loss. There is a very straight choice there, members of the Tribunal. It is knowing that there is billions of pounds worth of loss, do you deny the only opportunity to recover it, even though that seems, in our respectful submission, to be what the legislation is about, or do you allow the claim to proceed, even though there are inevitably elements of roughness and readiness in it? We say, with respect, you must allow it to proceed at the certification stage, frankly no matter what the difficulties are put in place with it on the part of Mastercard, because otherwise, knowing that there is this damage and loss, you will be denying ability for anybody who has been injured to get their hands on it.

Now, the pass-on, again, in these few minutes before the short break, the pass-on position is this; it is common ground, it seems to us, and certainly that is my submission, that there has been some degree of pass-on across different sectors, and I say that because --

MR. HOSKINS: It is not common ground it is a matter which would have to be tested.

MR. HARRIS: Well, what we do know, what we do know, members of the Tribunal, is that in different actions that they already face, Mastercard has pleaded, and therefore aimed to set out and prove, that there has been pass-on through the people who are suing them in those actions to none other than the people I seek to represent, and they go into those trials aiming to prove -- this is why this is such a difficult point for Mr. Hoskins -- they go into those trials seeking to prove the very thing that I say you should regard as a plausible case. They want to prove the very same thing.

THE PRESIDENT: Let us accept that it is very plausible, that there has been, or even more than plausible, some degree of pass-on in different sectors, where do we go from there?

MR. HARRIS: Well, if you are with me so far, what that means, therefore, is I have, for the purposes of today, a perfectly coherent and sensible case for aggregate damages at all three stages, and what you now address with me, sir, and I understand why, and it is a perfectly fair point is: am I going to be able to do enough post certification to demonstrate that I have a fair and reasonable and workable method of compensation at a sufficiently accurate level across the different sectors, and I say yes, because what is essentially said against me is at this stage,

and if you recall in paragraph 6.2.3(b) of the experts' report where they talk about how they are going to go about running a case of pass-on, they say, "At this preliminary stage", so at this preliminary stage, namely do we have a good enough case to go forward, what they have said is there are some sensible means by which you can progress a sectoral approach to pass-on, and we have heard some of those from Mr. Hoskins this afternoon. We have got some retailer claims against Mastercard, and we will get what we can from them, and we may, in a perfectly orthodox manner, be able to get more information out of those very people. There are, in addition, perfectly analogous cases that are not against Mastercard, so, for example, against Visa where the issue of pass-on arises, for instance, to take a sector which we heard some debate about during the course of the last two days, Motoring. There is an Exxonmobil case against Visa, so what do we have in that sector? We have multiple car rental cases against Mastercard, and we have none other than a petrol company --

THE PRESIDENT: How far is that case advanced?

MR. HARRIS: I can find out.

THE PRESIDENT: Some of these claims have been made, there is now the Sainsbury's judgment, Mastercard is trying to appeal, there is a Commercial Court judgment reserved from a trial ended, I think, in October, if that judgment does not produce an identical outcome to Sainsbury's, that is likely to be -- sought to be appealed, perhaps in any event, there will then be quite a long delay until the Court of Appeal decides whether to grant permission, and perhaps hears the two cases together, I do not know, it is likely that the cases are going to wait, so there may not be a lot produced in those cases at this stage.

MR. HARRIS: I accept that, sir, but one of the issues which confronts this Tribunal is to what extent, against the background of having got, in my submission, a very plausible case that results in damages, does this Tribunal say, "Oh well, evidential difficulties are so profound that I am not going to allow there to be", in my submission -- I put it as any justice at all to those victims and that is a very, very ambitious submission, in my respectful contention, that Mr. Hoskins makes. He's effectively saying, and this is his phrase from his written argument, "An exercise in impossibility". We say, "No, look at what we have done, even at this preliminary stage with experts who are plainly professional and experienced people who have turned their mind to the sort of framework for this claim at this preliminary stage", and what they have said is, "No, with great respect, you can have regard to materials in other cases, whether they be against Mastercard or otherwise, you can have regard to markets, you can have regard to sectoral analysis, you can have regard to third party disclosure, all that Mr.

Hoskins really says to that is, "Oh well it is going to be difficult. It might be expensive and it might be time-consuming". Well, what would you expect in a claim in which we are asking for billions of pounds? I have no difficulty with that at all. We have got a budget, we have got a team, if it is going to take some time and be --

THE PRESIDENT: Is your budget, just to be -- we were not clear about this -- include extensive third party disclosure when you have to pay the third parties for the considerable cost? Is that in the budget we have got?

MR. HARRIS: It is contemplated by the budget we have got, which is why I think it was subrule -- sub number 4 which talks about third party disclosure, but the critical point, sir, is that it has got a degree of flexibility in it. It has already got contingencies, but in any event there is a degree of flexibility.

THE PRESIDENT: When you say, "Flexibility", what do you mean?

MR. HARRIS: Well, it is not set in stone, even around --

THE PRESIDENT: We are just trying to understand because it may have bearings on other parts of this present case. Clearly the budget is not set in stone, it might need amendment and it might need an increase, but we just want an understanding, if one is going to have that sort of disclosure from a number of third parties, we have got the issuing banks already, but other third parties, merchants, is that something that is in this budget or is that something which envisages then the budget would need amendment?

MR. HARRIS: There is not only the contingencies, not only the express reference to third party disclosure in the existing disclosure heading which already has a very sizeable number, but then even without -- even today I can say that monies can be moved as between the various different columns of the budget, and the budget itself is hugely significant overall, and that is even without addressing the question of whether or not there would ever be potentially a bigger absolute number, so the difficulty that really faces Mastercard is, "Is this at a macro level". It is that, "We can see how to reach an aggregate damages award", there are no difficulties at all at Step 1 and Step 2, and then we know for sure for today's purposes that there will definitely have been damages that has filtered through to my proposed set of claimants at Step 3, and do you, in those circumstances , knowing that there is probably billions of pounds' worth of damages to the very people who we say Parliament intended should be able to claim under this new regime, and do you say no, that is to be shut out because, as Mr. Hoskins put it, look at it bottom up. Of course, when you start looking at it bottom up you can point to the fact that, well, if you look at the bottom somebody has got a

different spending profile. If you look at the bottom and then go up, somebody might have some different benefits. If you look at the bottom and then you go up, somebody might have some different interest arrangements, credit or debit balance. Well of course, but that is the wrong approach. This approach allows, and we expressly contend for, top down, and that is the answer to all of these complaints that are levelled against us.

THE PRESIDENT: Can you just show me in the budget what there is for third party costs of disclosure? It is in Bundle C at tab 6.

MR. HARRIS: Sir, maybe the sensible course, since we were going to take a few minutes and I have overstayed my welcome with the shorthand writer, she is very gracious --

THE PRESIDENT: Yes. I would find that helpful. Sorry, Professor Mayer had a question.

PROFESSOR MAYER: Staying with the top down aggregate analysis, we appreciate that, of course, one can undertake economic analyses and one can devote the resources to doing it, the question is how reliable is it, and we heard evidence to suggest that there are a considerable number of complexities in terms of elasticities of demand in terms of doing this analysis, so what assurance can one have that if one does this across a vast number of sectors that one is going to have results that are robust?

MR. HARRIS: Well, with respect, Professor Mayer, that is a slightly unfair question in this sense, that what the experts were asked to do was to put in an expert report on common issues which they have done, and not to put in an expert report showing it to the Nth degree how, if they get access to this sort of data, or exactly where they are going to get data from, this is exactly what they would do, but what I contend that you were able to obtain from the oral evidence that was given in conjunction with the report, is that these are sensible, experienced professional men who have said to you that they are confident that with their respective areas of expertise they can look at a variety of areas of data, and they both said separately, "These are data-rich areas", and they both referred to things like analogous sources of information, they are not necessarily pass-on memoranda within the business, but to take -- they may be analogous within the financial industry, one example was interest rates, another example was forms of tax, whether in financial sector -- otherwise, and what they can do, somewhat akin to what was described in the RBB report was a combination of actual data for particular businesses, market studies, sectoral analysis, econometrics where the data assists, and I think to quote from the RBB thing, the RBB report, it talked about, and here I quote:

"Reduced form econometrics and structural econometric models".

So these are the sorts of things that can be done. What, plainly, you cannot expect, in our respectful submission, is a CPO Applicant to come to the CPO hearing and say, effectively, "I have done all of that work today". What they have to do is come and explain to you that there is a plausible basis in their professional opinion, given their expertise, and Dr. Veljanovski talked about, for example, his experience in obtaining significant amounts of data, Mr. Dearman talked about extrapolating back, now Mr. Hoskins, today, it is relatively easy target to -- and this is not meant to be unfair to him to scoff at that sort of thing, but that is because it has not been developed because that is not the nature of the task. What you cannot, in my submission do is leave today thinking, oh well, these are the sorts of gentlemen who do not have the skill set, and there is just no possibility of them being able to do it.

THE PRESIDENT: I do not think that was the point of the question. No one is suggesting these are not experienced, professional experts. The question is whether, given the great complexity and the number of different markets, the range of variables, there is any reason to expect that one will get a robust outcome. That is something one can assess now, just as on the question is it reasonable to expect the data there. Well, they said very fairly they have not looked. We have seen what RBB say who did look and spent a lot of time looking, and we see what they say they found, or did not find, but there we are. I think we must take a break. We will be back --

MR. HARRIS: Perhaps I could end with this one sentence. I mean, this is a big question for this Tribunal, is to what extent Mr. Hoskins used the phrase, "Could I be hung by my own granularity", or something like that, and that is, really, the point. You have to decide does it -- am I to be shut out from obtaining justice for this class of consumers who have probably suffered very considerable loss because I have to go more granular, and we say no, he goes too far from the bottom up direction, and he says oh well you don't go far enough in the top down direction and somewhere someone has got to draw the line and what I am saying in these big picture issues is it would be wrong to shut us out because although we can do -- there will inevitably some limit that we reach, whether it be on data, or in data over time, but that is not a good reason, with respect, to say, right, do not do it at all.

THE PRESIDENT: Yes. Yes. We understand the point. We will come back at 3.30, but we will sit until 5 o'clock.

MR. HARRIS: I am very grateful, sir.

(3.22 pm) (Short break)

(3.31 pm)

MR. HARRIS: Thank you sir, members of the Tribunal, I said I would take you to the cost budget. You will find that in Bundle C, tab 6. There are really three short points here to be made.

THE PRESIDENT: Yes?

MR. HARRIS: First point, overall it is a very significant budget, we say it can be expected to contemplate all manner of difficulties and complexities and potentially time-consuming legal activity, the first point, big budget.

Second point, allied to that is there is absolutely no magic to the way in which it is set out in this particular format for today, save only as regards the amount set out for claims noticing and administration. That is earmarked, because you will recall seeing that in the funding agreement, I think it was 2.2 -- yes, I am not going to read out the figure -- but you saw it, and the details are confidential. That aside, absolutely everything else is completely flexible. It was set out in this form for today, so that you could see an indicative outline basis of the sorts of thing that might happen, and even there there is a great big contingency number.

THE PRESIDENT: Well, it is important, because we know the level of funding available, and in looking at whether it is adequate, you have to estimate what you might need, and you can only do that by looking at --

MR. HARRIS: Yes, I do accept that, but what I am saying is that if, as the case moves forward, there needs to be adjustment within this very indicative and large figure, then that is more than capable of being done, and then the third point is, it is not set in stone in the absolute sense either in the sense that if and when we get certification, then that changes the complexion from -- potentially changes the complexion -- from the point of view of the funder. If there is a good case going forward that is certified, then there is no reason why, if it turns out it is going to be more of an effort as regards, say, third party disclosure than had been encompassed or anticipated at a preliminary stage, well that cannot be adjusted upwards.

THE PRESIDENT: You mean by a revised funding agreement? Is that what you mean?

MR. HARRIS: By seeking more funding is what I mean. I think just as a point of correction, I don't want to be told I have made a mistake of fact, I am told there is -- there is some small amounts that are not moveable as regards Mr. Merricks's own costs, but those are, in the scheme of things, de minimis.

MR. HOSKINS: I am sorry, to be accurate, you do need to look at section 2.2 of the funding agreement, which is confidential. It is Bundle C -- I am sorry to interrupt -- C, tab 8.

THE PRESIDENT: I don't want to spend too much time on this. All I was really thinking about was whether third party disclosure, the cost is actually included in this budget, and at the moment

I still have not been shown that it is. I have been told the budget could be adjusted, moved, increased and so on.

MR. HOSKINS: Could I just make that point, sir, in terms about it being moved around, there are limitations on the amounts of money that can be spent on different hinges in section 2.2 of the funding agreement. It is the section, use of deployment.

MR. HARRIS: With respect that is a different point. They are upper limits as regards discrete categories. I mean, if one has not reached that --

THE PRESIDENT: Well, we will look at that.

MR. HARRIS: I am grateful. So that is the position as regards the funding, so I have dealt with --

THE PRESIDENT: But just on the question I asked you, which I am not sure you answered, which is in this budget has the cost of third parties, that they would charge for making disclosure in response to third party disclosure orders, is that taken account of? You have a disclosure column, and it is split between various things, but I don't think there is anything for third party costs in that other than the e-disclosure provider.

MR. HARRIS: Well, there are two answers to that. In note 4 it expressly references by reference to column 4, third party disclosure, so it has been contemplated and it has been included, and then --

THE PRESIDENT: Where is it included?

MR. HARRIS: But that is the point, sir, in this indicative outline, there is not a separate entry on the left-hand column by reference to paying third parties, but if and to the extent that that arises, that can be dealt with within the scope of the overall figure of the column, so, I mean, the difficulty -- I mean that is the point. There is sufficient flexibility in there, and let me give you another example. I mean, there are counsel's costs in there as regards disclosure which is more -- I mean those are, you know, properly to be in the broad brush approach to be thought of for doing disclosure applications, and they expressly include in 4, third party disclosure.

THE PRESIDENT: Yes, well I understand that part, counsel clearly is covered under disclosure, experts are covered, your experts, I think, looking at disclosure is covered, e-disclosure provider is covered, there is a line for third party costs but there is nothing attributed for third party costs of disclosure. That is the point I was making. You have got the ingredients in the table but there is no figure attributed there.

MR. HARRIS: Obviously, Sir, I accept that under the heading, "Other third party", there is not a separate -- slightly less emboldened type saying, "And payment to the third parties themselves". We say it is not -- by no means certain at this stage in the context of a big budget

with such great flexibility and the provision to go and get more if the need arises after certification.

THE PRESIDENT: Yes. I see. Thank you.

MR. HARRIS: So that is how I answer. I hope that is acceptable.

We were talking just before we broke, aside from the budget, about sources of evidence, and Professor Mayer asked me about to what extent can we be assured of robustness and I endeavoured to do the best I can and put it in the context of where we are in this case, but a point that has arisen once or twice, sir, is as regards the state of progress of other actions, but, of course, let us not forget that if and insofar as an action has even been commenced, that must be because the people who have commenced it think that they have the material to make it out which, in the case of all the merchants and retailers, includes pass-on. I appreciate Mr. Hoskins' point, he says, "Well, yes, but they are going to say is the opposite of what you want". That is not the point. The point is they must have the data addressing the issue of pass-on, and what is more, they must be under document preservation and retention regimes because they are not just contemplating litigation, they are actually in litigation, so we can get our hands on that. I am never going to stand here and say to any of you, "Oh, do not worry, there is going to be no problem with evidence, I am going to be able to get my hands on perfect evidence, I am going to be able to produce a perfect demand and elasticity curve for this market and that market and the other", but I do not regard that, with respect, as my function in an aggregate damages case where you can be confident with a sufficient degree of fairness and workability that you are going to achieve a relatively rough and ready broad measure of justice for victims who, we say, have been harmed who otherwise will not get a penny, and it all has to be seen in that context.

Moving to a couple of -- I am going to do, in the 20 minutes available to me, some of the more, as you know, traditionally slightly more disparate Reply points.

Mr. Hoskins began by talking about how, in my Claim Form at paragraph 46, it talks about, "If you are doing an individual claim then you might need to look at individual pass-on or individual merchants", but of course, that was just an example, if you are talking about a simple one individual. I gave the example in oral opening and it is elsewhere in our skeleton, if you had, say, a billionaire who had bought across 10,000 businesses, I do not say that even in an individual claim you would then do 10,000 Sainsbury's trials, far from it. You know, there has got to be a higher level of aggregation, even if you are doing an individual claim, and the very starting point of his was, oh, well, it is impossible because look at what you

would have to do in an individual claim, and we say no, that is wrong, even at an individual level.

We talked a little bit about the RBB report already, then there was a point about the Sainsbury's case, but Mr. Hoskins tries to sidestep this, and this presents, in our respectful submission, for him today, a very profound difficulty, because it does say, quite clearly and unequivocally, that they are approaching the question of what Sainsbury's could get from them, and how they could defend it as a matter of legal pass-on defence. They keep very expressly using that as a work of art as a matter of English law when you are addressing the question from the point of view as a defendant trying to fight off a claim brought against you. That is one thing.

Whatever else you say about it, that is not me. That is not my position.

Secondly, in Sainsbury's, it is simply undeniable that -- with respect, Ms. Potter put to Mr. Hoskins 5.2.5 sub 1, there is a further finding that there was 50 per cent pass-on. I accept there was a different purpose but that is fine for me today because I am for a different purpose, and indeed, the point that is further of great difficulty, very skillfully tried to sidestep it, because Mr. Hoskins is obviously an eloquent man, but what he cannot avoid is the fact that Sainsbury's themselves pray in aid in their own permission to appeal application what they say is a factual --

THE PRESIDENT: Mastercard prays in aid.

MR. HARRIS: I beg your pardon. That would be very skillful if he could represent both Sainsbury's and Mastercard in one hearing -- the fact that there is a factual finding of 50 per cent pass-on and he is the one who says, in his permission to appeal applications, that that simply needs to be taken account of, and he says it is an irreconcilable inconsistency, okay? So he simply cannot sidestep that. That, for today's purposes, is fine for me. Finding of pass-on for a non-legal defence purpose, no problem. Good enough for today.

Of course, let us not lose sight of the fact, members of the Tribunal, that he has also pleaded in some different sectors, by reference to the pleadings that he has exhibited, that there is -- and the words were, I believe, "No practical hindrance", I think that was paragraph 57 in the Ocado claim, no practical hindrance to full pass-on, so he is advancing, or if it not him then Mastercard is advancing the very proposition for which our experts at this preliminary basis are also contending, that there is no practical hindrance of pass-on, in other words, it could have happened. That is across different people.

I have dealt with the point about -- he says I will be hung for being too granular, we say that is effectively the major issue for you today. How granular do you have to be, he says a great deal because he works bottom up, we say wrong approach, top down, there comes a point at which you have to say, "This is sufficiently rough and ready and sufficiently workable and there is sufficient evidence". We say we have reached that certainly for today's purposes. That then takes me on to benefits.

This is a peculiar part, because he said, Mr. Hoskins, that it is only dealt with by me as a question of distribution, but that is not right. What we say is if -- if -- and that is a very big if, it turns out that as a matter of law our benefits relatively are to be taken into account, which we do not accept, and if, if, if he then proves what they are and that they are sufficiently causally related to what we are talking about, then at that point it will lead to an aggregate number for the relevant benefits that are relevantly to be taken into account.

At that point, you deduct that from the aggregate number that you are otherwise working with, okay? But there are a lot of ifs before you get there. No problem, if you then get there you deduct it, has not at the distribution stage, that is at the aggregate damages stage.

What I also went on to say, and I still stand by, is that you would then, at the distribution stage, have to recognise that some of the people who were claiming from the reduced pot are the people who are effectively not responsible for, but are relevant to the deduction, so you would say, "Well, were you a Mastercard holder?" or if you are doing it because of how the trial panned out, that some Mastercard holders of a certain type got more than some others, you would say, "Well, were you this type of Mastercard holder or were you that type of Mastercard holder", and then those people at the distribution stage also get -- well, it is not also, they get less, so that is how that one is dealt with, and what you cannot do, and what Mr. Hoskins -- understandably Mr. Hoskins does this because he always needs to conjure up this image of how different it is from an individual claim, it is all completely different, look at the differences, obviously benefits are different if you look at it at an individual level, but that is not what we are proposing to do at all. We would be proposing, if any of this is ever made out, to look at it at an aggregated level and deal with it accordingly, so it makes no sense, with respect, we say, to say, well, what does Mr. Bloggs have by way of air miles and loyalty rewards and, you know, such-and-such on his interest rate. Irrelevant.

Then we are talking about -- we moved on to the question of suitability, and I will just make a few discrete reply remarks to us here, to Mr. Hoskins here.

Obviously we accept that it is not a new cause of action. We do not need a new cause of action at all. What we need to do is look at the new legislation with its new purpose and expressly to recognise the very first point I began with, in what seems like an age ago yesterday morning, section 47, I think, C2. You can have aggregate awards and you simply do not have to assess the individual amount of loss. Reference was made to some of the US and Canadian case law, but what we also saw from the sections in the annexes to which I took you is that in certain instances at the certification stage, even if there is no loss at all to somebody within the class, that is not a barrier to granting certification, that can be sorted out later. This partly goes to one of the points that Mr. Hoskins did not raise orally but does in writing, that, oh well, some of the benefits might cancel out all of the losses, so there a person for whom there is no loss. That is not fatal at the certification stage, assuming it is ever made out, as you know I don't accept any of this.

Mr. Hoskins, understandably, again, places great emphasis upon the compensatory principle, but -- and I do not have time to read them out, but it will not have escaped your attention that in our Reply we have set out at some length the additional principles with which you have to grapple. Not suggesting it is an easy task but you, in this context, also have to grapple with the principles of doing justice. Mr. Hoskins' approach, by focusing on the exclusion of all other principles on the compensatory principle, avoids the biggest of them all. What are we here to do? We are here to do some measure of justice, rough and ready is better than nothing at all. I would invite you to just go back to them.

What I can turn up for you is in the case of *Devenish*, the Court of Appeal, in particular Lady Justice Arden in D2, tab 42, just as you are turning it up, to set the scene, of course, this was that case in which competition Council sought to argue for restitutionary form of damages in competition law as opposed to compensatory, and there are all manner of reasons why -- I think it was Mr Vajda was arguing for that approach -- including that it was jolly difficult to do it in any other way, and the outcome was actually that no, you cannot have restitutionary, but that was not the end of it, it was said that you could have non-restitutionary or, what we have been calling for the last two days, compensatory, and it is illustrative to have regard to what Lady Justice Arden says at paragraph 110 which you will find in the bundle at page 914, so this is in the context of competition law damages actions where it is said that there are such considerable difficulties of proof that amongst other things you should allow restitutionary awards, and Lady Justice Arden, picking it up at G:

"What appear be to be said on this aspect of the case ...(Reading to the words)... paragraph 91".

This is her response:

"The court is accustomed to dealing with those difficulties ..."

And I pause there, in what context? In the context of assessing competition law damages. I go on:

" ... by the exercise ...(Reading to the words)... cannot lead ..."

So where do we end up? Well, we end up with you do the best you can. Of course, a similar point is made by Lord Justice Tuckey at paragraph 159:

"I do not accept the assertion that damages ...(Reading to the words)... account of profits".

A similar point. What is this Tribunal almost above and beyond all others in this sphere of competition law accustomed to doing when it is assessing competition law damages in other contexts? Take, obviously, old cartel claims, as we all know the Tribunal simply does not throw up its hands and say, "Gosh, you know what, this is all too difficult, I am just not going to bother. I am going to shut you out, even though you are a victim because I do not have great data records going back, the econometrics are not perfect, there might have been some document destruction, this, that and the other, so bad luck, you are not having a penny". That is essentially writ large what Mr. Hoskins is saying here. He is saying, "You need to go further and further and show me what you have got and exactly what it is and how it should be used". We say that is a common theme with the criticisms of the experts' report, which is there is a danger of equating what is a preliminary stage expert report on common issues on the one hand with what would the expert report of this expert look like at trial, and we say that is not a fair approach, not the right approach. It is far too high a hurdle, and, and I do this, even though it is, to use Mr. Hoskins' phrase, an interrorem submission, if that is the right approach, just imagine the deterrent and chilling effect it is going to have on anybody else who wants to come and say, "I would like a CPO", particularly if it is to be a mass consumer claim where it is across anything more than -- well, even in one sector, but certainly across anything more than one sector, because Mr. Hoskins, inter alia, says; well, look, it is just not sufficiently faithful to the compensatory principle, including because it does not take account of individual spend, but every case has some individual spend, and if it is not a single sector case, it does not have to be economy-wide like this one, but if it is a multisector case, then if it is shut out here that on the basis of oh well you have not done it across enough sectors, well

that will shut out all other cases at this stage, and we say that that is plainly not what was intended by the legislation, and it is the wrong approach as a matter of principle.

As a more discrete point here my instructions have, my clear instructions are that when Mr. Hoskins was raising the issue about data that is only held by issuing banks as opposed to by Mastercard, and I think he raised it in two respects, only one of which I have noted, one was on benefits and somebody will remind me of the other, card not present, cardholder not present, my clear instructions are that we simply do not accept that that is an accurate point. We have information from a source who is directly and intimately knowledgeable about Mastercard's systems and records, and my instructions are that we have been informed that they do have information of this type, including because, as I am instructed, it goes to the question of -- this sort of data goes to the question of what Mastercard charges to its members for its membership fee and in relation to fraud detection.

In any event, whatever the true position is, the point is that we do not necessarily accept and certainly not for today's purposes, that the so-called, "Third party disclosure", issues are magnified to any material extent by having to also look at issuing banks, and, in any event, there is your point, sir, that it is a completely different order of magnitude.

A short point about polyurethane, you were taken to the indented citation in my annex about the polyurethane, and do you remember the point, generalised evidence of pass-through, and then Mr. Hoskins said oh yes, well, look what else they had in that case in the US, but of course in the US certification happens after disclosure, so when they say in that case, oh well, you had some data from the actual defendants, well, no wonder they were able to put that forward because they had had the disclosure at the certification stage, so those are unfair points to level against us.

Then there were some points taken about specific US cases, and I didn't jot down their names but it does not matter, they are the ones we started to look at and the critical point was that they were about time, and I can turn it up if you like, but in light of the time I do not propose to.

In our annex at 210 where we have obviously had express US law input, our response to there, I think, is in paragraph 210 and in the next paragraph is that they -- and we set out the citations -- they are to be distinguished because the US courts themselves have recognised that that is a far more difficult and speculative exercise when assessing an alleged damages across a class in a tie-in case as opposed to a price fixing case. That is what those cases say, and we have cited the relevant bits. We distinguish them.

Then there was a point about, oh well, Mr. Harris accepts that you can have regard to distribution proposals and Mr. Hoskins says oh, they are inadequate, and that is right, I did, to some degree, but you will recall that I said you must put it in perspective for today's purposes. That is why I took the trouble of starting with the absence of reference in the primary legislation, absence of reference in the secondary legislation, and a bullet point at some point later on in the tertiary source, namely the rules.

Now that is not to say that you cannot and should not do what you have been doing, but it is to put it in perspective, whereas Mr. Hoskins says, "It is fatal by itself". He said -- that was at his end. He said my accumulation of reasons would knock it out, but taken in individually -- we do not accept that. He says that what his case comes down to is too large a disparity, and it is, "Not anywhere near close enough", "Not a reasonable relationship". Again. That is the key question that you have to grapple with. We say it is. It does not have to be, and it cannot be, perfect. It cannot even really be close to perfect in the individualised bottom-up sense, but it does not have to be, and it should not be, and what Mr. Hoskins is constantly trying to say to you is, well, you need to be closer down to my end of the spectrum, and you have gone too far up the spectrum, and what I say, no, in this new legislation, I am quite happy where I am, thank you very much, at my end of the spectrum, and includes, I am not even at the extreme, so, for example, that is the point on distribution that I do not say, oh well, you just take your, say, 10 billion, if that is what you get on aggregate damages, and you divide it by 46 million and Bob's your uncle. We have already gone further than that, and then you have the point that it might be dealt with in a proportionate manner, and so I am pleased to say, subject to this point that Ms. Wakefield reminds me of, that leaves only the compound interest about which I have nothing further to say, save for these two short remarks.

As I said in my opening there is interest rate loss across the class. That is a common issue, and then Mr. Hoskins, again, says, ah but that is just not granular enough, and we say it is. You will have to decide, but it is definitely a common issue for the reason that you gave, Professor Mayer, and then he says but again you need to -- it is the same point again. He says, oh well, Mr. Harris suffers from the same point. In response I say Mr. Hoskins suffers from the same point. He, effectively, says you need to be more granular, you need to look at it on a more individualised basis. Some people might have credit for this period of time and debit for that period of time, and different years with different situations, and we say well yes, but that is too bottom up. That is too individualised. We are not doing that for the aggregate damages pot. It does not make any sense to somehow now start doing it for the compound interest pot.

That would be inconsistent, so have you should do it in the same way, and that leads to a CPO on that issue.

Then that leaves two things, the estates note for which we are grateful, thank you, I will deal with that by a short note myself, there is not much that needs to be dealt with, so that will come promptly and in writing, and then, sir, yesterday, and I said I would come back to this, you raised with me in my opening a couple of points about class definition. I will deal with them in 30 seconds each, if I may. The first one was should it say somewhere in it "individuals not in the course of a business", and we thought about that further, we have taken that on board and we still say no, with great respect, we say it is dealt with very adequately in the frequently-asked questions, I think it was paragraph 16, says no, not if you are doing it in the course of a business.

Then the other point, sir, was about, and this was just before the -- if you wanted to locate it in the transcript, just before the experts came on about 3 o'clock yesterday, but what about if you are buying from a business that is established outside the EEA, and as per the transcript, we stand by every word in that, this is not a case in which we are seeking to claim any overcharges by references to an overcharge -- by reference to a MIF that applied other than on a cross-border EEA basis within the meaning of the decision, and/or what we say is the causally related domestic MIFs. We do not say that it requires any amendment to the class definition, we are very happy to add a further Frequently Answered Question, and that will take care of, for instance, Sir, your point about a US business, or put the same point another way, the Cyprus business before it became EEA. They are both examples of non-EEA-established businesses, and they do not form part of our assessment of loss.

So, Sir, having over-stayed my welcome, doubtless by more than just the two minutes on the clock, unless I can assist further those are the reply submissions.

THE PRESIDENT: Thank you very much. Just one moment, Mr. Williams. (Pause).

Yes Mr. Williams?

SUBMISSION BY MR. WILLIAMS

MR. WILLIAMS: Mr. President, members of the Tribunal, I am acutely aware that costs is thought by most to be a dispiriting subject at the best of times, but at 4.05 on a Thursday afternoon I accept that it falls very much into the category of cruel and unusual punishment and then I can but present my apologies in advance.

If I can perhaps firstly start with an anodyne point of housekeeping, the revised skeleton which we referred to earlier, that has been served electronically and I am assuming it to be

satisfactory to the Applicant, it can be put on their website. So far as the Tribunal's bundles are concerned, the changes are extremely small. We are in your hands as to whether you wish them to be updated with further hard copies, or whether the Tribunal simply ignores paragraphs 166-170 of the skeleton in its present form.

THE PRESIDENT: We do not need further copies filed. Thank you.

MR. WILLIAMS: That conclusion might be fortified by a very small additional document which I am going to hand up now, if I may. (Handed).

What this document is, we mention in our --

THE PRESIDENT: Do you have a copy for -- it is coming through.

MR. WILLIAMS: We mention in our skeleton what some of the possible returns from unallocated damages are, and this is simply an exposition in tabular form of the points that we already make there, and I will refer to that as necessary in my submission. It might be useful just as we start to turn up the copy of the funding agreement which is perhaps most conveniently found at C8.

THE PRESIDENT: Yes.

MR. WILLIAMS: Sir, as the Tribunal is aware, under the agreement the funder only makes a return on its investment if it is entitled to appropriate a substantial share of the undistributed damages. Now, the minimum amount of those damages which it targets as its reward, in addition to any costs which are recovered from Mastercard directly, is the sum of £135 million. We have that in the definition of total investment return at page 244. Even at that minimum, that is almost four times greater than its anticipated maximum deployment of £35.6-odd million which one has at clause 2.1, and even if they extend to their long stop deployment of £43.4-odd million, it is still over three times greater than that. That, of course, is in addition to any return it makes on its deployment through recovery costs from Mastercard.

However, we respectfully remind the Tribunal that it is important to recall that its investment return might plausibly, if it has its way, be many orders of magnitude greater, even than that. It is the Applicant who, in their submissions, refer to an article by Professor Mulheron in the Law Quarterly Review. I do not ask you to turn it up, but for your note the reference is D7, tab 67, page 2951, where she says that in her experience of other jurisdictions where aggregate damages cases are brought, take-up rates of damages are as low as 30 per cent.

Now, on the graph -- not the graph, I am sorry -- the table that we have handed up which applies the formula that the funder gets 30 per cent of the undistributed proceeds up to a

billion, and 20 per cent of the undistributed proceeds over a billion, and taking the pleaded figure rounded down from 14.1 billion to 14 billion as the index point, you will see that if, in this case, only 30 per cent of the damages were distributed, on those figures, the funder's return would be in excess of £2 billion, and its return on its investment would be in the order of 4,646 per cent, and if different variables are inputted clearly different results are extracted but even if the take-up of damages was an implausibly high 90 per cent, one sees they are getting a return of £380 million, so over ten times their anticipated investment, and their basic anticipated investment, and nearly eight times greater even than their maximum anticipated investment of £43-odd million, so that is what, in due course, they aspire to persuade the Tribunal to approve being released to them out of unallocated damages.

Now, as the Tribunal is also aware --

THE PRESIDENT: We do not have to -- it does not mean we would approve it, of course.

MR. WILLIAMS: Of course it does not, and that is one of the reasons why we say there are very serious question marks over the viability of this proposed arrangement for multiple reasons.

THE PRESIDENT: I am not quite sure where this gets to. If you are saying, well, the maximum -- depending on the amount of damages awarded, which will depend, first of all, do you succeed your clients in knocking out the years 1992-1997, which will take out a significant chunk, particularly when you consider that this 14 billion is calculated with compound interest, so the compounding of interest since then is very significant, so it goes down, the take-up rate, we do not know, but whatever is left, the Tribunal would have to consider whether it is reasonable that the funder should get that.

MR. WILLIAMS: Yes.

THE PRESIDENT: If they do not, it goes to the Access to Justice Foundation.

MR. WILLIAMS: It does. Well, what we say is that that in itself gives rise to serious questions of, firstly, jurisdiction to the Tribunal which I will come to, and in any event of practicality, because how does the Tribunal decide what is a reasonable return for an investor on a speculation of funds? It is quite different from that which the rules, we will say, anticipates in this context, which is of a common assessment of legal costs.

THE PRESIDENT: Well, that is a task I can well see, that that is not an easy task. It is a new task, but it is one we have been given by the legislation.

MR. WILLIAMS: That, of course, begs the question which needs to be decided and I will come on to whether or not that is right, but of course, sir, what you say is that that is the way that Mr. Bacon would put it.

THE PRESIDENT: Well, I mean, it is clear that we have been given the task by the legislation of deciding to what extent the unclaimed funds should be paid out. That may include where there as been an ageing insurance premium, for example, and these are all areas we are not normally familiar with dealing with here.

MR. WILLIAMS: I quite accept that you are not, but, of course, there is a mechanism and we say that the existence of the mechanism is, in itself, telling as indicating what the anticipated ambit of this jurisdiction is, to refer such questions to a cost judge of the senior courts cost office who, of course, do have a great deal of experience in assessing things like uplifts on conditional fee agreements, and the cost of legal expenses insurance, and the cost of the legal expenses insurance is related to the quantification of the legal cost to which the insurer is exposed. To suggest it is within the skill set of any member of the judiciary or otherwise to determine what is reasonable investment return for somebody speculating upon the outcome of a new species of litigation is, we say, qualitatively different, but of course that is not a submission I shall make in a vacuum, I will come to the precise terminology of the various measures which control this in early course.

Before I do so, can I just develop this briefly in the context of the funding agreement itself? Again, the terms are extracted by both sides in their written arguments. The points at which we specifically flag is that the funder has the right to terminate its funding if the litigation becomes not commercially viable for it, or if this Tribunal disapproves or provides, in quotations, "Negative commentary", on the terms of the funding agreement.

Now, as to the former, we say --

THE PRESIDENT: You are referring to -- what? 2.4?

MR. WILLIAMS: I was just going to take you there, yes, it is the termination provisions are found in 2.4. (ii), "Purchaser", that is the funder:

" ... reasonably believes ...(Reading to the words)... independent advice", and so forth.

And then at (iv):

"CAT disapproves or provides ...(Reading to the words)... hereof".

In either of those circumstances they may terminate. Now, so far as negative commentary is concerned, it is the invitation of both sides, albeit for different reasons, for the Tribunal at this stage to pass some form of judgment as to the workability of this proposed agreement, and the Applicant itself makes that invitation to the Tribunal, presumably in discharge of the contractual obligation which he has under clause 2.5(a) where you will see that Mr. Merricks

agrees to seek approval of this agreement, and other transactions documents, from CAT at the earliest opportunity.

So we say, taking it from that, if it appears in this litigation to the funder, either whether it be because of negative commentary at this stage or for some other reason, that it may not be able to achieve its total investment return of at least £135 million, it may, if I can put matters very crudely, it may pull the plug.

Now, if it pulls the plug, we do not understand it to be controversial that absent funding Mr. Merricks could not qualify as a suitable representative as he would be unable either to fund his own costs, or as the rules indicate, it is a relevant criterion, nor would he be able to fund the defendants if the case ended in defeat.

So it is against that background that we say that Mastercard -- that Mastercard say the funding agreement does not work, and we say the consequence of it not working is that Mr. Merricks does not qualify as a suitable representative.

Now, so far as our submission on that is concerned, it is that the governing legislation does not allow for the appropriation of undistributed damages so that the third party funder may be rewarded for speculating funds, and to make that good, I will start, if I may, with the governing legislation, although I know it is very familiar to you, as starting with section 47(c) of the 1998 Act which you will find in tab 10 of D1. Within that tab, it is page 53.

Subsection 5 provides that:

> "Subject to subsection 6, where the Tribunal makes an award of damages it will be paid to the specified charity".

Subsection 6 is the provision with which we are directly concerned, that the Tribunal, if something falls within subsection, so it has to be a case where an award of damages has been made by the Tribunal, the Tribunal may order that all or part of any damages not claimed by the represented persons within a specified period is instead to be paid to the representative, in respect of all or part of the costs or expenses incurred by the representative in connection with the proceedings.

Now, sir, before I flesh out a submission on that, whilst we have this open, I however also want to invite your attention to 47(c)(viii) which prohibits damages-based agreements, more colloquially known as, "Contingency Fee", arrangements, in the context of opt-out collective proceedings, and we submit that that is of some background significance in this context.

First of all, can I remind the Tribunal why that prohibition has been made, and that is explained in the consultation paper, and can I ask you, without closing D1 entirely, if I could

-- I am sorry to ask you to have two bundles open at the same time -- could I ask you to look at D7?

THE PRESIDENT: Yes.

MR. WILLIAMS: Now, within that, might I ask you to turn up page 2828?

THE PRESIDENT: Tab?

MR. WILLIAMS: I am so sorry, sir, tab 55.

THE PRESIDENT: D7?

MR. WILLIAMS: Page 2828. Tab 62.

THE PRESIDENT: Tab 62, this is the government consultation?

MR. WILLIAMS: It is. This is the government consultation response to the consultation private actions in competition.

THE PRESIDENT: Yes.

MR. WILLIAMS: Now, so it is paragraph 5.62 of the government's response to that 2828. So, just to remind the Tribunal what damages-based agreements are, as I said, it is a piece of legal jargon that is used in this jurisdiction for what are more generally known, for example, in the United States as, "Contingency Fee", arrangements, they are arrangements were litigation is funded by lawyers or claims management representatives taking a percentage of the compensation, and in this forensic context, I think more or less uniquely in the civil jurisdiction, these are prohibited, and the reasons are stated in paragraph 5.62:

"Prohibiting the use of DBAs ...(Reading to the words)... new type of case".

Now, sir, the reason I show you that is twofold.

THE PRESIDENT: Just before you go on, the changes in LASPO, is this right, are that you cannot recover the uplift or the insurance premium from the losing party?

MR. WILLIAMS: Precisely sir. Yes, I was going to come to that but that is absolutely right. As you are aware, for about 16 years they have been recoverable, they were recoverable, and then the Jackson reform is that they are gradually being phased out, not in all areas of litigation but in most.

THE PRESIDENT: Yes.

MR. WILLIAMS: Now, as I say, twofold reasons for referring the Tribunal to this; firstly and more generally, we ask the Tribunal to have it in mind in looking at some of the broader submissions which the Applicant is making, because we say it is treating access to justice in its written emanations as something of a Joshua's trumpet which collapses any objection to funding arrangements, and we say that is not right, Parliament did not opt for a complete

laissez faire system, in fact it put restrictions on that which is permitted, and more specifically, we say Parliament's hostility to litigation in this area being funded by contingency awards because of a fear of speculation sits uneasily with any submission that section 47(c)(vi) should be subject to a sort of strained construction so that what we say as terms of well-settled meaning like costs and expenses are extended to encompass an arrangement such as the proposed funding arrangement here, because we say that if Parliament can be seen clearly not to want lawyers and claims management companies to fund litigations by taking a cut of the damages, it is unlikely that Parliament wanted the term, "Costs", which it used in section 47(c)(vi) nonetheless to be very broadly construed so as to encompass the sort of appropriations from damages, huge appropriations of damages, which are being proposed here, because those are extremely similar to what one would see in a Contingency Fee arrangement. It is taking a percentage of the damages in order to attain a massive speculative return, and so we do say that knowing that Parliament was hostile to that is something which should inform the court, the Tribunal, on what may be one of the key questions in this part of the case, which is how the words, "Costs and expenses", in section 47(c)(vi) are to be interpreted, do they have the relatively traditional meaning of meaning costs of a legal nature, or are they, as the Applicant would have it, sufficiently wide to encompass this new and unprecedented species of funding which is proposed, and you will not be surprised to know what our submission in due course is going to be on that.

So turning back to 47(c)(vi), and I didn't take my own advice and I shut D1, so if you would just forgive me for a few moments?

THE PRESIDENT: We can put away the consultation paper?

MR. WILLIAMS: You can put away the consultation paper, sir, yes. (Pause).

So back it page 53 at tab 10 of Bundle D1, 47(c)(vi), as I have said already the gateway to 47(c)(vi) is 47(c)(v), so it only apply unless those cases where the Tribunal makes an award of damages, so if there is a settlement, the Tribunal does not have any powers to make the order which the funder is seeking, and I mention as an aside that is a point that seems to have escaped the funder because the funding agreement at section 2.5(b) places an obligation on the Applicant to try to get an order if there is a collective settlement, and he cannot get one in those circumstances because the gateway to 47(c)(vi) has not, in those circumstances, been opened up.

THE PRESIDENT: So in section 49(a), that does not allow the settlement in those terms to be approved, is what you are saying?

MR. WILLIAMS: Well, I am not saying it does not allow it to be approved, I am simply saying it does not allow the Tribunal to make an order.

THE PRESIDENT: If there is a settlement the Tribunal has to make an order.

MR. WILLIAMS: Well, the Tribunal makes an order which approves the settlement.

THE PRESIDENT: Yes.

MR. WILLIAMS: Yes, I have acknowledged that and it might be that there is an aspect of Angels on the head here, but --

THE PRESIDENT: Are you saying that if this is part of a settlement that is agreed we are precluded --

MR. WILLIAMS: No. The difference, however, of course, for it to be agreed as part of an assessment my client would have to agree potentially to billions of pounds being deducted from unallocated damages which, under a settlement, would, if the system works as it is anticipated, might, in ordinary circumstances, in large measure be refunded to my client. Now, it might be thought that that -- that it would be surprising if somebody in the position of my client would subscribe to a settlement whereby billions of pounds' worth of unallocated damages went to --

THE PRESIDENT: Well, they might not agree to billions but they might agree to a certain amount going to the funder, whatever it is --

MR. WILLIAMS: They might.

THE PRESIDENT: -- they think it is reasonable, are you saying the Tribunal could not approve it?

MR. WILLIAMS: If we agree to it, however improbable that might be, but if we agreed to it then I accept it is within the Tribunal's powers to approve it, although of course the Tribunal might think that the charity is being milked to an excessive extent, but that would be decided --

THE PRESIDENT: Just as we would have to consider legal fees and whether they are reasonable or not, but yes, so we could do it there. I may have misunderstood you. I thought you were saying that if that was any payment to the funder other than -- beyond costs, the part of the settlement, the Tribunal could not approve it, but you are not saying that.

MR. WILLIAMS: No. I may have fallen victim to my own snippiness in that I was simply making point that the funding arrangement wrongly refers to the possibility of the Tribunal making an award of damages in the context of where there is actually a collective settlement, so perhaps we can move on from that, but the point -- the actual point of exposition which I was intending to focus upon is simply that this is a door which is only opened where an award of damages has been made, and then the door which is opened, as you can see, is to award the

representative, part of the -- all or part of the unallocated damages -- in respect of costs or expenses in respect of which he or she has incurred.

THE PRESIDENT: Yes.

MR. WILLIAMS: I do not suppose the purpose of that provision is likely to be controversial. It is directed at costs which -- it is intended to recover any shortfall on the costs which the representative has recovered from the defendant in order to hold him harmless from shortfall, and the reason I am using the language of, "Shortfall", is because the Tribunal will appreciate that pretty much ex hypothesi in the situation with which we are concerned, the representative will already have a conventional Cost Order in his favour, because damages have been recovered, so he has probably got his -- at least got his standard basis costs, so the purpose of section 47(c)(vi) --

THE PRESIDENT: Yes, subject to any --

MR. WILLIAMS: -- subject to the conventional arguments about issues or misconduct --

THE PRESIDENT: -- or a -- I can't remember the rule, an offer.

MR. WILLIAMS: A Rule 45 offer.

THE PRESIDENT: A Rule 45 offer.

MR. WILLIAMS: Yes. That is the function which it is intended to achieve, so there are two things required. Firstly, the representative has to incur the liability from which to be held harmless, and, secondly, the liability must be costs or expenses within the meaning of the legislation, and we say the funding arrangement falls on both counts, and, now, so far as the first is concerned, has the representative incurred a liability, we submit that under this funding arrangement it is never envisaged, and unsurprisingly never envisaged, that Mr. Merricks will ever incur a personal liability to pay the funder total investment return. He incurs no liability in that respect. His obligation is to use best endeavours to procure an order from the Tribunal, and one sees that at C8 --

THE PRESIDENT: In the agreement. Yes.

MR. WILLIAMS: Yes. I think it is perhaps most visible at 2.5(b):

> "In the event that the litigation ...(Reading to the words)... with the litigation".

So yes, he gets an order for the costs he has incurred but as far as the total investment return is concerned, there is no suggestion that that is a liability of Mr. Merricks from which he needs to be held harmless under the 47(c)(vi) jurisdiction. Whilst clause C says that, well, if the total investment return is ordered by the seller to be paid to him rather than directly to the funder, then in those circumstances the seller that is Mr. Merricks, must account to the funder

for the money which he has received immediately. That is an unsurprising obligation to account, but in no sense at any point does Mr. Merricks under this agreement ever incur a liability to pay the total investment return, and so therefore we say he simply does not cross the threshold of the mischief from which section 47(c)(vi) is intended to protect him, namely incurring a personal liability for which he is without recompense. He simply does not incur a liability under this agreement, and I dare say if somebody said to Mr. Merricks, "Will you please sign an agreement under which you would become personally liable to pay at least £135 million", he might have a dusty answer.

So, I mean, that is our first objection.

The second objection is slightly more involved, but we say the answer is nonetheless clear, and it goes it to the second question of what, in this statutory context, are costs or expenses, because even if Mr --

THE PRESIDENT: The first point, sorry to interrupt you --

MR. WILLIAMS: Not at all.

THE PRESIDENT: It is really a very short point, is it not.

MR. WILLIAMS: Extremely.

THE PRESIDENT: You say the statute shows, "Incurred by the representative", and under this it agreement it is not incurred, and that is it.

MR. WILLIAMS: Precisely. I hope that I have dealt with it relatively shortly.

THE PRESIDENT: You did. To be clear, that is the point.

MR. WILLIAMS: Yes. As I say, regrettably, and repeating my apology now with an extra 30 minutes attached to it, the meaning of costs and expenses, costs or expenses in this context, is slightly -- involves a slightly lengthier submission, but we do say it is terminology of a well-established meaning, and it does not include a funder's return on its speculation.

Now, so far as costs is concerned, in England and Wales that has a definition in the Civil Procedure Rules which, as the Tribunal knows, are more or less adopted into the CAT in respect of costs by Rule 104, and I will come to the CAT rules momentarily, but just to take the mainstream, if I can respectfully call it that, CPR definition in context, perhaps slightly surprisingly in bundles which are so comprehensive that we do not have that as a distinct inclusion, but it is quoted in a number of places, and I am just going to remind you of it, sir, in our response document which is at tab 2 of Bundle C, page 116.

So it is the block quotation immediately below paragraph 191:

> "Costs includes fees ...(Reading to the words)... on the small claims track".

Obviously we do not need to be too concerned about litigants in person and the small claims track, so fees, charges, disbursements, expenses, remuneration, and that is just what it includes, so on the face of it it is an open-ended definition.

One might ask, well, in circumstances where the classic costs, definition of costs in the Civil Procedure Rules says it already includes expenses, why does the 1998 Act at 47(c)(vi) refer to costs or expenses, but we posit there is a very simple explanation for that, and the explanation is cross-territoriality. The Act applies to all three UK jurisdictions, costs is the terminology that is used in England, Wales and Northern Ireland, but in Scotland, what we call, "Costs", are called, "Expenses". To some extent that -- the recognition of those different things -- is also -- can also be seen in the rules of the CAT itself as a cross-territorial Tribunal, and if one actually turns up Rule 104, and I think, sir, the Tribunal has the rules in loose form, but for those who are following the bundles, it is D1, tab 13, page 101 where it says that, Rule 104(1):

"For the purposes of these rules ...(Reading to the words)... as appropriate".

So again we see the reference to costs, expenses, as appropriate with reference to the three jurisdictions, so that is what we say is the explanation of the reference to, "Expenses", in the Act, so, "Expenses", is simply the Scottish term for, "Costs", and it throws us back upon, well, what does, in this context, "Costs", mean?

I have shown you under the CPR the definition is open-ended because it simply says what costs includes, but our submission is the breadth of that term has long been limited by authority. The authority must form part of the background against which Parliament was legislating. Now of course we acknowledge at once that Parliament could choose in this context to give costs a more expansive meaning than what we say is its settled meaning, but in our submission if that was so one would expect at least one or both of two things, firstly Parliament using clear words to signal an intention to depart from prior convention -- it does not, and, secondly, at least some sort of footprint in the direction of novelty, in the travaux preparatoires, like the consultation paper, or if it is admissible, Hansard, but you do not see any sorts of footprints of that sort to suggest that some new more expansive meaning of costs is being adopted in this context.

So we submit that absent those sorts of signposts, it should, with respect, be an entrenched starting point for the Tribunal that, "Costs", means in this context its ordinary meaning established in the authorities which Parliament must be taken to know, of which we say although it is an old case it is still very commonly cited today and in our skeleton I think we give one or two examples of very recent cases where it has been applied. The locus classicus,

if one can say that, is a case which is at D1, tab 18A, called, *London and Scottish Benefit Society v Chorley*, tab 18A, the question that immediately arise for decision in this case which was decided in 1884 was whether or not a solicitor who was representing himself could recover his costs as if he was acting professionally or whether he fell to be treated as a litigant in person and the court concluded the former, but in the course of doing so it made some general remarks about the approach to legal costs which have echoed through subsequent authorities in the intervening 140 years. If I can start with -- I think I am just going to take you to two extracts, one from the judgment of Sir William Brett, Master of the Rolls Lord Esher then was, at page 875 and then an extract from the concurring judgment of Lord Justice Bowen, as far as the Master of the Rolls is concerned, the report, because of antiquity, I am afraid that it does not have either paragraph numbers or marginal lettering, so if I can take you to 875?

THE PRESIDENT: Equally it means the judgments are very short.

MR. WILLIAMS: Yes. I do not want to get into *Parry v Cleaver* and collateral benefits but I think we can all agree that that is quite a substantial one.

So if I can start just below the upper ring punch where his Lordship says:

"I should have thought ...(Reading to the words)... out-of-pocket".

That is perhaps all that I need to read from Sir William Brett. The judgment of Lord Justice Bowen is perhaps the one that is cited more frequently, and that begins over the page. If I can take it up about half a dozen lines down the page after a semicolon there is a sentence which continues:

"As a guard and protection ...(Reading to the words)... purchased".

There is then a reference to Lord Cooke's commentaries, and taking up the commentary it at the bottom of the page:

"Here his expression mention ...(Reading to the words)... loss of time".

Then there is a slightly obscure discussion of the conjunction of the Latin verb "Constare", which I am going to skip. I said it was cruel and unusual punishment, I apologise again.

What does Lord Cooke mean by these words:

"His meaning seems to be that only ...(Reading to the words)... not be measured".

Those are the words which are proven influential, and what I simply stress in this context is there is an emphasis that what the court is concerned with is costs means legal costs, and one of the policy justifications is that legal costs is something which the court is able to measure, and we say that both the general principle, costs mean legal costs --

THE PRESIDENT: Well, surely it now covers, for example, experts' fees, they are not legal costs.

MR. WILLIAMS: Well, they are legal costs in the sense that they would normally be part of a solicitor's disbursements.

THE PRESIDENT: Yes. I am not sure how it came -- it would be regarded at that time, but, anyway, and then solicitor's disbursements clearly are part of legal costs now.

MR. WILLIAMS: The bundles are stuffed full of ancient learning about what various costs terms mean, and we actually have some cases about what disbursements mean, and I think it suffices to say only if Mr. Bacon suggests it is controversial, those authorities make it clear, even in the 19th century, experts' fees and such like were solicitors' disbursements and therefore part of legal costs but what we say is whatever legal costs are, legal costs have never included the cost of obtaining third party finance. Latterly, a statutory exception was created by statute for after the event insurance premiums which I shall, at some point, come to briefly, but there has never been an exception for the cost of third party funding, and there still is not. If you are -- if you retain a solicitor to act on a damages-based agreement in a world outside of opt-out collective actions, you cannot look to the other side to pay the percentage of damages which you pay your solicitor. You can only look to the other side to pay your solicitor's costs calculated on a conventional time basis, so it does not avail you to say, "Well, my solicitor has taken 50 per cent of the damages, it was a perfectly reasonable arrangement because my case was very risky, and it is terribly unfair because the case settled early and my solicitor's time costs are very low", that is not a value -- you can only recover your solicitor's time costs.

THE PRESIDENT: Is that part of the legislation that allowed damages-based agreements at all, that are circumscribed by the recovery?

MR. WILLIAMS: The recovery is, in fact, circumscribed by the Civil Procedure Rules which, in this context, outside collective opt-out --

THE PRESIDENT: It may not matter for your argument, but prima facie, one would have thought, if you make a damages-based agreement with your solicitor and it is now allowed, not in these proceedings but in others, indeed, let us take opt-in proceedings where a damages-based agreement is allowed, and in those circumstances are you saying that section 47(c)(vi) would not allow the Tribunal to pay out the percentage to the solicitor?

MR. WILLIAMS: Well --

THE PRESIDENT: That would be a fairly striking problem.

MR. WILLIAMS: That is more of a moot point because what we are -- what we are at least dealing with here is a sum which is being charged by a solicitor, so to that extent -- for his

professional services. Instead of charging on a time basis he charges on a value basis, and the Tribunal may know, in some contexts, solicitors have always charged on a value basis. It is only charging for litigation on a value basis which has been controversial.

THE PRESIDENT: But given that Parliament has allowed damages-based agreements for opt-in collective actions, maybe it does not arise because subsection does not apply to opt-in actions at all.

MR. WILLIAMS: I did say I didn't think it applies because it only applies to opt-out.

THE PRESIDENT: So you would get those, so it would be treated in the normal way.

MR. WILLIAMS: So it would be treated in the normal way. In any event, particularly given the hour and because I would like not to be more than half an hour tomorrow, without going excessively into the minutiae, what the submission is, is that will it be in the modern context of DBAs or in any other context the general principle is that costs which you have incurred in order to fund your case have never been categorised as legal costs.

Now, I have already --

THE PRESIDENT: So just to think this through, if your solicitor is not on a conditional fee or a DBA but on a regular is ordinary basis of charging and you have got to borrow money to pay the solicitor, to fund the solicitor, the cost of your borrowing, the interest costs, would that be recoverable?

MR. WILLIAMS: Well, not as legal costs, no, because both the court and the Tribunal can award interest on costs, and the rate of interest which the court allows, for example, can take account of what the actual cost of money to you has been, so if you actually simply incur borrowing charges there is at least a -- there is an express facility in those circumstances to make an award of interest, but the pure funding charges taken through a contingency-type arrangement, there is not , at least in my submission, there is not a precedent for those being recovered as part of the parties' legal costs.

Now, as I have acknowledged, of course, in different circumstances it might be open to argument that in a particular statutory field a Parliament had chosen to use costs in a more expansive guise, but you already -- I have already made my point that in this context there is nothing either in the language that Parliament used or in the background materials to indicate that that was Parliament's intention.

THE PRESIDENT: Yes.

MR. WILLIAMS: Sir, can I, without wanting to engage in an extensive citation of authority, it might be right to say that both sides can be criticised for the weight of authority, but just take

you to one case to make good the general principle, which is a case called *Motto v Trafigura* which you will find, I think, in D3 at tab 45. It is a decision of the Court of Appeal from 2011. I think it is right to say it covers a whole hotch-potch of points which arose out of what I think was the largest detailed assessment ever, I think, of costs, and it was more than £100 million arising out of a large group action involving a pollution claim for toxic waste being dumped in Africa which affected, I think, some 30,000 claimants, so it is in the course of a long judgment dealing with lots of points, that the Master of the Rolls, Lloyd Neuberger addresses the cost of funding and he does that from page 684 of the report which is page 1121 of the bundle if people prefer, and the sort of funding that was being looked at here was funding of a far more prosaic nature than that with which we are concerned. The case was funded on a conventional -- by then conventional CFA backed by after the event insurance, and the argument was over, well, what about the costs of setting-up the CFA, the costs of setting-up the insurance and dealing with the insurance, discharging the various reporting requirements that the insurer insisted upon, were those recoverable as legal costs, and the judge at first instance held that they were recoverable. Then it is paragraph 105 at the top of 685 of the report where the Master of the Rolls states the general rule:

"The defendants rely, as they did before the judge ...(Reading to the words)... relating to costs".

There is a reference to Order 62:

"The judge rightly, in my opinion ...(Reading to the words)... CPR".

Then making a point I have recently made:

> "There is now an express right ...(Reading to the words)... AT insurance".

At 106 his Lordship agrees with the judge that the costs are somewhat different than those considered in Hunt's case then at 107 he says:

> "But nonetheless, interest paid on money borrowed an costs incurred ...(Reading to the words)... on this issue".

Then he goes on to explain in some detail why, and the only point in the explanation I would particularly invite your attention to is at 112, over the page. His Lordship approves the -- what was the set-up practising the costs awards, and it is by marginal D:

"The judge's conclusion in this case ...(Reading to the words)... prospective client".

Then at 114 the same conclusion is reached in respect of the report acknowledge to it the AT insurer and although the judge says:

> "The dividing line ...(Reading to the words)... subjective".

He takes the view that these are matters which are collateral.

Now, again, I acknowledge that *Motto* is dealing with a different sort of funding but what we say is if, even the costs of a solicitor putting in place a CFA or an ATE insurance is regarded as an impermissible item of costs then it must be a fortification, we submit, of the proposition that this sort of funding, taking a percentage of the compensation in order to fund the cost of speculating money is not within the ambit of the label, "Costs".

In the five minutes or so I have this evening I just move on to a point that is connected to this, and it is back to what is said in the Chorley case about one of the reasons for placing limits on the scope of costs is a concern that the court is seized only of what it can measure, and I have already suggested that in the context of classifying what comes within section 47(c)(vi), that is also a relevant concern for this Tribunal, because if we can revert to the rules, and Rule 94, and the rules for those in the bundles are in tab 13 and the page reference is page 94.

THE PRESIDENT: You want Rule 94? That is collective settlements.

MR. WILLIAMS: It is Rule 94 which begins at page 93, in fact, for those who are following the bundle.

THE PRESIDENT: On collective settlements?

MR. WILLIAMS: Oh. I may have a slight mistake in my note in that case, forgive me. It is actually Rule 93 I intended to refer to. I apologise.

THE PRESIDENT: Yes.

MR. WILLIAMS: So this legislates for when the Tribunal makes an award of damages in opt-out collective proceedings. Subrule 4, where the Tribunal is notified that:

" ... thereunder ...(Reading to the words)... in Scotland and Northern Ireland".

That is all of a piece with the more general powers in respect of determining costs which one has at page -- at Rule 104, page 101 in the bundle, which also places on the Tribunal a general discretion to award costs and determine the amount of them and indicates the sort of criteria which the Tribunal would take into account, such as conduct, the amount of the costs, the extent of success, admittable offers of settle, proportionality and reasonableness in incurring the costs and proportionality and reasonableness in the amount of the costs, and I appreciate that I am really making a point that I have presaged already, but really what we say that contemplates, and we do say it is all of apiece with the traditional *London and Scottish v Chorley* approach is that the Tribunal is seized of that which it is capable itself of measuring, or if that -- if it is that which it is in itself capable, or at least it is not convenient to the Tribunal to measure, it sends it to a costs judge. Now, that is entirely consistent with costs in

this context having its orthodox meaning of costs of a legal nature, but we say it is inconsistent with the Tribunal itself, still less a cost judge, having determined what is a reasonable rate of return for a funder which has speculated its money.

Now, the variables which we will need to go into that, one would need to look at the cost of the money, the risk of the case, the duration the funder is out of its money, but what is the profit that the funder is going to be allowed to take for engaging on a speculation which others in the market weren't willing to speculate upon? One only has to start unpicking it before, in my respectful submission, one sees that the Tribunal and the cost judge is confronted with a task of a totally unfamiliar nature for which there is not a precedent, and which there is no guidance at all in the rules as to how to discharge.

Without at this late hour inviting the Tribunal to turn it up, the Tribunal will remember that the guide says that where any application of this sort is concerned, notice has to be given to the specified charity, and the specified charity turns up in front of the Tribunal and argues, presumably, "No, we want this money", and I hope it is fanciful to suggest that one might very quickly be reduced to a rather unseemly spectacle as one sometimes is in probate disputes where people are arguing over who should be the beneficiaries of the bequest of a rich uncle, and there is a charity who says, "Well, we want the money", there is a funder who says, "Well, we want the money", and there is an argument, if either of them gets the money how is it to be apportioned.

That is not to say, of course, that it might not have been the intention of Parliament that this entirely novel process was undertaken, but it does, in my submission, take us back to the question that I will pose rhetorically, if that is really what Parliament intended, then why was clear language not used, why are there no footprints to this effect in the travaux preparatoires, and why is there nothing in the rules that gives the remotest element of guidance to the unfortunate Tribunal chairman or cost judge who is having to quantify sums due under this jurisdiction, and be a fair arbiter between the competing interests of funder on the one hand and specified charity on the other?

Sir, I do not know if that is a convenient moment, given the hour.

THE PRESIDENT: That concludes the part on funding, I take it, on the recoverability under the funding agreement.

MR. WILLIAMS: It concludes the submissions I was making about the practical difficulties. I have got -- I probably would want another five or ten minutes to finish that, and then, as you know, there are really just some relatively short points about the £10 million and so on, so --

THE PRESIDENT: Yes. So you will be about half an hour tomorrow morning.

MR. WILLIAMS: I do not know if you have in mind starting at 10 o'clock again, or whatever, if 10 o'clock I would hope to be done by 10.30.

THE PRESIDENT: Well, that is why I was asking. I mean, if you were keen to start at 10.30 and you were done by 11, we have then got Mr. Bacon. I do not know how long you are proposing to be.

MR. BACON: Very short indeed. I am not going to be long. An hour would be sufficient.

THE PRESIDENT: Yes. I am just wondering whether, in fact, even with replies or counter-replies or goodness knows what, we really need to start at 10.

MR. WILLIAMS: Sir, you might very well be right. Mr. Bacon and I have had, I hope, a constructive discussion about replies. I do not think either of us is expecting to be at the throat of the other about who gets the last word, and in any event it is a matter for you. I would hope that 10.30 would accommodate us finishing by 1 pm.

THE PRESIDENT: I would have thought so, comfortably. We will say 10.30.

MR. WILLIAMS: Thank you, sir.