IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1306-1325/5/7/19
1349-1350/5/7/20
1369/5/7/20
1373-1374/5/7/20
1376/5/7/20
1383-1384/5/7/21
1385-1400/5/7/21
1406/5/7/21

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

Tuesday 1 March 2022

Before:
The Honourable Mr Justice Marcus Smith
Ben Tidswell
Andrew Young QC

BETWEEN:

H & H (Retail) Limited & Others v Mastercard Inc & Others
Coral Racing Limited & Others v Mastercard Incorporated & Others
Motor Fuel Limited & Others v Mastercard Incorporated & Others
Greene King Brewing and Retailing Limited & Others v Mastercard Incorporated & Others
Dune Group Limited & Others v Mastercard Incorporated & Others
Adventure Forest Limited & Others v Mastercard Incorporated & Others
(together, the "**Group 1 Claimants**")

Co-operative Group Food Limited & Others v Visa Europe Limited & Others
Moto Hospitality Limited v Visa Europe Limited & Others
Traveljigsaw Limited v Visa Europe Limited & Others
Nando's Chickenland Limited v Visa Europe Limited & Others
French Connection (London) Limited & Others v Visa Europe Limited & Others
H & H (Retail) Limited & Others v Visa Europe Limited & Others
Greene King Brewing and Retailing Limited & Others v Visa Europe Limited & Others
Hobbs Limited & Another v Visa Europe Limited & Others
JD Weatherspoon PLC v Visa Europe Limited & Others
Odeon Cinemas Limited & Others v Visa Europe Limited & Others
Coral Racing Limited & Others v Visa Europe Limited & Others
Motor Fuel Limited & Others v Visa Europe Limited & Others
Dune Shoes Ireland Limited & Others v Visa Europe Limited & Others
Adventure Forest Limited & Others v Visa Europe Limited & Others
(together, the "**Group 2 Claimants**")

Westover Group Limited & Others v Mastercard Inc. & Others
Westover Group Limited & Others v Visa Europe Limited & Others
(together, the "**Group 3 Claimants**")

Richer Sounds Plc v Mastercard Incorporated and Others
(the "**Group 4 Claimant**")

Furniture Village Limited v Mastercard Incorporated and Others
Caprice Holdings Limited and Others v Mastercard Incorporated and Others
Pendragon PLC and Others v Mastercard Incorporated and Others
J L and Company Limited & Others v Mastercard Incorporated & Others
(together, the "**Group 5 Claimants**")

Alan Howard (Stockport) Limited & Others v Mastercard Incorporated & Others
Alan Howard (Stockport) Limited & Others v Visa Europe Limited & Others
(together, the "**Group 6 Claimants**")

Soho House UK Limited & Others v Visa Europe Limited & Others
Pendragon PLC & Others v Visa Europe Limited & Others
Fattal Leonardo Royal Berlin Operation GmbH & Co. KG & Others v Visa Europe Limited & Others
MY Realisations Limited and FB Realisations 2017 Limited v Visa Europe Limited & Others
Furniture Village Limited v Visa Europe Limited & Others
Caprice Holdings Limited & Others v Visa Europe Limited & Others
GrandVision N.V. & Others v Visa Europe Limited & Others
Euromaster France & Others v Visa Europe Limited & Others
Firmdale Hotels plc & Others v Visa Europe Limited & Others
Globalgrange Ltd & Others v Visa Europe Limited & Others
Shiva Hotels Heathrow Limited & Others v Visa Europe Limited & Others
New World Hospitality UK Limited and My Bright Limited v Visa Europe Limited & Others
Grove F&B Limited & Others v Visa Europe Limited & Others
Baglioni (UK) Limited v Visa Europe Limited & Others
Edwardian Ltd & Others v Visa Europe Limited & Others
Melton House Investments Limited & Others v Visa Europe Limited & Others
(together, the "**Group 7 Claimants**")

A P P E A R AN C E S

Kassie Smith QC and Fiona Banks (On behalf of the Claimants in Groups 1-3 and 5-7)
Christopher Brown (On behalf of the Group 4 Claimant)
Brian Kennelly QC, Daniel Piccinin and Isabel Buchanan (On behalf of Visa)
Matthew Cook QC and Hugo Leith (On behalf of Mastercard)

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Tuesday, 1st March 2022

(10.00 am)

HOUSEKEEPING

THE PRESIDENT: Good morning and welcome to everyone. We have a few housekeeping things to address and then something more than housekeeping, which we are going to go through, but I will start with housekeeping.

These proceedings are being live-streamed, as you will all appreciate, and so I will start with the customary warning.

These proceedings are in open court and whilst they are being streamed to the public, there is to be no recording, transmission or photography of what is being transmitted and breach of that rule is liable to have very serious consequences. It hasn't happened so far and I am sure it won't happen today, but that warning needs to be given.

Secondly, we are, I think, a newly constituted tribunal. We have for reasons that are obvious, but which we may want to discuss later on, a tribunal comprising three chairs. We ought to put on the record that we, all of us, have at least one credit card, at least one debit card, and given the range of parties, there are inevitably going to be links between ourselves and the claimants. I, for

example, live in Cambridge and I see that a Cambridge local authority is a claimant. We have scanned the list of claimants. Nothing obvious has struck us as being a disabling factor, but I think everyone needs to be aware that if you were to try and identify connections between the panel and the parties, you would inevitably find some. I think it is appropriate that that be put on the record for everyone to understand.

The third point of housekeeping is just to say that we have read with attention the parties' written submissions and we are very grateful for that. We have also read a little bit more widely, but in light of the written submissions we have formed a provisional view as to how we want to approach these proceedings. We are very conscious that the parties have addressed us in light of an agenda that was framed by the Tribunal and therefore any implied criticism of the points that we are going to discuss should be directed entirely at me, but we think that a rather different process ought to be followed. What we propose to do after we have invited the parties to respond to the housekeeping questions and any points they might have is to go through how we think these cases ought to be tried. We would then propose to rise for about an hour to an hour and a half to enable the parties to consider just how much they object to the process we have articulated and we will spend the rest of the day dealing with the issues that arise out of what we have proposed, either to kill it dead or to work out the nuances of how it should work.

So with that series of housekeeping/health warnings, do the parties have anything they want to raise by way of housekeeping themselves?

MS SMITH: No, Sir. I don't think we have any points to raise in light of that. I don't know whether you need me to introduce everyone. I think you know who

everyone is sitting here. So I have nothing further to say.

THE PRESIDENT: I am very grateful. We have the benefit of a regular cast of people.

MS SMITH: All too familiar.

THE PRESIDENT: We are very pleased to see familiar faces again. So thank you for that.

MS SMITH: Sir.

THE PRESIDENT: Does anyone else have any points of housekeeping?

MR BROWN: Nothing from me, sir.

THE PRESIDENT: Grateful. I see silence.

MR KENNELLY: Nothing from me.

DISCUSSION RE WAY FORWARD

THE PRESIDENT: Mr Cook, I take your silence as consent.

The way forward. As I said at the outset, the agenda is very much informed by the process of (inaudible) litigation with lead parties, sample claims, disclosure plus perhaps questionnaires addressed to non-lead parties, expert evidence and then trial. We think that it is important to take stock at the beginning of what may be similarly large proceedings of what we have seen in the *Trucks* litigation. What we are seeing is this. We have a series of very substantial trials being listed before this Tribunal. *Trucks 1* is about 12 weeks long. *Trucks 2* and *Trucks 3* are in excess of 20 weeks each, scheduled for hearing in 2023 and 2024. Now that means in effect a year in court in *Trucks 2* and in *Trucks 3* with everyone accumulating substantial costs.

In advance of these three very significant trials, and I stress that it's not a closed list -- there may be a *Trucks 4*, a *Trucks 5* -- the indications are that we are

not going to stop at *Trucks 3* -- the demand for sequels is unending -- in advance of these trials there has been a series of very substantial disclosure exercises involving disclosure of substantial amounts of documentation and multiple hearings before a differently constituted Tribunal to this one. Again, enormous time and enormous cost.

As a measure of this, I am not going to try to term the lever arch equivalent of the electronic disclosure that has taken place. I can't say what the volume is. What I can say is that the volume of correspondence regarding disclosure that arises in front of each hearing runs to several lever arch files and that I think is an indication of cost and complexity that is undesirable, even if it is necessary.

Thirdly, a significant number of experts retained by all parties scrutinise these documents and deal with the very complex questions like pass-on by reference to the vast underlying set of documents that are produced as the result of disclosure.

Then with these very significant trials and their attendant costs comes the disbenefit we consider of there not being a binding outcome save on the actual parties to the proceedings. The *Trucks* litigation, as we understand it, proceeds on the basis that each trial is only of persuasive effect and the litigation occurs in the hope and probably the expectation that the parties will read across the outcome in the trials, but they are not bound by the outcome.

Now we consider that it is vital that this Tribunal learns from experience. We think that if we dialled back three or so years and were placed in the position of the Tribunal that has been managing the *Trucks* litigation and, like us it is a three-chair Tribunal presided over by Mr Justice Roth, my predecessor, we think we would have done exactly the same as they did. We would have had sampling trials and what we have here, but we now know the outcome, and

we consider that, without in any sense being critical of what has gone before, that we need to learn from experience, and it is incumbent upon us all at this stage of the proceedings to take a step back and to consider whether things can be done differently and more proportionately in accordance with the overriding objective, and it is in that spirit that the proposals we are now making are advanced.

It may be that we end up in exactly the same procedural situation as *Trucks* and that is absolutely fine. If that's where we end up, so be it, but we do consider that that needs to be a positive decision rather than a question that we simply follow by default and that is, as I have said, because of the very significant costs that the process involves, and whilst there are, I am sure, differences that one could articulate between *Trucks* and MIF litigation, there are also considerable similarities.

So we advance the thoughts that I am going to articulate rather tentatively. As I said earlier, what we will do is, we will invite the parties to think about those proposals for an hour or so and to push back, if so advised, as hard as you wish.

Let me also make clear that if any party considers that they need longer to consider the matter, we will be open to submission on those points. We do not want the parties to feel that they are having a procedural course imposed upon them without the opportunity to address us fully and properly. So, if you need more than an hour, do let us know.

There is, we consider, an entirely understandable distinction being drawn between issues in dispute that relate to infringement and issues in dispute that relate to quantum. Traditionally, the view has been taken that quantum cannot be litigated in a group action and we have seen that most clearly in the *Lloyd v*

Google outcome in the Supreme Court, but we think that is not always or necessarily the case. The *Lloyd's* litigation is an example where this was emphatically not the case. There were hundreds of litigants there but it was possible to identify in a rolled-up way what each claimant's loss was. We consider, albeit for very different reasons, that this case may be similar.

We anticipate, having scanned the pleadings, that pass-through or pass-on is going to be a major issue, not only in the claims which come before us in these proceedings but in relation to other claims before differently constituted tribunals, and we have in mind particularly the Merricks class action.

Our question to the parties is how far is it true to say that pass-on or retention of losses is truly an individual matter? As has been articulated in the Supreme Court in *Sainsbury's*, there are four principal options that a merchant might have when faced with an unlawful overcharge like an unlawfully increased MIF. First, the merchant may do nothing in relation to the increased cost and therefore suffer a corresponding reduction in profit or an enhanced loss or, secondly, the merchant can respond by reducing discretionary expenditure on his business such as reducing his marketing and advertising budget or restricting his capital expenditure, or, thirdly, the merchant can seek to reduce its costs by negotiating with many of its suppliers or, fourthly, the merchant can pass on the costs by increasing the prices that it charges to its customers.

Which option or combination of options a merchant will adopt will depend on the markets in which it operates, and its response may very well be influenced by whether the cost was one to which it alone was subjected or one which was shared by its competitors.

The question which arises, which has not so far as we are aware been fully discussed in proceedings, is how far such issues are to be resolved by

reference to the specifics of an undertakings business and how far they are to be resolved by the circumstances of the market in which the undertaking finds itself. We venture to suggest that the latter is much more likely to be the case, at least in this instance, than the former.

Now that I would like to flag seems to me to be a point on which we would welcome submission from the parties, because it contains within it a number of very significant implications.

The first implication is that if we are right, then quantum may be much more party-generic than party-specific.

Secondly, and related to that first point, disclosure may as a result be much less significant, and it may be that disclosure should not in the case of significant quantum issues be produced in the absence of an expert and lawyer-led framing of the issues, and I put expert and lawyer in that order quite deliberately, because it seems to me that it is the expert that is likely to be key with the lawyer articulating in legal form that which the expert considers to matter.

The third implication, and also related to the two points I have already made, there is the extent to which even such quantum issues can and ought to be generally binding.

So with that insight that we have generic questions of infringement and potentially generic questions of quantum, we are attracted by a process that operates along the following lines.

First, using the pleadings as a starting point, the parties with their lawyers and experts frame for the Tribunal's approval a series of common issues that arise across all actions, embracing not only infringement but most quantum issues also. We provisionally agree with Visa's submission that the infringement

issues are common issues that ought, so far as is possible, to be determined in one go and in a manner that is binding on all the parties. If that is wrong, then it would be extremely helpful to hear from the parties on that point; in other words, even if we are wrong about the question of commonality in relation to quantum, we consider that the process we are outlining is one that we ought to adopt *pro tem*, even if that means that at some point going forward we have to rethink and begin to determine individual issues individually or by reference to sample claimants, but we are not as matters stand in favour of embarking on a sampling exercise at this stage of the proceedings.

Thirdly, having identified and defined the common issues, we try them. We probably try them in linked batches rather than in one go, but we are open to suggestions on that, probably not today but for the future. We think that a single hearing would probably be too much, but we are not, I stress, ruling this out. If we are dealing with issues in linked batches, then clearly they will need to be framed in a logical and sequential order.

Essentially what we see is that we will have comprising the entire trial a series of preliminary issues. "*Preliminary issues*" is actually a misnomer, because we don't anticipate a set piece trial at the end of the process. We simply anticipate a series of preliminary issues, which will end up with resolution.

Prima facie we consider that all parties would be bound by the outcome of these preliminary issues. This would not be a weak *Ashmore v British Coal Corporation* abuse of process binding us but a fully fledged issue estoppel *res judicata*. The only difference we consider is that any appeals arising out of a particular issue would be occurring at the end of the total process rather than at the conclusion of each stage and we would want the parties to buy

into that. We don't see any attraction in having appeals at the end of a given stage such that the whole process is delayed for years while the appeal process is run. We think that all parties should proceed on the basis that we are absolutely not closing out their right of appeal, but their right of appeal should occur at the end of this process rather than in *media res*. Again that is something on which we would be grateful for the parties' views, because it does, I think, affect how this process works.

The issues having been defined, one would move straight to the expert analysis without further articulation in the pleadings of the parties' cases and we stress without disclosure. By that I mean we are not opposed to disclosure taking place. We regard disclosure as a very important part of the UK trial process, in particular before this Tribunal, but we consider in this case disclosure has to be expert-led. We see no point in issues-based disclosure in accordance with the Practice Direction that prevails in the High Court -- we see no point in issues-based disclosure occurring without the experts articulating precisely what they need to see. Precisely how such disclosure would be effected is open to discussion. We see a judicious mixture of data being provided rather than documents, specific and targeted requests for information, that is to say interrogatories, questionnaires to specific persons and, very much as a last resort, traditional documentary disclosure.

We consider that it is important that the experts involved in the process be limited, otherwise one will have a cacophony of divergent views as to how particular issues are to be sliced. We think, plucking figures from the air, that Mastercard and Visa should have two experts each, which they can pool if so advised, and that the claimants can have no more than four between all claimant classes however represented in these proceedings. Again, that's

something we are very happy to hear the parties on, but we consider that it is critical that the relevant expert pool be limited at the outset.

That would bring us to mode of trial. We will assume staged proceedings and we are fortunate that the majority of the claimants presently before us are represented by two firms who are very helpfully co-operating. There will therefore be no difficulty in having access to the relevant disclosure and the relevant example parties where a point requires examples. So, we are rather surprisingly, given our agenda, coming out against sampling on an overtly ordered basis. We have no difficulty in the experts identifying areas of interest amongst the pools of claimants and indeed areas of interest between Visa and Mastercard, but it is the case that we see the experts in the manner we described ranging freely, but subject to Tribunal control, across a vast array of data.

We would envisage staged proceedings taking place over, say, a two-week or eight-day period. Supposing three issues, hypothetically speaking, we see these hearings being structured in the following way. The claimants would have, say, three days to open and adduce their evidence. We would then have one day of down time. The proceedings would, we anticipate, be live-streamed and anyone watching who is not a party represented before the Tribunal on these occasions would have the opportunity to make themselves heard during this one-day down time. In other words, we would have effectively a walk-in opportunity for persons who are claimants but not represented in the manner we have described before the Tribunal. We would then have three days for Visa and Mastercard to respond and adduce their evidence and one-day claimant reply.

We put that forward as an example, but it is an important example, because we are

conscious that there are other claimants in the pipeline and that not everyone who is bringing a claim of this sort is actually at this point in time before the Tribunal, and one of the points we have in mind is how we tie in for purposes of consistency parties who are not at this moment in time specifically represented in the action.

There are a couple of other points that I should address, because they arise out of this overall process. Essentially what we envisage is a process where we deal with the generic issues as generic issues as long as we can. In other words, we create a series of binding issue by issue decisions which progressively narrow towards quantum. What we would like to see as the overall objective is a situation where the individual questions of quantum, which inevitably are going to arise, are actually reduced to an essential spreadsheet analysis of quantum, whereby the process is so clearly articulated as to what is and what is not claimable, that it is capable of being done in a more or less cookie cutter style way, really as was envisaged by the court in *Ashmore*, where one had a series of broadly similar claims of discrimination.

We also consider that this process of articulating and deciding common issues is a necessary consequence of the Court of Appeal's injunction in MIF cases that they be transferred to this Tribunal. The reason for that transfer is not merely because this Tribunal is an expert Tribunal for the purposes of resolving competition issues. That undoubtedly was a factor, but it is not, we consider, the critical factor.

The point about interchange fees and the unlawful overcharge in respect of those is that one has both direct and indirect claims arising out of them. As the damages directive makes clear, such claims should exist and, to be clear,

they do exist in this jurisdiction, but as the damages directive also makes clear, and also as is consistent with the law of this jurisdiction, one must not have either duplicated damages or cases where damages are not awarded in both the direct and the indirect claim, resulting in under-compensation. What one must achieve is a form of precise compensation where there is neither over-payment nor under-receipt.

That, as it seems to us, is why one needs to try these cases under one roof so that there is a consciousness of the various different matters that are appearing in this Tribunal, and I have particularly in mind in this case the fact that before a differently constituted tribunal we have the Merricks collective proceedings, which have recently been certified.

Now I have no idea as to the extent of the overlap between the Merricks indirect claim and the direct claims that are being framed here, but we would be quite surprised if there was not such an overlap given the rather elusive nature of the pass-through of costs. The fact is that costs can be passed on in a multitude of different ways where variables comprise not merely the manner of passing on but also the time-frame in which those costed are passed on. An unlawful overcharge may not be recoverable instantly, but may be recoverable after a period of time when the opportunity arises. We simply don't know.

We appreciate that the Merricks claim appears to end somewhere earlier than the claims in this case, and it may be that our concern about overlap is misconceived. If that is right, then, again, we would be pleased to know that, but it doesn't, I think, undermine the fundamental point that there needs to be consistency across cases in how pass-through is evaluated. It seems to us that is an objective that we should achieve even where the claim for damages

is actually only related in conceptual terms as a matter of pass-on and is not, in fact, duplicative.

So that brings us to the correspondence that we received recently from Scott+Scott. On 25th February 2022, Scott+Scott wrote in respect of certain claimants in the proceedings, *GrandVision NV & Others v Visa* in case number 1391/5/7/21(T). Essentially what was produced was a draft consent order staying those proceedings and inviting the Tribunal's consent to the stay that was sought.

I haven't made that order and it seemed to us that whilst we have no difficulty in permitting the parties staying the proceedings, we do consider that the premise that underlies the draft consent order, namely that the parties be relieved from the sampling exercise, has been, if we follow the process that we have articulated, comprehensively undermined. So, what we are saying is that, whilst we are prepared to make an order staying these proceedings, that would be on the explicit basis that the parties to the stay would be bound by any issues that we determined in this way. It seems to us that that is both inherent in the process that we have articulated and something that the parties to this particular consent order need to consider before it is made.

That has been, I am sorry to say, rather a long description of what we intend, but we hope that the parties can take it on board and respond constructively, by which we mean either critical improvements or critical opposition -- we are neutral as to which emerges -- but we hope that can be done if we adjourn for let us say an hour until 11.45. If the parties need anything more, then, of course, we will hear them, and if they have anything to say now, then obviously we will hear you now.

MS SMITH: Sir, we will, of course, adjourn and consider your proposals but could

I just ask a couple of points of clarification that immediately arise from what you have said?

THE PRESIDENT: Of course.

MS SMITH: First of all, could I ask as to who the Tribunal specifically envisages being bound by the findings arising from the staged proceedings? I was assuming that the only parties who could be bound by the findings are all those parties, those claimants listed essentially in the groups, the fifth to seventh groups of claimants who are in front of you today. I see, sir, you are nodding that those would be the parties who are bound by the findings.

So those, as I understand it, will be the parties who are represented in the proceedings that you envisage having and the staged proceedings that you envisage taking place over the two-week, eight-day period, the three days for the claimants to open, the one day of down time and then the three days for Visa and Mastercard. If that is the case, that the only parties who will be bound by the findings on the common issues are the parties who are represented, my question was what was the purpose of having a day, an opportunity, for other claimants who are not represented and, as I understand it, not bound by the findings to make submissions and make representations?

THE PRESIDENT: Well, you have put your finger on one of the problems that this litigation has, which is that we have several hundred claims that are formally before us where we can decide and bind the parties, because they are before us. We have several hundred more claims which are in the pipeline in various stages. Although we can't decide anything to do with that, what we want to give thought to is a process by which we can actually sweep these claims into the litigation that is ongoing.

Now that raises quite obvious issues about fair hearing and representation and bindingness, and it seems to us that we can't possibly create a system where parties not before us are bound without a hearing. However, we do want to leave the door open to an *Ashmore* type estoppel where someone who comes in late without good excuse and with a claim that is to all intents and purposes similar to the claims that we have been trying, that such a litigant should not be unduly advantaged by coming late. So we have explicitly built into the process a situation where there is an opportunity for a non-represented party to come in opportunistically, as it were, to say "*Hang on a minute. I am different*", in order to abrogate the weight of the abuse of process jurisdiction that arises out of *Ashmore*. That's why we have put it in there. It is not something I think which ought to trouble the parties before us today, but I am very grateful to you, Ms Smith, for raising it, because I do want on the record, as it were, for the pipeline cases that we are not particularly keen on having a process like this that repeats itself. We are going to do what we can, consistent with the overriding objective and fairness, to knock all these claims on the head in a consistent and fair way. So that is why we have the day.

It may very well be that it proves to be an unnecessarily baroque addition to a process, and it may be that we simply can't do what we would like to do, namely resolve everything in one process, but that was our thinking.

MS SMITH: Thank you, sir.

Can I also ask the second question of clarification, which is just the process that you have laid out. As I understand it, it is a three-stage process, one, formulation of common issues, two, expert analysis, three, trial of those common issues. Just so that I can be absolutely clear, there's no suggestion that there be two stages of trial so that trials to define the common issues at the end of stage 1

and then the expert analysis and then the trials, because, sir, you mentioned that there might be a series of hearings.

THE PRESIDENT: Yes.

MS SMITH: But then you suggested that there be just one period of hearings over -- one hearing in effect of about two-weeks, eight-days.

THE PRESIDENT: I understand your concern. No. I was making a hypothetical description of how one particular issue might be tried or several issues might be tried over a two-week period. I think we are under no illusions that there would need to be more than a single two-week trial to resolve all the matters in dispute. I mean, if I am wrong about that, I would be delighted to hear it, but I really don't think we will be. So, we envisage a series of hearings, because I don't think a single trial would work.

MS SMITH: Yes.

THE PRESIDENT: But you are absolutely right. We would envisage a formulation of the issues and the involvement of the experts across all of the issues from the outset, and then a sequential trial of those issues thereafter, but we do see significant front-loading of matters.

There will come a point, but we want to push it off as late as possible, where there will have to be a splitting where one hits, as it were, the individual as against the generic, but we want to make that occur as late as possible, and a significant part of our thinking is that actually, contrary to expectation, the quantum issues in this type of case are actually generic and not individual.

So, I am not saying, of course, that it's one shoe fits all in the case of pass-on. What I think I am saying is that the parameters that affect how costs are passed on are likely to be not susceptible of sampling in the traditional way. We think, and we put this forward as an example and not anything more, that how

pass-on is affected is likely to depend on parameters like the expensiveness of the goods being sold.

If you are flogging a Rolls Royce and you have someone who has a credit card limit that's big enough to buy one, the scale of the MIF is unlikely to be an issue, because you will just slap it on the price. If, on the other hand, it's a pack of apples from a small retailer on the High Street, then the ability to slap the MIF on to the apples is likely to be much harder and the chances are you will be absorbing the losses in some other way.

So, there will be common themes.

MS SMITH: Yes.

THE PRESIDENT: It is just that we think that the experts should formulate those common themes and be at liberty to pick on the data that elucidates them across the pool of claimants and using the data that will vest in Mastercard and Visa in that sort of focused way. In achieving that end we are incredibly assisted by the fact that the claimant pool is diverse, but the claimant representative pool is not, and that is, we consider, a massive advantage at the moment at least in this case, which wasn't the case in *Trucks*, and it's an advantage that we have every intention of seizing upon to the extent we properly can.

MS SMITH: So, without pre-judging what the common issues might be in any way at all, but to take an example, for example, if one of the common issues were defined to be '*can a particular type of MIF be exempted under 101(3)*', that issue would be formulated as one of the common issues. Next step would be expert input in that question. This is the data the experts say we need to see in order to define, to determine, that issue and then there would be a trial probably just on that issue which would follow the process that you have set

out of the two-week period. For example, that would be what you would envisage.

THE PRESIDENT: Exactly what you are saying, with this rider. I think there will be a degree of iteration in the process. I mean, we can probably all of us say that 101(3) is an issue and I would have no problem in saying we are going to have a trial of that as a separate issue. We then get to the economists input into this. What I would anticipate well before the trial of that particular issue is an articulation of what is actually in play, that is altogether more specific.

MS SMITH: Yes.

THE PRESIDENT: Now I don't think it would be wise to identify that process here and now, save in the most general way; in other words, we will do it issue by issue; we will do it in this way expert-led. We would have to have a series of case management conferences at which the disputes which I think we should say we expect to arise, because these are not easy issues, the disputes are resolved so that there is clarity at a relatively earlier stage as to what exactly is going to fall within one of the segments. It may be that that certainty is achieved at different stages for different issues, which is why the logical sequencing of the issues matters so much.

Equally it seems to us likely, though not inevitable, that the determination of one particular issue is going to affect the outcome and direction of later matters, and that's why the question of appeal is actually so tricky, because one could see that if 101(3) went in Visa and Mastercard's direction, there might very well be an argument for saying "*Look, there's no point in trying later matters. We need to resolve whether that outcome is right by way of an appeal*", in which case obviously that's something we would want to consider.

So what I said about the appeal process between stages is itself a nuanced question

that is dependent upon the process itself. What I think I would want, though, from the parties is a degree of buy-in into the notion that the right to apply for permission to appeal is something that can be pushed off by the Tribunal to a later date in the Tribunal's discretion after, of course, hearing the parties concerned.

Ms Smith, that was a very helpful series of interjections. I would want to resolve any points of clarification that any party had before we adjourn. So, if you have any points, please do raise them, otherwise we will rise I think until midday now. Yes.

MR BROWN: Just for my part, it is not so much a request for clarification. It is just that an hour may not -- I apprehend that an hour may not be quite enough. We may need a little longer because there is an awful lot to digest. It is a point you have already made yourself, sir.

THE PRESIDENT: It is an awful lot to digest. Is that a general feeling, because there is no point in shoehorning the parties into a limited period.

What we could do is we could rise until 1 o'clock. We'd take the short adjournment between 12.00 and 1.00 and then resume the hearing at 1 o'clock and run through the afternoon until -- I have to rise early today, because I have a commitment outside court, which is why we started at 10 o'clock, but I have to rise I think at 3.55 today. So, we have limits on the available time today, but, of course, we also have tomorrow, and to be clear, if any party wants to make submissions about adjourning this more generally, then we will hear them, because it is very important to get this right, not to make a decision today that might prove to be an undesirable one that we have to unwind later. So, two hours you have. If you need more than that, we will obviously hear you.

MR BROWN: Yes. For my part I would certainly look for 1 o'clock with the adjournment in between. Thank you.

THE PRESIDENT: Very good. Mr Cook.

MR COOK: Sir, just a couple of points. The issues here are potentially most significant for Mastercard on the basis the indications the Tribunal are giving are that there might be issues that are looked at here which have significant impacts on the Merricks claim, which you will recognise is a very big claim. The exact scale of the number depends partly on the decision that's awaited from the Tribunal most recently, but certainly we are talking about numbers in excess of £10 million. There's also a separate law firm instructed. I am instructed as counsel, but it is Freshfields who are instructed in that claim. Those kinds of issues are the ones which for the moment I am happy to say let us come back at 1 o'clock but on the basis that in that time I will need to take substantial instructions on whether we feel this is something, for example, that we will need to talk to our head office in the United States. You know, it has such a potential significant impact for us that this may be a greater issue. I don't want to do more for the moment than simply flag that up until I have taken instructions but that's going to be one of the first things I am going to be asking my clients.

Firstly, do we have enough people awake at the moment to deal with this sensibly? I appreciate New York will be open very soon but nonetheless to actually ensure that we have talked through these issues may take longer than that timescale. That is more a point for the moment to flag.

THE PRESIDENT: Again, I think that is a point that is well taken. Let me be clear that we have a sense of ever-widening circles in this litigation. What we do not want to decide today is the extent of bindingness on persons who are not

formally before the Tribunal as constituted today. What we are doing today hopefully is deciding how we resolve the issues that are formally before the Tribunal, *i.e.* the parties actually there. So, we are not today dealing with either the interchange fee claims that are in the pipeline, nor the other claims that are before other constituted tribunals here or indeed other courts generally, but we do want the process to be sufficiently robust to enable a degree of cross-fertilisation to be possible if that is considered to be desirable.

Now we absolutely acknowledge that there are enormous difficulties in doing that and it may not, to be clear, be possible. We have doctrines of issue estoppel and res judicata that are limited to cases of identity of parties for a very explicit reason and cases like *Henderson v Henderson* and *Ashmore* are exceptional for very, very good reason. So, I don't think you should worry about raising this with your partners in New York today. I absolutely would like you to raise it in the coming days and weeks, because we do have as an underlying concern the importance of articulating and resolving these issues consistently, but to repeat what I said at the outset, that is absolutely not on the agenda today. What I want to do is, I want to ensure that it is possible to have it on the agenda at some future date. So, I don't want a process that is explicitly antithetical to having a wider involvement, if that is possible.

MR COOK: Sir, that is very helpful. What I take away from that is that all you are looking at today is the idea of trying to define common issues without at the moment expecting me or any of the parties to sort of pre-judge whether or not there might be any issues in the context of passing-on, which is going to be the point that's perhaps most problematic in terms of the way historically this

has been approached, that it hasn't been seen in those kind of terms, and in terms of obviously as soon as you recognise or accept that there are common issues that has a potential impact or wider. I think that is helpful, sir.

THE PRESIDENT: Again, we have said a lot of things about passing-on and our view of it. Obviously, we have said so simply drawing on our experience of other cases, and those experiences have informed the way we see the process going forward, but obviously we are not making -- we are not going to make, we can't properly make any kind of decision as to how pass-on is, in fact, going to be resolved in the future. That is going to be a matter for the evidence, and if we are wrong and pass-through is not generic but individuated, what that I think means is that the process we have described nevertheless works, but there will have to be a point rather earlier than we anticipate where there is a divergence of cases.

So, I gave the example earlier of differentiating between expensive products and non-expensive products. I was hypothesising that pass-through might be different in those two cases. Now that would inform the sort of exercise that the economists would do, but if that's wrong and if pass-through is actually different for each and every person who is claiming, then the process will have to be re-invented at that point in time.

All I am trying to achieve at this stage is a situation where we are not pre-deciding that individuation at this stage, which is what sampling does. Sampling proceeds on the basis that you have got 780 different claims which need to be considered individually. You can't consider them individually, so what you do is you pick samples which are hopefully representative, and which will then persuade the parties not before the court to settle on roughly those terms.

Now that may very well be where we end up, but we don't think that that should be

something that we decide today, because it closes out the possibility, we think probability, that these are actually generic issues. So, if down the line the economists instructed say, "*Look, we can't formulate a general approach to pass-through. We need to know the following specific details about each and every party*", well, then that is where the economists take us, and it will have to inform both the evidence that is produced and the manner in which that evidence is heard. I don't want there to be any pre-judgment of that point beyond achieving a flexibility of process that enables a generic issue, if it is generic, to be tried in that way, and that I think was the mischief of the agenda that we framed. It immediately created a situation where we were seeing claims which could be tried generically as distinct, so not of general binding effect.

MR COOK: Sir, thank you. That's helpful.

The only other point I was going to make now -- I know it is the Tribunal's practice to produce a transcript. I don't know whether it would be possible practically -- whether the transcript of essentially the 45-minute introduction you gave this morning, sir, could be made available essentially as soon as it is available on the basis that, while we have all taken a note as we are going along, my experience of these things is that one goes away and realises that people's notes contradict each other. I appreciate nothing you have said, sir, is intended to be a statute or (inaudible) --

THE PRESIDENT: No.

MR COOK: -- or anything else, but nevertheless to have that document in front of us electronically sooner rather than later might assist the process.

THE PRESIDENT: What we will produce -- it will come as no surprise to you that I made a speaking note for this morning. We will get that copied and

delivered to the parties so that you can see what I said. I departed from the script in certain respects, but I think not inconsistently with it. I just expanded on it. So, we will make that available, because I don't think the transcript will come sufficiently quickly to be of assistance, but there's no reason why you can't have my speaking note.

MR COOK: Thank you, sir.

MR KENNELLY: Sir --

THE PRESIDENT: Mr Kennelly.

MR KENNELLY: -- we don't have any clarification at this stage. I may come back with some questions at 1 o'clock, but for the moment I don't have anything at this stage.

THE PRESIDENT: I am quite sure. I would be very disappointed, Mr Kennelly, if there were not questions at 1 o'clock, but thank you for that. In that case we will adjourn for two hours, just under, and we will resume at 1 o'clock.

(11.03 pm)

(Short break)

(1.15 pm)

Submissions by MS SMITH

MS SMITH: Sir, thank you for the time you have given us. We have had an opportunity on the claimant's side to discuss with Mr Brown, so all the claimants have had a detailed discussion about the position. Mr Brown will no doubt add anything that he wants to say to what I say, but I think we are pretty aligned as to our approach, our response to your suggestion, sir. We have had a two-minute exchange with counsel for Visa and Mastercard and I think we understand where the others are coming from, but I will let them say what

their views are. We have not agreed a detailed timetable to deal with the whole of the rest of everything.

From the point of view of the claimants we think that approaching this on an issue by issue basis is a very good idea, and we agree with that process. Our thoughts are the following and perhaps I can do this by taking you to some of the material we have before you at the moment.

We already have I think and can already put together in very short order -- I should start by saying the list of issues approach is a good idea. However, we on the claimants' side are extremely keen that the move from the sample exercise set out by the Tribunal last year is not taken as a move away from the focus that the Tribunal had at that stage of ensuring that what we did was practical and manageable. We are extremely keen, and we think it is extremely important, that the focus needs to remain on what's practical and manageable. It may be we now do it in a different way, but that must be, in our submission, at the heart of what the Tribunal's approach should be. We do not think, and we put a warning light, a big flashing red warning light, that this should not be seen as an opportunity for the defendants or for ourselves to rip everything up, start again and try and make this much more detailed and much more complicated than it would have been on the sampling process. This is not an opportunity, in our submission, for Visa and Mastercard to say "*Now the sampling has gone we are going to start from scratch. We want everything. We want you to provide us with everything and we want more than we were going to get and we want to litigate in effect 900-odd claims*". So that's my starting point.

Then my reaction to the proposals that you made, sir, practical proposals, is as follows.

As regards lists of issues, I think it is already pretty clear between the parties as to what the issues are at a level of relative generality, a high level. If I could ask you to look very usefully in Visa's skeleton argument for today's hearing. In paragraph 3 of Visa's skeleton argument for today's hearing they set out at a high level what they see the issues as being that remain to be determined.

THE PRESIDENT: (Inaudible).

MS SMITH: As a starting point that is agreeable. What our initial proposal would be is that it would be helpful to set a structure for the subsequent steps in the proceedings for the parties to agree this high level -- a high level list of issues at this sort of level. In our submission that can be done very quickly. Visa has put forward this proposal in its skeleton. The claimants can respond to that within 14 days, the defendants can come back within 14 days and then the Tribunal can decide and set in stone. Perhaps we don't need a hearing. We can have a decision on the papers setting the high level list of issues.

We think from our position we would need to take instructions. We would need to consider, but we think we would be somewhere along the lines of the high level of issues being set out here in paragraph 3 of Visa's skeleton.

You can see from that there are a number of issues that arise at (a) to (d) under 101(1). (e) is 101(3), (f) is 101(3) and (g) is quantum. Addressing how one should proceed with the case for each of those sets of issues, 101(1) issues, a number of those issues you will be aware are currently in front of the Court of Appeal on the summary judgment application.

THE PRESIDENT: Yes.

MS SMITH: So, sub-paragraph (a) and the post 2015 UK consumer MIFs, and I should say intra EEA MIFs, whether they restrict competition within the meaning of 101(1), is before the Court of Appeal. The commercial MIFs is not

before the Court of Appeal. It is not the subject of our appeal. The inter-regional is the subject of our appeal to the Court of Appeal for which we got permission. The non-UK MIFs, domestic MIFs in Italy and other countries are not before the Court of Appeal. So those 101(1) issues should -- how one goes about dealing with these subsequently for the purposes of the proceedings in front of this Tribunal will be informed by the Court of Appeal's judgment. If we get summary judgment on (a) and (c), then that's the end of the matter on 101(1).

THE PRESIDENT: It may be my understanding, Ms Smith, but I got the sense, and I think it was from Visa's written submissions, that the summary judgment application didn't determine every aspect of these issues.

MS SMITH: No.

THE PRESIDENT: I may be wrong about that.

MS SMITH: The summary judgment application did address -- our summary judgment application did address each of these (a) through to (d).

THE PRESIDENT: Right.

MS SMITH: The Tribunal found against us, or did not order summary judgment, on any of these (a) through to (d). We have appealed the Tribunal's decision on (a) and (c). We have not appealed the Tribunal's decision on summary judgment on (b) and (d).

THE PRESIDENT: I see.

MS SMITH: So (b) and (d) are still to be determined at trial on 101(1).

THE PRESIDENT: But I suppose what one can take from this is that there is a degree, and quite a high degree, of difficulty in framing what issues the court should deal with in these proceedings because the appeal may go any one of whatever ways.

MS SMITH: For 101(1) yes, that's the case. For the sub-issues set out at (a) through to (d), the Court of Appeal hearing has now been set down for 26th and 27th July and we would hope to get a judgment in Michaelmas term on that. So it may be that we leave -- at least we leave -- that's the position on 101(1).

The position on 101(3) is that our submission is that, regardless of how the Court of Appeal comes out on the summary judgment issues, there will still be exemption under 101(3) that will need to be determined at the very least as regards the pre-IFR domestic and intra EEA MIFs. Then there will still need to be a determination of quantum issues.

THE PRESIDENT: Yes.

MS SMITH: So, what we from the claimants' point of view envisaged was that following this high level agreement -- agreement of the high level list of issues, one would then move to what I think your Lordship had in mind, a more granular list of issues which is informed effectively by the experts, where the experts say "*Okay. Taking these high level list of issues, we will now tell you what granular issues need to be proven for each of those points and we will also tell you what we need by way of data and disclosure to prove those issues*". We had envisaged that the best way of doing that would be by the experts producing in effect reports that say, "*These are the granular issues that we think you need to prove under each of these high level issues and this is the data we need and why*".

THE PRESIDENT: Yes. Essentially what we would have is, one must not call them pleadings and one must call them theories apart, but they are a kind of, "*This is our thesis as to how we will establish these particular points. In order to establish this thesis, we need to see the following material which we think you*

have".

MS SMITH: Yes.

THE PRESIDENT: One then has a debate, which could operate at several levels. One debate would be, "*Look, this is oppressive. We can't give proportionately the material that you are looking for*".

MS SMITH: Uh-huh.

THE PRESIDENT: And to be clear, we said that there would be close Tribunal supervision of the process. So, if a methodology was objected to on the grounds that it was a disproportionate use of party resource, then we would be sympathetic to that, because we are not trying 780 or however many claims. We are trying common themes across them. So, we certainly expect that debate to take place, but equally there might be a response which would say, "*Look, we would love to help you on this but actually the data you are seeking does not exist in the form you think it does and you are going to have to think again, not because we don't want to provide data but because we can't*".

There may be a third class of objection, which would be to say, "*We can give you this data and it is not a problem giving it, but it won't establish what you think it will*". Now that's an objection I think we would be less inclined to give houseroom to, because if a party on either side wants to run a duff case, they are welcome to do so. We are not going to police the merits. We retain, as it were, the adversarial system to that extent. I am sure there will not be duff points, of course. I make that clear. It is not a control that we would be minded to take.

MS SMITH: Can I then make some practical suggestions?

THE PRESIDENT: Sure.

MS SMITH: We have made the first practical suggestion, which is that to get the matters moving that we exchange lists of high level issues and that we do that within the 14 days that I have proposed.

My next practical suggestion is, I have already indicated why I think for the moment on the broad issues that are encapsulated as the 101(1) issues, we need to wait and see what the Court of Appeal says.

My practical proposal I will make separately for 101(3) and for quantum. For 101(3) I have already said, and I hope this is correct, that we can progress this issue and should progress this issue whilst we are still waiting for the Court of Appeal judgment on 101(1) and that we can progress this issue by having agreed the high level list of issues. We then take the process that I think was in the Tribunal's mind of exchanging in effect these expert lists or reports or whatever you want of the granular issues and what the experts need to see.

Now the burden of proof on 101(3), as you will be aware, is on the defendants. So we would propose that they produce first their expert report or list and that we then respond. However, we do -- I am still on 101(3) but before I get to quantum. On 101(3) we cannot emphasise strongly enough that the parties have already been considering 101(3) in the context of this sampling exercise for a year and we have already had two expert reports from Mr Holt on what he needs to produce a MIT, Merchant Indifference Test, MIF. We have had our expert report in response from Mr Falcon.

Now we made the point in our skeleton, and it is in our submission important, that a MIT MIF is not the only issue that will need to be considered for the purposes of 101(3). We are likely to say it is a very minor issue. There are other issues that will need to be considered in order to establish the Supreme Court test for exemption, which is that merchants should get a fair share of

the benefits that arise from the restriction and that the benefits that merchants get from the restriction outweigh the negative impacts of the restriction. There is a lot more that the Supreme Court has said than just looking at the MIT MIF.

A lot of work has already been done. Although we accept that work was done in the context of a sampling exercise, which the schemes will say was imposed on them that they didn't want to do, but it was done in that context, we do have evidence from Mr Holt saying that in his view, taking 37 -- an RFI from 37 claimants plus the publicly available information means he can produce an adequate estimate of the MIT MIF. We say it can be done on the basis of ten sample claimants responding to the RFI and the publicly available information and that it is better done in that way.

There is already that issue between the parties which we were coming today ready to argue. In our submission we should not have to do all that work all over again. We should use the significant amount of work the parties have already done on that issue in order to see, for example, what type of evidence might be available or might be adequate for looking at the 101(3) issues or, at the very least, the MIT MIF issue within 101(3).

So, we say don't lose sight of the fact that work has already been done and we could argue today whether that is adequate, and we came prepared to do so.

THE PRESIDENT: Yes. I think, Ms Smith --

MS SMITH: So, what we are saying -- it may be this is a debate to be had once the experts have produced their detailed report. It is merely me putting down a marker saying what we don't want to see is the schemes' experts turning round and saying, "*Now you have given us an opportunity to come back we want everything*".

THE PRESIDENT: I understand. In a way what you have said cuts across the reason we implemented a three-chair Tribunal and didn't carry forward the Tribunal as constituted under Mr Justice Roth. In a way it informs my initial surprise when I was reading the skeleton arguments about how few skeleton arguments there were, because the reason we constituted the Tribunal in this way was because we were expecting far more claimants' groupings than actually there are before us. On one level, of course, I am delighted that the claimant groupings are as few as they are. On the other hand, what I think we are hearing is that the claimant groupings are few simply because there are an awful lot of matters in the pipeline, either because they are being transferred to the Tribunal or because they have been transferred to the Tribunal, but where there is no representation in those cases before us today. The reason I am raising this now as a concern is because if we are just carrying on under a slightly differently constituted Tribunal an old case, then a change of direction I think is undesirable for the reasons you have articulated. If, on the other hand, there is an additional accumulation of cases that can be dealt with in the course of these proceedings, then they jolly well should be.

So, my question really, and it may be one you can't answer, is why aren't there more claimant groupings?

MS SMITH: I am not sure I can answer that. What I can answer is that I am instructed by -- the original proposals for sampling were made in the context of the proceedings being litigated by one firm of solicitors, Humphries Kerstetter, which have led to now four groups of claims being litigated by Humphries Kerstetter, the Dune, Westover, and I can't remember the other ones. I think they are groupings one, two, three and four.

THE PRESIDENT: Yes.

MS SMITH: I am also instructed by Scott+Scott, who represent the various other claimants in groups.

THE PRESIDENT: (Overtalking).

MS SMITH: Then there is Mr Brown's client, which is one claimant. Now I again might have misunderstood. I don't know what the position is as regards -- I do know that there are a number of other claims either waiting in the wings or that have already been issued in front of the High Court and not yet transferred to the CAT, or have been issued and stayed in the High Court, not yet served. I know that there are a number of -- hundreds of other claims that are in that situation. I do not know if those claims are yet in front of the CAT. I had assumed, maybe wrongly, that they were not and that's why it is only our claims that are in front of the CAT today.

I had assumed that my claims, as it were, those being litigated by Humphries Kerstetter and Scott+Scott and Mr Brown's claims being litigated by Penningtons were the only claims that are live in front of the CAT. That's an assumption.

THE PRESIDENT: I think my assumption when I looked at this in preparation for this hearing was that there had been an expansion of the claimants but since the matter was decided by Mr Justice Roth, but very sensibly they had gone into the same solicitor firm in order to conduct those proceedings.

MS SMITH: There has been some expansion. There have been a number of claims that have been added to the Humphries Kerstetter claims. The Scott+Scott claims are again not an insignificant 200 odd claims that are being represented by Scott+Scott and those were not before Mr Justice Roth.

I suppose the point is that our claims, particularly the Humphries Kerstetter claims, have been going on for years and they have been in front of the CAT for

a number of years and were stayed initially because of the Supreme Court judgment and then were in front of Mr Justice Roth a year ago and then were held up by the summary judgment. What we don't want is for those claims to be delayed -- for all the other claims that are not currently in front of the CAT to catch up with them.

The claims that are before you are set out in footnotes 1 and 2 of our skeleton argument. I think most of the other claims that are not before you today have been stayed in one way or another and the defendants' counsel are probably in a better position to answer this than I am, because they face all these claims, but I understand other claims are either stayed in the High Court waiting to see what happens with our claims. I am not sure if any have even got to the CAT yet.

THE PRESIDENT: Yes. It may be that we need to do a further audit. When we in the CAT were planning the need for this case management conference, what we envisaged was that there would be an awful lot more claimants than those who were before Mr Justice Roth. Now it may be that actually the number was just the 200 odd that you have mentioned who are new arrivals. Obviously the exercise that we are contemplating, if we are right on, as it were, generic formulation, needs to be as broad bush in terms of bound persons that it can be. That said, we are very conscious that justice delayed is justice denied. So, your point about delaying proceedings that have already taken a while is well made, and equally we don't propose unless the composition of the claimant groupings is so different as to justify a clean slate approach to re-invent the wheel. So, work that is done ought to have its due value attributed.

So, it is actually quite an important question who is going to be coming down the

line and when, which does affect the way we see the proceedings going forward.

MS SMITH: Just for clarity if I could ask you to look at our skeleton, it explains who is now currently in front of the Tribunal. Our skeleton argument, paragraph 3, footnotes 1 and 2.

THE PRESIDENT: Yes.

MS SMITH: You can see that there are 704 claimants comprised of four waves of claims brought by Humphries Kerstetter. In footnote 1, the Dune Group, the Adventure Forest claimants and the Westover claimants were all in front of Mr Justice Roth a year ago. The wave four Alan Howard claimants were not and none of the SSU claimants, the 254 SSU claimants, were in front of Mr Justice Roth a year ago.

Of course, Richer Sounds, Mr Brown's client, was not in front of Mr Justice Roth a year ago. The difference is about 600-odd claimants were in front of Mr Justice Roth and about 900-odd are now in front of this Tribunal.

There is also the situation that you may also be aware, just to further complicate matters, there are a number of additional -- there are additional claims that are likely to be issued in the near future by Vodafone and Ideal Shopping against Visa that are not currently in front of the CAT, who are helped by Scott+Scott. They have been held up in the High Court.

THE PRESIDENT: Why have they been held up?

MS SMITH: Because of service issues which have been up to the Court of Appeal and back. Completely unrelated issues but totally related cases, procedural issues as to service and whether service was adequately done. That has been up to the Court of Appeal and back, but now the claims are about to commence or to proceed against Visa by Ideal Shopping and Vodafone and

one of the issues under the agenda item 8 was to deal with this. Obviously, Visa and Mastercard are aware of this, or Visa is aware of this, and they were happy for those to be brought into these proceedings but not necessarily to be in the sample.

THE PRESIDENT: Right.

MS SMITH: In any event, that is the position. What we are obviously not at all keen to do is in some way to wait for anyone else who might want to bring a claim who has either issued or served or not yet issued but is thinking about it and is in correspondence with Visa and Mastercard, because there are probably large numbers of claimants in each of those categories in pre-action correspondence with Visa and Mastercard threatening claims, issued claims but stayed before service, agreed a stay before service or have served claims and agreed a stay. I understand there are hundreds of claimants in just those positions against Visa and Mastercard. What we cannot do, I say, is wait for any of those in some way to catch up or in some way to be brought into these proceedings. We have 900-odd claimants here in front of the Tribunal today efficiently only represented by the three of us, but there are 900 claimants in front of the Tribunal today.

THE PRESIDENT: I understand. In a sense what you are articulating very clearly is the point that I said I would park this morning, which is how far the hypothetical day that would be left over for other parties would be needed. The question you are articulating is the extent to which we can allow these proceedings to proceed expeditiously whilst ensuring that we maintain a degree of consistency of outcome and a degree of bindingness with regard to people who are not formally before the court. That does raise a series of very interesting and difficult questions. I don't think that we can do more than

articulate the problem and proceed on the basis that we are unwilling to allow the tail to wag the dog in the most literal sense. We know that there are tails to this litigation and if claims are not brought, then they should not unduly prejudice the claims that are brought. Our function primarily has to be to resolve the issues that are before us.

That said, it is in the nature of the process that there's inevitably going to be a degree of delay in the framing of a complete set of issues until the Court of Appeal has handed down its judgment. So, if we budget for an October hand down of the Court of Appeal's decision in Dune, we actually have got a period of unfortunate fat in the procedural timetable, which might allow this blockage regarding the tail to be examined further.

MS SMITH: Sir.

THE PRESIDENT: Do go on.

MS SMITH: Not wanting to interrupt. What we can say certainly is that we have a huge pool of claimants represented in front of you today, over 900 claimants. We can also say they come from a vast range of different parts of the economy, unlike the previous claims brought by Sainsbury's, Asda and Morrisons, which tended to be large supermarket retailers, large retailers. We have a huge wide range of types of claimant in front of the Tribunal, 900-odd. What we can say for certainty is that those claims date back to 2016 at the earliest and have been stayed since 2016 for various reasons and it is time to get on with them.

What I can also say with some certainty is that the other claims that we know exist, but which we also know have been stayed, may not be bound by what is held in these claims, these 900 claims, but they will certainly be waiting to see what is said and they will certainly be, one hopes, realistic negotiations as to

settlement in the light of what has been decided in these cases.

As to using the time we have between now and the Court of Appeal judgment on the summary judgment issues, in my submission that would not be efficient to in some way try to encourage or force other people to put their heads above the parapet. It is far more efficient that they are stayed and wait and see what happens in our claims. The answer is to use the time as I have proposed to, first of all, agree within the next couple of weeks the high level list of issues and then, secondly, to use that time to proceed with the granular issue setting through the expert reports for 101(3), because, as I said, 101(3) is going to happen regardless of the outcome in the Court of Appeal, because we are going to need to consider 101(3) for the purposes of, at the very least, the pre-IFR period MIFs, which are not -- which Mastercard at the very least has agreed -- has conceded do breach 101(1) and Visa is seeking to appeal their asymmetrical counterfactual, but don't have permission for that yet.

So, we are going to have to consider, exemption one way or the other. We say we can use that time between now, 1st March and October to proceed quite well down the road on 101(3).

So, our proposal is that we have the high level list of issues agreed within the next four weeks. Then we move to the granular list of issues, expert reports, what the experts see to be the granular issues on 101(3), what they want to prove and how they are going to prove it, that the defendants put their expert reports on those issues in first, because they have the burden and then we have an adequate time to respond.

I have made my submissions as to the amount of work that has already been done that we think can very efficiently be used, but we could have the argument today and I am ready to have that argument, but it may be that the Tribunal

thinks that's an argument to be had once we have seen the detailed expert reports on the 101(3) granular issues.

Can I just, before we go to open this up to the more general discussion, make some submissions on the third category of issues?

THE PRESIDENT: Yes.

MS SMITH: Which is the quantum and pass-on. We think this is the one that is going to be the most difficult, because there may be some generic issues that one can look at for the question of quantum and pass-on, but we think there may also be issues that are very fact and claimant specific, or at the very least claimant type specific, so if not an individual hotel, at the very least hotels rather than a wider category of hospitality, but we think that -- we do not yet know -- we think before one gets to the stage or before one's experts get to the stage of determining what the granular issues might be for pass-on and quantum -- pass-on specifically, there is a legal issue that is still not clarified, has still not yet been clarified, and definitely is not agreed between the parties, as we understand it.

That is this one discrete legal issue on pass-on, which is what exactly has to be proved -- what actually is meant by paragraph 215 of the Supreme Court judgment? Does the approach that the CAT took in the *Sainsbury's* judgment as to a legal nexus, a direct causal link -- I will take you through it, if I may. Can I take you through it step by step? If we start with the authorities bundle 1, tab 3, which is the CAT judgment. *Sainsbury's* you will be familiar with, sir.

THE PRESIDENT: Yes.

MS SMITH: Etched upon your heart. If I could ask you to go to paragraph 484, which is paragraph 313 of the bundle numbering.

THE PRESIDENT: 484.

MS SMITH: Right towards the back. Page 313 of the bundle numbering.

THE PRESIDENT: Yes.

MS SMITH: At 484(4) this is where the CAT draws a distinction between an economist's perception of pass-on of a cost and what was presented as a legal definition of a passed-on cost, which may differ from that of the economist.

THE PRESIDENT: Yes.

MS SMITH: In two respects. Those two respects are set out in (i) and (ii) on the next page, in particular I would focus on (ii), which is:

"*The increase in price must be causally connected with the overcharge, and demonstrably so*."

This is what in the jargon we found ourselves referring to as a sort of direct causal link or nexus being required between the increase in price and the overcharge. The overcharge has to lead directly to an increase in price. You have to be able to, as a matter of fact, trace it through, find this direct causal link.

This was not a question that was considered explicitly by the Supreme Court and in our understanding there is still an issue between the schemes and claimants generally as to whether or not that direct causal link is required or whether it is sufficient for more of an economist's view of pass-on of costs, that if you have covered your costs, you have passed on the loss.

If I could ask you to have a look at the Supreme Court judgment.

THE PRESIDENT: Yes.

MS SMITH: Which is in authorities bundle 2, tab 8, page 455 of the bundle numbering.

MR JUSTICE MARCUS SMITH: Yes.

MS SMITH: You referred, sir, earlier to what effectively is set out there in paragraph 205?

THE PRESIDENT: Exactly.

MS SMITH: The four options -- the four ways in which a merchant might respond to a cost increase.

THE PRESIDENT: Yes.

MS SMITH: Or to an overcharge. Obviously that is set out, but what is not answered there is whether there has to be a direct causal link or a nexus between the overcharge and a price. Our argument will be, and has been, that the Supreme Court did still implicitly accept that there has to be this direct causal link or nexus between the overcharge and increase in price which has to be proved in order to prove pass-on.

I am not going to develop my arguments extensively for those purposes today, but effectively they turn on what is in the two pages on, paragraph 215 of the Supreme Court's judgment, where you might recall the Supreme Court referred to the *Westinghouse* case and mitigation and the fact that mitigation as characterised in the *Westinghouse* case says that there has to be the action that the claimant has taken, the mitigation -- the action in mitigation that the claimant has taken has to arise out of the transaction. There has to be, we would argue -- there is there a recognition of having to be a direct causal link.

THE PRESIDENT: Yes.

MS SMITH: As the underlying words show, the Supreme Court says.

THE PRESIDENT: Yes.

MS SMITH: So that is an issue that we say is still live, a legal issue that is still live.

Of course, in our submission, that legal issue whether for the purposes of pass-on a direct causal link has to be proven or established, as the CAT decided in the *Sainsbury's* judgment, or whether there is a less direct link, it is enough from an economist's point of view for a merchant to cover its costs, what is the correct approach as a matter of law we say needs to be determined before one can determine what material is required to prove pass-on.

Now it would be potentially extremely wasteful to go through the process of the experts setting out their granular issues on pass-on without knowing the correct legal test which is to be applied. So our proposal -- again everyone is dealing with this on the hoof -- would be -- and again this does not need to be -- this could again be an issue that is dealt with in relatively short order within the next few months -- that there should be a short hearing, a day or two hearing to address that legal issue so that we know what the answer to that is before we go to the experts and say, "*Tell us what you need to prove*", because we need to establish, as a matter of law, what they need to prove before we can ask them to tell us what, as a matter of economic fact, they need to identify, particularly if we are talking about having to establish a direct causal link, a direct nexus. That then gives rise to the issue that this may be more of a factual, claimant specific question and we need to then determine how to deal with that.

THE PRESIDENT: You have unpacked an extremely interesting question, which has been troubling me for some time in another matter, and because I have yet to hand down judgment in it, I will not say too much about that.

MS SMITH: Sorry. I should have said it has been considered, and again I am speaking off the top of my head here, this issue has been considered

specifically by Mr Justice Roth in one of the *Trucks* judgments. Of course, that's just a tribunal judgment. Still there is an argument as to what the Court of Appeal judgment actually means.

THE PRESIDENT: If it was as simple as articulating what the correct legal test was, you would be pushing at a pretty open door that one needs to resolve the nature of the issue that is to be proved before one goes about proving it. That I think is so obvious that it doesn't really need stating. The problem is that I am not sure it is as simple as that. We have a number of competing values here. We have the broad axe that applies in quantification cases such that where there is a properly articulated claim, and of course in these cases infringement is usually taken as read, but that's because of other findings in other decisions. So, you are immediately into broad axe territory.

That means that the claimants are entitled to a considerable degree of latitude in terms of how they prove their loss, but there must not be overall compensation. So, it does seem to me there has to be some kind of test for working out that which has been passed on versus that which has not been passed on, because if you don't have a test that is capable of application in general terms, you are inevitably going to result in over won compensation somewhere, because the proper level of compensation will become a matter of coincidence rather than anything else.

So, the question then is not *do you need to demonstrate a causal connection?* It becomes really a question of how you articulate or proffer that causal connection.

Now the interchange cases are actually a good example of how easy that can be, because it is often forgotten, although I am sure not by Mr Cook, that the *Sainsbury's* case was, in fact, an indirect claim. It is just that the cost was

passed 100% and transparently so from the acquirer to the supermarket, to the merchant. That was so clear that no-one sought to contend to the contrary. So, you get the nasty sense that actually *Sainsbury's* was a direct claim when, in fact, it wasn't. The question is how far do you establish what has demonstrably been shifted down the line?

I am wondering whether the legal question you have been articulating is not so much a legal question as how one demonstrates the passing down of the costs, and that's why I am so interested in the question of whether this is or whether this is not a generic question.

So, to go back to my example earlier of whether the pass-on is affected by the value of the goods, I can see an argument for saying that if you have something which is quite pricey, a marginal increase, even if it is calculated as a percentage of the price, is going to be less significant and easier to pass down the line than a situation where you have a cheaper commodity where a percentage increase in price, even if it is the same percentage, looks bigger in absolute terms. That may be something which an economist would articulate in saying "*When I am computing what has been passed through versus what has not been passed through, I take it into account*".

Another factor that might be relevant would be the level of asymmetry in cost base. Let me unpack that. Suppose you have a market which is competitive, but where one part of the market actually uses credit cards and so it is affected by the illegal MIF, but another part of the market doesn't, they pay in other ways. That would mean that, if you had a highly elastic demand curve between those two segments of the same market, it would be much harder to pass down into the prices the overcharge than if you were in a market where the overcharge affected everybody. So, one of the things in *Sainsbury's* was that

you could reckon that there was an ease of passing down the prices because all of the supermarkets were affected by the overcharge in broadly speaking the same way.

Now that is me talking. I don't know what an economist would say about that, but it struck me as pretty clear that that would be the case here. You can imagine that the pass-through would be very different if, let's say, that Sainsbury's and Tesco on the one side use credit cards and Morrisons and Asda and Waitrose don't.

Now the question is, does one feed these factors and other factors into the articulation of what is pass-through and do it at an ungranular broad axe level, or does one say "*No, we have to look at a sample set of bodies*" -- hotels, he took an example of -- "*and work out how in that specific case, which can then be read across to other hotels it works*". The question I have, and it may not be capable of resolution, is what actually would you want to have produced from the specific hotel in order to demonstrate pass-through, because I think in *Sainsbury's,* if we had ordered the widest disclosure in the world, we still would not have been able to work out whether the overcharged MIF had resulted in an increase in the price of bananas or a decrease in the salary of shelf stackers. I just don't think you would be able to find that out.

So, the question I think is not a legal one. It is a question of translating into provable language a concept that an economist is enormously familiar with. I mean, an economist sees pass-through completely differently to the way a lawyer does, and frankly I think the economists think the lawyers are pretty mad in the way they frame pass-through, because an economist sees pass-through as the way of doing business. You have costs. You have to recover them. The lawyers see pass-on as a particularly intrinsic evil that needs to be

compensated for. It is translating the two.

MS SMITH: Yes, sir. We still do think there is an issue that needs to be determined by the court, because on your characterisation and my characterisation of what an economist's view of pass-on would be, any profitable business has not passed on and would not be -- so if we take -- if I take the example of the test that was set out in the CAT, if you have that open, the test that was set out in the CAT at 484(4)(i) and (ii), say we have an extremely expensive car that's being sold at a price of 100 or whatever. The costs of producing that car are 10. The costs are increased by an increase in the MIF or an overcharge of 0.2. So, the costs are now 10.2, but the price remains 100. From the economist's point of view as defined in sub-paragraph (i) of the CAT's judgment, the economist would hold that that was still pass-on, because there's no -- it's been subsumed into the margin. The costs are still covered whereas there is no demonstrable increase in price as a result of the overcharge, because the price remains 100. Which test are we applying?

It seems to me that is a question which needs to be determined before we can -- whether that is the test I understand the CAT to be setting out, and we need to determine that before we can determine what we are asking the economists to look at or what material they need in order to prove pass-on.

THE PRESIDENT: I am very reluctant to say that a legal issue that one party has articulated shouldn't be decided before one delves in, but I have to say I do think that we are going to need a coherent statement.

MS SMITH: I think so.

THE PRESIDENT: From your side I think -- I am pretty confident I know where Mr Cook is going to be coming from -- I think we need a pretty clear statement from your side as to how you are going to demonstrate pass-through in

a specific case. I don't necessarily need the full granularity, but I do think that we are going to need a very clear articulation of how a court is going to decide the issue in a reliably predictable and consistent manner, because I have to say I find your test, and it may just be me being dense, I find your test very hard to fit into the four principal options from the Court of Appeal, because the thing is it is perfectly possible for an undertaking, a firm to do several of these principal options and do them indeed at different times. So, if you have an undertaking that negotiates a reduction in its wage bill or less of an increase than it would otherwise be inclined, but at the same time increases its prices of the goods it's selling, you would say that is always pass-on to be not compensated for by a direct claim, but by an indirect claim. Have I got that right?

MS SMITH: No. We would say that, unless it can be proven that prices were put up as a result of the overcharge or prices were increased as a result of the overcharge, there is no pass-on.

THE PRESIDENT: Right. So you need a consciousness.

MS SMITH: A direct causal link between the -- the point is that the -- in our submission, the Supreme Court held that there is a prima facie claim. The overcharge itself is the loss. It's not a loss of profit claim. The overcharge is the loss which is prima facie to be compensated. Then it is a question of mitigation. It is not enough to say if the claimants have covered their costs, that's enough. We say that the overcharge is the loss unless it can be shown that the claimants have -- there's a direct causal link between the claimants being given the overcharge and they have then passed it on by increasing their prices.

I think the most important thing is we say the defendants need to show that one of

the four principal options that the Supreme Court set out in paragraph 205, they need to have been -- they need to have happened as a result of, because of, in response to, the overcharge in order to prove pass-on.

The point is that it is only option 3 or option 4 in the Supreme Court's paragraph 205 that can, as the Supreme Court put it, reduce the merchant's loss, but it can only reduce that loss, that is the loss arising from the overcharge -- the loss is the overcharge -- if option 3 or option 4 occurs as a result of the overcharge.

THE PRESIDENT: Yes.

MS SMITH: Sorry. I didn't come to present that argument today so I have not possibly presented it as clearly as I could have done, but we do think there are issues which we understand have been -- there are issues between us and the card schemes as to how one interprets 205.

THE PRESIDENT: I completely agree, with respect. Also, I think there is an enormous danger in reading 205 as a statute rather than as an articulation of an argument that was taking place in the absence of the facts. So, I think this has been a very helpful discussion. We will obviously take it away to discuss, but my initial reaction is that, if we try to resolve this by an abstract discussion, we are going to end in tricky waters, because the problem with both the *Sainsbury's* judgment by the Tribunal and the *Sainsbury's* judgment by the Supreme Court is that they are an abstract formulation of what is going on. I think what we need, and frankly I don't care whether it is done through the experts or the lawyers, probably both, I think we need an absolutely clear articulation as to what needs to be shown in order to successfully have a claim of a loss that has been borne, or additional cost that has been borne by a claimant in order to work out whether that loss has remained or whether it has gone down the chain to a more indirect consumer.

Now the reason I have thrown economists into this and the reason that I think it is important that we have economic input into the way this is framed is because I do think that the way in which one articulates the claim as a matter of law is overlaid or underpinned -- I am not sure which -- but is related to the way in which you prove the claim, because it may well be that actually you are wrong on the law but right on the facts; in other words you can show by reference to other factors that, in fact, a loss has been retained by your client and it is really just a question of unpacking the facts that you need to show in order to make that good.

The point that we made this morning in relation to those factual questions is for our part we consider that they are generic points, not individual points; in other words, what you are doing is you are articulating the factors which inform a reasoned decision as to whether the loss stays or moves down the chain, and for my part I would be hugely reluctant to decide that matter in the abstract and without some form of packaging as to how it is going to work in the specific case.

So it may be that for pass-on we need to have a slightly more recondite process where each party sets out, using whatever material they wish, how they propose that the Tribunal decide the question of pass-through and we then consider the general correctness of those two approaches and resolve at a hearing any collisions of law that may occur. So it may be we decide you are right on the law and therefore decide to bin large tracts of, let us say, Mastercard's theory of how one computes this and we then proceed on the basis that facts are fewer, but I wouldn't want to have that argument without something fairly concrete which shows the issues we are grappling with, because the more we have this conversation, the more I feel that an abstract

debate is going to result in a complete car cash decision from this Tribunal and I want to avoid that.

MS SMITH: Sir, as do I. Three points, if I may, sir. The first point we emphasise the burden of proving passing on is with the defendants.

The second point is what we are absolutely, very keen to avoid is a situation where the economists put in their view as to what they think they need to prove to prove pass-on and we have ships passing in the night because they are applying completely different tests or looking at things from a completely different point of view. That's my third point. That's what we really want to avoid on pass-on. That's why we say we suggested tentatively the question of perhaps a preliminary issue on the law on what needs to be proved for pass-on. That's really where our concern arises, that there are going to be ships passing in the night and we are not going to get anywhere.

The third point, which has just gone completely out of my head -- the third point on pass-on I am going to have to come back on, because it has completely gone out of my head. Yes. It may be that we need a further -- it was about whether or not it is likely that the pass-on issues will be generic. This I think may be again informed by what our understanding is of pass-on. When we were talking, Mr Brown gave a very good example of a merchant, say Dune, selling shoes. On day one Dune are selling shoes at a certain price and they give a promise, a price promise out in the market that says "*We will not increase our prices for the next six months or we will match the lowest price out in the market*". The next day they are faced with an increased overcharge, for example, or an increase in their costs. Normally from an economic point of view the economist would say "*Well, the response to that would be, looking at how this market works, it is an extremely competitive market, etc, etc, from*

an economic point of view we would ...", obviously they would put their prices up in response to that, but they don't because, as a matter of fact, they have made a price promise on the market, for example.

So, we are very concerned that, one, these issues of pass-on may very well not be generic. They may be fact-specific, and it may be fact-specific at the level of a type of retailer. They may even be fact-specific at the level of a specific individual retailer.

Secondly, we are concerned that they cannot be determined by reference to economic evidence alone, because facts may very much impact on whether or not pass-on happens.

I give that example, and I think that example is informed by my understanding and my argument as to what needs to be proven under the Supreme Court judgment and under the CAT judgment of pass-on. You need to have an increase in price in response to the overcharge and in that case the overcharge was imposed. There was no responsive direct causal link to an increase in price. So, in that case we would say there is no pass-on, but that is very fact specific and also it is not possibly what an expert economic evidence would have said would happen.

So that just gives you an example of why we, one, think it might be useful to try to determine this what we have said to be a legal issue, but also why we are concerned that this may not at the end at the day -- there may not be many generic issues. We may need to go to, for example, a sampling type exercise for quantum and pass-on.

THE PRESIDENT: You may well be right about that. I hope one of the points that we made this morning was that we were not committed to resolving all of the issues on a generic basis. What we wanted to do was to preserve the ability

to do so, and it may be that when one has articulated what actually pass-through means, and I don't think any court has come close to doing that frankly, once you have articulated what pass-through means as a legal concept, then one can work out how to resolve it, but I think that if, having worked out what it is and how one resolves it, sampling becomes the answer, then sampling is what we will do. It is just I don't feel that at this stage we are at the position of resolving that rather difficult question.

MS SMITH: I think for the moment, sir, that's helpful. It rather leaves everything up in the air a little bit. I hope it makes clear that in our view, just to sort of conclude where we are for the purposes of today, because we are extremely keen for orders to be made today to start the ball rolling, because we had thought we were -- the ball had rolled a little way and now we don't want it just to roll back and nothing to happen. We do make the proposal for the high level lists of issues to be exchanged and to be agreed.

We do make the proposals on 101(3) that there be an exchange of -- not an exchange but a sequential production of expert reports setting out the issues that need to be -- granular issues that need to be determined for the purposes of 101(3) and what data material will be needed by the experts to prove that. So, as I have said, we would propose that that be produced by the defendants first and then, within a reasonable period, our experts to respond.

We also propose that there should be a CMC in Michaelmas term, probably towards the end of Michaelmas term, October/November time, so that we can determine the points that are to be in issue for the purposes of 101(3) and to deal with any disputes -- determine any disputes on what those issues need to be and what data needs to be, and hopefully by then we will also have a position on 101(1) and be able to decide how to take that forward in light of

the Court of Appeal judgment. So those are my proposals.

I am afraid on quantum I do still think that there are some very complicated issues to be determined how we best deal with that, but what we want to avoid is a simple production of expert reports where both parties just miss the boat and we totally are ships that pass in the night, because we do think there are some preliminary issues in the real meaning of preliminary issues that need to be determined on pass-on.

Submissions by MR BROWN

MR BROWN: Sir, may it please the Tribunal, I am not going to repeat much of what Ms Smith has submitted to you already. I adopt gratefully her submissions on the suggestion of a high level list of issues and for the issues then to be developed in more granular fashion by the experts setting out their views on what the sub-issues are, what needs to be proved, what sort of disclosure will go to that. It seems to me at least provisionally that it would be helpful for the experts to identify disclosure, coming not only on what they would wish to seek from the other side in terms of disclosure, but at least in broad terms what sort of documents and data will go to those issues more generally, including from their own side. That seems to me to be a helpful and constructive way for the experts to proceed.

In my submission it is sensible and appropriate for that process to be sequential, for it to be iterative. The burden, of course, is on the schemes when it comes to exemption. In my submission it makes sense for the defendants' experts to go first and for the claimants' experts to respond to that, to add to it and, if need be, there can be a further round.

So, sir, those points are essentially where we are all in agreement on this side of the

bar.

What I wanted to touch on really was the question of whether quantum is or may be a generic issue.

THE PRESIDENT: Yes.

MR BROWN: Along the lines proposed before the short adjournment and in the course of Ms Smith's submissions.

These are necessarily tentative and provisional views, so I just put down that marker, but it seems to us that the quantum analysis will inevitably require at least a good measure of individuated analysis. It seems to us that it is doubtful that one can get very far by looking at matters on a generic basis. I say that in part in reliance on what the Supreme Court said in its interchange judgment.

It may be worth just touching on one or two of the paragraphs in the course of my submissions. So, if the Tribunal could have that to hand. It is in bundle 2 of the authorities, tab 8. We have already looked at the pertinent paragraphs. I am going to concentrate on paragraphs 205, 215 and 216. We have the four ways in which merchants can respond to the imposition of a cost, two of which would count as pass-on and two of which wouldn't. The first two don't. There's no pass-on. That includes the second:

"*The merchant can respond by reducing discretionary expenditure on its business such as by reducing marketing and advertising budgets*", and so on. Then we have the third and fourth categories, which would count as a form of pass-on. So, supplier pass-on and downstream pass-on, if I can put it in that way.

We see just over half way down paragraph 205 the Supreme Court saying:

"*Which option or combination of options a merchant will adopt will depend on the markets in which it operates and its response may be*" -- I stress the words may be --"*may be influenced by whether the cost was one to which it alone*

was subjected or was one which was shared by its competitors."

Sir, I think that goes to a point you were putting to Ms Smith that there may be asymmetries in cost base and so on. The Supreme Court recognises that that may have an influence, but I stress the tentative language, and in my submission the reason the language is tentative is because the facts will matter.

We come on at -- if we turn over to paragraph 215 and 216, we see below the quotation from *British Westinghouse,* the Supreme Court saying that:

"*The relevant question is a factual question: has the claimant in the course of its business recovered from others the costs of the MSC, including the overcharge contained therein?*"

At paragraph 216, the point where the Supreme Court are saying, "*Yes, the legal burden is on the defendants, but there is a heavy evidential burden on the merchants to provide evidence as to how they have dealt with the recovery of costs in their business*".

"*Most of the relevant information about what a merchant actually has done to cover his costs… will be exclusively in the hands of the merchant itself.*"

In my submission that is the Supreme Court recognising that there is an intense factual investigation which has to take place in relation to the claims of any particular claimant.

Ms Smith has stolen -- I put it pejoratively -- she has adopted the example I put to her in the short adjournment of a hypothetical claimant which does something which is specific to it and then we have the imposition of a cost such as a MIF or an increase in that cost the next day. The merchant has, as it were, committed itself to its course of conduct. It does not wish to upset consumers by going against his promise to freeze prices. So even if we were in the world

of Rolls Royces or some other product which is not quite as high value -- let's just say I am an economist. I am not making any submissions about whether it is right as a matter of economics, but imagine that it is right as a matter of theory a high value product would -- in the situation of a high value product one would expect there to be pass-on of a small input cost. If the facts are that the retailer has made a price promise, then that will tend in the case of that particular merchant to indicate that economic theory is contradicted by the facts. It just doesn't -- it collides with the facts and the facts have to take precedent.

So that is a stylised example.

THE PRESIDENT: It is, but it is actually a very helpful one, because one might say "*Why haven't you pleaded this?*" You see, there's one way of resolving this. I am not particularly inclined to take it, because I think it is going to be procedurally unhelpful, but one view one could take of 205 and 206 is that the economists are right and that, generally speaking, a merchant will seek to recover its recoverable costs and, therefore, in a normal market any cost will be passed down to its customers and that, therefore, for that reason the prima facie test in 206 of the Supreme Court's judgment is articulated and it is incumbent upon the claimant to explain why that prima facie position is wrong by pleading the sort of example that you have set out.

Now that is not, I think, a practical course in these cases, because we have too many of them, and equally it is presuming that the economic evidence -- the economic theory is enough to satisfy the reversal of the prima facie measure of loss articulated in 206, but I think that all just goes to show that I'm not sure that articulations at this stage of burden of proof helps the Tribunal.

I think what is more important is to work out how each side is inclined to demonstrate

at trial the loss it says it has suffered. At trial we will clearly take into account whose burden it is, but we don't think, speaking entirely for myself, that we should allow the burden of proof to influence the obligation of each party to say, "*This is the issue that needs to be tried*".

The reason I say that is because, absent such an articulation, we are going to result in a hearing, a trial that is actually not capable of properly taking place, because the issues have not been articulated enough. So, somehow, we have to get from a position of "*We have been forced to accept an illegal cost, but we may have passed it on*", we have to move from that level of generality to a process where we can actually get to grips with the facts. Now what those facts are I don't know, but that's what we need to get to.

Now normally those would be front and centre in the pleadings.

MS SMITH: Sir, we have actually pleaded this, and I should have referred you to it, but it was your comment just then that made me suddenly think we have pleaded this. Could I just take you to CMC bundle 3. It is our replies, because the pass-on only came in the defendants' defence. Can I take you to two examples of how it is developed and to make good this point that actually it is a matter of fact that we have pleaded differently for two different claimants. These are the Scott+Scott claimants.

If I can take you first to tab 55 in CMC bundle 3. Tab 55 is the reply in Soho House. Is tab 55 the reply in Soho House? I am sorry. 52 and then I want to take you to 55. 52 first, which is Soho House. This is a reply on behalf of Soho House and other Soho House entries, that particular claimant group, all of the Soho House operating companies.

If you turn to page 1003 of the bundle numbering.

THE PRESIDENT: Yes.

MS SMITH: Paragraph 61, if I could ask you to read through paragraphs 61 to 63.

(Pause.)

You will see in 63 can I emphasise:

"*The Claimants will develop their case in this regard in due course in evidence. However ...*"

And the claimants there set out fact-specific issues that they rely on, issues that are specific to the type of business that Soho House operates. They are food and beverage prices, the hotel room prices, etc, and how the prices are set and how the costs are reflected in those prices.

So that is a specific factual pleading that is relevant just to those claimants as regards pass-on.

If you compare that to the pleading in the Furniture Village case, which is a furniture retailer unsurprisingly, at tab 56.

THE PRESIDENT: Yes.

MS SMITH: Page 1143 of the bundle. If I can ask you to read paragraphs 80 through to 82, you will see that there is there a different factual pleading as regards how that particular claimant engaged in that particular type of business, sets its prices and will develop its case in this regard in due course in evidence, but it will rely upon in order to say that there has been no pass-on by that particular business.

So, it is factual we say. It is claimant-specific and we have pleaded different factual cases for the different claimants, but those factual cases also do turn upon our understanding of what pass-on requires that I outlined not particularly well, and Mr Brown outlined much better from the Supreme Court judgment and the CAT judgment.

MR BROWN: The Supreme Court says that there is a heavy evidential burden on

the merchants. We understand that. We accept that. It will obviously be for the merchants to make disclosure and to set out their stall in their evidence. The Supreme Court judgment does not say there is, as it were, an onerous pleading burden on the merchants and the claimants here. It is an evidential burden and that's something we will obviously be well alive to down the line.

My simple point for today -- as I say, these are provisional submissions, as it were -- my simple point for today is the quantum exercise is bound to require a measure, possibly a very significant measure, of individuated analysis. At this stage it is far from clear to us that the quantum aspects of these claims will be suitable for a generic approach.

Now it may be the appropriate way of proceeding is to, as it were, park this question of what to do with quantum, not least because for the time being there is plenty enough to be getting on with in terms of the exemption --

THE PRESIDENT: What do you mean by "park"? You mean do nothing in relation to it?

MR BROWN: Well, first of all, the parties will probably wish to address you, having given the matter further thought following today, but my simple point was that over the course of the coming weeks, possibly coming months, pending Ms Smith's clients' appeal against the summary judgment application, there are matters which can be progressed in relation, in particular, to exemption along the lines Ms Smith indicated. It may be that, rather than have a further CMC in four weeks', six weeks' time to debate this question of pass-on and the extent to which there may be a quantum trial along generic lines, rather than have a CMC on that in the near future, that that be wrapped up into a wider CMC in the Michaelmas term once we have made some progress with the exemption issues.

THE PRESIDENT: So, your suggestion is that we progress non-quantum issues in the broad manner that we have been discussing but we park, as you say, do nothing, in relation to the quantum issues? We just let them rest.

MR BROWN: My primary position is it is difficult to see how quantum can be dealt with on this generic basis.

THE PRESIDENT: So, is your primary position we should do the sampling today?

MR BROWN: My primary position is that the exemption issues can be taken forward.

THE PRESIDENT: Right.

MR BROWN: And that when it comes to quantum, yes, that we should have a limited number of claims going forward on quantum, and not least because that process, which hopefully will result in judgments of the Tribunal on the quantum issues, will be informative and will help the rump of the cases to take a more informed view on settlement.

THE PRESIDENT: Right. Mr Brown, I am just trying to understand what exactly it is you are asking the Tribunal to make by way of orders and I think, to be clear, what you are saying is that as far as quantum is concerned we should order today or tomorrow the sampling that you say shouldn't be put off, because it's so clear that sampling is going to be necessary because we have individuated claims.

MR BROWN: Yes, sir.

THE PRESIDENT: I just want to understand.

MR BROWN: Subject to the point that these submissions are made at very short notice and the parties, including my client, may wish to come back to you with more considered submissions. It may be that -- subject to what I hear from my learned friends, it may be appropriate for the parties to come back to you

with further submissions on that, particularly on the quantum point, but subject to that, yes.

THE PRESIDENT: Thank you. That's very helpful.

MR BROWN: Thank you.

THE PRESIDENT: Mr Kennelly.

Submission by MR KENNELLY

MR KENNELLY: Sir, members of the Tribunal, Visa respectfully agrees with the Tribunal's proposal, which hopefully will give us finality on all the pleaded issues, and we respectfully agree that the issues should be taken in turn, all of the issues.

Now having heard Ms Smith and Mr Brown, they are suggesting that all or the substance of the 101(1) or the initial liability issues are before the Court of Appeal and therefore you should progress 101(3), but in our submission that's the wrong way to do it. You ought to follow, as I think the Tribunal suggested, the issues in the logical order, which is to begin where possible with the 101(1) issues, and there are stayed 101(1) issues on the pleaded case in these proceedings. There is also a claim under Article 102 pleaded by Ms Smith which has been stayed.

On the Tribunal's proposed approach all these issues should be in play. It would make no sense for this whole process to be developed, to have this series of preliminary issues right through to quantum and at the very end to come back and have a further trial on 101(1) issues and a 102 trial on abuse of dominance. So, the stay ought to be lifted on those issues and they as initial liability issues ought to be taken in their logical order before we get into 101(3).

I was pausing there, sir. I think you ...

THE PRESIDENT: Yes. I mean, I don't think -- I may have misread what Ms Smith was saying -- I don't think she was suggesting that there be a hearing -- substantive set of hearings out of sequence. I think what she was saying was that so far as the granular articulation of what these issues actually are, the unpacking, that the unpacking of (a) through (d) ought to await the outcome of the Court of Appeal decision, and therefore the heavy lifting in relation to (a) through (d) should take place in November and December of this year, but that there was no reason why one couldn't front load to this limited extent only (e), (f) and (g) and, as it were, get the unpacking done to the extent it could be before October.

Now for my part that seemed quite a sensible idea, given that the ball-park is changing or potentially could change in relation to (a), (b), (c) and (d), but I did not read her saying that we should conduct the sequential series of preliminary issues in the order of (e), (f), (g), (a), (b), (c), (d). If that was your submission, Ms Smith -- I see you shake your head. So, I think we are in agreement that the issues need to be dealt with substantively in pretty much the logical order set out in your paragraph 3, but the anterior work probably ought to reflect the fact that certain issues are in play, as it were.

MR KENNELLY: Sir, I see. Of course, we agree that the experts can begin the granular work on formulating the list of issues. What the Tribunal envisages is that the experts will, or with their assistance the parties will, formulate a full list of issues at a granular level. What you have before you in paragraph 3 of our skeleton is an extremely high level summary of only some of the issues.

My first point, though, is that that list is not comprehensive. May I take you -- I appreciate we have not got a huge amount of time -- very briefly to the

pleadings to show you the issues which are under article 101(1) and 102 and which are pleaded and ought to be in play also in the issues which this Tribunal will now determine if we are to have a comprehensive series of preliminary issues that will give us finality.

It is in bundle 2, behind tab 41. This is Ms Smith's pleading in Dune, page 531. It refers there to the Visa rules. This is part of her case against us under article 101(1). If you go to paragraph 25 on page 532, you will see a reference to certain rules which Visa applies and they are in bold: the honour all cards rule in (a); skipping down to (b), there is a reference to a surcharging rule; and (c) a reference to the co-branding rule. The Tribunal should see that in bold. Over the page at 533 at paragraph 26 you will see that these are collectively defined as "*anti-steering rules*". That's in bold at the very end of paragraph 26.

If you skip ahead, please, to paragraph 78 on page 552, you will see that Ms Smith pleads that:

"*These anti-steering rules are Visa rules which are imposed on merchants as a result of a decision taken by an association of undertakings and/or agreements or concerted practices. These are particulars of the breach under article 101(1)*."

THE PRESIDENT: Yes.

MR KENNELLY: If you want to see the claim under article 102, please go back to page 545, paragraph 59. There Ms Smith has pleaded for her client a detailed claim of infringement of article 102, so a claim of unilateral anti-competitive behaviour. You will see, skipping ahead, a reference to dominance, where dominance is pleaded out, and at page 547 an allegation of abuse, which extends nearly to the bottom of page 550.

THE PRESIDENT: Yes.

MR KENNELLY: Now these parts of the claimant's case have been stayed. That made sense in a way consistent with the prior position the Tribunal was taking. They were not stayed pursuant to the sampling concept, but that was the direction of travel. The Tribunal is now taking a very different approach, one which we respectfully endorse, which will give us finality. As I said, it makes sense for the stay to be lifted for these elements and for these to be in play, because, as I said, it would make no sense at all for us to get to the end of this process and then have to come back and have a 101(1) trial on the steering rules and a 102 trial on abuse of dominance.

THE PRESIDENT: Yes. Just so that I absolutely understand what you are saying, are you saying that there is benefit in doing work on these stayed issues in terms of articulating them and unpacking them in advance of the hand-down of the Court of Appeal's decision presumptively in October?

MR KENNELLY: Yes, indeed. They are not affected by the --

THE PRESIDENT: No. They are related, of course, because in competition law everything is connected to everything else, but you say, notwithstanding that connection, there is an advantage in putting the shoulder to the wheel now rather than in November or December.

MR KENNELLY: Indeed. We are also anxious to progress this as much as we can within the limits of practicability, and this seems like a useful step that we can do in the interim.

There is a limit to what can be done on 101(3) until we get finality in the Court of Appeal consistent with what the President has just said to me. It would make no sense to have hearings on the pre-IFR period 101(3) issues and then have to come back and do separate 101(3) trials, if required, following the appeals, but I think the Tribunal has made that point to me already.

Of course, the task before us is relatively substantial, because although Ms Smith said the parties have done a lot of work as part of the sampling exercise, which can be deployed for the purposes of the 101(3) issues, that's only partly true. Of course, nothing will be wasted and the work that Mr Holt has done can be recycled, but that was a very limited set of reports that he produced. He was not doing a full MIT analysis, as Ms Smith suggested. The Tribunal will recall he was focused on the merchant benefit test and specifically on the cost of cash and cards, which is quite a limited focus. A much broader job has to be done in order to fight the broader 101(3) issues at trial.

To take the point Ms Smith made and Mr Brown I think hinted at also, we are not suggesting that full disclosure should be given by all 950 claimants for that purpose. The proposal we endorse is the one the Tribunal made, which is that the experts will drive the data and disclosure that is required in a proportionate way, but that we can only speculate now as to what that will involve. The experts need to liaise and produce proposals for the Tribunal.

It is not appropriate, I think, at this stage to say any more than that about the general approach the Tribunal is taking. We noted with interest the Tribunal's suggestion of a walk-in period where other parties who have issued claims but who are not in these proceedings currently or not a part of this could become involved, in order possibly to produce more likely prospects of finality. That's ultimately going to be something the Tribunal will consider on another day, but we can see the sense in it and no doubt that's something that will be developed further by the Tribunal.

THE PRESIDENT: Well, yes. I mean, if I can put down a marker, I think this is something on which I have already articulated to Ms Smith the point that justice delayed is justice denied and I think everyone subscribes to that. On

the other hand, Visa and Mastercard will probably have a clearer idea of the status of claims that are in the pipeline, as it were, where in the pipeline they are and what particular blockages are preventing their articulation here.

Now it might be helpful not today or tomorrow but in the course of the next week or so to have an articulation from Visa and Mastercard about just what there is in the pipeline and what is delaying them so that we can consider the extent to which, consistent with progressing these matters as expeditiously as possible, we can draw other parties in if it is appropriate. I mean, we obviously can't make any view as to the appropriateness until we have understood just what the material in the pipeline actually is. So that is a request which I think we are articulating in order to flesh out this part of the process.

It may be that we can't flesh it out anymore, because there is a disinclination to bring claims into this Tribunal or there's a disinclination for good reason to progress them, and if that's the case, that's the case, but our sense is we at least ought to try to have as much resolved as possible on the basis, which may also be invalidated, that there are generic issues which can be decided commonly.

Now if that proves to be wrong, then, you know, we go down the fragmentation route and the sampling route. That is plain. If we can't try things generically, then we can't try things generically, but much of what we are saying today is in the spirit of keeping our options open so that if there is an opportunity to make binding decisions wider, then we want to seize it.

MR KENNELLY: Yes, indeed. That's entirely consistent with the idea of getting as much finality as possible. Of course, Visa would be happy to give the Tribunal, in conjunction with Mastercard, a note or an update on where the other cases stand and, to the extent we can, explain why they are stayed. I think the summary you were given earlier by my learned friends is accurate.

There are a large number of claims against us stayed in the High Court. I don't know why they are stayed, but I am sure we can find out why that is, but there are certainly a large number of claims in the pipeline.

THE PRESIDENT: Yes. There are -- and this is why I think information from all sides is going to be quite important -- I know that there are a large number of claims which are in the process of coming across to the CAT, and I think they are stayed in the High Court at the moment, but, like you, I don't know exactly what the position is, but I think it is in the form of the formalities of getting the documentation moved across and ensuring that the systems and records in the High Court are appropriately translated so that the CAT can receive those cases.

That may be completely wrong, but what I propose, and I will say no more, that the Tribunal, Mastercard and Visa engage in a sort of collective information-gathering exercise just so that we have a clear idea of the shape of the beast that we are talking about.

MR KENNELLY: Certainly. Certainly. I am going to move on now, if I may, to the points upon which the Tribunal specifically invited us to comment.

The first was the extent to which we agree that quantum issues may be generic. I am afraid on this I will be very brief because it will depend ultimately on the evidence. That may well be right, but we can see how certain quantum issues may well be determined on a market-wide basis, but beyond that I would be speculating, but it's something which now -- as we have been directed by the Tribunal and consistent with the approach which you are now proposing, our experts will apply their minds to that question, and no doubt we will make submissions about it in due course.

THE PRESIDENT: If I can frame where you stand and perhaps do so in

contra-distinction to Mr Brown, Mr Brown's position is, "*Look, let's not beat around the bush. You are not going to be able to do this generically, so let's get on with sampling*". Your position is, "*Mr Brown may very well be right, but we don't know until we have done a little bit of unpacking about what exactly a quantum exercise entails. So can we at least pro tem proceed down the route that the Tribunal has articulated, always appreciating that we may have to about-turn if the issues fall in a particular way?*"

MR KENNELLY: Indeed. That is exactly my submission. If I may say so, the merit of that is that to the extent that these can be viewed or treated as generic issues, the more likely it is that we can resolve them proportionately and expeditiously. We are attracted, if I may say so, respectfully, to the Tribunal's idea of whittling down the issues so that in the end the quantum exercise becomes more straightforward. That's plainly in everyone's interest.

The next point upon which we were asked to comment was whether infringement and the various infringement issues should be treated as common issues. That has been our submission all along. We respectfully agree.

The next point was on appeals. Again, we respectfully agree and see merit in holding over to the end the various appeals which no doubt will seek to be brought or that will arise as these preliminary issues are determined by the Tribunal, subject, of course, to the Tribunal deciding some appeals may need to progress in the interim.

We used the short adjournment to see if that were particularly possible. The Tribunal has already checked this. It is possible under Practice Direction 52(d), paragraph 8.1. So it can be done and we see merit in that.

On the question of appeals there is a further point that arises. The Tribunal will no doubt be aware that the parties currently have appeals pending before the

Court of Appeal to be heard in July arising out of the summary judgment here, which my learned friends have referenced, and the Tribunal will know that in that the claimants appeal against the finding that our new counterfactuals are arguable and we have an appeal in relation to the treatment of the relationship between Visa Inc. and Visa Europe.

Had this process we discussed today been canvassed by the Tribunal earlier, those applications for summary judgment may never have been brought, because logically we would simply have had them as preliminary issues. Now we are in this odd situation that the arguability of these points is in issue in the Court of Appeal when, in reality, it would make more sense to have those issues determined finally as preliminary issues by this Tribunal following the process that you have outlined today.

Now there's a limit to what can be done about that, because they are before the Court of Appeal. It would probably require the parties to agree to stay their appeals or withdraw them, and that would no doubt involve some joint approach from this Tribunal, but one can certainly see -- and there's little appetite on the side of the claimants to do that -- but following the logic of the Tribunal, one can see how that would bring some real benefits to the process and would allow us to expedite the process and approach it consistently with the process that you have now outlined to us. That's a matter really for the parties.

THE PRESIDENT: I think that's absolutely right, Mr Kennelly. If the parties were to come with an agreement to that process, then if the Tribunal needed to assist it in any way, the Tribunal would, but at the end of the day I think if any party to the appeal wanted to continue, then it would be ill-advised I think of the Tribunal to intervene and to try to compel an outcome, no matter how

sensible.

MR KENNELLY: I understand. I raise the point only because it is unfortunate that we have to wait for the outcome, because, of course, it is not just the Court of Appeal, but any further appeal to the Supreme Court, which will bring, potentially, delay and inconvenience to the progress of these preliminary issues that we wish to advance.

THE PRESIDENT: Yes. That I see. The only silver lining is that it will enable us to shoehorn a few more claimants in the pipeline into these proceedings. So, there is something of a silver lining, but I take your point.

MR KENNELLY: Sir, the next issue was experts. It has been proposed that each of Visa and Mastercard have two experts each and the claimants have a total of four between them. Again, I respectfully agree, subject to this caveat, if I may. It may be necessary, and, of course, permission will have to be sought from the Tribunal, for the defendants to have an industry expert in addition to the economist and the accountancy expert, because on pass-on it will be necessary not least because of the generic points we have been discussing this morning to have a greater understanding of the industry and the market that's under investigation. Of course, the claimants have the advantage of operating in that market, hotels, for example, whereas we have no idea. In fact, we may well need the assistance of an industry expert down the line.

THE PRESIDENT: Again, that's helpful. Mr Kennelly, the reason I put numbers to it was to give the parties a sense of what the Tribunal would like to see at the end of the process, but clearly things like the experts you call will be the subject of specific orders made in due course regarding the number and discipline of experts, and that will, of course, be informed by the unpacking of the issues process, but let me say this.

If you or the claimants come up with reasoned arguments as to why one needs six, seven, eight experts, then, of course, we will apply our mind to it, but we thought it was helpful to the parties to have some sense of how we see the proceedings going forward. So, to put it shortly, we don't intend to make an order today about the number of experts, but we do want to manage the parties' expectations that we like the number four on each side. We don't particularly like larger numbers than that, but it may be that we have to live with that when the unpacking has occurred.

MR KENNELLY: That's well understood.

The next short point that you raised, sir, was *GrandVision* and the point about the stay by consent. The Tribunal is anxious for us to understand that that stay now doesn't operate so as to allow the parties to relitigate issues, but if we do get the order which we seek from the Tribunal by consent, we will still be bound by the outcome of the preliminary issues which will progress, and we entirely understand and agree with that approach.

The last point I had, and this again is just to put down a marker, is in relation to costs. As a result of the approach which the Tribunal is outlining there will be an impact on costs. One issue that arises is the extent to which the claimants will be jointly and severally liable for the costs of this process to the extent they have any costs' liabilities down the line. It is not for now. We don't ask the Tribunal to make any ruling, but I raise it simply to put down a marker, and we will seek to raise that in correspondence at the first instance with the claimants, but it is an issue which causes us some concern and we will address that with the claimants in correspondence.

THE PRESIDENT: And just so that I understand the framework of that debate, you are saying that the costs position differs according to the process that the

Tribunal articulates. Is that because you expect this to be a more expensive process or because it in some way affects the costs regime as it has applied hitherto?

MR KENNELLY: Both. It is going to be a more expensive process and it is going to involve a greater number of the claimants more directly. It may be this issue was around all the time, but it has crystallised in our minds now in view of the new process that we are adopting. It may be there is an easy answer to it. It may be that we are barking up the wrong tree but the claimants will point that out to us no doubt in correspondence. I simply raise it to alert them to that fact.

THE PRESIDENT: That is helpful, and I think it gives me the opportunity to say that we would be a little bit concerned if there was a presumption that the process we have outlined would be more expensive than the process that was envisaged by the parties. We say that just to give a little bit of flesh to the point that Ms Smith made earlier, namely that we don't want to have a process that involves throwing away good work that has been done -- I am not saying never, but (inaudible) to be used -- and also we are not framing this process so that it becomes an over-managed and over-detailed process.

So, I think a good rule of thumb might be that if the costs of this process are likely to materially exceed what the costs might be of a sampling process and resolving those, then something has gone wrong, and we will endeavour to rectify it.

Now, of course, no-one actually knows what the costs of the sampling process would be, so that's not as helpful an indicator as it might be, but we do very much see this as a more efficient route to an outcome than a more expensive route to an outcome, which can be justified because it achieves a better result. So,

we are talking indications here, putting down markers. That's mine.

MR KENNELLY: Sir, I don't want to alarm the Tribunal with saying it is slightly more expensive. It is, if I may say so, a less risky investment, because the process the Tribunal is outlining will give us certainty and finality for sure, or at least as sure as we can be in this process, whereas the sampling process, as we pointed out, fell back on the *Ashmore* principle and the hope, if we are wrong about *Ashmore*, that somehow settlements would arise down the line. That was a more risky investment. So even if this turns out to be slightly more expensive, we cannot know, but at least it is more efficient and it is giving us greater certainty. That's another reason why, even if it is more expensive, we are happy to endorse it.

If I may just quickly check to see if I have missed anything before I sit down. No, I have nothing further. I am very much obliged. Thank you.

THE PRESIDENT: Mr Cook.

Submissions by MR COOK

MR COOK: Sir, thank you very much. As a starting point you will be pleased to know that Mastercard also welcomes the general approach laid down today in your comments. We certainly see the advantages, considerable advantages, of having trials or a trial which resolves the issues for 900 claimants and any other claimants who can sensibly be brought within the umbrella of this process rather than just a tiny sample relying upon common sense to settle the others, which is a risky process in litigation.

In terms of the other claims, I do have some sort of general figures from my solicitors about what else is out there, but if the Tribunal is happy, I think the better process is for me to actually get some proper numbers, firm figures and take

the approach the Tribunal suggested of writing later this week with those indications rather than giving you something which is necessarily going to be rough and ready and produced essentially by those behind me while we are in the middle of the hearing. To the extent to which there are other claims that are going to be actively pursued, clearly it is best to get them all brought within the process.

We also see the considerable advantages to having trials on more granular issues rather than having a giant bun fight at the end of the process, which resolves absolutely everything in one single very expensive case for all sorts of reasons, not least the potential for early issues to narrow the subsequent work down the road and, you know, potentially assist settlement in any event.

It does also, as we see it, provide the opportunity for the parties and, of course, for the Tribunal to try to be a little bit more creative and to try to identify issues, that, you know, one does not simply follow necessarily the liability, causation, quantum line. If there are individual points -- and I will come back to Ms Smith's point about paragraph 215 of the Supreme Court -- but nonetheless there may be points that we pick up in that process that will either sort of allow the evidence to be focused on a very specific issue, or which have the potential to knock out or narrow the issues between the parties in a way that, you know, promote the end of the case. So, again, this is something that does actually encourage the parties to be creative about how this case can be resolved rather than just resolve everything on a one-off occasion.

We also see the considerable advantages that come from this of determining what is the appropriate amount of data for each particular issue. The dangers we always saw of the sample approach, with the greatest respect to

Mr Justice Roth, who suggested it, was effectively that was almost a single one-off decision that this is the right number of parties to be involved in resolving any particular issue, but it was a one-off for absolutely everything, and there may well have been issues where for a particular piece of data it is worth getting a slightly larger number of parties; for other parties less. So one can actually be rather more sophisticated and flexible and in the end, of course, that's cheaper and more proportionate to do that. So we do see there being a lot of advantages to the general process the Tribunal has laid down, which will obviously be developed over a period of time.

In terms of the specific issues that have arisen and were raised by the Tribunal, an important starting point, of course, is to have what I might call a full list of issues, by which I mean what one might think of as being the Commercial Court list of issues, a lawyer's preparation of a list of issues, paragraph 3 of Visa's skeleton, and it will come as to no shock to Mr Kennelly that he was not intending to produce that kind of Commercial Court list of issues. What it does, in particular, is elides what actually are a significant number of quantum issues into the final sub-paragraph (g), because the focus of today has been rather more the liability exemption issues. There are, in fact, a lot more quantum issues. Even at the level of as lawyers how we break down issues it needs a lot more unpacking at that first stage before we then come to the process of experts putting more detailed flesh on how particular points will be dealt with by way of evidence.

THE PRESIDENT: Mr Cook, just pausing there, one of the pleasures and peculiarities of the cases that come to this Tribunal is that they present to a greater or lesser extent an interesting fusion of economics. One of the points that was crossing my mind during the course of Ms Smith's

submissions was whether we didn't simply say the issues at very high level are those articulated by Mr Kennelly at paragraph 3 and that we direct the parties then to move straight to the unpacking of those, but invite the parties to involve in that unpacking process as appropriate economists as well as lawyers -- I mean, some will be pure legal issues; some will be much more nuanced -- I have in mind particularly pass-through -- and, as it were, proceed by way of having a sort of significant first cut at what needs to be established and the sort of evidence that needs to be articulated in terms of proving the case, which is then exchanged between the parties and then further refined; in other words, shortcut the pure lawyers' expansion and incorporate it into a lawyer/economist first cut, which then is expanded further in light of the issues there have been revealed by that process.

MR COOK: Sir, I had not given thought to that, but my initial instinct on that is that there is an advantage to us as lawyers identifying what is in issue, properly in issue, from the pleadings before having the economists -- because essentially there is going to be a two-stage process of this is the issue which is properly raised on the pleadings and then the economists breaking down the particular evidence. I think if we wrap up the two, you know, there is potential for a greater degree of confusion, but to some extent, sir, if the end result is going to be the more detailed version, then how we jump to it may not matter that much, sir. It is a matter of procedure.

In terms of those sort of quantum issues, I mean, once you actually break down how many quantum issues there are, I think certainly our position is that there may well be some issues which are -- some quantum issues which are common or at least unlikely to be entirely specific to individual merchants, but I think, in common with everyone on the front row, we think the question of passing on

by merchants to consumers is unlikely to be something that is going to be capable of being resolved certainly as being a common issue, and we think that is likely to be fairly time-specific, market-specific and in many cases quite claimant-specific, but we do recognise, with respect, I say where the claimants were going wrong here is that there are quantum issues that could potentially be dealt with.

I'll give you a couple of examples. One of which we plead is that Mastercard would have changed its scheme rules, for example, in order to change things like fraud rules. Ultimately that is something which is dealing with the behaviour of a single party, Mastercard. Would it have done so? It is a point that potentially feeds into exemption as well.

Now the impact of that on individual claimants will be somewhat claimant-specific, but certainly the question of whether we would have done it and, if so, to what extent, those may be points that may be resolvable without worrying about the position of individual claimants.

The other matter that we do think that again has the potential to be something of a significant issue in this case is the important prior issue of passing on by acquirers to merchants, and, as you refer to, sir, each of these claimants is an individual purchaser, so it needs to show that any illegal overcharge was passed on to it.

Now, as you say, in *Sainsbury's* that sort of seems automatic. It was not in dispute. The reason it was not in dispute was Sainsbury's was on what is known as an interchange plus plus contract, by which essentially it was whatever the MIF is, that will be charged, plus depending on how it is structured, plus scheme fees, plus a margin, and it can sometimes just be interchange plus, which would be wrapped up into one addition rather than two, but in

Sainsbury's that was -- the contract contractually provided for essentially 100% pass-through.

Now while we need evidence, my understanding at the moment is that a large proportion of these claimants are going to be on what are normally referred to as blended contracts. So, they don't have that automatic contractual whatever the interchange fee is it gets passed on in total and 100%.

The Payment Systems Regulator's final report, which has not made its way into the bundle yet, and that was November 2021, concluded that for merchants that had a turnover below 50 million, the vast majority, if not all, of which were on blended contracts, there was little or no passing on of MIFs by acquirers to merchants, but effectively the MSC was so large or the margin they could make was so large -- I am sure there are differing views on whatever the motivations were -- was such that the MIF was such a small proportion that the MSC didn't change based on changes in the level of the MIF.

So, again, that is an important issue which -- now my learned friend Ms Smith said the burden of proving pass-on is with the defendants. Actually the first stage is the claimants have to prove that, if there is an unlawful overcharge, it was passed on to them. They fully bear that burden, which is a significant issue in this litigation, which it was not in *Sainsbury's*.

THE PRESIDENT: I had missed that, Mr Cook. I take it that's articulated in the pleadings.

MR COOK: It is raised in the pleadings. We have asked them to prove it. The evidence on it from our perspective has improved significantly with the fact that an external regulator has reached a conclusion, and I am sure my learned friends will disagree about exactly the detail of what's said, and I am not trying to make any point today that says my point is clearly right or

anything else. I am simply saying that again there is a significant point we have pleaded there that raises the first question. The burden is on them to prove that before we get into the issue, which I accept is one of mitigation, and the burden is upon us, the legal burden, subject to what's said about evidential burden by the Supreme Court, of whether or not the claimants have, in fact, passed on the loss to consumers.

THE PRESIDENT: Yes.

MR COOK: In relation to that issue it may well be, because that's something the Payments Systems Regulator has felt able to do, that that is something that can be looked at as more of a common issue ultimately, because we're looking at the behaviour of a relatively small number of acquirers rather than the specific relationship of individual claimants, where that is an issue which is more common and has the potential to have a significant impact on the claim. Ultimately if the pass-on is half, 50%, then the claim is 50%. If the Payment Systems Regulator's conclusion is right that there is little or no pass-on, there is little or no claim.

So, with respect, we would say it is absolutely right to do the exercise of granularly setting out these issues, because it's all too easy to sort of focus on some of the big ones that have been raised before and not actually go to some of the more detailed points, some of which may be ones that are firstly resolvable in a common way.

However, when it comes to the issue of whether or not it has been passed on by individual claimants to consumers generally, you know, we absolutely agree with what's largely being said around the room, which is we can see that that is going to be something that is -- we are going to be saying, is very much claimant-specific. That sort of arises in relation to the question that was

asked about the connection between these claims and, of course, the *Merricks* claim, which is the sort of very big claim that Mastercard faces.

Just in relation to that, and you alluded to it, sir, there is no temporal overlap between this claim and the *Merricks* claim. The claim in *Merricks* relates to the period from 1992, going back 30 years, to June 2008 --

THE PRESIDENT: Yes.

MR COOK: -- and the earliest claim in the present one, present claim, relates to some time in 2010 I think. Then obviously later claims are issued and they go back six years if it is covered by English law, five years if it's Italian or whatever, based on the date of issue, but the absolutely earliest claim here is, therefore, 2010. So, unlike some of the other claims like *Sainsbury's*, which went back and had a short period of overlap, we are at the stage here where there was actually a gap between the claims.

So, while you might see that maybe 2008 and 2010 are not going to be that far apart, you know, we are dealing with issues ultimately going back to 1992 in *Merricks* and going up to today's date and ever onwards, in fact, because the claims are ongoing claims essentially in the present proceedings.

So, in relation to that, you know, even if one is looking at elements of -- you know, obviously *Merricks* at the moment is pleaded to cover all sectors of the UK economy, which by definition covers all of these entities, all of these claimants. The extent to which there is going to be any sensible way of trying to look at the evidence in any common way is going to be relatively difficult. There is going to be very different issues largely relating to extremely different time periods, and the payment market, of course, has radically changed over that time period of 30 years.

THE PRESIDENT: I mean, the risk of overlap needs to postulate a rather sloth-like

pass-on in 2008 in order to have any kind of connection with 2010.

MR COOK: Well, no. As I understand it at the moment, there is no sort of attempt to suggest in *Merricks* that it would have taken two years for the loss to be passed on -- you sometimes get that sort of claim that it takes some time to be passed through -- at the moment at least. It may project forward a few months perhaps, but it is simply not going to overlap on time periods at all.

THE PRESIDENT: It is unlikely.

MR COOK: But in relation to that certainly our position on *Merricks*, which we set out very clearly, is we say pass-through is going to be geographic, time period and merchant sector and to some extent merchant-specific. There will be a certain aspect of a broad axe in the context of *Merricks* within sectors perhaps, but when it actually comes to an individual claimant saying it suffered a particular loss because it hasn't passed on, a lot of that we say is going to be focused on some of the points that were put by Ms Smith in terms of what they have pleaded in relation to some of the cases. It is probably right to point out that actually she showed you claims which were largely by individual specific claimants. Of course, groups one to four (inaudible), which involve most of the 600 or 700 claimants, don't have that level of granularity for perhaps understandable reasons, given the number of claims, but nonetheless that is a level of detail that at some point will need to be gone into and at that stage quite likely on some kind of sample basis.

THE PRESIDENT: Yes. So if again I can put you on a spectrum with Mr Brown on one end and Mr Kennelly on the other, you are closer to Mr Brown than Mr Kennelly, but I think your position is the same as Mr Kennelly's, which is, let's start by trying it on a generic issue by issue basis, unpack them, and as and when we hit the brick wall of individual claims needing to be dealt with

individually, we deal with it in light of the data we know about how the issue is going to be argued and you are really putting down a marker in saying that for your money most of the issues on quantum are going to be not generic but individual.

MR COOK: I am not sure I would say most of the issues, because somebody said -- fair enough. It depends on how you slice and dice them in terms of "*most*". What we are saying is for the moment what is certainly going to be one of the big issues, which is pass on to consumers, is -- and I think that's something that all four counsel addressing you have largely accepted that those are likely to be claimant-specific -- what I am suggesting is there may be some other issues which can be dealt with on a more communal basis whereas Mr Brown is suggesting we should basically -- none of them possibly can be, and I disagree with that.

THE PRESIDENT: I think Mr Brown is saying that, subject to late instruction, his view is that we might as well do the sampling now on quantum. Your and Mr Kennelly's view is it may well be necessary, but hold your horses, see how the issues unpack and frame the sampling exercise in light of that unpacking.

MR COOK: Well, I would probably go further than that to say it is not simply a question of how we unpack the issues. It may well be the case, for example, you know, what the Tribunal is anticipating, and we would agree with is that, you know, we get to a stage where we say, "*Right. Let's have a trial on issue one and three now. Then we will have another trial on issues two and four*". To some extent, if the decision is that something like passing on to consumers is going to be one of the last issues, probably not quite the last, because there's always the issue of interest, which is complex and incredibly interesting, of course, but, you know, it is actually something that

often comes last -- it will not be quite last, and that again gets into issues of waiting, costs of capital, which again is quite claimant-specific, but nonetheless we are saying it might well be something that you will, not necessarily at the next CMC, need to lay down how every single stage of the process will be done over the next two, three years. You will simply lay down, "*Right. We will have that trial, then that one and other things can be dealt with in due course*".

I appreciate the time, sir. Quickly on some of the particular points you asked or raised, other parties having the ability to participate in hearings, I am afraid we are concerned by this. We would like the judgments to bind as many parties as possible. We see considerable concerns about the idea of essentially a non-party turning up at a hearing. You will see issues of getting fair warning of what their arguments will be, ensuring, if they are putting forward evidence, it is properly tested, etc, but those are matters very much for another day, sir. At the moment, we are concerned and find that problematic as an option, sir.

Essentially, we really say parties either need to be in this process properly or they shouldn't be, and the idea you can sort of stick your oar in a little bit, not be bound but not participate properly and not, for example, be exposed to disclosure we find is a problematic possibility.

On appeal, sir, we fall into the camp of saying we can see some sense, depending what the issues are, that appeals will be rolled up and dealt with later on in the process.

Equally, we can see there might be a point where an issue is decided and has to be dealt with straight away. I give you an example. If it is the case that we actually end up with a preliminary issue trial on some of the -- or as a result of the decisions made by the Court of Appeal there are points where bits of the

claims don't continue or wouldn't continue, clearly it might make sense in those circumstances to have that heard sooner rather than later, because it makes no sense to have a quantum trial which only deals with half the potential quantum if the appeal subsequently overturns it and suddenly that quantum is back on the table. So, sir, essentially, we are saying we understand the idea. We are not opposed to it, but it might be a wait and see one in terms of exactly what happens.

THE PRESIDENT: I think the way I put it in exchange with Ms Smith was we wanted to take out the unilateral right of a party to insist on an appeal after a given stage. Rather what we would envisage is a default that would be rolled-up appeals, in other words, at the end of the entire process, but with the safety valve of the parties making submissions as to whether the question of permission to appeal should be considered in *media res*, and you are absolutely right. In some cases that might very well be appropriate; in other cases it might very well not be. That process would itself be informed by how we would be minded to run the later stages.

I mean, it is I suppose possible that we actually have separate stages, but hand down a judgment for three stages at the end of stage three rather than after each stage. It may be that we decided that even if, for instance, we have decided one issue against a party, we nevertheless go on and consider a later stage on the assumption that actually our decision is wrong, so that we can cover everything. So there are any number of combinations, and all I think we wanted to convey was that we would want the appeal process to be managed between parties and the Tribunal in a way that didn't, absent good reason, disrupt the flow of sequential hearings.

MR COOK: We are talking really about what the burden of proof is. As you said

earlier in relation to regards to where the burden of proof lies, quite often essentially the merits of the argument turn at the time. So we have no particular concern about the burden of proof, sir.

On experts, in relation to this, I mean, I understand, of course, the Tribunal -- suggestions of the kind -- that you are not making any decisions today and what you are talking about is essentially illustrative in terms of what the parties and what the Tribunal might be expecting.

Just one point to lay down. We do have some concern that there is no justification for saying Mastercard gets two experts, Visa gets two experts and the claimants get four experts. As matters presently stand, you know, with the honourable mention of Mr Brown on the end, essentially there is one group of claimants, represented admittedly by two law firms, but with one set of counsel. We wouldn't see a need for that group of claimants to split up and separately instruct two experts, an expert each essentially to deal with the same issues, and Mr Brown's clients may take their own position, but again we would be surprised if they really wanted to instruct separate experts to reflect their own individual position. This is not a case where, merely because Mastercard has an economist and Visa has an economist, that the claimants need two to respond to that. The economists will no doubt have as many assistants as they need to ensure they can respond, but in the normal course unless there is a point at which it becomes clear that there are claimant groups with entirely separate interests, which might be surprising, then there probably needs to be no more than the claimants getting the same number of experts as we do.

In terms of the number of experts, just to flag there is potential foreign law issues. It is raised at paragraphs 25 to 28 of my skeleton. At the moment at least I think

it arises in relation to the Hermes Group, which I have probably mangled and mispronounced, and where there are potential issues that their claims are governed by, we say, multiple different foreign laws and different limitation periods.

Again, we are keen that those issues should be -- and they can be brought out of the list of issues process -- but those issues may again be something that needs to be resolved sooner rather than later if there are going to be disagreements about what are the proper law of those claims and what are the time periods covered by them as a result of the relevant limitation rules, but again that will be something where we would need, therefore, a foreign law expert on limitation if that turns out to be in dispute, which it must be said, sir, has been in the past. The Deutsche Bahn set of claims where ultimately those cases settled, but there was going to be a preliminary issue trial raising a whole host of foreign law limitation issues. So potentially there may be significant points on that.

In terms then I think of the practical proposals, as Ms Smith put it, in terms of how to deal with this, we are comfortable with the sort of an initial process to try to agree high level issues, if, sir, you think that's the right route rather than a more complicated one, and then moving to a more granular expert-based route.

With respect, we don't think it's sensible to try to sort of narrow down and progress 101(3) ahead of other issues. We think there are potentially other issues in the case, like pass-on by acquirers, that may be something that inform the parties significantly. Not least some of the quantum issues and some of the exemption issues may well raise similar issues of evidence, and it would make sense that the experts, you know, consider if they are going to want

evidence on one issue for exemption and something fairly similar on passing-on or, you know, switching to Amex, for example, that they think about it once and ask the right set of questions once rather than sort of doing it, thinking about exemption now and then asking a different set of questions in a year's or 18 months' time. So we say that is a process that should be -- at this initial stage of scoping out the issues and thinking about how the case might proceed, that is something that should be done once rather than trying to sort of advance a particular sub-set of issues at this stage.

When it comes those points some of the quantum issues are undoubtedly going to be ones where we say the claimants bear the burden. Others, like passing on to consumers, we bear the burden, but that's a process where it can be divided up on who bears the burden to do a first draft. We see the sense in that. With respect in my learned friend's submissions, she didn't recognise there are a number of points where her clients do indeed bear the burden.

Sir, I don't think there is anything else that ... No. Or from the Tribunal? That's what I wanted to say this afternoon.

THE PRESIDENT: Thank you very much. We don't have any further points for you.

Ms Smith, your reply will have to come tomorrow morning, because I have got to be in another place at 4 o'clock. That's why we started I think at 10.00 this morning. I do apologise for that, because my inclination would otherwise have been to press on and at least give you an indication of where we were going procedurally, but I am afraid it will have to be 10.30 tomorrow. Unless you have anything you want to say in a minute, I think we had better rise now.

MS SMITH: No, sir.

THE PRESIDENT: Thank you very much. 10.30 tomorrow.

(3.48 pm)

(Hearing adjourned until 10.30 am on Wednesday, 2nd March 2022)

Key to punctuation used in transcript

--	Double dashes are used at the end of a line to indicate that the person's speech was cut off by someone else speaking
…	Ellipsis is used at the end of a line to indicate that the person tailed off their speech and did not finish the sentence.
- xx xx xx -	A pair of single dashes is used to separate strong interruptions from the rest of the sentence e.g. An honest politician - if such a creature exists - would never agree to such a plan. These are unlike commas, which only separate off a weak interruption.
-	Single dashes are used when the strong interruption comes at the end of the sentence, e.g. There was no other way - or was there?