**IN THE COMPETITION APPEAL TRIBUNAL**

Case No. : 1312-1325, 1350/4/12/20(T)

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP
(Remote Hearing)

Tuesday 1st December 2020

Before:
The Honourable Mr Justice Roth
Tim Frazer
Paul Lomas
(Sitting as a Tribunal in England and Wales)

BETWEEN:

Dune Group Limited and Others

-v-

Visa

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# A P P E A R AN C E S

Kassie Smith QC and Fiona Banks (On behalf of Dune, Adventure Forest Limited and Westover Group)
Laurence Rabinowitz QC, Brian Kennelly QC and Daniel Piccinin (On behalf of Visa)

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**Tuesday, 1 December 2020**

**(10.30 am)**

**(Proceedings delayed)**

**(10.40 am)**

**MR JUSTICE ROTH:** Good morning, everyone.

**MR RABINOWITZ:** Good morning.

**MR JUSTICE ROTH:** This is the Dune Group v Visa case. I should say at the outset that this is, of course, just as much a court hearing as if everyone was physically present in the courtroom in Salisbury Square House. It follows that, while an official recording is being made of these proceedings and a transcript will be provided in the usual way, it is a contempt of court for anyone who may be participating or watching online to make any recording or any visual image of these proceedings, and it can be punishable as a contempt of court.

If any of you lose connection at any time, just send a message through to registry, or if you have lost sound, and we will pause the proceedings until you can rejoin.

We will, as usual, take a break in the middle of the morning at a suitable time. That's particularly important with these online hearings, which I think everyone finds rather more tiring than a live physical hearing.

With that, I think, Mr Rabinowitz, it is your client's application.

**Application by MR RABINOWITZ**

**MR RABINOWITZ:** Indeed. Good morning, sir and tribunal.

As the tribunal know, I appear for Visa in this matter, together with Mr Brian Kennelly QC and Mr Daniel Piccinin. My learned friends, Ms Kassie Smith QC and Ms Fiona Banks, appear for the claimants, or the respondents to this application.

The tribunal will hopefully have received from both parties skeleton arguments dealing with the application and, indeed, a supplemental skeleton argument from us dealing with the abuse of process point.

**MR JUSTICE ROTH:** Yes, we have, and thank you for those. We have also read the Budapest Bank case, which is clearly at the heart of the application, and the Court of Justice judgment in MasterCard as well.

**MR RABINOWITZ:** I'm very grateful. It sounds from that as if the tribunal has a good sense of what the application is about, and the tribunal will therefore know that it is our application for an order that this court, or this tribunal, make a reference to the CJEU of a single point of law, and that relates to the appropriate counterfactual to be adopted in a case such as the present.

**MR JUSTICE ROTH:** The question, I think, if I can interrupt you, just to be clear, because it's slightly changed, I think, is that which we find at paragraph 42 of your skeleton. Is that right?

**MR RABINOWITZ:** Yes, so it is. I just want to turn it up to make sure your reference is the same as mine. Paragraph 42 on page 18.

**MR JUSTICE ROTH:** Correct.

**MR RABINOWITZ:** You will see from that question that, in effect, it poses the issue as whether in a claim alleging an infringement of article 101, should each scheme's MIFs be judged against the counterfactual in which the other scheme remains free to compete by setting its own MIF independently at higher positive rates.

As the tribunal will know, it is Visa's position that that question should be answered yes. In other words, in a claim against Visa alone for an arrangement to which it is a party but not MasterCard, whilst it may be right to proceed on the basis that there was no Visa agreement setting positive MIFs, it isn't right, we

say, that the same should apply to MasterCard, who is not alleged to be party to the same arrangements.

The claimants, on the other hand, say that notwithstanding that MasterCard is not alleged to be a party to the same arrangement as Visa, its MIFs should be constrained in exactly the same way, and we say, with respect, that that is wrong and is inconsistent with what is now said by the CJEU in Budapest Bank.

**MR JUSTICE ROTH:** Is this a question of law? Because, of course, we can only refer questions of law.

**MR RABINOWITZ:** It is a question of law. It is a question of law, as we will see when we go through the approach in particular the Court of Appeal have taken, but I'm going to say something about the three first instance decisions which have also grappled with this.

In a sense, it is how you, as a matter of law, construct the counterfactual. What assumptions should you make? I suppose there are two key issues which arise in relation to that, and we may as well get to the nub of this straight away.

The first key issue is whether, in looking at questions of restraint, anti-competitive restraint, on the acquiring market, is it right, as the Court of Appeal said in the appeals from the first wave of cases which went to the Court of Appeal, that you focus solely on the position in the acquiring markets, so that, as the Court of Appeal said, you should not have regard at all to what might be happening in either the inter-scheme markets or in the issuing markets? Just to expand a little bit on that, as the tribunal will have picked up, we say that, in the absence of the Visa scheme, what would have happened is that MasterCard would have continued to have a scheme which involved positive interchange

fees. The effect of that would be that all issuers would wish to be a party to the MasterCard scheme rather than the Visa scheme, which didn't offer them the opportunity of positive interchange fees. A consequence of that would be a huge migration of issuers to the MasterCard scheme, which would have an effect on the acquiring market, in the sense that, if all issuers, or almost all issuers, were MasterCard issuers rather than Visa issuers and you no longer had to worry about Visa having positive MIFs, which is why you'd have that migration to the MasterCard scheme. The effect of that would actually be adverse on the acquiring market. Merchants would end up paying more because, in the absence of Visa competing, MasterCard could have unconstrained positive MIFs and it would have an effect on the market.

Now --

**MR JUSTICE ROTH:** If I can interrupt you, sorry, this is what I think has been described, in shorthand, as the "death spiral".

**MR RABINOWITZ:** In a particular context. In a sense, the context that you describe is particularly relevant when you're dealing with objective restraint -- objective necessity/ancillary restraint. But it is described in both contexts, that is to say, is there an anti-competitive effect; and in the context of the arrangement about objective necessity.

**MR JUSTICE ROTH:** But it is the same scenario, essentially, that everybody goes over, or almost everyone, to the other issuer -- the other scheme.

**MR RABINOWITZ:** Exactly that. Now, just going back to why this is a legal point, the Court of Appeal, in the appeals to it from the three cases which have formed part of the first wave, in effect said that Mr Justice Popplewell, and indeed this tribunal, which heard the first of the three cases, made an error of law in having regard to what was happening in the inter-scheme or issuing

market, and that it should never have, in a sense, countenanced this argument, this death spiral argument, because the only relevant market was the acquirer merchant market. Now, in our respectful submission, actually, that was a misreading of what the CJEU said in MasterCard, but that it is the wrong approach is now absolutely clear, we would respectfully submit -- I don't need to go that far, and perhaps I shouldn't at this stage -- but real doubt must have been thrown on that as a result of the approach taken by the CJEU in Budapest Bank, who plainly look at the effect of these arrangements at inter-scheme level and issuer level, even in a case which is concerned with the effect of competition on the acquirer merchants' side of the two-sided markets. So that's the one -- in a sense, I'm talking about legal errors, but that's one issue of law which arises.

The second issue of law which arises is this, and, again, it is best identified by looking at what the Court of Appeal said, or at least me describing what the Court of Appeal said. Actually, it is even going to the original CAT decision.

The original decision by this tribunal in the MasterCard case which came before it asked itself whether, in constructing the counterfactual, you should assume, for the purposes of that counterfactual, that Visa, as it was in that case, would be constrained in exactly the same way as MasterCard, and this tribunal, when faced with that question, said it would be wrong to make that assumption, that Visa would be constrained in the same way as MasterCard, because it said, in testing to see whether the MasterCard scheme was unlawful, it was wrong to make an assumption about unlawfulness so as to constrain the Visa scheme in the same way.

Now, when this went to Mr Justice Popplewell, or when a similar point arose in front of Mr Justice Popplewell, as to whether it was right to make an assumption

that, in a case against MasterCard to which Visa was not said to be a party to the arrangement, you should make an assumption that Visa would not be allowed to have positive MIFs if MasterCard would have positive MIFs, you will find in Mr Justice Popplewell's analysis a rather long discussion about logic, about whether, as a matter of logic, it is right or not right to assume that the scheme which was not the subject of the attack in question would need to be similarly constrained.

There is a discussion about whether you constrain unlawfulness -- whether you constrain anything which might be unlawful, and there is also, as one sees in particular when one gets to the Court of Appeal on this, an assumption made by the Court of Appeal that you should take into account the fact that the regulators would never have allowed, let's say Visa, to continue adopting positive MIFs in circumstances where MasterCard were not allowed to do so. That was the issue under consideration.

That raises, again, an issue of law, which is the extent to which you should have regard to conduct which would only arise as a result of pressure or action taken by regulators, which is, as you will see, very much at the heart of what the Court of Appeal made of this. It effectively said it is unreal, or unrealistic, to think that where one of the schemes wasn't allowed to do it, for the purposes of the assumption, the regulators would stand by whilst the other scheme continued to do that, to do the same thing.

**MR JUSTICE ROTH:** Does it need action by regulators? There can be regulations about this, and there have been, as we know.

**MR RABINOWITZ:** Indeed.

**MR JUSTICE ROTH:** But article 101 is not a matter of regulation.

**MR RABINOWITZ:** No, it is not a matter of regulation.

**MR JUSTICE ROTH:** It is just certain conduct is unlawful.

**MR RABINOWITZ:** Certain conduct is unlawful, and the question is, in the context of testing whether conduct is unlawful, which is what this is about, do you make an assumption about unlawfulness? Do you make an assumption that the regulator would, in effect --

**MR JUSTICE ROTH:** Well, you don't need a regulator. That's the point I'm making. If you are saying, is somebody engaging -- to take a slightly crude example -- in criminal conduct, is it criminal? Do you assume that, if it is criminal, then how would other people behave?

**MR RABINOWITZ:** Indeed. And I suppose the question is, do you carry on to how the other people would behave? In a sense, the conclusion which you are testing, namely, that it is criminal. That is where this tribunal, in the first of the cases which came before it, said you don't do that, because you're testing to see whether it's criminal.

Mr Justice Popplewell thought you should do that. The Court of Appeal --

**MR JUSTICE ROTH:** Sorry, Mr Justice Phillips.

**MR RABINOWITZ:** Popplewell.

**MR JUSTICE ROTH:** I thought Mr Justice Popplewell also --

**MR RABINOWITZ:** For a different reason, which I will come on to, but he basically said, because he took the view that this tribunal had gone wrong and it had made the wrong assumption, he would constrain Visa in a case against MasterCard, provided the schemes were materially identical. He then concluded that the schemes were not materially identical, and because of that, he didn't constrain, in a sense, the scheme which was not under attack.

You then get to Mr Justice Phillips in the Visa case, who basically says, "You're all dancing on the head of a pin. You have all taken the wrong approach. You

shouldn't be testing this as a matter of logic and worrying about whether the arrangement for which you are testing lawfulness should -- you apply to another party who is not the subject of the case an assumption that would only arise if you are right about lawfulness". He effectively said, "Stand back, this is all unreal".

In a sense, with respect to Mr Justice Phillips, it was easy for him to take that slightly "on a pedestal" approach because he had already concluded that the scheme was not anti-competitive, as you know. So this was an obiter comment on his part as to how would one test this in circumstances where he had found that, even though the scheme would reduce prices, it did not distort competition. So that's how things stand.

You actually have two first instance cases adopting the asymmetrical counterfactual, but for very different reasons. As I have said, Mr Justice Popplewell gets there by a very different route to the route that the CAT gets there.

Mr Justice Phillips says, "This is all unreal. I'm not engaging in this. I'm not adopting a counterfactual in circumstances where we assume that the Visa arrangement can't take place because -- can't have positive MIFs, I'm going to assume that the same would have had to apply to MasterCard, because anything else is unreal".

As I will show you when we get there, if we do get there, because I'm taking it quite quickly, when we get to the Court of Appeal, the Court of Appeal says, "We agree that Mr Justice Phillips has gone wrong -- Mr Justice Popplewell has gone wrong", I'm sorry, "and we also think that CAT has gone wrong: number one, because they look at the wrong market" -- which is the first of the legal points I say arises -- "and number two because -- it's all unreal, because you couldn't have expected the regulator" -- this is the language they use -- "to

stand by whilst the other scheme -- and allow the second scheme to have positive MIFs". That's why I mention the regulator, because the Court of Appeal mentioned the regulator in the passages I will take you to.

The other aspect of this which, in our respectful submission, is relevant is this: that which Mr Justice Popplewell and the Court of Appeal assumed could not be allowed to happen, and in relation to which they thought the regulators would not stand by, was an agreement which involved the imposition of uniform and positive interchange fees. In effect, their position was, since that is the very arrangement which is said to be unlawful and restrictive of competition, you can't, in the counterfactual, assume that anyone is adopting an arrangement which has uniform and positive interchange fees.

When you get to Budapest Bank, what one finds is that the CJEU in that case has no difficulty at all with a counterfactual in which one of the two schemes has uniform and positive MIFs, interchange fees. Bear in mind -- and this is a point that my learned friends think is important but, with respect, doesn't help them at all -- that in Budapest Bank, the agreement was a different agreement. It was a much more pernicious or obnoxious agreement than the one with which this court is concerned, because it wasn't intra scheme, it actually involved both schemes. So MasterCard and Visa and their members were all agreeing to the imposition of uniform positive interchange fees. As I say, it is more pernicious than the arrangements which we are dealing with which were intra schemes rather than interchange fees.

The counterfactual, which we will see when we get to Budapest Bank, which the CJEU thought ought to be looked at, was one in which you don't have the MIF agreement, inter-scheme agreement, but each scheme can compete on the basis of their own positive MIFs. That is a conclusion which the courts in this

jurisdiction have said would involve unlawful agreements.

So the counterfactual constructed in Budapest Bank involves an arrangement which the courts in this jurisdiction, from Mr Justice Popplewell to the Court of Appeal -- and there's an assumption for this in the Supreme Court because the point wasn't taken in the Supreme Court -- all assume you could not have, in the counterfactual world, anyone having an agreement for the imposition of uniform and positive MIFs, but that is precisely the counterfactual which the CJEU in Budapest Bank considered ought to be tested.

That is why we get the conflict. On the one hand, you have the Court of Appeal in this jurisdiction purporting to follow -- or following, as it understands MasterCard and CJEU, adopting or, in a sense, constructing a counterfactual which, in our respectful submission, cannot stand with a counterfactual which the CJEU in Budapest Bank says should be constructed.

**MR LOMAS:** Mr Rabinowitz, when you get to Budapest Bank in more detail, it would be helpful if you could address whether the court is actually saying that counterfactual ought to be tested or is saying, if the referring court and the authority have identified that as a possibility, then it is not appropriate to proceed on an objects basis rather than an effects basis.

**MR RABINOWITZ:** I will get there, but if I can foreshadow, in a sense, because it is obviously an issue which is on your mind, what is actually being said there and I will show you in detail -- it is paragraphs 81 to 83, as you will be aware.

The case comes before as an objects case and it says -- the CJEU says, "Look to see whether this is an objects case. Yes, it may be that it is one of those cases where the Commission has made clear that, in a contract of this sort, it contravenes competition on the basis of an objects analysis, in which case you can stop there. But if it is the case that there is some suggestion -- if it is

not an obvious objects case and you look at the evidence and there's material which suggests that actually the arrangement may not be constraining, restricting, affecting competition, then you have to, in the context of an effects case, look at that counterfactual to see whether or not, viewing it as an effects case rather than an objects case and having regard to that counterfactual, this is an arrangement which contravenes competition law.

I will develop in due course why, in our respectful submission, the suggestion that you would do this in an objects analysis but not in an effects analysis, with respect, doesn't make sense, because why would one -- why would positive MIFs be allowed or -- why would the investigation of positive MIFs be something which the court would be interested in in the context of objects, an objects arrangement, but then, when you get to effects, you just disregard them? With respect, in our mind that does not make sense, to have a competition law where you have those two very different outcomes.

**MR JUSTICE ROTH:** You will get to Budapest Bank in due course.

**MR RABINOWITZ:** I certainly will. To some extent, I have cut through, in my attempt to describe the legal issues, rather a lot of what I was going to say before we get to the Court of Appeal. So perhaps I can actually just go straight to the Court of Appeal to show you what they said.

If the tribunal are familiar with the Court of Appeal, I'm not going to take you back to that. Perhaps, before I go to the Court of Appeal, I ought to go to MasterCard, because obviously MasterCard in the CJEU looms fairly large in the Court of Appeal analysis. For the tribunal's note, we have that authority at volume -- I don't know whether you have volumes or electronic bundles, but volume 1, tab 15, page 239.

I think the tribunal said you had read MasterCard, which is very helpful. You will

know that -- I am going to take it fairly shortly, if I can, and just take you to the passages that matter.

As you know, the Commission in 2007 had decided that MasterCard's cross-border MIFs restricted competition on effects by inflating the price at which acquiring banks set charges to merchants. Worth noting that the Commission was not considering that the interchange fees that MasterCard applied to the vast majority of the transactions were unlawful. It wasn't looking at domestic MIFs. It was only looking at cross-border MIFs. Of course, it is the domestic MIFs which have been the focus of the English claims.

**MR JUSTICE ROTH:** Of course it had to have an effect on interstate trade.

**MR RABINOWITZ:** Indeed. In all events, MasterCard appealed the Commission's decision to the General Court, contending that the Commission had erred in law in concluding that the interchange fees restricted competition. The General Court, however, upheld the Commission's decision on most of its conclusions.

Then, in 2014, the matter went to the CJEU, and obviously the CJEU had to consider a number of issues, most of which don't actually concern us. There was, however, some consideration given as to whether the General Court had adopted the correct counterfactual and whether the Commission had made an error in failing to consider what the actual counterfactual hypothesis would have been in the absence of the MIF.

This issue arose both in relation to objective necessity and in relation to restriction of competition. To be clear, though, MasterCard was not running the asymmetric counterfactual in that case in relation to either issue. Its argument was that a zero MIF counterfactual was not appropriate at all, whether symmetrical or otherwise, for either issue.

In this context, can I just show the tribunal some short extracts from how the CJEU dealt with this point. Can I ask you, please, to go first to page 257. At paragraph 96, one sees MasterCard's principal argument in relation to the counterfactual -- this is in the context of objective necessity. You will see the CJEU says a different approach needs to be taken depending on whether you're looking at counterfactuals for the purpose of objective necessity as opposed to restraint.

Paragraph 96:

"By the second and third parts of the first plea in the main appeal, which is appropriate to deal with together, the appellants complained that the General Court failed to assess the restriction of competition constituted by the MIF, and therefore the issue of the objective necessity of those fees in its proper context, by permitting the Commission to rely on a counterfactual hypothesis the prohibition of ex post pricing that would never in fact occur. The Commission's view that some of the problems created by elimination of the MIF could be resolved by prohibiting ex post pricing is very different from an assessment of what would actually occur if the MIF were eliminated. The appellants claim that the General Court did not respond to the argument that such a prohibition simply would not occur without a regulatory intervention but merely stated that the scenario envisaged did not have to be the result of market forces. By inserting a fictional condition in its analysis, the prohibition of ex post pricing, the Commission failed to comply with its obligation to assess the effects of the MIF on competition by comparison with what would actually occur in their absence."

One finds the court's answer to that point at paragraphs 110 to 111 of this judgment at page 259:

"In that regard, as is apparent from paragraph 97 [I think it should be paragraph 96] of the present judgment, the appellants also submit in essence that the General Court wrongly failed to penalise the Commission for not having tried, in the decision at issue, to understand how competition would function in the absence both of the MIF and of the prohibition of ex post pricing, a prohibition which the appellants would not have chosen to adopt without a regulatory intervention. However, the alternatives on which the Commission may rely in the context of the assessment of the objective necessity ..."

So that's what's being talked about here:

"... of a restriction are not limited to the situation that would arise in the absence of the restriction in question, but may also extend to other counterfactual hypotheses based, inter alia, on realistic situations that might arise in the absence of that restriction. The General Court was therefore correct in concluding, in paragraph 99 of the judgment under appeal, that the counterfactual hypothesis put forward by the Commission could be taken into account in the examination of objective necessity of the MIF insofar as it was realistic and enabled the MasterCard system to be economically viable."

So what the court is saying here is that the counterfactual for objective necessity does not have to be exactly what would have happened in the absence of the restrictive agreement. The Commission can also consider other realistic scenarios because the question on this issue is just whether the restriction was necessary for MasterCard to survive. As we will see, the court makes clear that the position is rather different for the analysis of restriction of competition.

Can I invite the tribunal next to go, please, to paragraph 127 on page 262. You will find there, just over halfway down the page, a reference to RBS's appeal.

RBS was supporting MasterCard and, as the tribunal can see, RBS's appeal related to restriction of competition rather than objective necessity. At paragraph 128, one sees the point that they were making about the counterfactual, and it is this:

"First of all, in assessing whether a decision has a restrictive effect on competition, the Commission should have considered what the actual counterfactual hypothesis would have been in the absence of the MIF. By not penalising that omission, notably in paragraph 132 of the judgment under appeal, and by thus relying solely on the economic viability of the prohibition of ex post pricing rather than on any consideration of the likelihood of such a prohibition actually being adopted, the General Court erred in law by confusing the legal conditions for objective necessity and those for effects on competition."

Perhaps I might just, at this stage, also draw to the tribunal's attention a point which LBG, Lloyds Bank Group, made on the appeal -- they, too, were supporting MasterCard's appeal. Can I, for this purpose, invite the tribunal to go to paragraph 140, which you will find on page 264:

"Next, in the light of the parties' arguments and in particular the economic evidence, the General Court, according to LBG, erred in law in excluding various elements from the analysis. In particular, in considering an infringement of article 81(1), the General Court failed to recognise the importance of constraints from other payment systems and the relevance of the two-sided nature of the system, which, according to the General Court, are relevant only in the context of 81(3). In LBG's submission, in order to rule that the Commission had demonstrated to the requisite legal standard that there was a restriction on competition, the General Court had to be satisfied that the Commission had considered the alleged restriction of competition in its proper

context."

As the tribunal sees, LBG's complaint was that the General Court had failed to recognise the importance of constraints from other payment systems and, indeed, the relevance of the two-sided nature of the system. Again, just to be clear, this wasn't raising the asymmetric counterfactual, it was just a general point about the need to consider the benefits of MIFs in those other markets.

So far as concerns the RBS point about the counterfactual, one finds this answered by the court at paragraph 161 at page 267.

As regards RBS's criticism, summarised in paragraph 128 of that judgment that:

"In assessing whether a decision has a restrictive effect on competition, the Commission should have considered what the actual counterfactual hypothesis would have been in the absence of the MIF, it should be noted that the Court of Justice has repeatedly held that, in order to determine whether an agreement is to be considered to be prohibited by reason of the distortion of competition which is its effect, the competition in question should be assessed within the actual context in which it would occur in the absence of the agreement in dispute."

Then one has a lot of cases citing, and there at the end of that:

"As the General Court rightly held in paragraph 128 of the judgment under the appeal, the same applies in the case of a decision of an association of undertakings within the meaning of article 81."

Then if I can pick this up again at paragraph 165, lower down that page, and I'm going to take the tribunal, if I may, to what is said between 165 and 169:

"In that regard, the Court of Justice has already had occasion to point out that, when appraising the effects of coordination between undertakings in the light of article 81, it is necessary to take into consideration the actual context in which

the relevant coordination arrangements are situated. In particular, the economic and legal context in which the undertakings concerned operate, the nature of the goods and services affected as well as the real conditions of the functioning of the structure of the market or markets in question."

Leaving out the citations and going to the next paragraph:

"It follows from this that the scenario envisaged on the basis of the hypothesis that the coordination arrangements in question are absent must be realistic. From that perspective, it is permissible, where appropriate, to take account of the likely developments that would occur on the market in the absence of those arrangements."

Paragraph 167:

"In the present case, however, the General Court did not in any way address the likelihood or even plausibility of the prohibition of ex post pricing if there were no MIF in the context of its analysis of the restrictive effects of those fees. In particular, it did not, as required by the case law set out in paragraphs 155 and 156 of the present judgment, address the issue as to how, taking into account in particular the obligations to which merchants and acquiring banks are subject under the Honour All Cards Rule, which is not the subject of the decision at issue, the issuing bank could be encouraged, in the absence of MIF, to refrain from demanding fees for the settlement of bankcard transactions.

"Admittedly, as is apparent from paragraph 111 of the present judgment, the General Court was not obliged, in the context of the examination of the ancillary nature, as referred to in paragraphs 89 and 90 of the present judgment, of the MIF to examine whether it was likely that the prohibition of ex post pricing would occur in the absence of such fees. Nevertheless, taking into account

the case law referred to in paragraphs 161 and 165 of the present judgment, the situation is different in the separate context of establishing whether the MIF had restrictive effects on competition.

"In those circumstances, it is correctly submitted in the present case that, in relying on the single criterion of economic viability, notably in paragraphs 132 and 143 of the judgment under appeal, to justify taking into consideration the prohibition of ex post pricing in the context of its analysis of the effects of MIF on competition, and by failing, therefore, to explain in the context of that analysis whether it was likely that such a prohibition would occur in the absence of MIF otherwise than by means of regulatory intervention, the General Court made an error of law."

So the tribunal can see here there is a difference between approach to counterfactuals depending on whether the issue arises in the context of, on the one hand, the restriction issue and, on the other hand, the objective necessity issue.

In the context of restriction, which is, again, what we are concerned with here -- we are not concerned here with objective necessity -- the Commission needed to consider what would actually have happened in the absence of that agreement, and it is not good enough to construct some other realistic scenario.

I would also just emphasise in these passages the last sentence of paragraph 169, where the CJEU says you need to look at what would actually have occurred otherwise than by means of regulatory intervention.

So when you construct the counterfactual, what you are concerned with is what the parties would actually do; not with what a regulator might have ordered them to do.

**MR JUSTICE ROTH:** Because a prohibition on ex post pricing would probably need regulation. It is difficult to see how it could arise under article 101.

**MR RABINOWITZ:** Indeed. What effectively the Commission said was -- MasterCard had said, "Look, if we don't have these default MIFs, what would have happened would be -- the law of the jungle -- the issuers would be imposing ever-higher ex post fees on the acquiring banks". The Commission said, "No, that wouldn't have happened. You would have had a prohibition on ex post pricing". The question is, how would that have arisen absent the regulator? The CJEU here says, "Forget about what may have happened as a result of regulator pressure. You need to look at what the parties would actually have done. That is what you are concerned about".

**MR JUSTICE ROTH:** Likely to have done, I suppose.

**MR RABINOWITZ:** Indeed, likely to have done. When they were actually doing something, obviously in the real world that makes it more likely they would have done it in the counterfactual.

So that's dealing with the RBS point.

So far as LBG's point is concerned about having regard to related markets and the relevance of the two-sided nature of the system, the CJEU addresses this over the page at page 269, between paragraphs 177 and 182.

**MR JUSTICE ROTH:** Before you go on to that, the court goes on to say, "Well, although the court made an error of law, we can consider whether there are the facts and findings there on which we can take the decision and substitute correct grounds".

**MR RABINOWITZ:** Yes, they do.

**MR JUSTICE ROTH:** I think they found that it was likely that there would have been a prohibition of ex post pricing, and that's what we get, don't we, at 173?

**MR RABINOWITZ:** Exactly.

**MR JUSTICE ROTH:** So, in fact, that was the likely scenario.

**MR RABINOWITZ:** Indeed. But obviously what matters for present purposes, because this case is not the same case, is what is the approach that one is to take.

LBG, as I say, their point the court answers or addresses beginning at paragraphs 177 and going to 182. If I can invite -- I'm going to take the court through this, because the Court of Appeal, in my respectful submission, rather misunderstood what the CJEU was saying here. We don't say what the CJEU was saying was wrong, but when we come to look at what the Court of Appeal understood this to be saying, in our respectful submission, they did not entirely understand the basis of the CJEU's ruling here. Beginning at paragraph 177:

"As regards the argument also referred to in paragraph 140 of the present judgment by which LBG accuses the General Court of having ruled the two-sided nature of the system to be relevant only in the context of article 81(3), it should be borne in mind that, as is apparent from paragraph 161 of the present judgment, and as LBG moreover has submitted, the General Court was obliged to satisfy itself that the Commission had examined the alleged restriction of competition within its actual context. In order to determine whether coordination between undertakings must be considered to be prohibited by reason of the distortion of competition which it creates, it is necessary according to the case law referred to in paragraph 165 of the present judgment to take into account any factor that is relevant, having regard in particular to the nature of the services concerned as well as the real conditions of the functioning and the structure of the markets in relation to the

economic or legal context in which the consideration occurs, regardless of whether or not such a factor concerns the relevant market."

So that's how they start:

"In the present case, the General Court found in paragraph 173 -- and this has not been directly challenged in the present appeal -- that the Commission could use the acquiring market as the relevant market for its analysis of the competitive effects of the MIF. Furthermore, as is apparent from 176 of the judgment under appeal, in its definitive assessment of the facts which is not contested in the present appeal, the General Court found that there are certain forms of interaction between the issuing and acquiring sides, such as the complementary nature of the services and the presence of indirect network effects, since the extent of the merchants' acceptance of cards and the number of cards in circulation, each affects the other.

"In those circumstances, the economic and legal context of the coordination concerned includes, as the appellants, RBS and LBG, maintain, the two-sided nature of MasterCard's open payment system, particularly since it is undisputed that there is interaction between the two sides of the system."

So that's an important finding:

"However, in the present case, as is apparent from 181 and 182 of the judgment under appeal, the arguments essentially put before the General Court which are not contested in the present appeal did not include the argument now advanced by LBG in the context of the present appeal. According to which, in order to assess a restriction of competition in its proper context, it is necessary to take into account the two-sided nature of the system in question. On the contrary, the criticism of the first instance concerning the failure to take the two-sided nature of the system into account merely highlighted the

economic advantages that flow from the MIF."

Pausing there, one sees that, what the CJEU notes is that the criticism which is now made arising from the interrelationship between the two sides of the system and the effect that that might have on an analysis of restriction of competition was not a point which the General Court was asked to consider. It was asked to consider the interaction between the two sides of the market for a very different purpose, and that, with respect, is fundamental to what the CJEU goes on to say about this.

Then at paragraph 181:

"In the light of that finding, the General Court therefore correctly concluded ..."

Sorry, I don't think I finished reading 180. I think I stopped halfway through:

"As is evident from paragraph 93 of the present judgment and from the very wording of 81, where it is established that a measure is liable to have an appreciable adverse impact on the parameters of competition such as the price, the quantity and the quality of goods and services and is therefore covered by the prohibition rule laid down in article (interference), such advantages can be considered only in the context of 81(3)."

In other words, the point that LBG had been relying upon with regard to the interaction between the markets was a point very different to -- the point about which they complain was it affected whether there was a restriction of competition. In relation to the point on which they sought to rely on it, the court says, well, that only arises in the context of 81(3) and, actually, you didn't complain about the point you're now complaining about.

Then the CJEU says this:

"In the light of that finding, the General Court therefore correctly concluded ..."

In other words, having regard to what LBG was actually complaining about:

"... in paragraph 182 of the judgment under appeal that the criticisms presented to it in relation to the two-sided nature of the system had no relevance in the complex text of a plea relating to the infringement of article 81(1), insofar as they entailed the taking into account of economic advantages under the paragraph. The General Court also correctly concluded that any economic advantages that may ensue from the MIF are relevant only in the context of the analysis under 81(3). It follows from this that LBG's argument in relation to the two-sided nature of the system is based on an erroneous interpretation of the judgment under appeal and is not, therefore, well founded."

We will come back to this, as I say, when we look at the Court of Appeal.

That is all I was going to show the tribunal from MasterCard. Having done that, and having identified what, in a sense, happened in the three first instance decisions in the first wave of the MIF litigation in this jurisdiction, can I then invite the tribunal to go to the decision of the Court of Appeal in the consideration of the three cases which came to it on appeal. You have that if you have hard copy bundles authorities volume 3, tab 19. It begins at page 790. Again, I think I made this point earlier, the relevant part of the Court of Appeal's analysis in relation to counterfactuals comes up in two sections of the court's judgment. It comes up in relation to the court's assessment of the restriction of competition where counterfactuals is relevant and it comes up again also in relation to the court's consideration of objective necessity/ancillary restraints. It is necessary to look at both because some part of the reasoning, perhaps, for the one with which we are concerned, which is restriction of competition, in our respectful submission may also pop up when the Court of Appeal is considering objective necessity.

Can I then invite the tribunal, please, to go to paragraph 171 of this judgment at

page 823. Just before we pick it up at paragraph 171, can I invite the tribunal to glance at paragraph 159 where the Court of Appeal refers to Mr Justice Popplewell's approach to the relevant counterfactual, namely, that for him there was no distinction to be drawn between a restriction counterfactual and an ancillary restraint counterfactual. That's the first couple of lines of 159:

"Mr Justice Popplewell concluded, at 154/155, that there was no distinction to be drawn in this case between a restriction counterfactual and an ancillary restraint counterfactual and that one realistic counterfactual which would, or might, arise was, one, a zero MIF, which is the same as no MIF with the prohibition on ex post pricing. He held that, subject to the death spiral argument, the MasterCard MIF did amount to restriction of competition on the acquiring market by comparison with a counterfactual of no MIF."

Going down to paragraph 161, I'm going to read to the tribunal from 161 to 164, if I may:

"Mr Justice Popplewell considered that the death spiral argument applied to the zero MIF counterfactual at 163 onwards. In our judgment, Mr Justice Popplewell fell into error, particularly at 182 to 185, in considering the death spiral argument at all in relation to the question of whether the measures were a restriction of competition under article 101(1). It is common ground that the correct approach to deciding the primary 101(1) question was set out at paragraph 111 in Cartes Bancaires as follows: 'determining whether, in the absence of the measures in question, the competitors' situation would have been different on the relevant market, that is to say, whether the restrictions on competition would or would not have occurred on this market'.

"It is common ground that the relevant market for article 101(1) purposes is the

acquiring market. That is stated in the first issue agreed between the parties under 101(1). But the death spiral argument does not concern a comparison between the state of competition in the acquiring market with and without measures in question. Instead, it concerns the effects on the inter-system market and the issuing market of issuers switching to a competing scheme in order to earn MIFs in the absence of MIFs being imposed in the MasterCard scheme. It is true that the putative decline of business in the inter-system market and the issuing market affects the level of business in the acquiring market, but, in our judgment, that is not the point. The first question is whether the measures in question restrict competition in the acquiring market. The second question is whether the scheme can show that the restriction is objectively necessary for a scheme of that type to survive, at which stage it is legitimate to consider both sides of the two-sided market and the inter-system market as was common ground in argument. The third question is whether there is an exemption of 101(3). It is not legitimate to consider the death spiral argument at the first stage."

That is, with respect, a critical finding that the Court of Appeal make and that goes back to the error -- to the legal point that I raised right at the outset:

"The General Court made this point clear at paragraphs 172 and 173 as follows: the Commission took the view that the four-party bankcard systems operate in three separate markets -- an inter-system market, an issuing market and an acquiring market -- and relied on the restrictive effect of the MIF on the acquiring market, and it must be held that such a definition is not manifestly erroneous. That approach was approved at 178 and 180. It is no justification for the course Mr Justice Popplewell adopted that the CJEU's decision at 177 to 179 also mentioned the need to consider the restriction within its actual

context and the possibility of taking into account the two-sided market at the 101(1) stage. The CJEU had rejected, at paragraphs 180 to 182, the argument that the Court of Appeal ought to have taken into account the economic advantages of the two-sided nature of the system at the 101(1) stage. The CJEU approved the court's concentration on the acquiring market at the 101(1) stage and said that no contrary argument had been addressed to that."

Just pausing there, as the tribunal sees, what the court says is that Mr Justice Popplewell went wrong in relation to his restriction counterfactual analysis because, in considering the relevant counterfactual, even at the restriction of competition stage, taking into account the asymmetric counterfactual, he took into account the position in the wrong market. In particular, they say, he looked at the issuing market and the inter-system market because that's where the death spiral arises, that's where the asymmetric counterfactual is relevant.

The Court of Appeal doesn't dispute that that would have had an effect on the acquiring markets, and you will recall what the CJEU said in MasterCard. It just says, as a matter of principle, it is wrong to have regard to what is happening in any markets other than the acquiring market here. It actually thinks that that is what the CJEU said in MasterCard, in those passages that I took you to.

With respect, as you have seen, that is not what the CJEU said. It rather depends on the argument. It said you couldn't look at it for the purposes of 101(1) when you're looking at economic benefits, but for the purposes of the restriction analysis, you did need to look at the associated markets to the extent that it had an effect. Its point was, you can't criticise the General Court

for not doing that because you didn't argue that in front of the General Court. With respect, that is a point that the Court of Appeal overlook. But it is a point which comes up again in Budapest Bank, as I shall show you. So that's why they say Mr Justice Popplewell went wrong.

Lest one thinks that this tribunal avoided the same bullet, no --

**MR JUSTICE ROTH:** What you are saying is, in essence, if I have understood it correctly, the CJEU is only saying, "We can only decide on the arguments put, and that was not a point that was argued and so you can't criticise where a Court of Cassation, essentially, criticise the General Court's judgment because the point wasn't taken before them".

**MR RABINOWITZ:** Exactly. In fact, it takes a view which is completely different to the Court of Appeal's understanding. It just says, that is not the point that was raised before the General Court. The point that was raised before the General Court was a rather different point, about economic benefits. And the General Court got that point right.

So they say Mr Justice Popplewell got this wrong. But, as I say, when we get to Budapest Bank, you will see again that they do think regard needs to be had to the inter-scheme market, and indeed to what happens on a death spiral. Inter-scheme issuing market, not just the acquiring market. So long, of course, as that is going to have an effect on the acquiring market.

Now, the Court of Appeal then turned to the tribunal, to this tribunal, and its approach to article 101(1) --

**MR JUSTICE ROTH:** Sorry, where are you now?

**MR RABINOWITZ:** I'm going to go to paragraph 175, if I may.

**MR JUSTICE ROTH:** They first deal with Mr Justice Phillips.

**MR RABINOWITZ:** I will come back to that. They deal with him in relation to

a different point, actually. Paragraph 175, page 827. Can I just read 175: "The CAT ..."

**MR JUSTICE ROTH:** Would you like us to read it to ourselves?

**MR RABINOWITZ:** Whatever the tribunal prefer.

**MR JUSTICE ROTH:** If you are going to read the whole paragraph.

**MR RABINOWITZ:** It is just 175.

**MR JUSTICE ROTH:** Why don't we just read that?

**(Pause)**

**MR RABINOWITZ:** The tribunal has read that.

**MR JUSTICE ROTH:** Yes, a somewhat similar point.

**MR RABINOWITZ:** Exactly. It is the same point. They say this tribunal also went wrong because this tribunal also regarded some market other than the acquiring market. This tribunal looked at the inter-system market and the issuing market and that's where the death spiral argument arises. That, says the Court of Appeal, on the basis of its understanding of MasterCard in the CJEU, was wrong, but, as I respectfully submit, that's because it misunderstood what was being said.

The Court of Appeal then turns back to this topic a little later in its judgment in the context of its consideration of objective necessity. I will come back to Mr Justice Phillips. I would again just note -- I have noted this more than once, so I apologise -- that the correct -- before we go there, the views about objective -- counterfactuals in objective necessity is not directly relevant to our application today because we are concerned today with counterfactuals in restriction of competition, which, as the CJEU noted in MasterCard, is different to how you construct counterfactuals in the context of looking at objective necessity. But I do need to take you to these paragraphs because

there are some additional reasons here for rejecting asymmetric counterfactuals which may be appropriate to the restriction context as well and indeed the claimants appear to wish to rely on some paragraphs which appear in this section of the judgment. So I am going to take you to that if I may.

Paragraph 198 beginning on page 831, please. Just looking at paragraph 198, the Court of Appeal repeats that they consider Mr Justice Popplewell was wrong in relation to the death spiral issue, and his analysis of the ancillary restraint issue. Then, just moving on to paragraph 201, it begins on the next page, between paragraphs 201 and 208, one finds the passages in which the Court of Appeal explain, giving two reasons, why it considered Mr Justice Popplewell's approach to the death spiral issue was wrong. This is in the context of objective necessity. The first reason is explained between paragraphs 202 and 203, and if I can just pick that up.

**MR JUSTICE ROTH:** Is this objective necessity or ancillary restraint? I thought it was ancillary restraint.

**MR RABINOWITZ:** Ancillary restraint. One sees that at paragraph 201.

**MR JUSTICE ROTH:** Yes.

**MR RABINOWITZ:** Just looking at what they said, 201 and 202 -- again, if the tribunal would let me know whether you would prefer me to read those or to read them to yourselves.

**MR JUSTICE ROTH:** How far would you want to read?

**MR RABINOWITZ:** 202 and 203.

**MR JUSTICE ROTH:** We will read those then.

**MR RABINOWITZ:** Thank you.

**(Pause)**.

**MR JUSTICE ROTH:** Yes.

**MR RABINOWITZ:** One sees the Court of Appeal says, in short -- this is its first reason -- the counterfactuals must be realistic and a counterfactual in which one of the schemes, MasterCard, is constrained from setting default MIFs but the other scheme, Visa, continues to do so, with the competition authorities and regulators standing by and allowing this to happen is unrealistic. The critical part of their reasoning is -- they make it clear this is the critical point -- one finds at paragraph 203:

"The critical point is that the hypothesis of the asymmetric counterfactual is that one of the schemes would be prevented from setting any default but the Commission and the UK competition authorities and regulators would allow the other scheme to carry on setting its default without any restraints being imposed."

That again goes back to the point about regulators that I made at the outset. The Court of Appeal is very influenced here by its perception that the regulators would not have stood by and allowed this to happen. I would ask, when the tribunal looks at this, that it has in court what the Court of Justice in MasterCard said at paragraph 169. You do not take into account what people would do as a result of the regulators requiring them to do it. You simply look at what, as a matter of fact, they would have done. So that's the first of the reasons that they give for rejecting Mr Justice Popplewell's approach in this context.

The second reason that the Court of Appeal give is explained between paragraphs 204 and 207, beginning at the bottom of page 832 and going over to 833, and I don't invite the tribunal to go through this. One gets the nub of the point at paragraph 207. You will recall that Mr Justice Popplewell had

said that if the schemes were materially identical, then he would constrain them in exactly the same way. He concluded they were not materially identical. He concluded that they were not materially identical by asking that question with regard to both 101(1) and 101(3), and the Court of Appeal, in effect, says that that was the wrong approach -- so this is the second of the reasons -- because the only thing that mattered was whether it was materially identical for the purposes of a 101(1) analysis, not for the purposes of a 101(3) analysis. If you simply constrain yourself to looking at whether they were materially identical for the purposes of a 101(1) analysis, then, says the Court of Appeal, they were materially identical. Because of that, says the Court of Appeal, Mr Justice Popplewell should have rejected the death spiral argument and concluded that the MasterCard arrangements in respect of MIFs did contravene 101(1) and so he should have adopted the symmetric zero MIF counterfactual as well.

**MR JUSTICE ROTH:** You're not challenging 207?

**MR RABINOWITZ:** I'm not challenging that at all. It is really the other reason.

**MR JUSTICE ROTH:** Yes, the first reason.

**MR RABINOWITZ:** So that is the Court of Appeal reasoning insofar as it went to the appropriate counterfactual.

The approach that they adopted was, of course, as the tribunal is aware, the approach adopted by Mr Justice Phillips, which was to say, as you have seen, both the other tribunals simply engaged on a misconceived exercise trying to work out whether you should assume that something is unlawful for the purpose of the analysis or whether you can't do that in the context of deciding lawfulness. So the Court of Appeal said Mr Justice Phillips has it right, this is all unreal. In circumstances where you can't expect the regulators to have

stood by, they would both have been in the same situation, but important in that is the position or the weight they put on the regulators.

**MR JUSTICE ROTH:** Yes.

**MR RABINOWITZ:** The matter then goes to the Supreme Court, but it is important to understand that, when the matter goes to the Supreme Court, there is no appeal from the Court of Appeal in relation to the question of the correct counterfactual.

**MR JUSTICE ROTH:** Just to be clear, because we have the point that there was no appeal to the Supreme Court. The Court of Appeals held that, following Mr Justice Phillips reversing Mr Justice Popplewell, the only realistic counterfactual is where both schemes are subject to this prohibition.

**MR RABINOWITZ:** Correct.

**MR JUSTICE ROTH:** You say that's a finding of law and therefore it forms the basis of a point of law to be raised by a reference.

**MR RABINOWITZ:** It is a finding of law because, as the Court of Appeal itself says, critical -- the critical point is taking into account the role of the regulators.

**MR JUSTICE ROTH:** So, subject to a reference and the Court of Justice, it is binding on us?

**MR RABINOWITZ:** Indeed.

**MR JUSTICE ROTH:** So that's the current position?

**MR RABINOWITZ:** That's the current position. The president indicated -- you have the point that the counterfactual point didn't go to the Supreme Court. The way in which the appeal went forward in the Supreme Court was that, even on the basis that it was right to take some symmetric zero MIF counterfactuals, even then -- since the defendants said the MIFs didn't restrict competition, it acted like a VAT charge. Although the MIFs might have led to higher prices in

the acquiring markets, the evidence established that there was no restriction of the competitive process in the acquiring markets which operated in exactly the same way and with the same intensity whether the MIF was positive or zero or, indeed, negative. Just as VAT exists, it's part of the price, it's added onto the price, but that doesn't affect competition.

The Supreme Court obviously, as the tribunal knows, rejected that argument, and it rejected it on two bases. Number one, it said it was bound by the CJEU in MasterCard in relation to that and that any positive MIF being set was anti-competitive because, in effect, you create a floor below which there can't be negotiation, and that, said the Supreme Court, was anti-competitive. It also said that, even if it wasn't bound by MasterCard, it would have arrived at that conclusion. By imposing uniform MIFs at a particular level, you were removing negotiation below that level and that, said the Supreme Court, even without MasterCard, it would have said was anti-competitive. One needs to see how that stands when one gets to Budapest Bank, the idea that any agreement as to positive MIF is, by definition, anti-competitive. Because in our respectful submission, it is difficult to see how you can square the two findings.

**MR JUSTICE ROTH:** Isn't that a different point from the asymmetric?

**MR RABINOWITZ:** It is a different point, but, in a sense, it -- it is absolutely a different point, but it does put into some contrast, if you like, how the courts in this jurisdiction have proceeded and, in our respectful submission, something has gone wrong with the courts here.

**MR JUSTICE ROTH:** But it is not a point covered by your questions.

**MR RABINOWITZ:** No, it isn't. Can I then invite the tribunal to go to Budapest Bank. Before I do that, the president indicated that it was

appropriate to take a break for the transcribers, and it may be that I've run over.

**MR JUSTICE ROTH:** I think not just for the transcribers, I think for everyone. So shall we say until 12.00 o'clock?

**MR RABINOWITZ:** Thank you very much.

**(11.51 am)**

**(A short break)**

**(12.01 pm)**

**MR JUSTICE ROTH:** Mr Rabinowitz?

**MR RABINOWITZ:** Thank you, sir. Before we go to Budapest Bank --

**MR JUSTICE ROTH:** Sorry, I have a sound problem.

**(Pause)**. Can we try again, please? Yes, that's fine.

**MS SMITH:** Sir, I can't see you, a picture of you on the screen. I'm not sure if that is an issue. I can hear you, but I can't see a picture of you.

**MR JUSTICE ROTH:** We can, at the moment.

**MR RABINOWITZ:** I'm in the same position as Ms Smith. I can only see one member of the tribunal.

**MR JUSTICE ROTH:** Which is Mr Lomas, is it?

**MR RABINOWITZ:** Now I can see Mr Frazer as well.

**MR JUSTICE ROTH:** But you can't see me?

**MR RABINOWITZ:** We can see you now. Welcome back.

**MR JUSTICE ROTH:** Right. Well, I'm sorry about those problems.

**MR RABINOWITZ:** I was going to invite the tribunal, subject to the tribunal, next to go to Budapest Bank. Before I do that, can I make a point about the Court of Appeal's treatment of ancillary restraint and objective necessity. It is not a big point, but the tribunal may want to note that the Court of Appeal seemed to

have used those terms interchangeably. One sees that most clearly at paragraphs 58 and 59 of this judgment. I just mention that.

Budapest Bank then, at authorities bundle 4, tab 21, beginning at page 940. As the tribunal knows, we have seen this case, it originated in Hungary. It concerned an agreement involving jointly the Visa and MasterCard schemes, and indeed the participants in those schemes. In that sense, it is a very different agreement from the one that was before the English courts which was intra-scheme rather than, as well as being intra, also inter-scheme. As I said at the outset, it is much more pervasive and in a sense if there is a problem with these schemes much more pernicious than the scheme with which the English courts are concerned.

What the agreement -- it is a different agreement and, as I said, this is a point that my learned friends are interested in, but what it fundamentally had in common with the agreements which are before the English courts, of course, is that, like the English agreements, it involved an agreement to fix a uniform and positive interchange fee, or positive MIFs. Now, it just did so more widely than the ones in England did because they only operated intra-scheme. This actually operated not only within the scheme but across the schemes.

One of the questions that arose was whether such an agreement involved a restriction of competition by object and possibly also by effect. That is very much an issue before the CJEU: did it involve a restriction of competition by object and possibly also by effect on the basis that the agreement had a restrictive effect on competition? As the tribunal would have seen, the Hungarian authorities, competition authorities, found that the agreement did restrict competition both by object and also by effect. They duly imposed fines. One gets this most clearly at paragraph 11, if you want to find

a reference to it, of the judgment, page 968.

They found that it did involve a restriction of competition both by object and by effect, and they imposed fines on the participants, the parties to the agreement, including Visa and MasterCard, and we see that in the last few lines of paragraph 11 on page 968.

There were then appeals from that determination in through the Hungarian courts. It gets to the Hungarian Supreme Court, who make a reference to the CJEU, and they raise three questions. One finds the first question identified at paragraph 15, as --

**MR JUSTICE ROTH:** I think four questions, actually.

**MR RABINOWITZ:** Although the last two really collapse into one, as the CJEU analyses. So that's why I was saying three. It's certainly framed as four but actually three substantive questions arise.

The first question one sees described at paragraph 15:

"... in the first place, whether the same conduct can give rise to a finding of an infringement under 101(1) on account of both its anti-competitive object and its anti-competitive effects as independent grounds."

Second question, paragraph 19, over the page:

"Whether the MIF agreement was capable of being regarded as a restriction of competition by object in circumstances where it was suggested that the Commission had never adopted a decisive position as to whether similar agreements may be regarded as constituting such restrictions."

And then, third, and as the president says, this is really a combination of two. You see this at paragraph 24, third and final place. It is really about the circumstances in which a party -- in this case Visa -- could come to be regarded as a party to an arrangement when it was not directly involved in

defining the content of that agreement but it did enable its conclusion and also accepted and implemented it. So that's question 3.

We are obviously primarily interested in what the CJEU had to say about question 2 but, in our respectful submission, it is not irrelevant to have regard to its conclusion in relation to issue 1, question 1. One finds that -- all we need to look at is the conclusion -- if you go to page 973, paragraph 44, they say this:

"In light of the foregoing, the answer to the first question is that article 101(1) must be interpreted as not precluding the same anti-competitive conduct from being regarded as having as both its object and its effect the restriction of competition, within the meaning of that provision."

So they're basically saying you can look at the same material and the same material may be relevant to either or both findings.

**MR JUSTICE ROTH:** That's a pure point of construction of the language of article 101, isn't it?

**MR RABINOWITZ:** Indeed. I'm not getting more out of it other than what it was saying is, you can look at material. If it doesn't get you there on objects, you can look at the same material to see if it gets you there on effects.

On its consideration of the second question, as the tribunal will have seen, it begins by addressing an admissibility question. We don't need to be concerned with that. It turns to the substance at paragraph 51 on page 974. Between 53 and 54, it addresses the circumstances in which an agreement can be said to restrict competition by object. The only thing perhaps to note is the first sentence of 54:

"... the concept of restriction of competition 'by object' must be interpreted restrictively."

That's something with which the tribunal is very familiar. Then, at paragraph 55, one

has the following:

"Where the agreement concerned cannot be regarded as having an anti-competitive object, a determination should then be made as to whether that agreement may be considered to be prohibited by reason of the distortion of competition which is its effect."

Pausing there, the court is saying that, if the agreement is not one that can be said to have an anti-competitive object, you then move on to ask whether it is anti-competitive in effect, and in what follows in this paragraph it goes on to give a general indication of how that investigation into effects is to be conducted:

"To that end, as the court has repeatedly held, it is necessary to assess competition within the actual context of which it would occur if that agreement had not existed in order to assess the impact of that agreement on the parameters of competition, such as the price, quantity and quality of goods and services ..."

We have seen exactly the same thing in MasterCard, obviously, at paragraph 55, in MasterCard.

Then, looking at paragraph 60, if I can take you there, at the bottom of the page, it describes the MIF agreement:

"So far as concerns the information actually submitted to the court, it should be observed, as regards, first, the content of the MIF agreement ..."

**MR JUSTICE ROTH:** It might be worth looking at 57, how the Competition Authority approached it.

**MR RABINOWITZ:** "According to the information provided by the referring court, in its decision the Competition Authority took the view that the MIF Agreement was restrictive of competition by its object, in particular because, first, it neutralised the most significant element of price competition on the

inter-systems market in Hungary, second, the banks themselves gave it the role of restricting competition on the acquiring market in that Member State and, third, it necessarily affected competition on the latter market."

So restricted competition in the inter-system market and affected competition in the latter market; that is to say, the acquiring merchants' market. I'm grateful for that.

Then paragraph 60:

"So far as concerns the information actually submitted to the court it should be observed as regards, first, the contents of the MIF agreement that it is not in dispute that that agreement established the uniform amount for the interchange fees that the acquiring banks paid to the issuing banks when a payment transaction was made using a card issued by a bank which was a member of the card payment system offered by Visa or MasterCard."

That goes to the point I made earlier about this having precisely the same offending element as is said to be offending -- or the Supreme Court has said is offending in the MIF litigation which has taken place in this jurisdiction. It imposes uniform positive MIFs.

If I can then go on to paragraph 79 -- I'm happy to read anything else the tribunal wants me to look at. I was, for my purposes, going to go on to 79. Page 978.

**MR JUSTICE ROTH:** They discuss --

**MR RABINOWITZ:** 65 to 67 to 68, they discuss how you move from one to the other.

**MR JUSTICE ROTH:** At the end of 63, the court says it cannot be ruled out from the outset agreements such as the MIF agreement may be classified -- "may be" -- in that it neutralised one aspect of competition between the two card payment systems.

**MR LOMAS:** Again at 66:

"... it falls to the competent authority or to the court having jurisdiction to analyse the requirements of balance between issuing and acquisition activities within the payment system concerned in order to ascertain whether the content of an agreement or a decision by an association of undertakings reveals the existence of a restriction of competition 'by object' ... "

**MR RABINOWITZ:** Indeed. There is no question but that the focus of the CJEU, at that stage, was on the by objects issue. They look at the by objects issue. They say what you need to look at in that context, what might be relevant evidence on that issue. By the time you get to paragraphs 81 to 83 --

**MR JUSTICE ROTH:** That was the question, of course. That was the only question.

**MR LOMAS:** Just pausing there, at 66 it is making the well-known point that the court -- it comes up at various places in the judgment -- does not necessarily have the information, nor is it appropriate, which is the admissibility point which is dealt with in 48 and 49, for it to decide the issue. It is merely giving guidance to the referring court as to the approach it should take in deciding the issue.

**MR RABINOWITZ:** Indeed. But it is giving guidance and the guidance -- it is obviously relevant, and if a court in this jurisdiction has misunderstood the guidance, then that is obviously a matter which would need to be remedied. If a court in this jurisdiction looks at guidance given here and it considers the guidance given here is different, or may be different, to the guidance given in MasterCard, then clarity is, in our respectful submission, required.

If I can then just go on to paragraph 79, perhaps just read the first sentence of 78, because it makes clear what is being talked about in 79:

"Secondly, as regards the acquiring market in Hungary, even assuming that the MIF

had, inter alia, as its objective the fixing of a minimum threshold applicable to the services charge ..."

**MR JUSTICE ROTH:** So sorry, Mr Rabinowitz. Oh, you're on 78? Sorry, I thought you were 79. Yes, 78.

**MR RABINOWITZ:** My fault, sir:

"Secondly, as regards the acquiring market in Hungary, even assuming that the MIF agreement had, inter alia, as its objective the fixing of a minimum threshold applicable to the service charges, the court has not been provided with sufficient information to establish that that agreement posed a sufficient degree of harm to competition on that market for restriction of competition by objects to be found to exist. It is, however, for the referring court to carry out the necessary verifications in that respect."

It is looking at the acquiring market now, again in the context of objects, I'm not suggesting otherwise. Then we have this at paragraph 79:

"In particular, in the present instance, subject to those verifications, it is not possible to conclude on the basis of the information produced for this purpose that sufficiently general and consistent experience exists for a view to be taken that the harmfulness of an agreement such as that at issue in the main proceedings to competition justifies dispensing with any examination of the specific effects of that agreement on competition. The information relied on by the Competition Authority, the Hungarian Government and the Commission in that connection, that is to say, primarily that authority's decision-making practice and the case law of the Courts of the European Union, specifically demonstrates, as things currently stand, the need to conduct an in-depth examination of the effects of such an agreement in order to ascertain whether it actually had the effect of introducing a minimum

threshold applicable to the service charge and whether, having regard to the situation which would have prevailed if that agreement had not existed, the agreement was restrictive of competition by virtue of its effects."

It is now saying it may be there's not enough to conclude about objects. If that is the position, look at effects. And in that context, you need to decide whether introducing this minimum threshold, having regard to the situation that would have prevailed if that agreement had not existed, the agreement was restrictive of competition by virtue of its effects.

**MR JUSTICE ROTH:** You have to first decide whether it did actually have the effect of introducing a minimum threshold.

**MR RABINOWITZ:** Indeed. With respect, quite right. Then it is the second part of that sentence on which we focus.

As I say, they refer to the need, in that paragraph, to conduct an in-depth examination of the effect of such an agreement to consider whether it actually had the effect as the president says, having regard to the situation which would have prevailed if that agreement had not existed, by virtue of not -- "was restrictive of competition by virtue of its effects". Pausing there, what the court is saying is that, on the basis of the information before it, this agreement between the schemes, fixing the interchange fee at a positive level, is not of itself sufficient to give rise to the conclusion that there has been an objects restriction of competition. So that it is necessary to consider whether there has been a restriction by effects, and I would just note that this is the key paragraph that Visa relied on in its post-hearing submissions to the Supreme Court. As I have already mentioned, Visa said that Budapest Bank -- and this passage in particular -- was relevant to issue 1 in that appeal which was whether the mere fact that a MIF fixes minimum prices

in the acquiring market is enough to establish a restriction of competition. Visa said that this paragraph showed that it wasn't enough. Of course, the Supreme Court disagreed, as the tribunal knows.

Now, the important part of the judgment for our purposes today begins at page 979 with paragraph 81. In this passage, the court deals with a particular argument that the schemes and banks had run, which the court said needed to be investigated in the context of such an analysis and, as I shall show the tribunal, that concerns not just an investigation of whether the agreement was anti-competitive as to object, but also whether it was anti-competitive as to effects.

Can I -- I don't know whether the tribunal wants me to take you through paragraphs 81 to 83. We have set it out in our skeleton argument as well.

**MR JUSTICE ROTH:** Well, we have read it. If there are any points you want to make about it, then please do. I don't think you need read them out.

**MR RABINOWITZ:** Great. Thank you. First, perhaps I can just identify the points we make. First, as the tribunal sees, the court noted the argument that, in the counterfactual world, the interchange fees introduced within each scheme -- that is to say, Visa and MasterCard -- would actually go up because of the issuer's preference for higher interchange fees which was a greater driver than the merchant's preference for lower fees.

**MR LOMAS:** Sorry, Mr Rabinowitz, did the court note that or did it note that that was an argument before the authorities in Hungary?

**MR RABINOWITZ:** You may be right. I'm just looking back at paragraph 81.

**MR LOMAS:** What I'm trying to get at is, did the court make any finding on that or did it simply note that that was an argument in the substantive proceedings?

**MR RABINOWITZ:** I think you're right. It wasn't making a finding about that, it was

just noting that those are -- based on the information before it, that is what was being -- I do wonder, actually, if you look at the -- actually I'm looking at the wrong paragraph:

"It was argued before the court ..."

It was not a (inaudible) increase, so you're quite right about that.

**MR LOMAS:** It is probably quite clear from the introduction to 82 and 83:

"In the event the referring court were to ..."

In addition, "if there were to be" suggests it is a hypothetical.

**MR RABINOWITZ:** Indeed. It is an argument which is being made. I'm sorry about that. I had slipped back to paragraph 79 and the language of demonstrating, so I misled myself. So there is an argument. But the point is going to be the same, in my respectful submission.

The argument before it was that, in a counterfactual world, the interchange fees introduced within each scheme would go up because of the issuer's preference for higher interchange fees which was a greater driver than the merchant's preference for lower fees.

Of course, that is precisely the same economic effect for which Visa contends in these proceedings in the asymmetric counterfactual, which is to say Visa contends that the issuers and cardholders' preference for higher interchange fees will mean that even if Visa had to cut its MIF to zero, merchants would have ended up paying more. That, of course, is an analysis -- Mr Frazer, we can't hear you because you're on mute, I think.

**MR FRAZER:** I'm so sorry. I pressed it twice. Can I just interrupt you at this point to bring us back to a basic point. I know that you want -- you're arguing that this statement in Budapest Bank, as it were, favours the asymmetric counterfactual. My question here is, was the court here rather saying that it

would have been -- the absence of an agreement on an inter-scheme MIF would have been that there was no such agreement and, therefore, there would have been competition between the schemes; each scheme would have competed in relation to its MIFs and perhaps other things as well, rather than the counterfactual would have been the situation where one scheme would have been a zero MIF and the other scheme would have continued in its then current form, which is, of course, the asymmetric counterfactual that we're considering at the moment.

I am not saying I've come to a conclusion on either, but I'd be interested to hear you as to whether or not the bank here -- the court here was saying the counterfactual here is no such inter-scheme agreement or whether it is saying the correct counterfactual is an asymmetric one.

**MR RABINOWITZ:** I would respectfully suggest, sir, that you are right and it is the former. No MIF agreement meant no agreement between the two schemes. So you have each scheme competing with the other. But in doing so, they can get their MIFs within the schemes, and, in that respect, you have, in a sense, the contemplation of an arrangement that the Court of Appeal in this jurisdiction said was unlawful and couldn't exist as part of a counterfactual. Because you have an intra-scheme fixing on this at a positive level. We are not saying the counterfactual involved one scheme having no MIFs at all and the other scheme being left to do what it wanted with its positive uniform MIFs. We are saying, break the MIF agreement. Each scheme can compete, but can compete on the basis of the MIFs that within the scheme -- the positive MIFs within the scheme, that it wishes to set, and part of our point is to say that reasoning, that you could have in a counterfactual a positive MIF within a scheme, runs absolutely flat bang into the Court of Appeal analysis

because it said it was unrealistic to think you could ever have that within your counterfactual because it said it was unlawful.

**MR FRAZER:** I see. I understand your point. Thank you.

**MR JUSTICE ROTH:** That's different from the asymmetric point.

**MR RABINOWITZ:** I'm not saying they decided the asymmetric point. With respect, any suggestion -- my learned friend sets up a straw man and then knocks it down. We don't say that this decided the asymmetric point. We say that the reasoning here is inconsistent with the reasoning in the Court of Appeal for saying you couldn't have the asymmetric point. If the Court of Appeal is wrong in its reasoning, then there is every reason -- sorry, I'm using the word "reason" a lot. If the Court of Appeal is wrong in its analysis as to why you can't have an asymmetric counterfactual, it would or, at least, may follow that you can have an asymmetric counterfactual. In our submission, Budapest Bank knocks down one of the two bases upon which the Court of Appeal says you couldn't -- actually, both bases upon which the Court of Appeal came to that conclusion because it does look at the inter-system markets and it does also contemplate, as not being unrealistic, the possibility of within a scheme, intra-scheme, positive MIFs being agreed.

**MR LOMAS:** Your point, Mr Rabinowitz, is that it doesn't really matter through which causal route it happens, but the consequence is that rates go up, not down, and that is inconsistent with the Court of Appeal's analysis?

**MR RABINOWITZ:** Precisely. It thought that was relevant. The Court of Appeal thought -- we will see it when you look -- in fact, it is mentioned in paragraphs 81 and 82. The Court of Appeal said it is irrelevant whether rates go up. You will recall that. The Commission relied upon that. The CJEU said, "Rubbish" -- well, I'm sure they didn't say "Rubbish", they said, "That is not

right. It is relevant to look at whether rates go up".

**MR LOMAS:** Did it actually say that or did it say, if there is evidence before the referring court to do that, then you have to look at an effects case rather than an objects case?

**MR RABINOWITZ:** The point is, with respect, it regarded that as relevant. Otherwise, why did it say you needed to look at it? It could have just said, "Forget it, it has no relevance at all. Why would you bother going there?", which is, of course, what the Commission was submitting. If that is the evidence, then you need to look at it. My response to that is, if it is completely irrelevant, why do you need to look at it? The CJEU plainly did not think that that was irrelevant, contrary to what the Commission was suggesting.

That, actually, is the second of the points I wanted to draw from this. I hope, Mr Frazer, sir, I have answered your point sufficiently in terms of the counterfactual?

**MR FRAZER:** Yes, you did answer it, thank you.

**MR RABINOWITZ:** The second point we would make, as the tribunal sees, is that, in expressing the views that it does, the CJEU rejected the suggestion made by the Commission that it was irrelevant to consider whether, in the counterfactual world, the fees would go up rather than down because of these effects in the inter-system market.

The argument advanced by the Commission in this regard -- I just want to pick up where it is. It is midway down paragraph 82. The argument advanced by the Commission in this regard to the effect it was irrelevant to consider whether, in the counterfactual world, competition might have led to higher fees, which the CJEU rejected here, was, of course, similar to the argument that was accepted by the Court of Appeal in Sainsbury's, where it actually said it is

irrelevant whether they go up. What matters is that you are fixing it at a level. It actually also said it is irrelevant because you shouldn't look at the issuer markets. That's what the Court of Appeal said: don't bother looking to see whether fees in the issuer market go up, because who cares about the issuer market? The relevant market here is the acquirer market.

**MR JUSTICE ROTH:** I thought they were saying in 82 that it is irrelevant to the question of object. They say it is relevant whether it's got an objective restricting competition. They are not saying that it's -- they are not dealing with effect in 82.

**MR RABINOWITZ:** No, they are not. They only start dealing with effect in 83. I suppose the question for the tribunal is this: when they get to 83 and they start dealing with effect, and when they have identified that which they think the relevant court should investigate, including whether fees go up -- this has to be my learned friend's case -- at that stage, they wish -- my learned friend has to say, whatever was said about fees going up relevant to object becomes irrelevant to effect because that is her case. That must be her case. In our respectful submission, that just cannot stand with what is said in 81 to 83. They cannot be saying, "Investigate all of these things in order to decide object, including whether fees go up, and you need to look at the issuing inter-system markets. When you get to effects, forget it, none of that matters". That has to be what my learned friend says about paragraphs 81 to 83. In our respectful submission, that is not a fair reading of those paragraphs.

So that is the second point which we draw out of this, the fact that the CJEU reject the Commission's suggestion really built on the Court of Appeal's analysis. We don't have the pleadings, but they refer, as Mr Stait says at paragraph 50 of his witness statement -- I don't know whether the tribunal will recall that.

I can take you to it. The Commission expressly refer to what the Court of Appeal in this jurisdiction said about it, about it being irrelevant to look at fees going up. Perhaps I should just turn it up because I can see --

**MR JUSTICE ROTH:** No, I don't remember that.

**MR RABINOWITZ:** Paragraph 50 of Stait 2. Documents bundle, tab 7, page 136. That's where it begins. The paragraph in question is at 149:

"Visa considers that the additional defence raised in the amended pleading is sound in law. In Budapest Bank, the CJEU endorsed the counterfactual in which each of the schemes would have been left to set its own MIF in competition with each other and this would have had the effect of driving up interchange fees beyond the level set in the impugned agreement. It rejected the Commission's submission made in that case that the agreement needed to be assessed against the counterfactual in which both Visa and MasterCard set their MIFs at zero. Indeed the Commission's submissions in that case expressly relied on the Court of Appeal judgment in the Sainsbury's and AAM proceedings. The Commission submitted that the scheme's argument in Budapest Bank to the effect that the competition would have driven MIFs to a higher level were similar to the asymmetric counterfactual that the Court of Appeal rejected."

So it was the Commission that drew the link and the CJEU rejected that.

**MR LOMAS:** Isn't this paragraph putting it a little bit more highly, certainly in the first couple of sentences, than you've just done in submission, Mr Rabinowitz? The CJEU endorsed a counterfactual. I think the point you were making a couple of minutes ago was that the CJEU was not prepared to exclude a counterfactual as relevant to the proper analysis under an effects doctrine.

**MR RABINOWITZ:** With respect, yes. I prefer the way I put it, if I can put it that

way.

Although what is clear from this is that the CJEU plainly considers that there is no legal impediment to such a counterfactual and that, in a sense, gives rise to the legal argument.

**MR LOMAS:** I understand that. On your narrow submission, the question is whether, as a matter of law, you are excluded from considering that counterfactual, and you would say, in the light of Budapest Bank, it is evident that the law does not require that.

**MR RABINOWITZ:** Precisely that. I'm sorry if I haven't been clear, but you have it precisely right. That is the second of the points we make.

The third point we make arises from paragraph 82. This is the argument about the potential effects of inter-system competition on the position of merchants and what the CJEU said about that also provides an answer, or at least a potential answer, to the theory of harm that the Court of Appeal upheld -- sorry, that the court upheld in MasterCard which in turn was the same theory of harm that the Supreme Court upheld in Sainsbury's v Visa.

In both of those cases, and again in this case, the complaint is that a MIF limited the downward pressure that merchants could exert on the acquiring banks to secure a reduction in the MSC and that this was sufficient to restrict competition. So simply because you have a fixed MIF, that, of itself, was sufficient to restrict competition and that was the theory of harm.

In Budapest Bank, however, the court, in effect, answers that when it envisaged, in the potential counterfactual with the MIF agreement gone so that there is inter-system competition on MIFs between Visa and MasterCard, that it was possible that merchants would face even higher charges in the acquiring world as issuers switched, or threatened to switch, to whichever scheme

offered higher MIFs and so more transactions took place at the higher cost scheme level. So that is an answer to the suggestion that you just stop as soon as you see positive MIFs because you can't negotiate below that because, as the court -- CJEU says in Budapest Bank, one possibility is that that is by far a better situation than would result if you allowed there to be competition with MIFs because the effect of it would be to drive the prices higher, which would result in a worse position for their clients.

**MR LOMAS:** Sorry to come back to this point, Mr Rabinowitz, it may be the issue we have been picking up before. Is the CJEU really finding that or is it simply saying, "We recognise that that arrangement is being made before the referring court and, if there is sufficient evidence to support it as a credible, arguable point, then you have to consider it, and that may mean that you don't have an objects case but you have an effects case". It is not stating any view on the merits of the argument itself.

**MR RABINOWITZ:** With respect, what it isn't doing is saying that that is an irrelevant and pointless argument.

**MR LOMAS:** That's back to the legal point that we were just discussing.

**MR RABINOWITZ:** Precisely that. It's not ruling out that as being a relevant argument. I don't think I need to put it any higher than that. It is contemplating this as a possible argument. So that is the third of the points.

The fourth point we make is this, and, in a sense, this goes back to the point I've been making I think in answer to questions repeatedly, although Budapest Bank was indeed an objects case, as one sees from paragraph 83, the court explained that if there was, on the investigation by the local court, domestic court, any factual basis for the arguments which were being identified about higher fees and rising based on inter-system competition, that

argument needed to be explored in depth in an effects analysis. In other words, the effects analysis would need to examine a counterfactual in which each scheme was free to set positive MIFs and competed with each other in order to do so, and the question is, what would have happened to prices as a result?

It is material to note, I would respectfully submit, as the tribunal will observe, that there is no discussion whatever here by the CJEU of whether in that situation, with each scheme free to impose uniform and positive MIFs, the Hungarian EU regulators would have been likely to permit Visa and MasterCard to compete to set higher MIFs in the counterfactual.

The CJEU is only interested in whether they would have chosen to do so in the counterfactual. It is not interested in whether some form of regulation would have been introduced to stop them.

Again, that would be in line with what was said at paragraph 169 of MasterCard. So it is looking -- it is not looking. It is saying that what needs to be investigated -- and I don't want to put that more highly than I need to. It is saying, look at the inter-system position, see if high prices go up and see the effect that that might have on the acquiring market. Again, compare that to the approach taken by the Court of Appeal, which said, "Forget about the inter-system market. It is irrelevant. You are looking at the wrong market". Look at MasterCard CJEU. They said don't look at that market. The CJEU in Budapest Bank plainly contemplated that that may be a relevant investigation to conduct, and, in my respectful submission, not just for objects, because there's nowhere any suggestion that you just throw that out when you get to the effects stage.

**MR JUSTICE ROTH:** Isn't that, Mr Rabinowitz, because here the agreement -- the

whole core of the agreement was restricting competition in the inter-system market. That's what the agreement was getting at.

**MR RABINOWITZ:** Well, you say "isn't that because". That's certainly the position in relation to this agreement.

**MR JUSTICE ROTH:** Yes.

**MR RABINOWITZ:** But that is not the extent of the enquiry that they want to conduct. They want to see -- you will recall that when they identified the areas where competition was being investigated and where it may be hurt, it was also in the acquiring markets.

**MR JUSTICE ROTH:** Yes.

**MR RABINOWITZ:** I would just say this -- it is a point we make in our skeleton argument, paragraph 26(c), at page 12. On 29 September 2020, the Hungarian Supreme Court gave judgment giving effect to the CJEU's ruling and, in doing so, it directed the Hungarian Competition Authority to examine what happens to MIFs in Hungary after the MIF agreement came to an end and Visa and MasterCard set their MIF independently. Can I invite the tribunal to turn to that, authorities bundle 4. If you go to tab 25 in that.

**MR JUSTICE ROTH:** You're not asking us to read from tab 24, I take it?

**MR RABINOWITZ:** I'm going to ask you to look at a passage which starts on page 1170. I'm not asking you to read 24 either, unless you do Hungarian. But the English translation is behind 25 and I think the relevant passage begins at 1170. It is paragraph 130. Can I just invite you to look at 130 to 132, if I might.

**(Pause)**.

**MR JUSTICE ROTH:** Yes, I don't find that entirely clear.

**MR RABINOWITZ:** I don't want to spend too much time on what the Hungarian

courts have done because I don't really have much time. But one thing you will, in our respectful submission observe, again, the Hungarian court understand Budapest Bank to mean, look at the situation in the absence of the MIF agreement, including what would have happened if each system were able to establish their own MIF arrangements; look at what they actually did, in the real world; and do not take into account the effect of regulation, the effect that regulation might have on this. That's the last sentence of paragraph 130. I don't want to spend too much time on this because I'm either right about what I say on Budapest Bank or not.

As I say, it's a point I have already made, we submit that the decision by the CJEU in Budapest Bank finding that there might be nothing wrong with an agreement, including one between the schemes, that fixed MIFs at a positive rate does suggest that someone somewhere has made an error of law in these cases because that (inaudible) outcome, at least in terms of contemplatable counterfactuals, cannot be reconciled with the reasoning and outcome of the Court of Appeal judgment, which bases itself largely on MasterCard.

I don't, obviously, need to persuade you that the Court of Appeal were wrong. All I need to do is to say that, in consequence of Budapest Bank, there is a real doubt about how, as a matter of law, one goes about constructing the assumptions. To what extent in the context of cases like this can you have regard to the issuing bank, inter-scheme bank, when looking at its effect on the acquiring market; to what extent must one assume away the possibility or not allow an assumption of anyone setting positive MIFs, which does seem to be inconsistent with the reasoning here, and to what extent should you have regard or take into account, in deciding what is realistic and not realistic, what regulators may do or stand aside and allow to be done?

In our respectful submission, in relation to all of those three points, Budapest Bank suggests something different to what the Court of Appeal, in its analysis of MasterCard, assumed or concluded the position to be.

As I say, all I have to do is establish that there is now real doubt in consequence of Budapest Bank.

In terms of why we say a reference -- sorry, I ought just to do this. We have set out, I think at paragraphs 29 to 34 of our skeleton argument, the main points that we make arising out of Budapest Bank. I'm not going to repeat those, but I would just commend those to your attention when we finish. There are four, I think, main reasons there, but there are a few others. They largely, I hope, coincide with the points I have been making orally.

Fundamentally, one is in a position where you either are or you're not allowed to have agreements within schemes -- in the context of counterfactuals, agreements within schemes which set positive MIFs. That's one of the points. It is difficult to see how one squares what Budapest Bank contemplates as an allowable, permissible, non-illegitimate counterfactual with the conclusion that the Court of Appeal reached. Just drawing the threads together on that, we say, at least following Budapest Bank, there is, at least, a lack of clarity of what the law requires in relation to this. There is a lack clarity in terms of whether you are allowed to look at the issuing intercreditor market and a lack of clarity in relation to the extent to which you can have regard to not just how people will behave, but how they will behave because of the involvement of regulators. I think I'm repeating that point and I'm not going to do it anymore.

If the tribunal is with me about this, about a lack of clarity, real doubt, then, in our respectful submission, it follows that the tribunal ought to make a reference because a reference is necessary. We have set out in our skeleton argument

from page 18, paragraph 43, why, in those circumstances, we say a reference should be made and why, indeed, we say it should be made at this point in time. But I will take it -- I don't understand my learned friend to argue with the "at this point in time" point. Her argument is all about why -- she has two arguments, with respect. One is that it is not necessary because there is no doubt. There is no doubt about the law. And, two, she has her abuse of process argument. But I don't understand her to say that, if she is wrong about there being no doubt and wrong about the abuse of process argument, then she would still say you shouldn't make a reference or not make it now. Certainly there is no argument like that made anywhere in her skeleton argument.

I think I have time just to touch on very briefly the arguments that my learned friend does make in her skeleton argument and I will do it briefly. I'm going to try to finish as close to 1.00 pm as possible subject to the tribunal, so as to give my learned friend a run this afternoon, subject to having my gown pulled over the short adjournment.

My learned friend, as the tribunal knows, makes two arguments. She makes an argument about this not being an issue because she says there is no doubt, no real doubt, in the authorities, it is all crystal clear. Budapest Bank doesn't introduce any doubt at all. Secondly, she says the very application we are making is an abuse of process, an argument she makes without having tried to strike it, without, indeed, having consented to our amendments which introduces the issue which has given rise to this amendment. But I will come back to that.

In terms of the "it is not necessary" argument, why there is no real doubt, as I understand my learned friend's skeleton argument, she identifies the three

main points. First, she says, the legal and factual context of Budapest Bank is so different from the legal and factual context of the claims before the English court as to render what it said about counterfactuals in that context to be of no real relevance to the claim before the English court. There are two arguments which are made under that.

First is, it was a different agreement. Secondly, my learned friend says this was all in the context of an objects restriction.

Secondly -- so that's her first argument. My learned friend's second argument is that, in any event, my learned friend says, Budapest Bank says nothing at all about the correctness or otherwise of the asymmetric counterfactual.

Third, my learned friend says everything that you need to know about counterfactuals is set out at paragraphs 55 and 83, in effect, of MasterCard in the CJEU. It answers all the questions you need. Although, of course, I don't think my learned friend would say that the asymmetric counterfactual was before the court in MasterCard.

Just very quickly responding to those points, legal and factual context, and my learned friend's point that the contract is different, again, as I have made perfectly clear, I accept there are differences in these contracts. This contract is, in a sense, more pernicious, but, fundamentally, what matters is not the differences but the similarity. The similarity is that these are all contracts which set positive, uniform rates for MIFs. In our case, just within the scheme; in the case of the MIF agreement, across the schemes. That is why Budapest Bank matters.

My learned friend also says other differences are that the agreements -- the MIF agreements in Budapest Bank pursued several objectives. My learned friend also says the agreements in Budapest Bank occasionally resulted in lower

MIFs and only more recently went higher. My learned friend also says the agreements in Budapest Bank were said to have involved some pro-competitive elements. With respect, all of those things are said by Visa in this case, all of those things. We, too, have a MIF which has gone down as well as up. We, too, contend -- this is paragraph 35 of our amended defence -- that this has pro-competitive elements. And we, too, contend that this is an important agreement for the purpose of the proper operation of the market.

So those differences, with respect, are not enough to take one's eye off the key similarity: positive, uniform MIFs being set.

Then there's the objects argument, and to some extent we have gone over this ground. My learned friend is right, this comes before the court as an objects point, as an objects restriction point, but the tribunal has seen that, first, the court says the same material that may be relevant for objects can also give rise to an effects restriction. It then, in those paragraphs we looked at, paragraphs 81 to 83 -- in 81 and 82 it is talking about objects, in 83 it is talking about effects. There is nothing in 83 to suggest that that which it said was relevant and needed to be investigated in objects becomes irrelevant for the purposes of effects, and the question the tribunal will want to ask itself is, why would that be the case? Why would higher fees be relevant in the context of objects, if that's the effect, higher fees, so, in a sense, people end up paying more MIFs. Why would that be relevant in objects but the CJEU sub silentio saying, "Ignore it in relation to effects, it's of no relevance", because that's what my learned friend has to say. In our respectful submission, that makes no sense at all.

So, yes, she's right about it being a different agreement. Yes, she's right about it

being an objects case. But one can't stop there. With respect, the analysis deserves, in a case like this, something a little bit more about this. This is complex stuff. You can't just stop at that point. You have to look at what else they said and the fact that they did address effects and they address effects in the context of an agreement which has that similarity.

As I say, I have already made the point about the differences being overstated.

Then I think, finally -- well, not finally. There is the suggestion that Budapest Bank says nothing at all about the correctness or otherwise of the asymmetric analysis. Again, I'm very happy to agree with my friend that Budapest Bank does not expressly express an asymmetric counterfactual analysis. Indeed, I think I accepted that when I answered Mr Frazer's point.

What it does is to identify reasoning -- an approach which cannot stand with the reasoning of the Court of Appeal. As I said in submissions earlier, if the Court of Appeal's reasoning is wrong for rejecting asymmetric analysis, at the very least there is real doubt in the law as to whether it is right, as a matter of law, that you cannot have an asymmetric analysis, because it is as a matter of law that the Court of Appeal got there and said, "You're looking at the wrong thing. You have to have regard, in terms of realism, to what the regulators would want". Again, I agree with my learned friend up to a point, but it doesn't really assist. One has to, in a case this complex, look further and look at the reasoning.

I think my learned friend's last point is to say all of this is dealt with by MasterCard. But, again, with respect, the asymmetric counterfactual argument was never before the court in MasterCard. None of the reasoning that we are dealing with here was before the court in MasterCard. To the extent that there was reasoning in MasterCard which is relevant to the counterfactual, it was

reasoning that, in my respectful submission, the Court of Appeal misunderstood, and I have already taken the tribunal to that. That's the point about ignoring what's happening in the issuing and intercreditor market. You will recall the discussion about what the General Court had decided and whether they were wrong to have decided what they did.

MasterCard, it is true, does say some very general things about an approach to counterfactuals. My learned friend refers to -- no doubt she will take you to these -- paragraphs 55 and 83 of MasterCard. I'm very happy to take you back to that if you'll allow me to do it now. I can tell you it says exactly what was said in, I think, paragraph 55 of Budapest Bank. It is a general statement about how you have to have regard for everything -- to everything. It doesn't tell you anything at all, in those two paragraphs, how you deal with the issues that arise in this specific case and the legal issues that I have sought to identify.

With respect, MasterCard just doesn't get you to a point where you can say there is no real doubt in the law.

I think, fortuitously, and subject to any points that I'm told, if I may, over the lunch break that I have -- really do need to draw to your attention, that is -- I need to say something about the abuse of process, actually. What I'm going to say about the abuse of process is this --

**MR JUSTICE ROTH:** Why don't you save abuse of process --

**MR RABINOWITZ:** I'm not sure I need to, because all I was going to say was this: we have set out in detail what we say about that in our skeleton argument. At this stage -- it is my learned friend's point. If she wants to develop it, I will listen to what she says. But this is about a million miles from any abuse of process of the sort that an English court has ever held to be an abuse of

process. The idea that you can't raise a point of law, the idea that we abused the process by not making this point, running this argument, in the Supreme Court, in circumstances where we'd never asked for permission to appeal on this argument, the decision in Budapest Bank occurred in April, the argument --

**MR JUSTICE ROTH:** We have got our points. We have read your supplementary skeleton.

**MR RABINOWITZ:** I'm grateful. Can I leave it, subject to the tribunal, like this: if I may over the short adjournment see if anyone on my side thinks I have neglected to say something I should, but subject to that, that was all I was going to say.

**MR JUSTICE ROTH:** Thank you very much. 2.00 pm.

**MR RABINOWITZ:** I'm grateful.

**(1.02 pm)**

**(The short adjournment)**

**(2.00 pm)**

**MR JUSTICE ROTH:** Yes, Mr Rabinowitz, is there anything additional?

**MR RABINOWITZ:** No, I'm grateful for the opportunity, but I have nothing further to add to my submissions at this stage. Thank you very much.

**MR JUSTICE ROTH:** We wanted to ask you this: the response you made just before we adjourned for lunch with regard to the fact that Budapest Bank says nothing about asymmetric analysis, which you recognise, and you made the point, but what it does is, it calls into question some of the reasoning of the Court of Appeal which led it to reject asymmetric analysis, and I understand that. But the reasoning, it seems to us, the crucial reasoning, was the approach in the Court of Appeal that a positive MIF has, of necessity,

an anti-competitive effect, so that an agreement with a positive MIF will contravene article 101.

That, it seems to us, is where you're saying, well, if one looks at the counterfactual that's being at least contemplated in Budapest Bank, that contemplates positive MIFs. Isn't that right? That's really the point that you say where Budapest Bank is inconsistent.

**MR RABINOWITZ:** That is very much the central point of where it is inconsistent, yes. That's exactly the point. I don't think that's the extent of the Court of Appeal reasoning which is wrong, but that reflects the Court of Appeal's understanding of MasterCard, that is to say, which market you can look at, et cetera. But the point you make about contemplating at least -- assuming that it is not illegitimate to have a positive MIF in the counterfactual is, I think, one of the points where we say Budapest Bank is centrally important and inconsistent with the Court of Appeal's understanding.

**MR JUSTICE ROTH:** In which case, it seems to us, if there is going to be a reference -- first of all, that is a question that should be asked --

**MR RABINOWITZ:** Indeed.

**MR JUSTICE ROTH:** -- because it is almost the anterior question before you get to the question of asymmetric competition. But also, that is also then saying that Budapest Bank calls into question the Supreme Court's judgment because the Supreme Court is very much saying a positive MIF will have an anti-competitive effect because it has a floor on the merchant service charge.

**MR RABINOWITZ:** Yes, indeed. All I can say about that is, I have notes where I was going to say that to the tribunal, whether you can believe that or not, but in an attempt to cut through it, I skipped over that bit. But that is -- I wanted to say two things. Number one, we have had a go at formulating the question,

and I'm not for a moment suggesting it is the best formulation, and I anticipate, as the tribunal will anticipate, that if the tribunal thinks there are uncertainties, the tribunal will assist in drafting the questions that should be drafted. But, secondly, in relation to the point that the president made about the Supreme Court, that is one of the things we say. We are in a conundrum now, because you can't have, as the CJEU thought in Budapest Bank -- or at least contemplated the possibility of positive, standard, uniform MIFs being agreed and the Supreme Court, and indeed the Court of Appeal, saying effectively that is, of itself, anti-competitive.

**MR JUSTICE ROTH:** Yes. That's what you get out of Budapest Bank, and the Supreme Court, of course, reached that conclusion, said the English courts are bound to that conclusion by MasterCard in the Court of Justice, did they not?

**MR RABINOWITZ:** The Supreme Court did say that --

**MR JUSTICE ROTH:** That's how they got there. It is a very careful analysis of all the decisions in MasterCard.

**MR RABINOWITZ:** That is the question that went to the Supreme Court, which is to say, even assuming zero MIFs, would it be anti-competitive, and the Supreme Court said, yes, because of MasterCard. So, in answer to your question, yes.

**MR JUSTICE ROTH:** In a sense you're saying, I think, that the Supreme Court didn't analyse MasterCard correctly.

**MR RABINOWITZ:** Yes, we do say that.

**MR JUSTICE ROTH:** Yes, that's what we thought it was amounting to, and that is really what you allege or argue is an inconsistency with Budapest Bank.

**MR RABINOWITZ:** Indeed.

**MR JUSTICE ROTH:** Because that's the whole foundation, then, to any question of asymmetric competition --

**MR RABINOWITZ:** I'm sorry to interrupt, but of course the Supreme Court only reaches the conclusion it does by reference to symmetrical zero MIF counterfactual. In other words, it arrives at the conclusion it does arrive at by proceeding on the basis that the counterfactual would have had zero symmetrical MIFs, and, then, we attack that reasoning as well. But it does come to the point the president identified.

**MR JUSTICE ROTH:** Yes, thank you. Ms Smith, I think what would be sensible, what we would welcome, is to hear you on the argument that it is necessary or appropriate for the CAT to make a reference and not get into abuse of process for the moment, and save that, come on to that, a bit later.

**MS SMITH:** Sir, yes. I was proposing to focus on the necessity points for the purpose of today's submissions.

In any event, I may need to, depending on where we get, briefly address the points made in the supplementary skeleton by my learned friend, but I will come to those, if I need to, at the end of my submissions.

**Submissions by MS SMITH**

**MS SMITH:** As the tribunal is aware, our primary argument is that reference of the question proposed by Visa to the Court of Justice isn't necessary for the tribunal to give judgment in this case and, therefore, the requirements of article 267 are not fulfilled.

However, it is important to start at the very beginning. In order for there to be a reference, in our submission, there must be a question of law that is at issue, but, more importantly, perhaps, or in addition to that, there must be

a question of European law at issue.

As we understood Visa's case as put in its application and its skeleton argument, Visa's case is that there is a tension or an inconsistency between the MasterCard CJEU judgment on which the Court of Appeal based its judgment or held it was found, there's an inconsistency between the Court of Justice's judgment in MasterCard and an inconsistency as regards the counterfactual in the Court of Justice's decision in Budapest Bank.

If, instead, Visa's real concern is that, as Mr Rabinowitz put it on a number of occasions this morning, if Visa's real concern is that the Court of Appeal in Sainsbury's and MasterCard misunderstood, I think is the way he put it, that the Court of Appeal misunderstood the Court of Justice's judgment in MasterCard, that is not a question for a reference, in my submission.

In that case, they say, well, the Court of Appeal misunderstood the Court of Justice judgment in MasterCard. It is not that there is any inconsistency or a question that needs to be resolved as a matter of European law, in my submission. What is then the complaint is that a national court has misunderstood a European court judgment. That is not a question for a reference.

Instead, if that is their concern, if that is Visa's concern, that the Court of Appeal misunderstood the MasterCard Court of Justice judgment, that could, and should, have been the subject of an appeal from the Court of Appeal to the Supreme Court on its misunderstanding, the Court of Appeal's misunderstanding, of the counterfactual which should be employed as a result of what was said by the Court of Justice in MasterCard. That should have been an appeal to the national highest court, and it wasn't.

**MR JUSTICE ROTH:** Subject to your point about abuse of process -- we have that well in mind --

**MS SMITH:** The point of abuse of process may become quite an important point.

**MR JUSTICE ROTH:** Yes, but subject to that point, if it is not an abuse of process, then I think the logic of what you are saying is, well, then, Visa can run the point in this case. The tribunal may be bound by the Court of Appeal, but they can take this case further and go back to the Supreme Court and say, "The Court of Appeal got it wrong" (overspeaking) --

**MS SMITH:** If that is their real concern, or if that is what arises, but it is certainly not a question for reference to the European court at this stage, or at any stage, in fact, in my submission.

Before I get to the meat of my submission, there is another preliminary issue, initial point of clarification, that I need to address, and that is the question that is proposed to be referred.

Sir, you were taken to Visa's skeleton argument, paragraph 42. I refer to that as being -- I think there are slight differences between that and what was in the application, but my initial point of clarification remains good.

That question refers, in general terms, to article 101 and to the counterfactual. It refers to a counterfactual in which the other scheme remains free to compete by setting its own MIFs independently at higher positive rates.

It does not distinguish, that question, between, on the one hand, the use of that counterfactual in assessing the effect of a restriction for the purposes of article 101 and, on the other hand, the use of that counterfactual, or the asymmetric counterfactual, in an objective necessity or ancillary restraint argument. But it was made absolutely clear by the Court of Justice in MasterCard and by the Court of Appeal in Sainsbury's -- for example, for your note, paragraph 108 of the MasterCard Court of Justice judgment -- that the use of a counterfactual in those two different circumstances is quite separate

and distinct and gives rise to quite separate and different issues.

Moreover, we say that, as regards the use of an asymmetric counterfactual in the latter situation, that is, in assessing an objective necessity or ancillary restraint argument, the position in law is clear. The Court of Appeal held that, as a matter of law, on the basis of the Metropole case and the case law related to that, the Court of Appeal held that, as a matter of law, an ancillary restraint must be essential to the survival of the type of main operation without regard to whether that operation in question needs the restriction to compete with other operations. It focused on -- it said, in other words, the restraint must be objective, or the necessity must be objective, rather than subjective.

The Court of Appeal held in terms that, in that context, you don't look at competition with other operations, and the asymmetric counterfactual is, in that context, wholly irrelevant.

I will take you to the relevant judgments in due course, but for your note, the Court of Appeal reached that conclusion as regards the use of the asymmetric counterfactual in the ancillary restraint context in paragraphs 72, 198, 200 and 346 of its judgment.

I will make this point when I get to the judgment, it is easier to make in respect of the judgment.

It is also important that there was no appeal to the Supreme Court on the Court of Appeal's judgment on the correct legal test for an ancillary restraint -- that's paragraph 45 of the Supreme Court judgment -- and the Court of Justice's judgment in Budapest Bank says absolutely nothing about the correct legal test for an ancillary restraint under article 101(1).

Now, I had -- given all of this, and given the basis of Visa's current application -- the basis of Visa's current application for a reference, as we understand it, is that

the Court of Appeal's judgment in Sainsbury's can't stand because of the Court of Justice's judgment in Budapest Bank, I had assumed that Visa is concerned only with the issue of the correct counterfactual for the purposes of it having effect for the first question, the prior question: what is the correct counterfactual for the purposes of assessing the effect of a restriction? That's implicit in Visa's skeleton argument, the last sentence of paragraph 17.

It was also implicit, to some extent, in the submissions Mr Rabinowitz made this morning, but it wasn't explicit. But it must be the case, on my submission, because the Court of Appeal's judgment on ancillary restraint did not turn on -- I will come and show you this when I come to the case. The Court of Appeal's judgment on ancillary restraint did not turn on saying that the asymmetric counterfactual was inappropriate; it turned -- paragraphs 198 and 200 -- on a finding that you don't even get to look at the asymmetric counterfactual if you are dealing with the question of ancillary restraint. A counterfactual is irrelevant. They said, in terms, there are plenty of four-party schemes out there that survive without a MIF and that is the answer to the question as to whether this is an ancillary restraint or objectively necessary.

Now, if that's the case, then the drafting of the reference question is far too broad, in any event, and unclear and in my submission potentially misleading. But even if it is the case, we say there is no reference to "necessary", in any event, even if the question is only meant to go to the question of the relevant counterfactual for the purposes of assessing effect.

**MR JUSTICE ROTH:** I think that's the way I understood, and I didn't misunderstand Mr Rabinowitz's submissions that it is absolutely to deal with the fact and no doubt the drafting of the question could be tightened.

**MS SMITH:** That's the basis on which I will proceed in that regard, but that is also

relevant to the submissions that Mr Rabinowitz made, for example, in paragraphs 202 and following of the Court of Appeal's judgment. Because those paragraphs -- I will show you, it is easier to see with regard to the judgment. But those paragraphs, 202 onwards, appeared in the Court of Appeal's -- part of the Court of Appeal's judgment in dealing with ancillary restraint and, in our submission, were effectively obiter, because the decision that the Court of Appeal had already made in paragraphs 198 and 200 was that you don't even need to look at the counterfactual for the purpose of addressing ancillary restraint, but we will come to that.

Turning then to my submissions on the necessity of a reference, what I will do, sir, is summarise my arguments and then make them good by taking you to the relevant judgment. We say a reference isn't necessary for the following reasons.

The Court of Appeal in Sainsbury's held that the correct counterfactual as a matter of law for determining whether the rules of Visa -- the separate rules of Visa and MasterCard setting default MIFs restrict competition as a result of their effect under article 101 in the acquiring market was a no default MIF and a prohibition on ex post pricing or a settlement at par rule.

As you have already said, sir, the Court of Appeal, in that regard, followed the Court of Justice's decision in MasterCard and held that it was bound to do so.

As Visa fairly accepts, neither it nor MasterCard appealed the Court of Appeal's finding on the relevant counterfactual to the Supreme Court. They did appeal the Court of Appeal's judgment on the binding nature of the Court of Justice's judgment as regards the existence of a restriction, the effect binding there, but that appeal was rejected by the Supreme Court.

As for the Court of Justice's judgment in Budapest Bank, we say that involved an

entirely different legal and factual context to that in the MIF litigation. It is important and fundamental that Budapest Bank involved an entirely different agreement, that is, an agreement between Visa and MasterCard and a number of Hungarian banks setting a common MIF -- one common MIF -- to be charged by the issuing banks to the acquiring banks for both Visa and MasterCard transactions. The agreement, the MIF agreement, at issue in the Budapest Bank operated entirely separately from, and over the top of, the separate scheme rules setting default MIFs, and the scheme rules were, of course, not before the Court of Justice in the Budapest Bank case.

In Budapest Bank, the Court of Justice was concerned only with the overarching MIF agreement. As for the relevant legal issue with which the Court of Justice was concerned in Budapest Bank, it was whether that MIF agreement could be classified as an agreement which had as its object the restriction of competition for the purposes of article 101.

The Court of Justice was concerned with whether the MIF agreement could be held to be, by its very nature, harmful to competition; that is, whether it could fulfil the test for an object restriction as set out in Cartes Bancaires and the previous Court of Justice case law.

In our submission, the Court of Justice in Budapest Bank said nothing new, nothing different, about how one should approach the question of the relevant counterfactual for the purposes of an effect assessment under article 101.

On the contrary, in paragraph 55 of its judgment, the Court of Justice in Budapest Bank simply repeated and confirmed the approach that should be taken as a matter of principle to determining the effects of any agreement, that is, in order to determine the effects of any agreement, you look at what competition would exist in the absence of that agreement.

There is no conundrum, as Visa would have it, or inconsistency created by the judgment of the Court of Justice in Budapest Bank. The Court of Justice in Budapest Bank did not consider the issues that are live in the MIF litigation, which is whether the scheme rules of MasterCard or the scheme rules of Visa, setting a default MIF, had the effect of restricting competition. That question was determined by the Court of Justice in MasterCard and confirmed by the Court of Appeal. The Court of Justice's decision in Budapest Bank doesn't affect that issue.

Now, I will turn, if I may, to the relevant judgments to make good my submissions in that regard. If I could ask you to turn back to the Court of Appeal's judgment in Sainsbury's. I will try not to repeat what Mr Rabinowitz -- the paragraphs Mr Rabinowitz has taken you to, except insofar as I want to make points on those paragraphs. But there were a number of paragraphs he didn't take you to that I would like to take you to, sir.

The Court of Appeal's judgment in Sainsbury's is in the third bundle of authorities at tab 19. If I can ask you first to turn to page 821, which you weren't taken to by Mr Rabinowitz. That is where the Court of Appeal addresses the Court of Justice's judgment in MasterCard. You will see at the heading at the top of that page, "The significance of the CJEU's decision". I just ask you to turn to look at paragraph 151. The Court of Appeal discusses the Court of Justice's approach to the relevant counterfactual, both in the context of ancillary restraints and in the context of assessment of effect. At paragraph 151 at the bottom of page 821 the Court of Appeal says:

"At paragraph 174, the Court of Justice concluded that despite the General Court's error, it had been entitled to rely on the same counterfactual it had used in the context of its objective necessity analysis, albeit for reasons other than those

in paragraphs 132 and 143 of the General Court's decision."

I think, actually, when Mr Rabinowitz was taking you to the Court of Justice's judgment, he referred specifically to that paragraph. Over the page, at the top of page 822, the last sentence of paragraph 151 of the Court of Appeal's judgment, they say:

"We emphasise that the Court of Justice thought the General Court had been deciding a legal issue in identifying the relevant counterfactual."

Then, at the end of paragraph 153, the last sentence, the Court of Appeal quoted the Court of Justice and said:

"This passage makes it clear that the counterfactual approved by the CJEU was one that involved an absence of MIFs for the abrogation of the default MIF rule and the imposition of an ex post pricing rule."

The Court of Appeal concludes its analysis of the Court of Justice's decision at paragraph 156. I will let you read that. It simply makes the point that I have made, that it holds that the Court of Justice said that the no default MIF and prohibition on ex post pricing was the correct counterfactual, as a matter of law.

**MR JUSTICE ROTH:** Yes.

**MS SMITH:** Then if I can ask you to turn to page 829 in the Court of Appeal's judgment, it is important by way of setting the scene, sir, to make the point that, on page 829, the Court of Appeal is setting out its conclusions, as you can see from the heading about halfway down, on the question of whether the scheme's rules setting default MIFs restrict competition under article 101(1) in the acquiring market. That is what it calls the primary article 101 issue, that is whether the scheme rules had the effect of restricting competition in the relevant market.

Over the page, on page 830, you will see the heading above a paragraph 191 that what the Court of Appeal is considering in the paragraphs 191 onwards is the ancillary restraint death spiral issue, and I will come to that in a moment.

If we can go back to page 829 and paragraph 185, here are the Court of Appeal's judgment on the effect arguments, whether the primary question. You weren't referred to these paragraphs of the Court of Appeal's judgment by Mr Rabinowitz, but, in my submission, they are absolutely central to this application. As you will see in 185, the Court of Appeal says:

"Our conclusions on the primary article 101 issue can be summarised quite shortly. The correct counterfactual for schemes like the MasterCard and Visa schemes before us was identified by the Court of Justice's decision. It was 'no default MIF' and a prohibition on ex post pricing (or a settlement at par rule). The relevant counterfactual has to be likely and realistic in the actual context ... but for schemes of this kind, the Court of Justice has decided that that test is satisfied."

So I interpose the Court of Justice has decided that this is the relevant counterfactual for schemes of this kind.

In paragraph 186, the Court of Appeal says that the Court of Justice's decision also made clear that MasterCard's MIFs which resulted in higher prices limited the pressure which merchants could exert on an acquiring bank resulting in a reduction in competition between acquirers as regards the amount of the merchants' service charge. It says this is not a decision from which this court either can or should depart, so they're bound by the Court of Justice's judgment in this regard.

Then they're addressing the argument that was made effectively that it is a transparent common cost, it is a VAT-type charge, which doesn't affect

competition. That's not now a point that you need to be concerned with.

Then, in paragraph 187, towards the bottom of the page:

"In the present case [the Court of Appeal continues], however, the MIFs are materially indistinguishable from the MIFs that were the subject of the CJEU's decision."

Then it says at paragraph 188:

"The death spiral argument is not relevant at this stage of the debate because the article 101(1) question must be asked in relation to the acquiring market."

So it is saying, "We don't need to get on to the death spiral because the primary article 101 question has already been decided by the Court of Justice: first, the relevant counterfactual is no default MIF and settlement at par; second, competition is limited because the MIFs limit the pressure which merchants can exert on acquiring banks resulting in a reduction in competition between acquirers as regards the amount of the merchants' service charge."

The Court of Appeal held that it was bound by the Court of Justice's decision as regards both of those points.

Then, sir, although we had established, or I had established, as far as I understand it, that the question that Visa is seeking to be referred to the Court of Justice goes only to the counterfactual to be applied as regards this primary question, the question of effect, it is relevant just to look at what the Court of Appeal said in its judgment on ancillary restraint and the death spiral argument.

As I said, that starts on page 830, paragraph 191 onwards, and the various submissions of the parties are summarised and then the Court of Appeal reaches its conclusions on page 831, the conclusions from 198 onwards. At 198, the Court of Appeal says:

"On this issue, we will apply the legal principles applicable to the ancillary restraint

doctrine as set out in Part IV of this judgment."

If, for your note, I could just say that the conclusion on the law on ancillary restraint was contained in paragraph 72 of the Court of Appeal's judgment, which basically says that the Metropole decision correctly states the law:

"... the ancillary restriction must be essential to the survival of the type of main operation without regard to whether the particular operation in question needs the restriction to compete with other such operations. All questions of the effect of the absence of the restriction on the competitive position of the specific main operation and its commercial success fall outside the ancillary restraint doctrine, as paragraph 109 of Metropole makes clear."

That's the legal conclusion. The Court of Appeal then continues in paragraph 198:

"On that basis, Mr Justice Popplewell was wrong, as we have said, to conclude that the issue of whether, in the absence of the default MIF, the MasterCard scheme would survive in view of competition from Visa was one which could be considered under the ancillary restraint doctrine under article 101(1). Such questions relating to the application of so-called asymmetric counterfactual are not the ancillary restraint issue under 101(1) but the issue of exemption under 101(3).

"We agree with the merchants that if questions of the subjective necessity of a restriction for the survival of a particular main operation were relevant for the purposes of the ancillary restraint document, it would enable failing or inefficient businesses that could not survive without a restrictive agreement or provision to avoid the effects of 101(1), which would undermine the effectiveness of that provision of EU law and the underlying competition policy."

Then the conclusion in paragraph 200:

"The only question in relation to the potential application of the ancillary restraint doctrine in the present context is whether, without the restriction of a default MIF, which is the relevant counterfactual, this type of main operation, namely, a four-party card payment scheme, could survive. The short answer to that question is in the affirmative and the contrary was not suggested by MasterCard and Visa. There are a number of such schemes in other parts of the world which operate perfectly satisfactorily without any default MIF and only a settlement at par rule."

So that is the conclusion of the Court of Appeal on the question of ancillary restraint and, again, I make the point that that question, as a matter of law, was not appealed to the Supreme Court.

What is important in what follows is the opening words of paragraph 201. In paragraph 201, the Court of Appeal says:

"Even if Mr Justice Popplewell had been correct in his conclusion that the decision of the Court of First Instance in Metropole was implicitly disapproved by the Court of Justice in MasterCard so that it was appropriate to consider, in the context of the ancillary restraint doctrine, the competitive effects of the removal of the restriction in question ... we consider the adoption of the asymmetric counterfactual was incorrect for two related reasons."

So this is why I've said that what follows, and in particular what follows in paragraphs 202 and onwards, of the Court of Appeal's judgment as to the asymmetric counterfactual is strictly obiter, because the Court of Appeal made it clear that they were only addressing those questions if they were wrong as regards their finding of law arising from Metropole. So all the points that Visa makes about regulators and the role of regulators appears in paragraphs 202 onwards.

But the Court of Appeal does say -- and I think Mr Rabinowitz took you to those paragraphs -- that it did agree that the asymmetric counterfactual was not realistic. It says at the end of paragraph 202:

"We consider the realistic counterfactual would assume that if one of the schemes was unable, whether for commercial or legal reasons, to set default MIFs, the other scheme would be similarly constrained."

That doesn't turn solely on the question of regulation. It turns, also, on what Mr Justice Phillips said about the schemes being engaged in the same business, using the same model and being fierce competitors. That was the first point that the Court of Appeal made.

The second point as to why the asymmetric counterfactual was not correct, in any event, is because, in paragraph 204, towards the bottom of page 832, it should not be open to one unlawful scheme to save itself by arguing that it would otherwise face elimination by reason of competition from the other scheme which is, itself, unlawful.

Then Mr Rabinowitz took you to paragraphs 206 and 207, where the Court of Appeal said:

"We consider that the two schemes are materially identical for the purposes of the article 101(1) analysis. They are both four-party card payment schemes with an Honour All Cards Rule for credit and debit cards, in which default MIFs are set which are paid to issuing banks and passed on to the merchants as part of the merchants' service charge imposed by acquiring banks."

So two main points to be taken out of that Court of Appeal judgment, at risk of repeating myself. First, the relevant counterfactual as a matter of law for the question of assessing the effect of scheme rules setting default MIFs, whether the effects of those rules is to restrict competition under 101, has been

decided by the Court of Justice and it is a no-default MIF and settlement at par.

The second point as regards ancillary restraint, the question -- the correct question, as a matter of law, is whether the scheme would survive -- whether, sorry, the restriction is necessary for the survival of the scheme itself without consideration of competition from other schemes without looking at the asymmetric counterfactual, and that is based on Metropole.

Sir, if I can ask you then to close the Court of Appeal's judgment and that bundle of the authorities, and then turn to the Court of Justice's judgment in Budapest Bank, which is in the fourth bundle of authorities, tab 21. The judgment starts on page 966 of the bundle numbering. It follows the AG's opinion.

**MR JUSTICE ROTH:** Yes.

**MS SMITH:** The point has already been made, but if I can just, again, highlight paragraph 6 on page 967 of the court's judgment, which describes the agreement that it was considering, that is what it called the MIF agreement, and that is the agreement between Visa and MasterCard and on the banks as to a common interchange fee.

Then if I can ask you to turn to page 973 of the bundle numbering, the Court of Justice is addressing the second question -- you will see it at the bottom of the page. We get to that second question because it is important to look at what question the Court of Justice was actually answering.

Before we get to that question, Mr Rabinowitz drew the tribunal's attention to paragraph 44 and the Court of Justice's answer to the first question. Its answer to the first question -- if you look on page 970, paragraph 26 sets out the first question, and that is simply a question of interpretation as, I think, sir,

you indicated. The first question is simply whether article 101(1) "must be interpreted as precluding the same anti-competitive conduct from being regarded as having both its object and its effect the restriction of competition within the meaning of that provision".

The answer the Court of Justice gives to that question is on paragraph 44:

"In light of the foregoing, the answer to the first question is that article 101 must be interpreted as not precluding the same conduct from being regarded as having both its object and its effect the restriction on competition."

Mr Rabinowitz said what paragraph 44 says is one can look at the same material as regards both object and effect. In my submission, that's not what it says. It simply says that, as a matter of statutory interpretation, article 101 is to be interpreted as not precluding an agreement having both as its object and effect the restriction of competition. I'm not sure it is a major point but I felt it was important to make any submissions on that.

What is important, sir, is what the second question actually asked. Of course, this is a reference to the Court of Justice from the Hungarian courts. There is the reference of a question of law, and the Court of Justice is constrained to considering only the questions that are referred to it.

The second question is set out in paragraph 45:

"... the referring court asks, in essence, whether article 101 must be interpreted as meaning that an interbank agreement which fixes at the same amount the interchange fee payable, where a payment transaction by card takes place, to the banks issuing such cards offered by card payment services companies operating on the national market concerned may be classified as an agreement which has 'as [its] object' the ... restriction ... of competition ..."

Effectively, the question, the only question, the second question that the Court of

Justice is considering, is whether an agreement in the form of the MIF agreement may be classified as an object agreement.

If I could ask you in that regard, bearing in mind that that is the question that the Court of Justice is answering, to turn to page 974 of the bundle numbering where, having moved from the question of admissibility, the court moves to the question of substance, paragraph 51 of the judgment states --

**MR JUSTICE ROTH:** It may be, before you get there, there is also a helpful sort of summary of the question they are addressing in paragraph 49.

**MS SMITH:** "... the referring court is essentially asking the court to give a ruling not on the specific application of article 101 to the facts of the main proceedings but on the question whether an ... agreement [in the form of a MIF agreement] ... may, in light of [101(1)] be classified as an agreement which has as its object ..."

Yes, that's effectively the point I sought to make with regard to what the second question actually is.

In paragraph 51 of the judgment, the Court of Justice sets out the test for an object infringement, and that is, as the court has already held, in particular in Cartes Bancaires, the court says:

"In order to determine whether an agreement between undertakings reveals a sufficient degree of harm to competition to be considered a restriction of competition by object."

That is what the court is concerned with when considering whether an agreement can be classified as an object agreement: does it reveal a sufficient degree of harm to competition?

In answering that question, the court, as per Cartes Bancaires, says:

"... Regard must be had to the content of its provisions, its objectives and the

economic and legal context of which it forms a part ... it is also necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question."

So it is a very broad analysis of all relevant circumstances which the court has to take into account in considering whether an agreement is an object agreement, including, and I stress, the economic and legal context of which that agreement forms part.

In my submission, that is a much broader analysis than the court takes when considering the effect of an agreement.

Then, if I could ask you to turn over the page to paragraph 54, the court again makes a statement which is absolutely familiar to us all:

"The concept of restriction of competition 'by object' can be applied only to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition for it to be found that there is no need to examine their effects ..."

Then it makes the point again -- as I say, pretty orthodox -- at paragraph 55:

"Where the agreement concerned cannot be regarded as having an anti-competitive object, a determination should then be made as to whether that agreement may be considered to be prohibited by reason of the distortion of competition which is its effect."

So there are two very distinct stages to the analysis. An agreement is to be considered -- first, you consider whether an agreement has an anti-competitive object. In doing that, you take a broad, broad view of all the relevant legal and factual circumstances -- objectives of the agreement, impact on competition, legal and factual context.

If you cannot conclude that the agreement has the object of restricting competition, you move on to an effect analysis. In paragraph 55, the Court of Justice says, again, to that end, pretty orthodox:

"... as the court has repeatedly held [when considering effects], it is necessary to assess competition within the actual context in which it would occur if that agreement had not existed in order to assess the impact of that agreement on the parameters of competition ... (see, to that effect ... MasterCard, paragraphs 161 and 164 ...)"

So, as a matter of principle, one simply employs a counterfactual hypothesis, no more than that. In order to assess the effects of an agreement, you look at what competition would exist in the absence of the agreement.

Then the court goes on to consider whether -- the question that was referred to it -- the "MIF agreement", could be characterised as an object infringement. It is in that context, at paragraph 57, that the Court of Justice refers to the decision of the Competition Authority, the Hungarian Competition Authority, which took the view that the MIF agreement was restrictive of competition by its object in particular because, first, it neutralised the most significant element of price competition on the inter-systems market in Hungary.

So that is the important starting point: what does the MIF agreement do? It neutralises price competition between MasterCard and Visa. It sets a common MIF. But what is important is, it sets a common MIF for all transactions, regardless of whether they're Visa transactions or MasterCard transactions. That is fundamentally different from the question, for example, "Does MasterCard rule setting a default MIF to restrict competition?", because that rule simply sets a default MIF for MasterCard transactions and affects, as the Court of Appeal said, competition on the acquiring market.

What we are dealing with here is the agreement, the MIF agreement, that stops inter-system competition, price competition on the inter-systems market. Is that enough, in itself, for that agreement to be considered an object infringement? The Court of Justice considers that question and, at paragraph 59, makes the point -- and I think this might have been brought to Mr Rabinowitz's attention by one of the panel members:

"... whether ... an agreement such as the MIF agreement may be classified as a restriction 'by object' it should be observed that, as is clear from paragraph 47 of the present judgment, it is ultimately for the referring court to determine whether that agreement had as its object the restriction of competition. In any event, the Court [of Justice] does not have at its disposal all the information which might prove relevant in that regard."

That is obviously the point that the Court of Justice makes always on references. But it then goes on to look, on the next page, page 976 of the bundle numbering, the Court of Justice then goes through and looks at all the relevant context, the broad sweep of issues which it says a court should consider when considering whether an agreement has the object of restricting competition.

On page 976, the court considers the nature of the MIF agreement, whether it can be characterised as indirect price fixing, and it concludes, at paragraph 65:

"Although it is clear from the documents before the Court that specific percentages and amounts were used in the MIF agreement for the purposes of fixing the interchange fees, the content of that agreement does not, however, necessarily point to a restriction ‘by object’, in the absence of proven harmfulness of the provisions of that agreement to competition."

Then the Court of Justice goes on to consider the objectives pursued by the MIF

agreement and makes the point which I again think it is important to note in paragraph 67 at the top of page 977:

"In order to assess whether coordination between undertakings is by nature harmful to the proper function of competition [that is whether it has an object of restricting competition], it is necessary to take into consideration all relevant aspects, having regard in particular to the nature of the services at issue as well as the real conditions of the functioning and structure of the market, of the economic or legal context in which that coordination takes place, it being immaterial whether or not such an aspect relates to the relevant market."

That's Cartes Bancaires, at paragraph 78:

"That must be the case, in particular, when that aspect is the taking into account of interactions between the relevant market and a different related market and, all the more so, when there are interactions between the two facets of a two-sided system."

That is the approach the Court of Justice is taking in this case to the question of object: you look beyond the relevant market, you look at all relevant factual circumstances and legal circumstances, you look at the objectives pursued by the agreement. That is extremely important to put in context what it says subsequently in the paragraphs relied upon by Visa.

As well as the objectives, the Court of Justice, on the bottom of page 977, considers another argument that was made, and this is a different -- the argument that, although the MIF agreement might neutralise price competition between Visa and MasterCard, in that it sets a common price, in effect, it might nevertheless intensify competition between them in other respects, non-price competition. That's the point being made at paragraph 74, that that is something one needs to look at in an objects assessment.

The last sentence of paragraph 74 over the page:

"... setting the interchange fees at a uniform level may have triggered competition in relation to other features, transaction conditions and pricing of those products."

Paragraph 75:

"If that was actually the case, which is for the referring court to ascertain, a restriction of competition on the payments systems market in Hungary, contrary to 101(1), can be found only after an assessment of the competition which would have existed on that market if the MIF agreement had not existed, an assessment which -- as is clear from paragraph 55 ... -- falls within the scope of an examination of the effects of that agreement."

Again, the point, over and over again, "Look at all these factors, including the effect on non-price competition. If you can't reach an obvious conclusion as to object, you then move on to effect".

Then, finally, on page 979, we come to the paragraph of the Court of Justice's judgment in Budapest Bank on which Visa relies for the purposes of the present application, and it is important to set those paragraphs in context. What those paragraphs, from paragraph 80 onwards, are doing, or what the Court of Justice is doing in those paragraphs, is looking at yet another aspect of the legal and factual context to the agreement in order to determine whether, on the basis of that broad-ranging assessment, it can say that an agreement of this type should be characterised as an object agreement. That you can see because the first sentence of paragraph 80, which Mr Rabinowitz did not read out, says the Court of Justice says:

"Finally ..."

So it's the final issue or factor of the many factors that the Court of Justice had

already taken into account as regards object:

"... with regard to the context of which the MIF agreement formed a part ..."

So what the Court of Justice is looking at in paragraphs 80 through to 84 is not any question of counterfactual, it is not any question of effect, it is looking at the context of which the MIF agreement formed a part for the purposes of determining whether it was an object agreement.

In light of that, we then look at the three points that the Court of Justice considers in that regard. In paragraph 80:

"... in the first place, it is true, as the Commission maintains, the complexity of the card payment systems of the type at issue in the main proceedings, the bilateral nature of those systems in itself and the existence of vertical relationships between the different types of economic operators concerned are not, in themselves, capable of precluding classification of the MIF agreement as a restriction 'by object'."

So this is just one of the sort of subpoints in the context:

"In the second place, it was argued before the court ..."

So just an argument that's being made:

"... that competition between the card payment systems in Hungary ..."

The competition which had been neutralised by the MIF agreement, price competition had been neutralised, between the card payment systems in Hungary:

"... triggered not a fall but an increase in interchange fees, contrary to the disciplinary effect on prices which competition normally exerts ..."

The point simply there being made is that, when you have an agreement on a common price -- here on the common MIF charged by -- on both Visa and MasterCard transactions, you generally consider that that would lead to an

increase in prices. But there's been an argument made that, in fact, that might have triggered -- that the agreement, in fact, led to -- sorry, competition would have led to an increase in the interchange fees, so the agreement may have kept those fees down:

"According to those arguments, this is due, inter alia, to the fact that merchants can exert only limited pressure on the determination of the interchange fees, whereas it is in the issuing banks' interest to derive revenue from higher fees."

So, effectively, the issuing banks push the fees up. It says there have been arguments that the MIF agreement keeps prices down.

But it then says in paragraph 82, and this first sentence is also extremely important and Mr Rabinowitz did not refer you to it:

"In the event that the referring court were also to find there to be, a priori, strong indications capable of demonstrating that the MIF agreement triggered such upwards pressure, or, at the very least, contradictory or ambivalent evidence in that regard, such indications or evidence cannot be ignored by that court in its examination of whether, in the present instance, there is restriction by object."

What is said in paragraph 82 is, if the referring court were to find evidence to the contrary that the MIF agreement triggered upwards pressure on prices, rather than keeping prices down, it has to look at that evidence in considering whether there's a restriction by object.

So all the court is saying in 81 and 82 is, if there is evidence that goes one way, and if there is evidence that goes the other way, you look at both sides, you look at all that evidence, in determining whether there is a restriction by object.

In paragraph 82, the Court of Justice then goes on to address the Commission's written observation, and I will come back to that, the submissions that Visa

make as regards that. Effectively, there the Court of Justice says that:

"Contrary to what appears may be inferred from the Commission's written observations ... the fact that, if there had been no MIF agreement, the level of interchange fees resulting from competition would have been higher is relevant for the purposes of examining whether there's a restriction resulting from that agreement, since such a factor specifically concerns the alleged anti-competitive object of that agreement as regards the acquiring market in Hungary, namely, that that agreement limited the reduction of interchange fees~..."

So all the Court of Justice is saying there is, actually, evidence that prices might have been, or the MIF might have been, higher, absent the MIF agreement, is a relevant factor to be taken into account in determining the anti-competitive object of that agreement. That is all that it is saying.

Then in paragraph 83:

"In addition, if there were to be strong indications that, if the MIF agreement had not been concluded, upwards pressure on interchange fees would have ensued, so that it cannot be argued that the agreement constituted a restriction 'by object' of competition on the acquiring market in Hungary, an in-depth examination of the effects of that agreement should be carried out, as part of which, in accordance with the case law recalled in paragraph 55 of the present judgment [which I have taken you to], it would be necessary to examine competition had that agreement not existed in order to assess the impact of the agreement on the parameters of competition and thereby to determine whether it actually entailed restrictive effects on competition."

Simply, all that the Court of Justice says in paragraph 83 is, if there are indications that without the MIF agreement interchange fees would go up so that you

can't conclude this is a by object agreement restriction, you need to carry out an in-depth examination of effect, according to which, and this is perfectly vanilla, you have to look at competition that would occur in the absence of the agreement.

**MR LOMAS:** I think, Ms Smith, the point being made against you is not whether this is perfectly vanilla, but, in the context of this series of cases, that is something which, on Mr Rabinowitz's case, is already barred by law.

**MS SMITH:** No, my Lord, and I will come on to that point. I'm not sure I quite understand, sir, your point, but all that the Court of Justice, in my submission, is saying in Budapest Bank is that you need to look at everything, all relevant factors, in determining whether this particular agreement which neutralises price competition inter-systems can be characterised as an object agreement, and if you conclude it can't be characterised as an object agreement, you then carry out an effect assessment of that particular agreement, the inter-systems agreement. That can live quite happily -- it does not cut across in any way an approach to a different arrangement which sits underneath the MIF agreement. The arrangements that are contained in the scheme rules, each of the scheme rules, separately between MasterCard, for example, on the one hand, saying to its bank members, "In the absence of a bilateral agreement, this is the default MIF that is to be paid by issuers to acquirers", and those two agreements are looked at separately. Budapest Bank says nothing about the agreements contained in the scheme rules, and you could perfectly well see a situation where -- well, let's step one step back.

All that the Budapest Bank judgment says is that, in considering whether the overriding agreement, the MIF agreement, over the top is an object restriction, you need to look at everything, including the indications or the submissions

that have been made that that agreement over the top keeps prices down. There is nothing about the agreements underneath.

What the Court of Appeal and the CJEU in MasterCard says is, it's gone that step further. It's not looked at the object point. It's gone to the effects point. It says, when you're looking at the effect of the lower-fee scheme agreement, the agreement setting default MIFs, and you take an effect, you look at the effect, you analyse the effects by reference to a counterfactual hypothesis, what counterfactual do you use? You use the counterfactual of no-default MIFs and settlement at par. That is a completely different question from the question being considered by the CJEU in Budapest Bank.

What Visa is saying is that it is Budapest Bank that has created an inconsistency as a matter of European law and there is a tension between the European Court judgment in Budapest Bank and the European Court judgment in MasterCard, and we say there is no such tension because they are addressing different questions and they are addressing different agreements at different levels of -- in different markets.

All, in my submission, that is said in paragraphs 80 through to 84 of Budapest Bank by the Court of Justice is, if there are indications that by neutralising competition between Visa and MasterCard on price, the MIF agreement actually kept the level of the common MIF down, contrary to what one would normally expect from an agreement which neutralises competition on price, such indications can't be ignored by the national court in determining whether there's a restriction by object. Similarly, indications which go the other way cannot be ignored by the national court in considering whether that agreement restricts competition by object, is of its very nature harmful to competition.

It makes the point simply that, once you -- that is what the Budapest Bank is saying.

That is its answer to the second question.

If you look at the answer to the second question on page 980, paragraph 86:

"In light of all the foregoing considerations, the answer to the second question is that article 101 must be interpreted as meaning that an [agreement which is of the nature of the MIF agreement] cannot be classified as an agreement which has 'as [its] object' the ... restriction ... of competition ... unless that agreement, in the light of its wording, its objectives and its context, can be regarded as posing a sufficient degree of harm to competition to be classified thus, a matter which is for the referring court to determine."

That is the extent of the impact of the Court of Justice's judgment in Budapest Bank: you need to take into account all relevant matters -- wording, objectives and context -- of an agreement in order to determine whether or not it should be classified as an object agreement. One of those factors, one of the number of factors that the court identified, is whether there are indications that keeps prices down rather than pushing them up.

My submission -- I don't think I need to go back to it. In other words, if the legal -- no, I don't think I need to repeat myself on that. That is all the Hungarian Supreme Court said. I don't need to go back to it, but that's all the Hungarian Supreme Court said in authorities tab 25, page 1170. All it says is that, if an object infringement can't be established, you should carry out an effect analysis by looking at competition in the absence of the agreement in issue.

Now, Visa makes a number of points about the Budapest Bank judgment in paragraph 26 of its skeleton argument and those points were repeated by Mr Rabinowitz orally today. The first point, which reflects what was said in paragraph 26(a) of their skeleton, is that Visa argues -- if I could ask you to have the relevant paragraphs of Budapest Bank open while we look at these

points, that is page 979. Visa argues that paragraph 81 of the Court of Justice's judgment concerned what would have been likely to happen in the counterfactual to the MIF agreement. I say that's absolutely not the case. What was considered in paragraph 81 was the context of the MIF agreement for the purposes of an object analysis, as I have said at the risk of repeating myself, which takes into account all the relevant context, both in the relevant market and in related market, it being relevant, in that context, to consider that there was an indication that the impact of the MIF agreement was to reduce the MIFs that would otherwise be payable, and, if so, that's relevant to the question of whether the agreement was harmful to competition by its very nature.

The second point that Mr Rabinowitz made which reflects what was said in paragraph 26(b) of his skeleton argument is to rely upon the Court of Justice's rejection in paragraph 82 of the Commission's submission. The Commission's submissions were that the arguments in Budapest Bank that were being made were similar to those made as regards the asymmetric counterfactual in the MasterCard CJEU judgment about prices being kept down, the impact of different schemes on each other, and that they should therefore be dismissed.

But if you actually look at the basis upon which the Court of Justice rejects the Commission's arguments, they don't help Visa at all. The basis upon which the Court of Justice, in paragraph 82, rejected the Commission's submission was because the asymmetric counterfactual in the MasterCard proceedings addressed a different point. It addressed the effect of the agreement. It did not address the approach that should be taken to analysing the object of an agreement.

The Supreme Court considered this point, so I think if we could keep our finger, as it

were, our collective finger, in the Court of Justice's judgment at page 979 of the authorities bundle and look at the Supreme Court's judgment which is in tab 22 of the authorities, in the following tab, and paragraph -- page 1005 is where the Supreme Court addresses this point, paragraph 85. The Supreme Court refers to, in the opening words of paragraph 85:

"The Court of Justice rejected the Commission's argument ..."

Sorry, here, page 1005, the Supreme Court is considering the Court of Justice's judgment in Budapest Bank, as you can see from paragraph 80. So the Supreme Court is considering the Court of Justice's decision in Budapest Bank, describes what the agreement was in Budapest Bank and what the issue was, and then, in paragraph 85, the Supreme Court refers to the Court of Justice in Budapest Bank rejecting the Commission's argument that in reliance on MasterCard, Court of Justice, the MIF agreement, that is, the agreement that was at issue in Budapest Bank, necessarily had the object of restricting competition. So that's the argument the Commission made in Budapest Bank. You will see how the Supreme Court addressed that over the page, paragraph 89. At the bottom of the page:

"The fact that the Commission sought to rely on MasterCard's Court of Justice judgment in argument does not affect these important distinctions. That is, the distinctions, the distinguishing features, which the Supreme Court says exist between Budapest Bank and the MIFs cases."

Paragraph 88:

"In our judgment, the case can clearly be distinguished, in that it concerned restriction by object rather than effect. It involved a different type of MIF agreement, in particular, one which was said to prevent escalating interchange fees and it involved a different counterfactual, namely, one where

each scheme had its own MIF rather than there being no MIF. The fact that the Commission sought to rely on MasterCard, Court of Justice's judgment, in argument does not affect these important distinctions. All the more so given that the commission's attempt to read across from an effect case to an object case was rejected by the Court of Justice."

So that is the point I rely on, that, in fact, the point that, in paragraph 82 of the Court of Justice's judgment in Budapest Bank, it rejects the Commission's observations does not assist Visa because the basis upon which the Court of Justice in Budapest Bank rejected the Commission's submissions that you should -- there is read across from the MasterCard case is that that was a completely different case on a completely different issue; namely, effect rather than object.

Sir, I do have a number of -- there were two further points that Mr Rabinowitz made on Budapest Bank which I need to address, and a number of other points that I want to address under the necessity argument, but this might be a good point to have the mid-afternoon ten-minute break.

**MR JUSTICE ROTH:** Yes, very well. If we say 3.30 pm.

**(3.21 pm)**

**(A short break)**

**(3.30 pm)**

**MR JUSTICE ROTH:** Yes, Ms Smith?

**MS SMITH:** Sir, the third point that Mr Rabinowitz made on paragraphs 80 through to 84 of the Budapest Bank Court of Justice judgment, which reflects points made in paragraph 26(c) of his skeleton argument, is he said that in paragraph 82 of its judgment the Court of Justice said that the argument about the effect of inter-system competition was an answer to the same

theory of harm that the courts considered in the MIFs litigation. Presumably they mean the theory of harm that instead of setting a floor to the merchant service charge, which would otherwise reduce, the default MIF stopped MIFs and, therefore, the merchant service charge from rising.

Paragraph 82, as I think I have already said, of the Court of Justice judgment in Budapest Bank said no such thing. It simply says that if there are indications that the MIF agreement triggers downward pressure on prices, similarly, if there are indications that the MIF agreement triggers upward pressure on prices, both of those are factors that cannot be ignored by the national court in considering the object of the MIF agreement. That's all it says.

Mr Rabinowitz's fourth point which reflects what's said in paragraph 26(d) of his skeleton, he says that in paragraph 83 of its judgment in Budapest Bank, the Court of Justice explained that an effects analysis would need to examine a counterfactual in which each scheme was free to set positive MIFs and to compete with each other. That is not the case. In fact, all that the Court of Justice said in paragraph 83 was that if there were strong indications that the MIF agreement, which was what was in issue in that case, could not be held to be an object restriction, the national court should proceed to carry out an in-depth examination of the effect of that agreement, which would involve simply looking at competition had that agreement not existed.

Of course, that agreement, as the court has noted, neutralised price competition between the schemes by definition. It removed competition on the level of MIFs, common for both Visa transactions and MasterCard transactions, so you need to look at the competition that would take place if that agreement did not exist. That, as I said, is a perfectly orthodox application of the counterfactual test, but it says nothing about the relevant counterfactual

for the purposes of assessing a completely different arrangement, that is, the effects of a scheme rule imposing an obligation to pay a default MIF, which the Court of Appeal, relying on the Court of Justice MasterCard case, said affects competition on the acquiring market by setting a floor to the merchant service charge, so reduces the acquirer's ability to negotiate a lower merchant service charge with each individual scheme.

I do go back to what I say is fundamentally of relevance, despite Visa's submissions, that the Budapest Bank case concerned a different question and a different agreement. That is fundamental to this application.

I also make the submission that there is no inconsistency or conundrum created by the following situation. All you have, as a result of the MasterCard CJEU decision on the one hand and the Budapest Bank decision on the other hand is, on the one hand, you have a finding that the underlying scheme rules have an anti-competitive effect on the acquiring market -- that's what was held in the MasterCard Court of Justice judgment. On the other hand, you have a decision that an agreement supplanted on top of those scheme rules and entirely separate from those scheme rules which neutralises price competition on the inter-systems market between MasterCard and Visa does not necessarily amount to an object restriction, or, actually, more accurately, sets out all the relevant factors that the national court has to consider in deciding whether or not such an agreement does amount to an object restriction, but says nothing about -- sorry, I will start again.

It says that an agreement which neutralises price on the inter-systems market, price competition between MasterCard and Visa on the inter-systems market, does not necessarily amount to an object restriction but might require an analysis of its effects. That's all that the Court of Justice said in Budapest Bank and that

is entirely, in my submission, reconcilable with the judgment of the Court of Justice in MasterCard as applied by the Court of Appeal.

I have taken you to the Supreme Court judgment in Sainsbury's. I'm not going to take you back to it, but, for your note, could I please make the following points. First of all, paragraph 42 of the judgment makes it clear that the correct counterfactual was not an issue on appeal before the Supreme Court. Paragraph 44 of the Supreme Court's judgment also makes it clear that the death spiral ancillary restraint issue was, and I quote, "not supported on appeal".

I have taken you to the paragraphs of the Supreme Court judgment, that is paragraphs 80 to 91, which address the Court of Justice's judgment in Budapest Bank, and it is clear that the Supreme Court rejected the relevance of that judgment, and I obviously rely upon the reasons given by the Supreme Court as to why that judgment is not relevant.

Again, I would ask you to look in due course at paragraphs 92 to 94 of the Supreme Court judgment. We have set out its conclusion, that the MasterCard Court of Justice judgment is binding in cases which are materially indistinguishable on the facts before the cases before the Supreme Court. That is the first wave of new cases. So, in conclusion, I say it is not necessary for the tribunal to make a reference. There is no conundrum or lack of clarity here.

There are a small number of outstanding practical points arising from Visa's skeleton that they say support their submission the tribunal should make a reference now. They say, in paragraph 43(d) -- just a couple of those I do need to come back on very briefly. Paragraph 43(d), Visa says that if it is successful in its argument as to the relevant counterfactual, there is likely to be held to be no

restriction to competition for the purpose of 101(1), so we can avoid the enormous costs, it says, of trying article 101(3) and quantum. But I simply make the point that such a (interference) will not be avoided on these cases, on these claims, as our case on article 102 will still need to be tried and will give rise to similar issues, even if there is no restriction to competition for the purpose of 101(1).

In paragraph 44 of its skeleton, Visa seeks to downplay the prejudice caused by the delay that would result from the reference to the Court of Justice. Such delay will, of course, be significant and it would cause prejudice to my clients, who have already experienced substantial delay waiting for the Supreme Court judgment in the first wave of claims.

Visa suggests it is all fine because we can make progress on disclosure in the meantime, but such progress will, of course, be limited if we don't know what the relevant counterfactual will be. Visa itself relies on the efficiency resulting from only needing to adduce evidence on counterfactuals that are consistent with the correct legal position following clarification on a reference. So its disclosure with getting on -- on getting on with disclosure in the meantime makes no sense at all.

I would finally like to make very brief submissions on abuse.

**MR JUSTICE ROTH:** We won't necessarily shut you out, of course, on abuse, Ms Smith, but I think, for our part, if we could hear briefly from Mr Rabinowitz in reply, not, obviously, then, on abuse, because there's nothing to reply to then on abuse, and then we will return to you on abuse of process.

**MS SMITH:** Sir, I hear what you say. My only point would be to put down a marker that we do submit that if what Visa would now seek to argue, which seem to me to be a lot of -- pretty much the first half of Mr Rabinowitz's submissions

this morning, is that it's not really about Budapest Bank, but their argument is that the Court of Appeal misinterpreted the MasterCard Court of Justice judgment, we would argue that we have -- on the question of relevant counterfactual, we would argue, if that is what they are really concerned about, trying to raise that issue on a reference now, when it could clearly have been raised on an appeal to the Supreme Court, the point that the Court of Appeal misunderstood, I think Mr Rabinowitz put it, or misapplied or misinterpreted the MasterCard Court of Justice judgment, if that is what he is really worried about, if that is what they are really concerned with, then that's certainly, we say, abuse --

**MR JUSTICE ROTH:** Yes, we have the point. I understand that.

**MS SMITH:** Not only is it not a question that should go up to the Court of Justice, but trying to open it now in a collateral way by way of a reference rather than appealing it first time around to the Supreme Court when it was obvious --

**MR JUSTICE ROTH:** Yes.

**MS SMITH:** -- (overspeaking) the parties and before the court would be a collateral attack and would be abuse.

**MR JUSTICE ROTH:** Yes, Mr Rabinowitz?

Submissions in reply by MR RABINOWITZ

**MR RABINOWITZ:** Thank you, sir. Actually, taking that point first, the point about the Court of Appeal, the Court of Appeal purported to apply MasterCard. It purported to apply it in a way that we suggest was not right in relation to MasterCard, but the point we rely on is not just that, but the fact that it is inconsistent with the way in which Budapest Bank approached it. Budapest Bank plainly approached the issue of what you are entitled to look

at on the basis that, if something happens in the related inter-system market, issuers' market, you can take that into account in considering the competitive effect on the acquirers' market. That ultimately -- in the end, just standing back, what we are asking here is, what is the law insofar as it relates to the proper construction of a counterfactual in a case such as the present. What can you take into account? Can you have regard to related markets? That's a point which has arisen both in MasterCard and Budapest Bank, and there's plainly some confusion in the law in relation to how that should be applied.

My learned friend Ms Smith doesn't say she says the Court of Appeal -- accepts the Court of Appeal is wrong. She effectively wants to say, no doubt, that the Court of Appeal is right and that is what MasterCard means. That being so, there is a real live issue of European law in relation to the extent to which, in a situation like this, where you have related markets, and an effect which is to be looked at in one market affects the other market, the relevant market, can you have regard to that or not in the context of the restraint issue, restriction issue, for the purposes of 101? We say Budapest Bank makes it clear that you can. Certainly the Court of Appeal's understanding of MasterCard is that you couldn't. It is not a question of English law. It is a European law question which we submit needs clarifying.

The second point I need to address is my learned friend's suggestion that in some way or other, entirely unclear to us, I have to say, MasterCard determines the right approaches to counterfactuals in relation to the sort of situation that we have here with two related schemes and, in particular, whether in relation to the scheme not under investigation or attack, for the purposes of the counterfactual, do you -- must you constrain that other scheme in the same way as the scheme under attack is to be constrained? MasterCard

doesn't come near answering that.

**MR JUSTICE ROTH:** I didn't think Ms Smith said that it does. She said Budapest Bank has nothing to do with that.

**MR RABINOWITZ:** I think she said the answer to how you deal with counterfactuals in FX cases is given to you by MasterCard. MasterCard certainly gives you a general approach to counterfactuals, but it really doesn't come close to answering the question that we ask, where you have these two related schemes, maybe doing the same thing --

**MR JUSTICE ROTH:** But how does Budapest Bank apply to that?

**MR RABINOWITZ:** Budapest Bank goes to that in the sense it attacks, or it tackles, so far as the counterfactual is concerned, the extent to which you can have regard to a scheme which is still imposing positive MIFs, and this, in a sense, is my third point.

Ms Smith wants to say that there is nothing in Budapest Bank, in 81 to 83, that touches on this at all because all it is concerned with is the overarching agreement, the MIF agreement, between schemes, but when the CJEU says, "You have to look at what the position is like in the absence of that agreement", what it is then opening up is a situation which, whilst there isn't an inter-scheme agreement setting positive MIFs, the two schemes separately can compete setting positive MIFs. That's precisely what they contemplate.

In other words, a counterfactual in which a scheme sets positive MIFs, precisely the point that my learned friend Ms Smith says has been decided to the contrary by MasterCard and, as I say, it does no such thing. So that is the real issue which arises from Budapest Bank.

**MR JUSTICE ROTH:** That's the questioning of the Supreme Court, that they were wrong in how they applied MasterCard, because they said it establishes, as

a matter of law, that that's the position.

**MR RABINOWITZ:** It goes a little bit further than that because here we are dealing with the counterfactual and, in the context of the counterfactual, the question is: can you adopt a counterfactual which reflects and represents what a party would have done, regardless of whether you think it might be lawful or unlawful? We say, in the context of Budapest Bank, that is precisely what the court contemplated, but it is -- in that sense, we completely support the asymmetric counterfactual. Ms Smith I think says that has, some way or other, been determined against us.

The next point I think I need to deal with is to take you back to 81 to 83. I don't want to repeat submissions about 81 to 83, but to some extent -- I think I've made this point, I just want to make the point again. Again, I think it is common ground the Supreme Court didn't consider the correct counterfactual, but I think you have that.

Paragraphs 81 to 83. Again, my learned friend seeks to say that what it says about upward pressure on prices and testing the position in the absence of the MIF agreement to see whether there is an upward pressure in the extent to which it affects the acquiring market, because that is what it says, it is not just talking about it at inter-scheme level, it is talking about the acquiring market, as you can see in paragraph 82. What my learned friend wants to say is that nothing in what is said in 82, or indeed the first part of 83, is relevant to an effects analysis. That's effectively her position.

But in our respectful submission, that is to ignore what the court here says. After saying, at the end of paragraph 82, referring to the effects in the acquiring market, "that agreement limited the reduction of the interchange fees and consequently the downward pressure that merchants could have exerted on

the acquiring banks in order to secure a reduction in the service charges", they then say -- again, I'm going to read it, but only in order to emphasise certain things. It's now been read to you a few times:

"... if there were to be strong indications that, if the MIF agreement had not been concluded, upwards pressure on the interchange fees would have ensued, so that it cannot be argued that [there is a 'by object' restriction], an in-depth examination of the effects of that agreement should be carried out ..."

It is saying that the very agreement which is referred to at paragraph 83, and as to whether it has an upward effect -- upward pressure on interchange prices or not needs to be carried out for the purposes of an effects analysis. With respect to my learned friend, it is simply impossible to disengage what is said about the effects analysis from that first part of 83 where it is looking at the upward pressure on interchange fees that it is said would exist if the MIF agreement wasn't there. An in-depth examination of the effects of that agreement. Again, I come back to it.

What has been understood by -- from MasterCard, and indeed this involves -- this is my learned friend's case, that is irrelevant in an effects analysis, and Budapest Bank, in the context of an effects analysis, plainly does not take that view. So that is the next point I needed to make.

My learned friend seeks to portray Budapest Bank as if you can simply have regard to the fact that it was concerned with the overriding agreement and its effect on the inter-scheme market. Can I just very quickly invite you to go back to paragraph 57, which my learned friend took you to, but I think moved quickly past this.

If you look at paragraph 56, you will see that the suggestion that there was an anti-competitive effect was not limited to the inter-system market at all. It is

not only the inter-system market, but also the issuing market and also the acquiring market. So my learned friend's attempt to portray this as having nothing to do with effects in the acquiring market, with respect, runs into the difficulty that that is contrary to paragraph 56.

If you look at 57, in the context of 56, in particular the last part of it, where it says:

"According to information provided by the referring court in its decision, the Competition Authority took the view that the MIF agreement was restrictive of competition by its object ... because first it neutralised ... pricing of the inter-systems market ..."

Correct, my learned friend did read that:

"... second, the bank themselves gave it the role of restricting competition on the acquiring market ... and third, it necessarily affected competition in the latter market."

My learned friend did not emphasise those points. But you can see that the court, in this case, was also concerned with competition in the acquiring market, and so the suggestion that you can just look at the overriding agreement -- overlaying agreement, as I think she called it, and stop there, because this has got nothing to do with competition in the acquiring market, with respect, it is simply not right. Once you take that point on board, one sees the similarity between this case and MasterCard and indeed our cases. Once you get rid of the MIF agreement between -- on the inter-system situation, and you allow for the schemes to compete with positive MIFs by virtue of the scheme agreements below that, you're in exactly the territory that MasterCard was in, but apparently with a different result, because no-one here says that you -- by having regard to what the MIFs are doing where they are imposing positive MIFs -- sorry, the schemes are doing, you are doing something which

effectively can't be done. I put that very, very badly, but I think you know --

**MR JUSTICE ROTH:** I think we understand, yes.

**MR RABINOWITZ:** I think that is all that I need to say by way of reply, subject to the tribunal wanting to ask anything else.

**MR JUSTICE ROTH:** Thank you very much. I think we will rise for five minutes.

**(3.54 pm)**

**(A short break)**

**(3.59 pm)**

**MR JUSTICE ROTH:** Thank you both very much. For reasons we shall set out in a written judgment that will be handed down in due course, this application is dismissed.

Housekeeping

**MR JUSTICE ROTH:** Ms Smith, we did want to ask you, we need to proceed to fix a CMC in this case. We have had a letter about that, but I wasn't quite clear, is that CMC to deal with ongoing procedural directions for the conduct of the cases, disclosure and so on, or are there going to be substantive applications, as was hinted, I think, at one point, for summary judgment or strike-out, because that has implications for the nature of the panel? A purely procedural CMC, if I can put it that way, can be heard by a chairman alone and summary judgment needs a full tribunal.

**MS SMITH:** Sir, yes. I think a date may have already been set for a CMC --

**MR JUSTICE ROTH:** No.

**MS SMITH:** -- or it has been talked about. We have been trying to set a date for January. As regards to exactly what applications are going to be made at that CMC, there have been indications in the correspondence that we would

want to make substantive applications -- there were summary judgment, there was also a preliminary issue about applicable law. I think, in light of -- I think everyone was holding fire, in effect, to wait and see what the result of today's application would be, so I am not sure that, at the moment, the position is fixed as to whether or not those substantive applications will be made at the CMC.

If I may, sir, come back --

**MR JUSTICE ROTH:** I don't want to put you on the spot today, but if those instructing you could write in just clarifying, as it were, the nature of the CMC and whether it therefore is a one-day CMC or half day, indeed, if it is directions, many of which might be agreed, or whether it is something more substantive and whether it is thought that it might need two days. No, it's not been fixed yet, I can say with confidence.

**MS SMITH:** In light of today's judgment, the parties will be able to liaise before we send letters to the CAT so we can agree as much as possible and then indicate in correspondence to the CAT what is not agreed and what needs to be dealt with by way of a CMC.

Sir, in light of your helpful indication that the application has been refused, with reasons to come, we have sent to the tribunal, and to the other side, a statement of costs for summary assessment if, sir, you are prepared to engage with that today.

**MR JUSTICE ROTH:** No. I think it is better that you wait until you get the judgment and then you can make written submissions on costs. We have your schedules, both sides' schedules.

**MS SMITH:** Oh, I haven't seen a schedule from the other side.

**MR JUSTICE ROTH:** Perhaps we don't have one from the other side. I thought we

did. Maybe it was a second copy of yours. In any event, I think we will deal with that in writing.

**MS SMITH:** We will take that course.

**MR JUSTICE ROTH:** Thank you.

**MS SMITH:** Thank you very much.

**(4.04 pm)**

**(The hearing concluded)**