IN THE COMPETITION APPEAL TRIBUNAL

Case No:1266/7/7/16

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Wednesday 19th– Friday 21st February 2025

Before:

The Honorable Mr Justice Roth
Hodge Malek KC
Professor Rachael Mulheron KC

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Walter Hugh Merricks CBE

Class Representative

- and –

Mastercard Incorporated and Others

Defendants

- and –

(1) Innsworth Capital Limited
(2) The Access to Justice Foundation

Intervening Parties

A P P E A R AN C E S

Mark Brealey KC on behalf of Walter Hugh Merricks CBE (Instructed by Willkie Farr & Gallagher (UK) LLP)

Sonia Tolaney KC, Matthew Cook KC and Owain Draper on behalf of Mastercard (Instructed by Freshfields LLP)

Charles Béar KC and Bibek Mukherjee on behalf of Insworth Capital Limited (Instructed by Akin Gump LLP)

Wednesday, 19 February 2025

(10.36 am)

Housekeeping

THE CHAIRMAN: Good morning. These proceedings, like all proceedings before this Tribunal, are being live streamed. In addition, an official recording and transcript of the proceedings is being prepared. It is strictly prohibited for anyone to make any unauthorised recording or take any unofficial image of the proceedings, and to do so, I must warn you, is punishable as a contempt of court.

In addition, I think there are two people who are on the Teams link within the confidentiality ring, so that if, as may be quite possible, we have to go into closed session, the live stream will then be turned off, but those two individuals, who I think are within the inner confidentiality, as it were, can remain on that Teams link to observe the proceedings.

We will, as usual, for the benefit of the transcriber, take a short break mid-morning and mid-afternoon at a convenient moment.

We have also seen, of course, there are quite a lot of confidential documents in the papers before the Tribunal, so I think I should make an order under rule 102(5), that the fact that those documents are being

referred to in the hearing, or being read by the Tribunal, does not entitle anyone to access to those documents, and I will make that order.

We thank all counsel for your skeleton arguments, which I can tell you are all the better for being brief. There is a little bit of confidential material in them, I hope that non-confidential versions have been made available to those who would like one.

Can I -- I see, Mr Brealey, you are on your feet. Just to check, in your skeleton, if you have that accessible, on page 3 in the copy that I have -- maybe it is not the latest copy -- in paragraphs 6 and 7 there are some figures that are highlighted as confidential, but my understanding is that they are no longer regarded as confidential, those figures, is that correct?

MR BREALEY: That is news to me. We -- I was hoping they would be not confidential, because they to a certain extent are simple maths.

THE CHAIRMAN: Yes, well, that is -- I think there was some correspondence by the Tribunal with the parties about that and I thought that was accepted, but perhaps you could just confirm that.

MR BREALEY: Could we? Because it just -- I was going to go through --

THE CHAIRMAN: Well, I can see that.

MR BREALEY: -- the various steps.

THE CHAIRMAN: It would make life easier. Perhaps you can just clarify that. Because those figures appear in another -- in the application.

MR BREALEY: The application, yes.

THE CHAIRMAN: I think in the application the confidentiality was removed, so on that basis it should equally be removed from the skeleton.

MR BREALEY: Can I take instructions from Ms Tolaney, please?

THE CHAIRMAN: Yes.

(Pause)

MR BREALEY: I do apologise, can I just check?

THE CHAIRMAN: Yes.

(Pause)

MR BREALEY: Sir, I do apologise, so the answer is that the green remains green for the moment.

THE CHAIRMAN: Yes.

MR BREALEY: I can --

THE CHAIRMAN: Yes, I see. I think it is because it is said one can extrapolate back to the --

MR BREALEY: Yes, I was hoping that because it is maths you could do it, but I can --

THE CHAIRMAN: Yes, I think that is probably why. Yes, I understand.

The other thing we want to say at the outset is it does seem to us that there are two quite distinct parts to this application. The first is whether the settlement figure as agreed between Mr Merricks and Mastercard, the 200 million and the terms of the settlement agreement, are just and reasonable, that is one question, bearing in mind, of course, that they do not have to be the perfect settlement, but as the Guide makes clear, the question for the Tribunal is whether they fall within the range of reasonable settlements that the parties could arrive at.

MR BREALEY: Yes.

THE CHAIRMAN: The second then is -- well, if the answer to that is no, well, that is the end of the application. If the answer is yes, then the question arises about distribution.

MR BREALEY: Correct.

THE CHAIRMAN: Whether it should be per capita, whether there should be these pots, 1, 2 and 3, the Funder's return and so on, but that is really a distinct part of the case.

MR BREALEY: Correct.

THE CHAIRMAN: We thought it would be helpful to hear from all the parties on, as it were, part 1 today, where Mastercard is of course directly engaged, and then

obviously if that concludes today, as we hope it might, then move to part 2.
MR BREALEY: Well, I do not know if that got relayed to the Tribunal, but we -- the Tribunal did request us to try and agree it and we did agree exactly that.
THE CHAIRMAN: No, it has not been relayed.
MR BREALEY: I beg your pardon. So the two issues: reasonableness, distribution. It has been agreed that we will do reasonableness first, distribution second. So reasonableness will have kind of openings and short replies, and I shall kick-off, and I shall hopefully finish around about 12ish, 12.30, which will allow Ms Tolaney then to proceed, and then Mr Béar.
THE CHAIRMAN: Yes. On that, clearly there is confidential material, so you will tell us at what point we should sensibly -- or if you want to refer to it -- go into closed session.
MR BREALEY: Yes, just on that, I -- I would like just to be as open as possible. I am only intending to refer to a couple of confidential emails, so I would hope that we do not go into closed session, I will just simply direct the Tribunal to the document in the bundle, the Tribunal can read it, and then I shall continue, so we do not have to move in and out.
THE CHAIRMAN: Well, that is very helpful. We have of

course read the various advices and opinions for which privilege is preserved, but they have been disclosed to the Tribunal.
MR BÉAR: Could I just say something on that. Good morning.
THE CHAIRMAN: Just for the transcript, if you could identify yourself, please.
MR BÉAR: Absolutely. For the transcript, and anyone else who does not know, my name is Charles Béar, I am representing Innsworth together with Mr Mukherjee.
Now, just a couple of housekeeping points, if I may -- thank you very much for letting me intervene. I think we all thought that we probably would not finish phase 1 today, so just to flag that up, I think it is very likely it will run into tomorrow, and I have got quite a lot to go through in that regard, and in that respect, unavoidably, I have considered whether it would be possible to do it just by pointing you to things in the documents, but I fear it would make my submissions impossibly Delphic if I limited it to that.
So there will need to be a closed session, and that session, as far as we are concerned, is one that should concern only the Intervener and of course Mr Merricks, but specifically not Mastercard. I mention that because there was a letter sent, which may or may not have reached you, by Freshfields, in the last day or two,

which said that they are concerned about submissions being made which may influence the Tribunal which they will not be here for. As far as we are concerned, that has been very clearly covered in the Tribunal's existing rulings in the last few weeks, but if it is a point that -- if there is any doubt about it, we should probably sort it out now, rather than have a situation in which Ms Tolaney says that she wants to be present when we are going through that material, or be told about it afterwards, or anything of that sort, because any ambiguity could obviously have dangerous consequences.
THE CHAIRMAN: Well, I suggest let us see how we go. Obviously part of your submissions Mastercard can be present for.
MR BÉAR: Yes, quite.
THE CHAIRMAN: There are things you say about whether it is mediation or the 10 million indemnity or whatever, where clearly Mastercard not only can but should be present and may wish to respond. There may be other things about what was said between Mr Garrard and Mr Merricks or various (inaudible) and a lot of evidence about who said what and when, where that is not something that Mastercard will be present for, so I suggest we see how we get on.

MR BÉAR: Absolutely. I am just flagging that up. As far as I am concerned, there will be material in that second bucket. Thank you very much.
THE CHAIRMAN: Yes, Mr Brealey.

Issue 1: Reasonableness

Opening submissions by MR BREALEY

MR BREALEY: Okay, can I kick-off then with: is the proposed settlement amount reasonable? Could we first just go to the Tribunal's rules. I know that the Tribunal knows them extremely well, but we should just first of all go to the rules.
On the Opus -- that is all I have got -- It is at authority 37. {AUTH/37}. We need to go to rule 94, which I believe is on page 51.
THE CHAIRMAN: Yes, we have that.
MR BREALEY: Then obviously we go over the page to page 52 which is rule 94(9). {AUTH/37/52} So is the proposed settlement sum reasonable, and I shall address reasonableness by reference to three main sub-issues, three main sub-issues, by reference to the rules, and the three issues are, first, how Mr Merricks calculates the 200 million. The "amount" is a relevant factor pursuant to rule 94(9)(a) of the rules. Rule 94(9)(a) says "the amount ... of the settlement". So:
"In determining whether the terms are just and

reasonable, the Tribunal shall take account of all relevant circumstances, including –

"The amount ... of the settlement ..."

So that is the first sub-issue.

Then, second, what is the likelihood of Mr Merricks obtaining significantly more than 200 million? This is a relevant factor pursuant to sub-section (c) of the rules:

"The likelihood of judgment being obtained in the collective proceedings for an amount significantly in excess of the amount of the settlement."

So that is the second factor I shall address.

Then the third factor is the duration and cost of any further litigation, and that is a relevant factor pursuant to rule 94(9)(d) of the rules.

Now, clearly there are other factors, but these are the main factors under the rules that I propose to address the Tribunal on.

So I go to the first sub-issue, how the settlement has been calculated. Now, clearly a payment of 200 million is a very significant sum. However, the original claim was much larger, so it is important to understand how the larger claim gets reduced to the settlement amount, and despite the complexity of the issues, the reduction is actually quite straightforward.

I shall endeavour to explain the reduction in five steps, five steps. Now, I do appreciate that the Tribunal will be aware of the reduction, but it is important that, for example, the Class knows where Mr Merricks is coming from and how it goes from a claim of billions into a couple of million, so I do ask for the Tribunal's indulgence. I want to go through the five steps because I believe it is important that people know how we get to the settlement sum.

THE CHAIRMAN: Yes.

MR BREALEY: So as the Tribunal -- I go to step 1, so step 1. Step 1 excludes the claim based on UK domestic MIFs, and this is liable to reduce the claim by 95%, and we set that out at paragraphs 2 and 5 of our skeleton.

As the Tribunal knows, the claim follows on from an EU decision that Mastercard's EEA MIFs infringed Article 101. EEA MIFs are charged on cross-border transactions where, for example, a tourist uses a Mastercard issued by their bank in France and buys from a shop in London. That is an EEA MIF. As the Tribunal knows, the EU decision did not find that the UK domestic interchange fees were unlawful. However, in his claim Mr Merricks alleged the EEA MIFs also caused the UK domestic MIFs to be inflated, and it is agreed -- and this is not confidential -- that the quantum of the

claim for both cross-border and UK transactions is worth circa 11 billion.

It is also agreed that the UK transactions --

THE CHAIRMAN: Just on that 11 billion, because we have had various figures given, can you just help me just on what does that -- is that inclusive or exclusive of interest?

MR BREALEY: Sorry, I should have said and I was going to say, that is inclusive of Bank of England plus 5%. So that 11 billion is the value of commerce that has been agreed by the experts and it includes interest at 5%, base plus 5.

THE CHAIRMAN: Up to what date?

MR BREALEY: Up to the date of the settlement.

THE CHAIRMAN: Does it exclude the deceased persons?

MR BREALEY: Yes --

THE CHAIRMAN: (Inaudible – overspeaking)

MR BREALEY: Yes, it does, yes.

THE CHAIRMAN: What does it do about run-off?

MR BREALEY: It includes the run-off.

THE CHAIRMAN: The full claimed run-off. For the one year or the two years?

MR BREALEY: One year, I believe. Two, sorry, two.

THE CHAIRMAN: As claimed?

MR BREALEY: As claimed, yes.

So it is agreeing that it is 11 billion on that

basis, two-year run-off, interest at 5, deceased, but importantly, as the Tribunal knows, the UK transaction part is worth 95% of the claim.

MR MALEK: Mr Brealey, one point on that figure. How many Class members are there if you take out the deceased people --

MR BREALEY: How many Class members?

MR MALEK: Yes.

MR BREALEY: I have not done -- I will ask.

MR MALEK: As long as we have it at some time, that is fine.

THE CHAIRMAN: I think I saw a figure somewhere of 44 million.

MR BREALEY: It is 44 -- you know, it is --

MR MALEK: That was the original figure.

MR BREALEY: That is right, I was just --

THE CHAIRMAN: I thought that was the revised figure.

MR MALEK: Is that the revised figure?

MR BREALEY: That is the revised figure, yes, 44 million.

THE CHAIRMAN: Billion? Million?

MR BREALEY: 44 million, yes. That is why, when we get to distribution, we are looking at what the Funder says is 200 million divided by 44.

Now, to conclude on step 1, by its judgment dated 26 February 2024, the Tribunal ruled that the EEA MIFs did not have any significant causative influence on UK

interchange fees. So as the UK interchange fees represents 95% of the quantum, that judgment prima facie reduces the claim by 95%, and this means that the claim is liable to be reduced to -- and this is not confidential -- 700 million unless further causation arguments can be made, and that is a point I shall return to. So it goes from 11 billion to 700 million unless there are further arguments to be made.

So that is step 1 at 700 million.

THE CHAIRMAN: Well, when you say "unless there are further arguments to be made", there are clearly further arguments to be made unless the argument succeeds.

MR BREALEY: Correct, yes. That is why I say prima facie. So prima facie it takes out 95%, and then the question is whether, for example, a second causation trial is likely to increase it, and I will return to that on my second factor. So we are just trying to work out where we get the 200 million.

THE CHAIRMAN: Yes.

MR BREALEY: So that is step 1. Step 2, we are now left with the EEA cross-border claim worth 700 million and step 2 concerns a reduction for remote transactions, remote transactions, and we summarise this at paragraph 6 of our skeleton.

It is agreed that there is an overclaim relating to

remote UK cross-border transactions, and an example of a remote transaction is where a consumer in London uses the internet to buy from a merchant in Paris. So someone in London uses the internet to buy from a merchant in Paris. Now, importantly, as the damages claim is based on pass-on of inflated EEA MIFs into higher UK retail prices, the vast majority of the higher prices charged by non-UK merchants are not in the UK. The higher prices are felt, for example, in France, not the UK. So the loss on remote in the UK is therefore minimal.

This is agreed, but due to this conceptual flaw, this overclaim, it is agreed that the claim for loss in the UK is further reduced by a significant amount. It is --

THE CHAIRMAN: I think the reduction amount should be -- should not be confidential. In other words, the difference between the two figures in your paragraph 6.

MR BREALEY: Well, I -- this is maybe for Mastercard to -- I understand that what Mastercard are concerned with, they do not mind the 11 billion, they do not mind the 700 million, and they do not mind the punchline --

THE CHAIRMAN: 200 million.

MR BREALEY: Well, no, they do not mind the punchline at paragraph 9 of the skeleton, which is 171 million, but

what they are concerned about, as I think you mentioned right at the beginning, is extrapolating in between.

Now, to a certain extent, as I say, it is maths. I understand the sensitivity on pass-on, but I am certainly not going to suggest that Mastercard have accepted any pass-on rates. From my own perspective I would like the green taken out, but I understand Mastercard's position on this, so that is why I am just referring to "a significant amount" rather than the amount in green.

THE CHAIRMAN: Yes. It was the 700 million. Technically it is 707, is it not?

MR BREALEY: Yes, sorry, I am kind of -- I am rounding off. I apologise.

THE CHAIRMAN: Yes.

MR BREALEY: But due to this conceptual flaw, it is reduced by a further significant amount.

So that is step 2.

Then we come to step 3 which relates to the limitation period, and we refer to this in paragraph 7 of our skeleton. So as the Tribunal knows, by its judgment dated 18 June 2024, the Tribunal ruled that all English and Northern Irish claims relating to loss before 20 June 1997 were time-barred, so there was a limitation period that kicked in, and it is agreed

between the parties and the experts that this ruling reduces the claim by a further significant amount. It is in green at paragraph 7 but I leave it in green for the time being.

THE CHAIRMAN: Just to be clear, that is also inclusive of interest?

MR BREALEY: At the moment it is all -- I am going to -- the last and final step we will deal with interest.

THE CHAIRMAN: Yes, but the amount by which it is reduced --

MR BREALEY: It is still inclusive of interest, yes.

Now, I turn to step 4 which concerns pass-on and we deal with this at paragraph 8 of the skeleton. The proposed settlement date of 3 December 2024 occurred during the pass-on trial to determine the extent of acquirer pass-on and merchant pass-on, and we know that judgment will not be given for some time as the proceedings have not yet concluded.

Now, I emphasise, on behalf of Mastercard, the rates of pass-on are not agreed, so what I am about to say does not commit Mastercard to anything. But in my submission the maths can be agreed on certain assumptions, and all I do in step 4 is offer some assumptions, and I am not suggesting that these are the rates that Mastercard has accepted. Its views are confidential.

THE CHAIRMAN: Or indeed I do not think your client has accepted them either.
MR BREALEY: Yes, quite. But I think it is important for the Class to know that the steps -- the pass-on can also reduce the figure by a significant amount.
THE CHAIRMAN: Yes.
MR BREALEY: As regards acquirer pass-on -- and we refer to this in paragraph 8 -- the Tribunal in the pass-on trial could adopt a pass-on rate of 75% which is contained in a recent report of the Payment Systems Regulator, so an independent report. The regulator has calculated that acquirers absorbed 25% of the overcharge in blended merchant service charge contracts, and these are contracts where Mastercard and Visa MIF is comprised in the overall merchant service charge and not itemised separately.

Now, on the assumption that the Tribunal were to adopt the regulator's pass-on rate, the claim would be reduced by a further 25%, as 25% of the EEA MIFs could not be reflected in higher retail prices in the UK. So that is just an assumption.

As regards merchant pass-on, this has been the subject of considerable debate in the pass-on trial. Mastercard considers that in the period of Mr Merricks' claim, merchant pass-on would have been very low, and

the retailers in the pass-on trial have submitted that merchant pass-on is also very low, from zero to 4-7% in certain sectors.

Now, just assuming 75% acquirer pass-on, and assuming -- not what the retailers say, but assuming a subsequent 70% merchant pass-on, the cumulative pass-on rate would be around 50%. The claim is reduced by 25% because acquirers absorb 25% of the overcharge, and the claim is reduced by a further 30% because retailers absorbed 30% of the remaining overcharge. So it is possible, on various assumptions, that Mr Merricks' claim at step 4 could be reduced by half a further 50%, which clearly is a significant amount.
THE CHAIRMAN: Just to say, you have given us these figures, and I cannot see why you should not have, and it is very helpful. They are highlighted in green in the document but, as you have explained them, this is not anyone's position, it is just the maths, if one takes those assumptions, and you explain the PSR assumption --
MR BREALEY: To be fair to -- so if I did the figure after step 4, then technically you might be able to extrapolate limitation and the previous step, so at the moment I am playing it cautious and trying to keep everyone happy.

So that is the amount at the end of step 4.

Then we get to the final step, step 5. Now, the final step concerns interest, and we explain this at paragraph 9 of our skeleton, and Mr Merricks, in his claim, claims interest at Bank of England base rate plus 5%.

Now, we know that the Tribunal's recent judgment in *Le Patourel* v BT ruled that an appropriate rate would have been Bank of England plus 2%. So he is claiming 5 and recently he got -- recently the claimants in *Le Patourel* -- and the Tribunal dismissed the 1 billion claim in its entirety -- would have only awarded Bank of England, BoE, base plus 2.

At paragraph 11 of the skeleton, at the end -- this is, as I understand it, not confidential because it is in Mr Garrard's witness statement -- we can see that the Funder's valuation of the EEA claims at circa -- is confirmed in paragraph 72 of his statement where he says, and this is not confidential:

"Even on the EEA claims case, the 200 million represents not a generous offer but one at, if not below, the bottom of any reasonable range."

Now, he does say it could be below, but he says it is at the bottom of any reasonable range, and we say, well, that is clearly evidence that a 200 million settlement is within a reasonable range. It is a

ballpark.

What I would also like to do is refer the Tribunal to two emails which are confidential to Innsworth, and so I am not going to, obviously, read them out, but if we can go first to an email dated 10 August 2023. Now, that is in intervention bundle 1, and if -- I do not know if -- I think we should look at them if we could. Intervention bundle 1.

I was told yesterday that we could not have any confidential on the screen, but I can give you the Opus --
THE CHAIRMAN: Right. Usually we get Opus; it does not mean that it goes on the live stream.
MR BREALEY: Correct, that is what I --
THE CHAIRMAN: But it may go to people in the room, I think that is the issue.
MR BREALEY: Yes, I mean I ...
THE CHAIRMAN: In which case ... and we do not have them in hard copy, I do not think.
MR BREALEY: You have not got intervention bundle 1?
THE CHAIRMAN: We have just got -- no, not as such.
MR MALEK: I have got my copy from the Interveners' bundle.
THE CHAIRMAN: I do not think we have exhibits. These will be exhibits to --
MR BREALEY: Yes.

THE CHAIRMAN: We have not got these.
MR BREALEY: Intervention bundle 1. It is quite --
MR MALEK: I presume it is in IMG1, is it, tab 4?
MR BREALEY: Correct, it is IMG1.
MR MALEK: Which page?
MR BREALEY: So that is tab D, and then it is at tab 6, so tab D, tab 6.
MR MALEK: Mine is not tabbed. Has it got a page number on it?
MR BREALEY: Well, no, it does not. Shall we go on Opus then?
THE CHAIRMAN: We were relying on Opus for exhibits and we would not normally have exhibits. What we can do, Mr Brealey, is when we take a break, if there are just two emails, if you give us the reference we will have them printed out and you can come back to them.
MR BREALEY: I am grateful.
THE CHAIRMAN: Do you want to give us the reference?
MR BREALEY: Okay. So, as I understand it -- my reference is Opus ...
THE CHAIRMAN: But we are not going to bring them up, we are just noting them.
MR BREALEY: Okay, WMIC-IBA/3/49. It is about -- I will not then go through it on the screen. It is about two-thirds of the way down, and it starts with a line

"Interest is a ... "
So this document, 10 August 2023, concerns what the Funder regarded was a realistic interest rate. So WMIC-IBA/3/49.
MR MALEK: What paragraph number is it?
MR BREALEY: Of the?
MR MALEK: Of that page.
MR BREALEY: It has not got a paragraph number.
MR MALEK: I have got the email in front of me, so whereabouts is it on the email?
MR BREALEY: Oh, okay, right. So if one -- sir, you have got 49, page 49? So if you go two-thirds of the way down, you have got "Interest is a key ... " That is the -- those three and a bit lines are what I wanted to refer to by way of on the interest.
MR MALEK: Yes.
MR BREALEY: The second email is, the Opus reference is WMIC-IBA/6/35.
I do not know, sir, whether you have the second volume of the intervention bundle, but it is exhibit BB8, and it is tab 3, tab I, and then we have a tab 10. It is quite complicated, but tab 3, tab I and then we have a tab 10.
They are quite important documents so maybe we should get them copied and then --

THE CHAIRMAN: Yes, we will. The date of this second email is?
MR BREALEY: The date of the second email is 15 November 2024.
Could I just pull this together. The combination of the five steps -- so we have the combination of the Tribunal's judgment on causation and limitation, the removal of the remote cross-border claim, some pass-on assumptions, an interest at base plus 2%, and that reduces the quantum claim -- and I can mention this, this is not confidential -- to around 170 million. 170 million.
Now, that is obviously below the 200 million settlement amount and, given the state of the litigation in December 2024, both Mastercard and Mr Merricks considered that the settlement sum of 200 million was in a range that was fair and reasonable and, as I say, the last email that I referred to, 15 November 2024, shows what the Funder, Innsworth, valued the cross-border claim at.
Now, that is all I want to say about the first sub-issue, the calculations that make up the 200 million, the five steps, and why we say, when we are looking at the EEA cross-border claim, we are in a reasonable range.

Now, clearly -- I now want to move on to the second sub-issue on reasonableness, which is what is the likelihood of a judgment being obtained for an amount significantly in excess of the settlement sum, and that is a relevant factor pursuant to rule 94(9)(c).
So again, just to recap:
"In determining whether the terms are just and reasonable, the Tribunal shall take account of all relevant circumstances, including ...
"(c) the likelihood of judgment being obtained in the collective proceedings for an amount significantly in excess of the amount of the settlement ..."
I ask the Tribunal just to note that (c) refers to the likelihood of judgment, it does not refer to the likelihood of further negotiation, for example; it refers to judgment, which is not an unimportant point.
Now, there are clearly two main issues to be considered under rule 94(9)(c), the two main issues as to whether Mr Merricks could get an amount significantly in excess of the settlement sum. The two main issues are -- the first is the litigation risk of a further causation trial, and the second is the litigation risk of pass-on.
Now, we explore these issues at paragraphs 34 and 50 of our skeleton, but I will take the causation trial,

the second causation trial, first.

Probably the most significant issue in the collective proceedings has been the causation issue because it affects, in principle, 95% of the claim. As this Tribunal well knows, the issue that was tried was whether the inflated EEA MIFs caused the UK interchange fees also to be inflated, did high EEA fees cause the UK fees to be higher, and the Tribunal comprehensively said no.

I would just like -- I know, sir, you know it backwards like the back of your hand, but I do need to go to the judgment.

THE CHAIRMAN: Well, my two colleagues were not in that case, so for them it is not so familiar.

MR BREALEY: I am sure they have read it, but I do need to make some points about it.

So it is authority tab 6 {AUTH/6/70} and the first paragraph that we need just to look at is paragraph 171. So this was the causation trial, whether the inflated EEA MIFs caused the UK MIF fees to be inflated as well.

At paragraph 171, the Tribunal says:

"We accordingly reject the CR's allegations that the EEA MIFs which were set in the infringement period ... had any significant causative influence, as alleged, on the level of interchange fees, whether bilateral or

multilateral, that applied to UK domestic transactions."

Now, at paragraph 172 -- we will just look at the first sentence because this is the counterfactual:

"We make clear [the Tribunal says] that we are not making any findings as to whether the position would have been the same in a counterfactual world where the levels of EEA MIFs were zero throughout, or very significantly lower than they were."

So in other words, the Tribunal is not making a ruling as to what the position would have been in a counterfactual world where the EEA MIF was zero. The question that was left open was whether, in a hypothetical world, a zero EEA Mastercard MIF would have influenced the domestic fees to be lower.

So put another way, the Tribunal found that in the real world, the EEA MIF did not influence the domestic fees upwards, but would a zero EEA MIF have influenced the fees downwards? This is the issue the Funder wants Mr Merricks to litigate or, it seems, to negotiate further.

There are six factors I would like to refer to, six factors that I would ask the Tribunal to consider whether a successful second causation judgment could be obtained, whether there is -- it was the words in one of the Australian authorities that the Tribunal sent

yesterday, whether there is a significant risk of getting a significant amount more. Is there a -- these six factors all refer -- relate to whether there is a significant risk that a further causation trial would fail.

Just while I have got it to hand, sir, it was one of the Australian cases you sent yesterday. It is the *Petersen Superannuation* Fund case at paragraph 65, where:

"The range of reasonableness of the settlement in light of all attendant circumstances."

The court says:

"... I am satisfied that the proposed settlement falls comfortably [within] the range ... As I have said there is a significant risk that if the case proceeds to hearing the applicant's claims will not succeed ..."

So these six factors are concerned with is there a significant risk.

So the first factor -- I referred to six -- the first factor concerns the Tribunal's findings on the zero counterfactual in the causation trial, because the Tribunal did in fact make findings as to the lack of any influence of a zero EEA MIF on UK interchange fees.

Now, if we go back -- if we have got the causation judgment to hand, it is paragraph 170 {AUTH/6/70}. The

Tribunal says there:

"In addition to the levels and movements in the respective MIFs over the periods discussed above, there was the dramatic example of what happened in June 2008 ..."

That is when Mastercard had to abolish them.

"... when all Mastercard's EEA MIFs were reduced to zero following the decision, but the UK MIFs were not changed."

The Tribunal goes on to find that even when the Mastercard EEA MIFs were zero, the domestic MIFs did not change. They stayed at the same high level.

So this is a challenge for Mr Merricks because here is a dramatic actual example of what would have happened in the counterfactual. Very often findings in the actual do relate to the counterfactual. Here is a finding in the actual which is highly relevant to the counterfactual.

So that is the first factor I would ask the Tribunal to consider on significant risk, the findings at paragraph 170.

Then if we go to paragraph 172, the second sentence, the Tribunal is -- in the counterfactual world, the Tribunal said:

"That would depend on the various assumptions made

about that counterfactual world, including whether the levels of Visa MIFs would have been different ..."

Just stopping there, the second factor refers to Visa. Mr Merricks would need to prove that the Visa MIFs would have been different, basically lower. We deal with this at paragraph 39 of our skeleton, but this is a challenge because the Tribunal found that in the real world the most significant influence on the Mastercard MIF was the Visa MIF.

So the question arises what would change in the counterfactual? How would the link be broken? Relevant to this question, to what would happen to Visa, it is important I think to go to the Court of Appeal's judgment on exemption.

That is at authority 74 {AUTH/74}, on page 48 {AUTH/74/48}. It is paragraphs 159 and 160. So paragraphs 159 and 160 of the Court of Appeal's judgment in *Merricks v Mastercard* on exemption.

At 159 and 160 -- I will not go through it because the Tribunal know it -- but the reason that the EEA MIF is zero in the counterfactual is because Mastercard failed to discharge its burden of proof. It ran its exemption defence way back when, at a very high level of abstraction, based on economic theory.

So the reason we get an EEA Mastercard MIF at zero

is because the Court of Appeal, and this Tribunal, found that Mastercard had not discharged its burden of proof in the specific circumstances, but, the fourth and fifth line of paragraph 159, it does not mean to say that Visa's EEA MIF would be zero. It does not mean to say that Visa would not deal with exemption differently and get an exemption. It does not mean to say that Visa's -- essentially the challenge is that a zero Mastercard EEA MIF in the counterfactual does not necessarily mean a zero Visa EEA MIF, let alone a much reduced Visa domestic MIF.

So the challenge in the counterfactual is trying to work out whether Visa would have been different, as the Tribunal says at paragraph 172.

The third factor I would ask the Tribunal to consider concerns evidence, and we refer to this at paragraph 40 of our skeleton. If we go back -- so paragraph 40 of our skeleton. If we go back to paragraph 172 {AUTH/6/70}, we see the Tribunal highlighting the challenges, the significant risks, to Mr Merricks on the counterfactual:

"That would depend on the various assumptions made about that counterfactual world ..."

We have seen Visa.

"... including whether the levels of Visa MIFs would

have been different and whether the Eurocard/Mastercard rules would have been the same (eg as regards fraud ... and chargebacks). We note that in his written opening, the [Class Representative] suggested that in that counterfactual world the structure whereby UK MIFs were set could have been different and Mastercard might not have removed [the] authority to set UK MIFs in November 2004. We note also that Mr Sideris suggested in his evidence that if issuing banks lacked the income from interchange fees in respect of consumer cards, they might have imposed fees on card holders."

It goes on to say it is not a matter for the trial.

But on any view, the zero counterfactual is based on assumption upon assumption: what Visa would have done, what issuing banks would have done, what Mastercard would have done. It is assumption upon assumption; and as Mr Merricks says in his witness statement, the challenge he faces is proving what Visa would have done, what Mastercard would have done, what the issuing banks would have done. He simply does not have access to these sources of information, he says. In short, if he did identify the counterfactual, he has challenges proving it. I do not say he cannot overcome it, but it is a challenge, it is a significant risk.

The fourth factor --

THE CHAIRMAN: I think he explains, or Mr Bronfentrinker explains the difficulties he had of getting evidence, even on the factual --

MR BREALEY: On the factual, yes.

THE CHAIRMAN: -- case, let alone the counterfactual.

MR BREALEY: Let alone the counterfactual when he is going to have to show, as I say, what Visa would have done in the counterfactual, what the issuing banks would have done. All counterfactuals are, as we know, speculative.

The fourth factor I ask the Tribunal to consider -- and this is a simple point -- is Mastercard's view of the merits, the merits of a successful judgment in a second causation trial. Now, obviously this is confidential and only the Tribunal has seen it, but I doubt it says that Mr Merricks is bound to win.

The fifth factor concerns the advice given to Mr Merricks by his own lead counsel as to his chances of success, what was his litigation risk. We refer to this at paragraph 37 of our skeleton. The advice is confidential and I say no more about it, but it is at paragraph 37 of our skeleton.

The sixth factor concerns the Funder's own position, and there is another passage in the email of 15 November 2024. I will just give the reference because we will have it photocopied for you. But it

is -- whereas the previous bit was on page 35, this is on page 36, and it is around about the fourth paragraph down. It is the line beginning "As to our thoughts ..."

Now, this is confidential, I obviously will not refer to it, but the Tribunal can ask the question: to what extent does that evidence a likelihood of obtaining a judgment for billions, or a sum significantly in excess of the settlement sum, a judgment significantly in excess of the settlement sum?

So those are the six factors which are relevant to the likelihood of a significant amount being awarded in a second causation trial.

Now, balanced against ... I might be -- I might be another, say, 20 minutes and maybe I can finish and then -- finish around about 12. I do not know what time we need a break, that was all I was -- not quite yet, I would not have thought.

THE CHAIRMAN: I think not quite yet.

MR BREALEY: Balanced against the litigation risk of the causation is the litigation risk of pass-on and this cannot simply be dismissed. So if Mr Merricks had rejected the 200 million and held out for more, he would be faced with a judgment in the pass-on trial perhaps this year.

Then the question arises, what is the litigation

risk of zero pass-on or very low pass-on? For example, if the Tribunal reaches the same conclusion as in *Sainsbury's v Mastercard*, merchant pass-on is zero, and this would extinguish Mr Merricks' claim and the settlement sum in its entirety, and in my submission it will be foolhardy to say there is no risk of zero pass-on given that the only case to date has held there was zero pass-on. So that is one example.

Another example, there has been debate about whether the Tribunal should accept Mr Merricks' economic expert evidence based on economic theory. The retailers have said that the better evidence is their evidence about how they treat costs.

Another example, Mastercard has argued that any pass-on would be very low in Mr Merricks' claim period, when payment cards were not so popular and therefore the interchange fees were not so visible.

I am not making anything new here. All these arguments have been publicly rehearsed in the -- in various forms at the pass-on trial, but the relevance of these known unknowns is that it cannot be regarded as certain that Mr Merricks will in fact achieve a pass-on rate that he feels he has obtained in the settlement, there is clearly a litigation risk that he will not, and he in fact brought certainty by agreeing the settlement,

and that should not be underestimated. Certainty should not be underestimated.

I then move to the third sub-issue. I said there were --

THE CHAIRMAN: As I understand, I am sorry to interrupt you, but if the pass-on judgment, if the case were to continue and the pass-on trial were to go badly for Mr Merricks, then you might not get for the EEA MIFs the level of pass-on that has been assumed in the settlement.

MR BREALEY: Correct. You might end up with 50 million, 25 million, you might end up with nothing. The Tribunal has the confidential advice of Mr Williams who has been in the pass-on trial for the whole time.

So it is -- the Funder saying are you going to roll the dice or do you buy certainty?

I said there were three factors to the reasonableness: the calculations, rule 94(9)(c), significant increase in the settlement sum, and the third is the likely duration and cost of the collective proceedings, and that is referred to in rule 94(9)(d) {AUTH/37/52}:

"In determining whether the terms are just and reasonable, the Tribunal shall take account of all relevant circumstances, including ...

"(d) The likely duration and cost of the collective proceedings if they proceeded to trial."

We set these out at paragraph 51 of our skeleton, but clearly there is significant litigation going forward. There would be a second causation trial, there would be a conclusion of the pass-on trial, there would be Mastercard's own counterfactual trial, there could be potential funding and certification issues which Mr Sansom raises in his statement at paragraph 5.66.

It is fairly obvious that there is scope for appeals to the Court of Appeal and possibly higher, particularly on pass-on.

Now, whilst the Tribunal clearly will not shy away from disapproving a settlement in appropriate cases, the flip-side raises some very important considerations. Mastercard does not want to be put to the expense of defending any further issues and both parties do not wish to be forced to litigate these issues that could continue for many years, and there is clearly a very strong public interest in allowing the parties not to engage in litigation contrary to their wishes unless there is a very good reason for insisting upon it.

That leads me to my last point, which I can take quite briefly, which is the Tribunal's position and how it should assess all these conflicting pieces of

evidence, particularly from Innsworth, the Funder.

I want to make two points on this. I will not labour the first point because the Tribunal knows it well, the principles we have set out in the skeleton, but the first point is the Tribunal has stated that it will not conduct a mini trial; it will adopt a broad brush approach and respect the settling parties' expert legal views. We submit that applying the principles that we have set out in the skeleton, adopting a broad brush approach, the settlement is just and reasonable.

The second point I just want to emphasise concerns the Funder's evidence, because the Funder's evidence is not really aimed at rule 94(9)(c) and a likely successful judgment -- and I emphasise "judgment"; the thrust of the attack is on the strategy, which I am sure we will hear at some point this afternoon.

They say he could have extracted more in a future negotiation. Quite how they are going to extract it from Mastercard, it must be a significant risk. But they complain that, for example, in the game of cards he stuck and did not twist. It is important on this strategy issue to note that Mr Merricks faced strategy considerations in autumn 2024 which, under the litigation funding agreement, fell within his sole remit, and I know the Tribunal has seen this, but it is

important to go to the litigation funding agreement.

Now, I have a salient documents bundle. It is at Opus -- I do not know if you want it in hard copy or electronic? You have got it.

THE CHAIRMAN: I think we have got it in our --

MR BREALEY: The litigation funding agreement -- just for the note, the Opus is --

THE CHAIRMAN: We have got it in a couple of places.

MR BREALEY: You have got it?

THE CHAIRMAN: Yes. If you give the Opus reference --

MR BREALEY: The Opus reference is WMIC-AB2/6/8.

The important clause is clause 4, "Role of the Class Representative". This is page 8.

Clause 4.1, as one would expect, because this is essentially very often a condition of certification, as one would expect:

"The Funder acknowledges that the Class Representative remains independent and is solely responsible for the conduct of the claims and the proceedings and that any and all decisions regarding the conduct of the proceedings are for the Class Representative to make in the best interests of the Class and in accordance with his obligations as a representative."

It goes on:

"The Class Representative also acknowledges that in the conduct of the claims and the proceedings he will at all times have regard to his obligations under this agreement."

But the important point to note is that the Funder is solely responsible for the conduct of the claims and the proceedings which includes settlement. Now, of course the Funder is entitled to be heard if it opposes the settlement, but lip service cannot be paid to the intention behind clause 4.1.

The Funder acknowledges that strategy decisions, the conduct, are predominantly for Mr Merricks to make, and why is that relevant? In my submission, in my respectful submission, it is relevant because the Tribunal should give weight to Mr Merricks' evidence and views as to the reasonableness of the settlement, otherwise we are not really giving full effect to clause 4.1.

So the strategy decisions taken by Mr Merricks deserve to be given weight when the Tribunal is assessing the evidence and adopting a broad brush approach.

PROFESSOR MULHERON: Can I just ask, is it true to say there was no attempt to resolve this under clause 13.2 of the Code by means of the dispute resolution mechanism

provided by the ALF?

MR BREALEY: You mean the KC -- the counsel? Well, I am not sure I can mention that in open court, but there was an issue about that which I can explain in closed session.

PROFESSOR MULHERON: Thank you.

MR BREALEY: But primarily it is for -- as you know, it is for the Funder to decide whether to settle. There is a process and it is --

THE CHAIRMAN: I think you misspoke.

MR BREALEY: Sorry?

THE CHAIRMAN: You said primarily it is for the Funder to decide --

MR BREALEY: I did misspeak. I am almost finished. I got it all wrong. It is for the Class Representative primarily to decide whether to settle. There is kind of a safety valve. It did not happen in this case, for reasons that are in blue, but we can deal with --

THE CHAIRMAN: We have got the clause that perhaps Dr Mulheron was referring to at 7.2, have we not, in this agreement?

MR BREALEY: Correct, correct, and things moved on, but I -- it is -- I do not think it is confidential to say that it did not happen. Why it did not happen is another matter.

THE CHAIRMAN: Yes.

MR BREALEY: But I do submit that clause 4.1 should be given effect to. In essence, the Funder should be respecting the way that Mr Merricks has conducted the proceedings. It is not just a question of conflicting views; Mr Merricks' views have to be given weight when --
THE CHAIRMAN: 7.2, because that is specifically where we are here, namely:
"If the Class Representative wants to settle ... for less than the Funder considers appropriate ..."
That is exactly the situation we are in. Then there is the KC mechanism. Then there is the final sentence:
"The decision as to whether to accept or reject a proposed settlement will ultimately be solely for the Class Representative ..."
Was there an amendment to this agreement or not? That is what I am not quite clear as to what happened.
MR BREALEY: So there was an amendment but it has not come into effect, so we are proceeding on clause 7.2 as is stated there.
THE CHAIRMAN: Then the last sentence is quite significant, is it not?
MR BREALEY: Sorry, I am reminded it has come into effect, I am told, but it does not apply to these proceedings. So going forward, if a settlement is not approved, a second negotiated settlement would be subject to the

binding KC opinion. This is a non-binding KC opinion. Again, this is all in the various witness statements.
THE CHAIRMAN: Yes. Obviously clause 7.2 is not in blue.
MR BREALEY: No, no, but the reason --
THE CHAIRMAN: -- in green. The reason of what happened maybe, and you tell me that the new agreement, which is also not confidential, does not apply to this settlement.
MR BREALEY: I will be corrected if anybody objects, but I am told, and I understand, that it is the existing 7.2 that applies to the proposed settlement dated 3 December 2024.
THE CHAIRMAN: Yes. Would that be a sensible moment?
MR BREALEY: That is very good because I have finished, unless the Tribunal has any questions for me.
THE CHAIRMAN: Well, we will print out the two emails.
MR BREALEY: We will.
THE CHAIRMAN: If we have any questions on them we will come back with that, but we will have a look at them and we will come back at about midday.
MR BREALEY: Thank you.
(11.49 am)
(Short Break)
(12.07 pm)
THE CHAIRMAN: Sorry, Mr Brealey, we took a few minutes

longer, but we have got the emails which we have now read.
MR BREALEY: Okay. No questions or ... No. Thank you.
THE CHAIRMAN: No, we will see what (inaudible) say about them.
Yes, Ms Tolaney.
Opening submissions by MS TOLANEY
MS TOLANEY: Sir, the Tribunal is aware that this is Mastercard's joint application and may I start with six overarching points.
The first point is that both parties to the settlement have, as you have seen, served extensive evidence setting out how the settlement was reached, both in terms of the amount agreed and the negotiation process, and both parties have provided extensive and frank assessments of the merits of the case, which has formed the basis of the settlement reached.
Secondly, and relatedly, there is no doubt that in this case the parties themselves are best placed to assess the merits. The litigation is complex, it has been on foot for a long time, and there are a range of different permutations in relation to the outcome on the various issues as the evidence sets out in some detail.
The third point is that it is clear from the evidence that the settlement reached by the parties

resulted from an arm's length negotiation between sophisticated parties who are represented by experienced and capable lawyers, and each side negotiated the agreement with the benefit of its careful and considered assessment of the amounts that Mr Merricks could reasonably expect to recover, weighing this with the costs and risks of continuing the litigation.
So in those circumstances, we suggest that the starting point for the Tribunal is that the settlement is likely to reflect a fair assessment of the merits and the costs and risks of the litigation, and I am going to come on to look at a few of the authorities, including Canadian authorities if the Tribunal wishes to see them, just to make good the relevant approach.
The fourth point is that Mr Merricks has acted in the best interests of the Class, as his evidence clearly states. The Tribunal is aware that Mr Merricks trained as a solicitor and is a very experienced Class Representative who has been involved in this litigation for over eight years, and he has been robust in advancing and defending the interests of Class members in multiple hearings, both in front of the Tribunal and at different levels of the court.
The settlement sum of 200 million that he wishes to accept is both objectively a good outcome for the Class,

and it is also an outcome that he considers to be a good outcome for the Class in his discretion as the Class Representative, and again that is very compelling for the Tribunal.

That takes me to my fifth point, which is that the sum of 200 million is in both parties' assessment, as you have heard this morning, more than the Class can reasonably expect to obtain if Mr Merricks was to press on with the claim.

Now, you have heard about how the relevant figure of approximately 170 million has been reached, and Mastercard gives its evidence about that figure in Mr Sansom's witness statement at paragraph 2.3, and that is -- we can bring this up -- in the non-confidential bundle, so {NC-IBA/10/4}.

THE CHAIRMAN: This is Mr Sansom's eighth --

MS TOLANEY: Ninth statement, I think.

THE CHAIRMAN: Ninth, is it?

MS TOLANEY: It is the ninth statement, at paragraph 2.3, and what you will see there is that there is in reality, in Mastercard's assessment, and indeed if one follows through Mr Brealey's submissions, a very real and significant risk that the claim would in fact fail in its entirety, and there are several realistic scenarios under which Mr Merricks could end up recovering nothing,

or almost nothing for the Class members, as Mr Sansom explains.

Once you have read paragraph 2.3 I can show you that.

(Pause)

So you will see, at paragraph 2.3, the evidence that the sum represents a premium above the range of realistic outcomes.

At paragraph 2.4 he refers to the approach taken to the analysis, and over the page, please {NC-IBA/10/5}, he has -- he says in terms that he explained in his eighth statement that:

"... a realistic outcome is that the Tribunal will find that the impact of these issues will be to erase the claim value entirely or reduce it substantially."

At paragraph 2.5 he sets out how various permutations could play out.

If one goes over, please, to the next page --

THE CHAIRMAN: Just a second.

MS TOLANEY: Sorry.

(Pause)

MR MALEK: Ms Tolaney, in paragraph 2.3 you say that your client was willing to pay a premium for the reason that you have given there. When you look at paragraph 2.5(c), in agreeing to the settlement sum of

200, did you give any value at all to that?

MS TOLANEY: To what is in --

MR MALEK: 2.5(c). Did you give any value at all to the possibility --

MS TOLANEY: Yes.

MR MALEK: -- that he might lose on that.

MS TOLANEY: Yes.

Yes, we did.

Then if we could look at, please, 2.6 {NC-IBA/10/6}.

(Pause)

So that is the key point.

If we could look at, please, paragraph 3.14, which is at page 17 {NC-IBA/10/17} -- sorry, I have got a bad reference, I think. Over the page {NC-IBA/10/18}. You will see here in the evidence of Mr Sansom that there would not have been an increased offer, that was the highest point. So it was either a settlement at this level or no settlement at all, and that is the clear evidence before the Tribunal.

MR MALEK: On that, was it a factor, in reaching that view, that the Class Representative had not produced a clear basis or a pleading for its case on the --

MS TOLANEY: Counterfactual?

MR MALEK: -- counterfactual?

MS TOLANEY: The answer to that, sir, is that the case

advanced by Mr Merricks was sufficiently clear for Mastercard to be aware of what it was, so the pleading point taken by Innsworth is not right in the sense of there is no suggestion that Mastercard does not know what the case is, but the position is that case is so weak, and it has not even been properly pleaded, and if it were, we consider it has no real prospect of success, and I can come on to address you on that.

MR MALEK: You can take a view that you are looking at your opponent and you can say "Well, clearly they do not have much confidence in their own case because they have not produced even a draft pleading or a detailed analysis."

MS TOLANEY: Indeed.

MR MALEK: Then the next question is to what extent was the fact that Mastercard could feel that there might be a funding issue, or a dispute with the Funder, that gave Mastercard the confidence to take the line it did?

MS TOLANEY: That is a separate question --

MR MALEK: It is a separate question.

MS TOLANEY: -- and there is a point on that, which is covered, and again I will come to it --

MR MALEK: Okay.

MS TOLANEY: -- which is that certainly there is a real prospect -- as far as the Tribunal is concerned -- that this claim in its current state could no longer be

certified, given the spectre of the dispute now between the Funder and the Class Representative. So that is also a relevant factor to the prospects of success of this claim.

MR MALEK: That was a relevant factor that your clients took into account in settling this claim?

MS TOLANEY: I do not believe so but I can take instructions on that.

It is not relevant to our assessment of the counterfactual causation claim.

MR MALEK: No, but it can be relevant when you are entering into a settlement if you feel, firstly, the other side do not have the confidence of their case on the counterfactual, because they have not even produced a detailed analysis or a pleading on it; and secondly, you think that there is an issue about funding and a dispute between them, in which case you can say "Well, look, I can take a much tougher line on this because I can smell blood".

MS TOLANEY: I do not think that is our position. Our position is that those two aspects in fact could lead to a recovery of zero, and in fact we have agreed a settlement that is significantly higher than zero, and what I would say to you is that those scenarios, being quite real scenarios, should give this Tribunal real

comfort that the Class Representative has done very well for the Class, and Mastercard's position is that it is willing for certainty, and to end the litigation, to pay at that level, which it recognises is a premium above the lowest point it has calculated, and indeed the fact is that there are many scenarios in which it would be a very significant premium, potentially, but Mastercard itself gets the certainty of ending this litigation rather than fighting through all those processes, including the decertification, potentially.

So, no, it is not relevant. I think your question is did that mean that we feel we got a better deal because of those two factors? No, because actually those two factors should reassure the Tribunal that there is really no merit to this claim at all.

MR MALEK: But the fact is those two factors are there, are they not?

MS TOLANEY: They are, and I will come on to that. They are part of, and support Mr Sansom's evidence that I have shown you, that there are realistic scenarios where the recovery could be zero. Put another way, there is no doubt -- and you have heard this from Mr Brealey -- that certainly the counterfactual point presents a real challenge to Mr Merricks that cannot be underestimated on so many levels, both as a matter of law in light of

this Tribunal's judgment on factual causation piece, and the lack of evidence with no witnesses. You have heard all of that. So there is a very real risk on that. Similarly, now the funding issue has developed in the way it has, there is also a very real risk on decertification were this claim to continue.

MR MALEK: Yes.

MS TOLANEY: So the Tribunal can be very satisfied that this case faces very large hurdles that the parties are well aware of and in fact are coming to this court both saying "We accept those issues with the case".

THE CHAIRMAN: Can I ask you a slightly different question. To what extent were your clients influenced by the timing of the settlement, namely that it meant that, if accepted, Mr Merricks drops out of --

MS TOLANEY: Of trial 2.

THE CHAIRMAN: -- the pass-on trial, and that therefore there is a benefit to Mastercard of a settlement now which, after closing submissions which have not happened yet, or let alone judgment, would not be there, so that there is a sort of premium in -- which would no longer be available to Mr Merricks if this was being negotiated later.

MS TOLANEY: There is absolutely no premium because, because of the approval process, the trial had to be completed

up to the point of closing submissions, so all the evidence --

THE CHAIRMAN: No, it has not been completed. Closing submissions have not happened.

MS TOLANEY: Up to the closing submissions.

THE CHAIRMAN: Up to the closing, yes.

MS TOLANEY: So all the evidence has already happened and Mastercard's expert has been cross-examined by Mr Merricks' expert.

The point that both the merchants and, at times, Mr Merricks' counsel -- and it was hard fought, that trial, and it finished just before Christmas, we are returning shortly, and the point that was made over and over again was that there was an inconsistency in Mastercard's position on pass-on, because it was saying high pass-on on one and low pass-on on the other, and much was made of that point, so any mileage in that point has happened.

In fact, the submission is completely wrong, and we explain that to the Tribunal and had some traction with it, I might say, in that Mr Merricks' claim period is a very different claim period to the merchants' claim period and there are different considerations that arise, plus there is a paucity of evidence on Mr Merricks' case as he has not adduced any proper data

and, as Mr Brealey said, he relies on expert evidence as to what the textbooks say about pass-on, which does not engage with any of the real world evidence.

THE CHAIRMAN: I appreciate these are all Mastercard's arguments.

MS TOLANEY: Exactly.

THE CHAIRMAN: One might think --

MS TOLANEY: The reason I --

THE CHAIRMAN: -- Mr Merricks had not been in that trial.

MS TOLANEY: Indeed. The reason I make the point is twofold. One is that all the points taken against me have been taken against me, so there is absolutely no premium, I have had to address them. Secondly, the suggestion that there would be a benefit is slightly misconceived anyway because, as I have just explained, we have a case that crosses both periods, so we do not need Mr Merricks to drop out to run the case that we have run, and we say our case is entirely consistent with *Trucks* and that is the case we presented.

Now, that is the case we will close on, irrespective of whether Mr Merricks drops out, because that is our case. So there is absolutely no premium. The only premium might be we save one day, which is a premium but not much of one.

MR MALEK: Ms Tolaney, so when it comes to having agreed

this settlement, that was not a material factor.

MS TOLANEY: No, it was not, and it could not be.

MR MALEK: You are very frank on that.

MS TOLANEY: It could not be because of the timing.

MR MALEK: I understand that.

MS TOLANEY: It might -- there was a suggestion at one stage that if one could reach a settlement you would save costs, and obviously that trial took a long time because it was a multi-hander, so I think it added a good week or so having Mr Merricks' involvement and witnesses and cross-examination, and of course we had to cross-examine his expert for I think two full days, so that could have been a saving, but in the end it did not materialise. But there was no saving in terms of our position because we are committed to our position.

MR MALEK: Yes. That is helpful, thank you.

MS TOLANEY: So with those introductory remarks, may I outline the structure of my submissions, and I can take this as quickly as you wish.

THE CHAIRMAN: Just so I am clear, I am not sure I got your sixth point.

MS TOLANEY: The sixth point -- you are quite right, because I had not yet made that sixth point.

The sixth point was one that you, sir, made, which is the question is not whether the settlement reached is

the one true, correct, best settlement; rather, it is whether it is within a range, and the parties are best placed to assess that range. They are both clear that it is within that range, and they have explained why, with evidence from very experienced solicitors who have been involved in the case, and the Tribunal can be satisfied about that.

It is relevant to have that in mind because the Funder's attack is, we suggest, at a different target, which is has Mr Merricks got the best possible settlement he could possibly have got, and we say that is just not the right question. We say the Funder is wrong about the arguments made, but in any case they are asking the wrong question.

MR MALEK: On the question of having regard to the assessment of the parties on the reasonableness of the settlement, you can have a wide range of scenarios. If you look at the ones I have looked at in the past, where you have not got the history of all these judgments --

MS TOLANEY: Indeed.

MR MALEK: -- you have not got the causation judgment, and you say to yourself "Well, look, we have a one-day hearing, are we going to be able to sort of second-guess when it does seem to be within a range to us", to this type of case where there is a lot of history, you have

got the causation judgment, a number of issues have been done, and we may be in a much stronger position to even have our own views about the prospects of success, let us say, overall, for example at the next causation trial, than we would have in many of these cases where they settle early.

So I do accept that we should be having regard to your views, but I do not think it is as simple as that where there is a lot of information and we can see for ourselves, possibly, where the merits actually lie.

MS TOLANEY: So I fully accept that, and you -- this Tribunal is very experienced and well placed because of both involvement in the case and the history.

What I will come on to develop -- and this is my first point of my submissions -- is the correct approach to a settlement approval process, which I know this Tribunal is very familiar with, but one of the points I was going to come on to make, and I shall make good, is that the Tribunal is usually not well advised to substitute its own decision on the merits for that of the parties, because it is a question of standing back and having in mind that the parties, even if they take a different view of the merits than the Tribunal might take, might have their own reasons. So I was going to come on to that.

MR MALEK: Okay.
MS TOLANEY: I do not suggest that the Tribunal should be blinkered in any way, but I would suggest that the starting point -- and certainly this comes out of the Canadian authorities very clearly -- is that in a sense, the Tribunal recognises that where negotiations have been at arm's length and hard fought, with competent legal advisors and sophisticated parties, that they can be satisfied that the amount reached is a number both sides can live with for the reasons they have said.
THE CHAIRMAN: I think the only point being made is that it is a matter of degree, perhaps, where you get a settlement put forward to the Tribunal right at the outset of proceedings.
MS TOLANEY: I understand that.
THE CHAIRMAN: Or indeed, as the statute envisages, even before proceedings start, the Tribunal really has nothing to go on, other than what the parties' lawyers tell it. In this case we have a lot of additional material, which indeed you are relying on --
MS TOLANEY: Indeed.
THE CHAIRMAN: -- in terms of judgments and views expressed, so we can take those into account, as it were, independently.
MS TOLANEY: Indeed. If I can put it this way, the Tribunal

I think, with its own independent judgment, would in my respectful submission reach the same conclusions the parties have, and in a sense what you can say is that you do not need to substitute your own decision for the parties, but you independently can concur with it, having had the material before you.
So may I then outline the structure of my submissions. There are three topics. The first is, as I said, the approach to settlement approval, which I appreciate will be very familiar to those I am making submissions to, but I would like to show you some Canadian authorities, if you would like to see them.
The second topic is the key evidence from the parties as to the merits and the costs and risk of continuing the litigation. Now, Mr Brealey has developed some of these points, and the only point I was going to focus on was the very real prospect of the claim failing in its entirety and providing zero benefit to the Class, covering a couple of the points that you have asked me about.
Then the third topic was responding to the points that we can see are being made by the Funder. I say that quite cautiously, because we have not actually seen a lot of the material which has been redacted, but there are some points that we can see are being taken that we

can address and would be well placed to address.
So turning then to the first topic, I have four points. The first point is that in considering whether a proposed settlement falls within the range of just and reasonable settlements -- and this is the point I was developing -- the Tribunal typically conducts a fairly high level review, putting a fair degree of trust in the parties' legal representatives and without pressing to substitute its own assessment for that of the parties, and we see that from the Guide, which is in the authorities bundle at tab 14, and it is page 7, please {AUTH/14/7}.
We are looking at paragraph 6.124 which is right at the bottom. If we go over the page, please {AUTH/14/8} to the top of that page, if we can blow it up a little bit, and it is really the two sentences which I accept:
"... the Tribunal will closely scrutinise the proposed collective settlement. However, the Tribunal will not require the settlement to be perfect and there is likely to be a range of ... settlements which could be approved by the Tribunal."
Then if we look on to paragraph 6.125.
(Pause)
If we go down the page, please, to the heading:
"The likelihood of judgment being obtained in

collective proceedings ..."
So if we could blow that up, please. You see that passage:
"... the Tribunal need not conduct a detailed analysis of the claims to determine what it would have awarded in damages (if anything) ... Rather, the Tribunal will adopt a broad brush assessment of the position, having regard to the prospect of success and estimated quantum of damages."
Now, obviously I take the point that the Tribunal has in this case very detailed evidence on these matters and a lot of material, but that still does not detract from the general principle that the review is necessarily a high one -- high level one, and the Tribunal has to have some awareness that there may be all sorts of factors at play.
Then it is also worth looking at the two paragraphs below, please, so going down or over the page {AUTH/14/9}, thank you.
So the heading:
"Any opinion by an independent expert and any legal representative of the applicants."
Now, Mastercard's legal team are very conscious of our professional duties to the Tribunal and have had full regard to those duties in presenting our evidence

and submissions on the merits and the costs and risks of litigation, and I am going to come back to one of the points the Funder makes, that there should have been an opinion of an independent expert, but you will see that there is in fact no requirement; there can be an independent expert or it can be the lawyers advising the Class.

THE CHAIRMAN: No, that is clear.

MS TOLANEY: Indeed.

THE CHAIRMAN: On the points you just made, I see one of the Commonwealth authorities, I do not know if it is one we have before us, in fact says that on a -- I think it is a Canadian case -- on this kind of application there is the same duty on the parties of full and frank disclosure that you would have on an ex parte injunction application, and indeed makes the point that even more so, because at least with an ex parte injunction there is usually then a subsequent inter partes hearing, whereas here, if the settlement is approved, that is it, so this is the final show, and so parties ought to be mindful of that duty, and I think that is the point effectively you are making.

MS TOLANEY: It is.

THE CHAIRMAN: But it seems to me that is probably the correct approach, is it not? There ought to be that

duty for these applications.

MS TOLANEY: Well, and in a sense you can be satisfied that each side has fulfilled that duty, because each side has put before the Tribunal confidential information as to the frank assessment of their assessments of the risk, the advice they have had from counsel on prospects. Each side -- and we have not seen each other's -- has a written opinion from counsel involved in the case saying what they would advise their clients as to the prospects, and that is why each side has been sensitive because we are in ongoing proceedings.

THE CHAIRMAN: Sure.

MS TOLANEY: So I think you can be satisfied that both sides have put before the court material that they do not wish the other to see.

THE CHAIRMAN: No, clearly. But I think, and I think you accept, that it is appropriate to say that that duty would apply to this sort of application.

MS TOLANEY: I do not -- I would not call it a full and frank duty, because typically the full and frank would require you to outline all the arguments to the other side, and here, as each side is full and frankly saying what advice they have had, in a sense they are doing that, but I cannot say, having not seen the information that has been provided by Mr Merricks, whether the duty

has been approached in that way. What I can say to you is that Mastercard has certainly shown its full hand to the Tribunal and made its assessment, including saying that actually it thinks it is paying more than it should and explaining why.

So we have been conscious of -- and when Mr Malek is asking questions about what we have taken into account, I have been quite careful to take instructions on that so that we are extremely candid about the position, which I think we have tried to be in our material.

MR MALEK: On my part, I think I made it clear in the previous decisions that I do regard there is a duty of full and frank disclosure, and that if there are points that people are asking us to approve a settlement that go against what their -- the settlement being approved, I would expect that to be put fairly before the Tribunal --

MS TOLANEY: Yes, I can certainly see that.

MR MALEK: -- so that the Tribunal can assess it, and it is just the same as you have in many approval processes in the court where, for example, a settlement is being approved on behalf of a minor. You put the points for and against.

MS TOLANEY: Exactly, and I certainly would accept that. I think when I was answering the question asked by the

Chair, what I had in mind is in ex parte injunctions you would have sections saying "These are the different ways the argument might be put", because you do not know. So --

MR MALEK: (Inaudible - overspeaking)

MS TOLANEY: -- here there has not been that type of analysis because we know the way the case is put, including the unpleaded counterfactual, and we have engaged in that, but we have put before the Tribunal all the material, both sides, as to why the settlement should be approved, in very candid and full and frank disclosure terms.

The second point I was going to make under this topic -- I think I said there were four points -- follows from the first, and I have already made it in opening, which is the Tribunal is not tasked with identifying the single correct settlement amount and the Funder's submissions are hitting at the wrong target when they make that point.

The reason I say that is at paragraphs 20 to 21 of the skeleton argument served by the Funder they rely on a recently obtained probability analysis, and I can bring this on screen, it is {NC-SBA/3/7}.

Now, this is what we can see. The Tribunal will obviously have a version that we cannot see. But what

it appears to do is put a pound value, or tries to, on the claims based on various assumptions, multiplications and additions, and it appears that the Funder has commissioned a desktop valuation to be produced by a barrister who has had no involvement in the litigation.

Mastercard cannot see the analysis, and no doubt if it had, it would be submitting that it fails to take into account various matters, including the probability of the case failing in many ways. But be that as it may, on a more fundamental level of principle, the exercise is completely misconceived because it is incapable of actually telling the Tribunal whether the settlement is just and reasonable. Settlements in complex cases such as this can rarely be reached purely on a spreadsheet analysis of probabilities multiplied by pounds, because factual and legal issues can develop, every number in a spreadsheet would have to carry such a large confidence interval that any rigorous modelling would produce a wide range of possible numbers.

So an approach that relies on a spreadsheet analysis rather than an evaluative judgment made by those involved in the case is unlikely to provide any real guidance, but it is also unlikely to assist, because the Tribunal's task under rule 94(8) is not to identify some

theoretical balance sheet value of a claim, but simply to consider whether the terms of the settlement are just and reasonable, having regard, as I said, to one factor which is the parties think they are.

Now, can I come on to the settlement approval decisions that the Tribunal has before it, and we refer in our skeleton argument to three settlement approval judgments at paragraph 20, and that is at {NC-SBA/2/6}, and we quote from the first two judgments, *McLaren v CSAV* and *Gutmann*, but what I was proposing to do was to go straight to the more recent *McLaren* judgment which summarises and applies the key principles. That judgment is in the authorities bundle at tab 8. This is a judgment of a Tribunal chaired by Mr Malek KC, so certainly he will be very familiar with it.

The settlements were in collective proceedings seeking follow-on damages arising from the Maritime Car Carriers cartel, and you can see that at page 5 {AUTH/8/5} from the first paragraphs 1 to 3.

The Class Representative presented for approval two separate settlements with some but not all of the defendants, and the value of the settlement against the first group of defendants you can see at paragraph 12, which is on page 8 {AUTH/8/8}, and that was 24.5 million of which 8.75 million was for costs and disbursements.

If you please go over the page {AUTH/8/9}, you can see that at (a) and (b), (i) and (ii).

The value of the settlement against the other settling defendant is identified at paragraph 15, which is on page 11 {AUTH/8/11} and it is at (b). The costs are 5.25 million of a settlement of 12.75 million.

If one then goes over to the next page, paragraph 16 {AUTH/8/12}, page 12, the legal framework of the rules and guidance is set out.

If one then please goes to paragraph 21 on page 17 {AUTH/8/17}, the Tribunal addressed the risks of litigation, and if we can go over the page, please {AUTH/8/18}, the sentences that I wanted to focus on are -- start eight lines from the bottom with the passage:

"The Tribunal appreciates that not all claims brought by way of collective proceedings will have a successful outcome. The claims may fail at trial."

And so on, and if I could just ask you to read that.

(Pause)

If we could then please turn to page 27, to paragraph 50 {AUTH/8/27}, we can see that in this case the settlements only equated to a modest amount per car affected by the cartel, resulting in £8.63 per vehicle.

If one then goes on to page 33 {AUTH/8/33}, at

paragraph 67 and following, the Tribunal considers the settlement sums, and please could you read paragraph 67.

(Pause)

Then going on to paragraph 69, which is over the page, please {AUTH/8/34}, and 70, the important piece of context which I think Mr Malek had in mind is that the settlements were reached here very shortly before the trial that would determine quantum, so the Tribunal had the detail of each side's evidence on quantum but not their opening submissions, but nevertheless there are points of general application within these paragraphs, and the short point is that both sides to a settlement pay for certainty and for the avoidance of costs of continuing to litigate, so if I could ask you to read those two paragraphs, please.

(Pause)

If we could please then go over the page to page 35 to look at paragraph 73 {AUTH/8/35}. In this case the Tribunal had considered that there was:

"... a real possibility that the [Class Representative], had they taken this matter to trial, would obtain sums in excess of the sums agreed in these settlements. On the other hand, there is also a real possibility that the defendants may be successful at trial in reducing the level of damages below the

settlement sums. The litigation uncertainty, therefore, justifies these settlements and informs the reasonableness of these figures."

In this case there was obviously material going each way, and nevertheless the settlement was agreed even if it meant a low return.

Then please if we can go over the page to paragraphs 75 and 76 {AUTH/8/36}, this simply refers to the benefit of the submissions made by experienced counsel and experienced solicitors.

MR MALEK: Just on one point. I do not regard that the settlement here in that judgment you are reading was a low return.

MS TOLANEY: Right.

MR MALEK: I regard the settlement in this case as a low return relative to the amount that was claimed on certification, but I did not regard that settlement as a low return. I thought it was a fair return.

MS TOLANEY: So I suppose what I would say is that the Tribunal was prepared to accept the settlement agreed by the parties, even though there was the possibility of the Class having -- if it had carried on -- made a better return.

MR MALEK: They could have got a better return, yes, exactly.

MS TOLANEY: So if I can put it that way, that the Tribunal did not suggest that because there was evidence to show they might have got a better return it would consider that the Class interests were not served by the settlement. Here there is actually quite a lot of evidence going the other way, that the Class is doing quite well out of this settlement. But I was saying even in circumstances where -- I think it is part of the Funder's submissions that the Class should carry on in case it could get more --

MR MALEK: Let us go back. When you say "quite well", you can say "quite well" in terms when you say you are confident we were going to win for the reasons you have given --

MS TOLANEY: Yes.

MR MALEK: -- but I would not describe at the moment that the outcome is a great outcome for the Class members given the amounts that were claimed initially and the amounts that are being paid out. So I do not necessarily accept -- you may say this is a fair settlement, and I understand all those points. It can still be a fair settlement without being a good result.

MS TOLANEY: Well, can I take that point head on, because that point relies on the premise that the claim was of a realistic value to start with.

MR MALEK: I know, but I am -- it is not a big issue. All I am saying is that you can have an outcome where you can say there is a fair settlement, even though the sum --

MS TOLANEY: Yes.

MR MALEK: -- relative to the amount you have claimed. It can still be a fair settlement or a reasonable settlement, but to say it is -- it does not mean it is a great outcome compared to what was opened when this case started.

MS TOLANEY: Yes. Well, I accept that, but can I put it another way: if a claim is brought for 100 million on a completely inflated basis and in fact is worth only possibly as much as nothing and maybe 5 million, and a settlement is agreed at above 5 million, it is a good outcome for the Class, because one has to recognise that the original claim cannot be looked at as having any real value when even the Class itself has backed away from the original claim as it was started. As Mr Brealey --

THE CHAIRMAN: They have suffered adverse judgments and they have fought hard to -- I think the point being made is if you start a claim, and you have been very clear that Mr Merricks is a very competent Class Representative, that he has been advised by capable lawyers and so on,

with all that you start a case and you say it is worth 16, it comes down to 11 billion, and you end up with 200 million, no one could say that is a fantastic outcome, could they? You can say that it is a reasonable settlement because of what has happened.

MS TOLANEY: Yes.

THE CHAIRMAN: But when you start these proceedings, if anyone said "Well, you are only going to get 200 million if you are lucky", that would have been seen as a pretty disappointing result.

MS TOLANEY: I do not need to press this point. The only reason I do --

THE CHAIRMAN: It seems a bit obvious.

MS TOLANEY: -- is it depends on what end of the spectrum you are looking at. If you do what Mr Brealey has done, and I think Mr Sansom does at times in his evidence, and start from the high number and justify how you get to the low, then undoubtedly that point is right. But if actually you start from the other end of the telescope and say, well, how do you get to any claim, and you end up with a result of 200 million when actually the realistic outcome is zero, then you could say that I am right to say it is a good outcome, if actually there is a real chance you could have ended up with nothing.

What I was saying about the inflated value of the

claim is true, because it is not just litigation risk and results, there are certain aspects of the claim, for example, the debit Solo cards, which were just conceded as no longer pursued, or the remote transactions, and actually it is quite a big step that it has been conceded that at least 95% -- and this is in Mr Merricks' evidence -- that 95% of the original quantum is either at serious risk or not recoverable.

THE CHAIRMAN: That is because of the causation judgment.

MS TOLANEY: Yes.

THE CHAIRMAN: Well, you cannot say the causation judgment was a good outcome for Mr Merricks.

MS TOLANEY: No, but --

THE CHAIRMAN: That is the only point being made.

MS TOLANEY: What I can say is --

THE CHAIRMAN: The case has not gone well for him.

MS TOLANEY: I understand that. But if you lose on causation it is hard to say -- on factual causation -- and it was always, sir, in my respectful submission, to say that a claim -- an infringement of EEA MIFs would read across to UK IFs. So to say that the claim genuinely held a real prospect of that -- we do not know what was advised, but to say it genuinely did and therefore this is not a good outcome gives weight to a claim that has been dismissed.

But I am not focusing purely on the causation, I am also focusing on aspects that were just conceded.

MR MALEK: All you need to show is that this is a settlement within the reasonable range.

MS TOLANEY: Yes, I do.

MR MALEK: You do not need to show that this is a great outcome.

MS TOLANEY: No.

MR MALEK: We are unlikely to find, as presently thought, that after a number of small -- not small fortunes, large fortunes have been spent by the parties --

MS TOLANEY: I understand that.

MR MALEK: -- a settlement at 200 million, of which it is envisaged possibly half go to the Class members, is a great outcome.

MS TOLANEY: Yes, I understand that.

MR MALEK: But you do not need to --

MS TOLANEY: I do not need to.

MR MALEK: -- a great outcome, it is just what it is, and we look at the question we have to look at.

It may be this great outcome point is more relevant for when we get to phase 2, and that does not really concern you, but we will come back to it later.

MS TOLANEY: That is right. I think it is fair to say that the reason I am making this point is because one of the

points that is taken as a sort of headline point is "Look how much the claim was said to be worth, this is obviously a bad outcome because they are being paid -- the end result is low", and the reason I am taking that head on as to say that if a claim was never worth that much, whether through legal decision or not, then you cannot start with the point against me, but I leave it there.

THE CHAIRMAN: I think we have got the point.

MR MALEK: Yes, we have got that point.

MS TOLANEY: Thank you.

May I then come on to -- I think I have got time briefly to just start with the Canadian authorities. I can just, for your reference, note that Lord Briggs commented on the persuasiveness of Canadian class jurisprudence when considering this case in the Supreme Court, and for your note --

THE CHAIRMAN: Yes. I mean, I do not think you need to go to that. He was talking about certification, which is fairly similar in Canada. Australia is not relevant on certification because they do not have any, but when it comes to settlement I think both Australia and Canada are obviously informative but not binding.

MS TOLANEY: I was proposing to take you to two or three decisions if you wish to see them, and the first was

Serhan v Johnson, which we have in the authorities bundle at tab 9 {AUTH/9/1}, and it is a judgment of Judge Horkins of the Ontario Superior Court of Justice.

THE CHAIRMAN: Sorry, which one is this?

MS TOLANEY: This is *Serhan v Johnson*, tab 9. If one goes over the page, please, to page 2 {AUTH/9/2}, you see that it was a tort case brought by a person suffering from diabetes against the manufacturer of a blood glucose monitoring device, and the device was said to have two important design errors which led to erroneous readings and harm to the users, and the claim was on an opt-out basis, and you can see that from paragraphs 4 through to 10, in particular 4 and 10.

If we can pick up the case at page 4, please, paragraphs 22 and 23 {AUTH/9/4}, you see a description of the settlement and the fairly modest money value of the settlement, including the statement in paragraph 23 that:

"... the amounts that are recoverable ... are considerably less than originally anticipated."

The table identifies how the funds would be spent.

If we could then go please to page 8 {AUTH/9/8}, picking it up at paragraph 51, this is the identification of the test which is:

"... in all the circumstances, the settlement is

fair [and] reasonable and in the best interests of the class as a whole ..."

It goes on to say:

"... taking into account the claims and defences in the litigation and any objections to the settlement."

Then paragraph 52 sets out the various principles drawn from Canadian case law, and please could the Tribunal just read that paragraph.

(Pause)

Then if we could, please, go over the page to paragraphs 53 to 56. These set out an approach to the merits that seem similar to the approach set out in the Guide, namely that there is no mini trial and that the review takes place at a fairly high level {AUTH/9/9}.

You see at 54:

"A settlement does not have to be perfect. It need only fall 'within a zone or range of reasonableness'."

55 adds some colour to that and it says:

"[It] helps to guide the exercise of the court's supervisory jurisdiction ... It is not the court's responsibility to determine whether a better settlement might have been reached. Nor is it the responsibility of the court to send the parties back to the bargaining table to negotiate a settlement that is more favourable to the class. Where the parties are represented – as

they are in this case – by highly reputable counsel with expertise in class action litigation, the court is entitled to assume, in the absence of evidence to the contrary, that it is being presented with the best reasonably achievable settlement and that class counsel is staking his or her reputation and experience on the recommendation."

THE CHAIRMAN: Yes.

MS TOLANEY: Then in 56 there is:

"... there is a strong initial presumption of fairness when a proposed class settlement, which was negotiated at arm's length by class counsel, is presented for court approval ..."

MR MALEK: Ms Tolaney, if, for example, we took the view that –– not on this case, some other case –– they said "We are going to settle for, let us say, £10,000", and we actually thought that they should have negotiated and got a settlement for, let us say, £50,000, are you saying that we just have to sit back and say "Well, we have to assume and follow paragraph 55?"

MS TOLANEY: Well, I am, rather, because it depends on the circumstances. If you identify a defect in the settlement and you are not satisfied that the relevant class has been properly represented by experienced counsel in proper negotiations, and therefore is in some

way in need of the court's protection, then I understand that. But if the court is saying "Well, actually, I wonder if more could have been got for the Class", I think that is a difficult situation because, as I said, you do not know the impetus behind every decision, and even if there are reasons you think a different negotiation strategy could have been taken, the Class Representative has explained that or will have given evidence as to why it is a good settlement.

So I think the answer to that question is it is not the amount that you would have to be singularly unhappy with, you would also have to take the view that the Class had not been properly represented in getting the amount it had agreed.

THE CHAIRMAN: Well, that would rather undermine the role of the Tribunal, I think. I mean here we –– first of all, we do have evidence to the contrary, so the presumption does not apply, because we have got the intervener objecting ––

MS TOLANEY: Well, yes.

THE CHAIRMAN: –– so I do not think the presumption does apply. Secondly, precisely because of that problem, where practicable courts have sometimes appointed an amicus, or I think in Australia they say a contradicter, because they are presented with –– as it is sometimes

described –– an adversarial void. Everybody says "This is a great deal and so you should bless it", and the court needs to scrutinise it.

So I think one has to be careful about saying there is a presumption –– I take your point that one gives weight to the fact that there is advice from experienced counsel, but that does not, in any way, preclude the Tribunal's role of having to itself be satisfied –– (overspeaking) ––

MS TOLANEY: I have not used the word "presumption". I am showing you a passage from the Canadian authorities. What I have said is that the starting point for the Tribunal, as I said in my opening, is that when two parties to complex litigation who are each sophisticated and well represented have reached a settlement based –– they have explained, each of them, on evidence and confidentially how they've got there, that provides a great deal of comfort for the Tribunal that the settlement has been reached on an arm's length basis and ought to be the starting point to the Tribunal's consideration.

That does not mean that the Tribunal does not scrutinise it, and I understand the concept of objectors, although I will come on to address what the Funder's real role here is, but I understand the

concept that the Tribunal scrutinises. But I think the question that was put to me is if the Tribunal thinks it should have been more, should they sit back? The answer to that is it is quite a difficult question to answer in the abstract. If it is just -- if it is simply that the Tribunal thinks the Class could have done better, then it is difficult to see why that is not simply substituting the Tribunal's own judgment. If it is that the Tribunal thinks, on scrutiny, that something has been missed and therefore the Class has not been properly represented, then I understand that the Tribunal would be intervening, but not just because of the amount, rather because it perceived the process of the arm's length negotiation to have gone wrong.

MR MALEK: It is our job to look into it and see whether we think it is fair and reasonable.

MS TOLANEY: But within a range.

MR MALEK: If there are features of this settlement agreement, for example, we are not happy with, as was clear in *McLaren*, we are perfectly entitled to say "We are not going to approve this settlement", as happened last time. I was not going to approve it unless it changed --

MS TOLANEY: Yes, that is right.

MR MALEK: -- and it was changed and then I did approve it,

but I am not keen to go down the line whereby we do not shake the tree and properly scrutinise it and say, "Well, just because the parties have agreed this, we are going to assume it is fair and reasonable."

MS TOLANEY: I do not think that is what the Canadian authorities are saying, but what they are saying is that the courts place weight and give respect to the experience of counsel and solicitors who have come to court having agreed a settlement and done so in fulsome terms, explaining how they have got there. That is all the case is saying. You start from the premise that they know what they are doing.

MR MALEK: But the reason why we have got here is that -- it is at that second line: it is not the court's responsibility to determine whether a better settlement might have been reached. All I put to you is that if looking at the material we took the view that they should have reached a settlement of double the settlement figure, are we not entitled to follow that view? That is all I was trying to put to you. I am not saying that is the scenario here. I was just questioning that paragraph, whether or not that represents what this Tribunal should accept as its policy.

MS TOLANEY: I think, sir, this paragraph only reflects what

is in the Guide itself, as I showed you, that -- at 6.124, that the Tribunal does not identify what it considers to be the perfect settlement, it does not conduct a mini trial --

MR MALEK: Of course, we do not.

MS TOLANEY: -- and the Tribunal is discouraged from conducting a detailed analysis of the claims; rather it is a broad brush assessment, having regard to the prospect of success and estimated quantum.

MR MALEK: We can have a broad brush assessment. We do not need to have a mini trial. There will be cases where when we look at it we would say, "This is not a settlement we are going to approve because they should have got different terms or better terms than the ones they have got at the moment". I am just trying to not put ourselves into a handcuff with that paragraph.

MS TOLANEY: I am not either trying to either. I say that does not apply here which is why I am pressing at it, but I am not trying to make submissions as to what the general role of the Tribunal would be in every case and all I am showing you is Canadian authority that seems consistent with the Guide, that you place weight upon experienced counsel and solicitors having reached a settlement. That does not shut out a court from saying something has gone wrong --

MR MALEK: That is fine.

MS TOLANEY: -- plainly.

MR MALEK: I think we are on the same page, with that qualification.

THE CHAIRMAN: Yes. I think that then might be a sensible time and we will return at 10 past 2.

(1.09 pm)

(The lunch break)

(2.13 pm)

THE CHAIRMAN: Yes, Ms Tolaney.

MS TOLANEY: Sir, as you know, there are a number of Canadian authorities in the bundle but I will just go to one more of the others saying more or less what I have shown you, which is the one at authorities bundle, tab 13, Mancinelli, and this is a judgment in the federal court.

If one goes over the page to page 2 {AUTH/13/2}, you will see it is a price fixing claim brought against various financial institutions in respect of --

MR MALEK: Sorry, what tab is this?

MS TOLANEY: Tab 13, and it is a price fixing case against various financial institutions in respect of certain classes of bonds, referred to as SSA bonds, and you see that from paragraph 3, and you see from paragraph 2, the last line, that the claim was for Canadian dollars

1 billion plus punitive damages.

The context of this was that there had been settlements with two of the 11 defendant groups and the application before the court was the approval of settlements with the remaining nine. There was a fairly long history of competition investigations and proceedings, most notably in the US in relation to the alleged price fixing of those bonds, and there had been a substantial settlement in the US, and you see that from paragraph 16 which is on page 5 {AUTH/13/5}, and what you see is there was a settlement against some but the non-settling defendants had succeeded and the claim had failed against them and you can see that in paragraph 17, these are the US proceedings, and paragraph 20 {AUTH/13/6}, which is on page 6, records that the Canadian claimants had applied for certification in May 2022, the settlements having been reached or the case having been dismissed in 2021 in the US.

Following certification in Canada, the settlement negotiations took place and the application followed in this judgment, and the legal principles applied are set out starting at page 8 in paragraph 27 to paragraph 29 {AUTH/13/8}. What you see is the principles they were applying were that, first of all, class action

settlements differ from a usual settlement because it requires the approval of a judge; secondly, negotiating a settlement will inevitably entail trade-offs and compromises, and we do not know what trade-offs and compromises were made here, this is in the principles that were summarised in the *Waldron* case.

"Third, the well-established test for judicial approval is that the settlement be shown to be fair, reasonable, and in the best interests of the class as a whole ... this standard does not require perfection, only reasonableness ..."

Fourth, the assessment is:

"... a binary take-it-or-leave-it proposition ... The court is not entitled to change the ... terms ..."

Fifth, the focus on the interests of the class as a whole may mean that it may not meet the needs ... of certain Class members, and sixth, a judicially approved settlement is binding nonetheless on every Class member.

If we then pick up again at paragraph 43 which is on page 14 {AUTH/13/14}.

THE CHAIRMAN: Paragraph 29 is quite helpful.

MS TOLANEY: Yes.

THE CHAIRMAN: It echoes some of the things said in the Guide.

MS TOLANEY: It does.

THE CHAIRMAN: It is a statement of the factors --

MS TOLANEY: It does, which are very similar.

THE CHAIRMAN: A sort of multi-factorial evaluation, is it not?

MS TOLANEY: That is right.

If we go then, please, to page 14, paragraph 43 {AUTH/13/4}, the court mentions two intervening events that had negatively impacted the prospects of the claims being certified and succeeding at trial, and there is a long discussion of those, but broadly the first event was that similar proceedings in the US had failed on the basis that the alleged conspiracy was implausible, and that is in paragraph 46 of the judgment on page 15, and then the second event was that the Ontario court had refused to certify proceedings in a broadly similar case, one related to the price fixing of dynamic random access memory chips, and the relevance of this was the court had concluded there was an insufficient basis for a conspiracy claim.

Here, the judge seems to have thought that the claimant's concern over the read-across from that case was overstated, and you can see that at paragraph 53 of this judgment at page 19 {AUTH/13/19}. In particular, you see the judge saying at the very end:

"Here, the circumstances ... are different ..."

But the court nevertheless did attach significance to the events that had caused the claimants to reconsider the merits and weigh them in against the costs and risks of the litigation, ie the developments that had occurred, and we see the conclusion on the reasonableness of the settlement sum in paragraph 54 which starts at the bottom of the page on screen, and the sum was described as "more than satisfactory" in the light of recovery and the risks of proceeding to a certification motion.

The sum is identified, back at paragraph 32 on page 10 {AUTH/13/10}, as a total of about 6.5 million Canadian dollars against all 11 groups relative to an original claim of 1 billion Canadian dollars plus punitive damages, so that was about 0.65% of the claim value if we ignore the punitive damages.

The court's conclusion and decision to approve is set out at page 28 {AUTH/13/28}, in paragraphs 73 to 76, if you could read those paragraphs, please.

(Pause)

Paragraph 75 is over the screen {AUTH/13/29}.

(Pause)

So that echoes, I think, what Mr Malek was saying about what the relevant question is: it is whether it is satisfactory now.

So can I just pull together in eight points the points that I think are relevant from the materials I have shown you on the approach.

The first point is that the question is not whether the perfect settlement has been reached, but rather whether it falls within the range, and you see that from the Guide, the rules and the Canadian authorities.

The second point is that the question is whether the settlement is within the range that is just and reasonable, and again that is consistent across the board.

The third point is that I fully accept -- and you were asking me questions about this before the break -- that this is a matter on which the Tribunal has to be satisfied, and I accept the Tribunal will scrutinise the settlement agreement in the light of all the information available, and in answer to Mr Malek's question, there may be more or less information depending on the case, and it may be that more information means the Tribunal is able to form a better view or to scrutinise more closely, I accept that.

The fourth point is that it is relevant to the Tribunal's scrutiny -- and I do not put it as a presumption, as the Canadian authorities do -- if the settlement has been negotiated at arm's length between

sophisticated parties, represented by experienced solicitors, who have set out in their evidence a frank assessment of the merits and the reasons why they each consider the settlement falls within the range of being just and reasonable. I also accept, as was put to me, that it is for the parties to set out fully and frankly any reasons that the settlement should not be approved. Now, having that material therefore gives the Tribunal, in my submission, respectfully, some comfort. I do not put it as a presumption, but it gives some comfort as to how the parties have got there.

The fifth point is that I accept that this does not mean the Tribunal is constrained from forming its own assessment.

Sixthly, in an appropriate case the Tribunal may consider that the settlement is outside the range, having seen all the material that they consider is just and reasonable.

But seventhly, the Guide suggests that the Tribunal will be slow to substitute its own judgment in the ordinary case, which suggests that what we are really talking about are those cases where the Tribunal can see something has either gone wrong with the process or the outcome.

My eighth point is -- which is not a point of

principle but is a final submission -- that I am not seeking to tie the Tribunal's hands in what we say is such a case, but I do say it does not arise here, and therefore I do not think it is appropriate, subject to the Tribunal's views, to try and identify each of the types of cases that may -- it may arise in, and Mr Malek gave me a question about numbers, and that is quite a hard question without knowing more about why the Tribunal did not think it was reasonable in that hypothetical situation.

I think it is enough for me to say that I am not seeking to tie the Tribunal's hands if they can see that something has gone wrong and/or they, for whatever reason in their assessment, having scrutinised the material, consider that the matter falls outside the range. But because, typically, the Tribunal will not conduct a mini trial, it must be in a particular case where there is a reason to believe that something has gone wrong, and typically if material is put forward before the Tribunal to explain how adversarial parties have got to a number, then typically one would say, in practical terms, that the Tribunal would have some insight into the negotiations and take a degree of comfort that a battle had been fought to get to the number and the parties were satisfied that it was

reasonable, and even more so where, if there is the duty which I am accepting, and the parties have accepted, that each party is candidly setting out its own gremlins and its own confidential advice, the Tribunal can take comfort from the fact that that duty of frankness means that the Tribunal is seeing things in the round perhaps very clearly.

PROFESSOR MULHERON: Can I just ask. In relation to rule 94(9), the CAT has to have regard to these inclusive list of factors in order to consider its protective function for absent Class members, and just drawing together, just to put to you whether, on the basis of your submissions and skeleton, I wonder whether there are three factors that would be additional to what is in this list, because after all it is an inclusive list, and I wonder whether the lack of objectors, which you note in your skeleton -- I mean, it seems quite significant. This is a hugely big class of 44 million and not one objector after extensive notification.

Now, that may well be covered under rule 94(9)(f), the view of represented persons, but I wonder whether that is an inclusive factor that would be within that rule?

Secondly, you have made much this morning of the likelihood of a judgment being obtained for no or very

low damages, and that I accept is perhaps the converse of rule sub-(c), but I wonder whether that is also a factor that would be within this inclusive list? I think we have to keep very much in mind that the CAT has a range of discretion in determining whether the settlement is within the range that you describe, and I am just you trying to flesh out what other factors may be within this rule 94(9).

Thirdly, the state of the evidence. You have mentioned this morning -- and indeed learned counsel did as well for Mr Merricks -- the counterfactual causation to come and the state of evidence, and I think that is also addressed in the *Serhan* judgment at paragraph 56, I think -- 52, sorry -- that the nature and amount of evidence which has been obtained and has yet to be obtained in the case of when the settlement is to be assessed, and I wonder whether that is a third factor that would be relevant under 94(9).

I would just be interested in your views on that, because it seems to me very important that this is an inclusive list and that it is inherent to make sure that, when assessing this -- the overarching obligation, which is under 49A(5) and then under 94(8), that the CAT has a clear idea of what factors are being referred to which may be additional to what is in this rule.

MS TOLANEY: So the first point is that you are absolutely right, that the discretion of the Tribunal is to consider all the circumstances. So irrespective of the subpoints there is that residual discretion of all the circumstances, it has to be just and reasonable.

I think it is right to say that the lack of objectors in a large class would be a very significant factor, and it might fall -- it might well fall within the provision sub-(9) that you have identified, because they are essentially represented by Mr Merricks, but if it did not it would be all the circumstances.

The second point is, as you say, the converse of sub-rule (c), which is the prospects of a greater sum, and in a sense if you know that there is a real prospect of a lower sum then you are satisfied that there is very little prospect of a greater sum. So it probably is encapsulated in my submission in relation to (c), but you are right to say that in not every case would there be clear argument that there is a realistic possibility of zero.

So you might say in the circumstances of this case that there is an even stronger factor that ought to be specially identified because, in some cases, you might say, well, it is quite clear that they are not going to -- there is not a real prospect of much more, you

might not have the converse, whereas here you do, and that is certainly our position.

Then the third factor is evidence, as you say, and here again you have got a very clear indication, because of the way these proceedings have developed, as to what evidence Mr Merricks might wish to have but cannot identify as in the mix of the lack of likelihood of exceeding the settlement sum and -- or the likelihood of the converse, depending on which way you look at it.

But you are absolutely right to identify those factors because they would not necessarily be specifically argued in every case. They may well be caught within the rule, as I said, but I do not think that would preclude you from saying "In the circumstances of this case, I pay particular regard to these factors as well as the ones that are expressly listed".

MR MALEK: Ms Tolaney, there is just one question I have got, which is Mr Brealey, in his opening, he gave us a sort of scenario calculation and it comes up to a figure of 171 million. Is that a figure that your clients would have recognised prior to the entry of this settlement, ie had you been doing your own scenarios and did you come up with a figure similar to that?

MS TOLANEY: Can I just take instructions on what I can and

cannot say in open court, if you give me one moment?

MR MALEK: Of course.

(Pause)

MS TOLANEY: So the answer to that is that there was a Calderbank in September, and it is I think in the confidential bundle but I can give you the reference to it to look at, and I think we have got hard copy materials of our confidential materials in court, so I do not want --

MR MALEK: If it is in the original supporting documents for the application in volume 3, it says "Mastercard Supporting Documents". Is it in this file?

MS TOLANEY: I think so. I am just going to check that.

MR MALEK: It should be, should it not?

MS TOLANEY: We do not think so at the moment, so may we get you a copy of it?

MR MALEK: Yes, okay.

MS TOLANEY: You will see the answer to your question, if I can put it that way.

THE CHAIRMAN: We see that we have got the Calderbank figure.

MS TOLANEY: Right, thank you.

THE CHAIRMAN: I cannot put my finger right now --

MS TOLANEY: I can give you the reference but not to bring up on screen.

THE CHAIRMAN: -- but that was not quite specifically Mr Malek's question, which is whether you had done scenarios and come up with the 171 million figure internally before doing the settlement --
MS TOLANEY: Well --
THE CHAIRMAN: -- this application afterwards.
MS TOLANEY: The Calderbank figure plus interest is that figure, with updated interest, I am told. That was in September.
MR MALEK: So that figure plus updated interest --
MS TOLANEY: Yes, in September.
MR MALEK: -- would amount to roughly the same figure?
MS TOLANEY: The Calderbank had a detailed explanation, so --
THE CHAIRMAN: Could you give me the reference.
MS TOLANEY: Yes, I can, not to be brought on screen. It is MC-IBA/3/54, and shall we get you copies of that?
THE CHAIRMAN: Well, we can download those, just not in the hearing. But you -- and you say that has got an explanation in it?
MS TOLANEY: If you look at paragraph 5 there is a breakdown.
MR MALEK: We will look at it separately. That is very helpful.
MS TOLANEY: The date is 12 September.

So I was -- I summarised the points under the case law, and then I had two other points under this head as to the approach, which were -- the third point was the weight you should give to legal advice, and whether it is a problem that the application is not supported by an outside independent lawyer. I do not now need to dwell on this, I have already shown you that there is no requirement that there is an independent expert's report, rather, it depends on the case, and there is a great deal of material from the legal representatives of the applicants, both solicitors and counsel, that is more helpful, we suggest, in this case, because they are very familiar with the issues.
THE CHAIRMAN: Yes.
MS TOLANEY: Then -- and can I also give you the reference, so you have it, that Mr Sansom's evidence summarises why no independent opinion was obtained, and that is at Sansom 9, paragraph 3.2, and the reference is {NC-IBA/10/13}, and in particular there would be a problem identifying somebody suitable who was not conflicted who could familiarise themselves with this material and would be better placed than the material you have, and the conclusion was reached that that was not appropriate.
THE CHAIRMAN: It is also a time problem, I think.

MS TOLANEY: Indeed.
THE CHAIRMAN: Because obviously you wanted this determined before trial --
MS TOLANEY: That is right.
THE CHAIRMAN: -- to continue -- the pass-on trial continues.
MS TOLANEY: Then my fourth point under this heading is the role to be played by the Funder's commercial interests in the consideration of the settlement and, as I have just said to the Professor, the Tribunal does have a discretion to take into account all relevant circumstances, so I am not in any way suggesting that the Funder does not have a right to make points, particularly as the Tribunal has granted standing. But it is difficult, we would suggest, to see how the Funder's commercial interests can be relevant to assessing whether the settlement sum is just and reasonable.

To put that in concrete terms, if settling for £200 million is reasonable, in the sense that it has a reasonable reflection of the merits, the cost, the risks and the claim value, and takes into account the factors that the Professor identified, settling for 200 million does not become unjust or unreasonable merely because the Funder hoped for a larger return,

so -- and the reason the Tribunal has a role in the approval of collective settlements is to protect the interests of the Class members against encroachment from lawyers' fees and Funder's claims. It is not part of the Tribunal's role to prevent the Funder from the unwelcome consequence of backing a claim that is not as successful as it hoped.

The reason I say that is that -- and I am not going to major on it, but there are obvious points of conflict between the Class interests and the Funder because, for example, point 1, the structure of litigation funding may give the Funder a particularly high appetite for risk and insensitivity to incurring legal costs, because the Funder may take a view that it does not mind, because it has got the money, gambling on its costs if it thinks it has got a 1% chance of a return, but the Class Representative, with its duties to the Class, would be more cautious about running a substantial risk of recovering nothing and gambling large legal costs.

The second point is that the Funder would typically have a portfolio approach, so even running a high risk of recovering nothing in one claim might make sense when viewed across the whole portfolio of investments, and a hedge fund can be very sanguine about that, but for the Class Representative and the Class, this claim is

not one of many investments but the only means of recovery, so losing the claim is the worst possible outcome for the Class members.

The third point is that the more the Funder puts into the litigation, the more it stands to take out, so again it may be more sanguine about the costs, whereas, all things being equal, more legal costs eat more into the amount that the Class members ultimately stand to benefit from.

The fourth point is --

THE CHAIRMAN: That point is because of the way the return is now, sort of post-PACCAR --

MS TOLANEY: Indeed.

THE CHAIRMAN: -- being calculated.

MS TOLANEY: Indeed. The fourth point is about delay. Money now may be very valuable to individual Class members, rather than at some uncertain time in the future, whereas that is not going to be relevant to a large hedge fund.

So I simply make those points not in any way to curtail objections being made and heard and addressed, but simply to say that there is a limit to the scope of where they feed in.

Can I then turn to my second main topic which is the evidence on the merits and costs and risks of the

litigation, and I do not propose to say much about the costs, the parties' projected costs are confidential, the Tribunal has them, but they are very substantial, and in addition to the costs in monetary terms there is the cost of delay which would be measured in years.

So what I was going to focus on was the merits and the risks and this is set out in detail in Mr Sansom's evidence, and can I ask you to have a look at the hard copy of Mastercard's evidence, volume 3, tab 1, internal pages 50 to 54.

THE CHAIRMAN: This is Mr Sansom's eighth --

MS TOLANEY: Eighth witness statement, that is right. The evidence is set out in paragraphs 5.1 to 5.9 in some detail, and what you see is the figure in 5.2(b), which we have been talking about, is one that Mastercard regards as having given a very conservative estimate of its prospects, and 5.6 onwards sets out the structure of the assessment.

(Pause)

MR MALEK: Mr Brealey, on looking at this 171 figure, is it your case that your clients did the same calculation and came up with the same figure as the other side at the time of the settlement?

MR BREALEY: They certainly did a calculation, I would have to take instructions as to where it is, but they

certainly did a calculation.

MR MALEK: Yes, because when you look at your skeleton you come up with this headline figure of 171, and they come up with a figure of 171, and they say they came up with that figure at the time prior to the settlement, and that is one of the calculations that they had. I just want to make sure that you did the same thing, and did you come up with the figure or something ... I just want to get clear as to where you get your 171, because on one view you could have got it from here, on the other view you could have done it yourself and come up with it independently.

MR BREALEY: Well, certainly we got the calculations in the joint expert report. We know what the 95% reduction is, they can calculate the remote, they can calculate limitation. That is all agreed. Then it is just really -- and they can calculate the interest. So the only thing that there may be some divergence on is the pass-on. That is where I have got to respect the views of Mastercard and ...

MR MALEK: Yes. So we have got 5.2 of his witness statement where they clearly say they formed a view and that view was the 171 figure, as we can see at 5.2(b), and I am just trying to figure out, looking at it from your side of the equation, when you entered into the settlement

agreement, was that a figure that you came up to at the same time and you both had the same figure when you agreed the 200 million?

MR BREALEY: Well, this was negotiated. This was discussed.

MR MALEK: It was discussed and you both agreed "Well, that seems to be the right figure"? That is what you are saying.

(Pause)

MR BREALEY: So, yes, so in the evidence Mr Merricks did his own calculations, and the joint expert report that is attached to the application can see where there is minor differences in these calculations.

THE CHAIRMAN: The joint experts' report shows -- the joint experts' report of course comes after the settlement, but I think what you are being asked is -- as we understand Mr Sansom's witness statement, this is what Mastercard did internally for the purposes of negotiating, and then, having done that, it made its -- it obviously did a calculation which led to the Calderbank offer at a precise figure, and that then fed through into what it then was willing to agree to as a compromise of 200 million, so that was its internal work.

I think what you are being asked is, well, did Mr Merricks do his own internal work, or, rather, his

solicitors, not discussing it with Mastercard but for himself when -- for the purpose of making the offers and counteroffers and then agreeing to the 200 million?
MR BREALEY: The answer is yes, and Ms Tolaney is going to inform you.
MS TOLANEY: Well, I have just looked at Mr Merricks' statement, and he addresses this and the timing and what his position was. I cannot read it because it is redacted.
THE CHAIRMAN: Mr Brealey should be answering this question.
MS TOLANEY: Oh, sorry.
THE CHAIRMAN: Because it will be in Mr Merricks' fourth witness statement.
MS TOLANEY: Indeed.
MR MALEK: Okay, show us where it is in Merricks' fourth witness statement.
MR BREALEY: Well, it starts at the beginning, so he starts at "Background to the settlement agreement". At paragraph 9 he refers to the 95%.
MR MALEK: Exactly.
MR BREALEY: Paragraph 10 is the limitation ruling. He goes through it in some detail. He then details, as you will have seen, the offers that he made, and then, for example at paragraph 49, he says:
"I was expecting Mastercard to counter ..."

So he goes through the challenges, he goes through the negotiations, he --
THE CHAIRMAN: Is it paragraph 46?
MR BREALEY: It is, 46 --
THE CHAIRMAN: Where he says Compass Lexecon -- not the joint -- he says around -- this is July 2024 -- prepared possible scenarios.
MR BREALEY: Yes.
THE CHAIRMAN: Although he says "prepared for this witness statement", but he says it was ...
MR BREALEY: So these are various assumptions --
THE CHAIRMAN: "... considering at the time I started the negotiation."
MR MALEK: But this is (inaudible). He is talking about 900 million. It is quite a simple question, is it not? In your skeleton you come up with the figure of 171. It matches 5.2, so I can see how Mastercard did the calculation in quite a sophisticated way, and that is there and that is in your skeleton. All I am trying to ask you is that at the time you agreed the settlement -- not what you have done since then -- is the 171 figure a figure that you calculated in your scenarios? It is either yes or no, or was it that you did not have the figures as to what that was going to be?
MR BREALEY: I will double check. I believe the answer is

yes, because these scenarios were discussed. So Freshfields set out the scenarios, and said "You are not going to get anything more than 165", could be 170, and that was discussed internally. That is where they -- that is where they -- but I will double check.
So the answer I believe is yes, because these figures were -- they did not just come out of the air.
MR MALEK: What I am trying to figure out is when you went into the settlement, was the view of Merricks that actually if this case fights the most likely outcome is that the damages are going to be in the region of 171 million? If that is what you are saying it is, that is fine, I will understand that, and if it is in writing somewhere that is going to be appreciated. But the way you put it in your skeleton gave the impression initially that was the figure that you had come to at the time you reached the settlement, whereas in fact when you look at the evidence it is the figure that Ms Tolaney's clients had come up with, and they explained it in paragraph 2 of Sansom 8. I am just trying to figure out where your clients were at the time, that is all.
MR BREALEY: Well, where they were at the time is they took the view that 200 was in the reasonable range. They knew that Mastercard was saying it was 165/170. They

knew that that was Mastercard's position. They discussed those figures, as far as I am aware, and that is why they arrived at a settlement of 200. That 200 that was jointly agreed was based on a joint discussion of these figures.
THE CHAIRMAN: Well, from what you are saying it sounds like Mr Merricks was making various offers, as we can see from his statement, which were being rejected, and Mastercard came up with these figures.
MR BREALEY: Yes.
THE CHAIRMAN: Explained how they got to it.
MR BREALEY: Correct.
THE CHAIRMAN: So it came from Mastercard and they were then discussed by Mr Merricks with his solicitors.
MR BREALEY: As -- in paragraph 46 we have seen that Mr Merricks did his own calculations in various scenarios, and there were multiple scenarios. We then get Freshfields approaching -- they were going -- obviously they were looking at settlement, and we get the figure of 165/170, and those are the figures, when you look at the 95%, the remote which is agreed ...
So the remote, for example, was more or less agreed in June 2024. The limitation Compass Lexecon can work out as well. They can work out the various pass-on assumptions. They know what the reduction is if

interest is at 2%. So, for example --
MR MALEK: What we have, though, Mr Brealey, we have Ms Tolaney's side with a very clear statement of Sansom saying we did all the maths calculations, various scenarios, we came up with the most likely scenario on a beneficial level, assuming it was not going to be zero, of 171 million.
Your clients settle at 200 million for the reasons that you explain, but when you settle at 200 million was the view taken that actually, if this case goes to trial, the most likely scenario of all the scenarios we are facing is that we are going to only get something in the region of 171 million?
MR BREALEY: Yes, because at paragraph 52:
"Around this point, I had my solicitors engage with Mastercard's solicitors ..."
So this is paragraph 52 of his statement.
"... to try and break the negotiation ... as I continued to consider ... These discussions succeeded in getting [them] to improve its offer ..."
Then it is in green.
Then:
"... following which it would revert back to its previous offer of [a figure]."
Now, that figure that is in green, as far as I am

aware, is the Calderbank offer, which was explained to Mr Merricks, so he knows the basis upon which that figure in green is being calculated. So this is the --
MR MALEK: What paragraph are you looking at, sorry?
MR BREALEY: 52.
MR MALEK: Yes, I am looking at 52.
MR BREALEY: So:
"These discussions succeeded in getting Mastercard to improve its offer ... following which it would revert back to its previous offer of ..."
Now, that is the Calderbank offer and that is -- that figure is also referred to in 49.
(Pause)
Then at 54:
"... having regard to advice received on the remaining issues ... it was possible that by continuing to litigate any recovery could be at risk, I did not believe that fighting on would allow me to obtain a better recovery for the Class ..."
Now, that is all in the context of being given a figure that I cannot mention but is the Calderbank, discussing it with Freshfields and Mastercard, discussing it with his legal team and his economists.
MR MALEK: We are going round in circles. Look, it is clear to me that Mastercard did an exercise, they did their

calculation, they have explained it very clearly, and this is how they reached their figure.
You say you were aware of that figure, roughly where they were ending up, and my question was: was it your client's assessment that at the end of the day, if it went to trial, the most likely scenario was you were not going to get more than 171 million?
MR BREALEY: That is paragraph 54.
MR MALEK: If that is what you are saying, that is what you are saying. That is fine.
MR BREALEY: I mean we do have some confidential damages scenarios, so it is not as if Mr Merricks did not do anything, and I can give you the reference for that.
THE CHAIRMAN: Is that not what is said in paragraph 46?
MR BREALEY: Yes. Well, the calculations are at WMIC-IBA/3/192.
THE CHAIRMAN: Those will be confidential, I am pretty sure.
MR BREALEY: So there were lots of scenarios. Compass Lexecon did lots of scenarios of its own in -- basically after -- I mean, what happened was there was the causation trial judgment, then the Court of Appeal refused permission, and then settlement really started to be focused on everybody's minds.
Compass Lexecon, paragraph 46 of the statement, did various scenarios. We then get Mastercard with its

Calderbank and the figure at 49. This obviously is then discussed internally. So, in essence, those five steps that I referred to this morning were all going through Mr Merricks' mind when he agreed the 200 million settlement, because he says at 54:
"... I [do] not believe that fighting on would allow me to obtain a better recovery for the Class ..."
THE CHAIRMAN: I think that is as far as we can take it.
MR MALEK: As far as we can take it, yes, that is fine.
MR BREALEY: Thank you.
MS TOLANEY: Just for your note in that bundle, at tab 7 of the Merricks bundle, you can see the Compass Lexecon documents of 16 January.
MR MALEK: Yes.
MS TOLANEY: Do you have that? Do you see the last sentence of the first paragraph:
"My team provided Mr Merricks with calculations that had the same or similar assumptions at the time he was looking to engage in settlement negotiations with Mastercard."
So there was obviously a separate process going on at the Merricks' end.
I have shown you the salient paragraphs from Mr Sansom's eighth witness statement, and you obviously have in tab 3 of that bundle Mr Cook's confidential

opinion, which I was not proposing to ask you to turn to, I assume you have looked at that.

The headline point I have shown you, but I would like to just call up again in the ninth statement of Mr Sansom, is at {NC-IBA/10/4}, and that is paragraph 2.3 that you have read. The analysis that leads to those figures starts from a theoretical maximum recovery and brings it down in steps to give the reasonable range.

I just wanted to make one point clear, because Mr Malek asked me this morning, looking at 2.5, whether value had been attributed to the MIF claim, the UK claim, and if we go over to 2.6, I showed you that. {NC-IBA/10/6}

So the position is that you know that value has been attributed to pass-on, and 2.6 makes plain that the value to the MIF claim is because it has been factored in that if he got value for the low possibility of succeeding in the counterfactual, which I will come on to, he has not had to give credit for succeeding on Mastercard's actually very likely to succeed counterfactual arguments of switching benefits and cardholders.

MR MALEK: My question was really about 2.5(c) and whether or not you attributed any value at all to that. It

seemed to me quite likely that you had not, but maybe you had a bit, but I do not think it was going to significantly swing the needle above the figure that you settled at.

MS TOLANEY: Yes, that is right. What I was going to say to you is that if we take the counterfactual, which was addressed in this bundle I showed you, Mr Sansom's eighth statement, for all the reasons Mr Brealey developed, the likelihood of that claim succeeding at all is very low because it is very difficult to see how it could succeed as a matter of law, given the findings in the factual causation judgment. Secondly, there is no evidence to prove it, and thirdly, even if there was a level of success, it would not be at the level claimed anyway, so it would be a tiny proportion of the claim.

Now, set against that -- and I am going to develop these -- are Mastercard's counterfactual arguments, which are achieving a high measure of success on the pleaded points of scheme changes and switching and cardholder benefits, to which no value has been attributed in the settlement sum.

So that is why we are saying when you look at it in the round, some value has been given, not a specific amount, but the value of not effectively reducing the settlement by virtue of those arguments which do have

a real prospect of success.

MR MALEK: It seems to me that you -- when you look at Sansom 8, paragraph 5.2 {NC-IBA/10/4}, you look at the various scenarios and you think the upper range is 171, and you have really used that as a sort of anchor point for justifying the settlement of 200 million. It does not seem to me -- and I may be wrong about that -- that you have given any significant value to this counterfactual, and the reason why you did that is all the reasons that you have given, plus the two points that I raised earlier, which you say, acting rationally, you say "We are not going to give them much -- of course if we lose it is going to be a huge amount of money, but we are not going to give them much because we are not going to lose, and they do not have any credibility, they have not pleaded anything, they have got problems of funding, so we are just going to give them a bit more than 171".

MS TOLANEY: Well, can I address you on that, that you are right to say that no value has been expressly attributed to the counterfactual for all the reasons I have given.

MR MALEK: Yes. I am not saying you are wrong to do that, I am just saying -- I understand -- that is your position which I fully understand.

MS TOLANEY: That is right, my position is that, but it is

also 2.6 as well, which I am going to come on to just address now, which is that the settlement does not give credit to Mastercard for arguments on which it is likely to succeed on and --

THE CHAIRMAN: I am a little bit lost on that point. The argument --

MS TOLANEY: There are three main ways, sir, that the claim might fail entirely, or end up being worth only a very small sum, and I just wanted to focus on those because you have not really heard anything about that. What you have heard is the 171, as Mr Malek is rightly saying, and seen the components to that, but what I have not addressed you on, which is now what I am moving on to, is what was raised with me a moment ago, that there is one other factor to factor in, that there are genuine scenarios here in which Mr Merricks' claim might totally fail and not be worth even the 171, which is why Mr Sansom says there is a range from 0 to 171, and I just need to address you on that range of 0 to 171.

THE CHAIRMAN: We understand, I think, but you will develop it, the going down to nought. I think what we are asking you is putting 171 as the top, that suggests that no possibility was incorporated for thinking that there might be some value in the hypothetical counterfactual.

MS TOLANEY: Yes, but what I was saying was -- that decision

is balanced against not off-setting the multiple scenarios in which nought might be achieved. That is all I am saying.

MR MALEK: That is clear. I understood that --

MS TOLANEY: So could I just address you on those scenarios, just so I have made that good. Because the first scenario you have heard about, which is Mr Merricks failing to prove substantial pass-on at one or both levels required for any overcharge to have ended up with the consumers, and we address this in our skeleton at paragraphs 48 to 52. I do not need to dwell on it because Mr Brealey has already identified, but Mr Brealey focused primarily I think on the merchant claim.

The first point is that Mr Merricks has to succeed on proving acquirer pass-on at the level he is claiming, he then has to prove pass-on at the level of merchants, and it is very difficult, that, because he bears the burden of proving pass-on at both levels, going all the way back to 1992 or 1997, and he faces serious problems because there is no merchant evidence that we had in trial 2A, and no acquirer data or other significant evidence coming in trial 2B, going anywhere near that far back.

In fact, the only data that he has in relation to

acquirer pass-on relates to 2015 and 2022, so he is forced to argue that those rates should be applied retrospectively to a different market up to 30 years earlier when there is no information at all about how acquiring operated during his claim period, and the factual causation judgment has already held that the acquiring market was rather different back in the 1990s.

So in the absence of any data he has got a real problem, and indeed the smaller the overcharge he is able to prove, the worse his position gets.

For merchant pass-on, as you have heard, the position is no better because of the change over the last 30 years, and the lack of data as well, and the fact, as we have already said, he relies only on expert evidence about the textbook position which does not engage with the real world.

The difficulties then in showing pass-on get even greater as the overcharge reduces, because if the claim is limited to EEA MIFs then we are talking about a tiny proportion of retail transactions, so a very small percentage of the very small percentage of transactions that took place on Mastercard-only credit cards. That is then multiplied by the size of any merchant service charge overcharge, so the overcharge would be a tiny percentage of merchants' costs and revenues, and the

point then is that you are into the *Trucks* litigation issue, in a judgment that the Court of Appeal has upheld, where the courts held that the overcharge leading to only a tiny change in merchants' total costs would not be able to be discernible and could not, therefore, be proven.

Indeed, Mr Merricks' own leading counsel -- not Mr Brealey -- in trial 2A coined the term "*Trucks* tiny" to capture what Mastercard says about the merchant service charge costs in the Merricks claim period, and it is not our term, but it makes the point very clearly for us.

So he faces a raft of problems and yet we have still given some value to that claim.

But you then have our counterfactual point. So the second scenario, in which we would succeed entirely on our arguments in the counterfactual, are addressed in paragraphs 38 to 47 and they relate to Mastercard's --

THE CHAIRMAN: This is your skeleton, is it?

MS TOLANEY: It is. So they relate to Mastercard's scheme rules, switching away from Mastercard to other payment schemes in particular, and just --

THE CHAIRMAN: I thought that is on probably the UK, if there was success on --

MS TOLANEY: That is right.

THE CHAIRMAN: -- the counterfactual causation.

MS TOLANEY: That is right. These are the three scenarios.

THE CHAIRMAN: But they would not -- and the first point you made --

MS TOLANEY: The first point, yes, is a separate scenario.

THE CHAIRMAN: -- about pass-on --

MS TOLANEY: That is right.

THE CHAIRMAN: -- 171.

MS TOLANEY: That is right, that is a separate scenario. But if --

THE CHAIRMAN: This second point would not reduce the 171.

MS TOLANEY: No, it would not -- sorry, yes, it would.

THE CHAIRMAN: Would it?

MS TOLANEY: Yes.

THE CHAIRMAN: I thought that the scheme changes are where you would have the low --

MS TOLANEY: It would reduce both. It would reduce both.

THE CHAIRMAN: -- because you are talking about scheme changes in the UK, but it would not be affected by just a low EEA MIF, it is only if it is the UK MIF that then this applies.

MS TOLANEY: It would also be cross-border so it would reduce both. I will ask ...

THE CHAIRMAN: Well, that is rather less compelling, because there was a cross-border MIF of zero at one point and

these changes did not come in, so it is not very powerful.
MS TOLANEY: Well, we -- can I just show you -- one of the points that is taken against us by the Funders is that the case has not been actually pleaded, but it has been, so I just want to show it to you and then you will see it. Because the context, sir, is that the default rules on interchange fees were passed --
THE CHAIRMAN: It is talking about the analysis of the counterfactual and other -- and that is the point -- this is the point made that you drew our attention to, I think, paragraph 172 of the judgment on causation, where it is saying these various matters would then have to be considered.
MS TOLANEY: Yes, that is what Mr Brealey did, and it would definitely arise in relation to the counterfactual, but it also arises more generally because the whole point is Mastercard's scheme rules included various default rules to govern the operation of the payment scheme and we -- if I show you first Mr Sansom's witness statement, which is in non-confidential format {NC-AB3/1/62}.
THE CHAIRMAN: This is the eighth?
MS TOLANEY: This is 8, yes. It is paragraph 5.26(a).
THE CHAIRMAN: Yes, and it starts with, at paragraph 5.24, the issue of counterfactual causation, and then it says,

at 5.26, that:
"... highly likely that it will be able to establish that the following would have occurred in the counterfactual ..."
MS TOLANEY: But these are our counterfactual arguments which are separate to Mr Merricks' counterfactual arguments.
THE CHAIRMAN: But in the counterfactual, they did not occur in the actual.
MS TOLANEY: Yes, but these are our counterfactual arguments.
THE CHAIRMAN: Yes.
MS TOLANEY: So let us assume their success on Mr Merricks' part, but he would also have to overcome all of these as well and some of them would apply anyway, and the statement identifies what the arguments are at 5.26 to 5.27.
THE CHAIRMAN: But:
"Had the Mastercard scheme been required to operate with substantially lower (or zero) interchange fees ..."
Well, that is true if Mr Merricks succeeds on his counterfactual for the UK, but if he does not, the Mastercard scheme would not be operating with substantially lower interchange fees, because it is only the intra-EEA portion, which is tiny, so that Mastercard

would be operating with substantial interchange fees, so I do not see how this arises.
MS TOLANEY: Well, I think it arises on both, but obviously it may have more impact on the UK because that is 95% of the value, but you have still got the 5% of the value.
THE CHAIRMAN: We know that Mastercard did have a zero EEA MIF at one point. They did not change these rules.
MS TOLANEY: Well, they did at a particular point in time, yes.
THE CHAIRMAN: Well, not when they had a zero EEA MIF for about a year or something.
MS TOLANEY: But there is also the case of switching and other benefits, you see. What we are saying is that the overall position would have been less favourable than Mr Merricks would need to show in order for consumers to suffer a loss.
So can I show you where it is pleaded, just so I have covered that off. It is pleaded in Mastercard's defence at {NC-SBD/2/56} and it is paragraphs 109 to 113 of Mastercard's defence.
You can see at 111:
"Both the EEA scheme rules and the UK domestic scheme rules in relation to each of these issues ..."
Then you see the point at 112.
(Pause)

THE CHAIRMAN: Yes.
MS TOLANEY: Then just while I am in the pleading, if we could go, please, to the next page --
THE CHAIRMAN: I can see it is said. I just have to say I do not think it is a very powerful argument if it is only 5% of the MIFs that are affected, the idea that it would have triggered all these massive changes. I can see the argument when it is the UK MIFs, but if it is only 5% of the value of the transactions, that they would then have introduced all these changes ...
MS TOLANEY: But it would only be changes to the cross-border transactions, which is why we are saying it is likely they would have introduced it, because they would not just take the hit without having compensation, and similarly we say at 114 to 123, this is the switching analysis {NC-SBD/2/57}.
(Pause)
THE CHAIRMAN: Yes, well, there it is.
MS TOLANEY: The point about countervailing benefits to merchants is pleaded at paragraphs 131 to 132, page 61. The only reason I am showing you the pleading is that it is suggested by the Funder that our counterfactuals at points have not been developed by Mastercard, at paragraph 50 of their skeleton, but they have actually been pleaded out.

The point is in relation to the scheme rules. In the counterfactual, the default rules made provision for three aspects of the operation of the scheme and distribution of costs and risks between participants. The three aspects are rules governing the circumstances in which the issuing bank was required to make a payment to an acquiring bank in respect of a fraudulent transaction; rules governing the circumstances in which the issuing bank had to make payment to an acquiring bank even if the cardholder defaulted; and then, thirdly, rules governing the time at which the issuing bank was required to make payments, bearing in mind that for credit cards the issuer normally only receives payment from the cardholder much later.

Now, the situation in the actual world was that all of these rules put various costs of the scheme's operation on the issuers, not the acquirers, and that came to be part and parcel of the same scheme imposing the MIFs to be paid by acquirers to issuers, and MIFs contributed to meeting the costs that issuers incurred under the default rules. So if MIFs were stripped out of the commercial bargain, we suggest there would have been an adjustment to leave the cost and risk with the acquirer of some or all of these matters, rather than shifting it to the issuer.

I think the point we are making is you cannot just alter one of the rules without looking at the whole package, and even if, sir, you take the view that there might not have been a total adjustment, we say that it is not a binary issue, we think it is likely there would have been some adjustment. That is our case.

The point on switching is equally straightforward, we suggest. If issuers no longer received interchange fee revenues from Mastercard, there would have been a strong commercial incentive to switch to other ––

THE CHAIRMAN: But they get 95% of their revenue. The idea they would switch because they are not getting 5% is a bit far-fetched, it seems to me.

MS TOLANEY: Well, I think, sir ––

THE CHAIRMAN: I think there is –– I fully see the strength of these arguments if the 100% or the other 95% goes down to zero, or indeed maybe not even zero but significantly lower, because that has a major impact, but the whole point about the EEA MIFs is that they are such a trivial proportion of what the banks were doing and getting.

MS TOLANEY: Well, I can see ––

THE CHAIRMAN: That is why the whole claim goes down so much. But to say it would have led to this quite significant change in practice by issuing banks ...

MS TOLANEY: Well, I can put it this way, sir, that one can see immediately a strong attraction of these arguments if we are talking about the whole 100%, so that is relevant to the assessment of the merits of the counterfactual. We suggest that if there is a claim for the 5%, it is right to factor in some degree of realism into these arguments, because, for example, Mr Justice Popplewell in the *AAM litigation* was persuaded that Mastercard would not have held on to issuers in the face of competition from schemes providing interchange fee revenue, and we know that Visa was free to pay EEA MIFs to issuers once it had the benefit of an exemption decision from the Commission in 2002.

So we say there is some justification for these arguments applying across the board, albeit I do accept it has more of a significant impact on the counterfactual.

The third argument, just to complete it, is the benefits, and this would only arise at the near final stage of Mr Merricks getting to an award of damages, so having cleared every hurdle, and at this stage we say that his loss would be off-set by the fact that members of the Class, namely Mastercard cardholders, receive benefits from interchange fees that they would not have

received in the counterfactual, and that is why we say the benefits, as addressed in our skeleton, would also be relevant.

Now, I only raise these points because no value on these three areas has been attributed to the reduction of the 171. Now, you may say that they more likely off-set, not giving any value to the counterfactual beyond –– and this is in answer to Mr Malek's question –– beyond all the problems Mr Brealey has identified. You have also got all these three points which I think the Chair is accepting might have some attraction in that scenario.

They also, we say, go further to show why there might be no recovery at all, and the pass-on point is another area which is relevant, that if Mr Merricks does not succeed there might be no recovery at all on either limb –– on both limbs, rather.

So what we are saying to you is two points: the first is that when the Funder complains that we have given no value to the counterfactual, and that is wrong, we suggest that the Funder's approach first of all does not look at the reality of the difficulties with the counterfactual, but, secondly, does not appear to take into account any of these arguments, which obviously have some value within any calculation. If they are

doing a calculation, we have not seen it.
MR MALEK: If you take the view in a negotiation that something has got no value, you are perfectly entitled to take that view.
MS TOLANEY: Yes.
MR MALEK: It is not a criticism of your side. If you take that view, and that is your honestly held view, you do not think it is worth anything, you are not going to give them any credit for something you do not believe is worth anything. I cannot see anything wrong with that.
MS TOLANEY: There is nothing wrong with that, sir, but I am giving you two reasoned bases for it. The first is that we think it has no value, but the second -- and the only reason I am making this point is we have not seen the calculation the Funder has put before you, but the second point is that there are these genuine arguments which are persuasive, and one, as I said, has already found had some merits attributed to it by Mr Justice Popplewell as he was then, the switching point.
There are also these reasons that if we are wrong in our assessment of no value and there was some merit to it, you would then have to take into account these arguments which would massively reduce the value or get rid of it in the first place, so it is a second limb for

that point.
It is also a point that supports my separate second point, which is that there are scenarios, realistically, of which Mr Merricks is aware, and you have heard the submissions from Mr Brealey, which could lead to an outcome where the Class recovered a lot less, pass-on being the obvious one, but also these, and the Tribunal needs to have that in mind. The reason I am emphasising that is because we are all talking about the figure 171 and where it has ended up, but actually the range that Mr Sansom's evidence says is nought to 171, and there is merit in looking at that.
The point that was made to me earlier, that as well as looking at the prospects of getting more than 200 million, one equally has to have in regard the prospects of getting less, and this is the case where there is real reason for me to say, with justification, that there is a real prospect of the Class getting less if this case was to carry on.
THE CHAIRMAN: Can you just remind me, the trial before Mr Justice Popplewell. Was the claim, that was the damages claim, was it only in respect of the EEA MIFs and not UK MIFs?
MS TOLANEY: I think it was the EEA MIFs only, was it not? It was UK as well, I am told by --

THE CHAIRMAN: It was UK as well, because otherwise the claim would be much less, yes.
MS TOLANEY: Yes. Could I then move very briefly to the Funder's objection to the settlement, and, as I said, I am not very well placed to address these in detail having not seen a lot of the material.
THE CHAIRMAN: No.
MS TOLANEY: But many of the points, we suggest, appear to be, doing the best we can, made on the basis of misapprehensions, including the idea that Mastercard was somehow bluffing when it made its best and final offer. You have the benefit of the evidence of Mr Sansom on that point in his ninth witness statement at paragraph 3.14 and it is clear that Mastercard would not have agreed to pay more.
In that context, can I address four points that are taken by the Funder. The first I have --
THE CHAIRMAN: Sorry to interrupt you, but bear in mind we should take a break at some point, so --
MS TOLANEY: I am entirely in your hands, sir. If you would like to take the break now, that would make sense.
THE CHAIRMAN: It sounds like you have reached a logical point for a break.
(3.32 pm)
(Short Break)

(3.53 pm)
THE CHAIRMAN: Yes, Ms Tolaney.
MS TOLANEY: Sir, can I just revisit the last point we were on before I moved on to the Funder's objections, just to give you some references, I am not pressing the point, but in terms of whether the 5% would have been enough.
Paragraph 43 of our skeleton argument is relevant because it sets out the unchallenged evidence at the causation trial that a differential of 5 basis points would be enough for switching, and the average MIF was 100 basis points, so losing revenue on 5% of the transactions would be equivalent to a 5 basis point reduction, and the evidence therefore directly addressed a loss of revenue on the relevant size, which was to the effect that switching would occur with this loss of revenue, and that was the same evidence before Mr Justice Popplewell on the basis of which he reached his findings.
The second reference is Mr Cook's confidential opinion at paragraph 115.
Just then briefly on the objections taken by the Funder --
THE CHAIRMAN: Yes, I cannot work it out in my head. I am not sure 5 basis points in the percentage MIF, the UK MIF ...

MS TOLANEY: It is 5 out of 100, I think.
THE CHAIRMAN: Yes, I am ... Well, it is 5 -- I think it is a 0 point ... I am not sure it is 5 out of 100, but one can look into it. I thought it was something else, from memory. I thought it is looking at the percentage MIF going down by ... In other words, if it is 1.2 going down to 0.7, I thought that was the basis points that we were talking about in the judgment, but one can look at that. Anyway, we have got the reference. Thank you.
MS TOLANEY: I just wanted to touch on three points to identify them, rather than to spend a long time with them, because I do not have the material necessarily to get into detail. But the three points taken by the Funder that I just wanted to touch on now are first of all the suggestion Mr Merricks is not recovering proper value for the UK interchange fee claim. I have addressed that, and so that is one of the main objections.
The second is that Mr Merricks should have mediated with Mastercard, or otherwise handled the negotiations differently, to which we suggest there is no evidence that a mediation would have reached any higher amount with two sophisticated, well advised parties, and a mediator in any event would have had to have taken the same points in relation to Mr Merricks' claim that

Mastercard has as to its prospects of success and highlighting the difficulties.
The third point is that Mastercard has said in terms that the offer it made of 200 million was its best offer, and the evidence also makes it plain -- this is Mr Sansom's ninth statement at paragraph 4.3 -- that Mastercard would not have instructed him to pursue mediation in this case. So we think that disposes of any suggestion that mediation was realistic, or realistically would have produced a better outcome.
MR MALEK: You can bluff as much as you want for the other side, okay. So you could say "This is our top figure", and it really is not your top figure. But now you are coming to this Tribunal for the approval of a settlement you have got duties of full and frank disclosure.
MS TOLANEY: Indeed.
MR MALEK: What you are telling us is "That really was our top figure, we were not going to go above it", it is as simple as that.
MS TOLANEY: That is absolutely right, and there is sworn evidence in clear terms from Mr Sansom on that saying exactly that.
MR MALEK: But that is the distinction between negotiating with the other side and dealing with the Tribunal.
MS TOLANEY: Indeed, and I accept that. So that would be --

if we were actually prepared to offer more, it would be a reason we would have to disclose to this Tribunal.
MR MALEK: You would have to, yes, of course.
MS TOLANEY: I agree.
Then the third point is that it is said that Mr Merricks settled too soon because the UK MIF claim was not yet completely dead and should have been pressed on with to extract more value. That is the one-way bet theory, and it is saying essentially that Mr Merricks gave up at a low ebb, but the answer to that is, as we have said, Mr Merricks could have done so much worse for all the reasons I have outlined, and particularly pass-on is looming.
So in terms of any points over the timing of this, Mr Merricks' prospects, as has been fairly conceded on pass-on, he faces a number of hurdles, and therefore the timing is beneficial for the Class, it is not at a low ebb.
So those are my submissions, unless I can assist further at this stage.
THE CHAIRMAN: Yes. Can I ask you both, that is to say Mr Brealey as well as you, one aspect we have been asked to approve the settlement and all its terms, which is nothing to do with the 200 million, if we look at the settlement agreement itself, which I think is in the

application bundle at page 60. I am not sure I have the Opus reference, but if someone has it ...
MS TOLANEY: It is page 60, tab 5.
THE CHAIRMAN: In the hard copy bundle?
MS TOLANEY: In the hard copy.
THE CHAIRMAN: But is there an Opus reference?
MS TOLANEY: Yes, it is {NC-AB1/5/1}.
THE CHAIRMAN: Yes, thank you. This concerns the release. If we go to page -- what would this be? Page 6, perhaps, in the Opus page, 36 in the hard copy {NC-AB1/5/6}, clause 4.2(b), it may be that it is covered by the opening phrase "To the maximum extent permitted by law", and you say that takes care of it, but it is only really this, that of course a represented person must have the opportunity to opt out of the settlement by the statute, and therefore the represented person who opts out will not be released and cannot be released from their -- any -- sorry, Mastercard cannot be released from any claim that they might, if so advised, wish to bring.
It may be in the reality of this case that the prospect of any represented person opting out is more theoretical than real, but I think it would be preferable if, rather than just saying "to the maximum extent permitted by law", it were to say that save where

a represented person exercises their right to opt out, which will be in the notice ––
MS TOLANEY: Yes.
THE CHAIRMAN: –– and I would hope that that is a change that no one would object to. It just gives effect to the statutory scheme.
MS TOLANEY: We are content with that, sir.
MR BREALEY: That is obviously fine. It is in the order, though, as well. The opt out is in the order.
THE CHAIRMAN: Yes, but I think to make clear that ––
MR BREALEY: Clear in the agreement ––
THE CHAIRMAN: –– is not seeking, as I am sure you do, by those who seek to opt out. Thank you.
Yes, Mr Béar.
Opening submissions by MR BÉAR
MR BÉAR: Yes, thank you. One way we say to understand what is wrong about this settlement is to look at the attempts to defend it against the criticisms that we have made.
Our first central criticism, as you know, is that the settlement, we say, attributes precisely zero value to the UK claim. I am going to have to look at that in a little more detail, given some of the things that have been said today, but we say on the evidence that is a conclusion that is abundantly justified, and one

reason why it is wrong is pithily summarised by Mr Humphries, who has given his report, and it is in the intervention bundle ––
THE CHAIRMAN: The report is –– just to stop you, that is confidential vis–à–vis Mastercard, is it not, Mr Humphries?
MR BÉAR: No, this particular bit is not highlighted, but I can just ask you to look at it in your own copy so that we do not run any risk. So his report has been shown to Mastercard but in a redacted form.
THE CHAIRMAN: I see, yes.
MR BÉAR: So I think I am confident in saying that the version that I am taking you to, which is tab 4 of the intervention bundle, contains the same colour–coded highlighting.
THE CHAIRMAN: We have got it at tab 6, in fact.
MR BÉAR: Have you got it at tab 6? All right.
THE CHAIRMAN: But anyway, we have got it.
MR BÉAR: Thank you very much. If that is the only misalignment I shall be doing well. But at page 12 of Mr Humphries, paragraph 46, he says this:
"It follows, in my opinion, the settlement of these proceedings was made on the basis of a settlement sum that was unreasonable because it had not yet been established by further steps in the litigation whether

settlement on very substantially improved terms could have been achieved."
Now, in addition ––
THE CHAIRMAN: What is slightly curious about that sentence, and he has worded it very carefully, is that he is not saying that settlement on improved terms could have been achieved and therefore this was too low, he is saying in a sense it was premature because you did not –– Mr Merricks did not yet know whether or not settlement on improved terms could have been achieved.
MR BÉAR: Well, that brings me to the other half of the reason why zero value is not reasonable, is outside the reasonable range, and that is to look at what Mr Merricks did know and what he was internally advised, which obviously we are going to have to discuss in closed session.
THE CHAIRMAN: Yes.
MR BÉAR: But even taking the most minimal view, we say Mr Humphries accurately identifies a problem, which is, putting it simply, if you have a claim that may be worth an enormous amount, it needs further work which has not been done, then are you justified in abandoning it for nothing? Because that, we say, is what happened here.
PROFESSOR MULHERON: Counsel for Mr Merricks this morning pointed us to 94(9)(c) and emphasised the likelihood of

judgment being obtained.
MR BÉAR: I am coming to that.
PROFESSOR MULHERON: You are coming to that?
MR BÉAR: Oh, absolutely.
PROFESSOR MULHERON: Good, thank you very much.
MR BÉAR: Now, just to foreshadow where I shall be going, I would imagine it will have to be tomorrow, still under this first point, and picking up on an important issue that arose in the discussion this afternoon about what assessment Mr Merricks and his lawyers actually carried out, leading to the figures of 171 or 200 that we have heard about, what assessment did they carry out, and I do not accept –– and we will obviously have to look at the evidence, but I do not accept that there is any contemporary evidence of Mr Merricks, still less of his lawyers, going through that analysis.
But to make that good and to explain what were the things that, as it were, could have happened but did not, we will need to be looking at it in closed session. I simply cannot say any more.
THE CHAIRMAN: No, I understand.
MR BÉAR: A second central criticism is that there were, we say, conflicts of interest that arose in the negotiation process. Why are these relevant? Because they undermine the weight that might otherwise be attached to

arm's length negotiations. Both Mr Brealey and Ms Tolaney have, understandably, from a forensic point of view, emphasised that where you have got a settlement that has been reached through a process of arm's length negotiation by experienced professionals, legal professionals, then that is a factor which one might expect to militate in favour and the -- just to stand back for a little, I mean probably it is pretty obvious, but one reason why that might be so is that that process provides a sort of proxy for the Tribunal itself arriving at its own direct judgment about the merits of the settlement, so that one can see if there is a process that has been followed that looks robust then that can give the Tribunal, charged with the responsibility under rule 94, indirect assurance that the result is an acceptable one.

Obviously there might be other forms of evidence, one thinks of the way that accountants often talk about level 1, level 2, level 3 in audit reports, hierarchies of evidence. One form of evidence which might be thought to be at the top of that hierarchy is what is mentioned in rule 94(4), which is the report from -- or opinion from an independent expert, or an independent opinion. Obviously that is not mandatory so we do not have one here. I believe that such a report has been

forthcoming in previous applications before this Tribunal, and in *McLaren*, which was decided earlier this year, as I remember, there was such a report from Mr Lawrence, in fact, who is here today. But there is not such a report here.

The benefit of that report obviously is you have then got somebody who is a neutral evaluator who can take the time and perhaps have access to lots of information and can provide that sort of assurance to a Tribunal.

In the absence of that kind of evidence, what else might you have? Well, you might have opinions from leading counsel. In a case where there is leading counsel that would be an obvious thing to do. I mean, that is the way that the system of heavy litigation works, is that parties settle having very close regard to advice from leading counsel.

MR MALEK: On your second point, have you looked at the authorities on representative parties which deal with when you -- when the court approves someone under Part 19, one of the things they look at is whether or not they have got a conflict of interest, have you looked at --

MR BÉAR: Under CPR 19?

MR MALEK: Yes.

MR BÉAR: Not on this, but I sense that I may do overnight.

MR MALEK: Yes. No, it is just that one of the points you are making is that by a certain stage Mr Merricks was hopelessly conflicted, on your case. So on one level you say he was wedded to a particular firm of solicitors he had been with and you were not happy with, you had lost confidence with.

MR BÉAR: Yes, we are in danger of trespassing into an area that is covered by blue redactions, but yes.

MR MALEK: Okay, yes. But on the other level it is the terms of a settlement agreement with an indemnity.

MR BÉAR: Yes.

MR MALEK: I just think it probably would be helpful if you look at those issues, and there are authorities on independence, conflict of interest, when the court decides who is the appropriate person (inaudible).

MR BÉAR: Yes, you are right, and I recall that, for example, in nominating a representative for -- as, for example, a Litigation Friend, there are issues, which may be what you are partly thinking of, issues about that, so we will take a look at those and come up with anything that may be helpful tomorrow morning.

MR MALEK: Yes, okay.

MR BÉAR: But the point I was making was that where you have the understandable submission that a process of arm's

length negotiation has occurred to which weight should be attached, then if there are conflicts of interest that are present on the part, in particular, obviously of the Class, the Class Representative, then we say that must undermine the weight that would otherwise be attached to the negotiating process, in the same way as a -- ultimately as a conflict of interest on the part of a fiduciary, for example, undermines the bargain that he or she enters into. It is a vitiating factor and, as the Tribunal will know, in those cases the Tribunal, or the court in the private law context, does not say to itself "Well, exactly how far was this conflict material, exactly what role did it play in the decision?" If there is a risk that it could have affected the decision, then typically the outcome, the contract or the transaction, is vitiated.

By analogy here, if the Tribunal detects a real conflict then that undermines the weight that can be placed on the process, and indeed it goes further, I would suggest, it actually undermines the outcome, because it means that your confidence that this is a just and reasonable settlement is correspondingly affected.

Now, the issues on this, or sub-issues, are not perhaps as clear as they might be because a feature of

Mr Brealey's skeleton is the absence, as far as I could see, of any reference to those arguments about conflict. So we do not know, as a matter of his forensic analysis, what he might say about that, but nonetheless I will do my best to try and provide some useful submissions on those issues.

A third point of criticism -- and this I am sure will be contentious in principle, but we do not shrink from saying it -- is that the Funder, we say, does not get a fair return under this settlement on any view of distribution, and we say it is not fair by reference to the contractual framework which was agreed on behalf of the Class and should be a factor in your discretion, it is not fair in terms of valuing the benefit received by the Class from the services provided by this Funder. That is what you might call, to use a shorthand, the quantum meruit analogy. We have mentioned it in the skeleton argument and we will be looking at it tomorrow, the law on how benefits are valued, even apart from a contract that effectively sets a price.

Also, and again I am very grateful here to another suggestion of the Tribunal that came through yesterday, the Australian cases, which certainly I had not attempted to mine, contain some interesting dicta on that score as well, and obviously they are not in any

sense binding but they do represent, as far as I can detect, quite a developed jurisprudence over a quarter of a century or so dealing with settlements, as the Chair pointed out, not with certification, but there seem to be a lot of decisions and, from an outsider's perspective, quite lengthy decisions on settlement at quite a high level in the Federal Court of Australia, et cetera, and speaking for myself, I found it illuminating to look at those. I do not pretend to be an expert, but I will want to take you to some of them tomorrow.

That brings me to some points about your exercise, and I am now starting to respond to Professor Mulheron's remark. First of all, we say that the burden is on the applicants, in our submission, to satisfy you that this is a reasonable settlement, just and reasonable settlement, because rule 94(9) specifically states that the Tribunal must be satisfied that the settlement is just and reasonable, and we say that that implies a burden and the burden must lie on the applicants. At any rate, the starting point is not that you must be satisfied that it is unjust or unreasonable, you start with the null hypothesis, and you must then obtain a state, if you can, of satisfaction that it is a just and reasonable settlement. So it is for the Tribunal to reach a positive conclusion, if the material before it

justifies it, that this is a just and reasonable settlement.

The second point -- and I think this must be common ground -- is that rule 94(9) is non-exhaustive, so, as Ms Tolaney told you, it says in terms the Tribunal must have regard to all relevant circumstances, that is the rule, and then the factors that are enumerated are simply particular legislative highlights, as it were, but they are not intended to rule anything else out.

Thirdly, a point I have already made, that within rule 94 there is reference to the possibility of an independent expert opinion, which you do not have in this case.

Can I just make a couple of remarks on that. It is said that the case is too complex and it was not possible to get someone suitable to look at its merits, and I will just give you the reference without asking you to look at it. It is Mr Sansom's ninth statement, which is the intervention bundle, tab 10, page 13, paragraph 3.2. So too much work, too little time, as the phrase has it.

But in the same breath, Mastercard in particular ask this Tribunal to reach its opinion on the merits based on their 20-page skeleton, Mr Cook's opinion which we have not seen, although I now know it runs to at least

115 paragraphs and a day and a half of argument, and we say, well, why then did the applicants, the settling parties, not seek jointly to obtain an opinion in the two and a half months between the time of the settlement and now? I do not accept that the case is that complex in terms of the feasibility of finding someone at the right level of experience and with the amount of necessary time and giving them enough information to come to some form of conclusion on the detail. I do not accept that the excuse that has been put forward is a valid or indeed convincing one, and if that was the approach that was taken it was not a justifiable approach.

So the position one reaches is that you could have had that gold standard of supporting evidence, but you do not have it.

Next, so the fourth point under this heading, dealing now directly with Professor Mulheron's point which, in turn, relates to Mr Brealey's submission that he made two or three times, he says that rule 94(9)(c) is --

THE CHAIRMAN: Can I just interrupt you a moment. This independent opinion; is not the benefit of the independent opinion, if one has it, that the KC or whoever it may be will look at a lot more material than

the Tribunal can look at?
MR BÉAR: Yes.
THE CHAIRMAN: If what you are saying is "Well, the Tribunal has been given these documents, they could have been given to a KC", well, frankly, I do not see that we are helped by a KC reaching a view on the same material on which we reach a view. We can then reach our own view on that. We are not going to be told by someone else "This is the view you should reach on these materials".
The benefit, if they get an independent opinion, is that they can ask a lot more questions, get more documents, look more widely, so it is a much more elaborate exercise.
MR BÉAR: Yes, yes, it is time and information.
THE CHAIRMAN: Yes. So it is not quite -- so to say "Well, if they can produce this material for the Tribunal, they can produce it for an independent expert".
MR BÉAR: No, I am sorry, then I --
THE CHAIRMAN: That is what I thought -- perhaps I misunderstood you.
MR BÉAR: No, I was making a slightly different point, which is the amount of time you have got to look at it is relatively short, which is this hearing, or part of this hearing, and the arguments you have seen, and obviously, in varying degrees with different members of the

Tribunal, your own knowledge of the case. But of course the particular knowledge here is somewhat more difficult than it might be on some other aspects because ex hypothesi we are dealing with a part of the case which was not tried, which was very specifically and carefully hived off by the Chair's direction in 2022 as to the preliminary issues, and where it is common ground that the work has not been done to develop it so that the -- there is a difficulty in simply drawing on one's own knowledge.
There is then a question of, well, what could be said to flesh it out and to anticipate what might be said and what sort of information could be available. There are also legal issues which have been adverted to and, for all I know, are mentioned in Mr Cook's opinion but are not directly the subject of argument before you and where I imagine you might be reluctant to come to a conclusion, not least because they are -- if they are the ones I think they are, they are difficult and you will not have heard contrary argument or had anyone able to look at Mr Cook's presumably eloquent opinion and tell you if there was something that might be said against it.
So where does that leave you? An independent report, in effect a referee, could have had lots of time

and the ability to have a back and forth with the parties, really get into the detail, and go through an exercise which you, with respect, simply do not have the time, resource, capacity to do, and it is not because there is some sort of hierarchy of opinion, it is simply the (inaudible) would be better. I am sorry if I did not make that clear.
Now coming to the rule 94(9)(c) point. So Mr Brealey says, well, it says "likelihood of judgment", and he -- so he stresses the word "judgment". We say the first word to look at is actually "likelihood", what is meant by "likelihood"? We say what is meant by likelihood here, as in many other spheres of civil procedure, is not is it more than 50.01%. It is a broader test. I think it was Mr Justice Hoffmann, as he was, who first -- or was one of the first to formulate it, and without trying to recall exactly what he said, it was along the lines of "It is whether something is quite likely to happen or liable to happen"
Another case that comes to mind is the Court of Appeal on CPR 31.17, a decision called *Sumitomo v Black*, where Lord Justice Chadwick went through all of this. It may be I will be able to briefly show you all this tomorrow, but there is a pretty settled body of learning that says that the word "likely", and the word

"likelihood" would be the same, does not mean a simple binary test: is it anything over 50%, yes or no? It is more flexible than that.
Secondly, the stress on what you would get at judgment, as if that was the only relevance of this factor, is itself a false dichotomy. Because let us assume, just for the sake of example, a case which has a 49% chance of success, so it is just under, and one knows that such cases are perceived to exist. People often say it is just above or just below the halfway mark. Well, would somebody say that that sort of case has no value, because if you have to place a bet on it you would bet against it succeeding? Of course not, and all the time, litigation, which is an inherently uncertain business, however much you get advice, is conducted on the basis of looking at percentage prospects.
It is a point which the Tribunal I am sure would be very well aware of, but again we may look very briefly tomorrow at some well-known authorities in the private law context where damages are recovered for loss of a chance in litigation, so solicitors' negligence cases, but where the courts have accepted that even if a case does not have, or is not found to have a greater than 50% chance of having got through, for example the

typical case where the solicitor forgets to file a claim on time, a limitation period elapses and then it is gone, so then the client has a claim in negligence against the solicitor. Can the client recover money on the basis that it has lost something of value simply -- or by showing, or only by showing that the case was more likely than not to succeed at trial? That is not the law.

So the value of a claim is not to be approached -- and it would be very surprising if the rules required it to be approached -- by asking yourselves "Well, do we think it is more likely than not to succeed if it goes forward to trial?"

So that is my response to Mr Brealey's point.

MR MALEK: On value, let us say you have got a claim for £100 and you take the view that you have got a 48% chance of winning. It does not necessarily mean that its actual value in settlement terms is £48 if in fact the party on the other side says "Even if you are right that it is 48% I am not going to pay you a cent for this".

So how do you, let us say, value in those circumstances, because then you have an option, you have an option of either settling on whatever terms are available or you take to trial something that you think

you are going to lose, and you may say "Well, I would rather take whatever -- however small it is, than take this to trial", and so often you have cases where people do not get much value, if any value, on claims which are worth less than a certain percentage because that is the reality of what is in the room.

MR BÉAR: I am not sure that that is right, with respect.

MR MALEK: I do not know, I am just asking you.

MR BÉAR: It does not reflect how a lot of litigation is conducted. I mean people do say, and they may well mean it at the time they say it, "I am not going to settle with you, this is my best offer", and such statements are true until they are not. Some further information comes, people change their minds, something comes along. Commercial organisations can be reasonably assumed to act rationally, and if somebody is facing a claim for let us say 1 or £2 billion, and they try and strike it out and they fail, then they are going to be told there is some risk, and there will be one of those tense conversations where the board of directors grills the partner of the law firm, or maybe the hapless silk, and says "Well, can you guarantee that we are going to win this?" I am sure you have been there, and it is very, very rare that one says that, and even more rare where there has been an attempted strike-out and it has not

worked, or you have not even attempted the strike-out.

So at that point, then, people will inevitably consider putting in some money. It may well be an amount less than the 48 or 49%, which is the hypothetical, or assessed prospect. That I accept, because then you come into areas of sensitivity to risk. Then all sorts of other considerations come into play: how much can we afford to pay, will there be knock-on effects for other cases, what about our litigation persona vis-à-vis other claimants? Et cetera. All sorts of wider factors. But the idea that somebody who says "This is my final offer", and that that should be treated as a kind of, you know, prohibition on the matter going forward, or a sort of trump card, is not, with respect, a realistic one.

MR MALEK: But the evidence we have heard and the submissions from Ms Tolaney today are that, as a matter of fact, Mastercard on this counterfactual claim, as part of the settlement, gave it zero pence value. That is what we have heard.

MR BÉAR: That is the submission you have heard, yes, that is the submission.

MR MALEK: Yes, that is what we have heard.

MR BÉAR: There is no doubt that the settlement -- the settlement figure attributes zero value, that is

absolutely correct, and that is our complaint. But the question --

MR MALEK: Your complaint is -- you know, you make a number of points that you make, but you say that various steps should have been taken to explore the counterfactual to put a credible case forward, and you say it is no surprise that there is zero value because nothing had been formulated in clear or convincing terms.

MR BÉAR: Yes, absolutely. That is right. So again, things may become also clearer when we look at the internal material in a bit of detail to see how those sort of considerations were addressed within the Class Representative's camp and the precise way in which they were looked at, but again I cannot --

MR MALEK: We will have to do that in private, will we not?

MR BÉAR: We will have to do that in private, I am afraid. I keep on trailing things and having to stop myself, so I am sorry. You may find tomorrow I am still cryptic, but if so that will be my fault. On this occasion it is not my fault, I just have to stop trying to develop it.

But the issue as to whether a party can be treated as in effect giving no objective value to a claim, if -- let us assume for the sake of argument the claim is or may well have objective value as a seriously arguable claim, can somebody say "Well, because we cannot be

satisfied that it is likely to succeed if it goes all the way to judgment", and because somebody says "I was told by my client that they were not going to settle", therefore it has got no value, I would reject that and I would invite you to reject that. That just is not realistic.

As I say, if a claim were formulated, if a claim got through the process of strike-out, then it would have litigation -- real litigation risk and a rational defendant, faced with such a big potential money judgment against it, would consider paying some money, regardless of what it had said before and regardless of how sincere it was in those instructions and that is just the way the world works, so Mr Sansom's evidence as to the instructions he was given -- it is not evidence from Mastercard, it is just evidence about the instructions that they gave him. He has been asked whether there is anything in writing and he says there is nothing in writing. We have had that in correspondence.

THE CHAIRMAN: As I understand it, you are not questioning his evidence that those were the instructions at the time and we have no reason remotely to go behind that. As I understood your argument, you were saying "Well, if matters had developed, the instructions might change."

MR BÉAR: Yes, exactly.

THE CHAIRMAN: That is the point you are making.

MR BÉAR: Exactly. If you will forgive me a quote, Lord Keynes said "When the facts change, I change my opinions", and that is how people work and it is the experience in heavy litigation that defendants -- indeed both parties move their position from what they previously thought it was and what they previously said it was and what they previously told their lawyers it was. People do move, I am afraid.

But we will also look in a little more detail at precisely what it was that Mastercard based their zero assessment on, just because there is some evidence about that which you have not yet seen and we will also look -- obviously this bit will be in closed session -- at what Mr Merricks looked at.

THE CHAIRMAN: Yes. I mean we have, and you do not of course, the benefit of leading counsel's advice to Mastercard.

MR BÉAR: Yes, exactly, you have got his advice. The other piece -- and if you will just allow me, I know we have strayed a bit beyond. If you allow me a few more minutes, if that is not trespassing too much.

THE CHAIRMAN: Yes, not beyond quarter to.

MR BÉAR: No, certainly not. I was hoping to make it

a little less.

One other point which goes to the exercise that has been conducted, which again has come up today, is the question of the duty of full and frank disclosure on the applicants, so just to set out our understanding of this.

First of all, Mr Malek's decision in *McLaren* this year indicated that the Tribunal would expect candour -- I forget the exact phrase -- but on the part of applicants.

In Canada, if I remember correctly, certainly in Ontario, the cases I have read indicate that there is an express provision in the rules that requires applicants to make full and frank disclosure. I will try and find you the reference, but I am confident that I have seen that. The analogy that we drew in the skeleton argument -- I am not sure if it appears in the cases or if it is something we thought of ourselves -- was with an ex parte injunction, or an application for a service out of the jurisdiction and, as the Chair has observed, this case might be thought a fortiori to those, but the reason there is a duty of full and frank disclosure is because the court is making a decision without the other party present and prima facie where you have both parties -- adverse parties to a dispute coming together

to ask the court to do something, then the rationale for the full and frank duty would equally arise.

A more sensitive question is the extent to which this was in fact complied with here and bear in mind there is a difference and a very big difference between people giving evidence that they believe to be true and then the extra burden that is imposed upon you, which all litigators recognise, when you have to make an application knowing that there is a duty of full and frank disclosure upon you.

When you apply, to take the obvious example, for a worldwide freezing order, there is a section in the affidavit that says "My duty of full and frank disclosure" and that is there as a checklist and comfort for everybody involved, and it is notable that there is no trace that I have been able to see in the application materials of that attitude being taken, and if it was the attitude at the time, there is no conceivable reason why it would not have been stated, and there is some inferential reason to think that it was not the attitude taken because there is very, very little by way of reasons put forward against the settlement and Ms Tolaney, when she was trying to defend the position on this, said "Well, there was a candid examination of the strengths of the underlying case", but that is

a different point -- I am paraphrasing what she said, but that is a different point from the pros and cons of entering into the settlement in this amount at that time and what one does not see -- and in particular we say one does not see it on the Class Representative side, which is frankly where you would expect to find it -- what one does not see is that sort of balance analysis being carried out.

So again, we will have to look at that tomorrow, but can I just leave you with two quick examples, bearing in mind the quarter to cut off.

First of all, why is the settlement 200 as opposed to the figures that have been mentioned, the lower figures, slightly lower figures? There is nothing in Mr Sansom's application statement -- that is Sansom 8, section 5. It is a long section, it must be 10 or 15 pages of evidence, if not slightly more, nothing to indicate why the figure is not the amount which we have been told today was the maximum realistic figure which was 171 million.

Why is it that Mastercard is putting in extra money? Why are their directors not worried about a claim for breach of fiduciary duty for needlessly giving away 31 million -- or whatever it is, 29 million of their shareholders' money? Well, it may be that they do not

have to be too worried when you look at what we say is the correct range of outcomes.

Mr Sansom does say something in reply and perhaps we can very quickly call it up, if you will forgive me, Mr Chair. It is IBA/10/8-9 and maybe we can have them both on the screen please. But now what we have got here, I am afraid, is not what I have got, so we will have to look at --

THE CHAIRMAN: Is this Mr Sansom's ninth?

MR BÉAR: Mr Sansom's ninth which is -- this is obviously the public version. I am looking at the version which is confidential as between the settling parties and the Funder, with green redactions on it, so you will see at 2.12, we can start it there --

THE CHAIRMAN: Paragraph 2.12?

MR BÉAR: I beg your pardon?

THE CHAIRMAN: Paragraph 2.12 --

MR BÉAR: Paragraph 2.12, yes, on page 8.

THE CHAIRMAN: -- of Mr Sansom's ninth, so that should not be on screen. Shall we read it to ourselves?

MR BÉAR: Can you read it to yourselves.

THE CHAIRMAN: The paragraph beginning "Third", yes?

MR BÉAR: Correct.

(Pause)

So you can see that the last two lines and one word

refer to a particular factor and then 2.13, that factor is then, as it were, superseded by what one can see in the sentence at the top of the next page, the last sentence of paragraph 2.13.

THE CHAIRMAN: "However".

MR BÉAR: Yes, "However".

THE CHAIRMAN: Yes.

MR BÉAR: Just also note footnote 11 at the bottom of the page, which refers to clause 4.4 of the settlement agreement.

I think Ms Tolaney may have said at one point today that timing was not a factor, in open court -- open Tribunal, but I am drawing your attention to this evidence.

THE CHAIRMAN: Yes.

MR BÉAR: Perhaps that is a convenient point.

THE CHAIRMAN: Yes, it is almost quarter to. So half past 10 tomorrow.

(4.45 pm)

(The hearing adjourned until 10.30 am on Thursday, 20 February 2025)

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