IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1266/7/7/16, 1517/11/7/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Thursday 25th May 2023

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

BETWEEN:
Merchant Interchange Fee Umbrella Proceedings

And

Claimants

Walter Hugh Merricks CBE

v

Defendants

Mastercard Incorporated and Others

A P P E A R AN C E S

Adrian Beltrami KC, Mehdi Baiou, David R Wingfield and Alexandra Littlewood (Instructed by Humphries Kerstetter LLP, and Scott+Scott (UK) LLP)
Philip Moser KC, Philip Woolfe and Oscar Schonfeld (Instructed by Stephenson Harwood LLP)
Derek Spitz and Greg Adey (Instructed by Mishcon de Reya) on behalf of Ocado
James Segan KC and George Molyneaux (Instructed by Hausfeld & Co. LLP) on behalf of Primark
Laurence Rabinowitz KC, Daniel Piccinin KC, Jason Pobjoy and Isabel Buchanan (Instructed by Linklaters LLP and Milbank LLP) on behalf of Visa
Sonia Tolaney KC, Mathew Cook KC and Ben Lewy (Instructed by Jones Day) on behalf of Mastercard
Marie Demetriou KC and Anneliese Blackwood
(Instructed by Willkie Farr & Gallagher (UK) LLP) on behalf of Walter Hugh Merricks

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(10.06am)

MR RABINOWITZ: I think at the end of yesterday I was addressing the Tribunal about the merchant pass-on issue and I had made some comments about the merchants' proposals and also about the Mastercard proposals and I also made some comments about Mr Holt's approach and indeed the Tribunal suggestion that we might have – and indeed Mr Holt's suggestion as well, that we might have reports from industry experts provided they were on the right topics, that is to say generally about the industry rather than seeking to focus on the particular pricing structures followed by particular claimants or about the internal accounting. In the context of dealing with Mr Holt's proposals, I also took the Tribunal to the Commission Guidelines on pass-on damages, and I showed the Tribunal some parts of that, and can I before I move on just take the Tribunal to one or two further passages in that. It is at volume 7 of the authorities bundle, behind tab 25. Yesterday I had shown the Tribunal, among other things, section 4.1 on page 2273, which was in a section explaining what factors affect the rate of pass-on and I made the point it did not mention internal accounting or pricing strategies. I also made the point that although the guidelines did say the qualitative evidence might be relevant, that should be analysed in the context of economic theory and that is what was said in section 4.1.

There is another paragraph that I should have taken you to and that comes at section 5.1.2, which is on the implementing of the comparator based approach and practice. You will find that at page 2280. I have in mind paragraph 8 at 108 and just picking it up at paragraph 107, "Techniques based on econometric analysis may in certain cases entail considerable costs. In such cases the court may find it is sufficient to estimate the pass-on by simultaneously assessing quantitative data without the use of

regression analysis and by taking into consideration qualitative evidence", so that is a cost thing, if it is going to be cheaper to do it this way then go this route. "Moreover, the court may in most cases also find it useful to assess qualitative evidence, such as direct evidence and passing-on, also, when employing the quantitative methods described in that section."

Then in paragraph 108 one has this, "When estimating passing-on based on qualitative evidence, internal documents describing a firm's pricing policy may be of particular relevance. When assessing internal documents, the court should be aware of the fact that firms in different industries or even within the same industry may adopt different pricing policies. In some cases, a firm may have a clear policy or established practice which identifies the price adjustments that will result from specific changes in costs. For example, in some cases purchasers may link price adjustments to changes in certain indices which may not be affected by the infringes of anti-competitive conduct, e.g., consumer price indices. In other cases, purchasers may seek to achieve certain performance objectives, e.g., apply a specific margin to the pricing of the products they supply. In principle, the former policy that is linking to an index may speak against the finding of passing-on whereas the later suggests that the purchaser would pass-on cost changes". Now, the Tribunal sees the Commission then makes the point not everyone will have the same policy and then it gives two examples of how pricing policies might shed light on the issue. One example, as you saw, was a claimant that links price adjustments to something like CPI, or perhaps RPI. And of course, there will be examples of that in the economy, like water companies, within a particular price period. They will link to CPI or RPI and you might have an energy company which may have long term contracts that link the price of energy to some benchmark price of oil or gas with a fixed mark up but, one does have to accept that you might have these companies within industries where there won't be a pass-on

because their price is linked to some factor - well there may not be a pass-on, put it that way. And you can see that, if a particular claimant did that mechanically, in a way that was fixed for the whole claim period in a particular case, that might mean there was no pass-on. The other example is cost plus, where again a mechanical application would inevitably produce pass-on and so we accept that in a particular case, evidence of that kind could be relevant or useful. But of course, just looking at that next paragraph, this is 109, as the Commission says, if you are going to rely on evidence of that kind you also need to verify that the business in question really does set their prices in that way by looking at their actual prices and what then leads into very substantial disclosure.

Now, is this a problem for us? No, because of the exceptions approach that we are taking. There will be within the wider sectors that we are having to look at, cases of parties who do set prices by reference to RPI and so at least over a particular period of time they could say, “Well our prices were not affected by the fact that this is variable, the fact that this is a competitive industry. There is just no way in which this can be taken into account” and if there is a company like that, then no doubt to the extent that the experts don’t deal with them and in a sense, there is no reason why the experts can’t deal with them (inaudible) that they are these companies, this may well be the position - they can be dealt with in the exceptions process. But the other point I want to draw out in relation to all of the passages that I have shown you in the Commission guidelines is what it is clear that they do not stand for is the proposition that the pass-on rate depends on what pricing model or what pricing strategy a claimant adopts in general. There are specific instances where it may matter but, in general, it does not matter. There is no suggestion in the guidelines that it matters which one of the pricing strategies the claimant selects – it doesn’t matter which strategy Mr Economides lists - or indeed more realistically, which combination of them

a claimant uses.

I should also make clear, again as I think I have, that we accept that in general it might be nice to know the detail of those price setting policies and what they actually did in practice over a long period of time because that is what would be involved. We say it wouldn't change the answer to this case. It may move it a jot but, not a lot of jots but, in a normal case – and I am trying to contrast this from a normal case – with a claimant or perhaps two claimants or even three claimants, one might expect to see a witness statement produced by the claimants identifying how they go about pricing, particularly where for example any cost is on the borderline between being fixed and variable because it may be fixed in the short term but variable in the medium or long term and it might be not if it is included in the cost stack. Again, that is something which may be a helpful pointer to know.

So, we are not taking an extreme position; we are not saying this evidence is never useful, we accept that it is useful; we accept it can be useful but in a case like this where we are dealing with transparent industry wide variable costs and we have to find pass-on rates there are applicable to 3000 merchants, 840 claimant groups, we need to use, as I have already submitted and indeed as the Supreme Court has said is acceptable, a broad axe methodology, that takes into account the factors that the Commission says are relevant, by measuring pass-on rates for other industry wide variable costs in each of our sectors. We don't, with respect, have the luxury of painting a full picture of how each claimant ends up charging low prices when MSC's are low. And nor is there, with respect, any point in trying to paint that kind of picture at industry level. And, as I say if there is a claimant out there who really does fall in one of paragraph 108 type situations because they set prices exclusively by reference to some cost index that does not include MSCs and they ignore completely their overall profitability and the prices of their competitors, then of course that is the type of

claimant for whom the exceptions process will be useful. With respect again, it seems very unlikely that any kind of merchant who operate in a competitive market is going to fit into that category. It is more likely to be a local authority or a university or similar and maybe even the Royal Shakespeare company – whatever plays they put on. That will have to be looked at. They are different.

Can I move on to another point still on merchant pass-on if I may? Yesterday the President put forward a proposal to me that I would just like to say a little bit more about this morning. The proposal was, if I have understood correctly that the expert economists should get together and try to agree the factors that are relevant to pass-on or perhaps if I could put this slightly differently, the factors that are sufficiently relevant to determining pass-on in this case to justify going out and collecting qualitative evidence about them. I made the point in response that Mr Holt has to some extent already done that and Mr Justice Roth was, with respect correct when he pointed out that Mr Holt had not given an exhaustive list of factors – with respect, that is right – but, he had done a large part of the work already. He had certainly thought about it, and he had identified certainly more than --

MR JUSTICE MARCUS SMITH: (inaudible)

MR RABINOWITZ: Indeed, indeed. So, as I think as I made clear yesterday, we would be supportive of such an approach but, there is just one point about it that I ought to make. Whatever further refinements there could be, the Tribunal already knows today that there is a major disagreement about one factor that is of great significance for case management purposes, that is to say the relevance, the materiality, of price setting information and internal accounting. That has been to some extent what the debate has been about and whatever further refinements there could be, we know that there is this disagreement, and it is of significance, great significance for case management purposes. And this is a point that is significant for

case management purposes because as is clear from the argument that you have heard, if all that is going to happen is the experts go away – well, we know what is going to happen, without some indication from the Tribunal. The experts will go away, Mr Holt and I think Mr Coombs will say, "We don't need to see price setting and internal accounting. What matters and we can get this from public studies, is: is this fixed or variable, is there competition in the industry, is it transparent?" and the sort of points that Mr Holt has made. And we know that from the other side, Frankel and Co will say, "We have to have price-setting information and you have seen our reports. We have to have information about internal accounting." Unless some guidance is given by the Tribunal today, we are going to be back here in three weeks or four weeks having exactly the same arguments again. Alternatively if it is not dealt with at some point, if the nettle is not grasped at some point, we are going to have this rumbling on to trial.

MR JUSTICE MARCUS SMITH: The effect of different ways of setting pricing information and indeed the distinction between fixed and variable costs: do they go to what I will call a question of latency rather than pass-on itself? Let me explain what I mean by that. Clearly there is a school of economic thought which is that costs incurred need to be indemnified or recovered by the prices charged by a firm, if it is to remain an economically viable undertaking. And, if that is right then whatever pricing structure or strategy you adopt, that has to be the outcome otherwise you are going to go bust. So, the pricing strategy that one adopts is obviously going to be informed by what competitors do and by the nature of the consumers that you are in but, one thing that it will do is affect when a particular cost is transmitted down through price, to the ultimate consumer. And is that what one might say price setting could go to – in other words, if one, for instance, takes the view that if one cannot vary prices daily or weekly

and the nature of the industry is such that actually you can really only change your prices once a year, well, for a year, if you have a cost increase at the beginning of the year you are going to be absorbing it but then you will bump up the price by a large increment in order to recover both the arrears and the future cost assuming it stayed higher. Now, that doesn't affect pass-on except in a question of time, which does affect however the claimant base. In other words, you have different people paying for the overcharge cost, because on the hypothesis I have, the overcharge cost is being fed into the system later and I can see that price setting could be hugely relevant to that. The question is much more, "Does that matter, when one has a series of claims spanning many, many years?" In other words, is latency something that we don't really need to worry about or is it something – I mean, you can imagine a situation where you have, say, two years and client one, in year one buying, client two in year two buying and they are mutually exclusive, well at that point latency may very much matter.

MR RABINOWITZ: My answer is essentially, yes. I accept exactly what you said and indeed I would agree with it. So first, let's try and split up the Merchants' Claimants from the Merricks claimants. The Merchant Claimants in a sense, we don't need to worry about when they passed on as long as they did pass on the costs, so the time issue doesn't arise. We have very long claim periods and if they didn't pass it on in the same year in which you had the lower MSC it would certainly have taken effect the following year – I am obviously taking estimates out of my thumb – or the following six months or whatever but, given that the claim periods are long claim periods, that is not going to matter to the Merchant Claimants at all. One can see that the issue might become relevant if you had consumer claimants for a limited period of time and at that point, in other words, non-aggregated consumer claimants who happen to say they bought a truck in year one and then the issue is – well was the price affected in year

one, or might it have been affected in year three, after their period was over. That obviously doesn't affect our position as against the Merchant Claimants. Given that the structure of the Merricks claim, again doesn't depend on particular years, as I understand it – Ms Demetriou will be able to explain that further. I respectfully submit that it would not make much difference to her position either.

MR JUSTICE ROTH: I am not an economist and one of the problems is we are sort of asking all counsel economic questions that really should be addressed to the experts which puts everyone in some difficulty. And one reason why both the guidelines and indeed I think Mr Holt and Dr Niels accept there is this relevant distinction is that if it is an overhead cost you may not adjust your overheads in a different way with other overheads and absorb it, rather that a pass through where if it is a variable cost, you really pretty much have to consider pass through because it increases with each product. And therefore, there may be – but it is not something you necessarily need much more detail than whether it is a variable cost but, I can see why economically they do consider it. The guidelines say it maybe that if it's fixed cost it gets eventually passed on but, it may not and there is a different likelihood of pass-on. That is the way I understand it.

MR RABINOWITZ: That is as I understand it as well and I am not an economist either.

MR JUSTICE ROTH: The other point which Mr Holt picks up, and again it is in the guidelines, is the firm's price adjustment costs, which may be firm specific but, probably are sector specific, which is something on which one would need information as to whether it is worth making those adjustments. That maybe be a latency point but, eventually it would, would it not – mounting up.

MR RABINOWITZ: I would say (inaudible) the economists would consider. I just want to tell you this about the costs, fixed and variable costs. What matters, as the Tribunal will appreciate, is whether the cost is variable in this case rather than where someone

in a firm says, "Well I think it's this", or "I think it's that". That is not going to really help the Tribunal. If the Tribunal, on the basis of economic evidence or evidence from an economist says, well, "This is plainly in the nature of a variable cost", it would be dealt with in a particular way, then that in our respectful submission is sufficient. I am not saying it wouldn't, in another case, be helpful to know something else. But we are not in another case; we are in this case with over 3000 claimants so, I would just make that point.

Can I just say – I am being passed a note, and I just say this, "Price adjustment cost is another latency point". I am sure that is right.

MR JUSTICE ROTH: I am just reading your expert: "Price adjustment cost can also affect the degree of pass-on."

MR JUSTICE MARCUS SMITH: Yes, the degree of pass-on to who? I do take your point, Mr Rabinowitz, that one needs to ask what one is seeking to answer in terms of pass-on because if one is looking at it from the merchants' point of view and there is no indirect claim then, pass-on to whatever, is fine. If one has a claimant class present, then the question may very well matter. The argument Ms Demetriou has is that she is claiming for the class and there is no need to differentiate between the members within the class because that is dealt with by distribution by the class representative on different non quantum-based parameters, obviously judicially supervised but, nevertheless, not quantified for each individual, so, the years may not matter in the same way.

MR RABINOWITZ: Can I just at this point, just taking us slightly out of turn – I think the Tribunal asked yesterday for an indication of whether parties opposed or didn't oppose the Merricks' claim being brought into these proceedings and I said we would take instructions. I will say something further about this. Our position generally is neutral, we certainly don't oppose it but, it is pretty obvious to us, in retrospect, that

there are some real advantages in Ms Demetriou's clients being present, not least to avoid something falling between a gap. With the indirect claimants here, one doesn't have the possibility of a mismatch where you have one Tribunal thinking there is a time issue which matters and another Tribunal thinking well there isn't a time issue that matters that they need to worry about indirectly and of course I am just being concerned with our claimants as opposed to ensuring that – in a sense it goes back to the point the President was making last year. If you had a situation in which in Trial 1, dealing with my client and the Merchant Claimants you said there was 80% pass-on or no pass-on and then in a trial a year later with Ms Demetriou's clients you said there was 80% pass-on, the people on the Clapham omnibus will think something has gone very badly wrong. And I think this is a point that is the Tribunal's point rather than my point. One purpose of actually – and I think the practice direction the Tribunal gave about bringing people into particular cases was to ensure that kind of thing couldn't happen. Perhaps the latency title point would be relevant to that. I will come back to that at the end if I may.

I just want to say this, still on the mismatch between the approaches of the parties where they say you really have to see price setting, and we say you don't. In our respectful submission, the Merchant Claimants have provided no adequate explanation as to how the kind of evidence that they propose to gather on internal accounting and pricing strategies could make any meaningful difference to the pass-on analysis, let alone how it could be so significant as to justify the enormous case management problems that this evidence will inevitably throw up. And in fact, at the heart of this whole debate, in our respectful submission is a legal error which is being made by the Merchant Claimants. The Merchant Claimants think or seem to think that something more is required as a matter of law other than proving that their prices would have been lower in a counterfactual. They seem to think that if they can show

that the price setting process was done without regard to a costs stack that included MSCs that they will win but, in our respectful submission, that is wrong in law. It actually makes no difference what price setting process leads to the result of pass-on. All that the Tribunal needs to do is estimate the effect that MSCs have on prices using some proportionate evidence base. And it is worth having in mind what the consequence would be if you were to come to a conclusion that although it was plain that there was in fact pass-on, you were not able to identify the precise mechanism, I think is the way it is put, by which that was done because you can't find a cost stack which includes MSCs. The consequence of that would be overcompensation for the Merchant Claimants and nothing for people who you know were actually the people that suffered. And again, it goes back to a point I made at the outset. We are all doing the same thing. We are all making submissions intended to assist our clients but one has to have regards to the realities of the situation.

MR JUSTICE ROTH: It is the Ridyard point.

MR RABINOWITZ: It is the Ridyard point, that there is a kind of reality about this. When the law falls behind reality there is always an adjustment by which the law comes up to reality and that is effectively what underlies – an inability to come to terms with reality. I don't mean that pejoratively. It is really what underlies the basis of the claimants' position here.

So, we submit that in the absence of a clear economic explanation as to how this kind of evidence is entered into analysis, and I mean necessarily enters into the analysis because if it is not necessary, given the cost, management consequences, one should, with all due respect say, "Although it would be nice for the client on this particular occasion" – without that clear economic explanation of how this evidence necessarily enters into an analysis, we respectfully urge the Tribunal to decline the invitation to bring it in. That was all I was going to say about merchant pass-on. I am not going to

take you through Mr Holt's analysis – I think we have seen it three or four times at different places – but, I am very happy to answer questions about it.

MR JUSTICE ROTH: May I ask you this: it has been put that there is a significant, almost opposition between Mr Holt's approach and the other approaches – except perhaps Mr Coombs. Is it really quite so fundamentally inconsistent with what Dr Niels is proposing? There are plainly differences, the first being Mr Holt says, "Well I start with identifying 14 sectors" by order but, he then says, actually there might be within the 14 various subsectors, so you end up with more than 14 quite possibly and he recognises that. Dr Niels says it slightly differently. We get a questionnaire (inaudible) and we ask in the questionnaire, "What sector are you in?" and on that basis, he also says – I think Mr Holt says he doesn't go by industry sector but, as I understand his report he actually does but, he says there might be subsectors within the industry because he is looking for the relevant market, which may be industry wide; it may be something slightly less than industry wide. It is very unlikely to be broader than an industry and indeed he says, quite clearly, that he is looking for the relevant market that the merchant operates in. Possibly, one advantage of doing it by questionnaire is having Mr Holt's categories, which he puts in his report. I think it is the one in the working bundle, at paragraph 43. He lists 14 industry groups, which is page 230, at tab 15 if you have that. In fact, I mean, it is clear from that it does not include one group that we do have to be concerned about, which is local authorities. There are quite a lot of local authorities claims and that is not one of the 14, so that has to be added on. Page 230.

MR RABINOWITZ: 230.

MR JUSTICE ROTH: 230, paragraph 43.

MR RABINOWITZ: Just to be clear, local authority comes within education and government.

MR JUSTICE ROTH: Ah, so he has got it in there, and he -- but he includes, for example, healthcare at the end. Well we were told yesterday actually we do not need healthcare because we have not got any healthcare claimants but the Niels' approach will get us actually information on what sectors the claimants are in and yes, there are 780, but it is not very difficult to analyse. So one -- it is not that far apart, it seems to me, at stage one in the way of doing because as I say, he goes on in the last sentence of paragraph 44 below, 'I would consider further whether some of these should be divided into subcategories. It does not seem to me that different.

MR RABINOWITZ: Up to that point, I would respectfully agree.

MR JUSTICE ROTH: And it may be that a questionnaire might help to refine the categories. Second point, and there is a major difference - Mr Holt starts with published studies and sees what one can get from them, suggests that for many of sectors you get a lot -- but he recognises that in some cases there will be gaps and for the gaps, he says -- and it is I think paragraph 100 -- he would then consider conducting an analysis of data from the sample of claimants in those sectors. Dr Niels does not use public studies, so he does not do that stage, but he goes as it were straight to getting data from the sample of claimants. But when he talks about, in his report, data apart from the fact that he does appear to suggest he would want to know how the sample claimants set their prices and, you say that is not relevant. Otherwise, the sort of data he lists is the same sort of data that Mr Holt wants.

MR RABINOWITZ: I would entirely agree and I would also accept that having this sort of survey is a good idea. The real issue is what are the contents of the question. So you go up -- I am just looking at Dr Niels' survey and perhaps up to question 10, 12 even, 12A, 12B about surcharging falls exactly in line with Mr Holt's approach. Mr Holt also wants to know about surcharging. It is really when you get to I think -- is it 13 onwards that there is a disagreement and that relates to the extent to which -- I mean,

underlying the disagreements is of course the issue as to whether there is any purpose to be served in gathering information on price setting or accounting. We have a number of points which I can make about Dr Niels' survey about the utility of something which purports to be simple but is not. It gives you one answer for how you go about setting costs, or your budgeting process. With respect that does not accord with reality because most firms have a combination of things. Whatever they say, people are going to want to test, so there is going to be a dispute about once you get to that part, how you frame these questions. Different people have different views. Then there will be a dispute about whether the answer is accurate, which will lead to a dispute to about what needs to be disclosed and so on. But up until that stage, with respect, we would entirely endorse an approach which says why not, in the first instance, supplement what you are getting? I mean, in a way, it is -- with respect, it is obviously a sensible idea for the Tribunal and everyone else, and the experts -- everyone else, but maybe the most important of everyone else -- to know what sectors they are dealing with.

MR JUSTICE ROTH: And we are going to have to ask every claimant were you on an MIF+ contract?

MR RABINOWITZ: Yes.

MR JUSTICE ROTH: So they are going to have to be asked.

MR RABINOWITZ: Yes, there is going to have to be a survey and so -- insofar as we were -- (inaudible) were not even interested in the survey, that is not right. We accept as a survey, there is some information which needs to be collected and indeed the need to identify industries becomes acutely important when you are dealing with Article 101(3) and exemption, where you are going to have to identify an industry wide, an economy wide pass-on rate. So with respect, it is obviously a good idea up until the point where he starts asking about processing and internal accounting.

MR JUSTICE ROTH: Yes, I understand.

MR RABINOWITZ: Can I -- again, subject to the Tribunal -- then just move on to the exceptions? In a sense, this is to pick up the position of, specifically, Ocado and Primark, but it is obviously generally an important issue that the Tribunal will want to grapple with because if the Tribunal is not comfortable with the exceptions process, then one might have to consider the whole structure going forward. That is really borne out of this concept. An exceptions process needs to be for exceptional cases. That is why it is called an exceptions process. If you have an exceptions process which is so used, or overused, that it comes to dwarf Trial 2, then we have failed in our endeavour. So whatever else one does, one needs to carefully control who it is that can make use of the exceptions process and on what basis. Can I just, at the outset, make two points? I am not here going to suggest that the Tribunal should now identify the criteria because in our respectful submission, the point in time at which the Tribunal will be best placed to identify what makes someone an exception will be after Trial 2, when you have worked out for yourself on the basis of all the evidence, what it is that has been fundamental-- or been a fundamental building block -- which has gone into the conclusions that you have reached. It may well be that, in constructing an exceptions process, at that point the Tribunal can say if you are a company or a firm for whom the following factors -- not just in not plain material, but are absent or -- I do not want to frame it now -- then it may be you are properly within the exceptions process. We do not want to hear from people who think they might have done better if they had run this case on their own because that is the very purpose of what we are trying to decide, to avoid people running cases on their own. They may have done better, they may have done worse, they may have done appreciably better. With respect, that should not matter because if they are part of a process where, for case management reasons, the Tribunal considers that this is the best way of deciding this

kind of mass litigation, undoubtedly there will be winners and losers because we are estimating. Despite wanting to make this about compensation in principle, no more and no less, there will be people who will say well, if I only had not been lumped with Primark or with Ocado, I might have been X or Y. So one has to accept that there will be people who will feel aggrieved and no doubt the card companies may also feel aggrieved but there are two ways of feeling aggrieved. One may feel you may have done better against a big company if you litigated against them separately. Too bad. There may be an error. People may say there is an error in the Tribunal approach. That is not going to be for the exceptions process. That will be for an appeal, if it is the sort of error on which you could appeal. But what we really, with respect, need to have well in mind is that -- and this is a message which needs to be understood by those who want to sit on the sidelines and wait, is that they should not assume that there will be a free pass to an exceptions process trial and indeed that there will be a barrier to entry -- I am trying to use an economic term to impress you -- a barrier to entry which will be quite high because if it is not high, it risks undermining the whole process. So our submission is that it should not just be a costs penalty because people may be willing to take that chance and the Tribunal will be the one to actually pay the price. There ought to be some kind of gatekeeping to prevent the exceptions process flooding the outcome of the trial and of the --

MR JUSTICE ROTH: Mr Rabinowitz, are you actually saying that the exceptions process is borne out of the process by which the Tribunal decides the majority of the cases? In other words, it is really the flip side of the same coin? We hear the case aiming to decide fairly and in accordance with the compensatory principle as many cases as we can. In doing so, we will obviously follow a principled and rational approach. If according to that principled and rational approach, there are parties who have certain criteria which cannot be framed now because we have not written the

judgment. There are certain criteria which suggest that they are going to be outliers because they, defined by the reference to the judgments, who should have the option if they want to take it, to say well, according to your judgment, Tribunal, we are outliers. We want to take advantage of that framing of our position and here is why you are correct, we are outliers. We want more.

MR RABINOWITZ: That is our submission and I must -- as I say, I am not suggesting to the Tribunal that you can -- and I do not think the Tribunal is putting to me that you should now set the criteria. I am just suggesting that a signal should be sent now so that everyone can hear it and there could be no confusion at a later date where someone says I just did not know this was going to be this way, otherwise I would have done A, B, and C. whether you call it a permission stage or not -- and I do not want to get involved in the arguments about language -- but there will have to be a filtering process so that not everyone who just feels they might do better in a trial on their own can turn up and say I am willing to take the cost consequence. I think I could do £100 million better and, although I look pretty similar to everyone that you have already made a decision about, why do I care if it is going to cost me £2 million? There is a £100 million pot at stake here. That is I think what the Tribunal will want to avoid.

MR JUSTICE ROTH: In other words, in (inaudible) terms, you want us to say this is a known unknown?

MR RABINOWITZ: Yes.

MR JUSTICE ROTH: You do not know the nature of the exceptions process but you should know it is not going to be a free for all, or is not necessarily going to be a free for all and you know that now, so you are going to have to inform your conduct in that way as of whenever we hand down our ruling in this hearing?

MR RABINOWITZ: In our respectful submission that commends itself to us, partly because of the focus itself but it also prevents the problem about free riders, people

who just think oh well -- and double bites of cherries or eating cakes and having it all, whatever. You see, you have a Trial 2, you do not participate, you try and say I am not responsible for any of the costs for this and then you see how it goes. Then you say right, it is fine, we will stick with this or you just think actually my case for £100 million, I think I might do better. I have incurred no costs, or I think I have incurred no costs because I wanted to stay on the side. I do not like that solution. I will try for my own solution. In a sense, that will undermine what the Tribunal is trying to achieve here.

MR JUSTICE ROTH: Almost by definition, therefore, let me test this with you, the exceptions process you are envisioning will be merchant claimant focused and neither scheme nor Merricks' class representative focused.

MR RABINOWITZ: We accept that the likelihood, in practice, will be that it will be merchant claimant focused and they should welcome that. What I do not want to do is to stand out here and rule out any possibility of it mattering to Visa and Mastercard to take advantage of some particular case after this. Standing here, I cannot see a circumstance in which that would happen but I am standing here, not standing in – during 2024.

MR JUSTICE ROTH: No, Mr Rabinowitz, do not get me wrong. I am not suggesting that we leave everything open to judgment if we go down this route, except to say we are going to prevent the schemes from invoking this process. That would be somewhat irrational. It just seems to me that if one is looking at it through this particular prism, the position of the schemes would be to say look, the Tribunal has simply got it so badly wrong in terms of its generic approach that the balance between exceptions and generic is just wrong and needs correcting on appeal. Whereas if you are doing a wide ranging exceptions approach. Well that, as I say, defeats the object and suggests there is an error in principle in the generic side of the reasoning.

MR RABINOWITZ: My submission is this is borne out of a hope, and indeed a view, that the process upon which we are urging the Tribunal to go will work. That is to say if you take a sector based approach and you do not rely on claimant specific evidence, you will, with the assistance of experts, be able to reach – there will be estimates but they will be robust estimates and that, with a few exceptions, people will feel that it has been fair. But plainly there will -- the Royal Shakespeare Company, for example, may say well we somehow got left out of this. What about us? There is no way -- there is nothing in anything that anyone suggested which would capture us. There may be someone else, I do not know. I like the Royal Shakespeare Company because it makes me feel cultured, or at least look cultured, but there will be other examples. Maybe the pawn people will feel that they have been left out somehow.

MR JUSTICE ROTH: Less cultured.

MR RABINOWITZ: Less cultured. Rounded personality. But one has to allow for this possibility and that is, I understand it, the whole purpose of the exceptions process but I think what I am urging is that what is said does make it clear that this will be for exceptional cases. I think when trying to catch cases where there has been an error because if there has -- if there is an error in approach generally, no doubt someone will go to the Court of Appeal next week or the week after and say you cannot do it like this. If there is an error of the sort that would (inaudible) an appeal, again after the hearing, that is not for the exceptions process. So the real question is what does come under the exceptions process? Exceptional cases, which are simply not catered for by the kind of approach as it turns out because the experts will try and cater for everyone, but it is conceivable that between the experts and the Tribunal, something gets lost.

MR JUSTICE SMITH: Well, I wonder how easy it is going to be in practice to differentiate between that and the second bite of the cherry case. But I think for

example if you accept that someone who prices by reference to CPI could come along and say that they did do that, why is that any different from someone who said I absorb the costs and they had a strategy for that. I suppose you can see that the door opens up quite wide. I think once you start to get into that situation -- and I am not saying -- I appreciate you are not inviting us to set any criteria, I am just wondering how practical -- and it almost seems to me as if you are suggesting we might be having some sort of permission stage, so that you have to show that you have got not only a credible theory that you are different for one of those reasons, and also some evidence that it has made a difference.

MR RABINOWITZ: The trouble about not having -- I mean, you can call it a permission stage and there (inaudible) the language that we use. An alternative is to see it as someone saying I am within the exception and Visa or Mastercard says no you are not. You are caught by exactly the reasoning and we have to apply to strike out, or whatever, but there ought to be some ability for someone, for the Tribunal to say we do not accept that this is exceptional. You ought to be able to do it before hearing -- people talk about two days, I think. I do not know how that figure has come about or why anyone thinks realistically that is going to be (inaudible), i.e. it is going to be that short but it may well not be that short. So in my respectful submission the Tribunal will want some sort of screening and maybe it will not be a permission stage. Maybe it will be if you tick certain boxes, you can go ahead but there will be a cost penalty if it turns out that what you have as to why you are exceptional does not work, but in our respectful submission it will be possible to identify criteria and the bar ought to be that you meet those criteria and indeed that is going to make a material difference. A material difference to your outcome is not enough. There has to also be a material difference in the reasoning and the basis upon which the conclusion has been arrived by the Tribunal. Otherwise, in my respectful submission, you are not exceptional.

Again, I just -- the main points to take away is we think you will have to do so something and we submit that it is worth the Tribunal saying something about that, even if you have not given -- are not able to give the details. Just one other point on that, on the question of whether there should be an order for mediation. We would respectfully welcome something which required the parties to give consideration to mediation after Trial 2. One needs to be a little bit careful about this just because -- I mean, it is obviously better if we can settle, if there is a settleable basis than coming back to the Tribunal. Anything that encourages that is obviously a good idea and that is why we welcome it. What one does not want to do is put forward something which, in a sense, provides an encouragement for a party to try and get into the -- to say that they are exceptional, simply as a basis of starting mediation. So one needs to be a little bit careful about how this is framed, but in general we would welcome that. On the question of experts because I know Ocado raised the question of experts, again as I understand the position as it developed at the hearing, they are not saying now they need an expert or you have to make decisions about experts now. That sort of point will be one to be considered at the point in time when they apply to be considered as exceptional, when they can identify why the expert evidence you had is not sufficient to deal with their exceptional position but it is not something that, in our respectful submission, the Tribunal is in a position to -- or ought to try -- to deal with now. One cannot rule out the possibility that they may need expert evidence but certainly there is no reason to rule it in either at this stage. I was going next, subject to any points that the Tribunal wants to raise with me, to move on to acquirer pass-on. Happily, this is becoming less and less controversial, although there are still some issues to be resolved. Can I just get out of the way what is not in issue? What is agreed is that where you have merchants who are on IC+ or IC++ contracts, or MIF+, MIF++ contracts, there is a general consensus that the acquirers will, in the overwhelming

number of cases -- sufficiently overwhelming not to make it worthwhile arguing the contrary -- have passed on 100 per cent of any increase in MIFs. That is the very nature of the contract and we accept that that is going to be the position. That means that the debate is really only around the merchants on blended contracts. Although when I say 'only', it should be recognised that that is 50 per cent of the claimants apparently we were told yesterday. So, a number of claimants, I think we have also been told -- no doubt as an attempt to disincentivise the Tribunal for -- I am looking at this too carefully -- that it is less than 25 per cent of value. But the fact is it is half the claimants and, as with anything else, it obviously needs to be dealt with proportionately. But it is important because if there was not a pass-on of this at all, or if a decrease would not have been passed on or would have been on passed on in full, that affects the size of the claim. It affects how much the Merchant claimants would have -- it affects the size of the overcharge, plainly. So one has to look at that and it does matter. Now, when the Merchant Claimants said -- and this was to a large extent correct -- that the position was moving on and they would rather see how it developed and it has indeed moved on further and it has indeed developed. Ms Tolaney mentioned yesterday that on about eight o'clock on Saturday or Sunday morning we had a letter from the Merchant Claimants saying for the first time that they could not realistically provide us with MSC data. This has been on the agenda for years and years and years. Slightly surprising to get that letter, but they say it would be very difficult and costly for them to compile those data. As I say, slightly surprising but rather than focusing on that, I think we can cut through this whole debate by explaining the approach that we have proposed in a letter that we sent yesterday. I do not think you have seen it. Has it been handed up? Okay, can we perhaps take a transcriber break just so we can sort out the logistics of this letter?

MR JUSTICE SMITH: Yes, of course if that would be convenient.

MR RABINOWITZ: It will not take -- I mean, if you do not want it -- it will take five minutes, maximum. Just need to make sure that we have the letter and it is where it should be.

MR JUSTICE SMITH: Okay, we will rise.

MR RABINOWITZ: Just bear with me one second because I think I may be able to answer (inaudible). We had a pile to hand up here but they have disappeared. We will find them and if you give us a couple of minutes.

MR JUSTICE SMITH: We will rise for five minutes.

(11.01)

(A short adjournment)

(11.15)

MR JUSTICE MARCUS SMITH: Mr Rabinowitz, thank you very much for this letter. We have read it. It may help if we give you a couple of preliminary indications as to where we think we ought to be going and you can tell us that that is not the right direction of travel.

First of all, but entirely independently of the question of how one analyses acquirer pass-on, we are of the view that the request that you have made that we request disclosure from the payment system regulator regarding the analysis for acquirer pass-on is one that should be made. I am not detecting any objection to that. We will obviously hear any objections to that but we think that particular issue should be provisionally determined in that way.

However, going to the question of how we proceed primarily to resolving the question of acquirer pass-on, for our part we are attracted to obtaining a data set that, across time, identifies the MIF rates and against that chronologically aligned the blended rates. The question is where do those blended rates come from, and we would ideally get that material from the acquirers rather than from the Merchant Claimants simply

because why not go to the persons who have the data or ought to have the data complete across time, because it is their business that we are talking about.

Our understanding is that the acquirer market, though large in terms of acquirer participants, is concentrated, so it would really be a question of going to the top three and saying can they help us out. Now, has that been undertaken to date? If it has not, is it something which commends itself to parties as a way of obtaining a data set?

MR RABINOWITZ: Indeed, that is in effect in line with what we were proposing. Our proposal was write to the PSR, see what we can get, because they must have this information in order to have done the analysis that they did. To the extent that there are gaps, acquirers would be the next step. Write to the acquirers. Indeed, looking to the claimants would be illogical. Well, it would be illogical. If we cannot get what we need from the PSR – they will have data, we expect – then either at the same time or maybe thereafter to go to the acquirers, and only as a last resort go to the claimant merchants.

MR JUSTICE ROTH: If it is not clear that from the PSR we will have data from the full period. They were looking specifically, were they not, at what happened when the IFR came in, and I think we want to see what happened generally when rates went up, not just when rates come down. I know there is a debate, as ventilated in the skeleton arguments, as to whether it is a counter-factual or not. I do not think that is something we can really resolve now; that may be for the trial. But I think we want to get the data that envisages that one might want to be looking at what happened when rates were going up.

MR JUSTICE MARCUS SMITH: So it is a twin track approach not a sequential approach. We leave the claimants' data at the end of the queue because that seems like the most inefficient way of doing it. We will, if the parties assist us in framing the request, make a request along the lines you have suggested.

So far as the acquirers are concerned, we are minded to leave that ball in one of the scheme's court to take it forward. We do not want the acquirers to be bombarded with requests from multiple parties but obviously ensuring that there is full transparency in terms of what is going on, we would invite – maybe, Mr Rabinowitz, since you are on your feet, it should be your clients who do this – to see what willingness there is to provide the data and what difficulties there might exist if there is willingness in terms of providing the data because we do not know how this material is being held, with a view to obtaining the sort of data set that we have discussed. If there is a problem in terms of resistance to providing the material voluntarily, then come back to us and we will consider what orders we can make. But in the first instance, particularly if it is a request coming from a scheme, I imagine that, appropriately anonymised, this sort of data would be not confidential and not particularly sensitive. I may be wrong about both those things, but those are matters that we want, if at all, with a view to short-cutting the parties' time and costs.

MR RABINOWITZ: I am very grateful for that indication and it aligns very much with what we had in. I am not sure I have to say much more about this topic. I think I ought just touch on – I do not know whose proposal it was – but it was one raised with Mr Beltrami as to whether it was worth looking at the contracts and any contractual notification of changes of rates, just to see what one can get by looking at the contracts to see what the blended rate formulas and notifications involved.

In our respectful submission, we are not against it and we are probably not in favour of it either, because we may get everything we need from analysing the PSR. The Commission have done a similar study. We obviously need to bring it forward to different time periods, but certainly Mr Holt and I think Mr Coombs as well, take the view that there is a fair amount of analysis of this done already, acquirer rates being passed-on. I can just identify for you - there is a lot of this in the PSR report which is

at bundle 8 tab 28. The conclusions relating to blended rates are all over the place but it is pages 2800 and 2801, paragraph 1.72. I was not going to ask you to turn that up now because it is not very easy to summarise in the summary that they have put, it is a little bit complicated to look at, but they have looked at a similar problem and identified the extent to which pass-on rates were passed-on by buyers and the position is not always. So it is definitely worth a candle to do this exercise and we will look at the PSR report and indeed look at the data and analyse the data – well, the economists can – that will take us a long way.

Just going back to the proposal of looking at all the contracts, that might be another route. In our respectful submission it might be a more laborious and less fruitful route, and it may be expensive as well, but if the Merchant Claimants want to do that we will assist them in any way we can in doing that.

MR JUSTICE MARCUS SMITH: Mr Rabinowitz, what we are minded to say is that we are going to direct that the PSR route be taken and that the engagement of the acquirers, or the biggest acquirers, be taken. That is not to close out any other route such as a contractual analysis, but we would rather the economists and persons who are looking at this data consider what extra they need from a position of strength rather than going down a route that might involve costs that are unnecessarily incurred, and it does seem to us that the exercise articulated by Mr Beltrami is one that is going to involve a certain degree of trouble and cost which may be necessary, but we would rather know that it was than speculate, given that two tracks or two hares running is perhaps enough for this point at this stage.

MR RABINOWITZ: I am grateful.

MR JUSTICE MARCUS SMITH: Mr Beltrami, in reply, if you want to come back on that, of course you should.

MR RABINOWITZ: Can I then move on to –

MR JUSTICE ROTH: Just one moment. (Pause) Can I just ask, and it may be a question for Ms Demetriou to come to, will this – and you need not do it now but I just throw it out – Mr Coombs suggested a natural experiment or event study based on the CNP increase which, speaking for myself, struck me that it could be quite useful on this. It is not clear to me whether this data will give Mr Coombs what he needs for that, and if that data can be obtained in some convenient way while we consider what exercise should be done, I think we should at least consider whether that can be incorporated in this exercise. Perhaps you would like to think about that.

MS DEMETRIOU: Can I take instructions on it?

MR JUSTICE ROTH: Yes, of course.

MS DEMETRIOU: It sounds like a very sensible question but let me take instructions.

MR JUSTICE ROTH: Yes. I would not want us to start gathering data and then find that we have to go back to the same people, which is never attractive because Mr Coombs says: Well, actually you have missed out this and this, and so on, or whether he needs – I mean, he talks about getting data from claimants but that was all before the recent exchanges and developments.

MR RABINOWITZ: I am grateful. Can I move on next to the different topic of – I will frame it in a way which suits my purpose – ought we to have in mind trial three when we are dealing with Trial 2, in other words the question of pass-on is not only relevant to quantum; it is also relevant to the exemption stage, in the sense that if you want to know the extent to which a merchant claimant suffered a detriment in order to calculate whether there was at least an offsetting benefit, one needs to know the detriment, and one of the important ways in which you are going to look at that is to identify how much of that detriment they suffered as opposed to pass-on. So passing-on. I talk about the Merchant Claimants slightly confusing, because passing on is an issue which not only arises in relation to quantum for the Merchant Claimants but it is an issue that

arises at 101(3) stage not just for the Merchant Claimants but for the economy as a whole.

The point we make in our skeleton argument – and I do not want to spend a lot of time on this – is that in our respectful submission, that being so, we respectfully submit that there are two things the Tribunal might do. Number one, it might consider that this question of pass-on economy-wide is something which we may as well do in Trial 2 – and I say "may as well"; I appreciate it is not nothing and it may be substantive, but we will be doing a fair amount of the work anyway, we are covering a fair amount of the economy. I do not say that that is the whole economy; I do not know what the whole economy is; it may just be an extra ten. But it is worth thinking about at least at this stage because if it is incremental as opposed to a different exercise entirely, then it is something that the Tribunal might think is worth considering now. Again, I was going to come to this but I can make the point now. The Merricks parties in a sense are economy-wide or, if they are not, they are pretty close to economy-wide; I think they are economy-wide. So they will be doing a sector-wide analysis for the economy as a whole, and our short submission is that it would be, in our respectful submission, sensible to be alive to that and to the need for that to be done in any event in these proceedings at some point.

In our respectful submission, if it could be done it would be efficient to do that in Trial 2, but I appreciate there may be logistical, practical reasons why that is difficult, but it needs to be aired. The alternative proposal is the much more modest point and it is that the Tribunal will want to have in mind the fact that there is going to have to be this exercise done at trial three, or at least as part of trial three; I do not say it is the whole of trial three but it is part of trial three, and that whatever we do in Trial 2 in relation to pass-on insofar as it goes to quantum and merchant claimants quantum, ought to at least be moving in the same direction in terms of the approach that we take, so that

one needs to be alive to the fact that there is going to have to be this further exercise going economy-wide. Would it not be a shame if what we did was to look at every claimant-specific examples here in a way which means it is overly-claimant based here and therefore less useful than an economy-wide basis.

MR JUSTICE MARCUS SMITH: Mr Rabinowitz, can we leave it like this. You have very helpfully aired the point both in writing and orally and we will obviously have it in mind. If it is a particularly low-hanging piece of fruit which we can, without any material cost, incorporate into the Trial 2 process, then in a sense the question answers itself. If, on the other hand, in order to achieve that objective one had to shift away from a methodology that would otherwise persuade was right, so for instance if we were going down the Mastercard merchant claimant route of sampling disclosure to answer the generic question, one would be very much focusing on sectors to the exclusion of generic questions, and I think in those circumstances we would be quite reluctant to broaden the ambit of the factual inquiry still further. On the other hand, if one is going down a more top-down route starting with general principles and working one's way towards exceptions from the general principles, then the matter may be different.

MR RABINOWITZ: Can I respond in this way. In my respectful submission, in deciding which route you want to go down now, for case management reasons it is worth having in mind the route that you are going to have to go down in trial three, because it would be unfortunate if you took a route now which was not useless but less useful for trial three. It will not surprise the Tribunal to know that we would respectfully submit that our proposal is most likely to be the most useful one for trial three purposes. I am not saying it would not work at all, but the more you are depending on internal accounting for specific claimants, the less it is going to be useful for industry-wide and economy-wide analysis. So it is effective to also go into the consideration of which route --

MR JUSTICE MARCUS SMITH: So what you are saying is if it were a marginal case with there being two methodologies, then taking into account which one assisted trial three more would be a relevant factor in how we disposed of matters in trying Trial 2.

MR RABINOWITZ: Exactly so. Can I finally – not finally actually but almost finally – just scoop up two other matters. The first relates to the structure and content of trials one and two, and you will have seen we flagged this I think in the last paragraph of our skeleton argument. Paragraph 49 of our skeleton argument, so supplemental volume 1 page 242. In the course of preparing for this and indeed of preparation moving towards Trial 1, two things have happened. Number one, there have been very extensive requests for I think disclosure in relation to Trial 1 which have concerned us in terms of the timetable for that. Number two, it has dawned on us perhaps later than it should that the issue of acquirer pass-on is likely to be material in Trial 1 in relation to inter-regional and commercial issues. Our argument involves in effect saying that even if MIFs were different it would not have affected the MSC, and that is a question of acquirer pass-on not merchant pass-on. So that is something which is going to be dealt with in Trial 1. It arises in Trial 1.

The problem is it arises in Trial 1 and also arises in Trial 2, and that is not ideal. If it arises in Trial 1 in which Merricks are not a party, that is a further problem if Merricks are part of our Trial 2, and they are not –

Mr JUSTICE MARCUS SMITH: Are Merricks concerned with individuals?

MR RABINOWITZ: They may not be but there will be some analysis of acquirer pass-on. It is not. It is not an exact overlap but there is an overlap here. Again, we identify this not because we want the Tribunal to rule on this now, but we thought it right to raise this. I think it is helpful for the Tribunal to have in mind that there is this issue, and the reason it is helpful now to have this issue is because if we are right about this pass-on being partly determined – or issues of pass-on arising in Trial 1 and arising in

Trial 2 too, and if the Tribunal thinks that is not a good idea then consideration must be given to, and the position being proved, one possibility is that the whole of that part of Trial 1 be moved to the end of Trial 2, and I understand there is objection on the basis that there is a lot to do. Another possibility is to move the whole of acquirer pass-on to Trial 1, and again there would be objection to that because Merricks, if they are involved, are not currently involved in Trial 1.

I am able to identify problems rather than solutions for this, and I apologise for that. Those are two possible approaches, but neither is ideal, but I am raising it again so that the Tribunal has this on its radar and understands what we are talking about in our paragraph 49.

MR TIDSWELL: When you say move it out to Trial 2, you mean just the part, the counter-factual in relation to inter-regional commercial --

MR RABINOWITZ: Exactly.

MR TIDSWELL: So if we split that off from there, our counter --

MR RABINOWITZ: Exactly. You still have a Trial 1, it would be slightly narrowed down. That issue would come at the end. We are all involved in that issue. It would come at the end of Trial 2, but you would only have to consider acquirer pass-on once. It is a possible solution. I know people say we do not have enough time and I am not arguing against that, but something may have to be done, and I am not going to say any more about that.

The only other thing I was going to mention with some reticence is this. We had our first pass-on hearing this time last year. The Tribunal will recall this but we made an application for costs following that hearing, which still has not been determined. Can I gently nudge? I am not asking you to determine it now but can I ask the Tribunal at some point – I cannot remember what the expression was – to have a look at it, please?

The only other thing I was going to say is again about Merricks. I have largely covered the points I was going to make. We are neutral on this but we do see some advantages in them being there. The first is to prevent an asymmetry or a mismatch between what is concluded at trials in relation to what has been passed-on and what has not. This is a point that the Tribunal itself made – I just remind you of this – in your judgment in the pass-on judgment, so volume 3 tab 39 page 791. At paragraph 15 the Tribunal was considering the perils of bilateral dispute resolution, and the general point that the Tribunal was making was about the advantages of having everyone who might be affected by an issue to the extent that there was the ubiquitous issue, an issue which affected both being dealt with in the same proceedings, at least under one roof, and at sub-paragraph (1) the Tribunal made their point. I am not going to read that out. Obviously that might be thought to be a reason why it is better to keep Merricks in. The other reasons are ones I have already identified. Well, there are two reasons. Number one, Mr Coombs does something very similar to what Mr Holt does, and the Tribunal may think that you may as well hear them at the same time. Number three goes to the point about economy-wide pass-on and the fact that it is going to arise in our 101(3) anyway. Merricks do that.

I should just say this. A point may be taken and indeed it has been taken that these are different time periods and therefore identifying economy-wide pass-on for Merricks will not make any difference here. Again, I am a vehicle for what the economists say, but our understanding is that the time difference will not matter, in the sense that what you are identifying is factors which will lead to a pass-on rate, or a very likely pass-on rate, and this will be applicable over time. So unless something material has happened between one time period and another to change the factors which go into building the sector-wide economy rate and the English economy-wide pass-on rate, the fact that there is not a time overlap should not be a problem.

MR JUSTICE MARCUS SMITH: But will there be a number of factors in the overall history which will have made a difference? I mean, the fact is if one goes back 20-or-so years, credit card usage was remarkably different then and one can – if one forces one's mind back there – understand a very different world where we can even remember the use of these triplicate Visa card machines which I suspect many people will regard as museum pieces, but they will have featured in the earlier years and that is just a sign of how economically significant the role of cards has changed over the years. That is something which one might say, if one could jettison, as it were, the earlier more primitive operations, that would be a significant saving in the economists' time.

MR RABINOWITZ: Can I leave it to Ms Demetriou to deal with that? I have no response to that other than to say it may be something the economists will deal with or not, I do not know, and in a sense it is not really my problem, because I do not have a dog in this fight. We are neutral but we can see some advantages of that.

Unless the Tribunal has anything else, those are my submissions

MR JUSTICE MARCUS SMITH: Thank you very much, Mr Rabinowitz. I am much obliged. Ms Demetriou?

MS DEMETRIOU: May it please the Tribunal, the key issue that I want to address the Tribunal on is the umbrella proceedings order. As the Tribunal is aware and as canvassed yesterday, we had an application for an umbrella proceedings order before the Tribunal back in November and that application was not determined by the Tribunal then but the Tribunal has indicated that it will determine it now.

I am sure there is no need to remind the Tribunal what the practice direction says, but it might be helpful for us to have it in front of us. I assume you have your own copies but I have a copy I can hand up if that would help.

MR JUSTICE MARCUS SMITH: It may be useful to hand it up but it is always available

online.

MS DEMETRIOU: So, ubiquitous matters are defined at paragraph 1.2 as the same or similar issues or matters or shared features albeit that those issues, matters or features may occur or be hosted in the context of different facts and circumstances and then you see at 1.3 what is meant by that is so ubiquitous matters may be hosted in different proceedings when they arise out of a broadly similar economic and/or regulatory landscape, and then the example is given of pass-on at different levels. Then at 1.5 and 2.1 we see that the President has a discretion to deal with and dispose of ubiquitous matters in the umbrella proceedings and the President can make an umbrella proceedings order to that effect.

So, that is the practice direction. Those are the rules and if we turn up, please, Mr Merricks' application, which is in volume 12. I do not think you have been troubled by volume 12 yet. It is at tab 126, page 4260. You will see there from paragraph 1 that the application is made in respect of two ubiquitous matters, acquirer pass-on and merchant pass-on and then if we turn on to page 4262, paragraph 9, that raises the issue of acquirer pass-on and you see at paragraph 11 that it says that the issue of acquirer pass-on is still ubiquitous and ought to be the subject of a UPO and the reasons that are given are essentially because that would best ensure efficiency and consistency of approach. Then in relation to merchant pass-on, that is dealt with at paragraph 12. Again, the justification and the reasons in support of making a UPO are set out at paragraph or summarised at paragraph 15 and the key factors again relied on by Mr Merricks in that context also are that a UPO would minimise the risk of inconsistency and lead to greater efficiency.

We say that acquirer pass-on and merchant pass-on are plainly capable of being designated ubiquitous matters by way of a UPO. We see the broad definition of ubiquitous matter and plainly they do fall within that definition and I do not understand

anyone to be disputing the jurisdiction, the power of the Tribunal, to grant Mr Merricks' application. I think the key question of dispute is whether the Tribunal should exercise its discretion in this case and we respectfully submit that it is clear that the Tribunal should do so and in developing my submissions I would just like to go back first to the point that Mr Rabinowitz just made in relation to the Tribunal's pass-on judgment of last year and show you a couple of further paragraphs. That is in bundle 3, tab 29 starting at page 784. But if we could take it, please, from paragraph 9 on page 788 so that you can see the context, I will remind the Tribunal of the context in which it made its finding that Mr Rabinowitz took you to at paragraph 15. So, at paragraph 9 the Tribunal is there assuming that there is no temporal overlap between the merchant claims and the collective proceedings.

Now, I do not want to overstate the point but we understand that there is some temporal overlap with some of the merchant claims including, for example Primark's, which goes back to 2006 and, of course, if the merchants succeed on the Volvo issue, then there will be substantial temporal overlap but the point I am making at the moment is that the Tribunal made the finding it did at paragraph 15, which Mr Rabinowitz took you to and which you can see on page 791, even assuming no temporal overlap at all and the Tribunal rightly found there that there are compelling reasons, even assuming no temporal overlap, to strike a consistency of approach and we respectfully agree. The reason set out by the Tribunal at sub-paragraph 1 is of fundamental importance because it would be unfortunate, to put it mildly – again this is a point Mr Rabinowitz made earlier in his submissions – but unfortunate if the merchants' trial were to result in, say, a finding of 80 per cent pass-on and Mr Merricks' trial was to result in something which was completely inconsistent with that, with perhaps a tiny award of damages which represented, say, 10 per cent pass-on. That really would not be a result that would commend itself to anyone, or if the merchants were to succeed in

showing no pass-on and then Mr Merricks were in a separate trial able to recover a substantial award so nobody wants to see results like that. That is why at paragraph 16 the Tribunal found that it is necessary, notwithstanding its simplifying assumption being no temporal overlap – necessary to look to regard the claims in the round and to articulate the law so that to the extent practically possible, consistency of outcome is achieved in the broadest sense. Then I will not read it out but I remind you of what the Tribunal said there.

So, that is the starting point. I would like to address merchant pass-on first. As you know, Mr Coombs' proposal is that in respect of most of the sectors, and you have seen now a number of times that what he proposes to do is conduct on a sector approach a regression analysis using publicly available data where he can and where he cannot, where there is no publicly available data available, using whatever merchant claimant data are available. As you know, he says that in respect of most of the sectors of the economy that he has identified, there are publicly available data available that he will use. But the position is, and this is really a significant point, in my respectful submission, that the data that he will use that is publicly available includes data covering the period of the merchant claims. That is because for some of the sectors there simply are not publicly available data for all of these sectors going back to 1992 for the beginning period of Mr Merricks' claim. So, what Mr Coombs is proposing to do is to analyse regress later data and extrapolate backwards. That is his plan and we see that if we can turn up Mr Coombs' second report, which is in B1 behind tab 12. If we can take it from page 189, the Tribunal will recall that the claim period for Mr Merricks' claim is 1992 to 2010 if one includes the latest of the run-off periods. If you look at paragraph 3.16 – this relates to ONS price indices, which are the public data that Mr Coombs proposes to rely on to analyse – he says there that for most of the sectors and subsectors, the matched CPI and PPI data cover the time

period from January 1996 to September 2020 and then you have an overview in table 1 over the page. You can see indeed if you cast your eyes down that column that for some of the sectors there are data going back to 1987 but for most of the sectors the data starts from 1996 and indeed, if we go to page 191 over the page and you look at the entertainment sector and particularly food and beverage serving services, the data there are 2012 to 2022. So, if you go back to page 189 – I am sorry, sticking on page 191 and reading paragraph 3.17 of Mr Coombs' report, he notes that for some sectors and subsectors, the data provides quarterly price and cost data that covers 1996 to 2020. "I really expect that these data could be used to provide an estimate that can be applied to the relevant time period, i.e. the time period of the claim, assuming there are no major relevant structural changes in the relevant retail sectors during the earlier years of the claim period for the collective proceedings that are not covered by the data".

We also see, if we pick up bundle B6 which contains the first report, tab 60, page 1974 – and it is paragraph 3.14 – he said there, "I expect that the sectorial approach will predominantly draw on publicly available retail sector specific data. The data will be used to estimate the relationship between cost and retail price at an aggregated level. It may be that the quantitative data covers a subset of retailers or a time period different from that which may be at issue in a given proceeding. In the absence of specific evidence to the contrary I would expect that these data could generally be used to provide an estimate that can be applied to the relevant time period or sector as a whole. In the absence of major structural changes in the relevant retail sectors I would not expect market wide pass-on rates to change materially over time. Similarly, I would not a priori expect pass-on rates to differ substantially across merchants within a given sector."

So, what we see from all of this is that what Mr Coombs is proposing to do is a

statistical analysis using this data which largely does not cover the early period, the first four years of Mr Merricks' claim of the collective proceedings and data which extends well after the claim period covered by Mr Merricks' claim but he is then going to extrapolate from those results in order to reach a conclusion about pass-on rates for the Merricks' claim period. So, that is his plan. As you have seen, that is on the basis that he does not consider that pass-on rates are likely to differ over time absent some major structural change to the market. That, we say, is consistent, that position is consistent with annex 1 to the Commission Guidelines that Mr Rabinowitz has taken you to which set out the key factors relevant to pass-on because we say that those key factors at play here, that MIFis a variable cost and an industry-wide cost have not changed.

MR JUSTICE ROTH: (inaudible), but Dr Niels says it clearly had – the proportion of credit card usage that at certain periods, in the early period and indeed there were some major retailers who would not even accept credit cards.

MS DEMETRIOU: To respond to your question, my Lord, can I explain at a macro level how we propose to deal with those points? The key question for the Tribunal now is not are there going to be any disputes about Mr Coombs' position. Plainly there will be disputes about Mr Coombs' position in the way that you have just pointed out an example.

MR JUSTICE ROTH: I do not think that is in dispute.

MS DEMETRIOU: I am so sorry?

MR JUSTICE ROTH: I do not think it will be in dispute that certain major retailers did not accept credit cards in the early period.

MS DEMETRIOU: So, that may not be in dispute and then the question is, well what impact if any did that have on – so to what extent should there be an adjustment to the analysis that has been carried in respect of the later data. That will be the debate.

Now, what we cannot do in this case is magic up data from 1992, either publicly available data or data from claimants in circumstances where that is disproportionate to provide it. So, using the broad axe, our approach will inevitably have to be to analyse what data we have, and that may well relate to a later period and then the battleground is going to be, "Well, can you safely extrapolate that grid and if so what are the adjustments that have to be made?"

MR JUSTICE ROTH: So, you need data on to what extent in each industry cards were used in the earlier period.

MS DEMETRIOU: If that is the point that Mastercard is going to be making –

MR JUSTICE ROTH: Well, they do, unsurprisingly.

MS DEMETRIOU: Then –

MR JUSTICE ROTH: And the Commission Guidelines make clear that that is an important factor. So, we know that that is –

MS DEMETRIOU: So, yes, so no doubt you will need data on that but the true fundamental point is that the evidence base that is going to be analysed in the first instance are the same data, the same material as is going to be analysed in the merchant claims. And then no doubt there will be an argument around the edges, we say, as to how reliably that data can be extrapolated from. But we say using the broad axe, that is really the nature of the task before the Tribunal, and that really is around the edges stuff, in the sense that the main analysis from our perspective is going to be using exactly the same evidence base as is available in the merchant claims. Now, for 35 per cent of the loss there are no publicly available data available. Mr Coombs has addressed that in his report too and what he says there and what he has always said, is that he will seek merchant data in respect of those sectors of the economy allowing him to carry out a regression analysis and the Tribunal has seen that both Mr Holt and Dr Niels similarly propose to seek merchant data allowing them to carry out

a regression analysis. So, again that data is going to be in the merchant proceedings in Trial 2.

MR JUSTICE ROTH: Well, only for sectors which are in Trial 2. I thought that Mr Holt said that it was rather less than 35 per cent.

MS DEMETRIOU: So, as we understand it, if one takes the 12 sectors – I appreciate that there is going to be an argument about what are the right sectors but if one takes the 12 sectors that Mr Coombs has identified, for each of those sectors there are representatives in the merchant actions. Now, it is correct that if one takes a far more granular approach to the sectors there are a minority of sectors that are not represented in the merchant claims but the answer to that point is that our position is not going to improve if we have a separate trial. We are not suddenly going to be able to obtain data, third-party disclosure or publicly available data because by definition it does not exist, which will allow us to directly estimate pass-on in those sectors. Again, we are going to be relying on a broad axe and extrapolating across from similar sectors. So, that really is not a point that should weigh against Mr Merricks taking part in Trial 2, firstly because it is a minority of the collective proceedings that does not find a claimant representative and secondly, because our position is not going to improve if we have a second trial. Essentially, whatever data and disclosure is made in Trial 2 is going to be the best that we ever get. That is what Mr Coombs is going to analyse in order to reach conclusions about loss to the consumer class. And the Tribunal asked me yesterday – the President asked me this at the end of proceedings yesterday – whether if the Tribunal makes the umbrella proceedings order, Mr Merricks would be seeking disclosure beyond the disclosure he would be seeking if the two trials were separate but heard together. That was the first part of the question you asked. The answer to that is “No” because we will have to engage with the merchants as Mr Holt will and as Dr Niels will to see what data they have and what is proportionate for them

to provide but the answer to that is not going to differ depending on whether there is an umbrella proceedings order or not. It is going to be the same answer and as Mr Coombs has said in his report expressly and as Mr Holt has said indeed, what data is sought from the merchants will depend on what is available and what is proportionate to provide. Now, if all that data relates to 2013 and afterwards, then so be it. Mr Coombs will have to make the best of it.

Now, we are not going to be the only ones extrapolating from data across different periods of time because it is highly unlikely, in my submission, that the claimants will have data precisely corresponding to the time periods of their claim and so within the current umbrella proceeding order within Trial 2, even if we are not in it, if I can put it that way, there will inevitably be extrapolation from data relating to one period across to other periods of the claims and of course if the claimant succeeds on the Volvo issue, then such extrapolation will be even more of a feature because in that case Mastercard and Visa will presumably seek to show that the overcharge in the expanded claims that the merchants would bring was passed on to the class.

So, really my fundamental submission is that whatever disclosure and data the Tribunal decides is appropriate to be provided by the merchant claimants in Trial 2 is going to be the best evidence available to Mr Merricks to prove merchant pass-on and prove loss to the class. So, one can imagine it this way; you can hypothesise this: if Mr Merricks is excluded from Trial 2 and what you have for the sake of argument pursuant to expert discussions between the schemes and between the merchants is disclosure of data relating to, I do not know, let us say to 2013 onwards, in our own trial, if we have a separate trial, if it was not proportionate for these claimants to provide any more data in the umbrella proceedings, we are certainly not going to do better through third-party disclosure applications if we have our own trial. I will come back to the point that whatever the Tribunal decides in relation to Trial 2 is going to be the

best we get. So, the best prospect of Mr Merricks securing an award of damages for the class and proving the claim and enabling the broad axe to be wielded as the Supreme Court said it should be is by having access to whatever is disclosed in Trial 2 and analysing it and making submissions on the basis of that data. It is really not going to get better for us.

MR JUSTICE MARCUS SMITH: Yes. Ms Demetriou, these are complex questions but I think they break down under three broad heads when considering whether to make an umbrella proceedings order. So, first, there is the question of whether your presence in Trial 2 under an umbrella proceedings order or just as a presence has an effect on the Merchant Claimants' burden in terms of costs of running a trial, length of trial, that sort of thing. Now, if one is simply talking about hearing together, that is a question of case management and working out what is the most efficient course, not merely for an individual party but for the parties in the round and the Tribunal's own business.

MS DEMETRIOU: Yes.

MR JUSTICE MARCUS SMITH: One thing, though, that a UPO may cause difference to arise is in this regard. Let us suppose you were present in Trial 2 but without an umbrella proceedings order. One can imagine that an order entitling you to see disclosure such as it might be in the Merchant Claimants' action could easily be facilitated but there is no way you would get more extensive disclosure simply by being in the same trial. That is not what consolidation achieves. You get to see what is produced as a matter of course; you do not get anything more than that. Now, one thing that an umbrella proceedings order might deliver, certainly there would appear to be the jurisdiction to do that, is that were there to be a ubiquitous matter under the umbrella proceedings order involving costs on extending to your clients, there would be the possibility of ordering more extensive disclosure against the Merchant

Claimants which is a factor that we would want to bear in mind when making the order at all. Now, my understanding of what you are saying is that there will actually be no further burden on the claimant merchants on whatever basis you are including by way of a UPO. So, that is my first broad head of exploration and I think you have gone a long way to answering that but obviously I want you to come back further on that, but if you could hold your horses until I have unpacked the other two areas, you can address us in the round.

MS DEMETRIOU: Yes.

MR JUSTICE MARCUS SMITH: The second area where it seems to me that there may be a question is whether, if there were to be a UPO made extending to the Merricks class, that that might have an effect on the methodology adopted to determine the merchant claims. Now, obviously that is a matter that is up for grabs in any event and we have yet to express a view and we will have to think long and hard about what the right approach is. But one can understand the merchants being somewhat aggrieved if we take the view that the right way of resolving the merchants' claims is to do x but if we make a UPO, drawing in Merricks, the answer moves from x to y. Now, that may not be the case but it does seem to me to be something that we need to consider as going to the question of whether the UPO is made at all. So, there again I think there is a significant difference in the way Merricks would want matters to be approached in terms of litigating their claim versus the way certainly the merchants and indeed I think Mastercard would want the merchants claim to be litigated. So, that is the second area where I think discretionary factors are engaged. The third is the Merricks' claimants' ability to bring an action at all. It would assist us, I think, if we understood whether assuming a completely separate trial, in other words, you are not participating in Trial 1 at all and you do not get disclosure as a matter of course from Trial 1 –

MS DEMETRIOU: Do you mean Trial 2?

MR JUSTICE MARCUS SMITH: Sorry, Trial 2. I do mean that – Trial 2 at all; whether you have a claim that is sustainable on its own basis. In other words whether what is happening admittedly behind the scenes and unarticulated, but what is happening here is you are actually turning a claim that is going to fail if it stands alone into one that is going to succeed because it is piggybacking on the others. Now, I am not saying that is a good or a bad thing. What I am saying is we need to have this on the table so that we are understanding why we are making this sort of order because if we are in the process of converting a claim that will be struck out into a claim that will carry on through to trial, then that is something that I think we need to be bearing in mind because it is not a question of inconsistency of results; it is a question of achieving result at all on that hypothesis.

Separately and related to that, is it the case that in fact Merricks is a trial action and you just have to try it on the basis of altogether more generic data relating to your period and essentially lacking the data including the regression analysis you would like to undertake? You have a trial claim but one which ex hypothesi, because you are using different data and looking at it differently, you are going to reach different results when one is looking at it on a non-temporally aligned basis. Now, of course there is an overlap here which is a further complicated factor but as you have rightly pointed out, last year we indicated that even if there was no temporal alignment, inconsistent results are a complication, undesirable. So, that is a point which exercising our discretion would militate in favour of bringing you in subject of course to all of the other points. Now, I am sure there are other factors and I am sure they will be brought out but that was my two penny worth in terms of how one ought to be thinking about this. Now, I have thrown an awful lot at you. I strongly think we need a short break because we have been going for quite a long morning with only a five-minute break. Would

now be a convenient moment to rise for five or so minutes?

MS DEMETRIOU: Yes, we are not going to say “no” to that.

MR JUSTICE MARCUS SMITH: I am grateful, in any event. We will rise then for five or so minutes. Thank you.

(12.13)

(A short adjournment)

(12.31)

MR JUSTICE MARCUS SMITH: Ms Demetriou.

MS DEMETRIOU: Sir, thank you for outlining the three issues. If I could deal with them in turn: the first point you put to me is whether the presence of our claim as part of the UPO would lead to much more wide-ranging disclosure than if we were simply present at the trial. Sir, you canvased that, if we were present at the trial, we could receive this disclosure, the disclosure that would in any event be ordered. And our response to that is to say that, obviously, when one is looking at how this is going to evolve, leaving us aside for the moment, Mr Holt and Dr Niels, at a minimum (and I think the other economists, too) all want merchant claimant data, and there will be a discussion as to what is available and what is proportionate to give. And if we are part of the UPO, then no doubt our economists will take part in that discussion, and there will then be, hopefully, agreement about what disclosure, what data are appropriate and proportionate to disclose and, if there is no agreement, no doubt we will have to come back to the Tribunal in the usual way and the Tribunal will rule. But the upshot is that it is ultimately for the Tribunal to rule, and we will live with whatever data are disclosed. So, in a sense we say that the tail mustn’t wag the dog because this is a matter which is in the Tribunal’s power, and if the Tribunal thinks that - I mean, it may be, for example, that data is sought from Primark and it has data ready and available going back to 2006, which is its claim, and it may be that you may have another

claimant who has a database that is readily accessible where the data does go back much further, in which case it may well be proportionate to hand it over. But certainly the presence of the Merricks' claim as part of the UPO is not going to result in disclosure which is disproportionate because that is something that the Tribunal will no doubt control. Ultimately, we say that, whatever disclosure is ordered, whatever data are ordered, that is the best we are going to get ever. We want to see it and we want to analyze it. So, that is what we say about that.

MR JUSTICE ROTH: I do not know to what extent we would order merchant claimant disclosure, but if, to take an example, say Primark had data going back to 1997, is it, your claim starts? '92. We would not be ordering Primark to disclose back to 1992 on any view if Merricks was not there. So, there would be the burden on Primark to go back to quite old data, and we all know the burdens of unearthing old data.

MS DEMETRIOU: Sir, in response to that, if it were burdensome, then the Tribunal would not order it, but I apprehend ...

MR JUSTICE MARCUS SMITH: No, that is not the question. The question is not whether it is, if one is resolving all of the disputes, it is proportionate. The question is whether it is right to foist on someone who is claiming not back to 1992 a burden that assists you in the action. In other words, there would be incurred expense which, viewed in the round, is entirely justifiable and defensible, but, viewed from their position, the claim they are bringing and the defence they are facing, is something to which they would say, "Well, why are we spending this money?"

MS DEMETRIOU: Sir, I understand, and if the Tribunal considers that that would not be the right thing to do, then we will live with that because, if it is not the right thing to do in Trial 2, it is never going to be the right thing to do. If it is not right to ask these merchants who are in a trial, disclosing data anyway, to go back a few years, if that would not be the right thing to do, then clearly we are going to be in a lot of trouble if

we have our separate trial and we are approaching totally different merchants, or indeed the same merchants, and asking for third party disclosure. So, really, again, we say it is a tail wagging the dog issue. If the Tribunal were to consider that the price of us participating in the UPO is that an additional burden should not be placed on the claimants, well, then, we will live with that. We have to live with that. I am not caveating my position in order to come back and trick anyone. The reason I am being a little bit, leaving it a little bit open, is because one knows that with economists, economists always like to get as much data as possible. So, it may be that Mr Holt says, "Well, you, Primark, have data going back on the same database ..." - once they have discussed this - " ... have data going back to 2006 and, actually, it would make my analysis more robust."

MR JUSTICE MARCUS SMITH: Ms Demetriou, unfortunately, we are all groping our way through a somewhat uncertain cloud because we do not even know yet how we are actually going to resolve these issues, even looking simply at the Merchant Claimants. But can you assist us on this: if we were to say, yes, the UPO would be made and this is a ubiquitous matter involving Merricks, but there would be an explicit order saying that disclosure in the combined ubiquitous matter from the Merchant Claimants would under no circumstances extend beyond that which would be ordered if there was no UPO made at all, is that something, (a) you think we have jurisdiction to make? And, (b) something which you would want to back on?

MS DEMETRIOU: I certainly think you have jurisdiction to make it because it is within your case management powers, so I do not have any difficulty with jurisdiction. I just need to take instructions on what we say about that. (Pause) Yes, I am told that, if that is what the Tribunal decides to order, then, yes, we will accept that order as the price of participating. Again, just to be clear, we would on that hypothesis be participating in the expert discussions and, if it were to turn out as part of those

discussions that it were collectively decided that longer data were helpful and could easily be provided, then, presumably, the Tribunal's order would not be shutting that out, if that were helpful in any event in the merchant claims. But the response, the answer is Yes to the question you have asked: Yes, and Yes. So, yes, jurisdiction, and, yes, we would accept that order as being part of the UPO. So, that was the first point, sir.

The second point was the question of methodology. So, what you put to me was that, if the UPO were made, might that be disruptive in the sense that Mr Merricks has got a different methodology to some of the other parties? You did say, of course, you are considering that in any event. But what we say about that is, of course, Mr Coombs methodology is very similar to Mr Holt's methodology, and my understanding is that Visa agree with that. So, both experts are proposing to conduct a sectorial regression analysis on the basis of publicly available data where they can and to supplement that by a regression based on claimant data in so far as that is ordered. So, their approaches are very similar and my understanding is that nobody from the other parties is seeking to shut Visa out from pursuing that approach. Rather, the question is whether they can also pursue their additional approach or their alternative approach? So, in circumstances where Mr Holt is going to conduct the analysis that he is in any event, then we say that Mr Coombs' analysis is really treading very similar ground, and it would obviously be efficient to have that determined at one and the same trial, as indeed Mr Rabinowitz said in his submissions just a little bit earlier. It is not just Mr Holt, I should say. I think that the differences - and this is a point that Mr Justice Roth put to one of my learned friends: so, actually, Dr Niels' approach - true it is, and this is a major point of difference in terms of evidence, true it is he wants all sorts of qualitative evidence about pricing policies and accounting, but he also wants data in order to carry out a regression. So, again, that is going to be an approach

which is, unless the Tribunal excludes it, and I do not understand anyone to be asking for it to be excluded, that is going to be an analysis which is before the Tribunal. I want briefly just to look at what Mr Dryden and Dr Trento say as well because, again, we say that their approach is rather similar. Let's pick up bundle B1 please, behind tab 4 and look at page - if we go back to their approaches, we see that, from page 92, there is approach 1, which everybody agrees cannot be done because the overcharge is too small. You then have approach 2, which is essentially the approach that Mr Coombs and Mr Holt are proposing: pass-on by analogy.

MR JUSTICE MARCUS SMITH: And is that a process which inevitably involves a regression analysis, or is that something which can be done in different ways?

MS DEMETRIOU: Both Mr Coombs and Mr Holt say that they are going to do it by means of a regression analysis. I am sure it can be done in different ways, but I think the main way envisaged by the Commission guidelines is a regression analysis, and that is what Mr Coombs and Mr Holt say that they are going to do. I do not know whether Mr Dryden - 2.11(b). Yes, so, again, he is saying the same thing: "An estimation of the pass-on using econometric analysis based on the claimants' data." So, he has got the same approach. And approach 2 is the approach in which he says there is merit, you see that at paragraph 2.7. This is his preferred approach, actually, on analysis, because when you look over the page at approach 3, which is analysis of industry and overcharge characteristics, he says at 2.16 that he has, " ... significant reservations as to the usefulness of using such analysis in order to estimate pass-on directly." You will recall that he wants to go through this step to arrive at the sectors, which is a different point, but his actual analysis for estimating pass-on is very similar to Mr Coombs and Mr Holt. And then you have, and this is important, approach 4, which is the assessment of pricing mechanisms, which is all the factual material that Mastercard want in, and you see at 2.23, "We consider that this approach would

indicate whether pass-on is more or less likely but may struggle to identify the exact or approximate level of pass-on except in selected cases." And he is only saying that that could be used, if at all, to compliment other approaches, at 2.24. So, again, it is just not the case, we say, that Mr Merricks' methodology is different and would result in a different trial to the trial that is going to happen in any event - quite the contrary. And just pausing there, if I could just make a couple of supplementary submissions before moving to the President's point 3: so, we have a situation, in my respectful submission, where the evidence base that Mr Coombs is going to be looking at will be the same as the evidence base in - what he is proposing is to look at the same evidence base as is the evidence base in the merchant proceedings. And he is going to be conducting a very similar analysis to the analysis that at least three of the experts of the other parties are planning to conduct, and I appreciate there is then a discussion as to on which points we adopt Mr Rabinowitz's submissions, but leaving that aside, there is a weight of opinion in favour of doing a regression analysis along the lines of Mr Dryden and Dr Trento's approach 2. So, one asks: well, what happens practically if there is not an umbrella proceedings order which includes our client? So, all of that is going to happen for sectors of the economy which mostly cover, to a huge extent, the Merricks' claim, and we are not then party to or bound by that result - this is the hypothesis. So, we then have another trial looking at everything again. Well, it is clear, we say, that there is a huge risk of inconsistency of result, and that is really something, we respectfully say, that the Tribunal should strive to guard against. Not only inconsistency of result but massive inefficiency. And thinking about it, there will be findings in relation to this data and the publicly available data that Mr Holt is going to be analyzing in Trial 2, which will not even be admissible in the Merricks' pass-on trial because we will not have participated, it will not be admissible. Ms Smith - I went back to the transcript and looked at what Ms Smith argued back in November: she

said, “Oh, well, you can deal with consistency by having the same constituted Tribunal decide both.” But that is really, with respect, a hopeless submission because: what does that achieve? First of all, the second Tribunal will not be able to forget what it learnt the first time, but those findings will not have been challenged or cannot be challenged and they are not admissible in the second trial. So, that simply does not work.

MR JUSTICE MARCUS SMITH: I think we pushed back quite hard at the time ...

MS DEMETRIOU: I think you did.

MR JUSTICE MARCUS SMITH: ... and, just so that the cards are on the table, we have considered this in the Sportradar litigation where there were two trials involving similar parties and similar issues, and the furthest that we felt we could go in those cases was to have the non-participating party in the first set present to make submissions and we indicated we would read across, but could not be bound by, what was held in the first set of proceedings, and that was as far as we considered we could go, absent there being any kind of issue estoppel.

MS DEMETRIOU: Sir, I am grateful for that explanation. Just transposing - we say that that would be a highly inefficient course in this case. So, if that is something that the Tribunal is considering, we would urge you not to adopt that because in those circumstances what you would have is us participating in Trial 2, having the disclosure, interrogating the disclosure, but then having to have a separate trial covering the same ground in order to determine pass-on, and we say that that really would be hopelessly inefficient. And when would that trial happen? It is going to cause extreme delay, in our respectful submission, and these collective proceedings have already, through no fault of anyone’s, been the subject of delay, really because it was one of the very early cases, it did go to the Supreme Court and we are now several years down the line. We are concerned about delay. So, we do want to get on with things.

Turning, sir, to your point 3, and your point 3 was: is this a ploy - I know you did not put it as ...

MR JUSTICE MARCUS SMITH: No, and, “ploy” would be the wrong word because we think it is an interesting question to have on the table because we can see it actually is a benefit of joining, or possibly a disbenefit. So, we would not regard it as a ploy, we would regard it as an interesting and difficult question that arises out of umbrella proceedings orders.

MS DEMETRIOU: Sir, I accept that and, of course, I did not mean it to intend that you saw it as a ploy. I think that that is probably how Mastercard would put it, but we will see. To put it neutrally, the question is: if Mr Merricks’ claim is unsustainable by itself, is it appropriate in the exercise of the Tribunal’s discretion to join it in these proceedings if that makes it more sustainable? That is as I understood the way in which the Tribunal put it. Can I just start - I am hesitant to do this because I know that you will know this off by heart - but can I start by taking you back to the Supreme Court in Merricks, please? If you will just bear with me, I will not take very long. It is in authorities bundle 3, tab 8, page 697, because this really is the starting point for the task of Mr Merricks and also the task of the Tribunal, if I may respectfully say so. So, this is in the judgment of the majority and we see the top of the page, so 697, that, “Mr Merricks’ expert team proposed to deal with the merchant pass-on issue by deriving a weighted average pass-on percentage from a review of each relevant market sector during the whole of the infringement period. For that purpose they proposed to divide the retail market into some 11 sectors ...” and then it says that, “The CAT reviewed the report from RB Economics saying that the sectors were incomplete and difficult to interpret” and you see further down, “Unlikely to cover the earlier part of the infringement period.” So, that was all before the Supreme Court, and then you see at 73, “The fact that data is likely to turn out to be incomplete and difficult to interpret is

not a good reason for a court or a Tribunal refusing a trial to an individual or to a large class who have a reasonable prospect of showing that they have suffered some loss from an already established breach of statutory duty." And then at 74, "The incompleteness of data and the difficulties of interpreting what survives are frequent problems with which the civil courts and Tribunals wrestle on a daily basis. The likely cost and burden of disclosure may well required skilled case management, but neither justifies the denial of a practicable access to justice to a litigant or class of litigants who have a triable cause of action merely because it will make quantification of their loss very difficult and expensive. The present case may well present difficulties of those kinds on a grand scale, but they are difficulties which the CAT is probably uniquely qualified to surmount. It may be that gaps in the data will in some instances be able to be bridged by techniques of extrapolation or interpolation and that some gaps will be unbridgeable, so that nothing is recovered in relation to particular market sectors or for parts of the infringement period. Nonetheless, it is a duty which the CAT owes to the representative class to carry out as best it can with the evidence that eventually proves to be available." Sir, that, as you know, is the starting point for this part of the discussion. Let's assume that there is a separate trial and we are not part of the umbrella proceedings order and that the merchants in the umbrella proceedings have made disclosure of certain data in Trial 2. Well, we apprehend it would be very odd if the Tribunal were then not to provide us with that disclosure in circumstances where Mastercard has had it, that would be odd and unfair. And so, I apprehend - I feel I can submit this perhaps with some confidence - that the Tribunal would order that disclosure which had already been collected and disclosed to be provided to Mr Merricks; it would plainly be relevant and Mastercard would have seen it already.

MR JUSTICE MARCUS SMITH: Well, they would have done but they would have seen it under the rule 102 obligation not to use it collaterally.

MS DEMETRIOU: Of course, sir, so it would require an order of the Tribunal.

MR JUSTICE MARCUS SMITH: Yes.

MS DEMETRIOU: That is correct, but in circumstances where the Supreme Court are saying, "One has to grapple with disclosure exercises and do the best with whatever material is available", it really would be inconsistent with those passages of the Supreme Court's judgment were this Tribunal to say, "Well, you can't have it because it was a different trial" - even though there would be no question of proportionality because it had already been disclosed.

MR JUSTICE ROTH: It may help you - it was envisaged, even in the original CAT judgment which the Appellate Court said was wrong, that that disclosure would be provided.

MS DEMETRIOU: Sir, thank you.

MR JUSTICE ROTH: The point was made that it would only cover a different period, and at that point there were not as many claims, of course.

MS DEMETRIOU: Sir, thank you for reminding me of that, and that is quite right.

MR JUSTICE ROTH: And I think that was picked up in the minority judgment of the Supreme Court, that there was nothing wrong with that.

MS DEMETRIOU: Sir, you are quite right. Thank you. So, we do say that the overwhelming likelihood, and this is what has been, we have been proceeding on this basis, is that that disclosure would be available in the separate, on this hypothesis, Merricks' pass-on trial. So, then one is back, in my respectful submission, to the problem one has with inconsistency and inefficiency because the findings on that very same data will have been made but will not be admissible and there is a very real risk of the Tribunal making inconsistent, different Tribunals making inconsistent findings, which, as I say, would avail no-one and would lead to analogous issues to those that have already arisen in other cases where there have had to have been appeals and

remittals and so on. As we say, it would also be highly inefficient to have the same data considered twice in two separate trials. So, that is what we say about issue 3. This evidence, we say, is going to be available in any event to Mr Merricks and there is no reason why it should not be, and so it is not, in my respectful submission, a reason not to join the Merricks claim in the umbrella proceedings order.

On acquirer pass-on, just to ...

MR JUSTICE MARCUS SMITH: I was waiting to see if you were moving on because I have one further question, I am afraid, on the extent of any ubiquitous matter, were we minded to order it.

MS DEMETRIOU: Yes.

MR JUSTICE MARCUS SMITH: First of all, let me unpack where I think you are coming from, which is that you are actually arguing your claim or presenting the evidence in support of your claim by way of a process of reasoning backwards; in other words, you are taking more recent events, in particular the overlapped period where Merricks has claims that overlap with the merchant claims, to determine pass-on in respect of those periods by reference to the methodologies that we are talking about. You are then going to take that data and regress it to work out what the position is in the pre-merchant data period. Have I got that wrong?

MS DEMETRIOU: No, that is not quite right. If I can pause there?

MR JUSTICE MARCUS SMITH: No, of course.

MS DEMETRIOU: So, we will take whatever data we get. So, let's say on this hypothesis that the merchant data is 2013 to 2020 - I am just using a hypothetical example ...

MR JUSTICE MARCUS SMITH: Yes.

MS DEMETRIOU: ... - Mr Coombs will use - and this, of course, is only for the minority of sectors where there is not publicly available data - Mr Coombs will use that data to

perform a regression analysis to demonstrate pass-on in that period, the period to which the data related, so 2013 to 2020, and he will then extrapolate to say, “Well, one can assume, because we don’t think there have been any major industry shocks, that the pass-on rate would have been the same in the earlier period.” That is how it is going to work.

MR JUSTICE MARCUS SMITH: I think I did have it right. For the period, and let’s take your range of 2013 to 2020, for the period prior to 2013, you take the outcome of the 2013/2020 assessment, however that works, and then, as a separate exercise, you look back and work out what the position was prior to 2013?

MS DEMETRIOU: Yes, so you may have to make adjustments, depending on whether there are - but we apprehend that those adjustments will be broad brush adjustments. So, our starting position is that ...

MR JUSTICE MARCUS SMITH: They may be/they may not be. That is a question which I anticipate would largely depend on how we assess the 2013/2020 period. My question is simply this: were we to see sense for all the reasons you have given in having the Merricks’ class in, in order to determine - and I am going to take your 2013 date, and I know that is not the date, but let’s take it as the date where there is common data between the Merricks’ claim and the merchants’ claim, so you have got data that you can use - if we had everyone in for assessing pass-on rates in that period, is there any reason not to detach Merricks and Mastercard to determine what adjustments need to be made in the pre-2013 period, using the data from Trial 2, so that one can, ideally in a very short trial, deal with these matters separately because they are actually distinct, albeit using the data from Trial 2, but they would involve far fewer parties? To the extent that that is a separate question that takes up time: is there any sense in hiving it off?

MS DEMETRIOU: My immediate reaction to that is that it is liable to be inefficient

because one is using in any event, as you have explained, the information that one has in Trial 2 and it really is just a question of making adjustments.

MR JUSTICE ROTH: Is it just a question? Because there is going to be extra evidence of what were the conditions in the markets in the earlier years. To what extent was card usage? What proportion in different sectors? Were transactions on card in the 1990s? There will have to be evidence on that. And there will be disputes no doubt, because everything is disputed in this case, as to how that should be interpreted. So, there is quite a - it is not a minor exercise just to say there will be adjustments. The adjustments will have to be based on information, and information about all these different sectors, which will differ, because it may be, for example, that there might have been surcharging by airlines, in the airline sector, on card payments in the earlier period and then it stopped. There will be other sectors where card usage was very insignificant in the earlier years, and all of that information has to come out and be given by probably expert evidence looking at data and material and so on. It is not a few day exercise.

MS DEMETRIOU: Sir, I see what you are saying but, in my submission, it would be premature to reach - let me put it this way - I think it would be premature to reach a decision on that because we do not know the size - of course, you are right to say in case like this there are always disputes, I am not - I accept that. But we do not know the extent of the dispute, we really do not, and so there may be sectors in which the economists can agree that there were no major changes over those periods of time, and so it is really only once we see the size of the dispute that I think it is sensible to think about hiving off part of the trial. It would obviously be better if possible to decide it all so that there is a definitive finding in relation to pass-on for Mr Merricks' claim, that would obviously be more efficient and it would avoid the need to come back, but one is balancing that ...

MR JUSTICE ROTH: Better for Mr Merricks, not better for everybody else who has to sit there while there is discussion about the earlier years, with all these other people in the court room who are not interested in it.

MR JUSTICE MARCUS SMITH: In one sense you are right, dealing with everything in one go is prima facie a good thing.

MS DEMETRIOU: Yes.

MR JUSTICE MARCUS SMITH: On the other hand, Mr Justice Roth makes a very good point, that if one has a series of discreet questions which arise solely in relation to a particular period, this pre-2013 period that we are labelling, that is a reason for hiving off. So, the question, I think, is not who is right about whether one trial is better or two trials are better, but: what is the harm in terms of inconsistent results or inability to bring a case, to Merricks of doing this? And if one were taking a forward-looking approach, if your approach of proving a case was to start in 1991 and say, "We build forward in a kind of historical approach, and therefore what happens post-2013 is in some way intrinsic to an analysis of a prior period", well, then, carving it up is rather different, but if you are saying, "Look, we start from the outcome in this 2013 to 2020 period and then as a separate exercise we work back to see what is different pre 2013", that seems to me to be an eminently detachable question that avoids the problems of shutting out Merricks from points which are relevant, from excluding it from disclosure and from inconsistent results. All of those problems do not arise. It may be, yes, that we think, having done this second trial on pass-on, "Gee, we could have done it in a few days in Trial 2 - if only we hadn't", but there will not be any more harm than that. So, of course, one can always revisit things, but in terms of one of the limiters to the ubiquitous matters order that we are contemplating, why is this such a terrible idea?

MS DEMETRIOU: Sir, no, it is not a terrible idea. So, let me explain my position. First

of all, I entirely understand what you are proposing, which is that we - I understand the hypothesis to be that we have our order made in so far as it relates to merchant pass-on, but apart from the question of the extent to which you can extrapolate into the earlier period, so we participate----

MR JUSTICE MARCUS SMITH: Let us suppose our period is 2013 to 2020 involving merchant claims and Merricks. You get a judgment at the end of Trial 2 will deal with all of that and you get the benefit of knowing which factors matter and which do not in terms of working out pass-on. You then take that finally and bank it and you say: Right, what was different pre-2013? How do these factors which have been established, which are binding, differ? One gets consistency. You would not be able to argue that a factor that had not changed in the pre-2013 period, you would have to take what you got. But you could say: Well, the assumptions about volume of credit card use in 2020 are completely different when one goes back to 1995.

MS DEMETRIOU: Sir, I understand, and can I answer the point in this way. There are two considerations here. One is consistency and one is efficiency. Now, taking them in turn, in terms of consistency I do not have a consistency problem with that at all. I think that you are right to say that doing that would not threaten consistency because you would have had the finding on the single-evidence base that we are all looking at the only question then would be specifically in relation to the earlier period. So I agree with that, respectfully.

The second point is efficiency, and going back to the point Mr Justice Roth made, it is imponderable because there is obviously arguments on both sides, and at the moment all I am saying is it is a little premature to decide where the balance lies, because if, in fact, all of these sectors are going to be up for grabs, then one can see there is going to be lots of evidence relating to industry shocks in those sectors over time, then I entirely see the efficiency reason for hiving it off, because even though we would like

it to be part of Trial 2, it does not affect most of the other parties in the room. I understand that.

If, on the other hand, those disputes are likely to be relatively contained – and I am not saying that because I have suddenly been injected with optimism; it is really because when one looks at the publically available data there are several categories where the data go back to 1987 and we do not have the problem of either seeking disclosure in respect of an earlier period or of extrapolating. Mr Coombs can directly model what pass-on was in those periods of time and that, as you saw from the table, does apply to a considerable number of the sectors so we do not have that issue. So all I am saying is that it is premature at the moment to reach a final view on where the efficiency balance is going to lie, and so my preference would be to wait to see how that pans out in terms of seeing what points Mastercard make in relation to this and then reaching a final view at that stage.

Now, you may tell me that that just cannot be done because we need to plan from now, in which case you can ignore what I have just said, but I am loathe to think at the moment that it is going to be a problem that affects all of the sectors simply because there are substantial sectors where we do have the data going back.

MR TIDSWELL: The argument is going to be how close a proxy for the MIFs those costs are, so the argument about differences in aligning across all of the sectors regardless of whether you have the data or not.

MS DEMETRIOU: Sir, I am not sure that I agree with that, respectfully, because I think that that argument is a consistency argument because that argument is going to be had in any event, so when Mr Holt looks at the publicly available data there will no doubt be an argument and, in fact, Mastercard said that they are going to –

MR TIDSWELL: It will be an argument about the difference and degree of the impact of those things, and so it becomes a sort of multi-dimensional thing.

MS DEMETRIOU: There may be, there may be, I do not know. At the moment we do not know. But my overriding submission is that you should not throw the baby out with the bath water because really the gravamen of the Merricks case will be to look at the very same evidence base and conduct the same type of analysis as the majority of the other experts in the case.

I am looking at the time; I am sorry, I got carried away. It is ten past one. I have not answered your question with a yes or no. It is a "Let us wait and see."

MR JUSTICE MARCUS SMITH: You have assisted though to this extent, in that you made clear that it is not problematic on one score, it is perhaps problematic on another score but on a rather less worrying score of efficiency because on questions of efficiency, these are judgmental questions which are likely to be proved right or wrong. Although it is time and costs, one tries to get it right. Sometimes one gets it wrong. The question of inconsistency, on the other hand, is something that is a problem of a different sort and one which we take, or I take, a little more seriously.

MS DEMETRIOU: I am grateful.

MR JUSTICE MARCUS SMITH: Would that be a convenient moment?

MS DEMETRIOU: That would be a convenient moment.

MR JUSTICE MARCUS SMITH: How are we doing on time? We are moving on to acquirer pass-on.

MS DEMETRIOU: I am not going to take long on acquirer pass-on. I have a very few supplemental submissions to make to those made by Mr Rabinowitz but they will not take me very long at all. So, I think probably another half an hour.

MR JUSTICE MARCUS SMITH: Right. Now, Ms Tolaney, and Mr Beltrami you both, I anticipate, are wanting to say something and possibly Mr Moser, but I want to understand what you are going to be pushing back on and how long we are going to need.

MR BELTRAMI: Yes, of course. I think we are ahead of schedule, so that is the good news. I would anticipate being perhaps half an hour. I need to deal specifically with and go back, I am afraid, to the question of merchant pass-on and what we see as a fundamental dispute about the evidential base on which the parties should be proceeding, so I need to come back on that a little bit. I think we do not have very much between us on acquirer pass-on, although there are one or two things I need to say about that, and I need to come back and am going to say something on the umbrella order as well.

MR JUSTICE MARCUS SMITH: Indeed. That was the area where I want to ensure that no one on this side of the room is feeling cut back. Ms Tolaney, are your general items broadly the same as Mr Beltrami's?

MS TOLANEY: Yes, although I think more focused on the submissions from Ms Demetriou.

MR JUSTICE MARCUS SMITH: On the Merricks' application?

MS TOLANEY: Yes.

MR JUSTICE MARCUS SMITH: Yes, I understand. Well, if you could, we are keen that you have as much time on that because it is a point that has not been aired except by Ms Demetriou and it can be done. So, can I suggest to the extent you probably can dump what you are going to say on the other topics on to Mr Beltrami and focus on the Merricks' participation but obviously take your own course. The reason I raise it is we do only have until 4.25 and we are going to have a two o'clock start now, so that is the time we have. Mr Moser, the same applies to you. Please do try and cut your cloth so that we have most on the area where we have not yet heard anything, which is the Merricks' question. You can take it that we have not forgotten what you all said the first time around, so reply submissions on the points that have been aired are very much reply submissions.

MR MOSER: With that in mind again I will attempt not to be repetitive. I do remind the Tribunal that although we have divided the submissions in a way that Mr Beltrami has taken the lead and I try not to duplicate, viewing the action as a whole, I do represent over 2000 of the approximately 3000 claimants.

MR JUSTICE MARCUS SMITH: Well, Mr Moser, if you want to go first and Mr Beltrami go second – in ourselves we are fine.

MR MOSER: We can fight over that over lunch.

MR JUSTICE MARCUS SMITH: You can go on about it over lunch. Mr Segan?

MR SEGAN: Sir, I would have been bidding for 10 minutes on the exceptions process but (inaudible) the Tribunal I apprehend that you would not welcome my spending any longer than I absolutely have to, but quite a few points have been made about it.

MR JUSTICE MARCUS SMITH: Can we see how we go but obviously we would want to hear on points that everyone has but I think we will leave you on that basis until the end because that is an area which has been I think probably clearly unpacked.

MR SEGAN: I thought that that is what you say, but I did not want to go without having –

MR JUSTICE MARCUS SMITH: Please do not think we have made up our mind – we certainly have not but I think we know what we need to make up our mind about at least to the extent that there is something not in play that should be that your 10 minutes would be best focused on, but we will try our best. Mr Spitz?

MR SPITZ: I should stand as well and just say this, that if there is the opportunity, I have probably five minutes' worth and no more than that. They are directly in response to a couple of the points that (inaudible) raised.

MR JUSTICE MARCUS SMITH: Well, we might by this time have our stop clock out.

MR SPITZ: Understood.

MR JUSTICE MARCUS SMITH: Thank you very much. We will resume then at two

o’clock.

(13.15)

(The short adjournment)

(14.01)

MS DEMETRIOU: I just want to make one further point on the issue that was being canvassed before the short adjournment about the efficiency or otherwise of hiving off the extrapolation issue, if I can put it that way, and it is to make this point, which perhaps I can make by reference to Mr Holt’s evidence. If we go to bundle 6 tab 59 page 1960. I think you have seen this before. He sets out here examples of public domain studies of pass-on which he proposes to take into account. It is correct that in Holt 7 he refers to slightly fewer but the list is here; it is not material for my purposes. If you cast your eyes down the list you will see that they relate to all sorts of different time periods. For example, you can see that some of them are quite early, so hotels, which is the example Mr Beltrami gave in his submissions, is a 1993 study, and there are others; there is just a wide range of time period, and so I apprehend that in Trial 2, regardless of the participation of Mr Merricks or not, there is going to be debate as to the extent to which you can extrapolate from one period to another, so even if the Merricks claim is not included it does seem from Mr Holt’s evidence that he wants to take account of studies that relate to, for example, much earlier time periods and say that they are relevant for claims which are later on.

One of the reasons why I said that it may be premature now to decide definitively to hive off that part of the Merricks claim is that if there is going to be a debate about that, the particular sectors, then it makes sense for everyone to have that debate together.

MR JUSTICE ROTH: These are not studies of MIF pass-on; they are studies of other kinds of pass-on. The point that Mr Tidswell was making, as I understood it, and I think the same point I have made, that in dealing with MIFs for the earlier period you

have to look at the credit card usage at the earlier period. It is quite different whether you can apply a study of how oil prices affect the price of petrol from an earlier period to a later period. But it is proxy for looking at passing-on of cars. There is not much in the way of studies of –

MS DEMETRIOU: No, there are not.

MR JUSTICE ROTH: So that is a problem.

MS DEMETRIOU: Yes, but as I understand it there are two stages to this. He is looking at studies of other costs, I agree with you, sir, and says that they are proxies for pass-on of the overcharge in this case. That is right, and that is also, of course, when Mr Coombs conducts his regression, he is going to be looking at other costs and saying that they are a proxy.

There is a second stage to it, which is that when Mr Holt looks at these other costs and says they are a proxy for the overcharge and the interchange fee, he is looking at different periods of time, and so my point is that if there is going to be an argument from anyone to say: Well, you cannot safely extrapolate from these years to these earlier years or vice versa, because of industry shocks and what type of industry shocks count to make a difference, then that is an argument which looks like it is going to take place in the merchant action too.

MR JUSTICE ROTH: The point being put to you is it is one thing to say: Well, has petrol retailing changed significantly. Quite different, the specific one, when you have worked out a pass-on of MIF for a later period to say that relates to the earlier period, because then you are looking at the difference in credit card usage. That is not what Mr Holt is seeking to do here. There might be an argument saying: Well, the sale of alcohol has changed substantially, but just instinctively one does not think that is so likely. The point that Dr Niels makes which instinctively does have traction is the degree of credit card usage acceptance really has changed over this period. So it

involves a quite different kind of expert and therefore evidential basis.

MS DEMETRIOU: Sir, I think it involves both, because, as I say, Mr Holt's analysis, as I understand it, is to say that these other costs are a proxy for the interchange fee, therefore – I am now simplifying – I infer that these studies showing that the pass-on rate of this different cost is reflective of the pass-on rate for the interchange fee, because that is why he is using these other costs as a proxy. So he will reach a conclusion as to the pass-on rate of the interchange fee based on these proxies which comprise other costs, but those other costs will relate to a different period of time, so there is a subsequent question as to once you have applied a proxy and reached a conclusion, an inference, as to the pass-on rate for the interchange fee, there is then a subsequent question as to whether that conclusion is safe, given that the study relates to a different period of time. So all of those arguments I think are then brought back in.

MR TIDSWELL: They might both be extrapolations but they are different ones involving different factual and expert evidence. So there is not much synergy between them. You are right that there may be some similarities of the nature of the exercise but the actual mechanics of the exercise will be quite different because the facts are quite different.

MS DEMETRIOU: I am not sure that I agree with that, with respect, because it is true that the time periods for the extrapolation may be different because our claim is earlier, but actually the point of economic theory will be the same – not in relation to the proxy point; I understand that is a different point and we all have to contend with that point because we all have to look at different costs – but when one is facing the estimate of pass-on on studies relating to different periods or regressions relating to different periods, one inevitably has to extrapolate to the time period of the claim, and so the points of economic theory about whether or not it is appropriate to do that or whether

there have been industry changes and what industry changes are relevant or very similar. So that is another reason why we say that it is premature to decide now that that part of the Merricks claim should be hived off, and we say that the right thing to do would be to grant the umbrella proceedings order and see how this all pans out.

Of course, the umbrella proceedings order can be amended at any time and so if it then becomes clear that, in fact, there is not going to be a similar debate in the merchant claims and that actually the size of the Merricks debate is going to be, on that extrapolation issue, time-intensive then we can see that it would make procedural sense to have it follow on. My only point is that that is not yet clear and there does not seem to us to be any compelling reason why the decision needs to be taken definitively now at this stage, because in a sense all of this has to be progressed in the Merricks in any event, otherwise it cannot be put on hold, and so it will all need to be progressed. We will see the expert reports, we will see what Mastercard say, it will become clear which sectors are affected by this issue. As I say, there are substantial sectors for which there is data going back to the beginning of the claim period, and once all that has become clear, then the Tribunal will be better placed to decide the efficiency question. So that is the additional submission I wanted to make in relation to that.

Turning to acquirer pass-on which I think I can deal with quite quickly, the position is similar in the sense that the evidence base is going to be the same and you have seen Mr Coombs' proposal is to conduct an event study and his proposed event study focuses on increases in 2021 and 2022. So self-evidently that is not an analysis that is tied to the Merricks claim period. On the contrary, we say it would equally shed light on acquirer pass-on for the period of the merchant claims too. So we say that it makes absolute sense to grant a UPO in respect of acquirer pass-on.

As to that, and in response to the question put to me by Mr Justice Roth, we do say

that we expect the acquirers to have the information that Mr Coombs need, and essentially we would need the acquirers to give us the MSC data broken out with each of its components, i.e. the MIF, the scheme fee margins relating to the CMP MIF category for 2021 when it was introduced, and ideally for 2022, and that is obviously something which we can bottom-out in greater detail later, but we would like to take the opportunity, since the acquirers have been approached, to seek that data. We think it would be very useful.

Ms Tolaney's submission yesterday about acquirer pass-on was that there is an issue between Mr Merricks and Mastercard as to whether it is appropriate to look at increases or decreases in the MIF, but she did clarify in response to a question from Mr Justice Roth that they agree that that in itself is not a reason to keep the Merricks case out. Indeed, Mr Beltrami clarified yesterday that his clients agree with us on that issue, and we say that that is a point which will need to be decided. It does not need to be decided now. It does not have great case management implications. It is obviously an issue that will need to be determined in any event in the umbrella proceedings, and again obviously better to have us in rather than out, because if the issue is decided separately in our case there is a risk of inconsistent outcomes. So that is what we say about acquirer pass-on.

Standing back, we can understand forensically why the merchants and why Mastercard are so keen to keep us out of Trial 2. Mastercard wants to ride two horses and the merchants do not want additional evidence in Trial 2 showing that the loss they say they suffered was actually suffered by their customers. So there is a tension. But those are very big reasons for keeping us in, because really they are the flipside of the coin of the consistency point.

For all those reasons, we accordingly invite the Tribunal to grant our application for an umbrella proceedings order in respect of both acquirer and merchant pass-on.

Just going back to the Tribunal's question two that you put to me, you said to me: Well, Mastercard want a Sainsbury's-type trial with lots of factual evidence; you want something different, and can you comment on how those two things might interact. You have my submission on that and I am not going to repeat it, which is that actually what we want is going to happen in any event because it is what Visa wants and what Mr Holt is putting forward, and I have explained that some of the other experts are not so very far from that either. We say that it is going to happen in any event because nobody at this three-day hearing has asked for Visa's approach to be excluded. Really the question is whether in addition there can be these other approaches which call for a lot of qualitative evidence.

In relation to that, we do respectfully adopt Mr Rabinowitz's submissions and say that the Tribunal should grasp the nettle now and find that it is inappropriate in the circumstances of all of these claims to have a Sainsbury's-type factual trial. It would just be unmanageable, and we also say that, contrary to Mr Beltrami's submissions on the first day when he said the Tribunal should actually let all these methodologies go forward to trial and then at trial the Tribunal can decide which is more compelling. We say that that risks exactly the ships passing in the night problem which exercised the Court of Appeal in the McLaren judgment. I am sure you do not need me to take you to it. That is what the upshot would be and it would be very expensive and, as we say, impracticable.

We say that the appropriate blueprint to trial here – of course, I am, in making these submissions which I will keep very short, assuming that we are in and I have locus to make them. In a sense, the submissions also go to whether it is appropriate for us to be in, because if you were to decide that the scheme of this trial looks like a Sainsbury's-type trial and there will not be any regression despite the fact that nobody is opposing Mr Holt's analysis, then I would be in a different position. But I do want to

make some brief submissions on why we say the appropriate blueprint to trial is a blueprint which is truly expert-led and which gives privacy to data as well as to any additional evidence that the experts, having met and discussed, say they really need. We say that that is the position of Mr Merricks, it is the position of Visa, and when one looks at their report it is also the position of Mr Dryden and Dr Trento. We say there are three key reasons for this which I will summarise very briefly.

The first is a submission about the law, and what we say about that is that Mr Beltrami took you to the Tribunal's judgment in Sainsbury's and in Trucks and he sought to say that because the Tribunal examined qualitative evidence about pricing practices, and so on, in those cases, the law requires the Tribunal to do the same in the present case. Underlying Mastercard's submission was a similar assumption. But those submissions are wrong. The first reason that they are wrong is that reliance on those cases proves too much because everybody accepts that it is impossible here to seek disclosure and evidence from every single merchant in relation to their pricing practices and their accounting practices. It is true for the merchant claims and it is doubly true in the collective proceedings. Our collective proceedings would be un-litigable if that is what we had to do, and so some other approach needs to be identified. Once you say another approach needs to be identified, then you are conceding that, in fact, the law does not require you to find claimant-specific evidence in every case of pricing practices and accounting practices.

MR JUSTICE ROTH: Collective proceedings; it is not different within, and it is clear that by definition they do not expect claimant-specific evidence, so you are in a better position on --

MS DEMETRIOU: Sir, I –

MR JUSTICE ROTH: I think that would have to be conceded by Mr Beltrami, because there is the statutory provision that assists you.

MS DEMETRIOU: Sir, that is right. We are in a better position but we say that we are in a different position and a better position on that score, but we say that Mr Rabinowitz is correct to say that the law does not require that for individual claims either. I am not going to repeat what he said.

The second difficulty with Mr Beltrami's and Ms Tolaney's submissions is that they assume that the extensive factual disclosure that they are seeking is actually going to shed light on what the merchants did about the overcharge and, for the reasons that were canvassed between Mr Tidswell yesterday and some of my learned friends, that is vanishingly unlikely because of its small size. That question goes to proportionality, our second submission in relation to why the Tribunal should grasp the nettle now and say that this evidence will not be taken into account and will not be pursued is that qualitative disclosure of that type – surveys, interviews, disclosure, cross-examination of factual witnesses in relation to pricing practices – would be disproportionate. It is disproportionate because it will not be useful and because it is going to be expensive and time-consuming to gather and to interrogate.

I have taken you already – I do not need to turn it back up – to Mr Dryden and Dr Trento's report. That information, that disclosure, goes to their fourth approach, and you can see that they are not terribly enthusiastic about the fourth approach and they say in terms that the fourth approach is not going to enable them to estimate pass-on. When you look at what the other parties, what the HK, SSU, SH claimants and also Mastercard say they are going to do with all of this disclosure, there is actually a yawning gap and we say that the Tribunal should be very hesitant to order it at this stage or to say that this is the way the trial is going to progress in circumstances where they have not explained exactly what they are going to do with it.

If we could just turn up briefly, for example, Mastercard's skeleton argument, I have that in the supplemental bundle behind tab 8, page 161, paragraph 42. So for the

Merchant Claimants Mastercard proposes that each merchant claimant complete a survey providing a range of information, etc. Then you see what the information is. Then you have the picking of the sample claimants over the page, and then at 45: "These sample claimants will be required to give more detailed disclosure and factual evidence in relation to factors relevant to their budgeting processes; also required to provide data on historic prices, etc. This evidence could then be analysed to determine how the Merchant Claimants dealt with the recovery of their costs in their business."

There is no indication here – and I am just going to show you Dr Niels's report in a moment – explaining how it is going to be analysed or why they need the qualitative information about pricing practices and accounting practices which is going to be for both of them.

If we look at Dr Niels's report, which is behind tab 17 in the same bundle – bundle 1 tab 17 page 355, paragraph 3.33 is the second stage. So the first stage which has been canvassed is not very onerous and so that is not disproportionate. The second stage is where it becomes very problematic. What do we see in terms of how this material is going to be used? All we get is this: "A representative sample would then be drawn from each of the groups for which MSC pass-on is subsequently assessed conceptually, factually and empirically, in order to ensure that the resulting pass-on estimates are unbiased." Over the page you see all the information that is sought, but what does that mean, "conceptually, factually and empirically", and how much of the swathes of qualitative material about price setting is going to be used for the empirical analysis? We say nothing. It is not going to be relevant to that at all. And what does "conceptually and factually" mean? So we say the Tribunal should be extremely wary before allowing all of this disclosure to be adduced when it is just not clear whether anything useful can be done with it.

MR JUSTICE ROTH: He says he needs it but he does not explain what he is going to

do with it and just says using it for the empirical assessment, but it is completely unclear --

MS DEMETRIOU: Completely unclear, and so that is the difficulty. This really was the opportunity. This is the three-day hearing to decide these issues, and if Mastercard cannot now come and justify why they need this extremely expensive and extensive second stage, then that is it, they have had their chance and there is no explanation of why this material is needed and what it would be used for.

The situation is similar in relation to Mr Beltrami's clients.

MR JUSTICE ROTH: They want simulation.

MS DEMETRIOU: They want simulation analysis.

MR JUSTICE ROTH: They need a lot more information for that.

MS DEMETRIOU: But what is not clear, with respect, is why they need that sort of qualitative material. They just state that they do. If we look at tab 3 in the same bundle – and you have my points from my skeleton argument about why we think simulation analyses are and what the guidelines say about those, about being very data-heavy and reliant on assumptions so I will not repeat those points now.

If we turn to page 71, you see there: "We propose to develop a simulation approach to Merchant pass-on", and you have already seen paragraph 75 that sets out the material that they consider is necessary including (vii) which is really the key one for the purposes of these submissions because that is the really onerous and also qualitative and we say not very meaningful category. But nowhere do they explain why that is necessary, what they are going to do with that qualitative information. If you turn the page to page 73 and look at paragraph 84, you see: "We must establish a robust factual understanding of the markets that the claimants operated in and the relevant pricing dynamics." So that is separate to the simulation analysis. They say: "In addition to the minimum factual information identified to develop a potential

simulation approach of merchant pass-on, we will also need a broader factual understanding of the features of the markets that the claimants operate in, especially the drivers and determinants of pricing." But then you see a series of paragraphs that essentially ask swathes of factual and documentary evidence from the claimants, or they are going to provide swathes of factual and documentary evidence about the methods by which prices are set, factors taken into account. It is just not clear what they are going to do with this. What do they mean when they say: We are going to develop a robust factual understanding"? It is just wholly vague.

Essentially our point on this is that nowhere do the claimants' experts or Mastercard's experts explain what they are going to do with all of this qualitative information which is going to be so burdensome to provide, and for that reason it should be excluded.

MR JUSTICE MARCUS SMITH: Ms Demetriou, though, precisely the same vagueness, although it is hidden, arises in relation to the regression analysis, and we have seen briefly mentioned throughout. Let us suppose one has an analysis conducted to establish the extent of pass-on for a particular sector or a particular factor, how one carves it up, and one has data which is intrinsically patchy because we are looking at public reviews and such data as one can get, there is no large unified statistical base so you will have to do what you can. You will punt it into one of these software programs having worked out the equations you want to use and no doubt the machine will pump out a pass-on rate of, let us say, 60, and that will look fantastic, it will be the highest point on the curve that is produced and be the most probable outcome on that data. We then ask ourselves: Well, what is the confidence interval? What is the range there? Let us suppose that it says that that range is not 60 or 55 to 65, it is 2 to 87. What assurance do we have that one is going to get a tight confidence interval of the regressions that the parties seem to rely upon?

MS DEMETRIOU: Sir, I would flip the question round and say how is – the starting

point is that the material required for the regressions is contained and more proportionate to provide. Indeed, it is a subset of the material that the claimants themselves say should be disclosed and Dr Niels wants. So I think the proper question is: Well, looking beyond that subset at all of the additional disclosure that Mastercard want in their stage two and Mr Beltrami's clients want to give, how is that going to help the Tribunal to decide whether or not the regression is accurate and what confidence it can have in it.

MR JUSTICE MARCUS SMITH: That is not the question. Let us leave on one side whether the sampling or disclosure basis helps or not. We understand the points there and we will consider them. I am asking a rather more fundamental question of what assurance in a trial that is going to be running for several weeks that we are going to be presented with a series of extremely expensive regressions which, because of the patchy nature of the data and with all the competence that is provided by the econometrists involved, will nevertheless have a range of values where, to 90 per cent or 95 per cent confidence, you have an enormous range. What, if that is what we end up with, are we going to do with it and what assurance do we have at this point, if we go down a pure regression route, that we are not going to end up with data that is extremely complex, on the surface extremely precise, but when you start asking about the actual statistical reliability, it is as vague as putting your finger in the air and trying to work out what the value is.

MS DEMETRIOU: Sir, I think that I would give two responses to that. The first is that, of course, you have seen and the Tribunal has canvassed this already, that there is going to be a measure of debate about what are the factors that are relevant to pass-on, so the characteristics, and we do, with respect, see the good sense in having the experts meet early to discuss what the factors are and what targeted material might be relevant to establishing those factors. I would hope that that would go a long way

to giving the Tribunal comfort about the precision of the analyses that it is going to receive, or at least give it material on which it can decide between competing regression analyses. So that is my first answer.

The second answer is really what is the alternative to doing that, because the alternative that is being presented to the Tribunal is something which requires a huge amount of factual material and a series of factual trials. On Mastercard stage two you have as yet an unknown number of mini-Sainsbury's trials. It is completely unworkable and we say they have not shown why it is necessary or going to help. So you do have to look at both aspects and we do, with respect, see the sense of what the Tribunal said yesterday about early engagement of the experts, but do that we would urge the Tribunal to avoid the ships passing in the night and to say: What we do not want is the meeting of the experts to reprise this discussion that we have been having in these three days and for Mastercard's experts to say: Well, we do still need all of this pricing information. We really do say the Tribunal should grasp the nettle on that now and say it is not appropriate in these cases, given the case management issues and given that they have not demonstrated that it is going to be of any utility.

But then on your point, sir, yes, of course, we understand that and we think that there should be a properly so-called expert-led approach where the experts do discuss what material they need to try and agree on factors, or at least ventilate the dispute in a meaningful way before the Tribunal as to what the factors are.

I am just looking at my notes to see if anyone else has anything else for me to say. I think those are my submissions. I would ask, just in the debate about timetable, for some time to reply on my application at the end, because it was my application for an umbrella proceedings order. I have not heard at all what anyone else has to say about it, and so if there is anything that is said that I have not anticipated I would like to reply.

MR JUSTICE MARCUS SMITH: Of course we will bear that in mind, but our aim is to

ensure that we have a full airing of points that we decide. We obviously do want to ensure that everyone has those points articulated but let us leave no surprises.

MS DEMETRIOU: Unless the Tribunal has anything further for me, those are my submissions.

MR JUSTICE MARCUS SMITH: We are very grateful; thank you very much. Let us do the reverse order. Mr Rabinowitz, you have nothing more to add.

MR RABINOWITZ: No.

MR JUSTICE MARCUS SMITH: I am grateful. Ms Tolaney, do you want to come next?

MS TOLANEY: May I deal with Ms Demetriou's application? Essentially, and I am putting this more colloquially perhaps than it should be, the question is whether Mr Merricks pass-on claim should be, in a sense, consolidated with these merchant proceedings, and it is for Ms Demetriou to satisfy the Tribunal that doing so would save time, costs, be more efficient, and that it is appropriate, necessary and desirable for that to occur. We say in a nutshell that she cannot do so and has not been able to do so.

MR JUSTICE MARCUS SMITH: This is not a consolidation question, so the inconsistency is probably the --

MS TOLANEY: Well, that is what I am going to come on to, because what I wanted to, first of all, just clear away and the reason I used that colloquial expression is that the Tribunal starts from the premise that there is not going to be any time or cost savings and it is not going to be more efficient, because it is quite clear that Mr Merricks' participation will lengthen and complicate Trial 2, and that will undoubtedly be to the detriment of the merchants and we say also to Mastercard, and so it is not appropriate or desirable for those reasons.

With that context, I turn to the question of necessity, and you are absolutely right, sir,

that the peg on which Ms Demetriou has hung her hat is that it is necessary for consistency. Let me give you three reasons why that is not the case.

The first is that there are material differences in the sectors and claim periods of the respective claims. The second is that there is different data and different facts that would be required to be considered to determine the respective claims. Thirdly, there is a different end point because of the different nature of the claims. That is why we say there is no risk of inconsistency in the way that Ms Demetriou has put it and we actually say that that risk does not arise, and I will come on to address you a bit more on that.

Let me take each factor.

MR JUSTICE MARCUS SMITH: The first two points I do understand. What do you mean by "a different end point" or "different nature of the claim"?

MS TOLANEY: I am going to come on to that, because the point is essentially that Mr Merricks' class action is not going to involve just dealing with ONS PPI data for multiple sectors. It is going to involve consideration of how the payment market and the multiple retail markets across the UK economy have changed over the last 30 years.

Starting with the sectors, I addressed you on that briefly. Time period. Mr Justice Roth asked yesterday about the time periods covered by the merchant claims and I referred in my submissions to the merchant claims generally relating to the period from 2013 onwards. The vast majority of the claims were indeed commenced from 2019 onwards, and I hope I caveated it yesterday by saying generally. There are a small number of claims that were commenced earlier and the only claims which overlap at all with the Merricks claim periods are the claims of M&S, Heals and Fortnum & Mason. Now, Heals and Fortnum & Mason are pretty unique businesses. Then the other two are Primark and Ocado. M&S, Heals, Fortnum & Mason and Primark were commenced in December 2013, so go back to December 2007, and Ocado's claim,

which was commenced in December 2014 goes back to December 2008. Of course, for the Primark and Ocado claims we know at the moment they are planning on trying to deal with it through the exceptions process, potentially.

We say even if you took those five claims, the overlap is very limited and almost exclusively relates to the potential run-up period. Just to remind the Tribunal, the main claim period in Merricks relates to May 1992 to June 2008, with a potential two-year overlap period to June 2010. Sorry, run-off period.

MR JUSTICE MARCUS SMITH: Ms Tolaney, it is very helpful that you have raised these figures. I think we did mention earlier the desirability of a schedule setting out, as it were, the agreed priorities of the claims. Can I just reiterate that that is likely to be extremely helpful.

MS TOLANEY: We will do that. The second point is difference in data. First of all, there is a question of duration of data series. So Ms Demetriou took you to table one of Mr Coombs's report and placed particular emphasis on the fact that many of the data sources that Mr Coombs proposes to rely upon go up to the present day and so cover the period for claim of the Merchant Claimants, and that was said therefore to be of assistance. We suggest that is a complete red herring to the question before the Tribunal, because the first point to note is that no one else is suggesting using the ONS PPI data which Mr Coombs proposes to use. It was loosely said by Ms Demetriou that Mr Holt and Mr Coombs adopt a similar approach but, with respect, that puts the point rather high. They both want to rely on publicly available data where it is available, but it is important to note that they are not relying on the same publicly available data. That is ultimately because they are trying to analyse different things. Mr Holt is attempting to assess pass-on rates for Merchant Service Charges by looking at public studies of pass-on rates for different categories of cost which he considers to be similar to charges. Mr Coombs is not trying to do that. He is simply looking at ONS measures

of PPI without considering which types of cost are the most appropriate proxies for Merchant Service Charges. So his analysis is one level further removed and would not produce results which any of the parties to the merchant claims suggest are relevant, and his analysis is completely different therefore and is not something that should be part of Trial 2. In the context of a claim period from 1992 to 2010, which is the Merricks period, where you have a data series from 1996 to date, there is no reason why you would need to look at data from outside the claim period. You would look at the period of data for the claimant period. Why would you waste time and effort looking at data for a 10-year period if it is outside the claim period?

So, the fact that the data sources that Mr Coombs relies on continue up to the present day is irrelevant and there is no reason for Mr Coombs to look at that data and there is no reason for anyone else to look at the data because nobody suggests it is the relevant period. I then turn to the different end point, which is the point at which the Merricks' class action is not just going to involve dealing with ONS PPI data for multiple sectors; rather, it involves consideration of how the payment market and the multiple retail markets across the UK economy have changed over the last 30 years and that is going to require factual and expert evidence concerning a 30-year period. The President gave an example of fundamental changes such as the use of carbon copying paper machines but the differences are more than just technology. As Mr Justice Roth said, major retailers did not accept credit cards and in addition, retailing in many sectors has changed enormously. The acquirer market has also gone through substantial changes and there will need to be evidence in relation to that.

So, with all of those points in mind, that then takes me to the suggestion that somehow it is necessary for Mr Merricks's claim to be joined in for consistency purposes. I suggest there is a difference between consistency of approach and consistency of outcome. So, here there is no risk, we suggest, of an inconsistent approach because

Mr Merricks' trial and the Tribunal in that trial will have the judgment of this Tribunal and it is not a question of being balanced. One knows the judgment is persuasive and will be the starting point given the issues considered here. Secondly, there is a great play made of access to information by Mr Merricks and it would be open to Mr Merricks to seek disclosure from these proceedings if he could show why that was necessary, but applying the consistent approach does not mean you would get the same answer for different periods or different industries. Taking timing as a key example, many retail markets look very different today to the position in the 1990s, so adopting the same approach, whether in these proceedings or Mr Merricks' own proceedings might well result in different conclusions on the pass-on rate in a particular sector in the 1990s to the pass-on rate in 2010 and onwards.

What that demonstrates is that there is not a consistency issue and even less so would it drive a need to hugely expand the scope of Trial 2 to include economy-wide pass-on for 1992 to 2010 which is what is relevant to Mr Merricks' claim. That is not a ubiquitous issue since it is not relevant to the Merchant Claimants and similarly the pass-on rate to the Merchant Claimants which is primarily from 2013 onwards is not a ubiquitous issue since it is not relevant to the claim period in Merricks.

I think the final point I say is that the Tribunal is clearly astute to the fact that Mr Merricks is keen to participate on their own admission because it was said they wanted access to data in an attempt, we suggest, to bolster their claim. Now, that is not a reason for them to participate in Trial 2. On the contrary, it is a reason that they should not be permitted to. The President raised the point that Mr Merricks' claim may fail a (inaudible), and the whole point is that if Mr Merricks' claim has difficulty on the material that might be used to prove it, it is a real reason why it should be determined in its own trial and not allowed to derail what we say are already very complex proceedings for the Tribunal to manage. We discuss at length the fact that we were here a year ago

and we are still trying to find the shape of these proceedings. Adding a whole new trial into these proceedings with different issues and different considerations should be the last resort and we say that Mr Merricks has not got out of the gate of actually showing why it is necessary and on the contrary as the President said, it is exactly the sort of case that needs to be determined in its own trial on its own facts and evidence in the usual way.

MR JUSTICE ROTH: Can I just ask you about (inaudible) you made that Mr Coombs is using different data and you said he is proposing to use PPI ONS data – CPI data. Yes, that is one support but surely he is also proposing to use a whole lot of other indices and data sources - as is Mr Holt. If one looks at Mr Coombs' report at page 189 of Bundle 1, Tab 12, he says, "Data requirements for his approach" at the top, "At a minimum the models discussed above require price and cost data over time." Then he says at the end of that paragraph, "Annex B provides a list of available data sources by sectors that include price and/or cost information by sectors. At this stage I would examine more closely ONS price indices data". So, he says, "For the purpose of this preliminary report I am going to talk about ONS data" but the sources he is going to use are far wider (as set out in his annex B, which you find on page 190), because he is looking for cost and price data, data relating to individual sectors. Mr Holt is similarly – while he starts looking at some studies for pass-on, he recognises there are relatively few studies actually on pass-on so he is also going to public data on costs and prices to construct his own analysis of pass-on (inaudible) as he explains in his section 2.2.4, which is at page 234, using public data sources on cost and price for each sector.

So, it does seem to me, I have to say, that although a worked example in Mr Coombs' report is on ONS data, he is certainly not just debating on that – he can use the same or much of the same cost and price data for sectors as Mr Holt.

MS TOLANEY: (inaudible) in Mr Coombs' report, and I think this is the point made by

Ms Demetriou – is certainly on ONS data and even Annex 2 makes that point as well, within almost every category - and his example is focused on that as well. If you look at Table 1 in particular (on page 190), you see that in the sectors that he has identified, and of course the effect of it (inaudible) a sample in respect of other sectors. But the (inaudible) as anticipated by Ms Demetriou –

MS DEMETRIOU: I was making a different point. I was not saying that he was –

MR JUSTICE ROTH: Yes, I think he said quite clearly that he is drawing on a broad list and he says, "At this stage, this is the one I (inaudible)" and then they are just giving – and these are preliminary reports – examples but they are both working on price and cost data. It may well be that Mr Holt thinks that it is not that useful and Mr Coombs thinks it is more useful but there is going to be quite an overlap on the exercise they are carrying out. I take your point entirely about the period but given that Mr Coombs is (inaudible) they are, it seems to me, proposing to do at least overlapping exercises.

MS TOLANEY: The way his report is framed, certainly there is high emphasis on ONS, but secondly he is looking at ONS measures of PPI without, it seems, considering which types of cost are the most appropriate proxies for the charges and I thought that Mr Holt was trying to do something slightly different in that regard.

MR JUSTICE ROTH: It is difficult without having them here to explore exactly how they were going to do it but it is a costs price regression based on cost price data for the same periods. They might have different views - they probably do - about which is the most useful or more useful, but we will end up with a view from Mr Holt of what a cost price regression suggests for pass-on in each sector, or segment, or subsector, and we will end with Mr Coombs saying what a price cost regression reveals for the rate of pass-on in each sector and he will be doing it, as he explains and Ms Demetriou emphasised, for the later period because that's where in many cases more data is

available so they will be covering the same question. That is our concern – well, the President's concern – I think all our concerns, certainly, on the Bench is not having – therefore inconsistent outcomes just because some of the data is different – separate trials.

MS TOLANEY: In a sense, he says first of all it is different data because in a sense he would be approaching the anterior questions in this trial through the wrong end of the telescope because we are allowing the existence of another set of proceedings where another exercise would be carried out to determine matters in this proceedings and that is not inconstancy; that is allowing, with respect, one set of proceedings to almost infect the other when that should not occur. The fact that the exercise might overlap on the preliminary look at the report – in a sense, if they overlap, then it is not adding anything. If what Mr Coombs is adding is analysis of a later period that is not relevant to these proceedings, then it is not a true overlap. It is bringing into these proceedings something that would not naturally be a part of it and I think there are dangers in that approach because it could carry on going indefinitely with all pass-on and other (inaudible).

Mr Coombs focuses on ONS data because it is what is available for the 1990s and 2000. So, that is why he is emphasising it for the purposes of his claim. And Mr Cook is pointing out that most of the data that is not identified in his schedule is from the 1990s. I think my point is that not only does it not justify Mr Merricks being in these proceedings, but in fact the risk that it causes the wrong approach for material that would not naturally form part of the bank of material for the Merchant Claims actually points to not including Mr Merricks in these proceedings.

Sir, that is all I have to say on Ms Demetriou's application. May I just make one or two short points on the Mrchant Proceedings and the question of how we take it forward? I think in some ways now there has been a narrowing between the parties in the sense

that – I may be being optimistic – but it almost indicates that everybody saw some value in the survey, albeit taking issue with potentially certain questions but there seems to be the value being now placed. It is what you then do next which is the million dollar question and I accept that. At one stage it seemed to be suggested, - I think, partly by the Tribunal and at times by Mr Rabinowitz - that my position was the most extreme, and I do not really understand that because of course the Merchant Claimants are suggesting full disclosure from everybody and Mr Rabinowitz is suggesting no factual evidence at all and we were trying to navigate a way through finding a manageable way of getting what we thought might be the necessary evidence so as to test the position and to inform the Tribunal and their decision-making process.

MR JUSTICE MARCUS SMITH: I think it is your position on industry experts that may have triggered a sense that you are much keener to go to the factual witnesses and so you are in that regard more extreme, because the way Mr Beltrami does it is he gets a data questionnaire and some disclosure and then uses the industry or expert witnesses to synthesise, that whereas you are saying, “No, let us drill down, work out what the heterogeneous groups are, sample those and produce them for cross-examination in due course”, so I am not sure it is an unfair description. It is not necessarily a criticism.

MS TOLANEY: Can I take that point and also the sample of the group point. So, on the group sector point – let me deal with that first – the difference now between us and Visa seems to be actually relatively narrow because Mr Holt seems to agree that there are a number of sectors for which there is insufficient data and that he will need further data somehow to be obtained in relation to those sectors. I think he may put it at five at the moment – it is not entirely clear, and there are subsections as well – and the crux of the difference, I think, between me and Mr Rabinowitz is how many sectors need additional data, and then the question of whether there should be qualitative data

at all and given that Mr Rabinowitz recognises that there are whole sectors which might have a situation of no pass-on at all, but you would want the data to show that, which is our position, his route is that that would come out at the exceptions level. But at the end of the day it seems that Mr Rabinowitz recognised the value of the data and also that his own expert was certainly needed in relation to some sectors. There may be real merit in the Tribunal allowing some process at this stage, and Ms Demetriou said (inaudible) and I agree, of actually allowing the parties to work out what their respective positions are on sectors or groups and then coming back or having a ruling immediately on how one approaches the sectors and what then happens. The claimant says there is 39. Visa says there are 14 and a number of subsections. There may ultimately be quite little difference once you take a view on how many subsections you have of a sector or not. That is what I would say on the sector point.

The second point on industry experts: our position started on the basis that Mr Beltrami's proposal was not to allow cross-examination of the relevant experts who were gathering the factual material, and obviously that was moved away from. I think our task at the moment is, and just taking the Tribunal's point, if the best way of getting evidence would be an industry expert in the position of Mike Coupe then so be it but we are at the moment, until we know the sectors or groupings, unclear as to three points. One is how many experts that will take across the different sectors, how many experts it would mean in reality in real terms, because each party would have their own expert then across every sector and whether they exist and that is why I would say to the Tribunal at this stage, it may be the most sensible course but it may be that in certain sectors the actual equivalent of Mike Coupe, who is the factual witness with that type of evidence would be the better choice and that would be a witness put up by the Claimant rather than having multiple experts across the board. So, it may actually reduce the number of people who are giving evidence. That is my only point

on it. The main point is that we do not think that the expert should undertake a factual, fact-finding exercise and that there has to be a proper factual exercise and then a collation of that material in a way in which it can be tested but recognising it has to be done sensibly and proportionately. That is our only point.

MR JUSTICE ROTH: There seems to be three elements. One is identifying sectors or segments and I think everyone seems now to agree that something should be done early on, a questionnaire that is covered by the questions to which Mr Rabinowitz said there is no objection. They are straightforward factual questions. We need to do that. The next question then is how you get evidence on each of those sectors, whether there is public data which is Mr Holt's starting point but he recognises for some of them there will not be but he says, "That's where we start" and if there is not then one looks at how you do it, which we do not know yet because we do not know what those sectors are, and Mr Holt says there might be an industry expert who said, "Well, let's deal with that then when we've got the sectors". But there is the fundamental difference still which Mr Rabinowitz identified as a point of law and speaking for myself, I think he is right to do so, which is what evidence for each sector is actually relevant for the pass-on question, and that is where you and the merchants I think are quite different from Visa and that is really Dr Niells's paragraph 3.3.4 which Ms Demetriou focused on. It is page 356. Again, speaking for myself – I cannot speak for others – it does seem to me that that is something we ought to decide now because that is so fundamental to how this exercise is conducted – it is about budgeting – how margin targets are set, how prices are set and how MSCs are (inaudible). Dr Niels says that is important. The merchants say that is important. It goes to the heart of, I think, Mr Beltrami's submissions of what is relevant for pass-on. Visa and Mr Merricks say, "No, it's irrelevant" and that is a question of law, I think, and if it is irrelevant, then we do not need to think about how does one go about obtaining whatever information and

whatever form it is going to address it.

MS TOLANEY: There are two points. Firstly, I think Mr Rabinowitz did actually accept it could be relevant.

MR JUSTICE ROTH: Then I misunderstood his submissions.

MS TOLANEY: As I understood it as well, one of his points was that the data of the particular sectors might show that there was no pass-on at all.

MR JUSTICE ROTH: I think that is analysis of the sort of data of revenues, volumes, costs, but I did not think it is the actual price-setting process that merchants undertake. I had understood, and no doubt, he will correct me if I am wrong, that he said that is not the relevant inquiry.

MR RABINOWITZ: That is our position.

MS TOLANEY: The reason we may be at cross purposes is that we had understood him to be giving examples of the Royal Shakespeare Company or local authorities where this might be –

MR JUSTICE MARCUS SMITH: Ms Tolaney, the problem - and it is true of all of the parties - is that there has been a failure to identify exactly what is relevant to pass-on and what is not and by that I mean of course one can say, “We need to know about a sector and what is going on and it is likely to what is going on in one sector for all undertaking that sector will be the same” but no one has asked, “Why are we grouping people together by sector? What exactly is it that makes pass-on the same across the sector?” Now, we are all buying into the idea that a sectorial analysis is right but no one has really zoomed in on what are the critical factors that moves a pass-on rate from complete to less than complete, and unless one answers that question first, you are going to end up chasing your tail saying, “Well, we want to know about the sectors.” Well, yes, of course we do. What do we want to know about the sectors is the question. And that is something which -- I think we are going to have to take the reports away

and look at very closely and work out why it is that we are asking about certain facts, and we need to be absolutely precise about that otherwise we are going to go down the range of the questionnaire we have seen, Mr Bloomfields questionnaire that is remarkably vague or we are going to go down Dr Niels's questions of what I want to know about, which again is remarkably vague and the reason is we do not really know, even now, what actually we are interested in. And unless we get that right, we are going to be producing reams and reams of material that will be of no earthly use to anyone. So, for my part, that is where I think we are going to have to start out on. We have a reasonable amount of useful information in the reports, but we are going to have to set out probably for the experts to comment on a way in which we see the core facts that need to be unearthed in order to answer this question and it is unfortunate but I think that is where we are at because no one has done that work. They have been so focused on the process, whether we do sampling, whether we do cross-examination, whether we do industry experts or whether we do econometrics that no one has actually asked themselves: what is it that we really need to know about?

MS TOLANEY: I think one of the problems may be coming as well from the fact that obviously the Merchant Claimants are suggesting that they would give the spirit of what they did, which might reveal the facts (the pass-on facts of the charges and factual discernment of what actually happened) and Visa and Merricks are saying, "You can get a doable solution from public studies of what in practice" –

MR JUSTICE MARCUS SMITH: It is much more fundamental than that because what Mr Rabinowitz is saying is that it does not matter two hoots how you price because it is always going to go down to the bottom. It may affect what we called this morning 'latency' but that is all it does. So, if that is right, and I am not saying it is, then that affects the scope of the inquiry. So, the first thing to do is to work out what matters and what does not, because if it is right – and this is one of the things Mr Justice Roth

is articulating – if all the way you price things just does not matter, then that rather changes the nature of the inquiry. So, until we have got that right and that is not just true of this particular factor but of all of them, we are grasping in the dark.

MS TOLANEY: I may be corrected. I am not sure that Mr Holt has engaged in this but –

MR RABINOWITZ: This is not our position (inaudible) … but that is not our position. … There will be pass-on but it won't be (inaudible)

MR JUSTICE MARCUS SMITH: Yes. I do not think I was suggesting the contrary.

MR RABINOWITZ: I (inaudible) .. I clarified that.

MR JUSTICE MARCUS SMITH: No, no.

MR JUSTICE ROTH: I think he does it by industry because of different markets but precisely how effective –

MR RABINOWITZ: Yes.

JUDGE TIDSWELL: But what we are really talking about is whether, as Ms Demetriou put it, there is a rule of law that says in order to consider these questions you have to look at pricing strategies, for example. And the answer according to Ms Demetriou and Mr Rabinowitz is "No". That does not exclude the possibility that there might be cases where they turn out to be relevant but they are likely to be the exception because most of the time the merchants (or whoever it is), will be looking to pass on their costs as a matter of economic reality to the full extent they can and that may be the effect of one of the things that we have just been discussing. So, I think the sharp point of the question for these three days is whether you can persuade us that there is a necessity for us to look at this evidence or otherwise we cannot reach a fair conclusion. Mr Rabinowitz is saying, "Actually, that's not right. There may be some cases, but that is the case, but they are amply dealt with in the sections process". Otherwise the rest of the time the likelihood is the evidence will not show anything different from the

approach that Mr Holt is advocating would show, and as a result when we think about the case management of this very complex set of proceedings it is entirely justifiable to exclude it.

MS TOLANEY: The evidence that Dr Niels has put forward, I appreciate, is at a high level but it is paragraphs 316 to 318 as to why he suggested the process he did, in particular at 316. Now, that is talking about why he wants the material. I understand that is on a slightly different point but that is his evidence as to why he has put forward the process. Obviously, that assumes that the proxy for a Merchant Service Charge would need to be determined in this way.

JUDGE TIDSWELL: There is a difference between data –

MS TOLANEY: I understand that.

JUDGE TIDSWELL: -- and (inaudible) … and I am not sure if he is talking exclusively on that only and I would assume that when he was talking about getting data, a wider set of data than merchants that has outweighed (inaudible), but if one is looking at the proxy that has come from some other industry and some other cost, then when you look at it here, you should not necessarily be applying it wholesale to the whole sector.

MS TOLANEY: Is now a good moment for the transcriber's break, sir, so I would just like to take instructions on one particular point that has just been made.

MR JUSTICE MARCUS SMITH: We will rise until 25 past.

MS TOLANEY: Thank you.

(15.13)

(A short adjournment)

(15.29)

MR JUSTICE MARCUS SMITH: Ms Tolaney?

MS TOLANEY: As I understand it, a point is being made that: as a matter of law, do we need to have a look at the costs (inaudible) pricing point? And could I just remind

the court, and I am sure I do not need to, of the Supreme Court decision in Sainsbury's which is Authorities Bundle 3, Tab 9, page 778, paragraph 211 to 216, but in particular 216. I would highlight first of all the heavy evidential burden on the merchants to provide evidence as to how they have dealt with the recovery of their costs in the business. Most of the relevant information about what a merchant actually has done to cover its costs, including the costs of the merchants' service charge will be available in the hands of the merchants itself. The merchant must therefore produce that evidence in order to forestall adverse inferences being taken against it. And then if you also look at paragraph 225, in the third sentence referring to the fact that it will be taken into account along with a multiplicity of other costs in developing their annual budgets.

Now, that is the type of exercise and material and information Dr Niels is asking for and that we are saying is relevant and that the Claimants are trying to disclose and marshal - and we do not at the moment follow why, as a matter of law, in the light of those dicta, it would be suggested that pricing or pricing mechanisms were not relevant to pass-on. Those are my submissions.

MR JUSTICE MARCUS SMITH: We are very grateful. Thank you very much. Mr Beltrami?

MR BELTRAMI: May I just start off on one point following on from the position we were at five minutes ago? The schedule of limitation claims – I have been asked just to make clear that given that I might have to speak for 3000 odd claimants, it is not envisaged, and I hope the Tribunal does not envisage, why most of the schedule has 3000 line entries in it. At least some form of summary, I suppose, of the broad claims across maybe sectors or something like that. Is that what the Tribunal –

MR JUSTICE MARCUS SMITH: If we could have something on a single page which if we use it at the introduction of our judgment to explain the complexity and the range

of matters that are before us, no one is going to feel affronted that they have been left out or we have misdescribed things. So, we would like it on a single page. We would like the parties to use their common sense. We do not want to go across 3000 lines but we do want something which accurately portrays in a manner that all are agreed the scale of what we are dealing with in these two trials.

(15.34)

MR BELTRAMI: Thank you. The biggest issue - the Tribunal is quite right, there is a point of principle here and a point of process, and the point of principle is, we submit: what is the evidential scope of the inquiry for Trial 2? And the point of process is: how can we efficiently manage Trial 2 so as to ensure that is achieved? We put it in that way because it would be wrong, and I am sure the Tribunal will not answer the question backwards and say, "What is the most convenient way of getting to the answer?" One has to see how one as a matter of principle gets there. The point of principle that divides the parties is whether the decision on pass-on, the Tribunal's ultimate decision, should be informed by qualitative evidence as to the different manner in which the claimants set their prices and treated their costs. And just to confirm one question I think that came from the Tribunal earlier: it is not expected - it is always possible in some case - but it is not expected that that evidence will show what any particular claimant consciously thought he was doing about interchange fees. That is not on the agenda, that is not the target. The target is objectively how they went about it. We submit that that information in some form, which is a matter of process which I will come on to, must inform the process, albeit we also submit that would not be the right question for the Tribunal because one of the questions earlier was: do the claimants have to persuade the Tribunal the information must be included? I am not sure that is the right way of putting it. We are talking about the evidential scope of the inquiry. It ought really to be whether the Tribunal is satisfied it is irrelevant, effectively on a strike

out test, not to be included. I do not think it really matters, we are not talking about the test at the moment.

MR TIDSWELL: I think it is acknowledged that you can have situations where it could be probative value, but most of the time it will not be. Taking the possibility that there might be some probative value, but not very much, when you put that next to a case management decision, but that does not exclude the process, and obviously the more probative value it has, the more difficult it is to rely on case management principles. I think that is the reason I put it that way.

MR BELTRAMI: I am grateful. The point of principle and the point of case management do balance to some extent, but my understanding that there is a big point of principle in dispute here, where the defendants are saying, “By and large, it shouldn’t be included because it’s not relevant” and the claimants are saying, “By and large, it should be included because it is relevant or, at the very least, it may be relevant.” In brief, we have three sets of experts who are telling the Tribunal they wish to see that information; they consider it is relevant. A point has been taken: well, there is not very much detail as to precisely how they say they are going to use that information. But these were preliminary reports to set out their methodology, in which they have set out the methodology and set out the material which they say they wish to see. They have also set out the processes by which they say they wish to undertake the analysis. Obviously, everyone could have done more detail as to a more granular analysis, but, as we will see, the defendants are also in the same boat. That was not the nature of this exercise. It was to present before the Tribunal the broad sense of what they needed and why they needed it, and we submit that the evidence goes that far and to that extent. So, that is the first reason. The second reason, we submit, as a matter of law, because there is a point of law here, is that that evidence, and I am talking about that pricing evidence, budgeting evidence, directly informed the outcome of both the

Sainsbury's decision and the Trucks decision. And that is why I took the Tribunal to both those cases on Wednesday, to look at the evidence they looked at and the questions they asked. Because the questions they asked involved identification - as I put it: how do you get from A to B? That is precisely what they were looking for. The words they used in Sainsbury's were, "Demonstrably so?", the words they used in Trucks, "Can it be identifiable?" Those were the questions they asked in those two cases. We know they had the pricing evidence, they used that to answer those questions which they asked. Some points have been taken by Mr Rabinowitz in respect of those cases and it is correct that the trials were procedurally different claims because they were by single or double claimants and therefore there were not the same case management considerations that we have here. But the ultimate question for the Tribunal as a matter of law is the same as in the earlier cases. There is not a different question. There may be a different way of trying to manage the question but the question is the same, and we submit the Tribunal should not shut out the material which those Tribunals did require to answer the questions which they put, albeit that the delivery of the materials may have to come a different way, and I will come back to that in a minute. So, that is the first point: different but the same in so far as it matters. The second point on this, and I pick up on a question from the President to Mr Rabinowitz, in a sense the million dollar question, when you asked, "Is Visa's approach that of Mr Ridyard?" and the answer inevitably was Yes. That should, in our submission, have set some alarm bells ringing at that point in so far as the Tribunal at this preliminary hearing is being asked to shut out evidence which the claimants consider necessary for their case on the basis that it accords with the minority approach in that decision against both the unanimous decision in Sainsbury's and the majority in Trucks. I do not know exactly what the underlying principle is in this court, but if it were, obviously, in the High Court, this could would not take a different view

unless it were convinced that the earlier decisions were demonstrably wrong. And I do not think that has been argued. But we are in that territory: the ultimate submission is being put to the Tribunal that the course that Mr Ridyard took is the correct course, and therefore the questions that were sought to be asked by the other Tribunals were not the right questions. So, we say it would be wrong in principle to take that approach, unless the Tribunal thought it was so obviously right, it was the answer. Also dangerous in practice. Given where we are, given that we have got a timetable, which is a tight timetable on any view, and we know that the Trucks decision is going to the Court of Appeal, and therefore the practical decisions on this are: the Tribunal can set the process in motion, allow evidence of some form to come in, and I will come on to the process in due course, and on we go. Alternatively, as I think you are being asked, or you are being asked, to rule now that the evidence should not be admitted because it accords with Mr Ridyard's approach to the question - when that gets to the Court of Appeal, whenever it does, and the decision, if it is upheld, then we have got a problem because all of a sudden we have got to go in reverse, and the probability is that we will lose the Trial 2 date. So, given where we are on that question, we submit that the right course would be to follow the majority and unanimous approach which admits the evidence at some level, but certainly not, we submit, to exclude it simply because of the practical difficulties that that would cause or may cause depending on the outcome of that appeal. Because I think all parties wish above all else that we have the Trial 2 date when it is fixed and it does not get derailed, and the only way it could, or a way it could be derailed is to take that decision and then it be subject to the Court of Appeal. The Tribunal asked me whether there was any other authority on the point on that dispute. I was going to go to the Supreme Court and my thunder has been stolen a little bit on that, but the reality is that that is what the Supreme Court said: the evidential burden is on the claimants and they directed it specifically to those issues that we are

asking to introduce; the pricing and budgeting policies. Therefore, we would submit that is the best indicative indication for the moment that this stuff is certainly potentially relevant. The last point on those decisions is that in fact Visa's approach, as we see it, is more extreme than Mr Ridyard's because Mr Ridyard also had regard to price setting evidence, even though his philosophical approach to the question was driven by the economic analysis, which everyone has discussed in the past. He saw that the practical side also is critical to his analysis. Can I ask you to go to bundle 4, tab 15, page 1331? I took you to some of the passages where he set out the economic starting point, if you like - as I sought to describe it: "Whereas the majority say, 'We've got to see how you get from A to B', Mr Ridyard said, 'Well, economics tells me that I'm at B.'" But the next question is: is there a plausible means to have got there? Because, if there is no plausible means, economics do not help, but a plausible means is enough. So, when you get to 1332, 7.12, he asks about the plausible means: "The next question is to address the causal connection between the overcharge and downstream prices ... apart from these naive cost plus model ..." and then he sets out the factual differences, which he then considers, and concludes that they do not actually make a difference to the outcome. So, what we get from his analysis, albeit that he begins with economics, he is driven by the economic process, he has to find a mechanism or he seeks to find a mechanism and he seeks to find that through the actual price setting process undertaken by the claimants through the regulatory scheme in that event, which he analyses on the facts. So, it is not a fact free analysis from Mr Ridyard either in reality. He obviously had the evidence there, so he could do it because it was presented to him, but the nature of the analysis involved, economics and then price setting, because the price setting required the mechanism to be examined. So, even on the minority view, we submit that the price setting process was central to the way the answer was reached by Mr Ridyard. So, that is the second

reason. We say that the law ultimately requires the Tribunal at some level to take into account this material.

The third reason is that we submit that the approach is fully consistent with the guidelines. Mr Rabinowitz took you to a number of the guidelines and I think Mr Moser will do so, too, only to say this: a number of the guidelines specifically refer to qualitative evidence, they specifically refer to price setting evidence. It is wrong, we submit, as Visa suggested, that they are only referring to exceptional cases. They do not say that. It is much more general. In fact, if anything, our case is exceptional the other way because we know it is a small charge and it is not a charge for a product which itself is being passed on. It is easier to spot a pass-on if it is a component of the actual product going to the consumer. That is not what we have. The product disappears because it is consumed by the merchant in this case. It is harder to spot, and the harder it is to spot, the more you need the evidence to assist you, we would submit. So, it is not limited to exceptional cases but, if it were, we fall into the category for different reasons. That is the third reason.

The fourth reason, we do submit, and we can only take this so far, is to stand back and ask as a matter of common sense whether the evidence we have put in across the piece is likely to assist the Tribunal to the overall question, which is a factual question, of course, of pass-on? You saw evidence from Mr Whitehorn. The way it is done in the automotive industry, the particular ways prices are set, not by reference to a retailer, by reference to other considerations. There are particular factors in that sector that are relevant to an overall assessment of overcharge. For instance, the fact that people only tend to pay deposits by credit card, but the main price goes via a bank transfer or whatever it is. It is very specific, it is very detailed. Equally, the local authority evidence: completely different to anything else. Set by different criteria. The question is: is that sort of evidence, and we will come on to the process, likely to assist

in an assessment of pass-on for individual industries? We say as a matter of common sense it cannot be irrelevant, at the very minimum, to see exactly how it is done. If it is peculiar, if it is different it will make a difference. We will submit that in some cases it will show no pass-on, but even if it does not show no pass-on, to say it is irrelevant is something, we submit, is going too far. So, those are the points. The last point, ultimately, also, you had submissions from Mr Rabinowitz and Ms Demetriou about how this is irrelevant - ultimately, of course, with respect, it is not for them or for me to say otherwise, but it is - I know it is a legal question, but in terms of, in so far as the legal question is dictated by the expert view as well: the expert view is only conditionally expressed, even by Mr Holt, who does not say this is irrelevant material; he says he does not think it is of much relevance, or something to that effect. So, even at that level, the economic level, it is not, we submit, sufficient to strike it out. That is why we say it ought to be included. I still go back, just for five minutes, just to remind the Tribunal of the alternative that is being presented. Mr Rabinowitz said the evidence is not fact free. Maybe not, but it is on an extreme diet, shall we say, on the facts. If you can bear to go back please one more time to his report, which is tab 15, bundle 1, page 226, paragraph 25, and the facts are, “The nature of the cost change ... magnitude of the cost change.” All right, on one view they are facts, but at a very abstract level, and when you get to 27, which I will not go through by you have probably already read, you realise that in fact many of them do not actually matter, according to Mr Holt, because economic theory trumps them whenever they do not assist. So, yes, they are the facts for what they are worth, but 27(a), for example, means that, even if they treat them differently, economic theory tells them it does not matter, and 27(c), if they are small, economic theory tells them that does not matter. Essentially, all right, there are some facts here but it is very much a theoretical approach rather than a fact driven approach. The result is that when one gets to the exercise that we

have looked at, it does become, we will submit, unreliable, but certainly on any view opaque, and that is the reason I took you to the hotel study, the 1970s hotel study, last time round. There is another one I did not take you to, which is the study of 10% VAT charges on the gate revenue of English football league games between 1971 and 1974, which is supposed to be the single relevant report for the entertainment sector. It is not for me to say that is going to be completely irrelevant, that is Mr Holt's job, of course, one way or the other, but at the very least one can see that a lot of work needs to be done to that to translate its benefits into our situation. What we do not know from Mr Holt's report is what needs to be done in the middle. We do not know how we get a gate receipt from 1971 to explain MIF overcharges in the entertainment sector in 2010. There may be lots of good ways to do it, but at the moment we do not know, the evidence in the report does not explain that and Mr Rabinowitz did not seek to do so either. So, what we are left with, or what the Tribunal may be left with is a very theoretical exercise, based on assumptions, one assumes, assuming the transferability of quite remote looking evidence into our situation, and at the same time denying yourselves the ability to see what actually happened, how these people actually dealt with their prices at the time. When one sees the alternative, we submit, it is quite plain that this evidence, of some nature, should be included. That is Mr Holt. That is all I want to say on the matter of principle.

As to the matter of process, how do we crack this nut? Because that is the real problem. Get over the point that it is relevant, we submit, or at least arguably relevant, sufficiently arguably relevant. How do we do it? We still maintain that the process we sought to identify as being a solution - we accept, as has been discussed, that the sort of surveys that were discussed in some of those reports may look a bit discursive and may not commend themselves to the Tribunal. So be it. If it is going to be a tailored survey of a Yes/No nature, purely for facts rather than discussion, that is not a problem

we have. So, in terms of a survey approach, we submit that is still manageable. We still consider that the concept of amassing the information into a useable form for a pricing expert is a manageable process for the Tribunal. If there has to be ultimate cross-examination of the underlying providers of information, so be it, but we still think that is likely to be unlikely. And therefore we thought that that would be a convenient way of presenting that to the Tribunal, in different stages. Everything is a compromise along the way, but in different stages: a tight survey, synthesis through a pricing expert and an economic analysis. We still submit that is a reasonable and sensible way of trying to manage this exercise. Over the course of discussion we have given some more thought about that: is it possible to hone that down even further? And we felt maybe it is; maybe it is possible, for example, to focus not on the claimant evidence but to focus on the industry expert evidence. We saw Mr Whitehorn and we saw Mr Waite and, as far as we can see, it seems very likely that there will be other experts in industries who are able to talk at a general level, with variations, of course, because there will be variations, at a general level of information within sectors. If that could be done, as we see it, it may be you do not much of the first limb, you do not need very much claimant specific evidence, so called; you can deal with it at an industry level, an expert, factual evidence level. So, you can cut out the need for an individual claimant who is still in the game, providing information, disclosure, for example, you can go straight to the industry material. How does one achieve that in practice? How does one get to the stage, for example, where you can sideline specific claimants and move into industry territory? Perhaps a survey to begin with, a smallish survey to begin with, to work out a number of sectors. It would have to be a smaller number of sectors, I do not know exactly what number, but you could work out a smaller number of sectors, and you could, for example, have a limited number of sectors and each claimant's side counts as one and each defendant's side counted as one. You could

have one industry expert evidence in each sector, for example. You could have a process by which each one could be cross-examined, or each group could be cross-examined for a day or whatever it is. You could manage that through a process of expert, actual, true expert evidence led through the industry. So, that would give you a variation, a broad enough explanation of industry practice, to enable the Tribunal then to factor that, well, the experts to factor that into the analysis and the Tribunal to understand how individual sectors, the automotive sector, the hotel sector or whatever, actually do their pricing. We have not quite fleshed this out but the way the discussion went, it does appear to us that a solution perhaps is to go for a preliminary survey and to agree within short form a list of sectors, 10 or whatever sectors, a broad list of sectors because, if we are going at industry expert level, the sector level cannot be so granular as perhaps has been discussed. A short survey of each of the sectors and identification of experts within sectors. There may be some outliers who are not susceptible to a sector and they may have to be dealt with separately, but in principle, we submit, if our primary proposal does not work, an industry led proposal may well provide everyone with what I think everyone seems to want, which is enough evidence for the Tribunal, to enable a decision to be made. There is an interesting question that the President raised a number of times: in a sense - it might be said it is not so much sector based as process based. Say there are five different types of payment processing: maybe you do not need 10 sector experts to explain that, maybe you can combine them, maybe you can have less, maybe it is more contract based than sector based? I just do not know the answer to that. But I would submit there is a decent prospect that, if a timetable be put in place identifying sectors with a view, and the Tribunal could give guidance on this, with a view to achieving an evidential outcome through an industry expert process, then I imagine that the parties would be able to at least see if that is feasible. There may be exceptions, there may be ways to deal with

exceptions, but that is one solution that we thought about. The way discussions had been going, it may be a modification of what we have proposed before that might commend itself at some stage to the Tribunal.

The only other point about the expert issue is the economist issue, and I know my expert has had a bit of flack for the simulation model that has been proposed. The real issue, we submit, is the evidential basis for the exercise. Once one sorts out what evidence can be put into the mix, we would suggest and commend to the Tribunal the experts should be allowed to do whatever the methodology they want to do on the evidence that is available. And if there is not enough evidence available for a full simulation model, they will have to do something different. But at this stage there is no real preference between the different models. It has been suggested, well, some of the defendants are using regression models, and it was said, I think by Ms Demetriou, that they are the preferred model under the guidelines. Let's not forget, these are not real regression models, they are not direct regression models that we are talking about. No-one is regressing this, because no-one can regress this, and everyone agrees about that. The only regression models we are talking about are proxy regression models for something else. So, even the regression model, so called, is not, so far as it produces a product, a full regression model. It is a step in the process of the answer. The answer may be a pass-on rate approach, a full simulation model approach or a mixture of the two. But we would suggest that the focus ought to be on the evidential scope of the inquiry but then not to interfere, we would suggest, with how the experts propose to undertake the examination that they wish to undertake in the light of the information which is available. So, at that stage that is too granular and too methodological, we would submit, to the Tribunal. If my expert cannot do his exercise on the material, so be it, but that is his look-out, if you like, rather than anything else. So, that is all on the merchant pass-on side. I will not

say any more on the umbrella, I think that has been dealt with by Ms Tolaney. We endorse her position. We are concerned at the impact, on the President's first question, the impact on the Merchant Claimants: it is too high a burden on the Trial 2, which is already compressed, in which we are struggling already to fit the important material into the trial. We submit it would be too high a burden to impose a new party who will have at least one new witness, possibly more than one new witness, and it will be an exercise which is at least in part different from the exercise which is being done for the purpose of the Merchant Claimants. In answer to Lord Justice Roth's question, there may be overlap in the expert analysis of Mr Coombs and Mr Holt, but I think, as Ms Tolaney said, if there is an overlap, we are not much further forward because it is just an overlap. If there is a difference, then it is an extension, and we are concerned that the trial will become - what is already a barely manageable trial will risk becoming unmanageable if we add even more into it, unless it is necessary. We would submit it is not necessary, there is no true risk of inconsistency, provided the successive Tribunals apply the correct principles to the materials before them. The suggestion of a carve out for some of the analysis, in so far as it works back from findings in the first trial, could, we submit, be extended more broadly to the rest of it. The reality is that once Trial 2 happens and there are findings on pass-on through the Merchant Claimants, in the real world that is likely to have a significant impact on the future conduct of that piece of the Merricks trial in any event. Whether it determines it or guides the parties in the right way, it is likely to have a significant impact, without risking anything else. Ultimately, it is not necessarily efficient to do it because it adds more time to the trial, whereas the likely separate trial will be of a smaller nature given the findings in the first trial. Last point on pass-on. I am grateful to the President for his indication earlier about the data exercise and we are happy certainly for that data exercise as proposed to be undertaken. The only issue that we have is that we had

envisaged -first of all, we also propose, if this commends itself, to provide - I do not have a timetable for this - evidence of a split between the blended and the plus plus contracts with the identification of the claimants within that. That is ongoing work, it has not been completed yet. It will be completed, I hope, and what we envisage is a schedule explaining those who are plus, plus, those who are plus, those who are blended, with an explanation of the methodology, and I hope that is going to assist. It may not be completely accepted but I hope it is going to assist. So, that is going to happen in any event and I think everyone agrees that that will be of assistance to the parties, at least to clarify the scope of the different contractual pieces. In addition, however, it is also my clients' wish to address this issue by reference also to the contractual position, which is referred to in the expert evidence that we have put in, i.e. not just the data points, because the data points may or may not provide all the answers, depending on what are the sufficient increases or decreases or whatever, but also to do an exercise examining the contractual relations between a small number of acquirers, I suspect. My understanding is that there is a small number of contemplated acquirers who are most of the market. And to provide some analysis of the position there. It had been our intention to do that before the data exercise. That is not a difficulty itself. All I think I would ask is not to be precluded from doing it at the moment because it is certainly something that we consider is going to be relevant and helpful.

MR JUSTICE MARCUS SMITH: Mr Beltrami, I hope I was clear but I will repeat what I was certainly wanting to say, which is that although we can see merit in pursuing the acquirer information gathering route first along with the other that we considered, and provided that route, albeit conducted by Visa, is done in consultation with all the parties so that an information request is made only once (in other words, one gathers everything that the parties want and, if there is a dispute, well, we stand ready to assist

on that), but we do that because it is low hanging fruit, but we are not in any way closing out any party who, having seen that material, would say, “We need or we want, in order to bring an argument to show more ...” So, the door is absolutely open, it is not merely not shut or blocked, it is open for that to happen and it is just at question of when it occurs. And we do not want process being undertaken on too many fronts, given the costs that are involved.

MR BELTRAMI: Yes, I am not sure I can push back any further. The reality is that - maybe we will see how far it goes.

MR JUSTICE MARCUS SMITH: I would hope it is not going to be too long before one gets some sense of what the acquirers have to provide, and, of course, if that proves to be harder than at the moment we are anticipating, then it may be that your approach needs to be promoted up the line because cost and time is always a matter of some moment. You mentioned a moment ago the process of classification of contract form. It seems to me that it would be helpful to have, as probably an Excel spreadsheet, a list of all of the relevant parties in your litigation group, and I am including Mr Moser in that, so that one can, as the data comes in, add it, populate it - and the first field could be the basis on which they are paying acquirers for the services that are provided, and it may well be that one gets further data which can be built up, which could in due course assist the economists, and it could be done on an agreed basis, in working out what data we have and what data we need to have. In other words, we may as well make a start on the sort of output that the questionnaires, if we go down that route, will produce by getting in place an agreement for the Tribunal and the parties that begins to record the sort of data that we have.

MR BELTRAMI: Yes, I can see that. My understanding is that the exercise is in the process and it will be done, but I have not got a specific date as to when it will be done. The sooner the better, I understand that.

MR JUSTICE MARCUS SMITH: I am grateful.

MR BELTRAMI: Thank you, those are my submissions.

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

MR MOSER: Thank you, sir. I have got a series of brief reply points, most of which I can take very briefly because my learned friends have covered much of the ground. Coming first to the point that Ms Tolaney mentioned and also this is point number 1 on Mr Justice Roth's list: the questionnaire. It seems everyone now has in mind a similar sort of questionnaire at the beginning. There is going to be some argument about what it contains. The one produced looked mainly at a cost basis approach. Obviously, we would say that some different questions need to be on there, but largely, multiple choice, drop down with the right questions, and that the questions to be agreed between the experts is something that we also agree with. That then assists with point 2 on Mr Justice Roth's list: the grouping together of some of the sectors. And my learned friend, Mr Beltrami, described a possible reduction of sectors in his submissions. That, as I read it, has always been the approach that Mr Dryden, Mr Trento and Mr Economides have been advocating. The purpose of the initial stage is to find sectors that price in a similar way, so that you can group them together. If I can just briefly look at the sectors that the claimants contend for as the starting point? That is at bundle 1 ...

MR JUSTICE MARCUS SMITH: Mr Moser, I think we will be able to look that up ourselves. I am just conscious that we have got a queue of people who need to go there and we will certainly be looking at the questionnaire factors.

MR MOSER: Indeed. Just for your note, it is at page 119 and those sectors, they are the standard industry classification that is used, for instance, by Companies House and the ONS, and is also internationally recognised. There are actually, my learned friend, Mr Rabinowitz is right, there are 38, not 39, because for some reason bars and

breweries are mentioned twice. You start with those and then you can perhaps join some together, perhaps in-store gaming is similar to hospitality casinos? That sort of combination. Not because they are the same industry but because perhaps they have a similar cost base. This is a hypothetical example. That is the idea of the reduction of groups, to group by pass-on characteristics rather than simply by some external exogenous characteristic. So, that is the idea and then you apply the experts - and I will not repeat what my learned friend has said about how we propose to introduce the facts, and it is quite right to say we are not contending for full fact; we are already in a low fact scenario because we are suggesting the industry experts, the pricing experts who mediate what we are calling facts in the way that I explained when I opened from Declan Music; you have certain expert evidence that is factual evidence, mediated through the expert and their knowledge. Bringing me on to experts: the points have been made, and I respectfully disagree with Mr Rabinowitz: he declared himself an adherent of what I call Ridyardism - or perhaps he was outed as a Ridyardist by the Tribunal. And, of course, his expert, Mr Holt, had done the same in paragraph 55 of his fifth report, which is in bundle 6, page 1951. And a lot of what Mr Holt says hinges on Ridyardism. What he says about, “Well, I don’t need any more facts” assumes that essentially passing on occurs regardless of individual pricing behaviours. Well, if that were true, it would be right, but there are three problems with that, and they are problems of law. The first problem is that that assumes that which he has to prove, and it would be not just reversing but removing the burden of proof to approach matters in that way, in my respectful submission. The second reason, and connectedly, is that that is not what was found in Trucks, so it would be a gamble on the appeal in that case succeeding, and, third, and that has been mentioned by both of my learned friends, and I just want to give it one further twist, it would be contrary, as a matter of law, to what the Supreme Court says, and my learned friend, Ms Tolaney, went to

paragraph 206, and I would go, if I had time, to paragraph 205, but we all know what it says. That is where the four factors are mentioned, and if the Supreme Court is right, if one can put it that way, that those factors matter, then it must be wrong as a matter of law that it is irrelevant how individual pricing behaviours pan out. It must be wrong. So, that is information and, however low fact, that has to be part of the consideration or there would be an error of law baked into the approach from the outset, and that would be disastrous. Mr Rabinowitz also took you to the EC guidelines. I can read the room, I am not going to turn up the guidelines, I am just going to give you a note on some of them because he looked at paragraph 157 and then in order to deal with a question from the Tribunal he went straight to paragraph 76. But if you look at paragraph 157 of the guidelines later on, you will see that they refer back to paragraphs 49, etc. and there is there at paragraph 51, which I took you to in opening, there is also there unseen paragraph 50 which talks about the need for factual evidence in the case at hand. So, even in the section that Mr Rabinowitz took you to you are in fact dealing with factual evidence in the case at hand. Very quickly, in response to Ms Demetriou, who claimed that qualitative evidence was only relevant to my experts' approach 4, and then made some slightly denigrating remarks about how important approach 4 is, that is not right, with respect. So, qualitative evidence goes centrally to approach 2 of Mr Dryden, that is the passing on rate, and it goes to how good or bad that is, and that matters for testing Mr Holt's proposal. And Mr Dryden wants information for that purpose and he wants to do approach 2 properly, not based on the German yoghurt markets from the 1990s. And it is, of course, relevant to approach 3, which is used for grouping, and I have covered that. Very quickly, the Tribunal did ask three questions about the exceptions process, which we have not had a chance to answer yet. I just want to put down a marker that the fact that we have left Primark and Ocado to make the exceptions submissions does not mean that they

cannot apply to what I call the main claimants. It has not left something for them to say but, of course, claimants in my claimant group, for instance Marks & Spencer, which is in a sense claimant number 1, they were the first, they cut across five different ...

MR JUSTICE MARCUS SMITH: You do not need to trouble us with that. Obviously, it will apply to all.

MR MOSER: Indeed. I am glad. It is just that some of the discussion yesterday was focused on that point. Bringing us to the three questions: mediation: in principle we see nothing wrong with the usual approach that applies in the CPR: if either party suggests it, then there might be a cost consequence. Of course, paragraph 74 of the Supreme Court in Merricks already says ADR cannot be ignored. Secondly, exceptions for schemes: we agree, that seems to be logical. Mastercard appear to agree, Visa more or less agreed. For the schemes, you are already looking across all of the sectors at trial. Third, and this is the only point that has not been touched on as far as I can see: the costs regime. We have in fact been considering this, including with specialist costs counsel, but the costs regime for the exceptions process, we submit, should be considered once we know what it is going to be rather than today, and I certainly have not got time now to develop the submissions. So, I just put down that marker and please do not make, as it were, a binding finding on the costs regime until you have heard us on that once we have seen what it looks like. Acquirer pass-on: I completely align myself with my learned friend, Mr Beltrami. The only additional thought we have is that there is public material out there as well. Annual reports of acquirer companies, we find, routinely state that they pass on interchange fees. That is also something that ought to be considered in the Tribunal's considerations, and that fits into Mr Economides' approach 4 for acquirers, and that is at page 98 of bundle 1. Regulation 101.3: it has not been touched on much, and I would just say that the

tail should not wag the pass-on dog, and there is enough on the Tribunal's plate for Trial 2 as it is.

MR JUSTICE ROTH: Did you say "regulation"?

MR MOSER: I am so sorry, I mean Article 101.3. Very briefly on the participation of Merricks: I, again, align myself with Mr Beltrami. Yes, it is right that, uniquely almost, M&S issued in 2012 or 2013 - most, as you will see from the table, issued in 2018 and go back therefore only to 2012. A lot happened between the 1990s and the 2010s, not least the financial crisis. So, when my learned friend, Ms Demetriou, says, "Well, as long as there was not any major industry shock" I think we will find that that is not a straightforward point.

(16.19)

Mr Coombs, of course, says everything he says is assuming there were no major relevant structural changes in the relevant retail sector. Well, M&S again, as Mr Justice Roth has indicated, only started taking mainstream credit cards in 2000, for instance, and there would be many examples like that. So this adds a whole level of complexity of evidence.

Ms Demetriou is right that her position is not going to improve in a separate trial and she wants to import all of her disclosure into our trial, but my client's cannot be improved, it can only be detrimentally affected by the importation of an enormous case of a completely different nature, and we are working on tight budgets in these claimant groups in relative terms. We certainly have not budgeted for extra experts, cross-examination, extra work, to do with time. I think it was Mr Tidswell who mentioned multidimensional, but there should not be, again with multidimensional tests in Trial 2, looking not only at quantum but also at time, and it seems, with respect, that the President has suggested to Ms Demetriou a very workable alternative and at least as far as disclosure was concerned Ms Demetriou has said she does not feel that she

has to have different disclosure to that which she would anyway have access to under the President's proposal.

I believe those are all the points that I wish to make, and thank you for the time.

MR JUSTICE MARCUS SMITH: We are very grateful, Mr Moser. Ms Demetriou, your reply on the question of umbrella proceedings, if you have anything.

MS DEMETRIOU: Yes. So I think that the main point I wanted to reply on was actually captured in the end in a discussion between Mr Justice Roth and my learned friend Ms Tolaney. So it was said that Mr Holt's analysis is not the same or is not a similar sort of analysis as Mr Coombs', and that is just completely wrong, but I do not think there is anything more I need to say about that because I think it was flushed out in discussion between, as I say, the Bench and Ms Tolaney.

There is one further point which is that both Ms Tolaney and Mr Beltrami seem to think that you can have Trial 2 without Merricks, making all sorts of findings en passant which are then relevant which are then persuasive in a separate Merricks trial in circumstances where Merricks has not tested that evidence. That is plainly wrong as a matter of law and its application of the principle in Hollington v. Hewthorn, which was then, of course, applied by the CAT in the Corcon(?) case. So that does not work.

Of course, we come back to the point that in circumstances where the fundamental analysis and evidence base is going to be the same, then we say there is plainly a risk of inconsistency that should be avoided by the Tribunal.

I do not have any further points in reply because I think I anticipated most of them in opening.

MR JUSTICE MARCUS SMITH: We are very grateful to you, Ms Demetriou. Mr Segan?

MR SEGAN: Sir, I understand I have three minutes and so I will attempt to fill them, which will not be hard.

First point. Mastercard said that any notifications under the exceptions process should come within four weeks of the judgment on this hearing or the groupings, and we say with all respect that that is completely unrealistic. One cannot possibly know whether one is an exception before one knows what the rule is, and the rule is to be set at Trial 2. It is notable that Visa's position was the diametric opposite, because they said you could not even set the criteria for the exceptions process until you had had Trial 2, let alone give your notification. So we say that that suggestion clearly should not be adopted.

The second point I need to deal with is the mooted criteria for the exceptions process. So various suggestions were made that we should have some kind of commission requirement for the exceptions process. We are very sceptical about the value of those suggestions, because they will simply build in additional costs, complexity, Tribunal time. We have already proposed a very tight set of safeguards which are quite sufficient, we say, to ensure proportionality.

Dealing with the three questions asked by the Tribunal, the first was mediation. We could see the merits of it. There were some rather disappointed noises from Mastercard but then some rather warmer noises from Visa. For our part, ultimately if the Tribunal considers that to be a useful safeguard we are happy to engage with that suggestion.

The second question was: should the schemes be able to use the exceptions process to undo. We say clearly not. Insofar as it is an issue with the benchmarks then that is for an appeal.

The final question: costs. What regime would apply to individually represented claimants whose claims had not been stayed as regards Trial 2? The answer to any costs question, of course, depends on the circumstances and exactly what the parameters and subject matter of Trial 2 are. As I explained, we have not ruled out

participating in Trial 2, because that depends on exactly what it is going to consider. But insofar as somebody does not participate at all, it seems to us that their position is not any relevantly different from a claimant whose claim has already been stayed. But, as I say, it is all, I am afraid, for a later time once it is known what Trial 2 is actually going to be all about.

I see it is 4.25 and so I shall stop there.

MR JUSTICE MARCUS SMITH: Those were three minutes very well used. Thank you very much.

MR MOSER: I am most grateful.

MR JUSTICE MARCUS SMITH: Thank you all for your assistance in this matter. We will obviously reserve our judgment and we will try to get something down which gives clarity to the parties as to where we are going as soon as we can. Thank you all very much.

(16.24)

(Hearing concluded)