IN THE COMPETITION APPEAL TRIBUNAL

Case No.: 1517/11/7/22 (UM)
and 1266/7/7/16

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

Tuesday 8th November 2022

Before:
The Honourable Mr Justice Marcus Smith
The Honourable Mr Justice Peter Roth
Ben Tidswell
(Sitting as a Tribunal in England and Wales)

BETWEEN:

THE MERCHANT INTERCHANGE FEE UMBRELLA PROCEEDINGS AND THE MERRICKS COLLECTIVE PROCEEDINGS

A P P E A R AN C E S

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Kassie Smith KC, Mehdi Baiou & Alexandra Littlewood (Instructed by Humphries Kerstetter & Scott+Scott)

Matthew Cook KC & Ben Lewy (For Mastercard)

Michael Bowsher KC & Derek Spitz (Instructed by Harcus Parker)

Philip Woolfe (Instructed by Stephenson Harwood)

Brian Kennelly KC, Jason Pobjoy & Isabel Buchanan (For Visa)

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Tuesday, 8 November 2022

(10.36 am)

Case Management Conference

MR JUSTICE MARCUS SMITH: Good morning everybody. Can I check that you can see and hear us. I am seeing nods all round. Excellent. I won't repeat the substance of the warning I gave yesterday. You can take it as read and so I won't repeat it.

You will have received, I hope, late in the day a further articulation of the Tribunal's preliminary thoughts. I hope you have all had that. You won't have had very long to consider it but we thought it might be helpful to give the parties something to aim at in terms of level of unhappiness with what is still a set of preliminary thoughts.

Before we hand over to the parties to express their degrees of unhappiness, one point that we are particularly keen to hear from the parties is the paragraph 4(b) point, namely the extent to which the 101(3) questions can form a part of a combination of trial one and trial two.

Now, it struck us as a very attractive way of dealing with 101(3) points, if it works, and we certainly didn't consider it as an option when we had our debates before the hearing. It's very much something that has emerged out of the submissions that we heard yesterday.

We have a feeling that it may not be the light at the end of the tunnel but rather the oncoming train that we are seeing in this proposal because we suspect that inherent to a number of the questions that reside under the 101(3) rubric there will be questions of what one might call the minimum lawful MIF or the exemptible MIF which will make these questions actually quite complicated.

So what we would invite, I think, in the first place is submissions from those who consider this to be a terrible idea just so that we can get a sense of whether this is

something that we ought to keep on the agenda or simply relegate to a different stage in the proceedings.

So if I could ask for those who are for whatever reason unenthusiastic about this idea to make their submissions first and then we will hear from those who are keener on the idea.

But, to be clear, this does seem us to, if it works, a very good idea. So we won't need much persuading to do it if we are satisfied that it works. So it seems to us that it's important we first get a sense of the difficulties that may exist in relation to this.

I don't know who wants to select themselves first as pushing back on this thought. We thought probably Mr Kennelly would be against and we thought perhaps also Ms Wakefield. But perhaps we can hear from Mr Kennelly first and then you can decide who goes next.

MR KENNELLY: Thank you, Sir. I'm afraid from our perspective we would see the suggestion that both parts of 101(3) be moved to first trial as very much the light of the oncoming train as opposed to something that might give us some efficiency gains.

But the problem is this, and it may be useful for the purposes of this submission to look at the list of issues themselves. If one turns up in volume 1 behind tab 1, the way in which 101(3) is broken down at issue 14.3. Beginning at 14.3, under the list of issues, it breaks down the criteria for 101(3), (a), (b), (c) and (d) and I think this is what the Tribunal was using in its letter to identify the split that it envisages.

The Tribunal then envisages in particular having (a) in the first trial and (b) moved into a subsequent trial. But the problem there is that it is impossible, we say, really to divide (a) and (b). There's a very significant spillover. The reason is this. In that first condition of 101(3), did the MIFs contribute to technical and/or economic progress, one is essentially asking the Tribunal to identify the efficiencies which we say the MIFs created and then show a causal link between the MIFs and those efficiencies.

Both of those tasks are very complex, and I will take you to what Mr Holt says about them, and there's also the question of assessing the magnitude of those efficiencies. We know from the Commission communication on what used to be 81(3) that certainly when the Commission looks at the first condition of 101(3) it asks the parties in those cases to identify the magnitude of the efficiencies as well. It may not be as specific as one needs when doing the balancing exercise and fair share but magnitude is definitely relevant.

So with that, could I ask you then to look lower down on that column where we have broken down the benefits which we say arise or could causally be connected to the MIFs. All of these are examples of efficiencies, technical and/or economic progress which we say can be shown to be causally connected to the MIFs themselves. We see them at (a), (b), (c), (d), (e) and (f) at the bottom of that column: cost savings to merchants resulting from increased use of cards instead of cash, for example, innovation, fraud protection, better credit terms, increased sales, high quality service; those are all examples of at least economic progress and in some instances technical progress, efficiencies generated by the MIFs.

One can see even before one looks at Mr Holt the complexity involved in making those points good.

Then with that, we turn to Mr Holt in volume 8A, Holt 6, tab 102.3, page 2158.54.

MR JUSTICE ROTH: I am sorry, Mr Kennelly, what's the reference in volume 3?

MR KENNELLY: Volume 8A.

MR JUSTICE ROTH: Oh, 8A.

MR KENNELLY: 8A, tab 102.3. It's Mr Holt's sixth report.

MR JUSTICE ROTH: 102 point?

MR KENNELLY: Three is the tab and page number is 2158.54.

MR JUSTICE ROTH: Yes, thank you.

MR KENNELLY: Here, Mr Holt deals with the criteria for exemption in 101(3). At 2.4.1, he sets out the summary of his proposed approach. He refers to the countervailing benefits and then he refers to the need, which is correct, to establish a causal link between the MIFs and the benefits.

Then he refers to quantification. We can come back to that. But then over the page at 2.4.2, the complexity of the required analysis and the efficiency considerations. We say this is all part of that first condition for 101(3) that the Tribunal proposes moving into the first trial. He is giving a summary providing for what he said in his first expert report and referring only to cost savings to merchants resulting from increased usage of card. That's only the first of the benefits which we've pleaded and which I have just taken you to in the column. So this obviously just a small sample of the work that would have to be done.

He describes there in 2.4.2(a) how issuers would have reacted to the reductions in MIFs and he describes how he'd have to address that. Then in (b) he assesses how cardholders would have reacted to such changes. Of course this is necessary to show the causal link between the MIFs themselves and the benefits that we say flow from the MIFs, which is a complex task to show that causal connection.

You see, if you read to yourselves in (a) and (b) how, he proposed to go about that task. (Pause).

Then in (c) it's entitled "to quantify the cost implications for merchants" but of course even if it's not necessary for the first condition precisely to quantify the benefits, we have to show that there are benefits. We have to address their significance. The Commission guide, as I said, refers to magnitude of these efficiencies. In any event, in identifying the benefits and showing the causal link we will inevitably overlap with ultimate quantification of benefits and that task he refers to as the most complex and evidence intensive. Assessing the magnitude of the benefits is a really considerable

job. Even in showing, for example, the technical improvements that cards have brought and bring relative to cash, a very basic question, one of very many questions that had to be addressed in the last trial, and that took weeks of cross-examination. I mean, it took a huge amount of preparation.

The claimants were asked to answer questionnaires about what their view was on the extent to which cards saved them money relative to the costs of processing cash and then we cross-examined them on that evidence and it was a very useful exercise. That evidence in many cases didn't stack up and it needed to be tested and that was just to show the technical advantages of cards over cash in terms of the technical and economic progress that was brought to merchants. That's one small aspect to this exercise.

Mr Holt refers to that exercise which took several months alone to collate and aggregate the claimants' data.

Then over the page at paragraph 26 he refers to the other potential benefits which we would have to identify and show that to be causally connected to MIFs, faster payment card innovation, the role of MIFs in the rollout of innovations such as contactless payments. That's at paragraph 26. And that exercise again is a complex one, not least because we have to show the causal connection between the MIFs and that technical progress, which the claimants will say would have happened anyway. That's obviously contested, a hotly-contested issue which I think inevitably will go into the first trial if first condition of 101(3) is included.

I make those points to say that what that means is that because of that greatly increased complexity, the time estimate which the Tribunal has provisionally allocated for that first trial is, we say, inadequate. The trial will take a lot longer and would have to be pushed back, it will be delayed and that creates obvious disadvantages, obvious disadvantages in terms of the efficiency and there's time and delay that will be involved

and so we ask then what are the advantages? What are the advantages, the countervailing advantages to moving these very complex aspects of 101(3) into the first trial? And there's really no advantage that we can identify because no certainty will be obtained from resolving part of 101(3). We will be no closer to the answer on 101(3) -- well, we won't have finality on the answer to 101(3) and it won't help settlement.

MR JUSTICE ROTH: Can I interrupt you, Mr Kennelly. I take all the points you make but of course if you fail to satisfy any of the conditions, that's sufficient to dispose of Article 101(3). If you fail to satisfy condition one, you don't have to look at conditions two, three or four.

MR KENNELLY: Indeed. They're connected conditions. So if we fail to show any benefits or if we can't identify a causal link between the MIFs and the benefits then we fail at that stage. But in order to get to that point, Sir, a huge amount of work will have to be done.

MR JUSTICE ROTH: Yes.

MR KENNELLY: But, no, I respectfully agree with your intervention, Sir.

The point I was trying to make is what's the advantage? We don't get certainty as to what the answer is to 101(3) and settlement is really -- subject to the point that you made, Sir, about the possibility that we might lose on showing benefits or causal link entirely, settlement isn't assisted because even if we got to a figure or some sense of the magnitude of the benefits and a causal connection, the parties still need to see what is the harm, the alleged harm and the exact magnitude of the harm that the MIFs caused in order to work out if we satisfy the fair share condition or not. So we get no certainty at the end of the day and a heavy price has to be paid to get that far.

So on balance we say that the interests of efficiency, which the Tribunal plainly has in mind, point strongly against including part of 101(3) in the first trial. I will just pause

there and check if I have missed anything.

Sorry, on trial two, trial two has been allocated in your provisional estimate I think a seven-week time estimate, which in view of what we've shown you in Mr Holt's evidence is again, we say, plainly inadequate. This 12.2, if it includes the fair share condition, will be extremely complex. It depends a little on the extent to which the Tribunal is with me on my reading of what's required for trial one. But on any view that seven-week time estimate is not going to work. We estimated this to be, the 101(3) issues alone to be at least an eight-week trial with 18 months preparation required. What that means, members of the Tribunal, is that that trial two couldn't take place in late 2024. It would be delayed well into 2025 and that would have a knock-on impact on Merricks. I am sure Ms Wakefield will address you on that point. But again to what end, we say, how is that trial assisted by the way in which 101(3) is addressed?

So, yes, I think those are the points I wanted to make on those two trials and I think Ms Wakefield can address you now.

MR JUSTICE MARCUS SMITH: Thank you very much, Mr Kennelly.

If I could just summarise what I have taken from this so that you can correct me if I have got it wrong. But what you are saying is that looking at the allocation of questions (a), (c) and (d) to trial one, that is problematic. First of all because the six week estimate is seriously wrong and, I mean, let me be clear, six weeks was plucked more or less from the air. We can, of course, extend it but I think what you are saying is that it would be a question of doubling or something like that in order to accommodate (a), (c) and (d).

Secondly, you are saying that the aspirational date of early 2024 could not be held.

Thirdly, I think you are saying, though I don't think it's front and centre of your submissions, that actually it's not completely straightforward separating evidence that goes to (a), (b), (c) and (d). In other words, there may be a potential for a bleed across

of evidence that goes to more than one issue. So I think you are saying you can't hermetically seal (a), (b), (c) and (d) separate from each other. They are to an extent, but no doubt that's contentious, but to an extent they are interrelated.

Then, fourthly, there is a point that if we put these issues into trial one, they would be ubiquitous matters which would then require a degree of ensuring that Ms Wakefield's clients were in at the right points of what would be a very long trial.

So have I sort of encapsulated appropriately the objections that you are taking to the course that we have tentatively proposed?

MR KENNELLY: Sir, subject to one point my learned friend Mr Pobjoy wants to give me, the answer is certainly, yes, Sir, and if I was tentative about the interrelationship between the various conditions, I shouldn't have been. We say there is a plain overlap between the work required for the first and second condition and inevitably the other conditions also but the really big overlap, the overspill is between (a) and (b). But before I stop I will just ask Mr Pobjoy what he wanted to ...

Mr Pobjoy's point, which I pass on, is that: and of course if we win on 101(1), parts of 101(1), all or some of that work on 101(3) will have been wasted, so that's why the Tribunal's initial idea of splitting it in the way that you proposed yesterday, in our respectful submission, is the right way to go through.

MR JUSTICE MARCUS SMITH: Thank you very much, that's very helpful, Mr Kennelly.

Mr Cook, I see you have your hand up. Before we hear from Ms Wakefield, we will deal with your yellow hand.

MR COOK: Thank you, Sir. I suppose it was just simply to make clear that Mastercard is also in the position of opposing this part of the proposal in relation to trial one, so the inclusion of exemption, and very much for the reasons, Sir, you've just so ably summarised. We would agree that this would essentially double the trial length, give

or take. It is simply not something that can be done while we are doing all the 101 issues in a period of slightly over a year. That timetable might be realistic if that's all we were doing but when we are doing all the 101(1) issues then that's already a heavy 2023 preparing for those. I would just emphasise of course this is issues 1 to 13, excluding possibly issue 6 or should be excluding issue 6, which is in relation to non-UK MIFs, and the breadth of this case is so much wider that any litigation that has been previously dealt with by the courts in interchange litigation because we have commercial card MIFs, we have interregional MIFs, we have a whole series of rules as well.

So it's a lot bigger and more complicated at that stage and then when we come to exemption and again I very much echo the point that Mr Pobjoy has just passed on to Mr Kennelly about the extent to which work could either be wasted or the problem is if we get a result where you say commercial -- you know, commercial MIFs are illegal or a restriction at certain points but certain surcharging rules are or are not, there's a whole series or variety of possible outcomes from 101(1) which then becomes the relevant consideration for exemption and benefits differ depending on whether surcharging should be allowed, whether there should be an honour all cards rule or not. So it's very easy to think about this case as just being about the same old MIFs case, it's not, there's a lot more to it.

So those points and we would agree as well that there is a considerable overlap between (a) and (b) in the first of the second conditions which is likely to lead to witnesses having to come back, which is always an inefficient approach.

So we would say trial one should be Article 101(1) issues. Trial two should be either/or, i.e. it should be Article 101(3) issues or pass-on, and the reason we say that again is simply if the time estimate for that trial, that a seven-week period is what we would say is roughly right for a pass-on trial, it might be about right for a 101(3) trial.

Having considered it overnight, our preference would be for that to be a pass-on trial but it certainly couldn't be something where we simply pushed 101(3) to be dealt with alongside the various pass-on issues within that kind of time estimate. Again that would not be possible both for preparation reasons and for the time available.

I suppose the only other point to say is I don't accept that Ms Wakefield would need to participate in the trial. If there were any 101(3) issues on that, the issue of 101(3) that arises in Merricks is a very different one or is a much narrower one because the exemption is only about the cross-border EEA MIF and that is a tiny subset of the much, much wider exemption issues that arise in relation to all the other MIFs, all the other rules and what we would say are very different time periods, at least pending a resolution, contrary to my clients interests on Volvo.

MR JUSTICE MARCUS SMITH: Thank you very much, Mr Cook. That's very helpful. Just to explore a little more what you were saying about the content of trial two. Assume for the moment we are with you and we don't deal with 101(3) in the way suggested by our preliminary thoughts but we have them separately dealt with. I think everyone is comfortable that if trial two comprises essentially pass-on plus maybe some other things, that the seven-week estimate and the date at the end of 2024 is doable.

The sense I got from Mr Kennelly was that if trial two, and I appreciate he was addressing a slightly different point, but if trial two comprised 101(3) questions, first of all the seven weeks might not be as comfortable a period for hearing of those matters and, secondly, the 101(3) issues might require more preparation time and therefore would make an end 2024 date less practicable.

First of all, Mr Kennelly, did I read you right? I know you were addressing the split of the 101(3) issues but I just think it would be helpful to have your submissions on that slightly separate point on the record before we go any further.

MR KENNELLY: Sir, if I could just be clear, the submission I made wasn't just that it might be slightly longer than seven weeks, it was that it would be significantly longer than seven weeks.

MR JUSTICE MARCUS SMITH: No, what you said was if we throw the 101(3)(b) issue into trial two, trial two would (a) be very, very much longer, about twice the length, and (b) would not be a 2024 date.

So that I have got. But if we are persuaded by your submissions that we can't deal with 101(3) by splitting it into trial one and trial two, so we are talking about a configuration of trial one which is aligned with the scheme operators and the question is what is the subject matter of trial two, what I am trying to get a handle on is if trial two is basically pass-on, then my sense is seven weeks end of 2024 works.

MR KENNELLY: Yes.

MR JUSTICE MARCUS SMITH: Right. There is a yes there.

MR KENNELLY: A clear yes.

MR JUSTICE MARCUS SMITH: But if we were to say not pass-on, I know Ms Wakefield will have a lot to say about that but if we were to say not pass-on but 101(3), does the same apply? Is seven weeks the right figure for this hearing and is 2024 the right date broadly backing?

MR KENNELLY: The answer to that, Sir, respectfully, is no and no. It's longer than seven weeks and not in 2024. Because of the evidence Mr Holt has given about the time it takes to prepare 101(3), it would be in the following year.

MR JUSTICE MARCUS SMITH: I am very grateful, Mr Kennelly. I think that's what you were impliedly saying but I think it's better to get it express on the record.

Mr Cook, you agree with that?

MR COOK: Certainly, Sir, I do agree and as much as anything the problem is that doing the 101(3) work before we have answers on 101(1) is likely to lead to a lot of

waste. So by the time we've had 101(3), got the judgment, we're realistically going to have to start work but it's going to lead to a lot of duplication and waste in doing so in those circumstances.

So, yes, for that reason in particular, being able to prepare for it in late 2024 will be inefficient, wasteful and very difficult.

MR JUSTICE MARCUS SMITH: Very much obliged.

Ms Wakefield, if you agree with Messrs Kennelly and Cook then do just say so, repetition won't add to the weight that we attach to those points but we would of course be extremely grateful for any additional points that you have to make either which way?

MS WAKEFIELD: Thank you, Sir. I do agree pass-on trial at the end of 2024, October, November, December, whenever in 2024, and 101(3) altogether subsequently.

I could address your Lordship, Sir, on the extent to which there is a true ubiquity of matter between my claim and the merchants' claims on 101(3) and exemptibility as opposed to exemptible but I am not sure you need to hear me on that if you were to be minded to adopt our joint position.

Perhaps I should take you to Mastercard's pleading just so you can see the way it arises in my case --

MR JUSTICE MARCUS SMITH: Of course.

MS WAKEFIELD: -- rather than the case of the merchants. So their defence is in bundle 6, tab 92. If we go to page 1353, you will see paragraphs 82 to 89 set out the argument on exemptibility. Now, of course, in my case it's not exemption at all because it's a follow-on claim, it's only ever exemptibility, so alternative exemptible MIFs for counterfactual damages purposes. We see the way it's pleaded there. If I summarise it, at least my understanding of it.

In paragraphs 82 and 83 we have a direct read-across from Visa exemption. In 84

and 85 we have a read-across of the cost categories applied in Visa exemption. 86 and 87, merchant indifference test. And in 88 we have the undertakings, the commitments that were given by Mastercard. So my understanding is that is essentially the way in which Mastercard proposes to run its counterfactual exemptible alternative MIF argument in my proceedings.

So although of course they would still need to satisfy all four criteria of 101(3), there's no way around that, this is the way they propose to do it and I confess at present I have not yet got a handle on the extent to which there's a full coincidence between that and the way in which it's being run in the merchants' umbrella proceedings. So it may be that in due course I would want to participate but it may be that we can go sooner and faster in my claim and consistent with all the submissions I made yesterday and I will be making ad nauseam today, that's really our core concern. We want to make progress, we want to go as quickly as possible and we are, as you know, Sir, happy with pass-on acquirer merchant and economy-wide, so that bit of condition (b) in the merchants' claim but not the balancing bit or the overlap with (a) but that bit of (b), that all being heard October, November, December 2024.

MR JUSTICE MARCUS SMITH: Thank you very much, Ms Wakefield. Again if I can just recap my understanding of what I understand your position to be. You are endorsing everything that Mr Kennelly and Mr Cook say without repetition, which is very helpful. You are saying that if we are not persuaded by these points, that the question of Merricks' participation in trial one is something which would be up for debate, you want to work out whether it was useful, but if it was useful it's not a deal breaker, we can ensure that the trial is arranged for you to be fitted in at the appropriate point.

So you are very much not, this is not a criticism, it's praise, you are not adding to the points Mr Kennelly and Mr Cook have made, you are simply saying for the same

reasons they have articulated this is a bad idea.

MS WAKEFIELD: I am, Sir, I am. Thank you. In terms of the listing of the pass-on trial, if I could just make our position plain. I hope I have already. But it really is important for us that we have a firm listing today or as firm as any listing ever can be and that we have a degree of certainty that the pass-on trial will come on towards the end of 2024. You know, Sir, that otherwise it may be the case that I don't pursue the application for a UPO today or it's pushed back for further consideration and we just case manage together or I seek to go back in front of Mr Justice Roth and his Tribunal to make progress separately.

So from our perspective really the key thing is getting that date locked down for trial two and trial two for pass-on, as Visa and Mastercard agree.

MR JUSTICE MARCUS SMITH: Ms Wakefield, we have that point very well in mind. The fact that we are not raising it as much as perhaps reflects its importance to your client should not be taken as any kind of indication that we aren't aware of the tension that exists in ubiquitous matters in that it is good to get things decided commonly across actions but not at the price of unreasonable delay because this Tribunal is in the business of getting disputes resolved as quickly as is practically possible. So we have that point, don't worry about that.

MS WAKEFIELD: Thank you.

MR JUSTICE MARCUS SMITH: Thank you very much, Ms Wakefield.

If I can move on to the persons who I suspect have less to say about this, Mr Bowsher and Mr Jones, you are, as it were, more Johnny-come-lately in this matter so you may be taking a neutral or a "we need to think about it" position. To the extent you have a position, we will hear from you now and then we'll go on to Ms Smith and Mr Woolfe.

MR BOWSHER: Shall I go first very briefly?

MR JUSTICE MARCUS SMITH: Thank you, Mr Bowsher.

MR BOWSHER: Obviously I am happy to assist the Tribunal. We are not exactly neutral but we set out our schedule yesterday. The Tribunal's schedule is somewhat different and I don't want to sort of chop and change.

The one point I would make, we don't necessarily accept the analysis set out by Mr Kennelly in his explanation for his position but I think we get there probably to the same position very much on the basis of Mr Cook's point, which I think is quite a powerful point, that without doing 101 first and getting an answer on 101(1) there is a risk of just wasting time in following unnecessary threads when it comes to the 101(3) analysis.

MR JUSTICE MARCUS SMITH: Thank you very much, Mr Bowsher, that's very helpful.

Mr Jones.

MR JONES: Yes, Sir, very briefly. I can't assist on the question of whether the four limbs of 101(3) can sensibly be divided. The only point which I have been asked to reiterate is a point I made yesterday, which is we are very concerned about the idea of leaving 101(3) too late.

Now, I am hampered in this because the stage that we are at means I am not in a good position to make submissions to you now on how long a 101(3) trial would take but I simply wanted to remind you, Sir, this may have fallen off the agenda, as it were, of my suggestion yesterday that that could be possibly revisited in the three-day hearing where one could look at with more information the question of whether trial two could include pass-on and 101(3).

But, Sir, beyond that, I don't have any further submissions to make on these issues at this stage.

MR JUSTICE MARCUS SMITH: I am very grateful, Mr Jones.

To be clear, we are obviously not going to close out the possibility of revisiting what

we order today later on, but it's clearly going to be quite difficult. We are talking about some pretty chunky litigation here, it's going to be quite difficult to revisit fundamentally what we are doing today later on.

So, for instance, if we were to say we are going to have a trial two which will be essentially pass-on plus a few frills and get that in the diary for let's say seven weeks at the end of next year, it will be I think rather difficult both from the Tribunal's perspective and from the parties' perspective to say: well, we'll have a three-day hearing in let's say May at which one discusses the feasibility of bringing in 101(3), even if it proves to be feasible, unless it's going to not add substantially to the trial time or not derail the trial process, even if it becomes a very good idea, we are unlikely to be able to do it.

So that's why I am very conscious that one may with hindsight think that something that seemed a good idea at the time was not; well, that may very well be the case but what we order today is capable of being tweaked but not I think massively rewritten in later hearings taking place next year, which is why we quite understand why you and Mr Bowsher are being tentative in the way you are expressing yourselves. That's completely understood. But the fact is we are quite sceptical about an ability to, as it were, rewrite what we order today.

We are not saying we won't consider it. We are simply saying that once we've pushed the bandwagon in a certain direction, it will have its own momentum which will be, rightly, quite difficult to change.

MR JONES: Sir, I am very grateful and I do understand that and I suppose I am therefore in the unhappy position of simply having to say we would like 101(3) as soon as possible but I can't assist on the details, Sir. So with that, I will hand over to others.

MR JUSTICE MARCUS SMITH: I am very grateful, Mr Jones, thank you very much. Ms Smith, do you want to go first or do you want Mr Woolfe to go first since Mr Woolfe,

as it were, majored on this point and in your opening you passed it off to him? I am in your hands as to order.

MS SMITH: I am happy to simply make four points. I am happy to make those first and Mr Woolfe can of course develop them because I absolutely take your point that this suggestion was developed further by Mr Woolfe but perhaps I could start by making the four points I want to make.

MR JUSTICE MARCUS SMITH: Of course.

MS SMITH: We do agree with the Tribunal's proposal that these three 101(3) conditions should be included in trial one.

The four points I want to make: first of all, Mr Kennelly argued that it was impossible to divide the issues as proposed by the Tribunal between trial one and trial two and he referred to Mr Holt's expert report in that regard. But if I can take you back to Mr Holt's report. I'm afraid I don't have a bundle reference because I am working from a separate copy.

MR JUSTICE MARCUS SMITH: We have I think the reference. So I have bundle 8A, tab 1023 and I have it open at paragraph 2.4 of Mr Holt's report.

MS SMITH: That's exactly the section I was going to take you to, paragraph 23 of his report. Mr Holt in fact characterises the exercise or explains the exercise that he is proposing to carry out as being a two-stage exercise: (a) to establish whether there's a causal link between the MIFs and the benefits and then, the second stage of his analysis, to quantify as far as possible the resulting services for merchants.

So in my submission that supports the suggestion that you can split the issues as proposed by the Tribunal between first of all establishing the causal link between the MIFs and the benefits and only then, which is condition one of the 101(3), needing to go on to carry out the quantification exercise necessary for the market share analysis under condition two.

You can see that as well, if I could ask you to go back to the list of issues, column three document, which is in bundle 1, tab 1.

MR JUSTICE MARCUS SMITH: Yes.

MS SMITH: If you look at how the parties have agreed that the 101(3), and I stress the word agreed, issue is to be approached, I'm afraid again I don't have a page number but it's issue 14.3.

MR JUSTICE MARCUS SMITH: Yes, we have that.

MS SMITH: You were taken to this I think. You will see under column two we start issue 14.3 by setting out the criteria for exemption that we all know, the four criteria. But then what I want to emphasise is the next paragraph in column two, which starts: "This [101(3)] issue will involve consideration of the extent to which MIFs lead (in the relevant market) to ..."

Then there are various benefits set out (a) through to (f).

MR JUSTICE MARCUS SMITH: Yes.

MS SMITH: What I anticipate the Tribunal had in mind was that in trial one, one can consider whether there is a causal link between MIFs and, say, benefit to (a) cost savings to merchants resulting from increased usage of cards, whether there is a causal link between the MIFs and the innovation leading to better service and lower cost, whether there's a causal link between better fraud protection and the MIFs, and then in the trial two, one then goes on to quantify those benefits and balance them against the costs to the merchants of MIFs.

So, in my submission, we can split in the way proposed by the Tribunal. So that's number 1. That's my first point.

My second point is there would be potential efficiency in this split between trial one and trial two. We also say that there would be efficiency, potential efficiency because, as Mr Justice Roth indicated, if the schemes are unable to identify a causal link or

establish the causal link between the MIFs and various benefits they say arise from the MIFs, their case under 101(3) will fail and we don't need to get on to the other conditions.

MR JUSTICE MARCUS SMITH: There's an asymmetric efficiency.

MS SMITH: Absolutely, my Lord, as there always is if you are going to split up a case. There's always the potential of an asymmetric efficiency because the whole point of splitting up trials into trial one or preliminary issues and then trial two is you hope that trial one will result in everything else falling away. But it may not. So there is this potential efficiency which could give certainty and could assist settlement. So that's my second point.

My third point in response to what Mr Kennelly said was the trial time estimate and whether we could deal with these issues in six weeks. Both 101(1) and 101(3), conditions (a), (c) and (d). My only point on that is to remind the Tribunal of the previous CAT trial between Sainsbury's and Mastercard where the Tribunal considered Article 101(1) issues, Article 101(3) issues and damages and pass-on and that trial took 23 days, four and a half weeks.

So if one compares that, again it appears feasible we could do this in the six weeks.

The fourth and final point is the participation of Mr Merricks in trial one if trial one includes these 101(3) issues and I would ask you, Sir, in that regard to turn up Ms Wakefield's skeleton argument for today's hearing and turn to the very beginning of paragraph 2 of her skeleton argument. Paragraph 2(b) at the top of page 3.

Mr Merricks doesn't at the moment seek a UPO in respect of the exemptibility issue. He reserves the right to seek a UPO at a later date. And he explains why that's the case in paragraph 2(b).

MR JUSTICE MARCUS SMITH: Yes.

MS SMITH: Again I am not on top of detail of the Merricks and Mastercard

proceedings. Mr Cook and Ms Wakefield obviously are. But at the end of that paragraph 2(b) there's the reference to the hearing of the exemptibility legal question in the collective proceedings being listed for January 2023 and he says: "if Mr Merricks succeeds on that threshold issue, then there will be no relevant area of "overlap" on the Exemptibility Issue with the Merchant Umbrella Proceedings. However, if he's unsuccessful … there will be such overlap and he may wish to apply for a UPO in relation to the Exemptibility Issue".

So what I am saying is that at the moment, pending that hearing in January 2023, the Tribunal should certainly not effectively grant a UPO to allow Merricks to participate in trial one because we don't know whether there is going to be an overlap. But again I say that on a relatively limited understanding of the Merricks and Mastercard proceedings, which the Tribunal, particularly Mr Justice Roth obviously, have a much better handle on.

MR JUSTICE MARCUS SMITH: I don't think Merricks is particularly important in terms of the configuration of trial one as we are discussing at the moment.

MS SMITH: Not as to the configuration. It's really simply the question, as you say, Sir, whether or not -- because on your letter of this morning you say it's not envisaged Merricks would participate, save perhaps on question 4(b) and that's simply the point that, as to the structure of trial one certainly, my points one to three are the important points. But obviously Mr Woolfe may wish to develop those or the Tribunal may have questions.

MR JUSTICE MARCUS SMITH: Yes. Two questions. First of all, you are comfortable that a six-week trial covering 101(1) and the 101(3) questions articulated is feasible. If we were to cut out the 101(3) questions, how long would an Article 101 trial require?

MS SMITH: I'm afraid I think I have not discussed that with my instructing solicitors so I would have to ask that. I can perhaps come back to you on that. One is

comfortable with time estimates as far as one is ever comfortable with time estimates but we certainly think on basis of previous experience that this could be done in six weeks but I will come back to you on that further point if I may.

MR JUSTICE MARCUS SMITH: Okay. Secondly, Mr Kennelly I think flagged up the question of delay and he made that point I think in two respects, as he did also in respect of time. He said, first of all, that six weeks wasn't enough for trial one. You've addressed me on that. But also I think that it was not a sure fire thing. I think I am rather underselling his point but not a sure fire thing, you could have trial one in early 2024 and I'd be grateful to have your submissions on that.

Then, secondly, if we were to include question (b) of 101(3) in trial two, do you again say what Mr Kennelly and I think Mr Cook were saying, as endorsed by Ms Wakefield, that a trial two containing question (b) couldn't be done in seven weeks and couldn't be done at the end of 2024?

MS SMITH: Taking those in turn, again we are dealing with things relatively on the hoof here so I will try to assist the Tribunal as much as I can but again this is said with some caution.

As to being ready for the six-week trial one, as proposed by the Tribunal, that's 101(1) and 101(3), questions (a, (c) and (d) for early 2024, I am instructed that we do think that's possible.

As to an alternative -- I am trying to remember all the various alternatives. Trial two covering pass-on and 101(3) question (b), we think could probably be done in seven weeks by -- and I don't think we've set down a proposed trial, end of 2024 for that I think was the proposal though it's not in the Tribunal's letter, whether it would be longer if we moved the 101(3) questions (a), (c) and (d) from trial one to trial two, it probably would be but at the moment I'm afraid I think we'd have to have a bit more of a number cruncher think as to how the split would move from one to the other but there

probably would be a split of, yes, some time from trial one to trial two if the issues were to move.

MR JUSTICE MARCUS SMITH: Yes. Thank you very much, Ms Smith. That was very helpful.

Mr Woolfe, you have the floor.

MR WOOLFE: Thank you, Sir.

I think the starting point from having made the suggestion I think of splitting out the fair share condition from the other limbs of Article 81(3) is the approach of the Commission guidelines as set out in regards to 81(3), as it were. If you recall, where we were in the bundle, the Commission says it's appropriate to deal with -- they say invert the order of the second and third condition and thus deal with the issue of indispensability before the issue of pass-on to consumers, and by pass-on to consumers they mean the fair share criterion. They say the analysis of pass-on requires a balancing of the negative and positive effects of an agreement on consumers. This analysis should not include the effects of any restrictions which already fail the indispensability test and which for that reason are prohibited by Article 101.

So essentially the way the Commission seems to have approached it is relatively a more factual question of indispensability, less concerned with quantification and therefore doesn't engage the (audio distortion).

If we might just mute ourselves for one moment while we try and fix the audio issue.

MR JUSTICE MARCUS SMITH: Do continue.

MR WOOLFE: Mr Kennelly took you to the sixth Holt report where he was explaining how 101(3) would be very complicated but I think we agree Mr Holt's report there does not neatly split out how he would consider each of the different aspects because it seemed to focus on the fair share criteria. But if I can take you to the way the Visa defendants have articulated their approach to column four on the exemption issue,

you can see that, that's in bundle 1, tab 3 and it starts at page 1.285.

MR JUSTICE MARCUS SMITH: Bundle one, tab 3.

MR WOOLFE: Bundle 1, tab 3.

MR JUSTICE MARCUS SMITH: Yes, which page?

MR WOOLFE: 1.285.

MR JUSTICE MARCUS SMITH: Thank you, yes.

MR WOOLFE: We are going to quickly get to all of the next couple of pages of this. You see at the very bottom of that page, issue 14.3: "Are the criteria for exemption in Article 101(3) met"? And these are the same list of potential benefits that I think were mentioned in Mr Holt's sixth report.

MR JUSTICE MARCUS SMITH: Yes.

MR WOOLFE: Then you can see over the next page 1.286 economist expert evidence from DH, that's Mr Holt, (audio distortion) MIFs and so forth. That's his qualitative and quantitative evidence. Then over the page: for each of the claimed benefits DH proposes to, one, determine the causal link between the benefit and the MIFs and, two, quantify the resulting savings for merchants.

To determine whether conditions (a) and (b) are met, so that I understand to be a reference to (a) and (b) of Article 101(3), DH proposes to add up the benefits and compare them against the amount of MIFs paid in the form of MSCs. The assessment of condition (c) and (d) to indispensability and the non-elimination of competition were based on a more conceptual analysis.

So it doesn't appear from this that he was proposing that you need a large quantitative exercise to address the issue of indispensability, it would be a more conceptual analysis based upon the benefits, the putative benefits that are identified, the candidate benefits, as it were, as pleaded and whether the MIFs contribute to those.

You can see then there's more commentary as regards to putative benefits over the

next few pages. You see: as regards the individual issues identified, (a), which is a reference back to I think cost savings to merchants, as I understand it, DH proposes to review the available economic literature, conduct an analysis based on publicly available data on interchange fee reductions and so forth, review factual witness evidence data and documents and so forth, innovation benefits, is point (b), can be assessed based on a review of factual statements and documents disclosed and so forth. (c), fraud protection benefits can be assessed based on a review of factual witness statements and documents.

Then there is quantification but what seems to be the case if you read down is that indispensability can be addressed in a more conceptual way by the experts based on a review of the factual material.

Now, my next point is simply to say that there is then an overlap between that factual evidence or some of it anyway and the evidence that will in any case be in the trial one because it's being identified by the defendants as being relevant to issues of objective necessity and also to issues of object, because I think it is being said that because there are benefits arising, or that some MIFs and the other restrictions, that therefore, even if they have the effect of restricting competition, they can't fall into object category.

So you can see that, for example, back in the same tab if you go to page 1.263, which is actually, as you can see, issue 6 point -- sorry, it's 1.263. That's right, 1.264, I am sorry.

The issue being, "did/do the UK/Irish domestic MIFs have the effect of appreciably restricting competition". Economist expert evidence from Derek Holt will assess whether the MIFs have the effect of increasing MSCs and whether MSCs in the acquiring markets may more broadly have been higher in the non-zero MIF counterfactual. That is evidence that goes to the question of cost savings for

merchants, which is the first putative benefit that is identified under Article 101(3).

Then, to take another example, if you go to page 1.266, whether the honour all cards rules has the object of restricting competition. Mr Holt is proposing to compare under that rubric the competitive dynamics and outcomes that would be expected across parameters of competition such as price output and innovation in the relevant markets in the actual against the relevant counterfactual.

So insofar as one of the putative benefits being identified is increased innovation, then also evidence on that is being brought into trial one in any event and so there's an overlap in fact as regards the question of whether MIFs really do drive these supposed benefits between the case the defendants are running under the issues I am identifying here and what we say would arise under Article 101(3).

Then another one is issue 9.3, which is on page 1.278. Sorry. 1.277, sorry, I apologise. This is under the rubric of objective necessity, issue 9.5, 1.276 on page 1.277:

"Economist expert evidence from DH: DH will assess the competitive dynamics and market outcomes in a counterfactual without the [honour all card rules]. See further issues 9.2 and 9.3."

If you go back to 9.3, for example, the body of this is on page 1.275:

"Derek Holt will also assess the rules' likely economic effects based on a comparison of the competitive dynamics and outcomes that would be expected across the relevant parameters of competition such as price, output and innovation in the relevant markets in the actual against a relevant counterfactual."

So he's already proposing to do under these 101(1) issues some sort of causal analysis, a comparison of the actual and counterfactual looking at the parameters of price outputs and innovation, which are the very things which Mr Kennelly was saying that would be an incredibly complex task to do in 101(3). So it seems to us based on

this -- and similarly in respect of the Mastercard defendants one can see a similar thing but I think the point has essentially already been made so I will do some references but it's the same point, so it's issue --

MR JUSTICE MARCUS SMITH: You don't need to repeat --

MR WOOLFE: So we don't see that a trial on the indispensability issue regarding the putative benefits identified would add very substantially to the trial one estimate and it's an issue which can be done.

Then the sort of rider to all of this is we do think it's better to make as much progress as possible on Article 101(3), so everything on liability, before proceeding to pass-on and quantum. That's the more normal order in which to approach issues: liability first followed by quantum.

Indeed, some of the pass-on issues may rather fall away if, as it turns out, exemptions fail on the basis of indispensability. There seem to be two varieties of pass-on. Issue one is economy-wide pass-on, which I understand is being said by Visa is necessary for the fair share issue, and the other is claimant-specific pass-on, albeit (inaudible) sector sort of basis, which is necessary for quantum. The first of those exercises may not be necessary if this fails the indispensability test.

So we do say that there is a category of issues which can be tried in trial one that don't appear to us to add massively to its length because they are largely covered anyway, and it would be wise to try them before the difficult quantification exercise that Mr Holt identifies.

Sir, those are our submissions.

MR JUSTICE MARCUS SMITH: Mr Woolfe, I am very grateful to you.

We are not going to invite, as it were, replies to Mr Woolfe's and Ms Smith's submissions. I think we could predict with some accuracy what those replies would say. We understand where the battle lines are drawn and we don't think, unless

someone wants to speak up with particular force, that we would be assisted by going around the same points again because we know where everyone is standing.

So is that a course that those who we understand to be in disagreement with Mr Woolfe and Ms Smith -- Ms Wakefield, you have your hand raised.

MS WAKEFIELD: Sir, I did it physically rather than the yellow hands which everyone else is using. My only observation is this. Since the submissions in favour of including part of 101(3) in trial one depend on supposed efficiencies of things falling away for trial two, it does strike me that that argument only works if there's time for judgments and for judgment to be received before work begins on trial two.

So I think that's the death knell for trial two in 2024. That's my observation.

MR JUSTICE MARCUS SMITH: Thank you.

Mr Kennelly.

MR KENNELLY: Thank you, Sir. Two very short points. In terms of timing, in the last Visa trial in front of Mr Justice Phillips there were far fewer claimants, one defendant, who only addressed 101(1) and 101(3) and it took 12 weeks and it was carefully case managed by the judge in that case.

My only other point is when one looks at addressing the first condition for 101(3), it's necessary to identify the benefits, establish the causal link and the magnitude of the benefit and even the first of that inevitably spill into the quantification exercise of the benefit that all parties accept has to be done and that overlap can't be gainsaid. Mr Woolfe's submissions really focused on carving out indispensability, which is quite a different point from the one made by Ms Smith.

MR JUSTICE MARCUS SMITH: Thank you very much.

Mr Kennelly and Mr Cook?

MR COOK: Yes, Sir, just very briefly on the Sainsbury's trial. I mean, that was seven weeks. It was 23 days of hearing but spread over seven weeks, with time, for example,

to write submissions, but it's important to bear in mind that was a claim that was only by a single merchant in relation to UK consumer MIFs. So that alone took that period of time. And of course similar evidence that we advanced in the Asda/Morrisons trial was described by the Court of Appeal as basically failing to establish the standard at all. So we've been told that we have to do a lot better than we did that time. So pointing to the fact that our evidence which was held to be inadequate to a certain period of time really does not take matters that far forward, particularly when we're dealing with multiple MIFs and rules.

MR JUSTICE MARCUS SMITH: Thank you very much, Mr Cook. What I am going to do is we will mute our microphone for a couple of minutes and then we'll be back with you shortly but we'll take our cameras and microphone off line for those couple of minutes.

(11.48 am)

(A short break)

(12.03 pm)

MR JUSTICE MARCUS SMITH: Before I begin, can I just check again that we have good communications. Yes, I am seeing nodding. Thank you very much.

Ruling

MR JUSTICE MARCUS SMITH: We have before us a number of difficult questions of trial management and allocation of issues. The prism through which we have discussed these is based upon a note that we circulated this morning to counsel and they have addressed us very helpfully on the issues that should or should not go into what we call trial one and trial two.

Just to set out the scenery, we invited the parties' submissions on a proposed six-week trial one to take place in early 2024 dealing with the Article 101(1) issues as set out in

the list of issues which we debated yesterday, plus Article 101(3), questions (a), (c) and (d).

Article 101(3) obviously refers to the relevant provision in the TFEU. Questions (a), (c) and (d) refer to the articulation of sub-issues in relation to Article 101(3) which are set out in issue 14.3 of the list of issues.

Those four questions are articulated as follows in the list of issues: (a) do the MIFs contribute to technical and/or economic progress; (b) do they allow consumers to receive a fair share of the resulting benefit; (c) do they contain restrictions which are not indispensable to the attainment of these objectives; and (d) do they afford the defendants the possibility of eliminating competition in respect of a substantial part of the products or services in question.

So that is what I mean when I am referring to questions (a), (c) and (d), and what we floated with the parties for their submissions was the extent to which it was a good idea to add those issues into the trial one hearing of Article 101.1 issues.

The corollary proposal was that there would be a trial two, a seven-week trial, which would deal with acquirer and retailer pass-on and Article 101(3) question (b). That it is suggested would take place at the end or towards the end of 2024 and would be approximately a seven-week trial. So that is the question that we have been debating and we have reached a clear view as to the answer.

However, it has also enabled us to reach views on a number of other questions which I will seek to articulate in this ruling also. So beginning then with the question of what goes into and what goes out of trial one, I want to stress that I am speaking in a relatively broad brush. There will no doubt be a number of marginal issues in respect of both trial one and trial two which we will want to debate. What I am doing in this ruling is I am setting out the broad outlines of where we want to go and what we want the parties to think about in terms of subsidiary issues to make that overall scheme

work.

I should also say that trial management, particularly with trials of this magnitude and issues of this complexity, involves an element of crystal-ball gazing. No doubt after these trials have been heard and dealt with we could with 20/20 hindsight look back and think how things could be done better. I am sure we would all have ideas with hindsight as to how things could be done better. Unfortunately the Tribunal's crystal ball is out of action and we are going to have to do our best with the very helpful submissions that all of the parties have made in order to achieve the most efficient and fair outcome for all of the parties, bearing in mind that there are other users of the Tribunal also.

So with those general points in mind I turn to the composition of trial one, which I remind myself is a six-week trial to take place in early 2024. The parties are all happy that if the trial is confined to Article 101(1), that is an achievable date and an achievable time estimate.

Equally, there is a broad consensus among the parties that it is sensible to deal with Article 101(1) first in this time slot. The dispute arises in relation to whether the Article 101(3) questions should be added into the mix. There seems to us no doubt that if these issues did not add significantly to the time length of these hearings or indeed to when they take place that it would be sensible to have these questions in trial one. Although their resolution would only have an asymmetric effect in terms of narrowing the issues, that is something of a benefit.

However, one must ask oneself to what extent the trial of that length can be held at that date if questions (a), (c) and (d) are thrown into the mix. We are entirely satisfied that it is not going to be possible to have a manageable trial one with these issues thrown in. We appreciate that there is disagreement between the parties on this, but Mr Kennelly, Mr Cook and Ms Wakefield advanced four issues in relation to the

inclusion of 101(3) points which I am now going to address but we are persuaded by those points that it would be a folly to include 101(3) questions in trial one.

The points made were these. First of all, the issues were so substantial that were being proposed to be added that they would both delay the start of trial one by a number of months and, secondly, add to the time that it would take to try those issues, not by an immaterial amount but by an amount that would approximately double the six-week trial estimate that we articulated. We appreciate these are all to an extent speculative assessments, or questions for judgment if one wants to be a little bit more polite, but we are persuaded that those are issues which do arise and need to be taken into account.

The third point that was made is that there is what we called a bleed-across between the various questions, the four questions that we have identified, in that it is not practically possible to hermetically seal issue (b) away from issues (a), (c) and (d) and therefore there is not the sort of clear-cut distinguishing line that can be drawn between the subsidiary questions.

So those are the first three reasons as to why trial one needs to be narrowly configured. The fourth point was essentially these reasons were so weighty that they overtook and outweighed by a significant margin the limited benefits of hearing questions (a), (c) and (d) in the course of trial one and, as is clear, although we do see some benefits, we consider that they are limited, they contain asymmetric savings of time and effort, but they are so limited that they are substantially outweighed by the disadvantages of adding 101(3) questions to trial one and so for those reasons we are not going to do so. Trial one will proceed in early 2024, six-week trial estimate, dealing with Article 101(1) questions only.

I stress that we are going to debate precisely what goes into trial one, but we hope that the outlines are tolerably clear from this ruling to enable the parties to assess and

discuss with us whatever frills need to be added to that broad direction.

I move on then to trial two. It is clear of course that from what we have said about trial one that there is no point in dealing with question (b) in a trial two that is dealing with pass-on in general. The question that we must ask is not should we have pass-on plus question (b). That ship has sailed because of our ruling in relation to trial one. The question really is do we have a trial two that deals broadly speaking with questions of pass-on or do we have a trial two that deals with the 101(3) questions in their totality. I remind myself that aspirationally trial two is to be a seven-week trial towards the end, by which I mean either October or November, of 2024. So the question I am going to address is what does trial two deal with given that it is not going to deal with pass-on plus question (b). Is it going to be pass-on alone, by which I mean acquirer and retailer pass-on? Or is it going to deal with the totality of the 101(3) questions?

Here too we are in no doubt as to the correct answer. It seems to us that this trial, seven weeks, October, November, 2024, must deal with pass-on, both acquirer and retailer. We say that for a number of reasons. First of all, we envisage that trial two will be dealing with matters which we label as Ubiquitous Matters under our Practice Direction. That means that not only with questions of pass-on as they arise in these proceedings, the retailer proceedings, be dealt with but so too will the Merricks pass-on questions.

There is before us an application for these matters to be dealt with as Ubiquitous Matters. We have in substance heard that application in the submissions -- I am seeing some shaking of heads from Ms Smith, I am going to continue with the ruling. If there is a sense on any party that the ruling has not dealt with objections to the question of Ubiquitous Matters and Merricks participation, then I will regard my ruling as a provisional one but I think it is helpful if I give a clear steer as to where we are going, even if it is not an absolute final point.

So, Ms Smith, if you have points about the application, I will hear you, but I will nevertheless set out where we think trial two should be going.

So it should be pass-on, acquirer and retailer. We consider that the advantage of this route is that it enables, subject to any objections that might be made, significant efficiencies for the Tribunal and also significant benefits in terms of consistency. Let me unpack what that means.

The point about the Practice Direction on Umbrella Proceedings was that when one has broadly speaking the same issue tried differently, one gets different results. The Practice Direction originates from the very difficult to the outsider results in three first instance decisions concerning interchange fees where three very capable Tribunals, one in this Tribunal and two Commercial Court disputes, reached on broadly speaking similar facts radically different outcomes.

That is an unfortunate consequence of the fact that different competition cases tend to give rise to similar issues which are however not determined by the established rules of *res judicata* or issue estoppel. Accordingly, in order for the future to avoid such inconsistencies, the Tribunal has published a Practice Direction which enables similar issues to be drawn out of one case and allocated into another. The substance of Ms Wakefield's application on behalf of Mr Merricks, the Class Representative in other proceedings, is that the pass-on question in those proceedings ought to be dealt with as part of trial two.

The reason that assists is, first, there will be consistency between pass-on in these proceedings and pass-on in the Merricks proceedings. There will also be efficiency in the terms of saving of time. Ms Wakefield has made quite clear on behalf of Mr Merricks that it is important to her client that pass-on and indeed all of the issues in the claim be dealt with swiftly. That is one reason that she has articulated a desire to have trial two (a) focus on pass-on and (b) take place towards the end of 2024.

Of course it would be entirely possible to have a pass-on trial in these proceedings somewhere in 2025 and to have a Merricks pass-on case at the end of 2024. That would be inefficient and give rise to the risk of inconsistency, which is why we are minded, subject to anything that is said to the contrary, to accede to the Merricks application to label pass-on as a Ubiquitous Matter.

Turning however to the substance of trial two, leaving on one side the Merricks application, it seems to us, even if there were no Merricks claim, it would be appropriate to deal with pass-on in trial two in the retailer actions. We say that not only because it is possible to deal with trial two and acquirer and retailer pass-on in trial two at the end of 2024 with a seven-week trial estimate but also that it would not be possible within that time frame and at that time to deal with the 101(3) questions.

Although Ms Smith, on behalf of the retailer claimants, was understandably equivocal about how much time would be taken and when these matters could be heard, the submissions of the defendant scheme operators through Mr Kennelly KC and Mr Cook KC was absolutely clear and unequivocal.

First of all, they said, as I have described, that these various sub-issues needed to be heard in the round together. But, secondly, they stressed that they would take a great deal of time and effort to be resolved in and that it would not be possible to have trial two - if it was dealing with 101(3) issues - it would not be possible to have trial two towards the end of 2024, nor would a seven-week trial estimate be appropriate.

In short, we would be talking about a trial two taking place sometime in 2025 with an estimate of something like 12 or 14 weeks. Well, it seems to us that those points make it absolutely clear that the label for the 101(3) issues is not trial two but trial three. We consider that 101(3) should be allocated to a trial three and that there needs to be a discussion in the future as to precisely what goes into trial three and when it is heard and how long it takes.

But that leaves a label trial two that is needing to be filled and it is clear that it should be filled by a disposal of the pass-on issues in the retailer proceedings, acquirer and retailer pass-on, which we will hear, as indicated, over a seven-week period towards the end of 2024.

We have given a very clear steer as to the position of the Merricks application on this - we are dealing with this hearing remotely - but judging by Ms Smith's body language I think she has something to say about that and it would be obviously right to hear her before we make a final ruling.

We will also want to hear from the parties on a variety of other matters, including the question that we floated but have not heard argument on, the hearing of the Volvo limitation point as a separate and earlier issue in, we were thinking, January/February 2023. That would be confined to points of law only and we would want to be leaving over any questions of fact to later hearings, but we were persuaded yesterday, subject to anything else that is said, that hearing limitation on points of law only would assist the parties and would be capable of being dealt with in a two or three day period. So that is what we are minded to order but we are conscious we have not heard any submissions on this, beyond points raised yesterday.

We are not sure whether that is a Ubiquitous Matter or not because, frankly, I do not have a sufficient grip of the Merricks pleadings to understand whether the point (a) arises or (b), if it arises, ought to be dealt with in a hearing that is an Umbrella hearing or whether the point is sufficiently different in legal terms to be dealt with separately. But I am sure we will be assisted on that by the parties in due course.

So that concludes a somewhat rambling ruling on where we are going. I will now hand over to the parties to deal with the Merricks application.

MS SMITH: My Lord, apologies for the rather emphatic shaking of the head.

MR JUSTICE MARCUS SMITH: One moment. Sorry, Ms Smith, I was just handed

a note.

What I am minded to do is, Ms Wakefield, I am going to take your application as read and we understand why it's made and we have given a provisional view as to where we are coming from on this. So you will obviously have a right of reply.

We would like to hear from the opponents to the application. Ms Smith, you are one. Mr Cook, if you are another, we will hear you after Ms Smith and anyone else who has anything to say about that after you.

MR COOK: Sir, I am most certainly an opponent of this.

MR JUSTICE MARCUS SMITH: Very good.

In that case, Ms Smith, you first and, Mr Cook, you second.

MS SMITH: Sir, thank you. Can I first apologise for the slightly overemphatic shaking of the head. I have checked my recollection very quickly against the transcript and my recollection is borne out by the transcript, particularly page 66 of yesterday's transcript, you said, Sir, that you would hear from Ms Wakefield first and then give me the opportunity to respond.

I brought up that point on page 68 of the transcript and said that I would be responding later and Ms Wakefield again made the same point on page 86, line 8 of yesterday's transcript to the effect that she would make her application today. So I'm afraid that's the understanding I was operating under and apologies for my slightly emphatic body language.

MR JUSTICE MARCUS SMITH: Ms Smith, that's quite understood. It's my mistake, not yours. I felt that we had gone through the narrow question of what went into trial one and trial two, a lot of the points that Ms Wakefield was making and all the points that I considered that you would be making in response.

Now, that was clearly an error on my part and it seems to me that your body language was not overemphatic, it was entirely appropriate that you signalled to me that I was

going a little bit further than I should have done and I apologise for that.

So it's now over to you and we will seek to understand the objections you have to the Merricks application.

MS SMITH: Thank you, Sir.

My submissions are, first, the Merricks application is premature. The Tribunal has now ordered that the Article 101(1) issue should be fast tracked or semi-fast tracked and heard first. We also agree the Volvo issue should very sensibly be heard first and I can address that if necessary.

We say that the Merricks application is better left for consideration at a later stage if it remains relevant. However, we make the submission that if the Tribunal is minded to consider the UPO application today, we make the submission that merchant pass-on particularly is not a ubiquitous matter. I say ubiquitous matter, use it very carefully here because there are matters that are ubiquitous potentially between the merchant umbrella proceeding claimants and then there are the question of whether a matter is ubiquitous between the merchant umbrella proceeding claimants and the Merricks Class Representative.

I am addressing only the latter situation for present purposes. We don't accept that pass-on is ubiquitous between even the umbrella proceeding claimants but we think that it can be dealt with at one trial between those claimants by use of careful analysis of the evidence.

But for the purposes of this application I am just addressing the latter question, the second question, which is whether merchant pass-on is a ubiquitous matter between the merchant umbrella claimant proceedings and the Merricks Class action. We say it certainly is not.

MR JUSTICE MARCUS SMITH: Can I just clarify one thing. I understand that you are addressing the Merricks matter. You said a moment ago that you considered that

a case could be made that in fact there was no ubiquitous matter between retailer claims. Do I understand the reason for your saying that is because it is your position that sampling is the only appropriate way of dealing with retailer pass-on and that in a sense makes things series of individual claims that certainly need to be managed in a collective way but don't for that reason fall under the umbrella proceedings regime as articulated by the Practice Direction? In other words, your starting point is not that this is a (audio distortion) umbrella proceedings question between retailer claims, it is a different sort of case management question which involves much more traditional sampling and trying separate cases together? I mean, I say that because I think it's quite important that we call spades spades here.

MS SMITH: Yes.

MR JUSTICE MARCUS SMITH: And it's important I think for us to understand where you are coming from.

So I am not inviting submissions about umbrella proceedings and retailer claims, the label there does not matter. We will be doing the same thing with them whatever. But I think it does matter in terms of how we respond to Ms Wakefield's application.

MS SMITH: Sir, my position on the issue of merchant pass-on for the purposes only of the merchant umbrella proceedings is really the position that I already articulated/developed to a large extent at the May CMC, the second CMC. We say that it is necessary -- we say that by definition each of the merchant claimants' claims is an individual claim for damages, even though they are now being heard by way of umbrella proceedings, they are individual claims for damages.

We say that in assessing those individual claims for damages the nature of the evidence that the Tribunal will need to consider is not only economic evidence but also factual evidence and that the latter, the factual evidence, will need to be obtained from individual claimants, the most effective case management way of obtaining that

evidence from individual claimants will be by way of a sampling regime.

That is our position on merchant pass-on when we are only looking at the merchant umbrella proceedings.

The question which I am now addressing in the context of Ms Wakefield's Mr Merricks' application is whether the merchant pass-on is a ubiquitous matter between the merchant claims and the Merricks Class claimant, the Class action claimant, so that Mr Merricks should be or the merchant Class action, the representative -- sorry, the consumer Class action representative should be included in the umbrella proceedings insofar as they are addressing the question of merchant pass-on.

We say that merchant pass-on is not a ubiquitous matter between the merchant claims and the consumer Class action because the issue of merchant pass-on does not arise in a substantially similar way in the two different sets of proceedings and the investigation will necessarily be different in the two different sets of proceedings.

My first point in that regard is that there are fundamentally different approaches taken as a matter of law and procedure to assessing damages in the individual merchant claims, which are being heard together but they are individual merchant claims, versus the approach that's taken as a matter of law and procedure to assessing damages in a Class action.

I make this point in a Class action because in a Class action damages are to be assessed as a matter of law or can be assessed on as a matter of law on a Class-wide basis without any need to articulate individual loss. We developed those points in our skeleton argument for the second CMC and it might be sensible for me just to remind you of that first point, the different approach to the assessment of damages in the merchant individual proceedings versus a Class action proceeding.

MR JUSTICE MARCUS SMITH: Ms Smith, I think we are well aware of that.

MS SMITH: So just to give you the references, that is paragraph 149 of the

Supreme Court judgment in Merricks, which makes it clear that in a Class action you do not have to articulate individual or assess individual loss.

Section 47C(2) of the 1998 Act, again the same point about Class actions and assessment of damages and Class actions.

By contrast in the merchant proceedings, the umbrella proceedings, the Tribunal is to undertake an assessment of the loss suffered by individual claimants, not an aggregate assessment of loss. Now, that quantification, that assessment of the loss suffered by individual claimants, can be done by taking a broad axe approach to the evidence or by deciding that we are going to quantify each claimant's individual loss by reference to a sample claimant or other ways of dealing with the evidence in a proportionate manner, but those are questions of case management and how to address the evidence in a proportionate manner.

What the Tribunal still has to do at the end of the day is to provide an assessment, a quantification of the loss suffered by each individual claimant on the evidence available to it in the most proportionate manner. So the distinction, clear distinction between what damages the Tribunal is assessing in a Class action versus how it will assess damages in the umbrella merchant proceedings. That's the first point we make that shows these are different questions to be addressed in the two sets of proceedings as regards quantum, loss and merchant pass-on.

The second point I make as to why these proceedings are fundamentally different when we are looking at quantification of loss and merchant pass-on is that for the Merricks consumer claims the burden of proving merchant pass-on is on the claimants, on Mr Merricks, on the consumer representative. He has to prove merchant pass-on in order to establish his claim.

By contrast, in the merchant proceedings the burden of proving the merchant pass-on is on the card schemes, the defendants, in order to mitigate or reduce the merchant's

loss. The Court of Appeal has been absolutely clear and the Supreme Court are absolutely clear about where the burden of proof lies in claims such as the merchant claims.

So the burden of proof in both cases is different and the approach that the court has to take is different. So we say those are two fundamental differences in the approach that the Tribunal is required to take to merchant pass-on in the consumer Class action versus the merchant umbrella claims. It is required to take this different approach by the law and the procedural rules under which it operates. With respect, these different procedural rules circumscribe the way in which the Tribunal has to approach the issue of pass-on.

Although of course consistency of outcome is desirable insofar as it's possible, we say it can't override those fundamental differences in approach that the Tribunal is required to take.

MR JUSTICE MARCUS SMITH: Yes.

MS SMITH: It may be that there will be because of these different regimes in effect that the Tribunal is operating under in the two different situations, it may be that there will be different results as regards merchant pass-on in the two claims as a matter of principle but in any event as a matter of fact there are differences. There is at the moment no, if any, overlap between the consumer Class action and the merchant proceedings as a matter of fact, moving on from principle to fact.

The merchant claimants are just a tiny proportion, although there are hundreds of them actually they are just a tiny proportion of those operating across the economy whereas the collective proceedings relate to the entire retail sector and other non-retailers which accept card payments.

So we are looking at very different claimants and they may have suffered loss. The particular merchant claimants may quite feasibly have suffered loss, have experienced

pass-on in a different way and to a different extent to how pass-on operated across the entire economy. So we are dealing with claimants as a very small proportion who make up a very small proportion of the economy. So there's that point as a matter of fact.

The second point as a matter of fact is that as we currently stand, as the claims currently stand, the claim periods are different.

MR JUSTICE MARCUS SMITH: Yes.

MS SMITH: There's no, if any, temporal overlap.

Now, as regards that point on temporal overlap, which we developed in the second CMC hearing, it may be that that temporal overlap is increased depending on what the Tribunal decides as a matter of law is the position under the Volvo limitation issue. So it may be that that temporal overlap will be increased.

MR JUSTICE MARCUS SMITH: Ms Smith, let's assume for the sake of argument that the position of the Merricks claimants is not strengthened by the existence of overlap, so let's consider the application on the basis of no overlap and see where we go, no factual one.

MS SMITH: Yes, no temporal overlap.

MR JUSTICE MARCUS SMITH: Yes.

MS SMITH: I make the point that there is no temporal overlap so again --

MR JUSTICE MARCUS SMITH: Yes.

MS SMITH: -- it may very well be that there will be differences as regards the existence, the extent, of merchant pass-on for different claim periods. So one may very well see a different result as regards merchant pass-on when one looks at the particular claimants in the umbrella proceedings or the particular sets of claimants versus the economy as a whole.

So again we would say that the pursuit of consistency should not override the reality,

which is that on the facts and as a matter of a temporal there is no temporal overlap and so there may very well be different results as regards merchant pass-on.

In any event we get back to the point that when you are looking at a UPO, the test to be applied, as we set out in our skeleton, is, first, whether there actually is -- the issue does arise in a substantially similar way and the investigation is the same in the cases that are proposed to be subject to the UPO. We say they are not for the reasons I have just set out. Insofar as there is a desire from a case management point of view to ensure that the Tribunal takes a consistent approach to issues, even if it ends up leading to different results, but the Tribunal takes a consistent approach to the issue of merchant pass-on, then that can be managed in a different way, it does not need the cases to be heard together as a part of the umbrella proceedings because the umbrella proceedings, inclusion of the Merricks claims in the umbrella proceedings has the effect that everyone subject to the umbrella proceedings will be bound by the result.

If there's a desire for consistency of approach then that can be done in a different case management way, it can be done by appointing common Tribunals, the same personnel to hear the issue of merchant pass-on for the purposes of the merchant umbrella claims and for the purposes of the consumer Class action and it can be managed by a proper sequencing of trials in front of a common Tribunal.

We would suggest, and this is just a suggestion that I am floating at the moment, that there could be a trial of merchant pass-on which would deal with the smaller segments of the market being covered by the merchant umbrella claimants. That could be heard first, the issue of merchant pass-on and the evidence in those cases could be canvassed first before there is a subsequent trial of merchant pass-on in the consumer Class action. I understand that that is a proposal with which Mastercard also agrees.

We say that approach is preferable to a UPO being granted on merchant pass-on for

the Merricks Class action because the UPO should not be granted for the reasons I have outlined.

MR JUSTICE MARCUS SMITH: Sorry, you first.

MR JUSTICE ROTH: Can I just try and understand what you've just said about sequential hearings by the same common Tribunal. Is that on the basis that the evidence in what you are postulating as the merchant pass-on hearing is admissible in the Merricks pass-on hearing and vice versa?

MS SMITH: That's not an option I have actually discussed. I think I need to discuss that. Certainly the findings of fact and the findings of the Tribunal in the first trial would be admissible in the second. There's no question about that as evidence because the findings would be admissible as evidence in the second hearing.

MR JUSTICE ROTH: But it's a bit difficult for the same Tribunal to hear what is a very similar issue in two different cases and disregard evidence in the one when you come to the next.

MS SMITH: Sorry, my Lord, could I just have a moment off mic to take instructions?

MR JUSTICE MARCUS SMITH: Before you do, Ms Smith -- too late.

MS SMITH: My Lord, sorry, Sir, my attention is drawn to the fact that the statutory regime makes clear provision in a Class action opt-out situation for there to be a hearing of the Class action, and then separate individual trials for those claimants who have opted out of the Class action.

So this situation where there is a Class action being heard I think, I don't know enough about Trucks to make submissions on the Trucks cases, but my understanding is that in Trucks there is a Class action or there are Class action proceedings but there are also individual opt-out proceedings and the statutory regime makes it clear that individual claimants have the right recognised by statute to opt out of a Class action proceeding. In those situations, foreseen and written into the statute law, the statute

book, we would have exactly this situation where similar issues --

MR JUSTICE MARCUS SMITH: Ms Smith, I am sorry to interrupt but of course I accept that you are right about there needing to be a process for dealing with the claims of those who opt out of proceedings. Obviously that is right because otherwise their claims would not be resolved. But that isn't the point that we are debating here. The point we are debating here is the extent to which the evidence deployed in trial one between A and B can be deployed in trial two between let's say B and C.

Now, when there is no commonality of parties you cannot simply import the evidence in trial one and use it to inform the outcome of trial two. Points of law, of course they are persuasive between courts of the same instance and, if it's a higher court, binding. But questions of fact can't, absent res judicata or issue estoppel, be translated in the way you are suggesting. I have heard submissions on this because I have just dealt with the first part of two related trials, which was the Sportradar litigation, where exactly this point cropped up and the furthest I felt I could go, having heard submissions on this point, was what I said would be a read-across order where I said it would be the same judge trying both sets of proceedings, namely myself, we would have a representative from the second trial who wouldn't otherwise have participated in the first trial present and I would be allowed to refer to the evidence in the second trial in order to save time.

But there was no question of the outcome on any factual issue in trial one there binding the parties in trial two, and quite rightly so. So I think it is, in order to ensure efficiencies of evidence, umbrella proceedings or bust. I quite take your point that we shouldn't order umbrella proceedings, but we don't see a route in case management short of umbrella proceedings whereby we can, as it were, juggle the evidence in Merricks with the evidence in these actions and allow a kind of cross-fertilisation.

Mr Justice Roth's point that the idea of having the same Tribunal deal with both seems

to us to be asking for trouble.

Ms Smith, do press us further on this point, but otherwise we'll move on to the other reasons why umbrella proceedings are undesirable. But what you are proposing I'm afraid just doesn't work.

MS SMITH: I am not sure whether we are misunderstanding what I am proposing. I am not proposing that the results of a separate merchant pass-on trial in the umbrella proceedings should bind Merricks subsequently in a Class action trial on merchant pass-on, I am suggesting that insofar as the Tribunal wants to ensure that it takes a consistent approach to questions of merchant pass-on, then it can appoint a common Tribunal, as you did in the Sportradar case, the same judge to hear both sets of proceedings so there can be at least a read-across or a consistency of approach.

What we are concerned about is the inclusion of Merricks in a UPO because the issues that are to be considered, in our submission, as to merchant pass-on in the consumer Class action are different and the evidence to be put in will be different because, as I said, the different approach to burden of proof and how to assess damages in a Class action from that of the merchant umbrella proceedings, that there is a danger that the -- well, first of all there is a danger that the approach taken in the Class action will drive the approach taken in the merchant collective proceedings but even leaving that to one side if that's not the case and the Tribunal is able to keep the two approaches distinct, there is no efficiency in dealing with them all together because the approach to be taken to determining damages in the consumer Class action, the approach of assessing them on a Class-wide basis without articulating loss is going to be a different issue, the evidence is going to be different and we are going to have, in effect, two hearings running along in parallel all at the same time with everyone there. There are no efficiencies from a case management point of view to have it all dealt

with at the same time under an umbrella proceedings order. Insofar as you want to ensure consistency, my suggestion was simply that they are heard sequentially involving the different types of evidence and the different approaches the Tribunal will need to take to the questions of merchant pass-on, they are heard sequentially but ensuring that where there are questions of law, for example, and other questions where consistency of approach is desirable, there is a common member of the Tribunal or common Tribunal constitution to ensure that that consistency is ensured. We think that that would be a far more efficient way of dealing with things because it does not mean everyone is there all the time for the whole of the merchant pass-on issues trial. It would be far more efficient to have sequential trials, if necessary, in front of common Tribunals that deal with merchant pass-on, we say first in the merchant umbrella proceedings and then subsequently in the consumer Class action. Those are my submissions on that point.

MR JUSTICE MARCUS SMITH: Ms Smith, it occurs to me that the basis of your submissions is predicated on an assumption that the evidential hearing that we have provisionally said should take place in May 2023 can have only one outcome and that outcome is that we will order sampling. That must be the basis on which you are addressing us.

MS SMITH: My Lord, I am sorry if I am being unclear. It's not a question of evidence and what evidence might be best suited to determine the questions that are before the Tribunal. My point is more fundamental than that. My point is that the questions that the Tribunal will need to determine are different when assessing damages for the purposes of a Class action versus the assessment of damages in the merchant proceedings. I have made my point on that, that the approach that is to be taken as a matter of law is different and that does not turn on what the outcome of the evidential proceedings is and we'll come to those. It's a question that the approach the Tribunal

is told to take is different and I've made the point about my first point being the Supreme Court judgment in Merricks at 149 and section 47C(2) of the 98 Act which says this is how damages are to be assessed in a Class action, which is different.

My second point is the burden of proof in the two actions is different. So again the legal approach to be taken in the two sets of actions is different. That's a prior question to the question of what is the appropriate evidence for the purposes of determining those issues, it's a prior more fundamental issue, that as a matter of principle these two different sets of proceedings are to be determined by reference to different procedural rules and different law.

MR JUSTICE MARCUS SMITH: Okay. I think Mr Justice Roth has a point but before he comes in I will just follow up on that, it may be that we are nibbling at the same point.

Judges very rarely decide cases on the burden of proof. It's the last desperate gambit when the factual materials are so unclear that you have to say: well, I am terribly sorry, one party has failed to overcome the burden that is on it. But it is a point that goes at the end of an analysis. Most cases are decided not on the burden of proof, you know, you failed to meet the burden, but on the basis the evidence takes you to a particular outcome more or less clearly on the balance of probabilities. So I am trying to think back and I don't think I have yet decided a case in more years than I care to recall as a judge on the burden of proof.

Now, the fact is we've got a defence in one set of proceedings and a claim in the other which turn on the same issues, albeit in different temporal periods. Now, that's why you have been making the point about consistency, because it would be extremely odd if you won in your proceedings and Ms Wakefield won in hers. I am not saying it's impossible but it would be extremely odd and it would not be an outcome that would be rendered any less odd by burden of proof.

The point is how does one articulate the evidence that is needed to resolve the very difficult questions that arise out of pass-on, which is something we addressed last time and which we are not going to address now.

However, it does seem to us that the existence of the burden of proof in no way mitigates the similarity of the issues that arise and the need for consistency. So that's why I was wondering whether your point actually did boil down to the fact that you were presuming that your claims could only be resolved by way of sampling and that one would have therefore a kind of apples and oranges issue arising out of the evidence that Ms Wakefield would be adducing and the evidence that you would be adducing. So that was the reason for my question.

I think Mr Justice Roth has another question and it's probably best deal to with them in the round.

MR JUSTICE ROTH: I have just a couple of points, Ms Smith. First of all, I wasn't quite clear, because you were focusing very much on merchant pass-on, whether you are also objecting to a UPO as regards Merricks on acquirer pass-on. If you want time to think about that, you could come back after --

MS SMITH: No, Sir, the position is set out in our skeleton. We've not objected to that. We have not developed our arguments on that but we don't object to a UPO on acquirer pass-on, yes, it's the merchant pass-on where we say the issues are fundamentally different. Mr Cook does object to a UPO on acquirer pass-on and he can develop the arguments in that regard.

MR JUSTICE ROTH: Thank you. The other point then you make about the difference -- I take your point about the temporal overlap or lack of it but as regards the point you make about a fundamentally different approach to damages, of course just as acquirer pass-on is one issue, we are not talking about the final assessment of damages here, we are just talking about merchant pass-on, which is a step on the way

but it's not the final resolution, which is quite different, as you rightly, say between individual claims and the aggregate damages.

But merchant pass-on, yes, you've explained you will be seeking to call evidence from your individual clients or at least a sample of them, but I got the impression from the way the column three in the list of issues was being explained that you also want to be able to call industry experts, indeed you made quite a point of that.

In other words, that you will consider, and I think some of that is developed, in the materials we have there are certain sectors and one can look at what degree of pass-on there might apply across the sector.

But if you look at the judgment way back in 2017 on the Merricks application for a CPO, which I am sure you have looked at, you will see that that is in fact precisely one of the ways, in fact the main way at that time in which the economic experts for Mr Merricks were proposing to do pass-on, namely by looking at industry sectors.

Whether they will do it through individual industry experts or one expert but they will do it by different industries, so one is actually going to get, insofar as you call industry experts, the same kind of evidence on the same factual question of what degree of pass-on was there, say, in petrol retail.

So there's quite a strong overlap, it seems to me, on the approach that will be taken to the evidence. Your expert will be saying in petrol retailing the overlap was X per cent, the pass-on rate was X per cent and therefore very little of the overcharge you suffered was passed on. Mr Merricks will be having an industry expert on petrol retailing or material on petrol retailing saying no, it was Y per cent. So that's the first point.

Secondly, if you perhaps look at the judgment in Merricks, which refused a CPO, as we now know wrongly, but it considered what evidence would be available for Mr Merricks' pass-on assessment, which will be somewhere in these bundles, I have

it loose but I assume it's somewhere, if someone can help me as to where it is in the authorities.

MS WAKEFIELD: I have it in authorities bundle 2, tab 0.2.

MR JUSTICE ROTH: Thank you very much. If people can find it there. If you take the internal pagination in the Merricks judgment you will see that the Tribunal considered what material would be available to the experts to assess pass-on.

One of the sources that the experts sought to rely on were the other individual actions in Mastercard, which is on page 29, starting at paragraph 70. There's reference to the initial cases Sainsbury's and Morrisons and then at paragraph 72 you will see that the experts' report appends a list of the significant number of pending claims by retailers and yet more claims have been filed since the hearing of this application. That was 2017. Now, considerably more of course have been filed since.

Now, the Tribunal then said:

"Those actions are mostly at a very initial stage. There is no realistic expectation they might progress to the point of producing evidence on pass-through until any potential appeals against the Sainsbury's and Morrisons judgments are resolved, and even then they may well settle."

It then goes on to make the point about different temporal periods. So that was then dismissed as a potential source of evidence relevant for Merricks because those other claims were so far in the future, but for reasons we all know Merricks has not come to a hearing in 2018 as was then being sought and has yet to come to a hearing and the other claims are no longer far in the future, indeed we are considering trial of them now.

So it's always been the case that, if available, Merricks was seeking to rely on evidence from individual claims. So the evidential material that Merricks is seeking to run is actually not so dissimilar from the evidential material that you are seeking to rely on to

establish rates should pass-through albeit that in Merricks it will be done industry sector by industry sector and then together to get a weighted average. In your case, it's done to some extent industry sector and industry sector albeit it's then applied to give a particular pass-through for an individual claimant.

MS SMITH: Sir, thank you. Just to address you on those points. The Merricks representative, counsel for Merricks wasn't present yesterday morning when we discussed the outstanding points on the list of issues and one of those outstanding points you will recall was our inclusion of industry expert evidence in column three of the list of issues and you will recall the position that I outlined yesterday and which was reflected in correspondence that had taken place with Mastercard and Visa over the weekend was that this industry expert evidence was very much a fallback position for my clients and that it was only to be used insofar as it was either more efficient to use it or instead of -- but our primary position is that we wanted to rely upon factual witness statements. That was our primary source of evidence. You recall that was the position we set out and made absolutely clear yesterday and that remains the position.

As to the points about assessment of damages, we say merchant pass-on does fall into the same nature of issues. The individual assessment for my clients or my groups of clients may very well be different from -- or the extent to which they passed on any overcharge -- for my individual clients, the extent to which they passed on overcharge may very well be different from the average pass-on of overcharge. The average pass-on of overcharge at an economy-wide level, which is what Mr Merricks is considering and concerned with, but my clients, each individual client may very well have passed on to a different extent from the average across an industry sector.

They need to be able to put in evidence to show what their individual position as regards pass-on was if it is, for example, going to be different from the level of pass-on

that you might find at an industry or a sector level. That's really where the heart of this point is.

MR JUSTICE ROTH: I think that's --

MS SMITH: That's the point -- I am sorry, Sir, if I could just finish that point. This is the issue -- and again, Sir, I appreciate that you were not part of the Tribunal that heard the second CMC in those proceedings but we addressed this issue at some length and in some detail and by reference to some detail at the second CMC.

I note that there is a suggestion from the Tribunal now in its letter of this morning, and it was raised yesterday in the hearing, that there be a three-day evidential hearing on matters of pass-on and I have submissions to make about that three-day hearing and what is to be considered at that three-day hearing and I will make those submissions as and when it's appropriate to do so.

But my starting point on that is that these issues have been already addressed in a huge amount of detail at the last CMC at which Mr Merricks was represented, as were Mastercard and Visa, as were the Stephenson Harwood claimants, so I can show, and I would like to have the opportunity, if it becomes appropriate, at an appropriate time, to show you what's already been done on the question of evidence on pass-on and what nature of -- what the parties will put in by way of evidence on pass-on.

But I am not sure that that is -- I will come to that when I need to. But the main point for the purposes of the UPO is that we will be putting in evidence, and it has been agreed on the face of the list of issues, insofar as we need to on the factual issues.

This is not really a question of sampling. The question of sampling is simply a case management question. It's a question about being able to put in factual evidence on the position of individual claimants when we are assessing their individual damages, which include assessing the rate at which they passed on any overcharge. We need

to keep that option open and that's the nature of the evidence that will need to be put in in the merchant proceedings, which we say is different from at least the evidence that Ms Wakefield said she would be putting in at the last CMC, the second CMC, where she said: we will be relying solely on expert economic evidence, taken from public sources, public data, and we will be extrapolating from that pass-on rates of other costs. We will be extrapolating from the pass-on rates of other costs the pass-on rates that we say apply across the economy and then at a sector-specific level for merchant pass-on for the purposes of our proceedings.

So there are going to be different trials and therefore we say there is no sense in having a UPO, either from the point of view of overlap of issues, because there will be distinct issues and distinct evidence that needs to be heard in the different sets of proceedings, or from the point of view of efficient case management because we will be having everyone sitting in the same trial, listening to different evidence for different purposes.

We say, and I have said it again -- I am repeating myself, I will try not to -- that, insofar as there are any concerns about consistency, we can have sequential trials of the merchant pass-on issues as I suggested.

MR JUSTICE MARCUS SMITH: Yes.

MR JUSTICE ROTH: I think that is why the President indicated that there seems a bit of a -- I don't want to use the word "overlap" again, but between this question of a UPO on pass-on and the way in which -- the sort of evidence that will be considered on pass-on, even in the merchant proceedings, in the way it's going to be done. But perhaps that's something we will revisit after lunch.

MR JUSTICE MARCUS SMITH: Yes. We are clearly going to go on. I see, Mr Bowsher, you have your hand up. I will come to you in a moment.

But I think though before we rise it's quite important that you, Ms Smith, understand

how I, at least, see the tectonic plates arranging themselves so far as Ms Wakefield's application is concerned.

When I read your written submissions, I found a number of passages quite troubling because they took as read -- you say you are not taking it as read but I think you are -- that you would be given permission to adduce factual evidence by way of sampling at the trial of the pass-on case. Now I am not saying you won't be, but I am saying that to take it as read is an error.

When I read, for instance, the first sentence of paragraph 25 of your written submissions:

"Given the large number of claimants in the HK and SSU proceedings, the potential number of witnesses runs into the hundreds."

Well, that's not going to happen. We are not going to be hearing 500 witnesses. So, to add to my concern, when I looked at the very helpful population of column four by your clients -- which I was so interested in I printed it out and I have 150 pages worth of this -- I read with enormous pleasure your answer to issue 28, pass-on/mitigation, which suggested, indeed states I think, unequivocally that you are only going for expert economic evidence. If one looks at page 121, that's what it says.

Now I was corrected in that assumption and you said: no, there's factual evidence on top and you must read the population of column four in respect of issue 28 in the light of Annex A1 and A2, which is listing a witness for each claimant.

So we've got a Scott+Scott schedule running to -- let's see how many witnesses there, a mere 22, and then we get to the HK list and we get a list of witnesses, oh, yes, it's 462. So we are just short of the 500 mark. We don't get any proposal of any sort as to how these enormous number of witnesses are going to be slimmed down. So those are two aspects in which I was troubled by your submissions and the schedule.

The final point is that you have, I am sorry to say, somewhat misread paragraph 61 of

our judgment, and I would urge you to read it over the short adjournment because it is the position of the Tribunal. The position of the Tribunal is that we are entirely sceptical that the pass-on defence can be established by claimant-specific evidence adduced from a sample of many thousand claimants. We consider that such an approach would be disproportionate and frankly hopeless as a way of deciding the question of pass-on.

Now we acknowledge that we can't at this stage, and we could not at that stage, tell you that you couldn't adduce this sort of evidence and that is what we've said in 61.5 where we say:

"However, we are not going to preclude the Umbrella Interchange Fee Claimants from adducing any evidence that they might wish to produce in support of their claim that the Overcharge was not passed on."

The words are "not going to preclude", not "permit". That's why we are going to have, unless you are extremely persuasive in response, a three-day evidential hearing as early as it can be fixed next year so that we can work out whether sampling is going to work or not.

Cards on the table, because we said it in paragraph 61: we don't think that evidence is going to work. We don't think it's going to be probative. If we don't think it's going to be probative, then it's not coming in. So what you have to ask yourself is how do you persuade us, given what we've said in paragraph 61 of our ruling, that sampling is going to result in evidence that will enable us to decide matters.

Now we've indicated in our note produced this morning, which you've all seen, that it would be of assistance if the claimants could consider whether, in advance of such a hearing, example factual evidence might be produced so as to assist the Tribunal on this point.

Now, we'll debate over the short adjournment whether we convert that into a direction

because at the moment I don't understand what your factual evidence is going to tell us given the way pass-on is framed. I have said that today. I have said it yesterday. I said it last time. We don't get where that evidence is going to go in terms of deciding the matter. If it isn't going to go to probative matters on pass-on, it's not going to come in. That is why I said earlier on it seemed to me that your submissions were presupposing the outcome of the evidential hearing.

Now, let's suppose that the outcome of the evidential hearing doesn't go your way: we are not persuaded that sampling of factual evidence works but instead we think the matter needs to be resolved by expert economists and industry experts, drawing on expert-led disclosure so that they get materials from the parties that they need, which we would be very keen to direct, but that we have experts fronting this particular approach.

I am not saying that's the right way of doing it. I am not saying it's the wrong way of doing it. I am saying it's a way that we are thinking it might be done. If it might be done that way, then the similarities between the Merricks case and your case -- and I appreciate it's not how you want to put it but you may not get the choice -- become extremely similar.

Now, I don't want to anticipate the outcome of a three-day evidential hearing next year. That would be entirely wrong. But it does seem to me that the application that Ms Wakefield is making needs to be considered on the basis that you might not be successful in getting the sampling that you so clearly want.

Now, if that is right, surely it makes sense to have the umbrella proceedings order made so that everyone knows that they are working towards a pass-on trial under the umbrella proceedings regime in late 2024. But if you are sufficiently persuasive, when we know what evidence is coming in, that that simply precludes the umbrella proceedings, we can then far more easily detach Ms Wakefield and Merricks and hear

them separately than attach two separate sets of proceedings in May when we decide that there are such similarities as there may be.

So it does seem to me that the evidential hearing that we've planned is actually extremely important in terms of the shape of the trial we are going to be hearing. I don't want to anticipate it, but I am absolutely not going to presume that it's going to have an outcome that you are going to be advocating for because, for the reasons we've given in paragraph 61, we need to be persuaded on that point.

Now, I am sorry I have gone on but I do feel that your submissions are somewhat missing the point of our concern about whether we do or do not make an umbrella proceedings order and it seemed to me important that I laid out at least my thinking on that point.

I see the time. I am going to deal with Mr Bowsher's point to the extent it remains live, it may have been addressed by what I have said, and then we will resume -- I think we had better resume at 2 o'clock. But, Mr Bowsher, you had your hand up.

MR BOWSHER: I am sorry to hold people back from their lunch. I just wanted to make this very short point.

A number of the submissions made by Ms Smith about the Merricks UPO application might at some point in the future be thought to be sort of applied mutatis mutandis to some hypothetical application that we might in future be able to make for a UPO in our case.

At that point we might have quite a lot to say about what was being said by Ms Smith. I anticipate the Tribunal doesn't want to hear from us on all those points because it is all hypothetical, but I just wanted to, as it were, I hate the phrase put down the marker but that's what I am doing I think, that in six months' time if someone were to say to me, "You sat in silence when all of that was said", well, I did, but I would have responded. If the Tribunal thinks it's useful, we can come back after lunch. That's all

I wanted -- really the only point I wanted to make.

MR JUSTICE MARCUS SMITH: Mr Bowsher, that is very helpful. I had been assuming that, all things being equal, you will be in Ms Wakefield's boat on these points. I mean one can't -- that's why we aren't hearing from you in full. One can't anticipate, but it does seem to us that we ought to approach this on a kind of FAC-oblig basis, namely that you may be making an application in the future along the lines of Ms Wakefield's, and what we really shouldn't do is, without saying it will be granted, we shouldn't do anything today that will absolutely prevent you from making such an application in the future. In other words, we ought to do our level best to keep options open rather than closed.

Now that again rather suggests that we ought to be making an umbrella proceedings order today, but putting down a marker that if Ms Smith is right and the evidence in the two actions is qualitatively so different that it actually wouldn't be possible to fairly determine all of the proceedings under one umbrella, well, then that is something which we would have to consider. But I say that with some reluctance and only because the Tribunal's concerns, as articulated in paragraph 61, have to date not been addressed.

I mean if we'd got an absolutely clear-cut and comprehensible understanding of how sampling would work, together with its probative value, well, we wouldn't be having this discussion. But what we have instead is a list of issues which says, well, we might be calling up to 500 witnesses, and that is not going to happen. However, we try it, it's not going to happen.

I am going to leave matters there. We will resume at 2 o'clock. Can I just check who, apart from Mr Cook, is going to be objecting to the making of an umbrella proceedings order?

MR WOOLFE: Sir, I am going to be suggesting that today is not the day to make an

order. If it's made at all, it should be made in the middle of next year and the Tribunal will be in a better position to judge at that stage whether to make one or not, but that's quite a limited point that I was intending to make.

MR JUSTICE MARCUS SMITH: All right. We'll think about that over the short adjournment. But it's just Mr Cook and Ms Smith on the substance of the order. Good. Thank you all very much. That was very helpful. We will resume then at 2 o'clock and we'll see you then. Thank you very much.

(1.26 pm)

(The luncheon adjournment)

(2.19 pm)

MR JUSTICE MARCUS SMITH: Good afternoon everybody. Can I again check you have good communications with me? Yes, I am seeing nodding. Excellent. Thank you very much.

I am not going to invite Ms Smith to resume right away. It may not surprise you to learn that we've had a somewhat intense discussion over the course of the short adjournment as to where these actions are going because we've had rather more about umbrella proceedings than frankly we anticipated given the note that we had overnight about how we saw the evidence in this case being framed.

What I am going to do is spend 10 minutes or so working out how we can hold the ring and ensure everyone is both aware and conscious of where we are going and happy with that direction and see if we can shortcut what will otherwise be rather lengthy submissions which will not, we fear, help us as much as they ought to.

So do bear with me, I am going to set out what I hope will be a way forward which may mean that I don't need to hear further from too many people.

So to begin with trial two, we have a pass-on trial that takes place, as proposed and indeed as directed this morning, in October 2024, time estimate seven weeks. The

retailer parties and the Merricks parties are all to attend that trial and to participate fully. We want everyone to be working on the basis that there will be a seven-week trial involving their pass-on issues at that date.

However, *pace* Mr Woolfe, we will not make an umbrella proceedings order today. That is because, and I will be frank about this, the rather careful plans that we made for controlling pass-on in the retailer proceedings, specifically the completion of the list of issues, has not worked, frankly, as we directed and as we would have liked it to have worked. What we expected to see in terms of our orders regarding the list of issues was a fully fleshed out and articulated understanding of how the evidence on all issues would be framed but particularly pass-on.

Credit to the parties, the work they've done on issue four in respect of most issues has been really very helpful and my sense both yesterday and today is that the interrelationship between column three and column four has really assisted in enabling the parties to understand what they need disclosure of, where they need to produce evidence and what the areas of dispute between the parties are, so big tick to all the retailer parties on that front.

I'm afraid a gamma minus on issue 28. Issue 28 is not articulated and to our minds is the source of the problems that we had mid-morning today. What we need is to understand with a considerable degree of precision what actually it is we are trying. So it seems to us that it is vital that we have an evidential hearing, we've put it at three days, and we've put it at May 2023, because that's far enough in advance of trial two for these very difficult questions to be finally sorted out.

Now, well before that May 2023 hearing, which will only be in relation to evidence on trial two, trial one we'll come to, we think that's much easier, well before that hearing the retailer claimants need to have absolutely specific and worked proposals as to the evidence they are going to call and I mean everything, I mean what they want by way

of factual evidence from their claimants, what they want from their industry experts, what they want by way of economic experts. I want that locked down so we know what they are asking for. I will say it again: if they ask for 500 witnesses to be adduced then we are not going to be particularly interested in a proposal along those lines because it's not consistent with a seven-week trial and it seems to us that a seven-week trial is more than enough proportionately to resolve these issues.

So that's the first thing we want, we want the retailer claimants to put their cards on the table as to what it is they want; whether they get it or not is a different question and it depends on how persuasive they are that it will have probative value.

Equally, before the May hearing, Mastercard need an opportunity to respond. That is absolutely clear from our judgment last time. What we said, just to remind ourselves, is that we weren't going to preclude the umbrella interchange fee claimants from adducing any evidence they might wish to produce, that is the position, but we would need to recalibrate what Mastercard themselves calls in the light of that evidence. Quite clearly we can't make any final prelusory order against Mastercard without seeing the colour of the claimants' money. So we need to see the colour of the claimants' money and Mastercard need to be able to understand what it is they would want to produce in response in order to make good their defences.

The same can go for Visa but, as I understand it, Visa's position is rather different but, frankly, Mr Kennelly, if you want to follow Mastercard's track on this then what I say about Mastercard equally applies to Visa. But I am addressing Mastercard specifically because it is Mastercard who made the running on this point and there's a difference in party choice as to how they are defending their claims which I am reflecting in these comments. But I want to be clear, we will treat the defendants exactly the same in this regard and if Visa want to participate in this process then absolutely they can do exactly as Mastercard does. I just want to make that clear.

The reason it's important that we get the claimants' cards on the table and an opportunity for Mastercard to respond is this. We've talked in a rather broadbrush way about sampling. Now, in one sense sampling is the right word because on any view no one is going to be calling 500 witnesses of fact in this case. I mean, I have used it as a stick to beat Ms Smith about the head with but I know she is not going to call 500 witnesses.

The difficulty is that sampling implies a rational way of selecting certain elements out of a group for more detailed investigation because they are representative of other examples that are not investigated. I am not sure that that sort of range of representation is going to arise in this case. I suspect there's going to be a great deal of variety which will not enable us to make inferences from, say, ten examples about what the other 490 were up to.

That I suspect will be Mastercard's problem with any sampling. That's why, cards on table, I can see great virtue in an expert-led approach where the experts say: we need this material, let us work out what it is we need to produce as part of our report and we can manage the process that way. But we recognise at this stage that's not a process that we can impose on the parties, the time may come that we do, but certainly at this stage we can't. We need to give the parties their head. This is still a Tribunal where it's for the parties to choose how they adduce their evidence and it's for the Tribunal to control that process.

So what we would like well before this May hearing is for Mastercard to be able to work out what they would want in response to what the claimants say they want.

Let me give you an example of a problem with sampling. Let's suppose we've got a case where one retailer says: actually we didn't have any discretion in setting price, we had the price imposed by someone else. In other words, the prices were set at a higher level beyond the claimant itself.

The chances are in that case Ms Smith might want to understand and explain to the court what the thinking was behind the person above the retailer claimant was thinking, whether MIFs featured in that thinking or not, and call evidence there. So, in other words, the sample may not be confined to the list of 500 claimants that we've got in the annexes.

Take another example. We may well have a situation where pricing was simply not thought about. There was simply a bid to ensure that as many widgets as possible were sold by the retailer and they didn't think about the MIF, they simply thought about what other competitors were charging and set their prices accordingly.

Mr Cook will recall that that was broadly speaking how Sainsbury's did it in the Sainsbury's litigation. There was a close watching not on cost but on what other people were charging and that may make a difference.

The problem with sampling is I don't want to have a case where Ms Smith picks her best ten where pass-on was absolutely considered and not passed on without Mastercard having an opportunity to pick their best ten. So we need to have a very clear understanding of what it is that we are talking about in terms of evidential shape well before trial two and the watershed date that we are minded to pick is May because it's a date that gives the parties plenty of time to think things through and it gives us plenty of time to ensure that the direction for trial two is set and set fair so that we don't have some time early in 2024 a whoops, we don't know what we are doing, we are going to have to adjourn trial two, because we don't want that to happen, we want trial two to be effective.

So that is how we are proposing to square the circle at the moment, which is -- well, I don't want to be rude about my own thoughts but it's very much kicking the can down the road, giving nobody all of what they are wanting but I hope ensuring that we can reach a proper course come next May and we think that that will enable Mr Bowsher

to be able to catch up sufficiently to be able to make a proper application for an umbrella proceedings order, if appropriate and if so advised, in May.

So just to add on to that, we said in the note this morning that Mr Tidswell will be chairing that application. We will have a CMC in that matter in the December and I am sure Mr Tidswell will ensure that Mr Bowsher is in a position, if that's possible, to move an application so that his claims can, if appropriate, be integrated.

Mr Jones, you are simpler, you don't need a CPO but you can take it as read that as regards your second stage claimants, those who want a stay on the usual terms, well obviously we'll grant that, but Primark again, you need to think about how Primark gets integrated into this action and how Primark's evidence is going to be adduced because we are going to be asking exactly the same questions of you. I appreciate your job is much easier because you only have a single claimant but nevertheless the concerns that we have about how pass-on is to be proved, which is why we had the hearing last time and why we had this very aggressive list of issues, we are still in the dark about how we are actually going to resolve the question of pass-on. That I think is the real problem that is going on.

So I have a few more things to say about Volvo limitation and trial one but before I go on to those, I think I had better see whether this calms the troubled waters of this morning or whether we are going to have to carry on with submissions about umbrella proceedings.

The final point: I have spoken a great deal about cards on table in May 2023. I am in two minds about how helpful this would be. I suspect it would be helpful, but it seems to us that Merricks also ought to be integrated in the process of what it is they propose to adduce in terms of evidence so that we have, as it were, all of the options on the table.

So what we are envisaging, I mean we see you, Ms Smith, as the problem case

because you've got multiple claimants and you have not yet said how they are going to give evidence and that's a problem but we do think that the same goes for all of the other claimants, Mr Bowsher, Mr Jones, the same applies to you, as it does to you, Ms Wakefield, because we think that you need to be clear about what is you are going to do to prove your cases so that we can get a grip of the trial and most importantly so that Mastercard and Visa can actually defend themselves because at the moment Mr Cook just doesn't know what he's facing and we don't know either.

I think Mr Kennelly is in a slightly different position because he has a clear view about how he's going to defend this through expert evidence but equally his clients may change their mind about how they want to do things and that is entirely understood. But we need to get to a position of clear certainty.

The final point: it may be that the only way to get to that clear certainty is if we actually get some factual evidence served. I am not going to make any direction about that but we hinted at it in our note this morning. I will say it again because the real concern that we have is that it's all very well to talk about proving pass-on through factual evidence and sampling in the abstract, I think we do need to get to a pretty granular level pretty quickly and May was the date for doing that.

So I will shut up now and hear whether we need to go any further. I am going to start, Ms Wakefield, with you because you are getting half a loaf, not a whole loaf, and I need to know if that is a problem for you, and then we'll go to hear from others.

MS WAKEFIELD: Thank you, Sir.

So far as the loaf I am getting is substantively still the loaf I wanted, I don't really mind what it's called if that makes sense. So provided I have the single joint trial of pass-on listed for October, November 2024, and of course you may go back to revisit that after the May hearing, but we have that now in the diary and that can dictate what happens in the collective otherwise, and provided I am entitled to participate in the three-day

evidence hearing in May, as you just indicated I will be, and provided that I am now copied into everything, if we can be please, to do with pass-on, at least in the run-up to that hearing in May, I have substantively everything that I wanted. So I don't mind if it's not called a UPO.

MR JUSTICE MARCUS SMITH: That's helpful. To be clear, it seems to us you absolutely should be copied in on everything and absolutely the parties should proceed on the basis that it will be a trial two involving everybody with a crossover of evidence so that evidence can be deployed in both sides and with enough time to deal with all issues.

Now, that's without prejudice because May is the time we will be deciding this. It may come up that actually Ms Smith is absolutely right and one can't do both together. In which case we'll jettison one or the other. The chances are it will be the retailers who get jettisoned not you but that's something which we would be debating in May.

But to be absolutely clear, the parties should work on the basis that there be a trial involving everybody on all the issues on a basis to be determined in the future. So, yes, you are getting most of what you want but what I really want to check, and I am grateful for your response, is that you are happy with the can kicking down the road approach of the potential to revisit these matters in May?

MS WAKEFIELD: I am, yes. That's fine for us, thank you, Sir. Could we have the UPO applications formally stayed rather than dismissed.

MR JUSTICE MARCUS SMITH: No, that makes sense. There's no point in your making further application later down the line.

MS WAKEFIELD: Thank you.

MR JUSTICE MARCUS SMITH: Subject to whatever other people say, that would be fine.

MS WAKEFIELD: Thank you.

MR JUSTICE MARCUS SMITH: Now, nextly, Mr Bowsher and Mr Jones, is that a process that you have any problem with? I am not expecting you to but I would like to know if there is.

MR BOWSHER: Shall I go first? We have no problem with that in principle. I think our intention would be to at least engage in a preliminary fashion at the CPO hearing with some of the material which you've just put across our bow, as it were. That was certainly our plan. All that's left really is finding the date for the CMC. I know there have been discussions in the background. I don't know how far you want us to go into those now.

We've found some dates which can suit some of us but we are not quite there yet.

MR JUSTICE MARCUS SMITH: Mr Bowsher, we'll leave that to be dealt with out of the hearing because that's something which will require a working out of both Mr Tidswell's diary and the other members of the Tribunal and I know we could deal with this by way of chair alone but generally speaking we try to get a three-person Tribunal up and running.

So we'll leave the diaries for outside this hearing but thank you very much. That's very helpful.

Mr Jones, the same question to you minus the CPO.

MR JONES: Sir, absolutely, we are very happy with that suggestion. I do have a quick question, if I may, just to clarify precisely what it is that we would be doing in May so that we are shooting at the right targets. We are kicking the can down the road, which we think is sensible. The question is really to make sure I understand exactly what the can is.

There's the evidential question, Sir, which you focused on, which we entirely understand, the extent to which expert and in particular factual evidence will be relevant, completely understood that. Above that or behind it, if you like, there's

a bigger question, which is how does the Tribunal actually envisage deciding pass-on? Would it be on a claimant by claimant basis so that at the end of this process we know what Primark's pass-on is or would be on a larger basis, for example a sector-wide basis and Primark, for example, would be part of that sector?

Sir, my understanding is from your earlier judgments that obviously we've looked at very closely that both of those questions are, as it were, still live. They are both part of the can that we are kicking down the road. They both may be relevant in May. I just want to ensure that I have understood that correctly and that we have the right issues in scope.

MR JUSTICE MARCUS SMITH: No, you have absolutely understood that that is part of the ever-increasing can that we are kicking down into May.

MR JONES: Yes.

MR JUSTICE MARCUS SMITH: We had hoped, to be clear, that we would have more material to enable a more granular articulation of what it is we are trying at this hearing. Now, that has not happened and it's no criticism of anyone, these are very, very difficult issues. But although the problem is perhaps easier in your case because you only have one party, I think you should regard the question that you will need to be addressing, namely whether these things are resolved at an industry level or at a claimant level as applicable to you --

MR JONES: Yes.

MR JUSTICE MARCUS SMITH: -- as they are to Ms Smith. Ms Smith has the added problem that even if we do it at a non-industry level on a claimant level, there's a sampling problem, which you don't have, but I wouldn't want you to think that simply because sampling isn't a problem in your case because you've only got one claimant, we wouldn't want to force you to deal with matters at an industry level and therefore be swept in with other similar industry types.

I am not saying we are going to do that but we certainly want to have the option of doing that and part of the point of May would be to understand how we can rationally and fairly in accordance with the overriding objective lay down the manner in which we are going to try and resolve these issues.

Normally we'd be doing it far later but it's so intractable, we've now had three hearings on this, we really do need to get an early grip on it otherwise things are going to go wrong.

MR JONES: Thank you, Sir.

MR JUSTICE MARCUS SMITH: That I think leaves the people who have real concerns about our course this morning. Mr Cook, I am going call on you first and then we'll finish with Ms Smith.

MR COOK: Sir, we are very comfortable with the approach you've suggested. I mean, to some extent my submissions were going to be this can should be kicked down the road and had not identified that idiom as being the right one to use but that was going to be where my submissions were going to go on this in any event. There will be a point where I will want to make submissions and those may be stronger or weaker depending on what happens over the next six to eight months, including that hearing, including the various hearing in Merricks that are scheduled and Volvo, but simply to ensure all options are open it's clearly a sensible approach for the Tribunal to take at this stage.

MR JUSTICE MARCUS SMITH: We are very grateful, Mr Cook.

Ms Smith.

MS SMITH: Thank you, Sir. In light of the Tribunal's indications before we stopped for lunch, we'd actually had an opportunity to discuss matters and I think had independently come to a very similar position to that now reached by the Tribunal and we were going to suggest that course.

We are also happy that the Merricks UPO application should be formally stayed for now and that if and insofar as Merricks' counsel seeks to reopen or apply for a formal UPO, that should be done at the May hearing alongside and after, in effect, the questions of the evidence on merchant pass-on are considered.

You indicated before the hearing that in your view that UPO issue is closely related to the question of the nature of the evidence, so it seems to me to be sensible to deal with them both in May.

We can proceed to trial one in the meantime. There is no suggestion that Merricks needs to be involved in those issues as they are now limited to Article 101(1) only. There is no overlap with the Merricks issues there.

We have no problem at all with Merricks being represented at the hearing in May 2023 to make submissions on the nature of pass-on evidence and also the UPO if she seeks to reopen that issue.

We also have no problem with Merricks being represented at the trial two, the question is whether there's a formal UPO with the implications that that has for the binding nature of the decisions, but that is to be heard, as you say, in May 2023.

We also are absolutely at one with the Tribunal on the question of the Harcus Parker CPO claimants being granted a UPO or in fact applying for a UPO. The best time to consider that is after their application has been heard in December 2022. So again in May 2023.

As regards the hearing in May 2023, we hear and have taken very close note of what the Tribunal says about what you expect from us in advance of the May 2023 hearing as regards factual evidence, as regards evidence on pass-on, merchant pass-on.

We did of course in preparation for the May 2022 pass-on hearing put in an expert report from Mr Falcon and you will recall a worked example of the evidence we propose to give from one of the claimants, Pendragon, which was attached to our

skeleton argument.

Those set out our approach to the question of evidence that we said is necessary for the purposes of merchant pass-on. We will develop that in light of the Tribunal's indications this morning, including we think it's a good idea that it may be that we put in specific witness statements, witness statement or statements as indicated in the note, the letter that you sent to the parties this morning. That is whether the assistants can consider whether in advance of this hearing example factual evidence might be produced. So we'll bear in mind that point and we'll develop what we've already produced for the purposes of the pass-on hearing May 2022 in light of what you've said.

So I think we have come to a conclusion, a sensible conclusion on trial two and the May 2023 hearing and I think we are probably there. There are issues arising as to what's to be done between now and the hearing of trial one in early 2024.

MR JUSTICE MARCUS SMITH: We'll come to that in a moment. Let's lock down the limited agreement on trial two because I am conscious I need to hear, he may not have much to say but I need to hear from Mr Woolfe. But I just want to make clear that we are very sympathetic to the difficulties that the claimants have in pulling together the evidence to make good the pass-on defence that has been raised as against them.

The reason for giving you such a hard time is because of the difficulty that you face and we are raising it early so that we have a trial that is controlled and fair in 2024 rather than a disaster zone where we simply don't have the wherewithal to fairly resolve the issues.

We have borne in mind and made the comments we have having in mind the material you have already produced and so I think you can take it that we have not had our concerns assuaged through the Pendragon example and the reports that you've put

in. That is not to say it's not a good starting point but I do want to underline that it's important, first, that you be very clear about what it is you need to adduce to prove your case but, secondly, that Mastercard, and again I am using Mastercard as the party that has raised this as an issue, that Mastercard can be assured that whatever sampling selective process you propose is one that enables the points that they want to make to be made.

To be frank, that is why we would be very receptive to an expert-led process where an expert says: look, this what I am doing, I am starting to look at the industry but there are then going to be certain specific factors that I need to look at in order to make good certain points. And one would then have on a facultative basis orders from the Tribunal on selective areas of disclosure or production of witness statements under the umbrella, sorry to use that term, of the expert, be it industry or general economist, so that the factual evidence can be marshalled in a sensible way.

Now, that may be a way of squaring the circle. It would not preclude factual evidence if it was something that the expert was saying: look, I can say X as a statement of fact because I have been told that by this particular claimant representative. If the veracity or significance of that evidence was necessary, then of course we would be minded to have that person giving evidence so that they could be cross-examined. So it may be that it's simply a question of which end of the telescope we are looking at. But it is a two-fold problem that I think you and Mastercard face. One is that it is simply a question of how do we manage a vast influx of factual data, 500 witnesses, and then, secondly, related to that, if, as you have to be, you are going to be selective, how can you be selective in a manner which ensures that we get a fair picture that is representative of the entire picture?

So these are the things we are grappling with and we feel at the moment we don't have a sufficient grip on it and the ball in that regard is very firmly in the claimants'

park to get a workable solution that works both for Mastercard and for the Tribunal.

MS SMITH: Sir, that's extremely helpful. I think it's also sensible for me to perhaps put on the record that although my position is slightly complicated by the fact that I am one counsel representing hundreds of claimants, the position of each of those 500 claimants is essentially the position of Mr Jones' one claimant, Primark, it's just that I am representing for Humphries Kerstetter 500 claimants, 500 Primarks and for Scott+Scott 22 separate claimants who are effectively 22 Primarks. It's simply a matter of trying to save costs and trying to ensure that things are done most efficiently that those hundreds of different claimants are represented by one counsel but that does not mean those claimants are not each in exactly the same position and are individual claimants as is Primark, Mr Jones' single claimant who he is representing today.

So I think we need to bear that in mind as well when we are talking about the evidence that's to be put in by the claimants. Primark is one of hundreds of claimants in front of you. It just happens that Primark is represented by one counsel and a number of hundreds of other claimants are represented by me. So we need to bear that in mind when we are making proposals for hearing evidence from the claimants. I just thought it was necessary in light of the unreality in fact of how people are represented in front of you today that in fact I am representing 500 claimants, 600 claimants but each of those are in exactly the same position as Mr Jones' one Primark claimant. So we need to bear all those issues in mind and we will do when we make our submissions for the May 2023 hearing.

MR JUSTICE MARCUS SMITH: Ms Smith, that's a fair point as far as it goes. But it does not go very far. The fact is Mr Jones is going to have to work as hard as you to explain to us whether there should be factual evidence from Primark. I appreciate that his job is in one sense easier in that it's only one party but if Mr Jones, and I don't think

he thinks this, that's why he raised the question, if Mr Jones thinks that he can simply say: it's easy, we are one party, therefore don't worry about the industry level, then he'll have another thing coming because he's going to get exactly the same push back that you are getting on how we prove this. Because the same issue arises, which is I am not sure, and you have so far failed to persuade me at least, that factual evidence is the way to go.

Mr Jones, on one level it's easier for you because you've only got one party to think about so you don't have to worry about sampling but so far as the appropriateness of factual evidence is concerned, it's exactly the same for all the claimants' parties and I don't want any of you to be under any illusions about the way in which at the moment given the material we've got we are seeing the pass-on question.

MS SMITH: Sir, you have just highlighted usefully my concern, which is that Mr Jones does have to worry about sampling, he's just one individual in a pool of a number of different claimants and if my claimants have to worry about sampling, a different approach cannot be taken by the Tribunal on that question, for example, to any other claimants. All claimants are being heard together under the umbrella proceedings represented by different counsel and so the approach taken to questions of what evidence should be allowed in, how it should be allowed in, including the question of sampling, needs to be applied across the board is all I am saying.

MR JUSTICE MARCUS SMITH: Ms Smith, I have just said that. What I am saying is that the mere fact that Mr Jones doesn't have a sampling problem doesn't mean that we are going to take a different approach between claimants but don't think that means you are going to get your sampling in.

Mr Woolfe.

MR WOOLFE: Thank you, Sir. Well, I am not going to oppose disposing of the UPO application at all because I think that's the right approach. If I can just briefly make

a few points though, Sir.

Our concern, if I explain what our concern about the UPO application in general is. As I understand it, the Practice Direction involves a determination that the issues are the same or similar. Now, there is no question I think these issues are the same because we are looking at what is in principle a claimant-specific quantum assessment versus the economy-wide pass-on quantum in Merricks, they are not the same, but as I understand the point that Mr Justice Roth was putting, which I do fully accept, the gap between those two points of principle is bridged by the approaches that are feasible. So you may have -- I think Mr Coombs is proposing to build up an economy-wide estimate sector by sector and then you may have some sort of sectoral-type approach to addressing the claimant-specific issue, so in practice they start to come together.

But we submit that that point of similarity will be best judged next year and that's what I was going to say.

But I also wanted to reassure you on -- well, I'm going to both scare the Tribunal and reassure you at the same time. I represent I think more claimants than anybody else here today. I think approximately 1500 claimants form part of Stephenson Harwood groups. But I can reassure you instantly that we are not proposing that there should be 1500 witnesses called or hundreds or anything of that sort. We do fully accept that sampling will be the maximum that is possible.

We do submit that it will be necessary to feed in facts into the expert process because having expert evidence entirely divorced from the facts is not productive of anything. There are a variety of approaches that could be taken, whether questionnaires, questionnaires susceptible to challenge with isolated witnesses being called or a small number of factual witnesses being called and so forth and that can be addressed, we submit, at the hearing next May.

But as regards our position at the hearing next May, it may still be that at that stage we are saying there's not sufficient similarity of issues fundamentally for the quantum pass-on issue in the merchant retailer cases to be heard together with the Merricks pass-on issue, but the Tribunal can judge that point then.

This final marker, if I may, is that there may be a greater similarity between the Merricks pass-on point and the pass-on point that Visa are trying to raise in respect of the fair share criterion in respect of the exemption because in that fair share criterion they are talking about treating merchants as a group of consumers and whether or not their loss was passed on as a whole. That's conceptually closer to what the Merricks claimants are talking about.

To the extent that point is in issue, the Tribunal may want to keep that in mind when it comes round to May as well but for now we accept that the Tribunal has made its position clear, we're looking at a pass-on trial and a process towards that. We'll engage enthusiastically with that process and set out our position on how that should be addressed and, to reassure the Tribunal, we are not proposing hundreds of witnesses or anything of that sort, we are fully aware it needs to be a manageable process within the parameters the Tribunal has laid down.

MR JUSTICE MARCUS SMITH: Yes, thank you, Mr Woolfe. That's very helpful.

MR KENNELLY: Sir, may I --

MR JUSTICE MARCUS SMITH: Yes, Mr Kennelly, of course. I had not heard from you because I sort of assumed that any concerns you might have would be addressed by Mr Woolfe, but of course I need to hear from you.

MR KENNELLY: I don't wish to cut across the next stage the Tribunal is at. I wish to make a very short point about the suggestion regarding the timetable in the prospective collective proceeding. May I do that now?

MR JUSTICE MARCUS SMITH: Please.

MR KENNELLY: Because it was suggested, Sir, by you that when Mr Tidswell is chairing the CMC for the prospective collective proceeding, we will be required to have a timetable that ensures judgment is handed down sufficiently in advance of the May hearing for Mr Bowsher to make an application, if he is certified, for an umbrella proceeding order. Our concern with that, Sir, is that it pre-judges the timetable in the prospective collective proceeding and very severely because it would require us -- because, remember, the CMC we are having in December isn't, as Ms Smith suggested, the actual collective proceeding application, that's just the first CMC and we will be subject to a very, very tight timetable in circumstances where we've not had that CMC in December where we will be addressing what's required in response to the expert evidence, if any, that's going to be required, funding, disclosure and so forth. Those are all matters we'll have before Mr Tidswell next month.

Obviously we'd aim to have, and of course it's not for us to say, the Tribunal will decide how long they need for the judgment, but we'd aim to have that resolved in time for May but to require it to be done before May I think may be, in my respectful submission, too much.

In fact does it pre-judge the timetable, which is a matter for Mr Tidswell in December. I leave that there.

MR JUSTICE MARCUS SMITH: Mr Kennelly, it's helpful that you've raised this point and what I can't do is speak for Mr Tidswell and I am not going to invite him to speak now on that matter.

But can I make two points clear in response to your perfectly well understood points. It's this. First, there can be no question of the procedural tail wagging the substantive dog. It is going to be Mr Tidswell's job independently to resolve the CPO application in a manner that is fair to both parties.

Now, if that means that it can't be done before the May hearing, then it can't be done

before the May hearing. Mr Tidswell is here. Of course he knows that there is a time pressure and that it will be desirable to have the matter resolved before the May hearing. But I don't know very much about the CPO application. I know much less about how you, Visa, will be minded to respond. Those are all matters for Mr Tidswell and he will decide them, knowing that May is important, but equally knowing that it's more important that the issue be resolved fairly and properly.

If that means that Mr Bowsher is in difficulties in May, then so be it. We may have to think about adjusting a May hearing. If it's so important that Mr Bowsher come in and be heard, well, that's something which we'll think about in the future. At the moment my sense is that May is a good time in order to deal with these extremely complicated evidential questions and it may be that the short answer to your question is that if the CPO application can't be determined in time for May, then we'll have to deal with Mr Bowsher in some other way.

So I don't want to anticipate that, but I do want to reassure you that you are not going to be squeezed unfairly. I suspect there may be some pressure to do things quickly but fairness is at the end of the day what we are all about.

MR KENNELLY: I am obliged. Just to reassure you, Sir, we don't seek to disrupt the May date in any way. It may be that despite our best efforts Mr Bowsher is not in a position, if he's certified, to make an application, then we of course could do a separate hearing, a shorter hearing obviously after May where Mr Bowsher had the benefit, if he's certified, of the work that's been done in the May hearing and whatever else we need to discuss can be bolted on at that stage. We don't seek to disrupt the May hearing in any way.

MR JUSTICE MARCUS SMITH: Mr Kennelly, I take it as read that all of the parties are both capable, as clearly their teams are, and as keen as we are to ensure that the process works and we know that if we say something needs to be done, the parties

will try and do it and they will, if they can't do it, have good reasons for saying why they can't, so there's a high degree of trust between the Tribunal and those who appear before it and your point is received in that light.

MR KENNELLY: I am grateful.

MR JUSTICE MARCUS SMITH: Mr Cook, you have your hand up.

MR COOK: I'm afraid I do, Sir. It was just ... I mean, I addressed you before simply on the question of the fact that this was all -- it assumes everyone agrees it's a sensible approach. Just one point to make in the context of that, which is Mastercard of course has an application for permission to appeal against the Tribunal's ruling from before the summer and that's something we just remind the Tribunal that's outstanding and that obviously we intend to pursue that and that's something that potentially will cause problems if it changes the direction of travel and we get an appeal ruling on that in due course, if we get one.

MR JUSTICE MARCUS SMITH: I am very grateful to you for the reminder. It is something which has been troubling both Lord Young, Mr Tidswell and myself. I don't think I am spilling any too secret beans if I can say you will be getting something in fairly short order, that is to say within the next few days, and I think when you see what is produced you will understand why it's taken us the length of time that it has to produce it. But I am not going to say any more than that. But thank you for the reminder.

What I am going to propose then, since we've now got an outbreak of harmony in respect of trial two, is that the parties collaborate to produce ideally an agreed set of directions to the May hearing. I want that done in short order because I want each party to be assured that the deliverable for the May hearing, which is the ability to decide the matters that we are kicking down the road finally in May, that's something that we need to be assured will happen and so I want the parties to give very careful

thought as to what each party should be doing and when they should be doing it.

I must say as we've been speaking I have been having some ideas along those lines myself but I think I would need to unpack them with my colleagues before I burden the parties with them. But you may get a communication from the Tribunal in the next day or so setting out how we think the trial two May issues can be resolved.

Ms Wakefield, you have your hand up.

MS WAKEFIELD: Sorry, Sir, I wondered if we might also have a formal listing in October for the pass-on trial because, diaries being what they are, the sooner we actually have a start date the more likely it is that the trial is effective, as we all want.

MR JUSTICE MARCUS SMITH: Yes, I think you can take it that one of the limited things we are ordering is a seven-week trial in October 2024.

MS WAKEFIELD: To start on first day of term or?

MR JUSTICE MARCUS SMITH: Well, let's leave that to the parties to think about exactly how much they have. I have been quite loose about mentioning October and November. I don't have insight into the parties' sense of just how tight an October 2024 deadline might be. I mean, it's odd to actually be speaking of a tight timetable when the date is October 2024 but actually if we are not going to have certainty about how the evidence is going to be produced until let's say June next year, we are actually then looking at a run-up to trial of just over a year.

So you will get a firm date but I think, along with the suggestions as to what is going to be done in the run-up to May, the parties could perhaps consider what the appropriate start date would be for an October 2024 late trial but you can proceed on the basis that we would be happy to have it begin on the first day of term but there may be better dates and if the parties are agreed on that then you won't get very much pushback from us.

MS WAKEFIELD: Thank you, Sir, we'll try and reach agreement amongst ourselves

then on that. In terms of the direction up to the May hearing, I don't know if terminology matters too much but would it be correct for us to say that the cases are being jointly case managed so far as the two issues of pass-on are concerned or should we leave that on one side and agree directions? I don't mind either way.

MR JUSTICE MARCUS SMITH: I would think that in this case less is better than more. It is clear that we are not clear about how exactly we are going to be trying matters in trial two.

MS WAKEFIELD: Yes, Sir.

MR JUSTICE MARCUS SMITH: And it seems to us that probably adding labels will detract rather than assist in this case. So let's avoid naming the beasts that we have created.

MS WAKEFIELD: Substance of the loaf, not name of the loaf. That's fine. Thank you.

MR JUSTICE MARCUS SMITH: That's very helpful. What I am going to proceed on to next is just to check that there is no pushback in respect of our proposal of a Volvo limitation hearing in January/February 2023 and to get some assistance in terms of how long the parties think that might take and to get further assistance from Ms Wakefield as to whether you or Mr Merricks would want to be in that or out of that or whether you can't say.

Mr Cook, I see you have your hand up again.

MR COOK: I have on the basis of just indicating that I am somebody who will be seeking to make submissions on the Volvo date, I suspect.

MR JUSTICE MARCUS SMITH: Very good. In that case let's move on to the Volvo date. I don't think we can fix a date specifically because we don't have our diaries available. I think Mr Justice Roth's diary will probably make February rather more likely than January but we will have to leave that I think to outside this today but what

other submissions do you have, Mr Cook, to make on limitation?

MR COOK: Yes. In terms of the basic principle, we absolutely see the sense in limitation, i.e. the Volvo point being dealt with sooner rather than later and certainly not being dealt with significantly before the 101 trial one that has been scheduled in early 2024.

Mastercard has particular difficulties with a January/February date on the basis that we have what's currently scheduled to be an eight-week trial, it may not be quite that long, but an eight-week trial starting in mid-January and where Mr Justice Roth has already put a four day, three to four day limitation trial in Merricks ahead of that trial.

So we already have a sort of full hearing schedule completely throughout January, February and going into the beginning of March. So from our perspective those dates cause us very serious problems, Sir, so we would invite you to push that back slightly into at the very least late March or April. There is one very short hearing scheduled in Merricks in April but that's unlikely to present any particular problems but from our perspective simply doing it any earlier is going to cause very serious problems that we simply don't have members of the legal team who are going to have availability to do that and it's clearly an important point but also one that arises in the context of -- you know, that is interlaced with these proceedings and it will be undesirable to try to deal with it with completely different lawyers, solicitors and counsel on these points.

We would say there simply isn't the need to try and slot it in so urgently that it should basically be heard in situations where that puts us in difficulties in attending and appearing at that hearing properly, Sir.

MR JUSTICE MARCUS SMITH: I suppose the question is let's suppose we decide limitation at a date in the first half of next year, does the determination of that issue have any effect on the scope of evidence in trial one?

MR COOK: Sir, we've given some thought to this. It may have some limited scope

effect. Bear in mind that's a trial of 101(1) issues. The Tribunal has already, and that was by consent, granted summary judgment in relation to the UK and Irish consumer MIFs on the 101(1) issues. That's in relation to the pre-IFR period, so pre-2015. So subject to there being points about exactly when the start of the claims are, and there will certainly be points about where we say the claims simply don't work necessarily earlier, the consumer claims at least, so far as they are domestic, aren't going to be altered by that ruling on Volvo.

There is the possibility of some adjustment for commercial interregional matters like that, but those are going to be comparatively smaller issues in the scheme of things. So, yes, it could have some effect. Certainly it depends on what claims are pursued against us. If one is going back to 1977, as Mr Jones said, that's against Visa not us, but clearly there will be arguments about some of those changes. But they are likely to be ones that could be bolted on rather than -- you know, the parties can do most of the work without any difficulties even though they don't know exactly the start date for some of those claims.

MR JUSTICE MARCUS SMITH: That's the reason we were thinking about January/February 2023 in order to enable -- because this will be a pure point of law but one of some significance -- an appeal to be heard and resolved without overlapping into the preparation time of trial one. But obviously the key question there is how significant is the Volvo limitation point to the work that needs to be done in respect of trial one, and that I think I do need to get a sense of.

So can I invite the parties, starting with you, Mr Cook, to give us submissions not on their diary availability, we will take that offline in correspondence, but whether they consider that there will be no questions of fact arising out of this point, it will be pure law, whether that understanding is right, first question. Secondly, assuming that is correct, how long the hearing will take. Is it two days, is it three days? Then, thirdly,

is there a need for a gap to enable an appeal to be determined prior to trial one? And my understanding from what you have said, but you can correct me, is that the answer is: it is pure law, two or three days is the time that you would want and you don't see any particular need in hearing it early because the damage that an appeal could do varies, the Tribunal's finding is limited in respect of its effect on trial one.

MR COOK: Sir, I think firstly in terms of the Volvo point, certainly what is the effect of the Volvo judgment itself is a pure point of law. There is then a factual point in relation to continuous infringement about whether or not -- which will then be a sort of subsequent follow up point about whether or not there has in fact been a continuous infringement. In relation to the EEA MIF, for example, Mastercard set that to zero after the Commission decision.

So there may be points about exactly when certain restrictions came in, whether or not there were continuous infringements or not, but that is a more limited kind of issue. To a large measure that will probably actually only be resolved many years down the road on the basis that some off those points will depend on the impact of 101(3).

So the pure point of law I think is what everyone is inviting the Tribunal to decide at that hearing, whenever it might be. There are already going to be claims going back to 2007 in relation to that Article 101(1) trial. That's going to be Mr Jones, Primark is the first of the claims that has a date at the moment.

So we are already going to be looking at 2007 onwards in any event as long as we are looking domestically. Theoretically the effect of Volvo would be to push claims in relation to commercial and interregional earlier than that. As I said, there may be a point at which we say there is a different issue in relation to consumer MIFs but at the moment at least the summary judgment in relation to Article 101 on consumer MIFs. So there may be a point where we say that doesn't go that far back. For example, during the 1990s there were no MIFs in Mastercard's credit card scheme.

There were bilaterally agreed interchange fees, for example, so that may be a completely different kind of scenario and analysis but in terms of fundamentally we have a trial that's going to be looking at 2007 onwards, dealing with the various issues, interregional, commercial, 95 per cent of that work is going to be the same whether there is a bolt-on need to consider the early 2000s, for example, for commercial cards or not as a result of Volvo.

MR JUSTICE MARCUS SMITH: Thank you. To be clear, we are envisaging a pure legal argument in Volvo with any factual questions and consequence left over to other hearings. So the parties should understand that that is all that is being offered by way of an early limitation hearing. It might be useful if in the schedule the parties interested in the limitation hearing could agree and frame the question or questions that actually need answering and really set it like an examination question rather than have uncertainty about what it is that we are addressing so it may be an agreed statement of facts will be needed which can then be used to resolve those legal questions. I don't have enough of a feel but I think that's something that needs to be dealt with in pretty short order.

But you think two days is enough, Mr Cook?

MR COOK: I think the issue is probably more the number of parties that are likely to participate in that process and how far, you know, the parties on the respective sides are completely aligned or take different points. Two days I would have thought, as the Tribunal suggested, two to three days would be sensible, to have the third as a potential overrun rather than sort of run the risk of potentially squeezing somebody on what is a point of very substantial importance.

MR JUSTICE MARCUS SMITH: Thank you, Mr Cook.

Mr Kennelly, I am going to pick you as the other defendant.

MR KENNELLY: Thank you, Sir.

So we agree two to three days. We agree that it's a pure point of law and we understand and we accept that one must envisage appeals because it's a pure point of law and because it's a pure point of law of such importance.

In terms of the extra factual evidence and disclosure that an adverse judgment from our perspective might generate, plainly the period will be extended significantly if we lose the Volvo point. But we are already dealing with a claim period that I think the Hillside claim begins in 2000 and of course all these claims run right up to the present day. So the parties can and should get on with their extensive obligations under 101(1) for that first trial anyway and they can do that, that does not need to wait for this, and then, depending on the outcome of the Volvo judgment, we can then address the supplemental disclosure and evidence that might be needed for earlier period.

Although earlier period, the extended period if we lose is very long, the likelihood of disclosure arising out of it would be relatively limited, not least because the documentary record may be very limited but also the documents and evidence that are likely to emerge from that period may not be significant. We have not done the work to analyse what would be required. But it does not seem to us that it would be very significant, even if the period were extended, as Mr Jones suggested.

Just to get my oar in, Sir, despite your warning, we would support stretching the period into March. We think that that could be accommodated and that would even allow an expedited appeal to be determined sufficiently in advance of the first trial.

MR JUSTICE MARCUS SMITH: Yes, I think the trouble is we are looking at a first trial early 2024. We could say that the trial will have the limits on the assumption that Volvo is decided not adversely to the defendants which would lock down the periods and we could say that that will remain the case whatever happens on appeal and one deals -- let's assume the Court of Appeal then overturn the Tribunal and come to the conclusion it is adverse to Visa and Mastercard, one could then have a separate trial

if necessary that would deal with the rump end or rump beginning of the claims that have then been brought in.

Now, if that is satisfactory to the parties, then we can be more relaxed about the date of the limitation hearing. If on the other hand it's better, and clearly in principle it is better but if it's appreciably better and practically better to have everything trial one, then January/February is to enable the appeal to be decided in sufficient time to enable the extra work to be done if it has to be done.

So I think I am detecting a degree of relaxedness on the part of Visa and Mastercard that actually any additional earlier periods would be dealt with separately and I just want to check that's right before I hear what other parties say in opposition to that.

MR KENNELLY: Sir, if I may, I will take instructions on your suggestion. To my mind certainly from what I understand I think that could work and it would allow the hearing of the Volvo application in March and the trial one to commence as you have directed. But I will wait to be told if there are any difficulties with that. I may hand over to my colleagues while I wait for those instructing.

MR JUSTICE MARCUS SMITH: I am grateful.

Mr Cook, is your position the same?

MR COOK: Sir, I think, well, a couple of points to make. Firstly, this is a point that has general importance for the competition law generally. I mean, this is not limited to this case. Volvo --

MR JUSTICE MARCUS SMITH: No, no.

MR COOK: (Overspeaking) -- other claimants is potentially -- just sweeps away (audio distortion) limitation periods generally. So one shouldn't assume an appeal to the Court of Appeal is going to be where that finishes. And obviously trying to accommodate the full rank of appeals means we are going to be looking at trials in 2026.

So I think pragmatically one needs to decide what's going to be in the Article 101 trial now, recognising that it could take a long time for the Volvo point to be decided. From our perspective, we think it's very sensible to do it on the basis of the time period that's definitely in play, on the basis that extending that backwards it could be done at a relatively short hearing some time later, and it's basically going to be at that point for Visa and Mastercard to identify any change of circumstances which sort of radically alters matters historically.

So it would be quite a narrow point and relatively, in turn, quite a short hearing, one would think, to deal with matters once the Tribunal has ruled on all the other Article 101 points for the primary limitation period.

MR JUSTICE MARCUS SMITH: Yes, thank you, Mr Cook.

We are just going to take 2 minutes -- yes, Ms Smith, we'll come to you, don't worry. We are just going to take 2 minutes. I want to discuss briefly one point with my colleagues and we'll take that offline, so we'll end our cameras and still the sound.

(Pause)

(3.33 pm)

(A short break)

(3.40 pm)

MR JUSTICE MARCUS SMITH: That was a more protracted break because of the shorthand writer. Can you see and hear me? Yes, good.

We wanted to discuss briefly just how confident we felt that any appeals, including appeals to the highest court, could be resolved in a manner that wouldn't disrupt trial one. We find to our irritation that our crystal ball is out of action on this point as well so what we are going to do is take a pragmatic approach. We will list this case, this issue for three days at a time for counsels' convenience, which probably means March or April.

We'll take a pragmatic view as to whether, if the ultimate outcome is adverse to the schemes, the additional material can or can't be shoehorned into trial one when we know what the position is.

I think as rule of thumb, if the question is ultimately resolved by the end of the summer, then there's little question but that it can be done. If the question is ultimately resolved much, much later than that, then equally clearly it can't be resolved in trial one. If it falls somewhere in October or November, it may be just possible and we'll have a conversation. But we don't think that there is any point in forcing the pace when it will clearly inconvenience a number of counsel to say it has to be January or February with a view to doing that simply because we are worried about what might happen on appeal. We think that that would be the wrong course. So we don't want the parties now to address us on the gap between this hearing and trial one. We will deal with that as it happens. Don't worry about dates, we'll sort that out offline, but we do want to know about length of time, we do want to know, Ms Wakefield, whether you are in or out on this and we do want to know about any other problems that (audio distortion). So I will go back to Mr Kennelly and Mr Cook to see if you have anything to add in relation to that and then (audio distortion).

MR KENNELLY: From Visa's perspective, nothing to add, we are obviously content with the course you've outlined.

MR JUSTICE MARCUS SMITH: Mr Cook.

MR COOK: I am very grateful, Sir, for the approach the Tribunal has taken, I have nothing further to add.

MR JUSTICE MARCUS SMITH: Very grateful.

Ms Wakefield, anything you have to say? First of all are you in?

MS WAKEFIELD: Thank you, Sir. I am sorry that for the time being I have to slightly sit on the fence on that issue. You will be aware, I know you are aware, that we have

a limitation trial listed in the collective in January and one of the steps of preparation for that hearing that the parties are currently undertaking is delimiting the various legal issues that go to limitation. Something we are considering is Volvo. Of course Volvo arises in a slightly different way in my case because it's a follow-on and so I have 92 to 2008, I can't go earlier than 92 anyway and I say I can sue for 92 anyway. So the issue for the hearing in January in essence is whether the period from 1992 to 1997 is time-barred.

There may be a Volvo point in that regard, there may not be. We are considering that at present. And then the list of issues of English law that are in dispute are due to be lodged at the Tribunal, Mr Justice Roth's Tribunal on 18 November, so that is a week on Friday, and after that point it will become clearer I apprehend whether Volvo issues will be in our January trial or if not because they don't arise then necessarily I won't form part of your later hearing.

In terms of the later hearing, Sir, and of course you've said that you don't want to hear submissions on this, but if I might just make a plea for impact on trial two and on the May hearing. So one of the issues for the May hearing will be overlap. I say overlap doesn't matter and we should have the UPO regardless because of the spine disjunct arguments that I made at the last May hearing but of course the argument which I always meet is that the lack of temporal overlap means that a UPO is less helpful. So there is that impact on the May hearing.

There is of course an impact on preparation for trial two because of the scope of disclosure from the merchants, in particular on acquirer pass-on, and we have not really dealt much with acquirer pass-on today, but if all of that information is already present in the pool of disclosure back and to encompassing my period, of course that again will change trial two.

So for my part whilst we can't do anything about the crystal ball and about the Court

of Appeal and potentially the Supreme Court, I would make a plea for your Volvo to come on as soon as possible, if I may. It is just a question of law and I would have thought that anyone could argue it, not just counsel already instructed in the case, but I may well be overstepping in that submission given your indication, so thank you, Sir.

MR JUSTICE MARCUS SMITH: No, as ever, that's helpful. At the end of the day though we know as certainly as we can that this is not a point that's going to rest with the Tribunal's decision. So whilst I entirely understand your desire to get things moving and to get certainty quickly, I am not sure that we are going to resolve that problem by listing it for January rather than let us say March.

So your point is well made. We are clearly going to have to deal with uncertainties as they exist throughout and what we would hope the parties will do is in their preparations particularly for trial two, to endeavour to articulate their evidence in a manner that is, as it were, Volvo neutral so that if you can stretch the periods that are covered without undue cost, you do so and therefore price in Volvo uncertainty rather than price it out so that huge amounts of work needs to be done in sort order or done again because Volvo doesn't end up the way you anticipate. I don't think we can make any direction in that regard but I am sure the parties will see the sense of that, that it's simply a question of saving of cost, and trial one, where obviously this is at its sharpest, it will deal with in the way we indicated earlier, namely we'll see what happens on the inevitable appeal.

Good. Who is next? What I think we'll do is we will hear from Mr Bowsher and Mr Jones and then we'll leave Ms Smith and Mr Woolfe to take the rear. I am assuming, but you will correct me if I am wrong, that neither of you have that much to say on this because you are obviously at a far earlier stage.

MR BOWSHER: Sir, I don't think we have anything really useful to add to anything we've already said. Our concern really at the moment is a much more short-term

concern about timetabling for more immediate hearings. I don't think there is anything that I can really usefully add on this at the moment.

MR JUSTICE MARCUS SMITH: I am very grateful, Mr Bowsher.

Mr Jones.

MR JONES: The same for me, Sir, I don't think I can really add anything.

MR JUSTICE MARCUS SMITH: Thank you both very much.

Ms Smith.

MS SMITH: Sir, I can make the following initial points hopefully relatively simply. We agree that the Volvo limitation point is likely to be -- well, is a question of pure law. We think it can be done probably, we think it should be a three-day hearing rather than two given the potential number of -- at least there be provision made for three days given the number of parties who may be represented.

From our point of view as regards counsel availability, I'm afraid that we are going to have to make arrangements for alternative counsel whether it's January, February or March, so the counsel availability problem I'm afraid arises for us regardless of whether it's January, February or March but we will have to do that.

As regards the impact on trial one, we do think that the question of limitation period could have a significant impact on the evidence and disclosure that's required for the trial one issues. Although, as Mr Cook said, it's been established that as regards domestic UK, Irish and inter EEA consumer MIFs there is a restriction pre the introduction of the interchange fee regulation, that's not been established as regards interregional MIFs, commercial cards and the other rules which are at issue here.

If you cast your eye over the list of issues, issues 4, 1, 5, 7, 8, 9 and 10, under each of those the parties have agreed that there should be factual witness evidence, for example as to the effect of the different MIFs from the defendants and there should be documentary disclosure from the defendants as to effect of different MIFs. There

should be factual evidence and documentary evidence disclosure from the defendants and from samples of the claimants on ancillary restraint issues.

So the time period that that witness evidence and that disclosure is to be given for is a live issue as regards, as I said, interregional MIFs, commercial cards and all the other rules that are at issue and are under issues 7, 8, 9 and 10, 11 and 12.

So the parties ideally would know whether the limitation period and the evidence they are going to have to produce and the documentary disclosure they are going to have to produce goes back to 1992, 1977 or 2007. We hear what you say as regards a proposal on that. We were about to propose, and I don't want to throw something else in the mix, that it might be more cost effective to proceed on preparation for trial one on the basis that Volvo does not extend the limitation period so that we are only preparing the evidence for trial one and the documentary disclosure for the limitation period we originally all thought applied before the Volvo judgment was handed down, that's six years from the date of the claims.

That might be more cost effective, which I think is the proposal that the Tribunal are making, that insofar as we can go back to 1977 or 1992 and prepare the evidence on that basis, it might also be clearer for everyone if that were the approach.

From our point of view that's not as desirable for my clients because obviously for my clients it's desirable that the limitation period goes back much further than six years from the date of claim but we very much take on board Mr Cook's points about appeal and about the possibility that even if we get the Volvo hearing in this case in January rather than March, we may be on the way up to the Supreme Court so it may make no difference at all.

So from our point of view and because of the potential for delay, we would rather get the trial one issues dealt with on a clear basis at an early stage as possible and that was simply our suggestion, that it might be more manageable and cost effective to

prepare for trial one on the basis of six-year limitation periods with the possibility of reopening the issue if the Volvo case does say that the limitation has to go back further.

MR JUSTICE MARCUS SMITH: Thank you, Ms Smith. That's helpful clarification. So to be clear, parties will prepare for trial one on the basis that the law is as it is at the moment or rather that the cases are as they are pleaded at the moment and that therefore the implied understanding is that Volvo is decided not adversely to the defendants but adversely to the claimants.

So everyone can proceed on that basis. The only qualification that I would make is that if -- and it's a big if -- the whole thing is resolved adversely to the defendants, all instances having been used up, by the end of the summer, we will shoehorn, subject to any further argument but we'll try to shoehorn the extra periods into trial one but we will not make that decision in advance, we will see where we stand and just how big the issues are in light of the work that has been done because what we are not going to have is a trial that is either adjourned because of the extended issues or is unmanageable for other reasons if it takes place.

So that is the --

MS SMITH: That's absolutely our position. We simply don't want to the trial to be adjourned for exactly those reasons or not take place because it becomes unmanageable. So in light of that, we are prepared to take a hit really at this stage, leaving open obviously the possibility that if we do win on the Volvo point and these do become claims that go back to 1977 or 1992, then we can revisit that a later stage after trial one but it's subject to that express caveat.

MR JUSTICE MARCUS SMITH: I am grateful.

Mr Woolfe.

MR WOOLFE: There are two areas on which I want to address you. One is the approach to trial one, a point you have been discussing with Ms Smith just now, and

then the timing of a hearing early next year. As regards the first point, we do think it would be desirable, if it can be achieved and the parties should hope to try and achieve, that trial one deals with all Article 101(1) issues. It would be rather messy if -- whilst I appreciate the requirement for certainty and efficiency that Ms Smith has articulated and the Tribunal has indicated we should prepare on the basis of what's currently in, it would be somewhat awkward especially with regard to the second trial, trial two, if we only have a determination in respect of Article 101(1) for a limited time period. So I would submit that if it can possibly be achieved that we get determination on everything, assuming Volvo is right, that would be greatly to be desired.

MR JUSTICE MARCUS SMITH: Indeed. That I think everyone is agreed on but are you advocating for a January hearing of this?

MR WOOLFE: What I was going to say is that, whilst you indicated that the hearing should be at counsels' convenience, we say that at the very least it should be at counsels' earliest convenience, perhaps having regard to the fact that there are multiple counsel available to many of the parties, Ms Smith has already indicated that she or at least her team is not available in that period but they are willing to take the hit, as it were, and get somebody else in. I would say there's no harm in that being the case for other --

MR JUSTICE MARCUS SMITH: Let me shortcut matters a little bit. I don't want to get into diaries now.

MR WOOLFE: Yes.

MR JUSTICE MARCUS SMITH: We are looking I think at March or April. If we get a situation which does happen where everybody says: gee, counsel of choice aren't available until June 2028, well, we'll fix it for counsels' inconvenience. That's the way we work. So we are looking at March/April. We may look at other dates but we are not going to try and shoehorn it into a date now and equally we know diaries are

complicated but it's a complication I think we can deal with outside the room rather than before.

But your general point that this needs to be done fast, we accept.

MR WOOLFE: Thank you, Sir. My final point, just to add to that, with an aim that if it can't be done in time for trial one, in time for trial two would be important as well, so we should factor that into the mix. Finally, Sir, just to say, as I understand it, there will be determination of Article 101(1) issues as far back as the earliest claim that is currently -- so the earliest claim that was issued, six years before that, as it were, takes one back, I think this is Mr Jones case, to 2007. We are looking therefore at a determination on trial 101(1) of those issues back to 2007. That determination is one that would then apply across the board to everybody. We don't yet have to know whether everybody claims can go back that far, one is still aiming to get a determination back to the time of the earliest claim. Is that right, Sir?

MR JUSTICE MARCUS SMITH: I think the answer is we will resolve the pleaded issues. I don't want to get drawn on whether there would be a read-across into issues that would be pleaded if Volvo was decided adverse to the defendants. Obviously there might be questions of issue estoppel because the parties would be the same and one would expect findings of fact in respect of one claim to certainly inform and possibly determine matters on the other.

But I don't think it's entirely fair to the Tribunal to require us to give an indication on that sort of hypothetical question without actually going to town on what the pleadings do say and the extent to which something can be read across. We will try and decide as much as we can fairly to all of the parties.

MR WOOLFE: Thank you, Sir. Perhaps I didn't put my point terribly well. In the case of Hillside, the claim was issued I think in 2017 initially, so it would extend back to 2011 in any event. There are other claims out there which were issued earlier and therefore

the claim periods extend back earlier.

We have a situation where you could envisage having a trial one taking place at a time when the Supreme Court has still not given judgment and therefore, leaving Volvo to one side, there wouldn't be a pleaded issue in that case, in fact we've already pleaded it back to 2000 so there is a pleaded issue but only contingent on Volvo being right or not.

Would one solution be, if the Tribunal wants to take this approach, to direct a start date for trial one, as it were, where you say trial one will resolve Article 101(1) issues from a certain date onwards, that date being six years before the earliest claim that is before the Tribunal and that might be one middle course?

MR JUSTICE MARCUS SMITH: Mr Kennelly, Mr Cook, I am not really in the business of trying to resolve problems that aren't problems. It's not something which I have actually thought about. How far is this a problem? I mean, I have said, which I think really does follow, we want to resolve the pleaded issues. I think Mr Woolfe is raising a question of a kind of contingent pleaded issue which presumes that Volvo is decided in the claimants' favour. Is there a short answer to dealing with this or is it actually as complicated as Mr Woolfe seems to be suggesting it is?

MR COOK: Sir, is that directed at me?

MR JUSTICE MARCUS SMITH: It's directed to Mr Kennelly and Mr Cook as the persons most affected by this.

MR COOK: Yes. Sir, we are actually looking to see what the scope of some of the claims are on the basis that not everyone has pleaded in relation to exactly the same thing.

But certainly in principle if we face a claim in relation to commercial MIFs going back to 2007, we will put our best foot forward in terms of justifying them back to 2007. I suspect there's probably not going to be any scope for us to come back and say that's

a ruling which is limited to one claimant if the Volvo point goes against us because we'll have had our bite at the cherry, Sir.

MR JUSTICE MARCUS SMITH: Look, we'll leave it at this: we are in the business of resolving those claims that have been pleaded and only those claims. There may be an unusual group of claims that Mr Woolfe has articulated where they have been pleaded on the basis that Volvo is decided the claimants' way.

Now, I don't want to decide whether we are going to cover that or not. I can see a good argument for saying: look, wait until Volvo is decided before you deal with that matter.

Can we leave it like this: if the parties are in need of clarity about the scope of the evidence that they need to adduce for trial one on the basis that we are not in the business of dealing with Volvo until it has been finally decided, if there is a lack of clarity about certain issues, raise it with the Tribunal on the papers and we will resolve it on the papers.

I'm afraid it's getting to a level of intimacy of understanding of the pleadings that frankly we don't have and I am very reluctant to make a kind of generic ruling about what is in and what is out in circumstances where we don't have all the cards on the table.

MR KENNELLY: From Visa's perspective, we are, respectfully, content with what you've just said.

MR JUSTICE MARCUS SMITH: Mr Cook, is that okay for you?

MR COOK: It is, Sir. Thank you very much.

MR JUSTICE MARCUS SMITH: Mr Woolfe, does that solve your problem?

MR WOOLFE: I think it does, Sir. I think there will be clarity after the next oral hearing and we can raise it in writing if needs be, Sir, thank you.

MR JUSTICE MARCUS SMITH: That's very helpful.

Is there anything else on limitation?

Good. That's very helpful. I'm afraid we are running to the last quarter of an hour that

Mr Justice Roth and I have, so there are a couple of other things that I need to raise in respect of trial one. I am going to leave it to the parties in general to frame the directions that are needed for trial one and I would like the parties to put their minds together in terms of what those directions should say.

It does seem to us however that we ought to put down a marker that in terms of experts we are satisfied that it would be reasonable for Visa and Mastercard to have experts in each discipline each. So far as the claimants are concerned, it obviously would be unreasonable, and I am sure not sought, for there to be one expert per claim. I am sure no one will be asking for that. But we do think the parties need to be clear that from the Tribunal's perspective less is better than more and we are not going to force the issue now but we do think that the claimants need to think quite carefully about whether a single expert or at least a very limited number of experts will suit their purposes, even if they have multiple representation across the many hundreds of claims that are coming before the Tribunal.

So I am not going to make a direction. I am giving a very clear steer that it is in the interests of the parties because of costs, in the interests of the Tribunal because of proportionality and clarity, that the number of experts be kept to an absolute minimum. I think it would be helpful if, without making any detailed submissions, I could have an understanding as to whether that strikes the claimants as a reasonable approach or whether they are going to be saying: no, we absolutely must have one expert per camp.

MS SMITH: Sir, you will be aware that last night we circulated, sent to the Tribunal and circulated to the other parties, a proposed draft order timetable for trial one. We anticipate from what you've just said about time we won't have time to take the Tribunal through that but we would propose to discuss that and seek to agree some timetable and draft order to trial one with the other parties.

We've already circulated that so we'll take that away. It's based on the work, it builds on the work that's already been done by the parties on the list of issues, which has been extremely helpful in focusing on what disclosure is sought by the schemes of the claimants and what disclosure is sought by the claimants of the schemes, what factual witness evidence is sought by each side and what expert evidence is sought by each side and the work done for columns three and four in particular has formed basically the basis for the foundations for this draft order that we sent round last night. So I hope we'll be able to take that away and work on it with other parties and seek to agree it with them.

On that, from the point of view of the claimants who instruct me, that is the Humphries Kerstetter claimants and the Scott+Scott claimants, we've always proposed to have common expert for all those claimants, so that's not an issue for us.

MR JUSTICE MARCUS SMITH: No, it may be an issue more for Messrs Jones, Bowsher and Woolfe.

MS SMITH: I am afraid I can't comment on what their position is obviously.

MR JUSTICE MARCUS SMITH: No, I appreciate that of course. We have put down an indication. I don't think it would be reasonable to expect the other claimant parties to articulate a position. Clearly Merricks is separate because we are keeping the streams separate so the issue doesn't arise. Sorry, I am reminded you are not even in trial one. I am getting my trials confused. But the general proposition actually applies to trial two as well.

But we've put down a marker. If it becomes a problem in terms of having multiple experts which will render trial timetabling more difficult, then we'd like that to be raised with us so that we can consider whether the approach of the parties is a reasonable one. But we intend to keep a pretty tight control over what is going on from here on in.

I don't know, Mr Jones, Mr Woolfe, Mr Bowsher, whether you have anything to add in relation to that indication. I don't necessarily expect you to.

MR BOWSHER: Can I very briefly. This is very much by way of a preliminary remark because I meant this as certainly something that we would have contemplated being addressed at -- well, the CPO hearing rather than the CMC I imagine. Given the fact that of course we are in a number of ways different from the other merchant claimants, I would expect that we would need to have our own experts on most matters. But certainly one of the thoughts we would want to think through is whether there are efficiencies to be gained on some topics where we could collaborate.

But we are obviously broader by virtue of being collective but also narrower in some other senses in terms of the subject matter that we cover, that we are only dealing with interregional and commercial, so in a number of respects we are different from the others so it might be quite difficult to share on a number of topics but that's a topic to be thought through with our team.

MR JUSTICE MARCUS SMITH: Thank you.

Mr Jones.

MR JONES: Sir, we've heard what you have said. We entirely understand it. We will take it away and do what we can. There are, as you put it earlier, obviously different sort of shifting tectonics plates at our end which I won't go into now, Sir, but we'll do what we can and only come back to you if and when we have either a problem or a solution.

MR JUSTICE MARCUS SMITH: Mr Jones, I am very grateful.

What I am going to do is I am going to address one last point as a marker to put down which is this. We've got, as everyone has noticed, a very well developed list of issues. We have a number of pleadings that are in. The parties should all think about, even if it involves them in a little extra cost in rethinking the pleadings that they might be

minded to file otherwise, the very real fact that less is more, given the number of claims that we have in together.

So the more that can be done by way of adoption of other parties' pleadings, the more that can be done by identifying issues by reference to the list of issues, and as necessary augmenting it so that the list of issues becomes the first port of call to work out what the issues actually are, the greater the cost savings in terms of convenience going forward.

We very much want the parties to think about minimising costs and maximising practicality and convenience in that way. Again, it's not something I can make a formal direction in relation to. The parties may want to think about whether there is an order to be articulated in that regard.

One of the savings of course is that if claims are articulated by reference to claims that have already been pleaded out, we don't have to worry Mastercard or Visa about responding to them because the responses will already be in, and that to our mind is an enormous advantage.

What we are looking towards is a funnelling of the pleadings. We've got lots and lots of claims and statements of case from the claimants in. We've got a large number of defences in. We now have the list of issues. We would like the trend to continue to be a narrowing rather than a widening of the number of documents that we have to read in order to understand what is in issue, because we are simply going to miss things if there are many, many pleadings.

Mr Woolfe, you have your hand up.

MR WOOLFE: Thank you, Sir.

I was simply going to make a (audio distortion), which is after our process of pleading is completed at some point, and I am not going to give a deadline now, we could write to the Tribunal confirming the extent to which the list of issues covers our claims, which

would very largely possibly with some type of small caveat or something. But would that be of assistance to the Tribunal to get that certainty from us, to the extent that it covers our claims and any issues we say don't arise and issues we say arise in our case that aren't in the list? Would that be of assistance?

MR JUSTICE MARCUS SMITH: That does sound helpful, Mr Woolfe, indeed.

Mr Kennelly, you also have your hand up.

MR KENNELLY: Thank you, Sir.

Am I right in thinking that for the first trial, just for the purposes of drawing up the directions, that the Article 101(1) issues include the interregional MIFs, commercial cards and the other rules, issues 7 to 12?

Everyone has been proceeding on the basis that they are included. Certainly that's what Ms Smith said and that seems to be the understanding of the other parties, but I just wanted to double-check with you before we start coordinating our directions. Of course the non-UK MIFs are excluded, Article 102 is excluded. I am not going back on that. I just wanted to check.

MS SMITH: Sir, in respect to the list of issues, my understanding was -- so that we actually get this clearly tied down to the list of issues, my understanding was that the trial one hearing, and again this is to try and assist everyone else around the table, as it were, would be addressing issues 1 to 5, 7 to 13 in the list of issues. That's all the interregionals, commercial cards, other rules, but not the non-UK domestic MIFs.

MR KENNELLY: That's our understanding as well, Sir.

MR JUSTICE MARCUS SMITH: Well, it sounds -- I mean the trouble is I had expected to spend this afternoon and perhaps even this morning discussing the fine-tuning of what goes into trial one and trial two. Unfortunately, we are now into the last four minutes of this hearing, because we are going to have to rise fairly promptly today because of commitments both I and Mr Justice Roth have.

So we are not I think going to be able to resolve those points. What we will do is we will expect the parties to liaise with a very clear articulation of the orders that we have in more general terms made. The Tribunal will also -- and we'll try and get this out in the course of tomorrow -- write a letter which identifies what we are expecting of the parties so that there is no misunderstanding about what it is that we are expecting to be delivered.

If we follow that process, I would hope at the very least that areas of potential dispute are identified which can then be resolved in the usual way by examining the order that is proposed with alternate formulations where there is disagreement that we can resolve. But I think it would be folly to try in now three minutes to articulate and resolve points which will just result in an excess of confusion rather than clarity.

I am going to give the parties an opportunity to raise anything that really does need to be discussed in the dying moments of this hearing because I wouldn't want points not to be articulated, even if they can't be resolved. But, subject to that, we will end the hearing around now.

Mr Cook, you have your hand up?

MR COOK: I am sorry, Sir. It's in relation to the timing of trial one, and it may be something that the answer is simply that is to be taken offline. Both Mastercard and Visa have a 12 week Euronet trial starting in October 2023. So we will certainly be suggesting that trial cannot start right at the beginning of January 2024. I just wanted to sort of flag that now, Sir, but that may well be something that the exact date of that is to be dealt with offline.

MR JUSTICE MARCUS SMITH: We've said, I think we've been quite careful in saying, early 2024. So that is I think an example of something where we would want the parties to be reasonable about the demands on others, and the Tribunal is not in the business of being unreasonable itself so you can take that as a general guide.

I think Mr Justice Roth has a point that needs to be raised.

MR JUSTICE ROTH: Just very quickly, we did in paragraph 4(e) of the note that was circulated by the President leave open the possibility that one, possibly even two, of the foreign MIFs could be included if (a) they were identified as being of real substance in terms of monetary value and there was a consensus that it could reasonably be done.

In your list, Ms Smith, of issues 1 to 5, you left out issue 6 but maybe that's something you could consider over the next week. If someone thinks that Italy, or whatever, should be included, you can circulate that between yourselves and see if you can reach agreement on that.

MS SMITH: Yes, Sir, I am sorry, I overlooked that. We have highlighted that and we will discuss that. It may very well be that Italy which, for my clients at least, gives rise to very substantial multi-million pound claims, then it may be that Italy is one non-UK domestic MIF we do wish to consider. But I think we also need to take into account whether that can be considered in the time available for trial one, the six weeks that we have for trial one.

MR JUSTICE ROTH: Yes, and for my part -- and obviously we have not discussed this -- if it's thought that's not possible within the time, then it's probably left for later. But perhaps you can consider that over the next week. That would be very helpful.

MR JUSTICE MARCUS SMITH: Any other points that need to be raised? I am seeing no yellow hands and no raised hands.

Well, can I conclude then by thanking all of you for the very considerable assistance that you've given in what is certainly not a straightforward matter of case management. Clearly umbrella proceedings, even if they aren't named as such, involve a great deal of fiddling with tectonic plates. I speak for all of us when I express my gratitude to you all for the assistance that you have given.

Thank you very much. We will the end hearing now. We are grateful.

(4.22 pm)

(The hearing concluded)