

OPUS 2

INTERNATIONAL

Sainsbury's Supermarkets Ltd v (1) MasterCard Inc, (2) MasterCard International Inc, (3) MasterCard Europe S.P.R.L.

Day 23 Redacted

March 16, 2016

Opus 2 International - Official Court Reporters

Phone: +44 (0)20 3008 5900
Email: transcripts@opus2.com
Website: <http://www.opus2.com>

1 Wednesday, 16th March 2016
 2 (10.00 am)
 3 (Beginning of open session)
 4 Closing submissions by MR HOSKINS (continued)
 5 MR JUSTICE BARLING: Good morning, Mr Hoskins.
 6 MR HOSKINS: Good morning. Last day.
 7 MR JUSTICE BARLING: Ready to do battle again?
 8 MR HOSKINS: Excitement in the air.
 9 MR JUSTICE BARLING: A feeling of celebration going on.
 10 MR HOSKINS: You have got work to do now.
 11 MR JUSTICE BARLING: We know that.
 12 MR HOSKINS: Exactly. I won't gloat too much.
 13 We left yesterday, I was about to do the adjusted
 14 cost benefit analysis. So I'm going to pick our closing
 15 submissions up at page 116.
 16 As you know, Dr Niels has conducted a cost base
 17 analysis. Mr Brealey got very excited at the start of
 18 his closing submissions by the sentence at
 19 paragraph 350, that:
 20 "Dr Niels had used the same subset of costs used by
 21 the Commission in 2002."
 22 He said that credit write-offs were not included in
 23 the free funding period. He is absolutely right about
 24 that, they are not included in the free funding period,
 25 but that's because they are included in the costs of

1

1 providing the payment guarantee.
 2 So if I can take you to the Visa decision. That's
 3 E1, tab 2, page 31.
 4 MR JUSTICE BARLING: Yes.
 5 MR HOSKINS: Because that's where the analysis of the four
 6 conditions starts. And at page 31 you see the heading
 7 "First and second conditions".
 8 Then page 32, bottom of the first column "according
 9 to the Commission", so you are moving into
 10 the Commission's analysis. Then the crucial part begins
 11 at recital 83, and then I think the easiest thing is if
 12 I can read to you 83, 84, 86 to 88 and 91.
 13 So 83, 84, 86 to 88 and 91.
 14 MR JUSTICE BARLING: Yes. Do you want us to read those?
 15 MR HOSKINS: Yes, I think that is the easiest thing, if you
 16 don't mind.
 17 MR JUSTICE BARLING: Do sit down if you want to.
 18 MR HOSKINS: I'm fine, thank you. (Pause)
 19 You will see in particular it is 87.
 20 MR JUSTICE BARLING: Right.
 21 (Pause)
 22 MR HOSKINS: So you will see from 84 the three cost
 23 categories: The cost of processing; costs providing the
 24 payment guarantee; costs of the free funding period.
 25 Then you will see from recital 87:

2

1 "As to the cost element of the payment guarantee
 2 relating to bad debt write-offs arising from cardholder
 3 default," etc, etc.
 4 Then 88 that follows.
 5 So yes, it is not in the free funding period, but it
 6 is in a different category.
 7 MR BREALEY: I can do this in reply, but you have to also go
 8 to footnote 16 on page 22 which defines ...
 9 MR JUSTICE BARLING: Footnote 16.
 10 MR HOSKINS: It is the last sentence of footnote 16.
 11 MR JUSTICE BARLING: On page 32?
 12 MR BREALEY: 22.
 13 MR JUSTICE BARLING: 22, sorry.
 14 MR HOSKINS: What one has in this decision is an exemption
 15 granted on the basis of payment guarantee including
 16 credit write-offs. And what Visa has to do in the
 17 future is provide future cost studies, and the
 18 Commission said the future cost studies shouldn't
 19 include default losses.
 20 MR JUSTICE BARLING: Other than the ...
 21 MR HOSKINS: So you have an exemption granted with default
 22 losses in and a future, the Commission monitoring going
 23 ahead and asking for stuff without it in.
 24 MR BREALEY: Sorry:
 25 "Any default losses occurring during the free

3

1 funding period are included in the MIF cost study."
 2 So after, say, the 28 days if you default after
 3 a year, well, it is for the Tribunal to interpret it,
 4 but we have always understood that to be that after the
 5 free funding period default losses are not included in
 6 the MIF cost study.
 7 MR HOSKINS: Which is plainly inconsistent with the
 8 substantive recitals 87 and 88 which I have just shown
 9 you.
 10 MR JUSTICE BARLING: I don't quite understand how there
 11 would be a default loss in the 28-day period.
 12 MR HOSKINS: Well, exactly.
 13 MR JUSTICE BARLING: How would that arise because no one
 14 expects any payment during the 28-day period, do they?
 15 MR HOSKINS: No. I agree it is not the most happily drafted
 16 decision, but if one is asking which is the tail wagging
 17 the dog, I strongly suggest that you look at the
 18 substantive reasoning in 87 and 88 which is quite clear,
 19 rather than a rather ambiguous sentence in footnote 16.
 20 It is a different point anyway. This is really
 21 a splitting hairs point because the truth is, as we will
 22 see when we come to what the two experts say,
 23 Mr von Hinten-Reed didn't challenge credit write-offs
 24 being included in adjusted cost benefit analysis. His
 25 only complaint -- we will see the difference between the

4

1 experts in the way they have approached the analysis in
2 this case -- is whether you include benefits of credit.

3 But the truth is we are not saying -- you have our
4 submission -- you are not bound by any of these
5 Commission decisions. You should have reference to
6 them, and if you decide on the basis of the evidence
7 that having credit is a benefit to merchants -- not just
8 in all the ways I have outlined, but also for the reason
9 I have described, which is they will get payment for
10 sales that are made where the cardholder doesn't
11 actually have the money to pay for it, so those are the
12 write-offs, if that's a benefit, and we say it clearly
13 is, then it is for the Tribunal to decide whether that
14 should be included in the adjusted cost benefit analysis
15 or not.

16 We are not asking for a slavish adoption of this
17 decision or any other decision. We are asking you to
18 exercise your judgment. There is no real dispute,
19 Mr von Hinten-Reed accepted it, that individual
20 merchants, his point is -- the legal one he is wrong
21 on -- but he accepts individual merchants get a benefit.
22 When someone uses a credit card, the merchant gets the
23 money that the cardholder subsequently defaults. The
24 merchant still gets the money.

25 MR JUSTICE BARLING: It is quite tricky though that one,

5

1 isn't it? Because the way you draw, if you draw a line,
2 and if so where you draw the line because the --
3 obviously the issuer gets presumably adequately, if not
4 well remunerated through, you know, for his credit, the
5 credit he gives, and it can be said that there's also of
6 course a benefit to the merchant and to at least --

7 MR HOSKINS: I'm going to deal with interest, sir, because
8 obviously it is an issue. What do you do about interest
9 revenues and the cost benefits analysis. So I am
10 certainly going to come to that.

11 MR JUSTICE BARLING: That was why Dr Niels has his slightly
12 rough and ready --

13 MR HOSKINS: Well, exactly. That's the point. There isn't
14 a right answer here. In a sense what you have got is
15 you have got two experts. I will develop this. I'm in
16 the same ground, I'm not saying our approach is perfect
17 but when we come to it you can look at the two and say
18 which is preferable and you can take your own view based
19 on that that, in our submission, as I will show you, the
20 Dr Niels approach, yes, rough and ready, but it is far
21 preferable to the Mr von Hinten-Reed approach which
22 simply ignores the benefits which merchants get from
23 credit. But I will come to that.

24 So back to the closings. Paragraph 350. You have
25 the point Dr Niels has conducted the cost base analysis.

6

1 He has used three categories: processing costs, payment
2 guarantee, free funding period. He is including credit
3 write-offs, and what he does is he doesn't say "I'm
4 going to attribute all those costs as giving rise to
5 benefits to merchants". He says "I will do an analysis
6 attributing 25% of those costs effectively to merchant's
7 benefits and 50%".

8 By doing that, you will see the figures he gets at
9 350A for credit cards, he gets a range of between 0.75%,
10 and that's if you allocate 25% of the credit cost to
11 merchants, and he gets 1.31 if you allocate 50% of the
12 credit cost to merchants.

13 Then we make the point, it is one I have made
14 already, Mr von Hinten-Reed accepts that a cost-based
15 methodology is useful as a cross-check. So there's
16 common ground between them that it is worth doing this
17 exercise, it can be useful.

18 We make the point at 352:

19 "Issuer-based cost approach was used by the Reserve
20 Bank of Australia. It was also used by the US Federal
21 Reserve in relation to their debit card regulation."

22 So it is a system that is recognised and used by
23 other authorities. It is not an outlier.

24 The main issue of principle between the experts we
25 identify at 353 with a quote from Mr von Hinten-Reed's

7

1 second report:

2 "In his first report, Dr Niels argues that issuers'
3 costs are a practical proxy to assess benefits
4 ... (Reading to the words)... 0.75 to 1.31. This result
5 is mainly driven by an inclusion of credit costs. When
6 these costs are excluded, as they should be as only the
7 transactional benefits [I think that should be ought] to
8 be taken into account, the cost base MIF falls to 0.2 to
9 0.35."

10 So you see the dispute between the experts is: do
11 you include anything for credit costs?

12 You understand immediately my point. You have got
13 the problem again of Mr von Hinten-Reed saying you
14 assume that credit is of no benefit whatsoever to
15 merchants. You heard my submissions yesterday afternoon
16 as to why credit is clearly of benefit to merchants in
17 a number of ways.

18 Of course the problem that Mr von Hinten-Reed has is
19 just his false legal premise, that he thinks you have to
20 look at all merchants in the aggregate. And as I showed
21 you in the case law, that's just simply incorrect. You
22 are looking at merchants who accept credit cards.

23 There is a query, is the market merchants who accept
24 MasterCard or is it merchants who accept all credit
25 cards, but I don't think it matters for the purposes of

8

1 this analysis because Mr von Hinten-Reed is clearly
 2 wrong on the law.
 3 So, again, that is the choice you have got, or
 4 that's what informs the decision you have to make. You
 5 have got an expert who says, well, credit is clearly of
 6 some benefit to merchants and I'm going to take account
 7 of that in a rough and ready way by assigning 25% to 50%
 8 of the costs. These particular costs categories, I'm
 9 going to say that that represents the costs that have to
 10 be incurred to give the benefits to the merchants and do
 11 a calculation.

12 You have got another expert, Mr von Hinten-Reed, who
 13 says "I will take no account of any benefits merchants
 14 get from credit", and we say the former is clearly far
 15 more realistic than the latter.

16 At 355 we set out some of the reasons from the
 17 literature which show why Mr von Hinten-Reed's approach,
 18 to assume merchants don't benefit in any way from
 19 credit, is wrong. I have made a number of submissions
 20 on that, but these were quite useful just to tie it
 21 altogether.

22 Rochet and Wright:

23 "Offering credit allows individual merchants to make
 24 sales that they otherwise would not make. The ability
 25 to make these incremental sales is the major reason

9

1 explaining why merchants accept credit cards and,
 2 indeed, are willing to pay higher fees to do so compared
 3 to the fees paid to accept debit cards. Prior to the
 4 widespread use of credit cards, store credit was much
 5 more widely used than today."

6 Rysman and Wright:

7 "Simply put, when a merchant accepts card it is
 8 improving the quality of the service ...(Reading to the
 9 words)... and is only natural that this allows it to
 10 charge a higher price. The more surplus it can offer
 11 consumers, the more it is willing to incur a cost to do
 12 so. This phenomenon is no different from any other
 13 service that a merchant may employ to attract customers
 14 for which it does not set a separate price."

15 I put that to Mr von Hinten-Reed in
 16 cross-examination and he agreed with that as
 17 a principle.

18 Then Tirole:

19 "In general though, the second notion exceeds the
 20 first. Consumers may inquire into whether the shop
 21 takes the card before going to or entering the shop
 22 ...(Reading to the words)... results in extra sales."

23 Again, put to Mr von Hinten-Reed and he said that
 24 was obviously correct, in cross-examination.

25 So he continuously accepted the economic theory, but

10

1 he retreated then to his, I'm afraid, mistaken view of
 2 the law to justify his narrow approach. But he accepted
 3 economic theory at every turn.

4 Then F, Tirole again:

5 "Suppose first that a customer in the shop does not
 6 have enough money in his bank account to purchase the
 7 good or service immediately. Either the purchase was
 8 unforeseen or the transaction costs of asking for an
 9 overdraft facility at his bank were perceived as high.
 10 Were the merchant not to accept credit cards, the
 11 transaction would not take place, generating a loss for
 12 the cardholder but also for the merchant who would then
 13 lose the usually substantial mark ...(Reading to the
 14 words)... insofar as it allows sales to take place
 15 earlier than would otherwise have been the case."

16 So there's almost no dispute on the theory. The
 17 actual dispute is the law, and as I have explained
 18 Mr von Hinten-Reed is simply wrong on the law.

19 In our submission, what the Tribunal should be doing
 20 in accordance with the law is taking account of benefits
 21 to merchants and seeking to come up with an acceptable
 22 benefit of MIF which takes account of that whether
 23 that's through the cost benefits analysis or the
 24 MIT-MIF, but more likely doing both, and taking a view
 25 in the round as to where the proper answer lies.

11

1 It is probably best then to deal with some of
 2 Sainsbury's subsidiary arguments in relation to this.
 3 We pick these up at paragraph 358 of the closing
 4 submissions.

5 At 359 there is the point that Sainsbury's made to
 6 say, well, Dr Niels' assessment, his cost benefit based
 7 analysis, is based on the 2008 EDC cost study, which is
 8 based on 2007 data. That's out of date. But I mean,
 9 that's too facile because the claim period is
 10 December 2006 to December 2015. So using 2007 data for
 11 a claim period that begins at the end of 2006 is
 12 eminently appropriate.

13 Now, I accept of course as over time 2007 data will
 14 become more out of date, but Sainsbury's have got the
 15 opposite problem with their MIT-MIF approach because for
 16 the MIT-MIF everyone is relying on Deloitte's
 17 survey 2015, which is great for the end of the period
 18 but, of course, is no good for the beginning of the
 19 period.

20 So again, it is really, yes, it is a valid point, we
 21 are struggling with data which is relevant for the whole
 22 period, but it cuts both ways.

23 What Dr Niels did say, this is paragraph 361 of the
 24 closing, he said:

25 "It is likely that reliance on the 2007 cost data

12

1 will actually underestimate the appropriate MIF because
2 the most significant element of the cost which is credit
3 default has actually rose significantly for part of the
4 period because of the financial crisis."

5 Again, it is rough and ready but that's where we
6 are. He says actually relying on the 2007 data is
7 likely to lead to an underestimate.

8 The second point is the interest point. What do you
9 do about revenues? Interest revenues. The first point
10 is the MIT-MIF takes no account of interest revenues
11 either. So this isn't a criticism that one can level
12 solely at the cost-based approach because the MIT-MIF
13 doesn't take account of interest at all either.

14 What this comes from, of course, is the
15 General Court -- you have been shown it on a number of
16 occasions by Mr Brealey -- referred to a need to take
17 into account other revenues obtained by issuing banks.
18 But remember, again, that I said that was an appeal
19 against the Commission decision. It was a judicial
20 review. So the General Court is looking at our
21 particular decision within that framework.

22 What we know subsequently is, for example,
23 the Commission has adopted a number of decisions,
24 commitment decisions, exemptions, which have taken no
25 formal account of interest revenues because they have

13

1 applied a MIT-MIF test which doesn't look at interest
2 as such.

3 We know that the Reserve Bank of Australia has used
4 a cost-based approach, that the Federal Reserve has
5 adopted a cost-based approach. Our submission is, yes,
6 there is that sentence in the General Court, but it is
7 quite clear, and I think this chimes with our
8 submissions generally, that the world has moved on in
9 terms of learning and analysis as to how one tries to
10 identify the exemptible level of the MIF. And there is
11 no hard legal requirement, we would submit, to take
12 account of interest revenues.

13 MR JUSTICE BARLING: Would it be permissible to take into
14 account the revenues from interest in order to reach
15 a rough and ready apportionment of the kind that
16 Dr Niels reached?

17 MR HOSKINS: What do you mean by "permissible", sir? Do you
18 mean, legally or economically, can you do it?

19 MR JUSTICE BARLING: Either or both.

20 MR HOSKINS: I can't say no. What I can say is our
21 submission is there's no -- I don't think -- in our
22 submission there is no hard legal requirement because of
23 the context in which the General Court made that
24 statement for you to do so.

25 The economic theory, both in terms of a MIT-MIF and

14

1 a cost-based approach, all the articles we have looked
2 at don't suggest that it is necessary to take account of
3 interest revenues in order to come up with the
4 appropriate level of exemptible MIFs. So in terms of
5 economic theory and where it has got to, none of those
6 articles actually suggest that you have to take account
7 of it. I think there's one that refers to it, and
8 I think it is Tirole. I would need to go back and
9 check.

10 But they actually say you should take account of it
11 because it would lead to a higher MIF because the
12 revenues that come from card use the issuers get then
13 allow them to offer better services to cardholders and,
14 indeed, compete amongst themselves. So rather than
15 seeing interest revenues as something that should reduce
16 the MIF, that economic argument is it is actually
17 a benefit that should be taken account of and would lead
18 to a higher MIF.

19 It is set out in our opening submissions.

20 MR JUSTICE BARLING: Presumably the reason, on the bottom
21 end of his range, 75% of the credit costs he apportions
22 to the issuer and only 25% to the merchant, is because
23 the issuer gets some benefits?

24 MR HOSKINS: Yes. I mean, what he is trying to arrive at is
25 fair share.

15

1 MR JUSTICE BARLING: Yes, exactly. But fair share must take
2 account of revenue, mustn't it?

3 MR HOSKINS: I don't think it is clear from Dr Niels' report
4 whether he was formally doing that. But insofar as you
5 have to do the exercise, you can look at it and say we
6 have had evidence on the benefits, we have evidence on
7 interest revenues, and our conclusion is that taking all
8 of that into account, a fair share is to take the 25% of
9 the costs on to merchants. There's certainly nothing to
10 stop you doing that.

11 MR SMITH: I quite take your point that neither test,
12 MIT-MIF or a cost-based approach, is very clear on the
13 interest received by issuing banks. But in a sense one
14 can see why logically, on the merchant indifference
15 test, interest is left out of the account, because it is
16 a test which is entirely focused on the benefits that
17 the merchant receives through a participation in
18 a credit card or debit card scheme and it just doesn't
19 look at the costs of the issuer at all. They are just
20 not regarded as relevant.

21 So since one doesn't look at the costs, why should
22 one look at the benefits received?

23 MR HOSKINS: I understand it is a more natural point to take
24 in relation to the cost-based approach, I agree.

25 MR SMITH: One can understand that.

16

1 MR HOSKINS: Before you move on, what it shows, sir, if one
 2 accepts that MIT-MIF is an appropriate way to get
 3 exemptible level, then when you look at what the
 4 General Court says, what the General Court can't have
 5 been saying is you can't have an exemptible level of MIF
 6 reached by methodology that does not take any account of
 7 interest revenues. Because the Commission has arrived
 8 at exemptible levels of MIF without taking account of
 9 any interest because it has used the MIT-MIF. So that
 10 is the way I would put it.
 11 MR SMITH: Yes, I see. But as you say, the issue is much
 12 more nuanced.
 13 MR HOSKINS: Alive in the costs one. Yes, I accept that. I
 14 accept that.
 15 But my point is there is no formal hard legal
 16 requirement to adopt an approach that takes account of
 17 interest because clearly the MIT-MIF is one of the ways
 18 in which you can do it and it doesn't take account of
 19 interest.
 20 MR SMITH: Yes.
 21 MR HOSKINS: That's more a legal point than an economic
 22 point.
 23 At 363, we also had the evidence, and we had second
 24 Sidenius as well, that the Baxter cost-based methodology
 25 does implicitly take account of revenues earned by

17

1 issuers. And we have set out the exchange in relation
 2 to that and you will remember the mini Baxter and the
 3 maxi Baxter etc.
 4 364, I mean, again, we are in rough and ready -- we
 5 are in broad axe territory, but it is important to bear
 6 in mind that the three cost categories which are used in
 7 the adjusted cost benefit approach don't reflect all the
 8 costs that are incurred by issuers. They are just
 9 a subset of those costs. And there is a large portion
 10 of costs incurred by issuers which are not included, and
 11 we set out some examples of them in 364A, B and C.
 12 So, again, there is probably some underestimate in
 13 itself by just looking at certain cost categories. Not
 14 a complete picture. It doesn't take account of
 15 interest, but nor does it take account of all the costs.
 16 You go to Baxter or maxi Baxter for that sort of
 17 exercise. It is to be described as a proxy and that is
 18 in truth what it is.
 19 MR SMITH: It is pretty much leaving out of account all
 20 common costs and only looking at incremental costs of
 21 the provision of the cards.
 22 MR HOSKINS: You are probably right, but I haven't thought
 23 about it that way, sir. That's why I'm hesitating.
 24 MR JUSTICE BARLING: Such as premises.
 25 MR SMITH: Premises, staff, IT, infrastructure.

18

1 MR HOSKINS: That's the thing. Yes, I'm not sure --
 2 processing costs -- processing the payment helps both
 3 sides just in terms of the mechanics. That's why
 4 I hesitated with common costs. But yes --
 5 MR SMITH: That might be common to both sides, yes. I meant
 6 costs that were common to the range of services provided
 7 by an issuing bank, those are --
 8 MR HOSKINS: I see, sorry. Yes, it doesn't include those.
 9 MR SMITH: And what you are focusing on is what you'd call
 10 the incremental cost of providing this particular
 11 service, namely issuing cards. I do take your point
 12 that the settlement system is something which has got
 13 the involvement of both the acquiring banks and the
 14 issuing banks, and in a sense both benefit.
 15 MR HOSKINS: For example, it leaves out reward programme
 16 costs, the costs of providing rewards. As we have seen,
 17 that is a very important part of the whole economic
 18 basis of these schemes, how they compete, how they gain
 19 market share. And my submission that you have heard is
 20 the more successful a scheme is, including by offering
 21 rewards, the more cards there are, the more merchants
 22 benefit because the benefits they get go up. It is not
 23 simply there are costs not included that are not
 24 relevant.
 25 When I say this is a proxy because it doesn't take

19

1 account of all costs, there are strong arguments on
 2 these, if you are trying to do a job of perfection you
 3 certainly would take them into account. But
 4 they're not.
 5 MR JUSTICE BARLING: So it is 25% to 50% of a subset of
 6 cost?
 7 MR HOSKINS: Correct. Of the three categories.
 8 The next point at 366 is that during the period of
 9 the claim, MasterCard used this sort of issuer
 10 cost-based approach. And it is important to note that
 11 the UK MIFs set were substantially below the results of
 12 the cost studies on each occasion.
 13 We give the figures at 366. They are confidential,
 14 but you will see there is a very substantial reduction
 15 from what's indicated by the cost studies in terms of
 16 what MIF was actually charged at the end of the day. So
 17 it is not simply that a cost study is done and all those
 18 costs are lumped on to the merchants. What MasterCard
 19 is trying to do, as the evidence shows, is come up with
 20 a fair share that takes account of all the interests of
 21 all the parties who want the system to succeed.
 22 MR SMITH: Speaking at the level of abstraction now, the
 23 process one ought to go through if one is taking
 24 a cost-based approach is first of all to identify the
 25 relevant costs, as it were, that are incurred by the

20

1 issuing banks. In other words, which ones one should
 2 look at and which ones one shouldn't look at, and
 3 clearly there are a range of views one could have there.
 4 And then having established that, you need to determine
 5 as between the two sides of the market where those costs
 6 should be allocated, in other words the distribution
 7 rights.
 8 MR HOSKINS: Yes, you could do it at H level for each
 9 category of costs, or you could actually do it at the
 10 end of the day and look at where the costs are. In
 11 a sense, that is the next point at 367.
 12 Again, some of this is blue so I have to be careful,
 13 but you will see the punchline: around 30% of costs of
 14 the MasterCard scheme were borne by merchants,
 15 around 70% were borne by cardholders.
 16 Again, rough and ready. Again, that is the end of
 17 the process that you could look at and say: is that
 18 roughly right?
 19 Unless you have other questions, those are our
 20 submissions on exemptible level. I was going to
 21 move on.
 22 MR SMITH: I suppose I just had one question, which was we
 23 obviously are focusing on credit cards much more than
 24 debit cards. Given the way in which the Sainsbury's
 25 claim is structured, they are much more important.

21

1 MR HOSKINS: Yes.
 2 MR SMITH: For that reason we are perhaps talking about
 3 exemptible MIFs in terms of a percentage. But of course
 4 on the debit card side, the general practice is not to
 5 have primarily a percentage, but to have a flat rate.
 6 MR HOSKINS: Yes.
 7 MR SMITH: When we are considering MIFs in the context of
 8 debit cards, ought we to be thinking in terms of a flat
 9 rate or a percentage rate?
 10 MR HOSKINS: The claim, as you know, relating to debit
 11 cards, is less than 1% of the total claim. So I'm not
 12 sure either party is pushing you to do a Rolls-Royce job
 13 on debit cards particularly. I will leave that to
 14 Mr Brealey to say if I'm wrong, but I'm really not sure
 15 whether it is worth anyone's while to have that. Both
 16 the experts have.
 17 MR SMITH: They have both addressed it?
 18 MR HOSKINS: Correct, they have come up with figures for
 19 debit cards but I think they are both percentages.
 20 MR SMITH: They are both percentages, indeed.
 21 MR HOSKINS: Certainly for our part we would be perfectly
 22 happy for you to adopt a percentage-based approach just
 23 because it is such a small part of the claim. But you
 24 are absolutely right, in terms of the practice for debit
 25 cards the practice is it is not ad valorem, it's per

22

1 transaction. Or flat rate, sorry.
 2 MR SMITH: Is the reason for the difference because the
 3 costs in relation to credit cards are proportionate to
 4 the amount that is spent in a manner that is more
 5 significant than is the case with debit cards?
 6 MR HOSKINS: I just don't know the answer. I would be
 7 fishing. Maybe it is somewhere, but I just don't know.
 8 I think, you know, the practice has been there.
 9 That's the way it was done. I doubt we have got -- it
 10 may be there, but going back in history -- why the
 11 credit cards were done that way and why debit cards were
 12 done differently.
 13 PROFESSOR JOHN BEATH: I suspect it probably has something
 14 to do with debit cards are thought of as the first thing
 15 after cash, and cash transactions were always dealt with
 16 as a fixed sum. I think it is historic.
 17 MR SMITH: No thanks to you, Mr Hoskins, but thank you very
 18 much, Professor Beath.
 19 MR HOSKINS: Well, I'm used to that.
 20 MR JUSTICE BARLING: Mr Hoskins, apropos of nothing --
 21 MR HOSKINS: This is going well.
 22 MR JUSTICE BARLING: -- but because it slipped my mind
 23 earlier when I should have raised it, I don't think you
 24 said anything -- correct me if I'm wrong -- about
 25 infringement by object.

23

1 MR HOSKINS: There is a reason for that.
 2 MR JUSTICE BARLING: Well, yes, but Mr Brealey --
 3 MR HOSKINS: I know you have got to deal with it.
 4 MR JUSTICE BARLING: Yes.
 5 MR HOSKINS: It is dealt with in the closing submissions.
 6 MR JUSTICE BARLING: So you don't want to add anything to
 7 what -- don't go into it now --
 8 MR HOSKINS: I will say it very quickly. I will summarise
 9 it now.
 10 The tests for object is something which is obviously
 11 a restriction of competition, without having to go into
 12 any detail of the economic context. What have we been
 13 doing for the last seven weeks? There is absolutely no
 14 way of applying the Cartes Bancaires test that this is a
 15 restriction by object.
 16 Mr Brealey never --
 17 MR JUSTICE BARLING: He came close to saying he wasn't
 18 pursuing it, but he didn't quite go that far.
 19 MR HOSKINS: It is dealt with and it has to be obvious. As
 20 soon as you have to start getting your hands dirty in
 21 the context, it is not a restriction by object, that is
 22 the case law. It is a crude way of summarising it, but
 23 that is the case law.
 24 MR JUSTICE BARLING: We have read it, but we will think
 25 about that.

24

1 MR HOSKINS: Because of time I'm not going to go into the
 2 appropriate damages counterfactual, but it is obviously
 3 an important point. This whole idea of switching
 4 migration we have covered a lot in any event in the
 5 counterfactuals, but I will leave you with the written
 6 submissions on that unless you have got any particular
 7 questions on it.
 8 MR SMITH: No, but unless you are going to address it, this
 9 question of interest and how it is computed, that's
 10 simply something which, again, we have no particular
 11 information to guide us on. In other words --
 12 MR HOSKINS: Interest in what context?
 13 MR SMITH: Interest received by crediting banks for the
 14 credit extended to cardholders. Because as I think we
 15 put it to Mr Brealey, you can see the free credit period
 16 in one of two ways. Either you say, well, it is a cost
 17 because you could have received interest for that 28-day
 18 period and you have foregone it, ergo a cost, or it
 19 isn't a cost because it has been fully factored into the
 20 interest which is charged to the revolvers to the
 21 benefit of the transactors.
 22 MR HOSKINS: Yes.
 23 MR SMITH: Really, we don't know which is the case.
 24 MR HOSKINS: Again, there's not necessarily a correct answer
 25 to that. You know the way we approach it. You know the

25

1 way Mr Brealey approaches it. I come back in a sense to
 2 the submission I just made in relation to the cost
 3 benefit analysis. It is a proxy, and I have shown you
 4 the sorts of example where it is only a subset of the
 5 costs, I have shown you where the split ends up,
 6 30/70 etc. I'm not sure I can do any better than that,
 7 to be honest.
 8 MR SMITH: It is simply a fact we bear in mind if we take
 9 the approach in terms of the split of costs that we
 10 apply.
 11 MR HOSKINS: I think that's the best I can do and it is
 12 probably the best you can do as well on the best
 13 evidence you have before you.
 14 MR JUSTICE BARLING: We haven't got any evidence as to
 15 whether or not it was factored in to the interest rates,
 16 have we?
 17 MR HOSKINS: Factored in by whom, sorry?
 18 MR JUSTICE BARLING: By the issuing banks, or any of them.
 19 MR HOSKINS: Mr Cook reminds me, in relation to his
 20 Sainsbury's Bank benefits point he took in
 21 cross-examination he went to the analysis internally of
 22 Sainsbury's Bank about the profitability of the scheme.
 23 And you know what his submission is, that it was
 24 profitable not because of interest revenues but because
 25 of the MIT.

26

1 MR JUSTICE BARLING: Yes.
 2 MR HOSKINS: So you have that. Certainly that's not saying
 3 that every bank's in that position, but clearly there
 4 are banks that don't have lots of revolvers and wouldn't
 5 be able to support a scheme purely on the basis of
 6 interest. I think that's clear.
 7 You do have the second Sidenius maxi Baxter material
 8 which when it was done it did take account of interest
 9 revenues, it still supported the way MasterCard were
 10 doing it at the time. You have that. None of this is
 11 perfect, but I think that's the best evidence there is.
 12 MR SMITH: Thank you.
 13 MR HOSKINS: That's the test.
 14 So the damages counterfactual is page 127 and I will
 15 leave you with that and I will go on to pass-on and
 16 mitigation of loss.
 17 I can start doing this in open court, but I'm afraid
 18 there will come a time when I hit yellow and I'm going
 19 to ask for it to go into closed session. But I will do
 20 as much as I can in open first.
 21 I will start with a statement of the obvious. The
 22 fundamental basis of quantification for a victim of
 23 a tort is to put the victim in the position he would
 24 have been in if the wrong had not occurred. But what
 25 you are actually looking at is whether, in relation to

27

1 a commercial enterprise, they have suffered a diminution
 2 in profits as a result of the wrong.
 3 A good example of that is the taxation issue,
 4 BTC v Gourley. So in a straight overcharge case, for
 5 example, in a cartel overcharge case, it is not enough
 6 to establish what the level of overcharge was and then
 7 multiply it by the number of sales. You then have to go
 8 into what the tax position is because they are getting
 9 the money, say, 10 years later. And if the tax regime
 10 has changed, then the money will have a different value
 11 in their hands.
 12 The fact that the courts in BTC v Gourley say you
 13 must take account of that sort of tax position is just
 14 an example to demonstrate that you are looking at
 15 diminution in profit, and it is not enough just to show
 16 that there has been some unlawful element of overcharge.
 17 You are actually looking at the position in the round of
 18 the enterprise and seeing if it has suffered any loss of
 19 profits or not.
 20 The possible effects of a MIF overcharge on
 21 Sainsbury's appear to be threefold. This is
 22 paragraph 424 of the closings. Mr Von Hinten-Reed
 23 identified the three as follows. He said as a result of
 24 any overcharge, it is possible that, relative to
 25 a scenario in which there was no overcharge, Sainsbury's

28

1 prices might have been higher.
 2 Now, that's pass-on. Spend in other areas might
 3 have been lower and that's basically offsetting costs
 4 elsewhere in the business to take account of the
 5 increase in costs due to the overcharge. Or profits
 6 might have been lower.
 7 Just to set out where I'm heading with this. In
 8 relation to pass-on, as you know, our submission is
 9 Sainsbury's is not entitled to claim damages in respect
 10 of any part of the MIF overcharge which is passed on.
 11 In relation to the second category, offsetting cost
 12 cuts, again we submit that Sainsbury's is not entitled
 13 to claim damages to the extent that any part of the MIF
 14 overcharge was mitigated by cutting costs elsewhere.
 15 I will come to the detailed evidence on that.
 16 But if a company mitigates any potential loss by
 17 taking axe elsewhere, we say it follows from
 18 British Westinghouse that that is then not recoverable.
 19 But I will come to that and I will deal with that in
 20 more detail.
 21 PROFESSOR JOHN BEATH: Sorry, in this context would
 22 mitigation imply that there was no adverse damage felt
 23 by the party? Somehow mitigating it is you have found
 24 some scope, but you don't really feel you have lost
 25 anything?

29

1 MR HOSKINS: That's why I stressed the lost profit point at
 2 the start. I would say the test is, as a result of the
 3 wrong, any unlawful overcharge in the MIF, has as
 4 a matter of fact Sainsbury's suffered any loss of
 5 profit? Our submission is it won't have as far as it
 6 has passed through. And insofar as anything wasn't
 7 passed through but was offset, then equally it has not
 8 suffered any lost profit as a result of that overcharge.
 9 MR SMITH: Can I test that a little bit.
 10 MR HOSKINS: Can I come to it separately? Because what
 11 I would like to do is deal with the first one, which is
 12 pass-on, and then -- I know you are going to test me on
 13 it, I understand why -- deal in detail with that second
 14 category. I'm just setting out the roadmap, because
 15 I need to go further, I need to deal with
 16 British Westinghouse and material like that, and I would
 17 rather deal with it after we've done pass-on, as long as
 18 you are satisfied with that, sir.
 19 MR SMITH: Okay.
 20 MR HOSKINS: Thank you.
 21 The third category is reduced profits. It is quite
 22 odd in a sense because Sainsbury's hasn't provided any
 23 analysis to suggest what its loss of profits as a result
 24 of any overcharge was. What it does is deny
 25 pass-through in its entirety, and then we will have this

30

1 issue about whether offsetting costs has any effect on
 2 the quantification or not.
 3 But it is odd, because one would expect, in a claim
 4 such as this, a company to say the lost profits is X and
 5 have a figure.
 6 Let me go to the legal principles. I didn't take
 7 you to the judgment itself, but we have set out the
 8 passages and we set them out in opening, but
 9 British Westinghouse is the leading case certainly on
 10 mitigation and, beyond that, how you generally apply the
 11 compensatory principle put in the position you would
 12 have been if the harm hadn't occurred.
 13 It is actually quite dramatic facts. It's worth
 14 reminding oneself what happened in British Westinghouse.
 15 This is paragraph 430. The claimant purchased turbines
 16 from the defendant. The turbines were provided at
 17 various dates during 1904, 1905, 1906. And after they
 18 were installed it was discovered they were defective,
 19 but the defendant carried on using them until 1908. So
 20 some of them had been in use for four years, three
 21 years, two years. It was a long time they carried on
 22 using them.
 23 Then they went out in the market and bought new
 24 turbines, and the new turbines were better than the old
 25 ones so it put them in a better position than they would

31

1 have been in because of the superior efficiency. That
 2 wiped out the loss.
 3 That's quite dramatic because something that
 4 British Westinghouse did four years later was deemed to
 5 be something that had to be taken into account when
 6 deciding what the quantum of loss was.
 7 The principles, it is important to see them because
 8 I will come back to these when we talk about whether
 9 offsetting costs is mitigation of loss or not.
 10 The principles, at 431, the Lord Chancellor,
 11 Viscount Haldane:
 12 "The fundamental basis is this compensation for
 13 pecuniary loss naturally flowing from the breach. But
 14 this first principle is qualified by a second, which
 15 imposes on a plaintiff the duty of taking all reasonable
 16 steps ...(Reading to the words)... prudent man would not
 17 ordinarily take in the course of his business."
 18 That's not this case. We are not saying this is
 19 something that Sainsbury's should have done but didn't.
 20 But the next bit is this case:
 21 "But when, in the course of his business, he has
 22 taken action arising out of the transaction which action
 23 has diminished his loss, the effect in actual diminution
 24 of the loss he has suffered may be taken into account
 25 even though there was no duty on him to act."

32

1 So if you do take steps, even though you are under
 2 no duty to do so, you do take steps which mitigate your
 3 loss, that is to be taken into account.
 4 Then B at 690:
 5 "I think that this decision illustrates a principle
 6 which has been recognised in other cases, that provided
 7 the ...(Reading to the words)... in the ordinary conduct
 8 of business, properly have taken ..."
 9 That is almost like a causation test:
 10 "If the steps they have taken are taken as a result
 11 of the wrong in the ordinary conduct of business, then
 12 it is to be taken into account in the calculation. The
 13 subsequent transaction, if it is to be taken into
 14 account, must be one arising out of the consequences of
 15 the breach and in the ordinary course of business."
 16 So that is the causation test. For it to be
 17 relevant.
 18 Then C:
 19 "I think the principle which applies here is that
 20 which makes it right for the jury or arbitrator to look
 21 at what actually happened and to balance loss and gain.
 22 The interaction was not res inter alios acta, but one in
 23 which the person ...(Reading to the words)... in which
 24 he was placed by the breach."
 25 Then the bottom of the page:

1 "It formed part of a continuous dealing with the
 2 situation in which they found themselves and was not
 3 an independent or disconnected transaction."
 4 We say that principle is one of the ways you can
 5 justify -- I mean, pass-through in English law, you can
 6 take it as being relevant because of the general
 7 principle you only get compensated for loss that has
 8 actually been suffered. Some people suggest that the
 9 principle underpinning, legal principle underpinning
 10 pass-through is this mitigation. Or indeed, if you have
 11 taken steps which mitigate then you can't recover and
 12 that would cover pass-on.
 13 But as I said in opening, there is no dispute
 14 between us that pass-through is relevant to
 15 quantification, and we have been through the cases where
 16 it has been accepted by the English courts, but
 17 admittedly without argument that there is no argument to
 18 suggest that it is not relevant here.
 19 I will come to the EU law in a minute. Before I get
 20 there, what I will just say is the broad axe, because if
 21 the broad axe applies to the quantification of damages
 22 we say it applies at all stages of quantification. That
 23 must follow.
 24 So the broad axe, if it applies at identifying what
 25 loss, if any, or what level of overcharge, if any, there

1 was, it must equally apply to pass-through. Because it
 2 is a general principle of quantification and it can't be
 3 one that applies purely for the benefit of the claimant
 4 and not for the defendant.
 5 MR JUSTICE BARLING: How do you mitigate loss, other than by
 6 a direct pass-on in price? How do you mitigate loss
 7 caused by an overcharge which is alleged to have taken
 8 place here?
 9 MR HOSKINS: Let me set up two situations. There is
 10 a reason I want to take this separately, but I can see
 11 everybody wants -- it's an interesting point, so let's
 12 go with it now. Put pass-through on one side, we will
 13 assume there's no pass-through in this case. This point
 14 will equally arise if there is some pass-through, but
 15 not complete pass-through.
 16 So there is an overcharge in the MIF, we have got to
 17 that stage in the analysis. If what had happened --
 18 let's say the overcharge is worth 20 million a year, and
 19 if it is shown as a matter of evidence at the end of the
 20 year Sainsbury's profits are 20 million less than it
 21 would have been, they can claim that 20 million. Our
 22 submission is what happened in this case is that in the
 23 ordinary course of business, as a result of the wrong,
 24 what Sainsbury's says it has done is it has recognised
 25 a cost in the MIF and it has sought to deal with that

1 loss by making cost savings elsewhere.
 2 So at the bottom line, at the end of the day has
 3 Sainsbury's suffered a loss in profit as a result of the
 4 MIF overcharge? No, because it's offset. Is the
 5 offsetting legally relevant to the task of quantifying
 6 damages? We say yes, because the offsetting arises as
 7 a result of the wrong, the MIF overcharge, and the
 8 offsetting took place in the ordinary course of
 9 business.
 10 Now, the reason why we say it is mitigation, what
 11 happened in Westinghouse of course is what the claimant
 12 went out and did was actually got new turbines that were
 13 better than the old ones, and therefore it didn't suffer
 14 any loss in profit over the course going forward because
 15 it --
 16 MR SMITH: It did two things, Mr Hoskins. It lived with the
 17 defect for a number of years, operating the machines
 18 with the defect, and then in its own good time it
 19 replaced them. So it is a combination of those two
 20 factors. And isn't there some significance in the fact
 21 that the plaintiff in that case simply chose to live
 22 with the defect?
 23 MR HOSKINS: I think it would have been exactly the same
 24 approach in law if the machines had gone wrong on
 25 day one and they had gone out and bought replacements

1 from a third party that were more efficient. Because
 2 you would have had an issue there about the extra cost
 3 they had to pay because they are buying two sets of
 4 turbines, but insofar as the new turbines gave them
 5 a benefit in terms of efficiency, that would have gone
 6 into the equation in terms of the overall calculation.

7 So it would have been exactly the same legal
 8 principle applied if they'd bought new turbines on the
 9 second day. Passage of time makes no difference.

10 What one has here, let's assume in
 11 British Westinghouse the facts were they went out and
 12 they bought turbines, that, rather than being more
 13 efficient or as efficient as the new ones, were a bit
 14 more efficient, and all that did was mean that rather
 15 than being in profit over the piece because they ended
 16 up with more efficient turbines, let's assume over the
 17 piece they actually ended up neutral and they had
 18 suffered no loss.

19 The result in British Westinghouse would have been
 20 the same. There would have been no recovery and that's
 21 all that has happened here because of steps taken in the
 22 ordinary course of business they have suffered no loss.

23 The actual claim they could have for this would be
 24 if they could show that they had suffered a loss of
 25 profits because of the offsetting cuts made. So take

1 the sweet shop example. A person is laid off because of
 2 an increase in the MIF overcharge. The result of that
 3 is because there is a member of staff less, the shop
 4 makes less profit. That would be recoverable. That is
 5 the same here. The actual loss that's suffered, there's
 6 nothing in the offsetting loss, but if as a result of
 7 cost savings made elsewhere there was a loss of profits,
 8 it is exactly the same as the volume loss on the
 9 pass-through claim. There is no such claim.

10 MR SMITH: Sorry, Mr Hoskins, how do you square what you
 11 have just said with what you quote at page 142,
 12 paragraph C in British Westinghouse:

13 "Apart from the breach of contract, the lapse of
 14 time had rendered the applicant's machines obsolete
 15 ...(Reading to the words)... replacing them with new and
 16 up-to-date machines."

17 It is the --

18 MR HOSKINS: But the point of that -- sorry -- is that there
 19 was no obligation on them -- well, there might have been
 20 a duty to mitigate. The point is this arose in the
 21 ordinary course of business. That's what that's going
 22 to, because what's happening here is the machines became
 23 obsolete. So in the course of business they went out
 24 and bought new machines, and that's why it is causally
 25 relevant.

1 MR SMITH: Indeed. They endure the defect for however many
 2 years, and in the ordinary course of business they
 3 retire the machines and put in the new ones. And you
 4 can see why --

5 MR HOSKINS: But they retire them sooner than if the
 6 machines had been fit for purpose. It is not simply
 7 that these machines when they bought them had a shelf
 8 life of two or three years. I do not think that is the
 9 basis of British Westinghouse, because there was a claim
 10 for contract because the turbines were defective. That
 11 is the point of British Westinghouse. There was a claim
 12 and they had suffered loss because they bought -- in
 13 terms of money paid, they paid for defective turbines.
 14 But the point was, in the ordinary course of business
 15 they took steps to do something which mitigated that
 16 loss. And so the point in British Westinghouse, you
 17 don't just turn round and say "I claim the cost of the
 18 defective machines I have had to replace".

19 MR JUSTICE BARLING: The problem here is, though, there it
 20 was slightly more clean cut as to what the defect was.
 21 Here, when you have an overcharge of this kind, it is
 22 very difficult to see what the result is.

23 You are saying it is only to be measured in terms of
 24 loss of profit or something very close to that. Whereas
 25 I'm not at the moment putting my finger on why

1 British Westinghouse doesn't appear to me to be
 2 comparable to this case. But -- I will obviously have
 3 to read it carefully, as I am sure we all will, but
 4 surely the situation is different with an overcharge
 5 which then has to be dealt with in various ways?

6 PROFESSOR JOHN BEATH: Suppose this response had been, by
 7 Sainsbury's, the mitigating response has been that they
 8 opened one store less than they might otherwise have
 9 done. Would that not --

10 MR HOSKINS: They would have a claim for the lost profit due
 11 to their inability to open another store. That would
 12 absolutely be the claim. But the claim is for lost
 13 profits as a result of the offsetting costs.

14 MR JUSTICE BARLING: You say it is not lost profit, you
 15 don't get it?

16 MR HOSKINS: Yes.

17 MR SMITH: Mr Hoskins, suppose I do, as you suggest, save
 18 costs, in other words I take the overcharge, I can't
 19 pass it on to my customers and so I hack away at my
 20 costs and keep my bottom line intact, but in the course
 21 of doing so I damage the quality of my business in
 22 a manner that is not capable of very clear assessment in
 23 monetary terms. And let's suppose I decide not to offer
 24 in my supermarket child friendly parking for parents who
 25 have children and need bigger parking spaces, and

1 I therefore am offering less good service, but it is
 2 very hard to quantify what effect that has. Is your
 3 position that because my bottom line remains the same,
 4 my profit remains the same, that diminution in the
 5 quality that I'm offering and possible long-term harm
 6 that my business therefore suffers is left out of
 7 account?
 8 MR HOSKINS: Yes. Unless you can prove diminution in
 9 profits, you can't claim it.
 10 MR JUSTICE BARLING: So it is profits or nothing?
 11 MR HOSKINS: Yes.
 12 MR SMITH: Does there have to be, on the law, a link,
 13 a causal link between the overcharge and the saving?
 14 MR HOSKINS: Yes. You will see it, for example, at
 15 page 142B. It is the quote I read out:
 16 "The subsequent transaction, if to be taken into
 17 account ..."
 18 Here we would say the subsequent "action":
 19 "... if to be taken into account must be one arising
 20 out of the consequences of the breach and in the
 21 ordinary course of business."
 22 I will come on to what Sainsbury's own evidence is
 23 about how it reacted, what it said it did in relation to
 24 any MIF overcharge.
 25 Our primary submission is actually because of the

41

1 mechanics of the business it will have been passed on.
 2 But this is our alternative argument, insofar as
 3 material wasn't passed on. It is Sainsbury's own
 4 evidence that this is what they would have done.
 5 MR JUSTICE BARLING: You are probably coming on to this so
 6 stop me if you are. I am sure you will. How does
 7 European law impact on this? This is a claim for breach
 8 of competition rules, including the EU competition
 9 rules. And if one reads Crehan, there is no objection
 10 to a defence of pass-on provided it is directly passed
 11 on, and so on.
 12 Now, that of course would mean, if it was directly
 13 passed on, there might be a volume effect, but subject
 14 to volume effect there wouldn't be any loss of profit.
 15 MR HOSKINS: Yes, EU law recognises the volume of profit --
 16 MR JUSTICE BARLING: I know that.
 17 MR HOSKINS: But by definition I would submit that supports
 18 my position. In EU law you have a right to claim for
 19 any loss you have suffered as a result of a breach of EU
 20 law. So you still have to establish loss.
 21 MR JUSTICE BARLING: But if it has not been directly passed
 22 on in prices, and you have got a super efficient company
 23 that somehow manages, by adjusting everything and so on,
 24 to keep its bottom line, there's no extra impetus from
 25 EU law to say that --

42

1 MR HOSKINS: Mitigation -- step back. Is the Common Law
 2 principle of mitigation contrary to EU principle of
 3 effectiveness? Because that's what that question is.
 4 The answer is clearly no. Indeed, in the state
 5 liability cases, in Factortame itself, the Court of
 6 Justice said that one of the considerations in looking
 7 at entitlement to damages was whether the claimant had
 8 taken all steps they could to mitigate their loss.
 9 I can't remember if they used the word "mitigate", but
 10 that is certainly towards the end of that Factortame
 11 judgment.
 12 So in the context of an EU right to damages,
 13 mitigation is expressly recognised in state liability,
 14 and the principle is just because it is state liability,
 15 it doesn't mean it doesn't apply here.
 16 MR SMITH: I hesitate to move the sweet shop example from
 17 one side to the other but I will.
 18 Let's take Mr Brealey's sweet shop which faces the
 19 unlawful wholesale overcharge and doesn't, because let's
 20 say it can't, pass on the overcharge to its customers
 21 because it is a very competitive market.
 22 MR HOSKINS: The pocket money hasn't gone up to match the
 23 increase.
 24 MR SMITH: Exactly. It is a very competitive market, the
 25 sweet market. So what it does is it pushes down the

43

1 hourly wage it pays its shop assistants, and let's
 2 suppose that the causality of this can clearly be
 3 established, that you can show penny for penny
 4 a correlation between the overcharge and the reduction
 5 in wages.
 6 Now, on your case that is something that the sweet
 7 shop can't recover because it has not affected --
 8 MR HOSKINS: It has suffered no loss. Do you know who would
 9 have a claim though?
 10 MR SMITH: That was my question. Would the worker have
 11 a claim?
 12 MR HOSKINS: Yes.
 13 MR JUSTICE BARLING: Who would have a claim, sorry?
 14 MR SMITH: The employee would have a claim.
 15 MR JUSTICE BARLING: They would have a claim, would they?
 16 MR HOSKINS: Yes, they are the ones who have suffered the
 17 loss.
 18 MR SMITH: So you are taking a position on, as it were,
 19 pass-on that is much closer to Dr Niels' position now --
 20 MR HOSKINS: This isn't pass-on, it is mitigation.
 21 MR SMITH: Well, one might say pass-on is just a
 22 manifestation of mitigation.
 23 MR HOSKINS: It is a type of mitigation. I didn't find that
 24 helpful trying to force this sort of concept into
 25 pass-on. Pass-on is a type of mitigation and this is

44

1 a type of mitigation, but I don't think this is a type
 2 of pass-on.
 3 In some examples it will be, in the example you have
 4 given me, who has actually suffered the loss? It is the
 5 employee. I understand that. But it won't always be
 6 the case. You could have these sorts of mitigation
 7 arguments where nobody actually suffers any loss at the
 8 end of the day.
 9 So, for example, here Sainsbury's offsets costs but
 10 in the grand scheme of things it doesn't actually affect
 11 the profit it makes one jot. There is just simply no
 12 one who has suffered any loss. It is not a pass-on
 13 issue in that context, it is just a mitigation issue.
 14 PROFESSOR JOHN BEATH: So you are saying what the overcharge
 15 has done is made Sainsbury's pedal a hell of a lot
 16 faster, but -- that's made them work better or whatever.
 17 MR HOSKINS: A little bit faster.
 18 MR JUSTICE BARLING: It would be an interesting claim by the
 19 employees, their employer decides rather than take it
 20 off his bottom line, to drop their wages a bit. And
 21 that wouldn't break the chain of causation, you would
 22 say. They would have a perfectly good claim against the
 23 overcharger. I can see some considerable difficulties
 24 with a claim like that.
 25 MR HOSKINS: They are. It is the same. I will move back on

1 to pass-on.
 2 That is exactly the point that's made in the US.
 3 The truth is if you allow a pass-on defence, then the
 4 people who are buying a pint of milk will never bring
 5 a claim and therefore it is unfair. And that's
 6 precisely why the US has this policy decision of not to
 7 allow a pass-on defence because of the difficulties.
 8 But that US approach, I mean, the Chancellor gave it
 9 short shrift in Emerald, just before running this,
 10 because oh, it would be terrible because of the
 11 cartelist, the dirty dog, or whatever, would get off
 12 because nobody would actually bring a claim and the
 13 Chancellor said that is US policy, that's nothing to do
 14 with English --
 15 MR SMITH: Because you --
 16 MR HOSKINS: I say that because Mr Brealey has prayed that
 17 in aid. But with respect, that would be inconsistent
 18 with the law for the Tribunal to take that into account
 19 because that's a policy decision which has no feature or
 20 part in English law. See the Chancellor in Emerald
 21 Supplies.
 22 MR SMITH: It just gets very complicated.
 23 To go back to the employee example. Suppose if the
 24 sweet shop negotiates the wage down, the employee then
 25 chooses to leave and go elsewhere and the sweet shop is

1 put to the cost of hiring a new employee. That would
 2 then become --
 3 MR HOSKINS: Those are all causation issues.
 4 MR SMITH: -- that would then become a causation question
 5 and the claim would shift back to the sweet shop.
 6 MR HOSKINS: Those are all causation issues. If it can
 7 establish it, yes.
 8 MR SMITH: I see. A question closer to pass-through.
 9 Presumably it must be your case that if the overcharged
 10 entity can pass-on the cost, it should?
 11 MR HOSKINS: That would be a mitigation argument, and we
 12 have pleaded that.
 13 MR SMITH: I saw it. So even though one might say it is not
 14 particularly public spirited to have the overcharge
 15 passed down the line, if you can do it, you should?
 16 MR HOSKINS: That's the argument.
 17 MR SMITH: Can one not temper the extremity of that position
 18 by the test of reasonableness? Because of course
 19 mitigation is always a question of reasonableness.
 20 MR HOSKINS: Sorry, are we still on should you pass --
 21 I have not pushed that orally because I think you have
 22 seen two arguments. We say pass-on and we say
 23 offsetting costs. There is that one pleaded. You know,
 24 I understand as you go down you get more extreme, it
 25 gets harder to make a -- I'm not going to pin my colours

1 to that last one.
 2 MR SMITH: No, but it is the consequence of the legal test
 3 you are propounding, I think.
 4 MR HOSKINS: It is actually a different part of
 5 British Westinghouse. If you go back to 141, and
 6 I showed you this quote:
 7 "The fundamental basis is compensation for pecuniary
 8 loss flowing from the breach. This first principle was
 9 qualified by a second which imposes on a ...(Reading to
 10 the words)... which is due to his neglect to take such
 11 steps."
 12 That is the principle, sir, that we are focusing on
 13 now, the sort of third argument, if you like.
 14 But then there is a different part. It all comes
 15 out in this principle of compensation, but the one
 16 I have been making submissions on in terms of the
 17 offsetting is actually the next bit of the quote:
 18 "But when in the course of business he has taken
 19 action."
 20 So reasonableness becomes less of an issue, if you
 21 see what I mean.
 22 If you say someone has taken action in the ordinary
 23 course of business, you then are entitled to say, well,
 24 what effect has that had on profits? I accept that the
 25 third argument is a more difficult one because if you

1 are saying should someone have done it, then
 2 I understand where you get into difficulties when you
 3 then come back to me and say: are you really saying it
 4 is reasonable that every retailer must pass on costs and
 5 if they don't, I get that?
 6 But they are actually two different -- they come
 7 from the same basic principle of compensation, but they
 8 are different aspects of that principle. I'm relying on
 9 the second one, not the first one.
 10 That's why reasonableness is easier, because by
 11 definition it has to arise out of the consequence of the
 12 breach and in the ordinary course of business. By
 13 definition someone has done it. It is not what should
 14 someone do reasonably, it's what have they done and what
 15 has been the effect on their bottom line as a result.
 16 If I can go to page 146 of the closing. I'm not
 17 going to say much about the EU law relating to
 18 pass-through because I develop that fully in opening.
 19 Paragraph 446. This is really what EU law says. You
 20 see this repeatedly in the cases:
 21 "The question whether an overcharge has been passed
 22 on in each case is a question of fact to be determined
 23 by the national court, which may freely assess the
 24 evidence."
 25 That is really what EU law tells you.

49

1 At 448, I mean evidence as to economic theory is not
 2 a legal or evidential presumption of pass-through. It
 3 is just part of the evidence which the Tribunal should
 4 take into account. It is not excluded by EU law. On
 5 the contrary, it is something you should take into
 6 account; it is part of the evidence.
 7 Finally, at 452 we say, well, the concept of the
 8 broad axe is consistent with EU law because the whole
 9 purpose of the broad axe is to allow a claimant to claim
 10 damages even where it can't prove with any degree of
 11 precision what loss it has suffered. But when you are
 12 trying to see what loss it has suffered you have to look
 13 at all aspects of the quantum calculation, from what is
 14 the overcharge to has there been any pass-through. The
 15 products must apply throughout.
 16 So let me move into pass-on. Our primary case is
 17 that there has been a high degree of pass-through in
 18 this case. I will start with the economic theory.
 19 455. It is common ground here between the economic
 20 experts that economic theory indicates that pass-through
 21 by Sainsbury's in this case should be, first of all,
 22 between 50% and 100% and also it should be at the top
 23 end of that scale.
 24 We have set out the extract from Mr von Hinten-Reed
 25 where he accepts that. He accepts it in terms. You

50

1 remember in his first report, this is paragraph 456, he
 2 said:
 3 "The theory is contingent on a number of
 4 assumptions."
 5 And I questioned him and said are these assumptions
 6 which one finds in the theory and he accepted no, they
 7 were just assumptions that he had built in for the
 8 purposes of this case.
 9 So they are not part of the theory. They are
 10 attempts by Mr von Hinten-Reed to say why the theory
 11 shouldn't apply in this case. And I dealt with them
 12 separately, but they are not part of the theory as such.
 13 At 457, the next point, and this is a factual point,
 14 the more competitive the market, the higher the degree
 15 of pass-on that is likely. That's, again, accepted.
 16 Actually, under the theory, in a market where there is
 17 no competition, essentially a monopoly, economic theory
 18 would still predict pass-on of 50%. Again, that is
 19 common ground between the experts.
 20 So that is why what you have got here, is as
 21 a matter of fact it is common ground the UK market
 22 business is highly competitive and that's why we say
 23 there is likely to have been pass-through, because it is
 24 a competitive industry and it is likely to have been
 25 high because it is a highly competitive industry.

51

1 The third point, high rates of pass-on will occur
 2 when the cost in question is industry-wide rather than
 3 firm specific. Again, no dispute, paragraph 460.
 4 Mr von Hinten-Reed accepted that the MIF is
 5 an industry-wide cost. It clearly is.
 6 I'm about to go into the closed session, so I'm in
 7 your hands.
 8 MR JUSTICE BARLING: Shall we have a break before we do?
 9 MR HOSKINS: That makes sense.
 10 MR JUSTICE BARLING: Is this closed session for everybody?
 11 It is mainly yellow?
 12 MR HOSKINS: It is all yellow.
 13 MR JUSTICE BARLING: I will just have to remind myself now,
 14 that's your material?
 15 MR HOSKINS: It is Sainsbury's confidential material.
 16 MR JUSTICE BARLING: So if there are people who are only
 17 entitled to hear MasterCard's confidential information,
 18 I'm afraid they will have to leave, as well as everyone
 19 else who is not in the confidentiality ring. So anyone
 20 who is entitled to hear just Sainsbury's confidential
 21 information can remain.
 22 PROFESSOR JOHN BEATH: Does that include Mischon de Reya?
 23 MR JUSTICE BARLING: Yes, it depends whose information you
 24 are entitled to hear. And I think, David, you have
 25 probably got the up-to-date position on that.

52

1 Okay, we will take a short break while you do that.
 2 (11.14 am)
 3 (End of open session)
 4 (A short break)
 5 (11.30 am)
 6 (Beginning of yellow confidential session - REDACTED)
 7 (12.41 pm)
 8 (End of yellow confidential session)
 9 MR JUSTICE BARLING: We will give Mr Cook a 15-minute run
 10 in, then, until lunch.
 11 Closing submissions by MR COOK
 12 MR COOK: Sir, there are four issues I'm going to be dealing
 13 with. The first, which is a relatively quick one which
 14 I hope to deal with before lunch, is the quantification
 15 of damages, then Sainsbury's Bank benefits point,
 16 interest, then ex turpi causa.
 17 In relation to the three principal issues I'm
 18 dealing with, Sainsbury's Bank, ex turpi causa, there is
 19 a lot of detail in relation to those. We have set it
 20 all out in writing. A lot of it is confidential. My
 21 goal is not to repeat the detail we have given you in
 22 writing but deal with some more headline issues and
 23 respond to issues we have had. Obviously if the
 24 Tribunal have more detailed questions, I can deal with
 25 those and if you have more detailed questions we may

1 have to consider going in camera. But at the moment I'm
 2 hoping to do it at a level that I don't need to mention
 3 specific numbers or detail.
 4 MR JUSTICE BARLING: Thank you.
 5 MR COOK: Quantification of damages, firstly. This is (ix)
 6 of our closing submissions.
 7 This is the point we simply describe that we have
 8 given the Tribunal both flowcharts showing calculation
 9 of damages in various scenarios and also a damages
 10 toolkit. I would like to emphasise in relation to those
 11 flowcharts that in order to keep them in reasonable size
 12 parameters, we haven't reflected all of the possible
 13 issues and all of the permutations of all the issues.
 14 It is a decision tree. Every time we split something it
 15 goes onwards and onwards. To try and keep them at
 16 a reasonable size we have not included everything.
 17 The most obvious thing that is not included is the
 18 Sainsbury's Bank issue. Both experts agree a reduction
 19 should be made, although they differ about the amount.
 20 There are various different numbers. That's not in
 21 there. They are a simplification, but we hope it is
 22 a useful simplification for the Tribunal.
 23 I wasn't planning to say anything more about the
 24 detail of those other than if the Tribunal did have any
 25 questions in relation to either the spreadsheets or the

1 damages toolkit, I'm here to do my best to answer any of
 2 them at this point. Obviously if there are detailed
 3 points on the damages toolkit, we would deal with those
 4 offline if there were any questions. Doesn't look like
 5 there are.
 6 There are two particular points I did want to
 7 address in relation to the quantification of damages,
 8 and that's two entirely new lines of argument that
 9 Sainsbury's have included in their closing submissions
 10 without having raised them previously in submissions,
 11 without having put evidence in relation to them, without
 12 putting them to factual or expert evidence. They are
 13 both alternative migration scenarios.
 14 Our basic point in relation to these is they are not
 15 evidenced, they have not put them to witnesses, the
 16 Tribunal should simply ignore them. They simply don't
 17 have any force behind them. But I'm going to go on to
 18 explain why they are misguided in any event.
 19 MR JUSTICE BARLING: These are matters that are not
 20 currently dealt with --
 21 MR COOK: That is right. One of them we have dealt with
 22 briefly in relation to the quantification section. But
 23 they have been heavily developed because it was
 24 something that we saw was in the damages toolkit that
 25 Sainsbury's produced but hadn't been developed in any

1 way and the other one seems to be completely new.
 2 The first of these is developed in paragraphs 653
 3 to 656 of Sainsbury's closing. It would probably help
 4 if the Tribunal could turn up those paragraphs. This is
 5 dealing with what would happen if MasterCard had
 6 significantly reduced its interchange fees during the
 7 claim period and Visa had maintained a significant
 8 differential with MasterCard.
 9 It is dealing with the first scenario, we say the
 10 right scenario, which is what happens if Visa can
 11 maintain a material difference with MasterCard. Our
 12 case doesn't rely on them staying at the same level,
 13 just being materially higher. That is the situation we
 14 are looking at.
 15 Sainsbury's suggests that if the Tribunal is going
 16 to look at the evidence from Maestro to see how
 17 migrations take place, over what timescale, at what
 18 speed, then the Tribunal should look at the picture from
 19 2003 onwards.
 20 We see that point made in 653. They say the story
 21 starts in 2003. They say you should look at it from
 22 2003 onwards, and then they say at paragraph 654, third
 23 line:
 24 "If one were to be conservative, one should
 25 ...(Reading to the words)... by at least 50% to reflect

1 other causes."
 2 Basically Sainsbury's are making two points. They
 3 say if you are going to apply something based on
 4 Maestro, you should apply it looking at what happened
 5 from 2003 onwards and you should assume only half the
 6 rate of decline because there are obviously, they say,
 7 other factors associated with Maestro.
 8 Our point in relation to this is primarily this was
 9 not a case that was put to Dr Niels, and Dr Niels has
 10 used Maestro as the best available evidence of how long
 11 migration takes and the rate at which that takes place.
 12 We say simply you can't criticise an expert's evidence
 13 after the event without having given him a chance to
 14 look at the material. That's why you should look at
 15 Maestro. That is the unchallenged material on Dr Niels
 16 on this point.
 17 Both arguments made by Sainsbury's on this point we
 18 say are flawed. Dealing first with the date point,
 19 ie you should look at what happened 2003 onwards and use
 20 that to model what would have happened to MasterCard if
 21 there was a material difference. We say it is obviously
 22 clear from the evidence that the Tribunal has heard that
 23 there will be a tipping point in relation to migration.
 24 It is not going to be every fractional difference in
 25 interchange fee that will lead to migration, there will

57

1 be a point at which the differences between card schemes
 2 are sufficiently large and are expected to be of
 3 sufficient duration that it is effectively worth the
 4 cost involved in migrating. Because obviously that is
 5 not a cost-free process.
 6 Realistically, you would not expect every bank to
 7 have exactly the same tipping point since the costs of
 8 migration will be somewhat different for different
 9 banks. But since fundamentally the basic economics of
 10 issuing credit cards, issuing debit cards are broadly
 11 the same and all of the issuers are large sophisticated
 12 organisations -- so we are not in the kind of consumer
 13 situation where some people who never bother to switch
 14 because they don't spend the time or effort to think
 15 about them, we're looking at highly sophisticated large
 16 organisations who are going to be well aware of the
 17 relative advantages of switching.
 18 We say in relation to that once you get to the
 19 territory where it is a tipping point for one issuer,
 20 you are probably going to be close to the level of
 21 a tipping point for most of the others. Not necessarily
 22 quite the same, but you are going to be there or
 23 thereabouts.
 24 What we say in relation to Maestro is the best
 25 evidence from Maestro is that the mainstream tipping

58

1 point was only really reached after January 2007. That
 2 was the point -- it was announced six months earlier in
 3 July 2006, but it was January 2007 when Visa increased
 4 its PIN, principal interchange fee, and as a result that
 5 led to an interchange fee differential of 9.2 basis
 6 points. There had been one before, about 6.6, but that
 7 hadn't led to widespread migration. It had been in
 8 place for several years but not led to widespread
 9 migration.
 10 What you see from Maestro, the best one can draw
 11 conclusions from, is effectively the tipping point is
 12 reached when you get to that level, and that is the
 13 point when lots of banks start considering moving.
 14 We say simply in relation to considering what
 15 Maestro shows us, looking prior to 2007 tells you very
 16 little because that's simply looking at what happens
 17 before you have reached the tipping point or at least
 18 the point where you are at the grey level where maybe
 19 it's the tipping point for one bank, because one bank
 20 did move but most of the other banks don't seem to have
 21 done. It's when it increases the disparity goes up over
 22 9 basis points, that's the tipping point that lots of
 23 people look to move.
 24 We see in particular -- and we've put an annex on
 25 Maestro --

59

1 PROFESSOR JOHN BEATH: Does that mean in terms of the
 2 diagram we are looking at, the way in fact that would
 3 have been modelled overestimates -- it would have been
 4 a much more dramatic reduction?
 5 MR COOK: In terms of what Dr Niels has done -- are you
 6 asking about the graph that's in front of you and
 7 Sainsbury's?
 8 PROFESSOR JOHN BEATH: Yes.
 9 MR COOK: What Dr Niels has done is he has looked at the
 10 point at which the differential hit 9 basis point in
 11 2007 and he has then said you see how long it takes and
 12 you model it down by reference to what happened with
 13 Maestro.
 14 What Sainsbury's are doing, you see in the graph
 15 here, they effectively assume there is relatively little
 16 switching for quite an extended period modelled on the
 17 basis of what happened on Maestro 2003 and 2007. They
 18 say you project very little switching for up to three or
 19 four years.
 20 PROFESSOR JOHN BEATH: So your dashed curve card would be
 21 a long way below this?
 22 MR COOK: Yes, that's what Dr Niels does. It starts coming
 23 down faster and more rapidly, and so the second point
 24 Sainsbury's do, or they say you should do, is you assume
 25 only half the rate of migration from Maestro. And

60

1 that's the second point, because they say it is due to
 2 other factors. So they are assuming half the rate of
 3 decline and happening more slowly as well. So there are
 4 two points they make.
 5 At this stage I'm saying the best evidence is that
 6 2007 onwards is once the tipping point is reached, and
 7 therefore that's the best evidence of how fast a credit
 8 card scheme would lose its business once the tipping
 9 point has been reached and that's how it has been
 10 modelled.
 11 The other point I was alluding to that Sainsbury's
 12 make is you should assume that Maestro was due to other
 13 factors, and they say therefore the Tribunal should
 14 assume effectively that half the migration was due to
 15 other factors and so assume half the rate of migration.
 16 Our starting point, this is what we develop in the
 17 Maestro schedule, is, we say, based on the evidence
 18 before the Tribunal, particularly based on the evidence
 19 of MasterCard's witnesses and we out what each of them
 20 said when they were asked questions on this, that the
 21 determining factor in issuers deciding to migrate from
 22 Maestro was the interchange fee differential.
 23 There are some other points, but the clear evidence
 24 of the witnesses was those were basically trivial points
 25 in the scheme of things. The dominant figure, key

61

1 factor, was the interchange fee differential.
 2 If we go to appendix A to our closing submissions,
 3 paragraph 27, it is just bearing in mind the point we
 4 make there that it was not just HSBC and RBS who were
 5 the two big banks who left to go to Visa Debit following
 6 on from HBOS who moved a couple of years earlier, but
 7 the British arms of National Australia Group, Clydesdale
 8 Bank and Yorkshire Bank also decided to migrate to
 9 Maestro at the same time.
 10 MasterCard was successful in relation to National
 11 Australia Group in persuading them to migrate to
 12 MasterCard Debit rather than Visa Debit.
 13 What we do there and we set out in relation to the
 14 quote, which is confidential, so I won't repeat it, but
 15 it goes over the page on the paragraph on 27, you see
 16 there the quote. MasterCard's internal analysis of why
 17 we managed to keep, in the sense they left Maestro but
 18 went to debit and MasterCard. We say it is quite clear
 19 from that -- you see what the quote says -- had we not
 20 had a competitive product, then that is another bank
 21 that would have migrated to Visa Debit. The difference
 22 was by that stage we had managed to introduce something
 23 which was competitively priced.
 24 PROFESSOR JOHN BEATH: You managed to hold them?
 25 MR COOK: We have managed to hold them, but only because we

62

1 were competitive. It was not Maestro. If we had just
 2 kept Maestro we would not have managed to hold them.
 3 The point we make at paragraph 27 is effectively the 3%
 4 we kept of the market is almost all National Australia.
 5 MR JUSTICE BARLING: That is the quote at paragraph 10, is
 6 it, you were just referring to? MasterCard's internal
 7 documents.
 8 MR COOK: At paragraph 27 over the page. You are quite
 9 right, the quote at paragraph 10 is one which shows
 10 effectively the tipping point happening and that's the
 11 point when the interchange fee differential increases
 12 and we get to that level. But the quote at paragraph 27
 13 is the one dealing with the one we did manage to keep,
 14 which is almost all of the debit card share of the
 15 market we kept.
 16 But it was due to the fact that by then we had got
 17 a competitive product in the market, which is why we say
 18 in a world in which we were not able to introduce
 19 a competitive product we would have gone to zero. Also
 20 it shows it is not just two banks. Effectively it is
 21 all the people we have left are thinking the same thing
 22 at the same time, broadly reached a widespread tipping
 23 point at this stage.
 24 The point we make overall in terms of Sainsbury's
 25 assumption that you should assume only half the

63

1 migration would take place is the reality is that once
 2 a tipping point is reached, it is likely to be a similar
 3 tipping point for everybody and there's not going to be
 4 a difference. The fact we have five issuers or ten
 5 issuers, they are all making effectively a very similar
 6 evaluation of the costs of moving versus the benefits of
 7 moving. When we get a tipping point for one, we're
 8 going to be pretty close to a tipping point for all of
 9 them.
 10 That's why we say once you determine what the
 11 tipping point is, it is going to happen with all of them
 12 whether it is a small or a large number of issuers.
 13 There are slightly more issuers in the credit card
 14 market but we are not talking an enormous number.
 15 On that basis, I mean there was no challenge made to
 16 Dr Niels' evidence that looking at Maestro gives you
 17 a reasonable idea of how quickly people are going to
 18 make the decision to migrate and, once they have done
 19 so, how quick it is going to be. It is worth bearing in
 20 mind that there was evidence, evidence we quote at
 21 paragraph 401 of our closing, that there was evidence
 22 that actually it is considerably quicker, cheaper and
 23 easier to move credit card schemes.
 24 Mr Douglas' evidence, paragraph 402 of our closing,
 25 a quote from his cross-examination we set out there

64

1 which explains that with credit card schemes because
2 they are not connected to debit card schemes, it is
3 cheaper, quicker and easier to move credit card schemes
4 than debit card schemes.

5 We say the clear tipping point for Maestro was 9.2
6 basis points. The tipping point for credit cards is
7 likely to be smaller, it is going to be quicker. We say
8 therefore on those points simply that suggestion of you
9 assume half the rate of migration simply doesn't make
10 sense. Once tipping point is reached it is going to be
11 for everybody largely at a very similar level.

12 In relation to where the tipping points arises in
13 relation to credit cards -- the Tribunal may not need to
14 get into this -- the expert economist said with the
15 large differentials one is considering there might be
16 a flood of migration. It is only when we are talking
17 about smaller differentials the Tribunal gets into this.

18 We say the evidence is, one, Maestro at 9.2 basis
19 points; two, Mr Douglas' evidence that it is quicker and
20 easier to move credit card schemes so the tipping point
21 is going to be at a smaller level. And third, it is the
22 point made at paragraph 4 of our closing, which is
23 talking about sums of money involved. Again, a point
24 Mr Hoskins went to, that even with 9.2 basis points it
25 is going to be worth 75 million to MasterCard's issuers

65

1 in the middle of the claim period as illustration.
2 So the tipping point in credit cards is going to be
3 a lot smaller than the 9.2 with Maestro. To some extent
4 the Tribunal only have to decide that if the exemptible
5 level or wherever you come to, or something, on another
6 issue means the differential is relatively small. There
7 was common ground between the economists with
8 significant differentials there would be a flood.

9 MR SMITH: Could I ask a very mechanical question about
10 paragraph 4 of your Maestro appendix?

11 MR COOK: Certainly.

12 MR SMITH: In paragraph 4 you set out the MIFs for Maestro
13 and Visa. You use a weighted average and I just wanted
14 to understand how that works because as I understand
15 both Maestro and Visa, it was a flat rate of pence per
16 transaction that was charged as a MIF in each case.

17 So what exactly are you weighting and averaging to
18 reach your 6.6p?

19 MR COOK: If you look where the footnote is, that is
20 an analysis that MasterCard has carried out at the time
21 and it is based on, it's relatively easy, once you know
22 the average transaction value, which MasterCard
23 obviously did know at the time, then you simply apply
24 the flat rate fee and turn that into a ratio of basis
25 points.

66

1 But MasterCard, if you look at those documents and
2 they are confidential, did do it in two ways. It quoted
3 both and said: what is the flat rate difference? What's
4 the basis point difference? Part of the reason for that
5 is when we first introduced debit MasterCard, we did
6 that on an ad valorem basis, so that was partly why we
7 were trying to change it and we obviously wanted to make
8 sure that what we sought to do was ensure that actually
9 the relative pricing wasn't too different.

10 MR SMITH: I see. So the 6.6 is not in fact the per
11 transaction charge, it is, as you say, affected by the
12 volume of transactions?

13 MR COOK: The value.

14 MR SMITH: Secondly, could you define basis point for me?

15 MR COOK: Yes, sir. A basis point -- one hundredth of a
16 percentage. So when we talk about the rates at the
17 time, the average interchange fees at the time for PIN
18 transactions were 80 basis points for credit cards and
19 so we are talking -- so the differentials here are 6
20 basis points, goes up to 9 basis points as compared to
21 actual interchange fees of credit cards of around
22 80 basis points or higher.

23 MR SMITH: Thank you.

24 MR COOK: Quickly, sir, the other point I wanted to deal
25 with was the second migration case that Sainsbury's

67

1 advances which they take at paragraph 676 of their
2 closing.

3 This is dealing with the Amex migration issues. So
4 if the Tribunal assumes legally or factually you should
5 assume that Visa has to follow MasterCard down to
6 exactly the same level, then because there's no legal
7 requirement for Amex to come down to the same level, one
8 considers what the migration to Amex would be.

9 There is common ground between the experts, as the
10 Tribunal knows, that there would be migration. It is
11 only the level of migration that is in dispute.

12 Mr von Hinten-Reed says 5%, Dr Niels says 31%, and
13 that's out of a total of 76% of MasterCard's business
14 which was in Amex's sweet spot, is the phrase that's
15 used.

16 The point Sainsbury's make at 676, they say there's
17 no need -- it is the final sentence -- for any
18 adjustments as regards the assessment of damages because
19 Sainsbury's would pay more on the transactions that
20 migrate to Amex but these are offset by lower fees paid
21 by Amex on Amex cards.

22 Again, this is an entirely new point being made.
23 There is no expert evidence weighing the benefits and
24 detriments here. It was not put to Dr Niels this was
25 an offsetting effect.

68

1 Sainsbury's has sought to smuggle a bit of expert
 2 evidence into this at appendix 1 to their closing
 3 submissions, which is the second addendum to the second
 4 report of Mr von Hinten-Reed.
 5 This was meant to be a document on the face of it
 6 which simply updates the calculations, but at the third
 7 bullet on 439, B1, it says:
 8 "Unlike in the earlier version of the addendum
 9 ... (Reading to the words)... fall in Amex's fees."
 10 There's simply, as far as I can see, no analysis
 11 behind that. There is certainly none produced for the
 12 Tribunal. It has not been tested in cross-examination.
 13 It would simply be illegitimate for Sainsbury's to rely
 14 upon that brought in as something after the event like
 15 this.
 16 If the Tribunal was going to get into this kind of
 17 territory -- we say you simply shouldn't -- you would
 18 need to carry out a more sophisticated exercise because
 19 what you need to look at is not simply the headline
 20 rate, but the full terms of the agreement with Amex. We
 21 dealt with that at paragraph 101 of our closing, noting
 22 the fact that there are actually a number of other
 23 differences between what happens with MasterCard and
 24 Amex.
 25 Without going into confidential material, you get

1 payment takes place on a different schedule, so you
 2 don't get payment as fast from Amex, and Amex has
 3 different charge back rules which means Amex can send
 4 back more fraudulent transactions to the merchant.
 5 So you have to look at all of the elements of the
 6 sort of the terms of the relationship to see what the
 7 final cost to the merchant is.
 8 We say when account is taken of this you end up with
 9 something pretty similar of the actual rate for
 10 MasterCard and Visa during the claim period. But the
 11 simple point is there has been no attempt to analyse it
 12 and it is simply to late for Sainsbury's to do it
 13 through the back door like this.
 14 The Tribunal should look at what is the level of the
 15 migration and damages should be discounted accordingly.
 16 We developed, and I was not intending to say anything
 17 more about it -- the level of migration we say is
 18 correct based on Dr Niels' evidence.
 19 MR JUSTICE BARLING: Thank you, Mr Cook. How do you think
 20 we are getting on? Are we okay? We have got a reply as
 21 well.
 22 MR COOK: I was envisaging that I would sit down at about
 23 3.15 pm at around the mid-afternoon break, and that
 24 would give Mr Brealey an hour.
 25 I suppose, sir, in terms of lunch the only question

1 is partly, you know, the three topics I'm going to be
 2 dealing with. If the Tribunal could give me any
 3 guidance as to whether you are packed full of questions
 4 on them. I appreciate if I say things that lead to
 5 questions you will ask them, but if you have a lot of
 6 questions in your back pocket, then we might need a
 7 shorter lunch. If on the other hand you have a small
 8 number of questions, then --
 9 MR JUSTICE BARLING: I think we might have one or two
 10 questions, but I don't think we have got a massive
 11 amount. But we can start quarter of an hour earlier if
 12 you think that would be wise.
 13 MR COOK: There would certainly be no harm in that, sir. We
 14 will take a short lunch if everyone can manage with
 15 a short lunch and start at 1.45 pm, then.
 16 (1.10 pm)
 17 (The short adjournment)
 18 (1.45 pm)
 19 MR JUSTICE BARLING: Mr Cook, as you may know we have got to
 20 be appropriately compassionate towards those who are
 21 doing hard work there, so we are going to take two short
 22 breaks in the course of the afternoon, so the transcript
 23 writers can have a proper rest. They have had a short
 24 lunch.
 25 MR COOK: Certainly, sir.

1 Sir, I'm coming next on to the Sainsbury's Bank
 2 section.
 3 MR JUSTICE BARLING: Yes.
 4 MR COOK: That's section 7 of our closing submissions.
 5 MR JUSTICE BARLING: Right.
 6 MR COOK: As a starting point we say it is a basic principle
 7 of damages under English law and the principle of full
 8 compensation under EU law does not alter this. Damages
 9 should put the claimant in the position that he would
 10 have been in if the wrong had not been committed. And
 11 that necessarily means that if the claimant has
 12 benefited from the wrong in some way, then that has to
 13 be taken into account otherwise the claimant would
 14 receive a windfall benefit because they would be
 15 compensated for a loss they didn't suffer.
 16 The case we rely on particularly for this is at
 17 paragraph 434 of our closing. It is in the mitigation
 18 passing on section, but it is not an authority
 19 Mr Hoskins particularly focused on this morning. It is
 20 the speech of Lord Bridge in Hodgson v Trapp and it is
 21 the principles that were being dealt with this morning.
 22 But it is a particular illustration of it in the context
 23 of offsetting benefits, and we set out the quote there.
 24 It is particularly the last five lines of that quote
 25 that:

1 "If, in consequence of the injury sustained, the
 2 plaintiff has enjoyed receipts to which he would not
 3 otherwise have been entitled, prima facie those receipts
 4 are to be set off against the aggregate of a plaintiff's
 5 losses and expenses in arriving at the measure of his
 6 damages. All this is elementary and has been said over
 7 and over again."
 8 We say it is elementary, and quite clearly to the
 9 extent to which the Tribunal concludes there is
 10 an offsetting benefit, as a result of the relationship
 11 with Sainsbury's Bank that should be taken into account.
 12 Sainsbury's says in their closing that's wrong, you
 13 shouldn't take account of it, so that is quite clearly
 14 what the law is and it has been said over and over
 15 again.
 16 MR JUSTICE BARLING: What paragraph was that again, Mr Cook?
 17 MR COOK: It is 435 of our closing is where we set out
 18 Lord Bridge in Hodgson v Trapp. The whole quote is
 19 relevant. It is the last five lines, which we say are
 20 the key bit at the end of it.
 21 So it is common ground between the experts that
 22 Sainsbury's did receive substantial benefits as a result
 23 of Sainsbury's Bank receiving revenue from the UK MIF.
 24 They disagree about the valuation of that, but even
 25 when Mr von Hinten-Reed retreated in his third report

73

1 from his earlier much higher figures, he still puts
 2 a significant multimillion-pound figure on that. What's
 3 quite clear as well is neither expert suggests that
 4 there is insufficient evidence to address this issue
 5 at all.
 6 Now, Mr Spitz in his oral closing tried to suggest
 7 there's not enough evidence, and effectively the
 8 Tribunal should simply ignore this point. That would
 9 simply give Sainsbury's an unjustified windfall. Of
 10 course there are uncertainties involved, there are
 11 uncertainties involved because we are in
 12 a counterfactual and not the real world, and inevitably
 13 therefore we don't have real evidence of exactly what
 14 would have happened in 2007 and 2008 in this particular
 15 situation.
 16 However, there is extensive evidence before the
 17 Tribunal on this issue. There are five experts' reports
 18 on this particular point. The experts largely agree on
 19 the relevant questions. They disagree on the answers
 20 but they agree on the questions, and they both address
 21 and approach these questions on the basis of the same
 22 material. Therefore, there is more than enough material
 23 for the Tribunal to use Mr Hoskins' broad axe, and the
 24 Tribunal, in my submission, should do so.
 25 The principal complaint that Mr Spitz appeared to be

74

1 making in his oral closings is actually that Sainsbury's
 2 has not introduced any factual evidence on these issues.
 3 Ultimately, that's a matter for Sainsbury's. They have
 4 chosen not to put forward any factual evidence from
 5 their factual witnesses on these points. But they have
 6 chosen not to do so. They can't complain that evidence
 7 is not before the Tribunal.
 8 This point was first developed by Mr Harman in his
 9 first report served in August 2015. Sainsbury's has
 10 since then served two expert reports in relation to the
 11 issue. It served supplemental witness statements in
 12 November 2015, so over two and a half months after
 13 Mr Harman had served his report dealing with this point.
 14 They chose not to address the Sainsbury's Bank issue.
 15 If Sainsbury's had wanted to introduce factual
 16 evidence that says Mr Harman was looking at it the wrong
 17 way, there are other facts that are relevant, they have
 18 had more than the opportunity to do so. They haven't
 19 done so and they cannot complain if the Tribunal
 20 proceeds on the basis of the evidence that's before it.
 21 That is the material and that is the evidence the
 22 Tribunal should proceed based on.
 23 On this point, let's start with the actual. What
 24 happened in the real world? We can split this into two
 25 periods. There is the actual sort of prior to 2015 in

75

1 terms of what's happening in the world prior to the
 2 regulation coming into effect and prior to the run-in,
 3 the glide path into the regulation. During that period
 4 Sainsbury's Bank was in fact providing generous reward
 5 cards, and moreover it received millions of pounds of
 6 funding -- the specific numbers are in our submissions
 7 but they are confidential -- from Sainsbury's in order
 8 to encourage it and persuade it to do so.
 9 It is important to bear in mind that the key
 10 document on which both Mr Harman and Mr von Hinten-Reed
 11 relied in their analysis, we call it the 2012
 12 Sainsbury's Bank presentation and it is at bundle E3.15,
 13 tab 280. It is the one we went to with the various
 14 different evaluations of revolvers, transactors etc.
 15 That was the document that Sainsbury's and Sainsbury's
 16 Bank used to negotiate and agree on the funding that
 17 Sainsbury's would provide to Sainsbury's Bank. It is
 18 actually the document Sainsbury's Bank drew up to
 19 persuade Sainsbury's to provide funding and the basis on
 20 which Sainsbury's agreed to provide that funding.
 21 Mr Spitz made various points about how
 22 representative some of the figures in that document are.
 23 But it is important to bear in mind those were the
 24 numbers that the parties themselves accepted were
 25 sufficiently representative for their purposes. There

76

1 is no suggestion that Sainsbury's looked at that and
2 said, well, those are irrelevant, that's not a fair
3 illustration of the profitability of reward cards, or
4 anything else. That was the material they used and the
5 material they accepted as being appropriate for that
6 purpose.

7 An attempt to try and say that one shouldn't look at
8 that because it is not clear enough isn't good enough,
9 in my submission. It is exactly what the parties were
10 using and were satisfied with.

11 It is also important to bear in mind that that was
12 the motivation for Sainsbury's agreeing to provide the
13 financing to ensure that Sainsbury's Bank continue to
14 offer generous reward cards. So while there were
15 attempts to look at the overall profitability of the
16 card business versus the profitability of the reward
17 cards also being addressed in that document, the point
18 being made now about, well, the profitability of the
19 general business was relatively good, that wasn't what
20 was being said at the time.

21 The response from Sainsbury's was not to say: you
22 don't need any money from us, you are making lots of
23 money overall. No, they accepted the logic of what was
24 being put forward to them, which is if Sainsbury's Bank
25 were going to continue to offer the generous reward

1 cards with all the very extensive benefits they
2 generated for Sainsbury's, not for Sainsbury's Bank,
3 then Sainsbury's would have to encourage that process,
4 would have to finance that process.

5 So a lot of the points being made about "of course
6 there was general profitability", that was not the
7 response being made at the time. They accepted the
8 logic of what was being put forward, and again we say
9 Mr Harman has simply followed the logic of how the
10 parties themselves approached the issue.

11 It is important also to bear in mind credit cards
12 are a high capital business. Ultimately, in order to
13 run a credit card business, you need a very, very big
14 float because you are going to pay merchants now and at
15 some point potentially quite far in the future for some
16 of your customers, you are going to get the money back
17 in from the customer. So you need quite a substantial
18 capital float in order to run a credit card business.

19 Therefore, in order to do that, you are going to be
20 looking at getting a return on that capital employed.
21 So it is not right to simply say you made a profit, you
22 are going to need to justify that you are putting all
23 that money in and you are getting a return at
24 an adequate level.

25 But, fundamentally, we say the key thing is that's

1 how the parties looked at it. They recognised the
2 validity of that assessment, and therefore there's no
3 need to deviate or worry about whether that is the
4 assessment they should have carried out in the real
5 world. That is the assessment they carried out. And
6 there's no logical reason to think in a counterfactual
7 world in which there was less interchange revenue they
8 would have looked at it on any different basis other
9 than adjusting those numbers to reflect lower
10 interchange fee revenues.

11 So that is the first part of the actual which shows
12 what the parties actually looked at. We then have the
13 2015 period. Those are the changes that took place in
14 the shadow of the regulation. To some extent this is
15 a real world example of what we are considering in the
16 counterfactual.

17 It is not perfect in the sense that we are obviously
18 looking at a situation in which the regulation comes in
19 at 30, 0.30 basis points, and it may be that the
20 counterfactual we are looking at has a different rate of
21 interchange fees. So one has to take account of those
22 matters. Nonetheless it does still give us
23 an indication of the kind of analysis that Sainsbury's
24 and Sainsbury's Bank would have done in a world in which
25 interchange fees revenues were materially lower.

1 The evidence shows that two things happened during
2 that 2015 pre-regulation, regulation period. First,
3 Sainsbury's Bank halved its rewards. We say it is quite
4 clear on the evidence, firstly, that fundamentally that
5 was a halving of the rewards. There was a point made by
6 Mr von Hinten-Reed about maybe there was a bit of
7 offsetting benefit. Simply on the documents we saw that
8 doesn't go anywhere. It is quite clear it was a halving
9 of rewards, or pretty close to halving.

10 We also say on the evidence it is very clear that
11 this was due to the reduction in interchange fees. It
12 is going on at the point at which the glide path with
13 MasterCard was announced in November 2014, rates start
14 coming down from April 2015 and that's when the cut
15 takes place. And we see lots of other banks at around
16 the same kind of period all start making the same kind
17 of cuts as interchange fees come down.

18 We say quite clearly on the evidence on the balance
19 of probabilities, which of course is all the Tribunal
20 needs to be satisfied, it is cause and effect, cuts in
21 interchange fees led to the halving of rewards.

22 But it is important to bear in mind that that
23 halving of rewards took place along the same time as we
24 saw there were changes in the payment flows between
25 Sainsbury's Bank and Sainsbury's. We say the effect of

1 those, again, the specific number is confidential, but
 2 it is at paragraph 665 in MasterCard's closing.
 3 We say it is clear on the documents is that
 4 Sainsbury's Bank was the number in 665 better off a year
 5 as a result of the changes in the payment flows. And it
 6 is obviously not a new payment -- formally, it is not
 7 a new payment from Sainsbury's to Sainsbury's Bank. It
 8 is the reversal, they stopped charging. So it is the
 9 cancellation of a charge that previously existed. The
 10 effect is that Sainsbury's Bank is better off by that
 11 many millions of pounds.
 12 Now, an attempt was made by Mr Spitz in his oral
 13 closing to suggest that not all of that was new funding.
 14 That was a point that was not put to any of the experts.
 15 It was not suggested by any of the experts. It was not
 16 put to them in cross-examination and, with respect, it
 17 is clearly wrong.
 18 If I can ask the Tribunal to go to bundle E3.15. It
 19 is tab 284, page 6639. This is the document concerning
 20 the intercompany recharging which had been cancelled.
 21 Obviously it deals with two things, one of which is
 22 ATMs, and we needn't worry about that.
 23 But at page 6639 we see the effect:
 24 "The executive summary says: the impact of the
 25 recommended changes on the budgeted PBT."

81

1 So profit before tax. And we can see the financial
 2 effect was being put down in terms of Sainsbury's Bank
 3 profit before tax.
 4 That is showing the entire change, and what that
 5 tells you is that Mr Spitz suggested that a certain
 6 amount of the funding was already in place. Quite
 7 clearly that's not the case. The figure being shown
 8 there is the entirety of his new funding effectively,
 9 because if it wasn't new funding, on the basis there was
 10 some existing payment flow that was being cancelled,
 11 then the effect on the budgeted PBT wouldn't be the
 12 number being shown in these documents.
 13 So we say we are quite right to have said in our
 14 closing submissions at 665 that the financial change
 15 which took place in 2015 was the full amount of that
 16 recharge being cancelled.
 17 So what we have is a situation in which Sainsbury's
 18 Bank is X million pounds, the number you have seen,
 19 better off as a result of the changes of the flows, but
 20 nonetheless it still halves reward points on its cards
 21 as a result of the reduction on the interchange fees
 22 revenues.
 23 So what we know in the real world illustration we
 24 are getting from the interchange fees regulation is that
 25 faced with a reduction in interchange fees down to 0.3%,

82

1 Sainsbury's Bank still were getting millions of pounds
 2 a year more in additional revenue, still cuts its
 3 rewards in half.
 4 We say that in many ways coupled with the analysis
 5 of the 2012 Sainsbury's Bank presentation, you put the
 6 two of them together, which is what Mr Harman has done,
 7 and that's the best evidence available of what would
 8 have happened in a counterfactual of low interchange
 9 fees.
 10 If the interchange fees come down below 0.3%, the
 11 effect would have been even greater. And, with respect,
 12 the evidence of what happens in the actual world,
 13 in 2015, shows the absurdity of Mr von Hinten-Reed's
 14 evidence that all it would have taken is a few million
 15 pounds. Again, the relevant number is confidential, but
 16 it is at paragraph 629 of our closing.
 17 So you see the number at the bottom of page 629.
 18 That's Mr von Hinten-Reed's number for the entire
 19 nine-year claim period. He says that's all that
 20 Sainsbury's would have had to pay in order to encourage
 21 Sainsbury's Bank to offer cards with exactly the same
 22 rewards.
 23 We say, looking at 2015, that's just obviously
 24 absurd. You get a change in financing which is bigger
 25 for one year than Mr von Hinten-Reed's nine-year number

83

1 and despite that Sainsbury's Bank still halves its
 2 rewards.
 3 The fact that Mr von Hinten-Reed's number simply
 4 couldn't be justified was no doubt the reason why the
 5 figure at 629 wasn't even put to Mr Harman in
 6 cross-examination. They put the much higher figure,
 7 which is around four times higher, and that was the only
 8 one that was put to Mr Harman in cross-examination.
 9 We say, therefore, the bottom number for this is,
 10 effectively -- there are a number of possible
 11 evaluations of this that Mr Harman considers, but the
 12 bottom line number, and I think Mr Spitz referred to it,
 13 if I can use it, is 16.6 million. And that is going to
 14 be at least in excess of that. And Mr Harman identifies
 15 a number of reasons why we say it is significantly
 16 higher than this.
 17 That approach is done on the basis of two possible
 18 calculations: The costs approach and the benefits
 19 approach. So the costs approach simply says: in order
 20 to maintain the same level of rewards, because the
 21 rewards are what persuade people to use Sainsbury's Bank
 22 credit cards and go and spend a lot more money in
 23 Sainsbury's, trying to remember the enormous value in
 24 terms of incremental spending and consequently
 25 incremental profit that Sainsbury's Bank received as

84

1 a result, how much money would they have to pay in order
 2 to encourage Sainsbury's Bank to carry on offering those
 3 very generous reward cards? That is the cost approach.
 4 The benefits approach says if they didn't offer that
 5 money, what would happen if the rewards were reduced,
 6 taken away and they would lose that incremental spending
 7 and the consequential incremental profit?
 8 Now, there is a lot of detail in relation to these
 9 points which we set out in our closing submissions. It
 10 was not my intention to go through that detail any
 11 further unless the Tribunal has questions on it. The
 12 detail is there and a lot of it is confidential on the
 13 numbers.
 14 PROFESSOR JOHN BEATH: I had read it and I have no
 15 questions.
 16 MR COOK: I then turn to interest, which is section 8 in our
 17 closing submissions.
 18 Mr Smith, you asked Mr Spitz some questions about
 19 the correct analysis of the law with which he agreed,
 20 and I was just quickly going to tell you MasterCard's
 21 position on this.
 22 We say, first, it is clear from Sempra Metals that
 23 interest is the same as any other head of loss. It is
 24 one that has to be pleaded and it is one that has to be
 25 proved.

1 Secondly, the relevant question is what would put
 2 Sainsbury's in the position that it would have been in
 3 if the wrong had never been committed, per Mr Hoskins
 4 saying that is the relevant test this morning. To that
 5 extent, those are matters Mr Spitz agreed with and so we
 6 are on the same page in relation to those.
 7 In the context of interest, we say the right thing
 8 for the Tribunal to be considering is whether
 9 Sainsbury's incurred additional finance costs or
 10 potentially received less income from having money in
 11 a bank account as a result of the wrong that was
 12 committed if the Tribunal concludes that the UK MIF was
 13 setting an excessive level.
 14 It is only if there is actually some financial
 15 impact upon Sainsbury's, in terms of additional finance
 16 costs or reduced interest revenue, that there's
 17 something which should be compensated by the award of
 18 interest.
 19 So how do we apply the law to the facts? Now, as
 20 Mr Hoskins has already developed, there are only two
 21 cases being put by the parties to the Tribunal.
 22 Firstly, MasterCard's case, as you have heard already,
 23 primary case is that any overcharge was passed on in
 24 higher prices. If that's the case, apart from the
 25 volume effect there would be no additional financing

1 required because simply the money passes through in
 2 terms of higher price. Sainsbury's doesn't have to go
 3 and borrow more money, it doesn't end up with more or
 4 less money in its bank account to change the amount of
 5 interest it was receiving.
 6 If that's the case there's nothing on which interest
 7 is due other than the volume effect point.
 8 Sainsbury's position, and MasterCard's secondary
 9 position -- to be clear it is Sainsbury's closing at
 10 paragraph 405 -- is they say that any overcharge would
 11 have been offset through savings to other costs.
 12 Again, we say you have heard Mr Hoskins in relation
 13 to what that means in terms of damages overall, but in
 14 terms of interest, if it was offset through savings to
 15 other costs, there was no additional finance required.
 16 So, again, there's no basis on which interest could be
 17 due in those circumstances.
 18 It is interesting to see how Sainsbury's tries to
 19 put its interest case at paragraph 559 of Sainsbury's
 20 closing. It is a section that I'm afraid is in yellow.
 21 I think I can quote a little bit without getting into
 22 the confidential and then stop before I do.
 23 It is the first sentence:
 24 "It is highly likely that ... if [the first bit had
 25 happened] it would have reduced [then we see what is

1 suggested]."
 2 What they are saying is if they had earned more
 3 profit then that's what they say would have had the
 4 effect.
 5 But the reality is that is not the case that's being
 6 put forward by the claimant to the Tribunal. They are
 7 not saying that they would have earned higher profits as
 8 a result if the UK MIF had been at a lower level. The
 9 basis for the claim for interest simply doesn't stack up
 10 with the claim that's being advanced in front of the
 11 Tribunal. We say simply it doesn't get off the ground
 12 in terms of an interest claim generally.
 13 The other paragraph I do need to respond to is
 14 paragraph 551A of Sainsbury's written closing, which
 15 involves a manful attempt to try and develop an interest
 16 case with evidence from Mr Reynolds. We say it simply
 17 doesn't come close to trying to create a case in terms
 18 of saying that Sainsbury's has in fact suffered a loss
 19 of profits, and therefore has had less money in its bank
 20 account, less money on which to gain interest or which
 21 required it to obtain higher financing.
 22 Again, I'm afraid it's a section which is
 23 confidential, but I was going to point the Tribunal to
 24 simply if you read the passage that's being quoted and
 25 there were two words I was going to particularly

1 emphasise, neither of which are going to be too
 2 controversial if I say them out loud.
 3 You have the quote there. About eight lines down --
 4 nine lines -- the sentence that starts "so if". So it
 5 is "so if" and it says something "might". So it is
 6 raising a possibility. So if something happened, this
 7 might have another effect. But, again, nobody is saying
 8 that's what happened. It might potentially have
 9 happened, but that's not the claim that Sainsbury's is
 10 advancing.
 11 Then four lines up from the bottom it says that
 12 a reduction could have a particular effect. Again,
 13 hypothetically that might have happened, but that's not
 14 the case that's being advanced.
 15 So the reality here is that there is no case being
 16 advanced that Sainsbury's would have generally had lower
 17 profits as a result of the UK MIF. We say when it comes
 18 to the issue of interest, it follows from that that
 19 there is no reduction in interest revenue on money in
 20 the bank and no higher interest revenue or interest cost
 21 as a result of higher borrowings.
 22 We say that's the end, largely, of the interest
 23 claim apart from the possibility of a volume effect. If
 24 the Tribunal accepts that there is a passing on, or to
 25 the extent the Tribunal accepts there is a passing on,

1 there's obviously the volume effect and that might be
 2 something on which interest would be due.
 3 To the extent the Tribunal is against me on that or
 4 when we are coming to look at the volume effect point,
 5 we say the starting point, and this is very much what
 6 Sempra Metals said, what Mr Smith put to Mr Spitz in his
 7 questions is the key is that Sainsbury's has to plead
 8 and prove its actual loss. We say it simply hasn't come
 9 close to doing that.
 10 We set out various passages from the witness
 11 statements, confidential passages in our closing, and
 12 they are ones where they simply raise a lot of
 13 possibilities. They don't identify any particular case,
 14 they certainly don't prove any particular event
 15 happened.
 16 That's simply not pleading and proving the case.
 17 The pleading is a range of possibilities. The evidence
 18 is a range of possibilities. Nothing specific is
 19 pleaded and proved.
 20 But in terms of what one is thinking about here, it
 21 is quite important to bear in mind that when one comes
 22 to talk about the overcharge, a volume effect, some net
 23 loss, we are talking about relatively small amounts of
 24 money accruing every single day, or relatively small
 25 amounts of cost accruing every single day. That happens

1 daily throughout the claim period.
 2 This is something the experts have modelled. It is
 3 how it develops over time. It builds up slowly, a small
 4 amount daily. The aggregate overcharge becomes larger
 5 over time depending on the exemptible level. But
 6 there's no suggestion that Sainsbury's changes its
 7 borrowings on a daily basis.
 8 So all that one can say as a matter of logic is that
 9 if there was some effect on profitability, it would be
 10 an effect that would be felt in less cash at bank
 11 initially, and consequently there would be in terms of
 12 that lost interest received on the deposit account. And
 13 at some point potentially, depending on the size of the
 14 overcharge, that would have or could have impacted on
 15 the amount of money that Sainsbury's borrowed.
 16 Then once they go out and borrow some money because
 17 they need more money, the overcharge starts to build up
 18 again. One gets a step effect. It gets to a certain
 19 level, they need to borrow some more, it gets to
 20 a certain level again, they need to borrow some more
 21 again.
 22 The fatal problem with Sainsbury's case in this
 23 regard is it has made no attempt to put forward evidence
 24 to show what kind of change in cash at bank is required
 25 before there is an impact on borrowings. Would it take

1 six months, a year, five years? There's simply no
 2 evidence of any kind before the Tribunal suggesting when
 3 it moves or how quickly it moves from a reduction in
 4 interest of the bank account to higher financing costs
 5 on increased borrowings.
 6 Sainsbury's hadn't put forward anything of that.
 7 They have not disclosed a cash management policy if they
 8 had one. It is not before the Tribunal. So we don't
 9 know if there were built-in triggers. In the absence of
 10 evidence one assumes there aren't built-in triggers and
 11 none of their factual witness have identified any kind
 12 of threshold that would have needed to be crossed for
 13 Sainsbury's to start changing its borrowings.
 14 There is simply a complete absence of evidence on
 15 these issues, and we say that's just fatal to the
 16 compound interest claim under Sempra Metals because they
 17 have not proved the actual affect that would have had.
 18 If the Tribunal decides to overlook those evidential
 19 difficulties, and we say you shouldn't, consistent with
 20 Sempra Metals the only evidence on additional borrowings
 21 is that this would be short-term borrowings and not sale
 22 and leasebacks because that's the closest that anyone
 23 comes to a case, other than a section in Mr Roger's
 24 evidence and he comments about all things being equal,
 25 although, and we set it out in our closings, when he was

1 asked about this in cross-examination he said, well,
 2 things are never equal, things are all varied.
 3 But there's certainly no positive case being put
 4 forward that this would be reflected in sale and
 5 leaseback. Mr Smith observed yesterday those are linked
 6 into borrowing to raise money for new stores. It
 7 certainly can't be new equity during the period because
 8 Sainsbury's didn't raise any new equity during the claim
 9 period. J Sainsbury plc did in 2009, but Sainsbury's
 10 itself didn't raise any new equity during the claim
 11 period.
 12 Therefore, the most that Sainsbury's could ever
 13 claim, subject, as I said, to the evidential difficulty
 14 of when it moves from lower interest on its bank account
 15 to paying higher financing costs on higher borrowings,
 16 is potentially on that net debt effect.
 17 What you certainly don't get from the evidence is
 18 any suggestion that if borrowing did at some point
 19 increase, that had any impact upon the sums which
 20 Sainsbury's paid to its shareholder J Sainsbury plc.
 21 And we know that throughout the claim period they paid
 22 exactly the same dividend to J Sainsbury plc every
 23 single year: £250 million year on year on year through
 24 the nine-year claim period.
 25 During that period, profits changed by a factor

1 of seven. The gearing changed enormously during that
 2 period, and nonetheless the dividends remained
 3 absolutely constant: £250 million a year. It cannot
 4 credibly be suggested, and to give him his due
 5 Mr Reynolds does not suggest, that without the UK MIF
 6 Sainsbury's would have paid £240 million a year to its
 7 shareholder. So the 250 million was an increase. There
 8 is no sort of link put forward in terms of the actual
 9 payment to shareholder changing.
 10 We say that basically means the whole analysis of
 11 weighted average cost of capital is simply irrelevant,
 12 because the concept of weighted average cost of capital
 13 is the idea that it is relevant to look at it because
 14 the payments you have to make to your shareholders have
 15 changed.
 16 But the evidence is quite clear, and there is a lot
 17 of the economists dealing with this as a matter of
 18 economic theory. Ultimately we dealt with that in the
 19 closing submissions. We say it is just very simple and
 20 should be dismissed on a pure factual point. No one is
 21 suggesting this dividend policy would have changed from
 22 250 million a year based on sums of money that we are
 23 talking about here. And that's the end, we say, of the
 24 weighted average cost of capital argument.
 25 It is important to bear this in mind, that as far as

1 we have been able to determine, no court in England has
 2 ever awarded interest on a weighted average cost of
 3 capital basis.
 4 It is an entirely novel argument and one that simply
 5 fails entirely on the facts here, and there are good
 6 reasons why, as you have seen from the complexity of the
 7 evidence, the courts are not keen, or should not be keen
 8 to encourage this kind of complexity of analysis
 9 going on.
 10 If anything, it is going to be loss of bank
 11 borrowing, loss of bank interest, and potentially, if
 12 there was evidence on it, increased cost of borrowing.
 13 In terms of the relevant rates that we say should be
 14 applied, we set these out at paragraphs 797 and 798 of
 15 our closing.
 16 Again, the tables are confidential so I won't go
 17 into the specific numbers, but we have given you two
 18 tables there. The first of them deals with effectively
 19 the interest earned on Sainsbury's cash balances. So
 20 that would be the interest foregone for the period when
 21 it was reflected in cash balances.
 22 Then the second table is Sainsbury's annual average
 23 weighted cost of new debt. Evidentially the problem is
 24 one doesn't know which table to apply for which periods
 25 to which sums of money. The reason why we say the

1 Tribunal simply can't proceed on that basis.
 2 The other point I need to deal with is the
 3 suggestion that the Tribunal can award compound interest
 4 at some conventional interest rate. Essentially, the
 5 situation here is that there are two Commercial Court
 6 cases dealing with these issues, which conflict. We
 7 rely upon JSC v Ablyazov and we have quoted that at
 8 paragraph 709 of our closing.
 9 In that case, Mr Justice Teare -- just to give you
 10 the date of that, that is around April 2013 -- rejected
 11 any idea of compound interest without parties having
 12 pleaded and proved the actual interest rate losses. So
 13 their personal specific losses.
 14 That was April 2013. Now, what Sainsbury's do is
 15 rely upon the decision in Equitas. That was
 16 Mr Justice Males. Mr Justice Males concluded that he
 17 could award interest at a conventional rate, a compound
 18 interest at a conventional rate. Of course the problem
 19 there is that there's no indication from the judgment
 20 that Mr Justice Males was shown the judgment of
 21 Mr Justice Teare, which was about six months earlier.
 22 The cases are April 2013 and October/November 2013.
 23 So we have a conflict between two Commercial Court
 24 cases. Obviously Mr Justice Teare couldn't have known
 25 about the conflict because Equitas comes six months

1 later, but it is not clear from the judgment that
 2 Mr Justice Males was shown Mr Justice Teare's earlier
 3 judgment. So there is a conflict of interest in
 4 relation to that.
 5 We set out at paragraphs 716 to 718 of our closing
 6 the reason why we say the Tribunal should follow the
 7 approach of Mr Justice Teare, because that's what's
 8 required by the House of Lords in *Sempra Metals*.
 9 The short point is that if the House of Lords in
 10 *Sempra Metals* had intended in the future that all awards
 11 of damages could take place on a compound interest basis
 12 at simply a conventional rate, then they just simply
 13 would have said so. That would have utterly removed the
 14 entire statutory basis for the award of damages because
 15 you could always in those circumstances just do compound
 16 interest at a conventional rate. That does not reflect
 17 the approach adopted by the courts generally since
 18 *Sempra Metals*, it appears to be a decision that only
 19 Mr Justice Males has reached the conclusion that *Sempra*
 20 *Metals* gives the Tribunal that power.
 21 With respect, we would say it is quite clear from
 22 what is said in *Sempra Metals* that that is not what the
 23 House of Lords is doing, giving a general right to claim
 24 compound interest without any evidence of the actual
 25 loss to the claimant. Because they emphasised, we set

1 out in our closing, that a claimant must claim and prove
 2 his actual interest losses if he wishes to recover
 3 compound interest. And nothing could be clearer that
 4 you actually have to claim and prove your actual loss,
 5 which removes any possibility of doing it on
 6 a conventional basis once you are into the compound
 7 interest territory.
 8 Obviously if the Tribunal concludes there is some
 9 financing cost which should be covered here, there is
 10 always the fallback for Sainsbury's of claiming on the
 11 statutory basis, which is simple interest. If the
 12 Tribunal is minded to go down that route -- and we say
 13 again the financing issue, unless there is a head of
 14 loss and they have been out of money, the Tribunal
 15 shouldn't award interest at all. But if the Tribunal is
 16 going to award interest, they certainly shouldn't do so
 17 at the excessive rates set out in Sainsbury's closing at
 18 paragraph 601.
 19 Again, I'm afraid I can't refer to them other than
 20 by saying they are excessive, because the two figures in
 21 there have been highlighted as being confidential. What
 22 I would invite the Tribunal to do is go back to
 23 Mr Harman's tables, we set them out at paragraphs 797
 24 and 798 of our closing, which reflect the actual money
 25 that Sainsbury's received in its bank account and the

1 actual money that Sainsbury's paid to borrow during the
 2 claim period. And you will see that they are
 3 dramatically lower than the figures that Sainsbury's
 4 suggest at paragraph 601 would not over-compensate them.
 5 The reality is they would over-compensate them
 6 because the actual evidence shows Sainsbury's could
 7 borrow dramatically lower rates than those which
 8 Sainsbury's now tries to claim at, which is the reason
 9 why we say the Tribunal is going to award interest,
 10 concludes it is right to do so, should be on the basis
 11 of simple interest, and at the conventional approach
 12 simple interest of 1% above the Bank of England rate we
 13 say is clearly the right rate in those circumstances.
 14 And if the Tribunal looks at the rates Sainsbury's could
 15 actually borrow at, we submit that is a rate which would
 16 not over-compensate.
 17 Unless there are other questions on compound
 18 interest, I was then going to move on to *ex turpi causa*.
 19 MR JUSTICE BARLING: Thank you, Mr Cook.
 20 (2.30 pm)
 21 (A short break)
 22 (2..35 pm)
 23 MR JUSTICE BARLING: *Ex turpi causa*?
 24 MR COOK: *Ex turpi causa*, indeed, sir. So we have set out
 25 our case on this in some detail in the closings. There

1 were three points I wanted to develop orally.
 2 We set out a lot of factual material. First, the
 3 single economic entity point. Now, there will clearly
 4 be circumstances in which the single economic entity
 5 will be extended up the chain to a parent who had no
 6 actual involvement in the business in question on the
 7 basis that the parent had decisive influence over the
 8 subsidiary. So that undoubtedly is, one sees that a lot
 9 in the case law.
 10 We say it is quite clear from the cases though that
 11 that's not the only circumstance in which companies can
 12 be part of a single economic entity, and we have all the
 13 classic tests. The single economic entity is about
 14 unity of conduct, whether or not they act jointly on the
 15 market. We say that is where the Tribunal in terms of
 16 looking at sister companies, obviously there can be
 17 situations in which one company controls the other, but
 18 if they are -- there is a unity of conduct, if they act
 19 together jointly then they are a single economic entity.
 20 And that's what we say is the situation here. And the
 21 Tribunal deals with this by looking at the links between
 22 Sainsbury's and Sainsbury's Bank to see whether they
 23 were acting jointly on the market in relation to
 24 MasterCard credit cards.
 25 Because we accept, obviously, you are looking at

1 just not a general question, it is relevant to what's
2 the conduct that's relevant to the basis of saying ex
3 turpi causa applies, and so what's relevant to the cause
4 of action relied on.

5 We say when you look at all of the evidence this is
6 a question which ultimately admits of only one answer:
7 Sainsbury's and Sainsbury's Bank were clearly working
8 together in relation to Sainsbury's Bank MasterCard
9 credit card business. Basically I scratch your back and
10 you scratch mine. They were working together for their
11 own mutual benefit. We say when you look at all the
12 factors there, that was clearly what was going on and
13 that's single economic entity.

14 Mr Brealey suggested in closing you should be
15 reluctant to suggest that people, just because they are
16 part of the same group, part of the same single economic
17 entity. We are not suggesting that merely because they
18 are part of the same group, single economic entity. It
19 is about their relationships with each other. Are they
20 actually working together. We say it is important to
21 remember why there is this concept of a single
22 undertaking, single economic entity, under competition
23 law. And the reason why you have it is designed to
24 prevent, or at least ensure that it doesn't happen too
25 readily to prevent situations where subsidiaries which

101

1 work together are suggested to be part of a cartel with
2 each other.

3 The reason why you would not normally expect there
4 to be a cartel just involving members of the same group
5 is that ultimately you expect subsidiaries in a group to
6 work together. You would not expect them to compete
7 with each other. That would just be absurd. To use
8 a phrase in this case, it is all about wooden dollars.
9 It doesn't matter whose bank accounts the money ends up
10 in, it is all the group's money. It would be absurd to
11 have two group subsidiaries fighting for the same
12 business, competing each other down to try and get the
13 same business, because frankly that is in neither of
14 their best interests --

15 MR JUSTICE BARLING: Is it merely coincidental that they
16 happen to be subsidiaries, co-subsidiaries? Or could
17 you have the same synergies with two unrelated companies
18 that happened to work in the same way as Sainsbury's
19 Bank and Sainsbury's Supermarket, to their mutual
20 benefit?

21 MR COOK: I think there are certainly circumstances where
22 single economic entities have been held to exist in
23 relation to companies that were not held together. You
24 get the situation, I appreciate it is a different one,
25 where you have a person's agent saying it is a separate

102

1 entity, it is not owned by you, but you are working to
2 the -- there are certainly circumstances where the fact
3 you are not jointly owned can arise.

4 However, no, we would say it is about the fact that
5 ultimately you would not expect there to be competition
6 between members of the same group. It is about the
7 links that arise from that as to whether they are
8 working together.

9 MR SMITH: Is the test or a factor to take into account the
10 extent to which the two companies operate in a way that
11 is not the way they would operate if they were in
12 an arm's length relationship?

13 MR COOK: We would say that. That is a very, very good way
14 of putting it, sir. But that's sort of the fundamental
15 difference that one gets with companies within a group,
16 they don't -- ordinarily if I'm negotiating with
17 somebody, obviously I have to find a deal that works for
18 both of us. But my principal objective is to try and
19 get a deal that's the best for me.

20 In the context of a group situation, and what we say
21 one sees in spades in the evidence here, is they are
22 thinking about the group first and not their own private
23 benefits. That's where one gets that group mentality,
24 rather than sort of everyone, competition red in tooth
25 and claw.

103

1 MR SMITH: Just to look at the factors that one might focus
2 on. For instance, if information that would in a third
3 party situation be regarded as confidential, if that's
4 freely flowing between the companies, that you would say
5 is an indicator?

6 MR COOK: It is an indicator and that's what we do say
7 arises here. One does see flows of incredibly
8 confidential information. It is the reason why a lot of
9 the cross-examination on these issues took place in
10 confidence.

11 The kind of detailed profitability numbers, the kind
12 of detailed analysis, information flows in relation to
13 information on customers based on Nectar card data,
14 which was just being handed across by Sainsbury's to
15 Sainsbury's Bank, that's incredibly valuable data.
16 Normally if somebody wanted that data you would say,
17 okay, I might give it to you, but how many millions of
18 pounds are you going to give me for access to my
19 database. It is just handed across.

20 You do see this incredibly confidential
21 profitability, what particular customers are costing
22 you, what revenues you're getting from you, being passed
23 back and forth in the way you would expect in a group
24 without sort of any analysis of who's who. That's not
25 something you would do with somebody that wasn't part of

104

1 your group.
 2 MR SMITH: So in a sense, the fact that the companies are
 3 part of the same group explains why they are behaving
 4 that way. But if you had, for whatever reason, I can't
 5 honestly think of one, two companies that were entirely
 6 independent in terms of their group structure but they
 7 were operating on this non-arm's length basis, I can't
 8 see why they would, but suppose they did, you would say
 9 again this is an indication that even though they are in
 10 separate groups, part of the same undertaking?
 11 MR COOK: Other than you do see some of the agency
 12 situations where somebody has formalistically
 13 self-employed. But in a different legal system one
 14 might see them as being effectively an employee almost.
 15 And where 100% of your business comes from somebody, you
 16 end up with a relationship which is akin to being
 17 employed by them.
 18 So one can see situations where they are legally
 19 separate, but they have such a mutuality of connection
 20 of interest that one gets there. In normal
 21 circumstances, effectively unless you have that kind of
 22 element of focusing on the other person's performance as
 23 being intrinsically good for you, which is what you only
 24 get in a group, whether it could legally happen is
 25 perhaps less relevant than whether it could factually

105

1 happen.
 2 MR JUSTICE BARLING: Sorry to interrupt. You sometimes get
 3 things like a Costa -- instead of a company having its
 4 own canteen, you sometimes get them embedding a Costa in
 5 their shop or organisation because that is mutually
 6 beneficial, because they each increase their customer
 7 base through being together. No reason why a bank
 8 shouldn't get together with a big supermarket if they
 9 were quite separate entities and find that this same
 10 kind of synergy that we see here would be --
 11 MR COOK: No, there is no reason why you shouldn't do it,
 12 and of course you do get people working with people in
 13 different spheres all the time. The difference is
 14 normally when they look at the negotiations there will
 15 obviously be an element where it has to work for you too
 16 or we are not going to do the deal. That's just
 17 a fundamental fact of commercial life. Unless I can
 18 persuade you to do the deal, it won't happen.
 19 But nonetheless each individual party is negotiating
 20 at arm's length with the other one, looking at their own
 21 personal benefit and saying is this financially worth it
 22 for me.
 23 MR JUSTICE BARLING: You are suggesting there isn't that
 24 evidence here, the bank didn't look at its own benefits
 25 and --

106

1 MR COOK: I'm suggesting one sees a lot of situations -- the
 2 phrase "wooden dollars" is by far and away the best
 3 evidence in relation to this. That's the idea that
 4 money in the other person's pocket is not real money and
 5 it is not real money because it is going into the
 6 group's pockets. We say that is the best evidence.
 7 That is an illustration of what one sees. In practical
 8 terms, one sees it in relation to if we can't beat them,
 9 join them in relation to premium cards and one sees it
 10 as an illustration in relation to ATMs where Sainsbury's
 11 Bank does something on the face of it which is highly
 12 risky for Sainsbury's Bank but is beneficial for
 13 Sainsbury's. One sees this in relation to how they
 14 consider whether or not they should take out particular
 15 cards, particular payment, alternative payment products.
 16 It is about what's good for the group.
 17 We saw the evidence that that was as well what
 18 Sainsbury's management expected them to be doing. It
 19 would be absurd to take the approach of focusing on your
 20 own personal benefits when you are part of a group. We
 21 say that's what you see right the way through this is
 22 an element of looking at it on the group basis and
 23 saying this might not be good for me, but nonetheless
 24 I'm willing to do this because it is good for the group.
 25 So we say that is what one gets from the evidence

107

1 here. There is an incredibly close link in relation to
 2 what they are doing in terms of the business. I can
 3 take you to paragraph 868 of our closing.
 4 I mean, there are a couple of points. I'm afraid
 5 I can't take you through that many of them on the basis
 6 that a lot of it is confidential, but there are a couple
 7 of them that are not confidential and I want to
 8 particularly highlight as being crucial to the Tribunal
 9 in terms of the parties working hand in glove in
 10 relation to Sainsbury's Bank's MasterCard credit card
 11 product.
 12 In paragraph 868, Sainsbury's was an authorised
 13 representative for Sainsbury's Bank. It should say "for
 14 the purpose of", not "for the purchasing of". For the
 15 purpose of selling financial products including credit
 16 cards. That was an FSA requirement that Sainsbury's
 17 need to be authorised to act on behalf of Sainsbury's
 18 Bank in selling Sainsbury's Bank credit cards to
 19 Sainsbury's customers in store, with paperwork.
 20 When you go to the till at Sainsbury's, you have all
 21 the different leaflets saying pick up a Sainsbury's Bank
 22 credit card. That is a fundamental part of the business
 23 model here. And we see at paragraph 869 the percentage
 24 of Sainsbury's Bank's credit card business that was
 25 coming from Sainsbury's Supermarkets acting in this

108

1 authorised representative role.
 2 The figures are confidential, but you can see how
 3 fundamental that relationship was. So they are
 4 absolutely working together. We saw as well the
 5 millions of pounds of funding that Sainsbury's provided
 6 to allow Sainsbury's Bank to increase take-up and usage
 7 of MasterCard credit cards. We say again that's them
 8 working together. It might be it has some mutual
 9 benefit, but they are clearly both involved in this
 10 business.
 11 We also saw and this is into some of the more
 12 confidential material, in relation to the payment
 13 steering group, the payment scheme steering group, the
 14 PSSG and what was being discussed in relation to that.
 15 And we addressed that from paragraph 892 of our closings
 16 onwards. We see, as you would expect within a group,
 17 joint decisions being made in order to take account of
 18 their mutual interests. We see a number of the quotes,
 19 and we went through this in cross-examination, about
 20 what was the goal behind this, and phrases like
 21 "consistent strategy", "fully aligned". I mean, those
 22 are words that groups of companies use who are working
 23 together. That's not the kind of thing one has if you
 24 are negotiating something on an arm's length basis.
 25 So we say you see very clearly unity of conduct

109

1 working together.
 2 MR JUSTICE BARLING: What's the best authority? You
 3 mentioned quite a lot in the footnotes in this section,
 4 but which would be the best one on this -- I forget the
 5 phrase you used.
 6 MR COOK: 602, ICI v Commission is the unity of conduct on
 7 the market. We give the quotes in relation to each of
 8 them.
 9 So:
 10 "A unity organisation of personal, tangible or
 11 intangible element to pursue a single economic aim on
 12 a long-term basis."
 13 That is Michel v Commission and HFB v Commission.
 14 "Where two companies are adopting the same course of
 15 conduct on the market," and that's
 16 DaimlerChrysler v Commission.
 17 MR JUSTICE BARLING: It is those you mention in footnote 600
 18 onwards on that page, 255.
 19 MR COOK: But I mean, I don't understand that any of those
 20 kind of quotations are seen as particularly
 21 controversial. That is the traditional formulation of
 22 the basis on which you say somebody is a single economic
 23 entity. We say that is the test.
 24 It is then simply a question of applying the clear
 25 facts that are available on this case. We say the facts

110

1 admit really of only one analysis of how they are
 2 working jointly together.
 3 Now, Sainsbury's only real answer to this, other
 4 than its attempt to say single economic entity is all
 5 about decisive influence, they are a bit grey on that in
 6 the end. They say, well, you shouldn't be too ready to
 7 find sister companies working together. So they seem to
 8 acknowledge there is an aspect of this that you should
 9 be cautious. Well, whether you are cautious or not the
 10 evidence is pretty clear here, and we reject the idea of
 11 caution, the idea there is some presumption against it.
 12 In the context of group companies, frankly one would
 13 expect them to be doing just this, and that's what the
 14 witnesses said, that's what their expectation was of how
 15 group companies act. And ordinarily, it would be
 16 an extraordinary outcome. We say it couldn't happen,
 17 but it would be an extraordinary outcome to say that
 18 companies in a group were in a cartel just with each
 19 other. I'm not saying it couldn't happen, but it would
 20 be a surprising outcome because you would expect them to
 21 be acting jointly together.
 22 MR JUSTICE BARLING: Do you allege that there was decisive
 23 influence that mattered here or not?
 24 MR COOK: We don't. There is the decisive influence that
 25 clearly goes up to the parent in relation to both of

111

1 them. We are not saying that Sainsbury's has decisive
 2 influence over Sainsbury's Bank or vice versa. I mean,
 3 we say they are acting jointly together.
 4 MR JUSTICE BARLING: Do you rely upon the fact that they are
 5 both the subsidiaries of J Sainsbury's in the sense that
 6 decisive influence is coming -- does decisive influence
 7 play any part at all in your analysis?
 8 MR COOK: To some extent we do certainly refer to the fact
 9 that J Sainsbury's -- there is an aspect here of
 10 obviously there was a period -- a lot of the claim
 11 period Sainsbury's Bank was not wholly owned by
 12 J Sainsbury plc, so we do look at the extent to which
 13 J Sainsbury plc had control over it. To see the extent
 14 to which -- partly to address the evidential argument to
 15 say that actually, if it had been in the camp of -- if
 16 it had been completely controlled by the
 17 Bank of Scotland, Halifax Bank of Scotland, then one
 18 might, in those circumstances that would at least
 19 suggest there might not be that kind of working
 20 relationship together, one would still need to look at
 21 the evidence.
 22 We say looking at the way in which the structural
 23 relationships worked, you do have that parental control
 24 going on and that shows why you would get the working
 25 jointly together. We don't say the fact that they are

112

1 simply controlled by the same parent -- the case law
 2 makes very clear, the mere fact of being controlled by
 3 the same parent doesn't mean you are part of a single
 4 economic unit.
 5 It is a consideration. One might go further than
 6 that and say it is quite a powerful consideration, but
 7 ultimately it is still about looking at the evidence
 8 linking them. And the key phrases are:
 9 "... unitary organisation of personal, tangible and
 10 intangible elements to pursue a specific economic aim on
 11 a long-term basis."
 12 It is looking at all of those tangible and
 13 intangible elements to see if that unity of conduct is
 14 actually present. We say that's what the test is and we
 15 say it's met in terms of the evidence.
 16 Sainsbury's only answer to this, other than the
 17 legal point, is to fall back on a very formalistic
 18 company law position that the directors of a company
 19 have a duty to act in the best interest of the company,
 20 and so Sainsbury's Bank had to act autonomously.
 21 A slight sort of financial services overlay put over
 22 that basic company law proposition.
 23 If that was the answer, then the whole concept of
 24 single economic entity would cease to apply under
 25 English law and, I suspect, the company laws of almost

113

1 any jurisdiction since you would always rely on the fact
 2 the directors control the company and have a duty to act
 3 in the best interests of the company, you could never
 4 have a single economic entity.
 5 Quite clearly that's not right. The reality is that
 6 in groups of companies, directors are expected to, they
 7 do in fact, and certainly on the facts of this case the
 8 directors of Sainsbury's or the staff of Sainsbury's and
 9 Sainsbury's Bank were expected to, and did, put the
 10 interests of the group as a whole ahead of the interests
 11 of the particular part of the group they happened to be
 12 acting for that week.
 13 It is a tremendous oddity with all of the witnesses,
 14 you ask them who are you employed by, "I have no idea
 15 who I am employed by. I have to remember ten years ago
 16 who I signed a contract of employment with." I mean,
 17 the reality is you see them going back and forth, and
 18 one day you are wearing your hat as an executive
 19 director of this company and the next day you are
 20 a non-exec of this or that as you get within groups.
 21 People move around and they are thinking about the best
 22 interests of the group as a whole.
 23 Whatever the realistic theory, one looks at the
 24 reality and the reality, we say, is very clear on the
 25 evidence. So that is why we say the single economic

114

1 entity test is clearly met here.
 2 The second point I wanted to develop is in relation
 3 to whether or not it can be said that Sainsbury's
 4 undertaking, that's what we say is the relevant test,
 5 has itself committed any wrongdoing.
 6 We develop this at paragraphs 933 to 942 of our
 7 written closing. It is quite clear from the way in
 8 which the case is being advanced that the Sainsbury's
 9 undertaking either has an agreement with MasterCard and
 10 they are putting their case on the basis of an agreement
 11 with MasterCard, or it is part of the association of
 12 undertakings that they say MasterCard, being the head of
 13 that association of undertakings. We disagree with that
 14 analysis, as you know.
 15 So from the point of view of if there's an unlawful
 16 agreement, which is what's being suggested the MIF is,
 17 the contracting party or the party we are acting on
 18 behalf of includes the Sainsbury's undertaking. We
 19 don't need to go that far.
 20 Paragraph 938 is the point we make, and it is taken
 21 from Provimi, but we understand this simply to be
 22 a statement of general proposition of law. It is not
 23 a point that gets sort of thrown into doubt by
 24 subsequent questions about the Provimi principle:
 25 "The implementation of an infringing agreement is

115

1 itself an infringement of article 101."
 2 So you don't need to have actually have been party
 3 to the agreement proper.
 4 If there is an agreement and you implement it,
 5 that's a breach of article 101. One could accept
 6 a situation potentially -- this is Lord Sumption's test
 7 in relation to turpitude -- one might accept if one was
 8 implementing agreement without knowing it was unlawful
 9 or illegal in certain respects, then the turpitude
 10 principle Lord Sumption enunciates might save you from
 11 the application of the ex turpi causa principle.
 12 But, again, on the evidence here it is quite clear
 13 that the Sainsbury's group has long held the view,
 14 through the claim period, that the UK MIF was unlawful.
 15 That's the position now. We had this odd situation
 16 where one had individuals who are directors of, among
 17 other things, Sainsbury's Bank, coming to court on
 18 behalf of Sainsbury's and giving evidence saying the UK
 19 MIF is unlawful.
 20 They simply can't get off on the basis of saying
 21 Sainsbury's Bank honestly and reasonably believed that
 22 the UK MIF was lawful. That wasn't the position being
 23 taken internally. What one actually sees internally is
 24 an entirely different viewpoint in relation to what was
 25 going on, and we have set this out in our paragraph 842

116

1 of our closing. We set this out.
 2 MR JUSTICE BARLING: Is that 842 or 942?
 3 MR COOK: 842. We are going back.
 4 They were focused on the idea they would lose money
 5 if interchange fees were reduced, and they quantified
 6 it, but we are not worried about the number. But they
 7 were happy to go on with the UK MIF on the basis that
 8 the risk of retrospective damages seems somewhat remote.
 9 That is just a situation where they are going nobody is
 10 coming after Sainsbury's Bank, we don't need to worry
 11 about it.
 12 So they quite clearly carried on doing something the
 13 group believed to be unlawful.
 14 MR SMITH: Is subjective belief the test? Because we have
 15 obviously spent a long time during this trial debating
 16 and hearing argument about whether there is in fact
 17 an infringement of competition law here and, indeed,
 18 Mr Hoskins was saying that the open and shut argument of
 19 an infringement by object was not open and shut, it was
 20 very unclear. All that doesn't matter if the party to
 21 the ultimately unlawful behaviour subjectively believes
 22 it to be unlawful.
 23 MR COOK: We would say that. That must be an aspect. There
 24 are aspects here where sort of ignorance of the law is
 25 no excuse, things like that. I wouldn't certainly

117

1 suggest that the fact that one didn't believe one was
 2 acting unlawfully in the context of turpitude would
 3 necessarily be an answer. If you know all the facts,
 4 that might be enough anyway. It is knowledge of the
 5 facts, not necessarily knowledge of the law.
 6 But in a situation like this where you have a party
 7 who goes ahead believing that what they are doing is
 8 unlawful, that turns out to be right, it is very
 9 difficult to turn round and say maybe I should not have
 10 come to that view. You have done something believing
 11 what you were doing was unlawful, and we say that must
 12 be turpitude for these purposes.
 13 There's no sort of public policy sensible reason for
 14 saying that somebody who believed themselves to be
 15 acting unlawfully was not acting in a morally
 16 turpitudinous way. So we say yes, if you believe you
 17 are acting unlawfully that's got to be good enough.
 18 MR SMITH: Even if my subjective belief is without
 19 foundation, objectively speaking?
 20 MR COOK: I think to some extent one has this artificial
 21 position. If your subjective beliefs turn out to be
 22 completely without foundation, there wouldn't be any
 23 wrongdoing. That is the difference here.
 24 Your subjective belief, if it turns out to be
 25 validated because -- to some extent, the position is

118

1 saying should you get away with doing something you
 2 believe to be wrong, you knew to be wrong? That's
 3 partly why we say there's a fundamental distinction in
 4 front of the Tribunal's questions between the approach
 5 in terms of exemplary damages which Sainsbury's have of
 6 course now dropped against MasterCard, and whether that
 7 in some way impacted upon the position in relation to
 8 turpitude on the Sainsbury's undertaking and to some
 9 extent one is looking at different people.
 10 But what is quite clear here is that there was no
 11 suggestion that Sainsbury's Bank were saying maybe it is
 12 not that clear cut, we think there are some good
 13 arguments for it. There is no suggestion of that at
 14 all. We would say they were behaving in a way they
 15 believed to be unlawful, and quite clearly the reason
 16 they were doing it is (1) it made them a lot of money,
 17 and (2) they didn't think anyone was going to sue them
 18 in relation to it.
 19 We do say in those circumstances they implemented
 20 the agreement. They have done so believing it to be
 21 wrong. And any sort of turpitude standard required is
 22 therefore clearly met.
 23 So that brings me to the third point, which is that
 24 of significant responsibility. To some extent I have
 25 covered those points. We do develop it in relation to

119

1 a number of principles, and one of the points I wanted
 2 to emphasise is the requirement laid down by the Court
 3 of Justice in Crehan to avail yourselves in good time of
 4 all the legal remedies available to them.
 5 What you can't do, and what Sainsbury's undertaking
 6 did and continues today -- I mean, that's the thing.
 7 They are still charging, they are still operating today
 8 at the UK MIF at a rate which is still 0.3, twice the
 9 level that Sainsbury's say is lawful. So they are still
 10 doing it today. They simply have made no attempt to
 11 avail themselves in good time of the legal remedies
 12 available to them. They are happily collecting the
 13 money. They think the risk of being sued is remote.
 14 The Tribunal has obviously been interested in the
 15 idea of bilateral agreements. We say in normal
 16 circumstances once you have a default rate, whatever the
 17 default rate is, whether it is zero, 80 basis points, no
 18 acquirer will want to agree to a higher rate. If it
 19 agrees to a higher rate than its competitors it is at
 20 a competitive disadvantage, and no issuer will want to
 21 agree to a lower rate because that's going to put him at
 22 a competitive disadvantage in terms of supplying
 23 benefits to his cardholder. Both of them have a reason:
 24 one side doesn't want to go up, the other side doesn't
 25 want to go down.

120

1 The one time where you should able to say the
 2 bilateral agreement is easy to agree is where you have
 3 a default interchange fee and the issuer says: I would
 4 like a lower rate.
 5 Normally that won't happen. There's no sensible
 6 reason for an issuer normally to positively propose
 7 a lower rate.
 8 MR JUSTICE BARLING: They don't need to, do they, because
 9 all they needed to do is to say, okay, we will just
 10 agree the MIF? We will have a bilateral at the same
 11 rate as the MIF. And hey presto, there's no problem at
 12 all.
 13 MR COOK: They can do that, but if they take the view they
 14 should not do it at a particular rate, they could do it
 15 at a different rate, at a rate they do consider --
 16 MR JUSTICE BARLING: You would not be suggesting there there
 17 was any turpitude if they just agreed the MIF rate,
 18 would you? They certainly wouldn't be acting
 19 unlawfully, would they?
 20 MR COOK: It may well be the case. If they are genuinely
 21 suggesting it shouldn't be above a certain rate for
 22 particular reasons, then maybe they should have thought
 23 about that. But, in any event, they should certainly
 24 have pursued bilateral agreements.
 25 To some extent if they had offered a lower rate

1 21

1 an acquirer would have bitten their hand off because why
 2 would the acquirer not want a lower rate if it gets the
 3 opportunity and one is offered --
 4 MR SMITH: Sure but to avoid the illegality if the bilateral
 5 agreement that avoids the illegality and then one could
 6 debate what rate it might be agreed at, but it is the
 7 bilateralness that escapes the turpitude.
 8 MR COOK: Yes. To some extent it depends how you formulate
 9 it in terms of what's put against us, but, on any view
 10 they could certainly have done a bilateral in a way that
 11 satisfied themselves it would not have been problematic.
 12 We say that is clearly an option that is available to
 13 them. It is an option that's available to them now.
 14 The evidence is they hadn't even enquired about the
 15 possibility.
 16 MR JUSTICE BARLING: What would be the point? Why should
 17 they bother?
 18 MR COOK: They should bother on the basis, sir, that: why
 19 should people bother not breaking the law? Because
 20 breaking the law is wrong.
 21 MR JUSTICE BARLING: It is not going to help anybody one way
 22 or the other if they agree the same rate. They are not
 23 controlling the rate, are they?
 24 MR COOK: They are if they agree a bilateral.
 25 MR JUSTICE BARLING: They are not controlling the MIF.

1 22

1 MR COOK: If they agree a bilateral they are controlling the
 2 rate and if they consider the MIF is in some way
 3 problematically high, and it's being created at a
 4 problematically high level, then they agree it is
 5 a different rate. But the reality is that determines
 6 the amount of money they are taking from Sainsbury's and
 7 they are taking Sainsbury's from all sorts of other
 8 retailers across the UK.
 9 Of course, sir, the answer is that sometimes you get
 10 cartels where the cartels is tremendously ineffective,
 11 everyone breaks the rules or you don't have enough
 12 people in the cartel and so the cartel doesn't have any
 13 effect on prices. One gets that sometimes. If you
 14 claim damages in relation to those kind of cartel, the
 15 answer is zero. But that doesn't mean it is perfectly
 16 fine to enter into that cartel on the basis that: I've
 17 just entered into an ineffective cartel, it is not
 18 having any impact. No, you are duty bound not to do so
 19 and we say in those circumstances it is quite clear they
 20 have a significant responsibility.
 21 MR JUSTICE BARLING: It scuppers the claim. You say they
 22 had significant responsibility for the MIF?
 23 MR COOK: They implemented it. They are the ones who
 24 received the money. The oddity here is MasterCard
 25 doesn't receive the MIF. So MasterCard has never had

1 23

1 an interest in an abstractly high MIF because we are
 2 getting it. MasterCard has always had an interest in
 3 a MIF which we say balances the system in a way that
 4 drives demand on both sides of our two markets.
 5 MasterCard has never had an interest in a high MIF.
 6 Sainsbury's Bank was the one who was actually in this
 7 context receiving the money, implementing what they say
 8 is an unlawful collective agreement.
 9 MR JUSTICE BARLING: You have had an interest in a high MIF
 10 because it is through a high MIF that you say you can
 11 drive the payment issuing and issuers will queue up and
 12 your MasterCard payment system will be highly successful
 13 opposite Visa.
 14 MR COOK: We say we have an interest in the right MIF. It
 15 depends whether you view what we currently have as high
 16 or not. Sainsbury's do. It is considerably lower than
 17 Amex throughout that period. We have an interest in the
 18 right MIF. But we don't receive the money. The measure
 19 here is not whether MasterCard also has significant
 20 responsibility, it is not a: only one of you can have
 21 significant responsibility. The question is whether the
 22 Sainsbury's undertaking has significant responsibility
 23 and we identified a number of factors at paragraphs 945
 24 to 953. We say it is quite clearly it does have that
 25 responsibility and, as I say, they can't get off the

1 24

1 hook on the basis they didn't know the facts, they were
 2 not aware of what was going on. That's just not
 3 suggested at all.
 4 Ultimately the conclusion of that is, we say, if we
 5 are wrong on all of the points that Mr Hoskins has
 6 already developed and the Tribunal does conclude that
 7 MasterCard acted unlawfully, then it follows that the
 8 claim should be barred by ex turpi causa.
 9 Unless there are any more questions, those are my
 10 submissions.
 11 (Pause)
 12 MR JUSTICE BARLING: No, thank you.
 13 (3.12 pm)
 14 (A short break)
 15 (3.20 pm)
 16 Reply submissions by MR BREALEY
 17 MR BREALEY: I guess I have got about half an hour,
 18 something like that.
 19 MR JUSTICE BARLING: Right.
 20 MR BREALEY: Can we just start with the ex turpi causa while
 21 that's fresh in our minds and just on this unity of
 22 conduct point. If we could go to paragraph 845 of
 23 MasterCard's closing.
 24 My Lord asked what is the authority for unity of
 25 conduct on the market and we see there MasterCard

125

1 saying:
 2 "The test for identifying a single economic unit
 3 requires unity of conduct on the market."
 4 And then the last sentence:
 5 "More specifically, the concern is to determine
 6 whether the two companies are adopting the same course
 7 of conduct on the market or acting jointly on the
 8 market."
 9 Just pausing there. That can't be the test for a
 10 single economic unit. I mean acting jointly on the
 11 market is a test for concerted practice, for example.
 12 So you look to see whether two parties are acting
 13 jointly on the market, it is a test for concerted
 14 practice. So if you just take this too literally,
 15 concerted practices would end up being a single economic
 16 unit. There's something kind of troubling there.
 17 I'm going to go to a few authorities but if we could
 18 go to the authority which is relied on, which is the ICI
 19 case, at footnote 602.
 20 MR JUSTICE BARLING: That's 12.
 21 MR BREALEY: It is tab 1. Basically, the quote is from
 22 paragraph 140, tab 1, 43 of the bundle, 663 of the
 23 report. So the quote is:
 24 "The formal separation between these resulting from
 25 their separate legal personalities cannot outweigh the

126

1 unity of their conduct on the market".
 2 Let's just see the analysis that leads to that and
 3 that starts, as one knows, the parents were guilty of
 4 price fixing, the subsidiaries were implementing it and
 5 the question is whether, as we see at 131, the parent's
 6 conduct is to be imputed to its subsidiaries.
 7 So we get the same approach at 132:
 8 "The fact that a subsidiary has separate legal
 9 personality is not sufficient to exclude the
 10 possibility. Such may be the case in particular where
 11 a subsidiary having separate legal personality does not
 12 decide independently upon its own conduct."
 13 That is a classic test. It is not deciding
 14 independently its own conduct. 134, again we get the
 15 same buzz words:
 16 "Where a subsidiary does not enjoy real autonomy in
 17 determining its course of action in the market."
 18 "In view of the unity of the group thus formed..."
 19 So one can see if the subsidiary is not carrying out
 20 real autonomy, there is a unity:
 21 "It is well known that the applicant held or at any
 22 rate majority of the shares".
 23 Then 137:
 24 "The applicant was able to exercise decisive
 25 influence over the policy of the subsidiaries."

127

1 So those were the factors that led to that
 2 conclusion at 140 about unity of conduct on the market.
 3 So one has to be slightly careful, just reading that
 4 paragraph 845, and concluding well simply because there
 5 is some sort of unity on the market that is an economic
 6 single unit.
 7 MR JUSTICE BARLING: Was this, without reading it I'm not
 8 sure, in order to get at the parent? Was this one of
 9 those cases where they wanted to fine the parent or was
 10 this where they wanted to decide whether there was some
 11 concerted action between the parents and the
 12 subsidiaries?
 13 MR BREALEY: I think from 125 it is the jurisdiction.
 14 "The applicant, whose registered offices are
 15 outside, argues that the Commission is not empowered to
 16 impose fines on it by reason of its effects ..."
 17 MR JUSTICE BARLING: Yes. So this is to do with getting at
 18 the parent then. Yes.
 19 MR BREALEY: Yes. But one sees the classic lines about real
 20 autonomy, decisive influence, to lead to this conclusion
 21 of unity of conduct on the market. So all I'm doing
 22 here is just to urge the Tribunal to not read too much
 23 into that paragraph.
 24 What I was also going to do by reply -- I don't know
 25 if the Tribunal has Day 22 of the transcript -- I was

128

1 just going to highlight certain bits of the transcript
 2 and then make some submissions.
 3 I just want to start with a fairly obvious one and
 4 it concerns the investigation into Visa. If we could
 5 pick this up at page 21. So internal page 21, line 18.
 6 This was a question by Mr Smith and I know the Tribunal
 7 has it in mind but I just want to be doubly sure. So
 8 you asked Mr Hoskins, this is at page 21, line 18:
 9 "In the UK the only proceedings was the OFT's
 10 quashed proceedings against MasterCard, there was no
 11 paralegal proceedings against Visa by the OFT."
 12 I just wanted just to double check that. Of course
 13 if we had gone to E1, tab 5, we have simultaneous
 14 investigations into both MasterCard and Visa. That's
 15 tab 5. That's June 2006. The tabs after that are full
 16 of investigations into Visa. So, in tab 5 again you
 17 have the investigation both into MasterCard and Visa,
 18 who account for over 90% of credit cards in the UK.
 19 That investigation is expanded at tab 7.
 20 "The OFT has decided to expand the scope of its
 21 investigation into MasterCard and Visa, current UK
 22 interchange fee."
 23 So that is the OFT. If one goes to tab 8 we know
 24 there was a Commission investigation into Visa. That's
 25 tab 8. And one can go on throughout this bundle, for

129

1 example, at tab 10, the Commission sends a statement of
 2 objections to Visa. Of course Visa ends up giving
 3 commitments. So I just wanted to double check that the
 4 Tribunal is aware that Visa has been investigated
 5 throughout. It starts off with the 2002 exemption
 6 decision.
 7 That was my first point. If I could then go
 8 to page 72, line 22. This is what I call the no
 9 credible grumblings from retailers.
 10 MR JUSTICE BARLING: We are still on Day 22?
 11 MR BREALEY: I'm only going to stay in Day 22.
 12 MR JUSTICE BARLING: No credible rumblings.
 13 MR BREALEY: From retailers. So this is a question from
 14 my Lord:
 15 "Of course you would be sticking your neck out, but
 16 you were saying they couldn't make a credible threat.
 17 And what about the British Retail Consortium?"
 18 This is at the bottom of page 72.
 19 This is a question to Mr Hoskins:
 20 "Are you suggesting that there couldn't be any
 21 credible rumblings that would ... have some impact on
 22 Visa?"
 23 Then the answer:
 24 "It didn't happen in Maestro. It didn't happen.
 25 It's the UK. It's a large differential. Acquirers,

130

1 merchants, regulators did nothing ..."
 2 Then 16:
 3 "I think you are ad idem in the sense that nobody
 4 would take the first step ... crazy ... Asda and Tesco
 5 are probably not going to follow ..."
 6 That is kind of the response.
 7 I just wanted to remind the Tribunal about the story
 8 of the MasterCard Debit. So in the Maestro story of
 9 course you have the MasterCard Debit story. Just to
 10 pick that up, could we go to E3.12. This is, I think,
 11 confidential so I will just highlight the passage.
 12 It is one of the documents I put to Mr Douglas, and
 13 if you go through Mr Douglas' evidence, we touch on
 14 this. But the document is at tab 215. If one remembers
 15 that the MasterCard Debit card was introduced, as we
 16 know, in 2007 and it was a bit of a disaster. And the
 17 reason it was a bit of a disaster is, if one looks at
 18 4895:
 19 "Later attempts to induce straight ... for this
 20 reason when we launched ..."
 21 This is MasterCard's reaction to the rather
 22 unsatisfactory launch of Debit, and it is the bit over
 23 the page at 4896.
 24 So we have got a problem with issuers, acquirers,
 25 but it's the merchants at 3.3:

131

1 "Once more the major ... merchants have delivered
 2 a strong ... message."
 3 Then you get reference to Tesco, John Lewis, do not
 4 accept; mention M&S, Sainsbury's.
 5 Now, all I do is Mr Hoskins refers bits of evidence
 6 where the retailers are accepting that this is
 7 an example of retailers not accepting, or at least
 8 objecting to the MasterCard Debit card. So it is just
 9 an indication of if that differential is too big, those
 10 retailers do have some clout.
 11 If I could go to exemption and essentially that's
 12 where I'm going to finish, and I have got four things to
 13 say on exemption.
 14 I have got the no worse off point, the small
 15 merchants point, Mr von Hinten-Reed's sample of one
 16 point, and we will finish with the specific MIF point.
 17 The no worse off point, if we could go to page 109
 18 of the transcript, Day 22. I will need to go through
 19 a few authorities, but if you could open up at
 20 MasterCard's closing at 68. That's 209/210.
 21 In the light of Mr Hoskins accepting essentially
 22 paragraph 85 of the guidelines and the no worse off,
 23 this is not such a big point now. But I do feel it is
 24 right just to get the law straight for the purposes of
 25 the Tribunal.

132

1 So 209.
 2 MR JUSTICE BARLING: Paragraph?
 3 MR BREALEY: Yes, at page 109 of the transcript, Mr Hoskins
 4 referred to the Maritime Belge case. That is at
 5 line 23, then set out the passage which you see there at
 6 209. Then I intervened a little bit and then I shut up,
 7 but I wanted to -- if one then looks at paragraph 210 of
 8 the closing, everything is set out. Paragraphs 236,
 9 237, 241. But I would urge the Tribunal to note
 10 paragraph 242 because it is not quite complete, as we
 11 shall see.
 12 So I just want to, at the moment, highlight that
 13 there is something not complete about 242. You can put
 14 something at the beginning and something at the end
 15 basically.
 16 What I would like to do is just go to the guidelines
 17 of the general courts and the CJEU to make good this
 18 point. That quote is not quite complete.
 19 MR JUSTICE BARLING: So we want E1, do we?
 20 MR BREALEY: We want E1, yes, sir. We will start off at the
 21 guidelines and this relates to the Maritime Belge case
 22 that Mr Hoskins referred to at page 109 in the
 23 transcript, and it is set out there in 209 in the
 24 closing.
 25 It is at page 38A.7, paragraph 43.

133

1 MR JUSTICE BARLING: What tab is this?
 2 MR BREALEY: Sorry, it is 2A. So it is the guidelines.
 3 MR JUSTICE BARLING: And paragraph?
 4 MR BREALEY: 43. It is relevant to the submission that is
 5 being made in the closing about the benefits to
 6 merchants and benefits to cardholders.
 7 So at 43:
 8 "The assessment under 101(3) of benefits flowing
 9 from restrictive agreements is in principle made within
 10 the confines of each relevant market to which the
 11 agreement relates. Community competition rules have as
 12 their object the protection of competition on the market
 13 and cannot be detached from this objective. Moreover,
 14 the condition that consumers must receive a fair share
 15 of the benefits implies in general that efficiencies
 16 generated by the restrictive agreement within a relevant
 17 market must be sufficient to outweigh the
 18 anti-competitive effects produced by the agreement
 19 within that same market.
 20 "Negative effects on consumers in one geographic
 21 market or product markets cannot normally be balanced
 22 against and compensated by positive effects for
 23 consumers in another unrelated geographic market or
 24 product market."
 25 That is the starting point. But then it goes a bit

134

1 wider:
 2 "However, where two markets are related efficiencies
 3 achieved on separate markets can be taken into account
 4 ..."
 5 This is the important bit. The proviso:
 6 "... Provided that the group of consumers affected
 7 by the restriction and benefiting from the efficiency
 8 gains are substantially the same."
 9 I would ask the Tribunal to note that:
 10 "... provided that the group of consumers affected
 11 by the restriction and benefiting from the efficiency
 12 gains are substantially the same."
 13 You see there the footnote, 57, that actually refers
 14 to the Maritime case. That is at page --
 15 MR JUSTICE BARLING: You get that at the end.
 16 MR BREALEY: Right at the end. Penultimate page.
 17 Basically what the Commission says there is, it is
 18 the bit "importantly", four lines down:
 19 "Importantly, however, in this case the affected
 20 group of consumers was the same."
 21 So that is why when you are looking at two markets,
 22 if the group of consumers is the same, then you can say
 23 they are benefiting. So those are the guidelines.
 24 If I just quickly go to the General Court, which as
 25 you know is at tab 15. Paragraph 228 at 348. I just

135

1 refer to this because this is essentially what I believe
 2 was being appealed. 228, it is the whole thing.
 3 Three lines up:
 4 "However, as merchants constitute one of the two
 5 groups of users affected by payment cards, the very
 6 existence of the second condition necessarily means that
 7 the existence of appreciable objective advantages
 8 attributable to the MIF must also be established in
 9 regard to them."
 10 Then if we can go to the main court, the CJEU, at
 11 paragraph 242, which is at page 438, tab 19. Again, I'm
 12 not quite sure how important this is in the light of
 13 what Mr Hoskins has accepted as regards merchants must
 14 not be worse off, but it is important to see 241 and 242
 15 and how it fits together because we need a few more
 16 words, as I say, in the closing submissions of the
 17 quote.
 18 At 241, it follows:
 19 "Should the General Court have found that there were
 20 appreciable objective advantages flowing from the MIF
 21 for merchants even if those advantages did not
 22 themselves prove sufficient to compensate for the
 23 restrictive effects identified, all the advantages on
 24 both consumer markets could, if necessary, have
 25 justified."

136

1 It is slightly couched in conditional terms, but the
 2 bit I emphasise is having said that you can look at all
 3 the advantages on both markets, that's essentially what
 4 241 is doing, you can in principle look at those, then
 5 you get 242: .
 6 "However ..."
 7 So they are laying down a principle but then they
 8 are saying "however" and you are going to lead into
 9 something. That "however" is not in the quote in the
 10 closing:
 11 "However, as is recorded in paragraph 234 of the
 12 present judgment, examination of the first condition
 13 raises the question. Thus whereas in the present case
 14 restrictive effects have been found only on one market
 15 of a two-sided system, the advantages flowing the
 16 restrictive measure on a separate but connected market
 17 also associated ... cannot in themselves be of such
 18 a character as to compensate for the disadvantages
 19 resulting from that measure ...(Reading to the words)...
 20 in the relevant market."
 21 That is quoted, but then the bit that's not in the
 22 quote is:
 23 "... in particular, as is apparent from 21/168/180
 24 of the judgment, where the consumers on those markets
 25 are not substantially the same."

137

1 In other words, the European Court is saying that
 2 the consumers on these two markets are not substantially
 3 the same and that's why we have always said the focus
 4 has got to be on the merchant market.
 5 So you take paragraph 43 of the guidelines and
 6 substantially the same is feeding into those guidelines.
 7 Mr Hoskins accepts that you have got to decide whether
 8 merchants are neutral or any worse off, but it is
 9 important to recognise the European Court saying these
 10 two consumer groups are not substantially the same.
 11 So you read paragraph 242 of the CJEU in conjunction
 12 with paragraph 43 of the guidelines. So that is the no
 13 worse off point. I can put E1 away, I think.
 14 Can I just quickly go to small merchants. So this
 15 is page 163 of the transcript. We just need to get
 16 E3.10 as well, page 4351. This concerns the
 17 categories 1 to 8, the smaller merchants.
 18 If you remember, Mr Hoskins took the Tribunal on
 19 this table, really to support a similar allegation that
 20 you could perhaps take the small merchants being 20
 21 times as opposed to seven or ten. We are not actually
 22 quite sure where this small merchants being 20 times
 23 comes from. Obviously it has cropped up for the first
 24 time in closing, but I just wanted to --
 25 MR HOSKINS: Sorry, I put the cross-examination to

138

1 Mr von Hinten-Reed.
 2 MR JUSTICE BARLING: I'm sorry?
 3 MR HOSKINS: I put this point on this table to
 4 Mr von Hinten-Reed in cross-examination.
 5 MR BREALEY: Yes, you put this table, but what I want to do
 6 is just highlight the relevance of this table.
 7 186 and 187, particularly:
 8 "However, the instances of very high or negative
 9 ...(Reading to the words)... minor share of the turnover
 10 in the sample."
 11 So Mr von Hinten-Reed accepted to a certain extent
 12 what Mr Hoskins was putting to him, but if you go back
 13 to the transcript it only goes so far. And then at 187,
 14 the Commission is saying:
 15 "The results presented above do not provide any
 16 information about potential differences in the marginal
 17 costs of cash and card or in the indifferent MSCs for
 18 merchants of different sizes."
 19 All I'm doing here is when Mr Hoskins is relying on
 20 this table in the closing as giving support for, well,
 21 small merchants really bump up the MIF and the MSC, just
 22 have a degree of caution because the Commission itself
 23 is saying the results presented above do not provide any
 24 information about potential differences in the
 25 indifferent MSCs for merchants of different sizes.

139

1 MR HOSKINS: So I don't waste my time, I just add can you
 2 just read the whole of 187, in particular the last
 3 sentence?
 4 MR BREALEY: "This makes it possible to give an insight on
 5 the relationship between the merchant size and the
 6 ...(Reading to the words)... ultimately between the
 7 merchant size ..."
 8 It gives an insight, but does it give you an insight
 9 of 20 times?
 10 The Commission starts that paragraph:
 11 "It does not provide any information about potential
 12 differences in the marginal cost of cash and card."
 13 So that leads me -- I think we can put that away and
 14 just go back to page 156 of the transcript, line 20,
 15 where the submission is being made, which is preferable
 16 route? Mr von Hinten-Reed offers you a sample of one,
 17 whereas Dr Niels seemingly relies on the very survey
 18 that they spend most of their time criticising.
 19 But I would just like to make five points on
 20 Mr von Hinten-Reed's sample of one because we say when
 21 you actually look at his report it is a very unfair
 22 description of his approach.
 23 My first point is, first, Mr von Hinten-Reed has at
 24 least started with real data going back over a period of
 25 time, but real data, and he has carried out a thorough

140

1 analysis on that data.
 2 So he has at least taken some data and analysed it.
 3 That's my first point. The second point is that
 4 Sainsbury's is a good start for the average transaction
 5 in the UK. So he has not taken a corner shop, he has
 6 taken a retailer which is a good start for the average
 7 transaction in the UK. That is the second point.
 8 The third point is he hasn't just taken Sainsbury's
 9 data, he has compared that. He has compared the results
 10 with the competition survey. And his conclusion is
 11 comparable to the Commission's results. That is the
 12 third point. So he has compared the results of
 13 Sainsbury's data with the Commission's survey.
 14 The fourth point is that he has also benchmarked or
 15 compared the results by reference to the British Retail
 16 Consortium survey. So he sense checked it again. This
 17 is all in his first report. But the fourth point is he
 18 has benchmarked his conclusions by reference to the BRC.
 19 The fifth and last point is that in his evidence he
 20 has at least attempted to account for small merchants,
 21 and his overall conclusions are not dissimilar from the
 22 MIT-MIF in MasterCard's undertakings and in the
 23 interchange fee regulation.
 24 So he has at least attempted to account for small
 25 merchants, and so his overall conclusions are not

141

1 dissimilar from the MIT-MIF in MasterCard's own
 2 undertakings and in the interchange fee regulation.
 3 So that is the third point on exemption I just
 4 wanted to highlight, this criticism of a sample of one
 5 which we say is rather unfair.
 6 The fourth point I would like to make on exemption
 7 is the level of MIF and the four conditions. And if one
 8 goes back to the transcript at page 132, again it is
 9 a question from my Lord at line 8. This is Day 22,
 10 page 132, line 8:
 11 "I think all we are looking at now is under the
 12 heading of indispensability, but in terms -- I was going
 13 to ask, but I think you have partially answered it,
 14 maybe fully answered it: in terms of where you fit --
 15 how you fit the level of a MIF as opposed to the
 16 existence of a MIF into those four criteria --"
 17 Mr Hoskins says:
 18 "I'm going to come to that. It is a big issue."
 19 He then says at 132, line 24:
 20 "I put it under indispensability."
 21 Two points on this, one relating to Mr Hoskins and
 22 one relating to the question that Mr Smith put.
 23 The first point on Mr Hoskins is that, in my
 24 respectful submission, he did not then go and deal with
 25 the level of MIF. He certainly doesn't deal with the

142

1 level of MIF in the four conditions. What he does do is
 2 he goes basically to indispensability and then to how
 3 Dr Niels has calculated the MIF.
 4 But it is, as the Tribunal knows, a massive
 5 criticism of ours, it is one of the misconceptions we
 6 put in our closing, that MasterCard never properly
 7 distinguish between the scheme and the MIF and how the
 8 MIF leads to efficiencies under the first condition,
 9 fair share under the second condition.
 10 If I could just finish with Mr Smith. You put to
 11 Mr Hoskins the same question you put to me, which is:
 12 how could you start this? You start off with a cost and
 13 then the allocation. And I kind of took issue, which
 14 was maybe you shouldn't be talking about the cost first,
 15 which is you should be looking at the efficiency, how
 16 the MIF specifically leads to an efficiency.
 17 What I was going to submit is that if you look at
 18 the cost first and then on the allocation, in that
 19 allocation MasterCard must still satisfy the four
 20 conditions and how the MIF specifically leads to
 21 efficiencies.
 22 So, for example, we don't have to go to it, but at
 23 paragraph 701 of the Commission decision, the Commission
 24 said:
 25 "The MasterCard MIF does not meet the first

143

1 condition of Article 101(3) because MasterCard failed to
 2 demonstrate a causal link between the MIF and objective
 3 efficiencies."
 4 We would say that they have singularly failed in
 5 these proceedings to demonstrate a causal link between
 6 the MIF and objective efficiencies. The same old
 7 criticism, the same old problem.
 8 That concludes my reply. Thank you very much for
 9 everyone's patience.
 10 Housekeeping
 11 MR HOSKINS: There is a housekeeping point, which Mr Brealey
 12 will probably have no interest in.
 13 The MasterCard team have got the pleasure of doing
 14 exactly the same trial again in June and July against
 15 eight different claimants. You are probably aware --
 16 MR JUSTICE BARLING: You'll be able to retire after that,
 17 Mr Hoskins.
 18 MR HOSKINS: If I'm still alive. But I just raise the
 19 practical point, I know you have got a lot to do but
 20 that trial starts on 13th June and there's clearly --
 21 MR JUSTICE BARLING: I hope you are not going to ask us
 22 when --
 23 MR HOSKINS: I'm not going to ask you to do it, I'm just
 24 going to say --
 25 MR JUSTICE BARLING: I'm afraid it is --

144

1 MR HOSKINS: That's fine. 1
2 MR JUSTICE BARLING: It is in the Commercial Court. 2
3 MR HOSKINS: That's fine. It was simply if the judgment was 3
4 available before that, that would be helpful. 4
5 MR JUSTICE BARLING: That is a statement of the obvious -- 5
6 MR HOSKINS: I didn't know you knew it. I could have said 6
7 if it is helpful we will have it early; if it is 7
8 unhelpful, we will have a later. But you are aware of 8
9 the point -- 9
10 MR JUSTICE BARLING: I'm aware. I'm not going to raise any 10
11 hopes of anything, frankly. 11
12 One thing I was going to say, first of all I was 12
13 going to thank you all for the considerable assistance 13
14 that you have given us, all the advocates and the legal 14
15 teams and everyone behind you, and of course our 15
16 transcript writers. Thank you very much for your 16
17 patience and hard work. 17
18 But the second thing I was going to say was, and 18
19 this is perhaps more directed to people sitting behind 19
20 you, please don't make enquiries of when it will be 20
21 available. You can be assured we will be doing our 21
22 best, but it doesn't help us actually to have enquiries. 22
23 So I think that's it. So that relates to what you have 23
24 just said. 24
25 MR HOSKINS: No, that's fine. I just wanted to make sure 25

145

1 you were aware, and you're aware.
2 MR JUSTICE BARLING: It is difficult not to be. Thank you
3 again.
4 MR HOSKINS: Thank you.
5 MR BREALEY: Thank you.
6 (4.00 pm)
7 (The court adjourned)

8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

146

INDEX PAGE

(Beginning of open session)1
Closing submissions by MR HOSKINS1
(continued)
(End of open session)53
(Beginning of yellow confidential53
session - REDACTED)
(End of yellow confidential session)53
Closing submissions by MR COOK53
Reply submissions by MR BREALEY125
Housekeeping144

147

A	75:25 79:11 83:12 90:8 92:17 94:8 96:12 97:24 98:2,4 98:24 99:1,6 100:6 ad (3) 22:25 67:6 131:3 add (2) 24:6 140:1 addendum (2) 69:3,8 additional (6) 83:2 86:9,15,25 87:15 92:20 address (6) 25:8 55:7 74:4,20 75:14 112:14 addressed (3) 22:17 77:17 109:15 adequate (1) 78:24 adequately (1) 6:3 adjourned (1) 146:7 adjournment (1) 71:17 adjusted (4) 1:13 4:24 5:14 18:7 adjusting (2) 42:23 79:9 adjustments (1) 68:18 admit (1) 111:1 admits (1) 101:6 admittedly (1) 34:17 adopt (2) 17:16 22:22 adopted (3) 13:23 14:5 97:17 adopting (2) 110:14 126:6 adoption (1) 5:16 advanced (4) 88:10 89:14,16 115:8 advances (1) 68:1 advancing (1) 89:10 advantages (7) 58:17 136:7,20,21,23 137:3,15 adverse (1) 29:22 advocates (1) 145:14 affect (2) 45:10 92:17 afraid (8) 11:1 27:17 52:18 87:20 88:22 98:19 108:4 144:25 afternoon (2) 8:15 71:22 agency (1) 105:11 agent (1) 102:25 aggregate (3) 8:20 73:4 91:4 ago (1) 114:15 agree (14) 4:15 16:24 54:18 74:18,20 76:16 120:18,21 121:2,10 122:22,24 123:1,4 agreed (6) 10:16 76:20 85:19 86:5 121:17 122:6 agreeing (1) 77:12 agreement (15) 69:20 115:9,10,16,25 116:3,4,8 119:20 121:2 122:5 124:8 134:11,16,18 agreements (3) 120:15 121:24 134:9 agrees (1) 120:19 ahead (3) 3:23 114:10 118:7 aid (1) 46:17 aim (2) 110:11 113:10 air (1) 1:8 akin (1) 105:16	aligned (1) 109:21 alios (1) 33:22 alive (2) 17:13 144:18 allegation (1) 138:19 allege (1) 111:22 alleged (1) 35:7 allocate (2) 7:10,11 allocated (1) 21:6 allocation (3) 143:13 143:18,19 allow (5) 15:13 46:3,7 50:9 109:6 allows (3) 9:23 10:9 11:14 alluding (1) 61:11 alter (1) 72:8 alternative (3) 42:2 55:13 107:15 altogether (1) 9:21 ambiguous (1) 4:19 Amex (12) 68:3,7,8,20 68:21,21 69:20,24 70:2,2,3 124:17 Amex's (2) 68:14 69:9 amount (9) 23:4 54:19 71:11 82:6 82:15 87:4 91:4,15 123:6 amounts (2) 90:23,25 analyse (1) 70:11 analysed (1) 141:2 analysis (34) 1:14,17 2:5,10 4:24 5:1,14 6:9,25 7:5 9:1 11:23 12:7 14:9 26:3,21 30:23 35:17 62:16 66:20 69:10 76:11 79:23 83:4 85:19 94:10 95:8 104:12,24 111:1 112:7 115:14 127:2 141:1 annex (1) 59:24 announced (2) 59:2 80:13 annual (1) 95:22 answer (14) 6:14 11:25 23:6 25:24 43:4 55:1 101:6 111:3 113:16,23 118:3 123:9,15 130:23 answered (2) 142:13 142:14 answers (1) 74:19 anti-competitive (1) 134:18 anybody (1) 122:21 anyone's (1) 22:15 anyway (4) 4:20 118:4 apart (3) 38:13 86:24 89:23 apparent (1) 137:23 appeal (1) 13:18 appealed (1) 136:2 appear (2) 28:21 40:1 appeared (1) 74:25 appears (1) 97:18 appendix (3) 62:2 66:10 69:2 applicant (3) 127:21 127:24 128:14 applicant's (1) 38:14 application (1) 116:11 applied (3) 14:1 37:8 95:14 applies (6) 33:19 34:21,22,24 35:3 101:3	apply (12) 26:10 31:10 35:1 43:15 50:15 51:11 57:3,4 66:23 86:19 95:24 113:24 applying (2) 24:14 110:24 apportionment (1) 14:15 apportions (1) 15:21 appreciable (2) 136:7 136:20 appreciate (2) 71:4 102:24 approach (36) 6:16,20 6:21 7:19 9:17 11:2 12:15 13:12 14:4,5 15:1 16:12,24 17:16 18:7 20:10 20:24 22:22 25:25 26:9 36:24 46:8 74:21 84:17,18,19 84:19 85:3,4 97:7 97:17 99:11 107:19 119:4 127:7 140:22 approached (2) 5:1 78:10 approaches (1) 26:1 appropriate (6) 12:12 13:1 15:4 17:2 25:2 77:5 appropriately (1) 71:20 April (4) 80:14 96:10 96:14,22 apropos (1) 23:20 arbitrator (1) 33:20 areas (1) 29:2 argues (2) 8:2 128:15 argument (14) 15:16 34:17,17 42:2 47:11,16 48:13,25 55:8 94:24 95:4 112:14 117:16,18 arguments (6) 12:2 20:1 45:7 47:22 57:17 119:13 arises (3) 36:6 65:12 104:7 arising (4) 3:2 32:22 33:14 41:19 arm's (3) 103:12 106:20 109:24 arms (1) 62:7 arose (1) 38:20 arrive (1) 15:24 arrived (1) 17:7 arriving (1) 73:5 article (3) 116:1,5 144:1 articles (2) 15:1,6 artificial (1) 118:20 Asda (1) 131:4 asked (5) 61:20 85:18 93:1 125:24 129:8 asking (6) 3:23 4:16 5:16,17 11:8 60:6 aspect (3) 111:8 112:9 117:23 aspects (3) 49:8 50:13 117:24 assess (2) 8:3 49:23 assessment (7) 12:6 40:22 68:18 79:2,4 79:5 134:8 assigning (1) 9:7 assistance (1) 145:13 assistants (1) 44:1 associated (2) 57:7	137:17 association (2) 115:11 115:13 assume (14) 8:14 9:18 35:13 37:10,16 57:5 60:15,24 61:12,14,15 63:25 65:9 68:5 assumes (2) 68:4 92:10 assuming (1) 61:2 assumption (1) 63:25 assumptions (3) 51:4 51:5,7 assured (1) 145:21 ATMs (2) 81:22 107:10 attempt (7) 70:11 77:7 81:12 88:15 91:23 111:4 120:10 attempted (2) 141:20 141:24 attempts (3) 51:10 77:15 131:19 attract (1) 10:13 attributable (1) 136:8 attribute (1) 7:4 attributing (1) 7:6 August (1) 75:9 Australia (5) 7:20 14:3 62:7,11 63:4 authorised (3) 108:12 108:17 109:1 authorities (3) 7:23 126:17 132:19 authority (4) 72:18 110:2 125:24 126:18 autonomously (1) 113:20 autonomy (3) 127:16 127:20 128:20 avail (2) 120:3,11 available (9) 57:10 83:7 110:25 120:4 120:12 122:12,13 145:4,21 average (10) 66:13,22 67:17 94:11,12,24 95:2,22 141:4,6 averaging (1) 66:17 avoid (1) 122:4 avoids (1) 122:5 award (7) 86:17 96:3 96:17 97:14 98:15 98:16 99:9 awarded (1) 95:2 awards (1) 97:10 aware (8) 58:16 125:2 130:4 144:15 145:8 145:10 146:1,1 axe (8) 18:5 29:17 34:20,21,24 50:8,9 74:23	80:18 balanced (1) 134:21 balances (3) 95:19,21 124:3 Bancaires (1) 24:14 bank (81) 7:20 11:6,9 14:3 19:7 26:20,22 53:15,18 54:18 58:6 59:19,19 62:8 62:8,20 72:1 73:11 73:23 75:14 76:4 76:12,16,17,18 77:13,24 78:2 79:24 80:3,25 81:4 81:7,10 82:2,18 83:1,5,21 84:1,21 84:25 85:2 86:11 87:4 88:19 89:20 91:10,24 92:4 93:14 95:10,11 98:25 99:12 100:22 101:7,8 102:9,19 104:15 106:7,24 107:11,12 108:13 108:18,18,21 109:6 112:2,11,17,17 113:20 114:9 116:17,21 117:10 119:11 124:6 bank's (3) 27:3 108:10 108:24 banks (14) 13:17 16:13 19:13,14 21:1 25:13 26:18 27:4 58:9 59:13,20 62:5 63:20 80:15 BARLING (94) 1:5,7,9 1:11 2:4,14,17,20 3:9,11,13,20 4:10 4:13 5:25 6:11 14:13,19 15:20 16:1 18:24 20:5 23:20,22 24:2,4,6 24:17,24 26:14,18 27:1 35:5 39:19 40:14 41:10 42:5 42:16,21 44:13,15 45:18 52:8,10,13 52:16,23 53:9 54:4 55:19 63:5 70:19 71:9,19 72:3,5 73:16 99:19,23 102:15 106:2,23 110:2,17 111:22 112:4 117:2 121:8 121:16 122:16,21 122:25 123:21 124:9 125:12,19 126:20 128:7,17 130:10,12 133:2,19 134:1,3 135:15 139:2 144:16,21,25 145:2,5,10 146:2 barred (1) 125:8 base (4) 1:16 6:25 8:8 106:7 based (12) 6:18 12:6,7 12:8 57:3 61:17,18 66:21 70:18 75:22 94:22 104:13 basic (5) 49:7 55:14 58:9 72:6 113:22 basically (9) 29:3 57:2 61:24 94:10 101:9 126:21 133:15 135:17 143:2 basis (58) 3:15 5:6 19:18 27:5,22 32:12 39:9 48:7	59:5,22 60:10,17 64:15 65:6,18,24 66:24 67:4,6,14,15 67:18,20,22 74:21 75:20 76:19 79:8,19 82:9 84:17 87:16 88:9 91:7 95:3 96:1 97:11,14 98:6,11 99:10 100:7 101:2 105:7 107:22 108:5 109:24 110:12,22 113:11 115:10 116:20 117:7 120:17 122:18 123:16 125:1 battle (1) 1:7 Baxter (6) 17:24 18:2 18:3,16,16 27:7 bear (9) 18:5 26:8 76:9,23 77:11 78:11 80:22 90:21 94:25 bearing (2) 62:3 64:19 beat (1) 107:8 Beath (11) 23:13,18 29:21 40:6 45:14 52:22 60:1,8,20 62:24 85:14 beginning (6) 1:3 12:18 53:6 133:14 147:3,6 begins (2) 2:10 12:11 behalf (3) 108:17 115:18 116:18 behaving (2) 105:3 119:14 behaviour (1) 117:21 Belge (2) 133:4,21 belief (3) 117:14 118:18,24 beliefs (1) 118:11 believe (4) 118:1,16 119:2 136:1 believed (4) 116:21 117:13 118:14 119:15 believes (1) 117:21 believing (3) 118:7,10 119:20 benchmarked (2) 141:14,18 beneficial (2) 106:6 107:12 benefit (28) 1:14 4:24 5:7,12,14,21 6:6 8:14,16 9:6,18 11:22 12:6 15:17 18:7 19:14,22 25:21 26:3 35:3 37:5 72:14 73:10 80:7 101:11 102:20 106:21 109:9 benefited (1) 72:12 benefiting (3) 135:7 135:11,23 benefits (33) 5:2 6:9 6:22 7:5,7 8:3,7 9:10,13 11:20,23 15:23 16:6,16,22 19:22 26:20 53:15 64:6 68:23 72:23 73:22 78:1 84:18 85:4 103:23 106:24 107:20 120:23 136:17 143:2 best (22) 12:1 26:11 26:12,12 27:11 55:1 57:10 58:24
----------	---	---	--	--	---	---

59:13,14 65:15 79:15 86:8 considers (2) 68:8 84:11 consistent (3) 50:8 92:19 109:21 Consortium (2) 130:17 141:16 constant (1) 94:3 constitute (1) 136:4 consumer (3) 58:12 136:24 138:10 consumers (11) 10:11 10:20 134:14,20,23 135:6,10,20,22 2:23,24 7:1,4,6 8:3 137:24 138:2 context (14) 14:23 22:7 24:12,21 25:12 29:21 43:12 45:13 72:22 86:7 103:20 111:12 118:2 124:7 contingent (1) 51:3 continue (2) 77:13,25 continued (2) 1:4 147:4 continues (1) 120:6 continuous (1) 34:1 continuously (1) 10:25 contract (3) 38:13 39:10 114:16 contracting (1) 115:17 contrary (2) 43:2 50:5 control (3) 112:13,23 114:2 controlled (3) 112:16 113:1,2 controlling (3) 122:23 122:25 123:1 controls (1) 100:17 controversial (2) 89:2 110:21 conventional (7) 96:4 96:17,18 97:12,16 98:6 99:11 Cook (50) 26:19 53:9 53:11,12 54:5 55:21 60:5,9,22 62:25 63:8 66:11 66:19 67:13,15,24 70:19,22 71:13,19 71:25 72:4,6 73:16 73:17 85:16 99:19 99:24 102:21 103:13 104:6 105:11 106:11 107:1 110:6,19 111:24 112:8 117:3 117:23 118:20 121:13,20 122:8,18 122:24 123:1,23 124:14 147:9 corner (1) 141:5 correct (7) 10:24 20:7 22:18 23:24 25:24 70:18 85:19 correlation (1) 44:4 cost (61) 1:14,16 2:22 2:23 3:1,17,18 4:1 4:6,24 5:14 6:9,25 7:10,12,19 8:8 10:11 11:23 12:6,7 12:25 13:2 18:6,7 18:13 19:10 20:6 20:12,15,17 25:16 25:18,19 26:2 29:11 35:25 36:1 37:2 38:7 39:17	47:1,10 52:2,5 58:4 70:7 85:3 89:20 90:25 94:11,12,24 95:2,12,23 98:9 140:12 143:12,14 143:18 cost-based (10) 7:14 13:12 14:4,5 15:1 16:12,24 17:24 20:10,24 cost-free (1) 58:5 Costa (2) 106:3,4 costing (1) 104:21 costs (64) 1:20,25 2:23,24 7:1,4,6 8:3 8:5,6,11 9:8,8,9 11:8 15:21 16:9,19 16:21 17:13 18:8,9 18:10,15,20,20 19:2,4,6,16,16,23 20:1,18,25 21:5,9 21:10,13 23:3 26:5 26:9 29:3,5,14 31:1 32:9 40:13,18,20 45:9 47:23 49:4 58:7 64:6 84:18,19 86:9,16 87:11,15 92:4 93:15 139:17 couched (1) 137:1 counterfactual (7) 25:2 27:14 74:12 79:6,16,20 83:8 counterfactuals (1) 25:5 couple (3) 62:6 108:4 108:6 coupled (1) 83:4 course (41) 6:6 8:18 12:13,18 13:14 22:3 32:17,21 33:15 35:23 36:8 36:11,14 37:22 38:21,23 39:2,14 40:20 41:21 42:12 47:18 48:18,23 49:12 71:22 74:10 78:5 80:19 96:18 106:12 110:14 119:6 123:9 126:6 127:17 129:12 130:2,15 131:9 145:15 court (21) 13:15,20 14:6,23 17:4,4 27:17 43:5 49:23 95:1 96:5,23 116:17 120:2 135:24 136:10,19 138:1,9 145:2 146:7 courts (5) 28:12 34:16 95:7 97:17 133:17 cover (1) 34:12 covered (3) 25:4 98:9 119:25 crazy (1) 131:4 create (1) 88:17 created (1) 123:3 credible (4) 130:9,12 130:16,21 credibly (1) 94:4 credit (60) 1:22 3:16 4:23 5:2,7,22 6:4,5 6:23 7:2,9,10,12 8:5,11,14,16,22,24 9:5,14,19,23 10:1,4 10:4 11:10 13:2 15:21 16:18 21:23 23:3,11 25:14,15	58:10 61:7 64:13 64:23 65:1,3,6,13 65:20 66:2 67:18 67:21 78:11,13,18 84:22 100:24 101:9 108:10,15,18,22,24 109:7 129:18 crediting (1) 25:13 Crehan (2) 42:9 120:3 crisis (1) 13:4 criteria (1) 142:16 criticise (1) 57:12 criticising (1) 140:18 criticism (4) 13:11 142:4 143:5 144:7 cropped (1) 138:23 cross-check (1) 7:15 cross-examination (...) 10:16,24 26:21 64:25 69:12 81:16 84:6,8 93:1 104:9 109:19 138:25 139:4 crossed (1) 92:12 crucial (2) 2:10 108:8 crude (1) 24:22 current (1) 129:21 currently (2) 55:20 124:15 curve (1) 60:20 customer (3) 11:5 78:17 106:6 customers (7) 10:13 40:19 43:20 78:16 104:13,21 108:19 cut (3) 39:20 80:14 119:12 cuts (6) 12:22 29:12 37:25 80:17,20 83:2 cutting (1) 29:14	53:14,22,24 55:3 67:24 96:2 103:17 103:19 106:16,18 142:24,25 dealing (12) 34:1 53:12,18 56:5,9 57:18 63:13 68:3 71:2 75:13 94:17 96:6 deals (3) 81:21 95:18 100:21 dealt (10) 23:15 24:5 24:19 40:5 51:11 55:20,21 69:21 72:21 94:18 debate (1) 122:6 debating (1) 117:15 debit (28) 7:21 10:3 16:18 21:24 22:4,8 22:10,13,19,24 23:5,11,14 58:10 62:5,12,12,18,21 63:14 65:2,4 67:5 131:8,9,15,22 132:8 debt (3) 3:2 93:16 95:23 December (2) 12:10 12:10 decide (7) 5:6,13 40:23 66:4 127:12 128:10 138:7 decided (2) 62:8 129:20 decides (2) 45:19 92:18 deciding (3) 32:6 61:21 127:13 decision (17) 2:2 3:14 4:16 5:17,17 9:4 13:19,21 33:5 46:6 46:19 54:14 64:18 96:15 97:18 130:6 143:23 decisions (4) 5:5 13:23,24 109:17 decisive (9) 100:7 111:5,22,24 112:1 112:6,6 127:24 128:20 decline (2) 57:6 61:3 deemed (1) 32:4 default (11) 3:3,19,21 3:25 4:2,5,11 13:3 120:16,17 121:3 defaults (1) 5:23 defect (5) 36:17,18,22 39:1,20 defective (4) 31:18 39:10,13,18 defence (3) 42:10 46:3,7 defendant (3) 31:16 31:19 35:4 define (1) 67:14 defines (1) 3:8 definition (3) 42:17 49:11,13 degree (4) 50:10,17 51:14 139:22 delivered (1) 132:1 Deloitte's (1) 12:16 demand (1) 124:4 demonstrate (3) 28:14 144:2,5 deny (1) 30:24 depending (2) 91:5,13 depends (3) 52:23 122:8 124:15	deposit (1) 91:12 describe (1) 54:7 described (2) 5:9 18:17 description (1) 140:22 designed (1) 101:23 despite (1) 84:1 detached (1) 134:13 detail (11) 24:12 29:20 30:13 53:19 53:21 54:3,24 85:8 85:10,12 99:25 detailed (6) 29:15 53:24,25 55:2 104:11,12 determine (4) 21:4 64:10 95:1 126:5 determined (1) 49:22 determines (1) 123:5 determining (2) 61:21 127:17 detriments (1) 68:24 develop (8) 6:15 49:18 61:16 88:15 100:1 115:2,6 119:25 developed (7) 55:23 55:25 56:2 70:16 75:8 86:20 125:6 develops (1) 91:3 deviate (1) 79:3 diagram (1) 60:2 differ (1) 54:19 difference (13) 4:25 23:2 37:9 56:11 57:21,24 62:21 64:4 67:3,4 103:15 106:13 118:23 differences (5) 58:1 69:23 139:16,24 140:12 different (29) 3:6 4:20 10:12 28:10 40:4 48:4,14 49:6,8 54:20 58:8 67:9 70:1,3 76:14 79:8 79:20 102:24 105:13 106:13 108:21 116:24 119:9 121:15 123:5 139:18,25 144:15 differential (9) 56:8 59:5 60:10 61:22 62:1 63:11 66:6 130:25 132:9 differentials (4) 65:15 65:17 66:8 67:19 differently (1) 23:12 difficult (4) 39:22 48:25 118:9 146:2 difficulties (4) 45:23 46:7 49:2 92:19 difficulty (1) 93:13 diminished (1) 32:23 diminution (5) 28:1 28:15 32:23 41:4,8 direct (1) 35:6 directed (1) 145:19 directly (3) 42:10,12 42:21 director (1) 114:19 directors (5) 113:18 114:2,6,8 116:16 dirty (2) 24:20 46:11 disadvantage (2) 120:20,22 disadvantages (1) 137:18 disagree (3) 73:24	74:19 115:13 disaster (2) 131:16,17 disclosed (1) 92:7 disconnected (1) 34:3 discounted (1) 70:15 discovered (1) 31:18 discussed (1) 109:14 dismissed (1) 94:20 disparity (1) 59:21 dispute (7) 5:18 8:10 11:16,17 34:13 52:3 68:11 dissimilar (2) 141:21 142:1 distinction (1) 119:3 distinguish (1) 143:7 distribution (1) 21:6 dividend (2) 93:22 94:21 dividends (1) 94:2 document (8) 69:5 76:10,15,18,22 77:17 81:19 131:14 documents (6) 63:7 67:1 80:7 81:3 82:12 131:12 dog (2) 4:17 46:11 doing (29) 7:8,16 11:19,24 16:4,10 24:13 27:10,17 40:21 60:14 71:21 90:9 97:23 98:5 107:18 108:2 111:13 117:12 118:7,11 119:1,16 120:10 128:21 137:4 139:19 144:13 145:21 dollars (2) 102:8 107:2 dominant (1) 61:25 door (1) 70:13 double (2) 129:12 130:3 doubly (1) 129:7 doubt (3) 23:9 84:4 115:23 Douglas (1) 131:12 Douglas's (3) 64:24 65:19 131:13 Dr (23) 1:16,20 6:11 6:20,25 8:2 12:6,23 14:16 16:3 44:19 57:9,9,15 60:5,9,22 64:16 68:12,24 70:18 140:17 143:3 drafted (1) 4:15 dramatic (3) 31:13 32:3 60:4 dramatically (2) 99:3 99:7 draw (4) 6:1,1,2 59:10 drew (1) 76:18 drive (1) 124:11 driven (1) 8:5 drives (1) 124:4 drop (1) 45:20 dropped (1) 119:6 due (12) 29:5 40:10 48:10 61:1,12,14 63:16 80:11 87:7 87:17 90:2 94:4 duration (1) 58:3 duty (7) 32:15,25 33:2 38:20 113:19 114:2 123:18	133:19,20 138:13 E3.10 (1) 138:16 E3.12 (1) 131:10 E3.15 (2) 76:12 81:18 earlier (9) 11:15 23:23 59:2 62:6 69:8 71:11 74:1 96:21 97:2 early (1) 145:7 earned (4) 17:25 88:2 88:7 95:19 easier (4) 49:10 64:23 65:3,20 easiest (2) 2:11,15 easy (2) 66:21 121:2 economic (36) 10:25 11:3 14:25 15:5,16 17:21 19:17 24:12 50:1,18,19,20 51:17 94:18 100:3 100:4,12,13,19 101:13,16,18,22 102:22 110:11,22 111:4 113:4,10,24 114:4,25 126:2,10 126:15 128:5 economically (1) 14:18 economics (1) 58:9 economist (1) 65:14 economists (2) 66:7 94:17 EDC (1) 12:7 effect (30) 31:1 32:23 41:2 42:13,14 48:24 49:15 68:25 76:2 80:20,25 81:10,23 82:2,11 83:11 86:25 87:7 88:4 89:7,12,23 90:1,4,22 91:9,10 91:18 93:16 123:13 effectively (15) 7:6 58:3 59:11 60:15 61:14 63:3,10,20 64:5 74:7 82:8 84:10 95:18 105:14 105:21 effectiveness (1) 43:3 effects (7) 28:20 128:16 134:18,20 134:22 136:23 137:14 efficiencies (6) 134:15 135:2 143:8,21 144:3,6 efficiency (6) 32:1 37:5 135:7,11 143:15,16 efficient (6) 37:1,13 37:13,14,16 42:22 effort (1) 58:14 eight (2) 89:3 144:15 either (8) 11:7 13:11 13:13 14:19 22:12 25:16 54:25 115:9 element (7) 3:1 13:2 28:16 105:22 106:15 107:22 110:11 elementary (2) 73:6,8 elements (3) 70:5 113:10,13 embedding (1) 106:4 Emerald (2) 46:9,20 eminently (1) 12:12 emphasise (4) 54:10 89:1 120:2 137:2 emphasised (1) 97:25
--	--	---	---	---	---	--

<p>employ (1) 10:13 employed (4) 78:20 105:17 114:14,15 employee (6) 44:14 45:5 46:23,24 47:1 105:14 employees (1) 45:19 employer (1) 45:19 employment (1) 114:16 empowered (1) 128:15 encourage (5) 76:8 78:3 83:20 85:2 95:8 ended (2) 37:15,17 ends (3) 26:5 102:9 130:2 endure (1) 39:1 England (2) 95:1 99:12 English (6) 34:5,16 46:14,20 72:7 113:25 enjoy (1) 127:16 enjoyed (1) 73:2 enormous (2) 64:14 84:23 enormously (1) 94:1 enquired (1) 122:14 enquiries (2) 145:20 145:22 ensure (3) 67:8 77:13 101:24 enter (1) 123:16 entered (1) 123:17 entering (1) 10:21 enterprise (2) 28:1,18 entire (3) 82:4 83:18 97:14 entirely (7) 16:16 55:8 68:22 95:4,5 105:5 116:24 entirety (2) 30:25 82:8 entities (2) 102:22 106:9 entitled (7) 29:9,12 48:23 52:17,20,24 73:3 entitlement (1) 43:7 entity (16) 47:10 100:3,4,12,13,19 101:13,17,18,22 103:1 110:23 111:4 113:24 114:4 115:1 enunciating (1) 116:10 envisaging (1) 70:22 equal (2) 92:24 93:2 equally (3) 30:7 35:1 35:14 equation (1) 37:6 Equitas (2) 96:15,25 equity (3) 93:7,8,10 ergo (1) 25:18 escapes (1) 122:7 essentially (6) 51:17 96:4 132:11,21 136:1 137:3 establish (3) 28:6 42:20 47:7 established (3) 21:4 44:3 136:8 EU (14) 34:19 42:8,15 42:18,19,25 43:2 43:12 49:17,19,25 50:4,8 72:8 European (3) 42:7 138:1,9</p>	<p>evaluation (1) 64:6 evaluations (2) 76:14 84:11 event (6) 25:4 55:18 57:13 69:14 90:14 121:23 everybody (4) 35:11 52:10 64:3 65:11 everyone's (1) 144:9 evidence (87) 5:6 16:6 16:6 17:23 20:19 26:13,14 27:11 29:15 35:19 41:22 42:4 49:24 50:1,3,6 55:11,12 56:16 57:10,12,22 58:25 61:5,7,17,18,23 64:16,20,20,21,24 65:18,19 68:23 69:2 70:18 74:4,7 74:13,16 75:2,4,6 75:16,20,21 80:1,4 80:10,18 83:7,12 83:14 88:16 90:17 91:23 92:2,10,14 92:20,24 93:17 94:16 95:7,12 97:24 99:6 101:5 103:21 106:24 107:3,6,17,25 111:10 112:21 113:7,15 114:25 116:12,18 122:14 131:13 132:5 141:19 evidenced (1) 55:15 evidential (4) 50:2 92:18 93:13 112:14 Evidentially (1) 95:23 ex (9) 53:16,18 99:18 99:23,24 101:2 116:11 125:8,20 exactly (17) 1:12 4:12 6:13 16:1 36:23 37:7 38:8 43:24 46:2 58:7 66:17 68:6 74:13 77:9 83:21 93:22 144:14 examination (1) 137:12 example (17) 13:22 19:15 26:4 28:3,5 28:14 38:1 41:14 43:16 45:3,9 46:23 79:15 126:11 130:1 132:7 143:22 examples (2) 18:11 45:3 exceeds (1) 10:19 excess (1) 84:14 excessive (3) 86:13 98:17,20 exchange (1) 18:1 excited (1) 1:17 Excitement (1) 1:8 exclude (1) 127:9 excluded (2) 8:6 50:4 excuse (1) 117:25 executive (2) 81:24 114:18 exemplary (1) 119:5 exemptible (9) 14:10 15:4 17:3,5,8 21:20 22:3 66:4 91:5 exemption (7) 3:14,21 130:5 132:11,13 142:3,6 exemptions (1) 13:24 exercise (6) 5:18 7:17</p>	<p>16:5 18:17 69:18 127:24 exist (1) 102:22 existed (1) 81:9 existence (3) 136:6,7 142:16 existing (1) 82:10 expand (1) 129:20 expanded (1) 129:19 expect (10) 31:3 58:6 102:3,5,6 103:5 104:23 109:16 111:13,20 expectation (1) 111:14 expected (4) 58:2 107:18 114:6,9 expects (1) 4:14 expenses (1) 73:5 expert (8) 9:5,12 55:12 65:14 68:23 69:1 74:3 75:10 expert's (1) 57:12 experts (15) 4:22 5:1 6:15 7:24 8:10 22:16 50:20 51:19 54:18 68:9 73:21 74:18 81:14,15 91:2 experts' (1) 74:17 explain (1) 55:18 explained (1) 11:17 explaining (1) 10:1 explains (2) 65:1 105:3 expressly (1) 43:13 extended (3) 25:14 60:16 100:5 extensive (2) 74:16 78:1 extent (18) 29:13 66:3 73:9 79:14 86:5 89:25 90:3 103:10 112:8,12,13 118:20 118:25 119:9,24 121:25 122:8 139:11 extra (3) 10:22 37:2 42:24 extract (1) 50:24 extraordinary (2) 111:16,17 extreme (1) 47:24 extremity (1) 47:17</p>	<p>Factortame (2) 43:5 43:10 facts (11) 31:13 37:11 75:17 86:19 95:5 110:25,25 114:7 118:3,5 125:1 factual (9) 51:13 55:12 75:2,4,5,15 92:11 94:20 100:2 factually (2) 68:4 105:25 failed (2) 144:1,4 fails (1) 95:5 fair (7) 15:25 16:1,8 20:20 77:2 134:14 143:9 fairly (1) 129:3 fall (2) 69:9 113:17 fallback (1) 98:10 falls (1) 8:8 false (1) 8:19 far (10) 6:20 9:14 24:18 30:5 69:10 78:15 94:25 107:2 115:19 139:13 fast (2) 61:7 70:2 faster (3) 45:16,17 60:23 fatal (2) 91:22 92:15 feature (1) 46:19 Federal (2) 7:20 14:4 fee (12) 57:25 59:4,5 61:22 62:1 63:11 66:24 79:10 121:3 129:22 141:23 142:2 feeding (1) 138:6 feel (2) 29:24 132:23 feeling (1) 1:9 fees (18) 10:2,3 56:6 67:17,21 68:20 69:9 79:21,25 80:11,17,21 82:21 82:24,25 83:9,10 117:5 felt (2) 29:22 91:10 felt (1) 141:19 fighting (1) 102:11 figure (6) 31:5 61:25 74:2 82:7 84:5,6 figures (8) 7:8 20:13 22:18 74:1 76:22 98:20 99:3 109:2 final (2) 68:17 70:7 Finally (1) 50:7 finance (4) 78:4 86:9 86:15 87:15 financial (6) 13:4 82:1 82:14 86:14 108:15 113:21 financially (1) 106:21 financing (8) 77:13 83:24 86:25 88:21 92:4 93:15 98:9,13 find (4) 44:23 103:17 106:9 111:7 finds (1) 51:6 fine (6) 2:18 123:16 128:9 145:1,3,25 finer (1) 128:16 finger (1) 39:25 finish (3) 132:12,16 143:10 firm (1) 52:3 first (44) 2:7,8 8:2 10:20 11:5 13:9 20:24 23:14 27:20 30:11 32:14 48:8 49:9 50:21 51:1</p>	<p>53:13 56:2,9 57:18 67:5 75:8,9 79:11 80:2 85:22 87:23 87:24 95:18 100:2 103:22 130:7 131:4 137:12 138:23 140:23,23 141:3,17 142:23 143:8,14,18 143:25 145:12 firstly (3) 54:5 80:4 86:22 fishing (1) 23:7 fit (3) 39:6 142:14,15 fits (1) 136:15 five (6) 64:4 72:24 73:19 74:17 92:1 140:19 fixed (1) 23:16 fixing (1) 127:4 flat (6) 22:5,8 23:1 66:15,24 67:3 flawed (1) 57:18 float (2) 78:14,18 float (2) 65:16 66:8 flow (1) 82:10 flowcharts (2) 54:8,11 flowing (6) 32:13 48:8 104:4 134:8 136:20 137:15 flows (5) 80:24 81:5 82:19 104:7,12 focus (2) 104:1 138:3 focused (3) 16:16 72:19 117:4 focusing (5) 19:9 21:23 48:12 105:22 107:19 follow (4) 34:23 68:5 97:6 131:5 followed (1) 78:9 following (1) 62:5 follows (6) 3:4 28:23 29:17 89:18 125:7 136:18 footnote (8) 3:8,9,10 4:19 66:19 110:17 126:19 135:13 footnotes (1) 110:3 force (2) 44:24 55:17 foregone (2) 25:18 95:20 forget (1) 110:4 formal (3) 13:25 17:15 126:24 formalistic (1) 113:17 formalistically (1) 105:12 formally (2) 16:4 81:6 formed (2) 34:1 127:18 former (1) 9:14 formulate (1) 122:8 formulation (1) 110:21 forth (2) 104:23 114:17 forward (9) 36:14 75:4 77:24 78:8 88:6 91:23 92:6 93:4 94:8 found (4) 29:23 34:2 136:19 137:14 foundation (2) 118:19 118:22 four (13) 2:5 31:20 32:4 53:12 60:19 84:7 89:11 132:12 135:18 142:7,16 143:1,19</p>	<p>fourth (3) 141:14,17 142:6 fractional (1) 57:24 framework (1) 13:21 frankly (3) 102:13 111:12 145:11 fraudulent (1) 70:4 free (8) 1:23,24 2:24 3:5,25 4:5 7:2 25:15 freely (2) 49:23 104:4 fresh (1) 125:21 friendly (1) 40:24 front (3) 60:6 88:10 119:4 FSA (1) 108:16 full (5) 69:20 71:3 72:7 82:15 129:15 fully (4) 25:19 49:18 109:21 142:14 fundamental (8) 27:22 32:12 48:7 103:14 106:17 108:22 109:3 119:3 fundamentally (3) 58:9 78:25 80:4 funding (16) 1:23,24 2:24 3:5 4:1,5 7:2 76:6,16,19,20 81:13 82:6,8,9 109:5 further (3) 30:15 85:11 113:5 future (6) 3:17,17,18 3:22 78:15 97:10</p>	<p>glove (1) 108:9 go (57) 3:7 15:8 18:16 19:22 20:23 24:7 24:11,18 25:1 27:15,19 28:7 30:15 31:6 35:12 46:23,25 47:24 48:5 49:16 52:6 55:17 62:2,5 80:8 81:18 84:22 85:10 87:2 91:16 95:16 98:12,22 108:20 113:5 115:19 117:7 120:24,25 125:22 126:17,18 129:25 130:7 131:10,13 132:11,17,18 133:16 135:24 136:10 138:14 139:12 140:14 142:24 143:22 goal (2) 53:21 109:20 goes (11) 54:15 59:21 62:15 67:20 111:25 118:7 129:23 134:25 139:13 142:8 143:2 going (90) 1:9,14 3:22 6:7,10 7:4 9:6,9 10:21 21:20 23:10 23:21 25:1,8 27:18 30:12 36:14 38:21 47:25 49:17 53:12 54:1 55:17 56:15 57:3,24 58:16,20 58:22 64:3,8,11,17 64:19 65:7,10,21 65:25 66:2 69:16 69:25 71:1,21 77:25 78:14,16,19 78:22 80:12 84:13 85:20 88:23,25 89:1 95:9,10 98:16 99:18 101:12 104:18 106:16 107:5 112:24 114:17 116:25 117:3,9 119:17 120:21 122:21 125:2 126:17 128:24 129:1 130:11 131:5 132:12 137:8 140:24 142:12,18 143:17 144:21,23 144:24 145:10,12 145:13,18 good (23) 1:5,6 11:7 12:18 28:3 36:18 41:1 45:22 77:8,19 95:5 103:13 105:23 107:16,23,24 118:17 119:12 120:3,11 133:17 141:4,6 Gourley (2) 28:4,12 grand (1) 45:10 granted (2) 3:15,21 graph (2) 60:6,14 great (1) 12:17 greater (1) 83:11 grey (2) 59:18 111:5 ground (9) 6:16 7:16 50:19 51:19,21 66:7 68:9 73:21 88:1 group (37) 62:7,11 101:16,18 102:4,5 102:11 103:6,15,20</p>
--	--	--	---	---	---	---

103:22,23 104:23 105:1,3,6,24 107:16,20,22,24 109:13,13,16 111:12,15,18 114:10,11,22 116:13 117:13 127:18 135:6,10,20 135:22 group's (2) 102:10 107:6 groups (6) 105:10 109:22 114:6,20 136:5 138:10 grumbings (1) 130:9 guarantee (5) 2:1,24 3:1,15 7:2 guess (1) 125:17 guidance (1) 71:3 guide (1) 25:11 guidelines (8) 132:22 133:16,21 134:2 135:23 138:5,6,12 guilty (1) 127:3	heading (3) 2:6 29:7 142:12 headline (2) 53:22 69:19 hear (3) 52:17,20,24 heard (5) 8:15 19:19 57:22 86:22 87:12 hearing (1) 117:16 heavily (1) 55:23 held (4) 102:22,23 116:13 127:21 hell (1) 45:15 help (3) 56:3 122:21 145:22 helpful (3) 44:24 145:4,7 helps (1) 19:2 hesitate (1) 43:16 hesitated (1) 19:4 hesitating (1) 18:23 hey (1) 121:11 HFB (1) 110:13 high (13) 11:9 50:17 51:25 52:1 78:12 123:3,4 124:1,5,9 124:10,15 139:8 higher (23) 10:2,10 15:11,18 29:1 51:14 56:13 67:22 74:1 84:6,7,16 86:24 87:2 88:7,21 89:20,21 92:4 93:15,15 120:18,19 highlight (6) 108:8 129:1 131:11 133:12 139:6 142:4 highlighted (1) 98:21 highly (6) 51:22,25 58:15 87:24 107:11 124:12 Hinten-Reed (25) 4:23 5:19 6:21 7:14 8:13 8:18 9:1,12 10:15 10:23 11:18 28:22 50:24 51:10 52:4 68:12 69:4 73:25 76:10 80:6 139:1,4 139:11 140:16,23 Hinten-Reed's (8) 7:25 9:17 83:13,18 83:25 84:3 132:15 140:20 hiring (1) 47:1 historic (1) 23:16 history (1) 23:10 hit (2) 27:18 60:10 Hodgson (2) 72:20 73:18 hold (3) 62:24,25 63:2 honest (1) 26:7 honestly (2) 105:5 116:21 hook (1) 125:1 hope (3) 53:14 54:21 144:21 hopes (1) 145:11 hoping (1) 54:2 Hoskins (127) 1:4,5,6 1:8,10,12 2:5,15,18 2:22 3:10,14,21 4:7 4:12,15 6:7,13 14:17,20 15:24 16:3,23 17:1,13,21 18:22 19:1,8,15 20:7 21:8 22:1,6,10 22:18,21 23:6,17 23:19,20,21 24:1,3 24:5,8,19 25:1,12 25:22,24 26:11,17	26:19 27:2,13 30:1 30:10,20 35:9 36:16,23 38:10,18 39:5 40:10,16,17 41:8,11,14 42:15 42:17 43:1,22 44:8 44:12,16,20,23 45:17,25 46:16 47:3,6,11,16,20 48:4 52:9,12,15 65:24 72:19 86:3 86:20 87:12 117:18 125:5 129:8 130:19 132:5,21 133:3,22 136:13 138:7,18,25 139:3,12,19 140:1 142:17,21,23 143:11 144:11,17 144:18,23 145:1,3 145:6,25 146:4 147:4 Hoskins' (1) 74:23 hour (3) 70:24 71:11 125:17 hourly (1) 44:1 House (3) 97:8,9,23 housekeeping (3) 144:10,11 147:11 HSBC (1) 62:4 hundredth (1) 67:15 hypothetically (1) 89:13	I I2 (1) 126:20 ICI (2) 110:6 126:18 idea (10) 25:3 64:17 94:13 96:11 107:3 111:10,11 114:14 117:4 120:15 idem (1) 131:3 identified (4) 28:23 92:11 124:23 136:23 identifies (1) 84:14 identify (4) 7:25 14:10 20:24 90:13 identifying (2) 34:24 126:2 ignorance (1) 117:24 ignore (2) 55:16 74:8 ignores (1) 6:22 illegal (1) 116:9 illegality (2) 122:4,5 illegitimate (1) 69:13 illustrates (1) 33:5 illustration (6) 66:1 72:22 77:3 82:23 107:7,10 immediately (2) 8:12 11:7 impact (7) 42:7 81:24 86:15 91:25 93:19 123:18 130:21 impacted (2) 91:14 119:7 impetus (1) 42:24 implement (1) 116:4 implementation (1) 115:25 implemented (2) 119:19 123:23 implementing (3) 116:8 124:7 127:4 implicitly (1) 17:25 implies (1) 134:15 imply (1) 29:22 important (18) 18:5 19:17 20:10 21:25	25:3 32:7 76:9,23 77:11 78:11 80:22 90:21 94:25 101:20 135:5 136:12,14 138:9 importantly (2) 135:18,19 impose (1) 128:16 imposes (2) 32:15 48:9 improving (1) 10:8 imputed (1) 127:6 inability (1) 40:11 include (5) 3:19 5:2 8:11 19:8 52:22 included (12) 1:22,24 1:25 4:1,5,24 5:14 18:10 19:23 54:16 54:17 55:9 includes (1) 115:18 including (5) 3:15 7:2 19:20 42:8 108:15 inclusion (1) 8:5 income (1) 86:10 inconsistent (2) 4:7 46:17 incorrect (1) 8:21 increase (7) 29:5 38:2 43:23 93:19 94:7 106:6 109:6 increased (3) 59:3 92:5 95:12 increases (2) 59:21 63:11 incredibly (4) 104:7 104:15,20 108:1 incremental (7) 9:25 18:20 19:10 84:24 84:25 85:6,7 incur (1) 10:11 incurred (5) 9:10 18:8 18:10 20:25 86:9 independent (2) 34:3 105:6 independently (2) 127:12,14 INDEX (1) 147:1 indicated (1) 20:15 indicates (1) 50:20 indication (4) 79:23 96:19 105:9 132:9 indicator (2) 104:5,6 indifference (1) 16:14 indifferent (2) 139:17 139:25 indispensability (3) 142:12,20 143:2 individual (4) 5:19,21 9:23 106:19 individuals (1) 116:16 induce (1) 131:19 industry (2) 51:24,25 industry-wide (2) 52:2 52:5 ineffective (2) 123:10 123:17 inevitably (1) 74:12 influence (9) 100:7 111:5,23,24 112:2 112:6,6 127:25 128:20 information (11) 25:11 52:17,21,23 104:2,8,12,13 139:16,24 140:11 informs (1) 9:4 infrastructure (1) 18:25 infringement (4)	23:25 116:1 117:17 117:19 infringing (1) 115:25 initially (1) 91:11 injury (1) 73:1 inquire (1) 10:20 insight (3) 140:4,8,8 insofar (5) 11:14 16:4 30:6 37:4 42:2 installed (1) 31:18 instance (1) 104:2 instances (1) 139:8 insufficient (1) 74:4 intact (1) 40:20 intangible (3) 110:11 113:10,13 intended (1) 97:10 intending (1) 70:16 intention (1) 85:10 inter (1) 33:22 interaction (1) 33:22 interchange (26) 56:6 57:25 59:4,5 61:22 62:1 63:11 67:17 67:21 79:7,10,21 79:25 80:11,17,21 82:21,24,25 83:8 83:10 117:5 121:3 129:22 141:23 142:2 intercompany (1) 81:20 interest (87) 6:7,8 13:8,9,10,13,25 14:1,12,14 15:3,15 16:7,13,15 17:7,9 17:17,19 18:15 25:9,12,13,17,20 26:15,24 27:6,8 53:16 85:16,23 86:7,16,18 87:5,6 87:14,16,19 88:9 88:12,15,20 89:18 89:19,20,20,22 90:2 91:12 92:4,16 93:14 95:2,11,19 95:20 96:3,4,11,12 96:17,18 97:3,11 97:16,24 98:2,3,7 98:11,15,16 99:9 99:11,12,18 105:20 113:19 124:1,2,5,9 124:14,17 144:12 interested (1) 120:14 interesting (3) 35:11 45:18 87:18 interests (7) 20:20 102:14 109:18 114:3,10,10,22 internal (3) 62:16 63:6 129:5 internally (3) 26:21 116:23,23 interpret (1) 4:3 interrupt (1) 106:2 intervened (1) 133:6 intrinsically (1) 105:23 introduce (3) 62:22 63:18 75:15 introduced (3) 67:5 75:2 131:15 investigated (1) 130:4 investigation (5) 129:4,17,19,21,24 investigations (2) 129:14,16 invite (1) 98:22 involved (5) 58:4 65:23 74:10,11	109:9 involvement (2) 19:13 100:6 involves (1) 88:15 involving (1) 102:4 irrelevant (2) 77:2 94:11 issue (20) 6:8 7:24 17:11 28:3 31:1 37:2 45:13,13 48:20 54:18 66:6 74:4,17 75:11,14 78:10 89:18 98:13 142:18 143:13 issuer (9) 6:3 15:22,23 16:19 20:9 58:19 120:20 121:3,6 Issuer-based (1) 7:19 issuers (13) 15:12 18:1,8,10 58:11 61:21 64:4,5,12,13 65:25 124:11 131:24 issuers' (1) 8:2 issues (13) 47:3,6 53:12,17,22,23 54:13,13 68:3 75:2 92:15 96:6 104:9 issuing (10) 13:17 16:13 19:7,11,14 21:1 26:18 58:10 58:10 124:11 ix (1) 54:5	J J (7) 93:9,20,22 112:5 112:9,12,13 January (2) 59:1,3 job (2) 20:2 22:12 John (11) 23:13 29:21 40:6 45:14 52:22 60:1,8,20 62:24 85:14 132:3 join (1) 107:9 joint (1) 109:17 jointly (11) 100:14,19 100:23 103:3 111:2 111:21 112:3,25 126:7,10,13 jo (1) 45:11 JSC (1) 96:7 judgment (10) 5:18 31:7 43:11 96:19 96:20 97:1,3 137:12,24 145:3 judicial (1) 13:19 July (2) 59:3 144:14 June (3) 129:15 144:14,20 jurisdiction (2) 114:1 128:13 jury (1) 33:20 Justice (106) 1:5,7,9 1:11 2:4,14,17,20 3:9,11,13,20 4:10 4:13 5:25 6:11 14:13,19 15:20 16:1 18:24 20:5 23:20,22 24:2,4,6 24:17,24 26:14,18 27:1 35:5 39:19 40:14 41:10 42:5 42:16,21 43:6 44:13,15 45:18 52:8,10,13,16,23 53:9 54:4 55:19 63:5 70:19 71:9,19 72:3,5 73:16 96:9 96:16,16,20,21,24	97:2,2,7,19 99:19 99:23 102:15 106:2 106:23 110:2,17 111:22 112:4 117:2 120:3 121:8,16 122:16,21,25 123:21 124:9 125:12,19 126:20 128:7,17 130:10,12 133:2,19 134:1,3 135:15 139:2 144:16,21,25 145:2 145:5,10 146:2 justified (2) 84:4 136:25 justify (3) 11:2 34:5 78:22
K								
keen (2) 95:7,7 keep (6) 40:20 42:24 54:11,15 62:17 63:13 kept (3) 63:2,4,15 key (6) 61:25 73:20 76:9 78:25 90:7 113:8 kind (22) 14:15 39:21 58:12 69:16 79:23 80:16,16 91:24 92:2,11 95:8 104:11,11 105:21 106:10 109:23 110:20 112:19 123:14 126:16 131:6 143:13 knew (2) 119:2 145:6 know (37) 1:11,16 6:4 13:22 14:3 22:10 23:6,7,8 24:3 25:23 25:25,25 26:23 29:8 30:12 42:16 44:8 47:23 66:21 66:23 71:1,19 82:23 92:9 93:21 95:24 115:14 118:3 125:1 128:24 129:6 129:23 131:16 135:25 144:19 145:6 knowing (1) 116:8 knowledge (2) 118:4 118:5 known (2) 96:24 127:21 knows (3) 68:10 127:3 143:4								
L								
laid (2) 38:1 120:2 lapse (1) 38:13 large (7) 18:9 58:2,11 58:15 64:12 65:15 130:25 largely (3) 65:11 74:18 89:22 larger (1) 91:4 late (1) 70:12 launch (1) 131:22 launched (1) 131:20 law (43) 8:21 9:2 11:2 11:17,18,20 24:22 24:23 34:5,19 36:24 41:12 42:7 42:15,18,20,25 43:1 46:18,20 49:17,19,25 50:4,8 72:7,8 73:14 85:19 86:19 100:9 101:23								

objective (6) 103:18 134:13 136:7,20 144:2,6 objectively (1) 118:19 obligation (1) 38:19 observed (1) 93:5 obsolete (2) 38:14,23 obtain (1) 88:21 obtained (1) 13:17 obvious (5) 24:19 27:21 54:17 129:3 145:5 obviously (29) 6:3,8 10:24 21:23 24:10 25:2 40:2 53:23 55:2 57:6,21 58:4 66:23 67:7 79:17 81:6,21 83:23 90:1 96:24 98:8 100:16 100:25 103:17 106:15 112:10 117:15 120:14 138:23 occasion (1) 20:12 occasions (1) 13:16 occur (1) 52:1 occurred (2) 27:24 31:12 occurring (1) 3:25 October/November ... 96:22 odd (3) 30:22 31:3 116:15 oddity (2) 114:13 123:24 offer (7) 10:10 15:13 40:23 77:14,25 83:21 85:4 offered (2) 121:25 122:3 offering (5) 9:23 19:20 41:1,5 85:2 offers (1) 140:16 offices (1) 128:14 offline (1) 55:4 offset (5) 30:7 36:4 68:20 87:11,14 offsets (1) 45:9 offsetting (16) 29:3,11 31:1 32:9 36:5,6,8 37:25 38:6 40:13 47:23 48:17 68:25 72:23 73:10 80:7 OFT (3) 129:11,20,23 OFT's (1) 129:9 oh (1) 46:10 okay (5) 30:19 53:1 70:20 104:17 121:9 old (4) 31:24 36:13 144:6,7 once (12) 58:18 61:6 61:8 64:1,10,18 65:10 66:21 91:16 98:6 120:16 132:1 ones (9) 21:1,2 31:25 36:13 37:13 39:3 44:16 90:12 123:23 oneself (1) 31:14 onwards (9) 54:15,15 56:19,22 57:5,19 61:6 109:16 110:18 open (10) 1:3 27:17 27:20 40:11 53:3 117:18,19 132:19 147:3,5 opened (1) 40:8 opening (4) 15:19 31:8 34:13 49:18 operate (2) 103:10,11

operating (3) 36:17 105:7 120:7 opportunity (2) 75:18 122:3 opposed (2) 138:21 142:15 opposite (2) 12:15 124:13 option (2) 122:12,13 oral (3) 74:6 75:1 81:12 orally (2) 47:21 100:1 order (12) 14:14 15:3 54:11 76:7 78:12 78:18,19 83:20 84:19 85:1 109:17 128:8 ordinarily (3) 32:17 103:16 111:15 ordinary (12) 33:7,11 33:15 35:23 36:8 37:22 38:21 39:2 39:14 41:21 48:22 49:12 organisation (3) 106:5 110:10 113:9 organisations (2) 58:12,16 ought (3) 8:7 20:23 22:8 outcome (3) 111:16 111:17,20 outlier (1) 7:23 outlined (1) 5:8 outside (1) 128:15 outweigh (2) 126:25 134:17 over-compensate (3) 99:4,5,16 overall (7) 37:6 63:24 77:15,23 87:13 141:21,25 overcharge (38) 28:4 28:5,6,16,20,24,25 29:5,10,14 30:3,8 30:24 34:25 35:7 35:16,18 36:4,7 38:2 39:21 40:4,18 41:13,24 43:19,20 44:4 45:14 47:14 49:21 50:14 86:23 87:10 90:22 91:4 91:14,17 overcharged (1) 47:9 overcharger (1) 45:23 overdraft (1) 11:9 overestimates (1) 60:3 overlay (1) 113:21 overlook (1) 92:18 owned (3) 103:1,3 112:11 P packed (1) 71:3 page (37) 1:15 2:3,6,8 3:8,11 27:14 33:25 38:11 41:15 49:16 62:15 63:8 81:19 81:23 83:17 86:6 110:18 129:5,5,8 130:8,18 131:23 132:17 133:3,22,25 135:14,16 136:11 138:15,16 140:14 142:8,10 147:2 paid (8) 10:3 39:13,13 68:20 93:20,21 94:6 99:1

paperwork (1) 108:19 paragraph (60) 1:19 6:24 12:3,23 28:22 31:15 38:12 49:19 51:1 52:3 56:22 62:3,15 63:3,5,8,9 63:12 64:21,24 65:22 66:10,12 68:1 69:21 72:17 73:16 81:2 83:16 87:10,19 88:13,14 96:8 98:18 99:4 108:3,12,23 109:15 115:20 116:25 125:22 126:22 128:4,23 132:22 133:2,7,10,25 134:3 135:25 136:11 137:11 138:5,11,12 140:10 143:23 paragraphs (8) 56:2,4 95:14 97:5 98:23 115:6 124:23 133:8 paralegal (1) 129:11 parameters (1) 54:12 parent (8) 100:5,7 111:25 113:1,3 128:8,9,18 parent's (1) 127:5 parental (1) 112:23 parents (3) 40:24 127:3 128:11 parking (2) 40:24,25 part (31) 2:10 13:3 19:17 22:21,23 29:10,13 34:1 46:20 48:4,14 50:3 50:6 51:9,12 67:4 79:11 100:12 101:16,16,18 102:1 104:25 105:3,10 107:20 108:22 112:7 113:3 114:11 115:11 partially (1) 142:13 participation (1) 16:17 particular (23) 2:19 9:8 13:21 19:10 25:6,10 55:6 59:24 72:22 74:14,18 89:12 90:13,14 104:21 107:14,15 114:11 121:14,22 127:10 137:23 140:2 particularly (10) 22:13 47:14 61:18 72:16 72:19,24 88:25 108:8 110:20 139:7 parties (10) 20:21 76:24 77:9 78:10 79:1,12 86:21 96:11 108:9 126:12 partly (4) 67:6 71:1 112:14 119:3 party (10) 22:12 29:23 37:1 104:3 106:19 115:17,17 116:2 117:20 118:6 pass (4) 40:19 43:20 47:20 49:4 pass-on (24) 27:15 29:2,8 30:12,17 34:12 35:6 42:10 44:19,20,21,25,25 45:2,12 46:1,3,7 47:10,22 50:16 51:15,18 52:1

pass-through (17) 30:25 34:5,10,14 35:1,12,13,14,15 38:9 47:8 49:18 50:2,14,17,20 51:23 passage (4) 37:9 88:24 131:11 133:5 passages (3) 31:8 90:10,11 passed (12) 29:10 30:6,7 42:1,3,10,13 42:21 47:15 49:21 86:23 104:22 passes (1) 87:1 passing (3) 72:18 89:24,25 path (2) 76:3 80:12 patience (2) 144:9 145:17 Pause (3) 2:18,21 125:11 pausing (1) 126:9 pay (7) 5:11 10:2 37:3 68:19 78:14 83:20 85:1 paying (1) 93:15 payment (23) 2:1,24 3:1,15 4:14 5:9 7:1 19:2 70:1,2 80:24 81:5,6,7 82:10 94:9 107:15,15 109:12 109:13 124:11,12 136:5 payments (1) 94:14 paby (1) 44:1 PBT (2) 81:25 82:11 pecuniary (2) 32:13 48:7 pedal (1) 45:15 pence (1) 66:15 penny (2) 44:3,3 Penultimate (1) 135:16 people (16) 34:8 46:4 52:16 58:13 59:23 63:21 64:17 84:21 101:15 106:12,12 114:21 119:9 122:19 123:12 145:19 perceived (1) 11:9 percentage (5) 22:3,5 22:9 67:16 108:23 percentage-based (1) 22:22 percentages (2) 22:19 22:20 perfect (3) 6:16 27:11 79:17 perfection (1) 20:2 perfectly (3) 22:21 45:22 123:15 performance (1) 105:22 period (42) 1:23,24 2:24 3:5 4:1,5,11 4:14 7:2 12:9,11,17 12:19,22 13:4 20:8 25:15,18 56:7 60:16 66:1 70:10 76:3 79:13 80:2,16 83:19 91:1 93:7,9 93:11,21,24,25 94:2 95:20 99:2 112:10,11 116:14 124:17 140:24 periods (2) 75:25 95:24

permissible (2) 14:13 14:17 permutations (1) 54:13 person (2) 33:23 38:1 person's (3) 102:25 105:22 107:4 personal (5) 96:13 106:21 107:20 110:10 113:9 personalities (1) 126:25 personality (2) 127:9 127:11 persuade (4) 76:8,19 84:21 106:18 persuading (1) 62:11 phenomenon (1) 10:12 phrase (4) 68:14 102:8 107:2 110:5 phrases (2) 109:20 113:8 pick (5) 1:14 12:3 108:21 129:5 131:10 picture (2) 18:14 56:18 piece (2) 37:15,17 pin (3) 47:25 59:4 67:17 pint (1) 46:4 place (16) 11:11,14 35:8 36:8 56:17 57:11 59:8 64:1 70:1 79:13 80:15 80:23 82:6,15 97:11 104:9 placed (1) 33:24 plainly (1) 4:7 plaintiff (3) 32:15 36:21 73:2 plaintiff's (1) 73:4 planning (1) 54:23 play (1) 112:7 plc (5) 93:9,20,22 112:12,13 plead (1) 90:7 pleaded (5) 47:12,23 85:24 90:19 96:12 pleading (2) 90:16,17 please (1) 145:20 pleasure (1) 144:13 pm (10) 53:7 70:23 71:15,16,18 99:20 99:22 125:13,15 146:6 pocket (3) 43:22 71:6 107:4 pockets (1) 107:6 point (145) 4:20,21 5:20 6:13,25 7:13 7:18 8:12 12:5,20 13:8,8,9 16:11,23 17:15,21,22 19:11 20:8 21:11 25:3 26:20 30:1 35:11 35:13 38:18,20 39:11,14,16 46:2 51:13,13 52:1 53:15 54:7 55:2,14 56:20 57:8,16,17 57:18,23 58:1,7,19 58:21 59:1,2,11,13 59:17,18,19,22 60:10,23 61:6,1,6 61:9,11,16 62:3 63:3,10,11,23,24 64:2,3,7,8,11 65:5

65:6,10,20,22,23 66:2 67:4,14,15,24 68:16,22 70:11 72:6 74:8,18 75:8 75:13,23 77:17 78:15 80:5,12 81:14 87:7 88:23 90:4,5 91:13 93:18 94:20 96:2 97:9 100:3 113:17 115:2 115:15,20,23 119:23 122:16 125:22 130:7 132:14,15,16,16,17 132:23 133:18 134:25 138:13 139:3 140:23 141:3 141:3,7,8,12,14,17 141:19 142:3,6,23 144:11,19 145:9 points (32) 55:3,6 57:2 59:6,22 61:4 61:23,24 65:6,8,12 65:19,24 66:25 67:18,20,22 75:5 76:21 78:5 79:19 82:20 85:9 100:1 108:4 119:25 120:1,17 125:5 140:19 142:21 policy (7) 46:6,13,19 92:7 94:21 118:13 127:25 portion (1) 18:9 position (24) 27:3,23 28:8,13 31:11 31:11 31:11 42:18 44:18,19 47:17 52:25 72:9 85:21 86:2 87:8,9 113:18 116:15,22 118:21 118:25 119:7 positive (2) 93:3 134:22 positively (1) 121:6 possibilities (3) 90:13 90:17,18 possibility (5) 89:6,23 98:5 122:15 127:10 possible (7) 28:20,24 41:5 54:12 84:10 84:17 140:4 potential (4) 29:16 139:16,24 140:11 potentially (7) 78:15 86:10 89:8 91:13 93:16 95:11 116:6 pounds (7) 76:5 81:11 82:18 83:1,15 104:18 109:5 power (1) 97:20 powerful (1) 113:6 practical (3) 8:3 107:7 144:19 practice (6) 22:4,24,25 23:8 126:11,14 practices (1) 126:15 prayed (1) 46:16 pre-regulation (1) 80:2 precisely (1) 46:6 precision (1) 50:11 predict (1) 51:18 preferable (3) 6:18,21 140:15 premise (1) 8:19 premises (2) 18:24,25 premium (1) 107:9 present (3) 113:14

137:12,13 presentation (2) 76:12 83:5 presented (2) 139:15 139:23 presto (1) 121:11 presumably (3) 6:3 15:20 47:9 presumption (2) 50:2 111:11 pretty (5) 18:19 64:8 70:9 80:9 111:10 prevent (2) 101:24,25 previously (2) 55:10 81:9 price (5) 10:10,14 35:6 87:2 127:4 priced (1) 62:23 prices (4) 29:1 42:22 86:24 123:13 pricing (1) 67:9 prima (1) 73:3 primarily (2) 22:5 57:8 primary (3) 41:25 50:16 86:23 principal (4) 53:17 59:4 74:25 103:18 principle (28) 7:24 10:17 31:11 32:14 33:5,19 34:4,7,9,9 35:2 37:8 43:2,2,14 48:8,12,15 49:7,8 72:6,7 115:24 116:10,11 134:9 137:4,7 principles (5) 31:6 32:7,10 72:21 120:1 prior (5) 10:3 59:15 75:25 76:1,2 private (1) 103:22 probabilities (1) 80:19 probably (12) 12:1 18:12,22 23:13 26:12 42:5 52:25 56:3 58:20 131:5 144:12,15 problem (10) 8:13,18 12:15 39:19 91:22 95:23 96:18 121:11 131:24 144:7 problematic (1) 122:11 problematically (2) 123:3,4 proceed (2) 75:22 96:1 proceedings (4) 129:9 129:10,11 144:5 proceeds (1) 75:20 process (5) 20:23 21:17 58:5 78:3,4 processing (4) 2:23 7:1 19:2,2 produced (3) 55:25 69:11 134:18 product (6) 62:20 63:17,19 108:11 134:21,24 products (3) 50:15 107:15 108:15 Professor (11) 23:13 23:18 29:21 40:6 45:14 52:22 60:1,8 60:20 62:24 85:14 profit (21) 28:15 30:1 30:5 8 36:3,14 37:15 38:4 39:24 40:10,14 41:4

<p>42:14,15 45:11 78:21 82:1,3 84:25 85:7 88:3 profitability (9) 26:22 77:3,15,16,18 78:6 91:9 104:11,21 profitable (1) 26:24 profits (17) 28:2,19 29:5 30:21,23 31:4 35:20 37:25 38:7 40:13 41:9,10 48:24 88:7,19 89:17 93:25 programme (1) 19:15 project (1) 60:18 proper (3) 11:25 71:23 116:3 properly (2) 33:8 143:6 proportionate (1) 23:3 propose (1) 121:6 proposition (2) 113:22 115:22 propounding (1) 48:3 protection (1) 134:12 prove (7) 41:8 50:10 90:8,14 98:1,4 136:22 proved (4) 85:25 90:19 92:17 96:12 provide (8) 3:7 76:17 76:19,20 77:12 139:15,23 140:11 provided (8) 19:6 30:22 31:16 33:6 42:10 109:5 135:6 135:10 providing (5) 2:1,23 19:10,16 76:4 Provimi (2) 115:21,24 proving (1) 90:16 provision (1) 18:21 proviso (1) 135:5 proxy (4) 8:3 18:17 19:25 26:3 prudent (1) 32:16 PSSG (1) 109:14 public (2) 47:14 118:13 punchline (1) 21:13 purchase (2) 11:6,7 purchased (1) 31:15 purchasing (1) 108:14 pure (1) 94:20 purely (2) 27:5 35:3 purpose (5) 39:6 50:9 77:6 108:14,15 purposes (5) 8:25 51:8 76:25 118:12 132:24 pursue (2) 110:11 113:10 pursued (1) 121:24 pursuing (1) 24:18 pushed (1) 47:21 pushes (1) 43:25 pushing (1) 22:12 put (52) 10:7,15,23 17:10 25:15 27:23 31:11,25 35:12 39:3 47:1 55:11,15 57:9 59:24 68:24 72:9 75:4 77:24 78:8 81:14,16 82:2 83:5 84:5,6,8 86:1 86:21 87:19 88:6 90:6 91:23 92:6 93:3 94:8 113:21</p>	<p>114:9 120:21 122:9 131:12 133:13 138:13,25 139:3,5 140:13 142:20,22 143:6,10,11 puts (1) 74:1 putting (6) 39:25 55:12 78:22 103:14 115:10 139:12</p> <p style="text-align: center;">Q</p> <p>qualified (2) 32:14 48:9 quality (3) 10:8 40:21 41:5 quantification (10) 27:22 31:2 34:15 34:21,22 35:2 53:14 54:5 55:7,22 quantified (1) 117:5 quantify (1) 41:2 quantifying (1) 36:5 quantum (2) 32:6 50:13 quarter (1) 71:11 quashed (1) 129:10 query (1) 8:23 question (26) 21:22 25:9 43:3 44:10 47:4,8,19 49:21,22 52:2 66:9 70:25 86:1 100:6 101:1,6 110:24 124:21 127:5 129:6 130:13 130:19 137:13 142:9,22 143:11 questioned (1) 51:5 questions (23) 21:19 25:7 53:24,25 54:25 55:4 61:20 71:3,5,6,8,10 74:19 74:20,21 85:11,15 85:18 90:7 99:17 115:24 119:4 125:9 queue (1) 124:11 quick (2) 53:13 64:19 quicker (4) 64:22 65:3 65:7,19 quickly (7) 24:8 64:17 67:24 85:20 92:3 135:24 138:14 quite (43) 4:10,18 5:25 9:20 14:7 16:11 24:18 30:21 31:13 32:3 58:22 60:16 62:18 63:8 73:8,13 74:3 78:15 78:17 80:3,8,18 82:6,13 90:21 94:16 97:21 100:10 106:9 110:3 113:6 114:5 115:7 116:12 117:12 119:10,15 123:19 124:24 133:10,18 136:12 138:22 quotations (1) 110:20 quote (24) 7:25 38:11 41:15 48:6,17 62:14,16,19 63:5,9 63:12 64:20,25 72:23,24 73:18 87:21 89:3 126:21 126:23 133:18 136:17 137:9,22 quoted (4) 67:2 88:24 96:7 137:21 quotes (2) 109:18 110:7</p>	<p style="text-align: center;">R</p> <p>raise (6) 90:12 93:6,8 93:10 144:18 145:10 raised (2) 23:23 55:10 raises (1) 137:13 raising (1) 89:6 range (6) 7:9 15:21 19:6 21:3 90:17,18 rapidly (1) 60:23 rate (47) 22:5,9,9 23:1 57:6,11 60:25 61:2 61:15 65:9 66:15 66:24 67:3 69:20 70:9 79:20 96:4,12 96:17,18 97:12,16 99:12,13,15 120:8 120:16,17,18,19,21 121:4,7,11,14,15 121:15,17,21,25 122:2,6,22,23 123:2,5 127:22 rates (8) 26:15 52:1 67:16 80:13 95:13 98:17 99:7,14 ratio (1) 66:24 RBS (1) 62:4 reach (2) 14:14 66:18 reached (11) 14:16 17:6 59:1,12,17 61:6,9 63:22 64:2 65:10 97:19 reacted (1) 41:23 reaction (1) 131:21 read (10) 2:12,14 24:24 40:3 41:15 85:14 88:24 128:22 138:11 140:2 readily (1) 101:25 reading (16) 8:4 10:8 10:22 11:13 32:16 33:7,23 38:15 48:9 56:25 69:9 128:3,7 137:19 139:9 140:6 reads (1) 42:9 ready (9) 1:7 6:12,20 9:7 13:5 14:15 18:4 21:16 111:6 real (15) 5:18 74:12 74:13 75:24 79:4 79:15 82:23 107:4 107:5 111:3 127:16 127:20 128:19 140:24,25 realistic (2) 9:15 114:23 Realistically (1) 58:6 reality (9) 64:1 88:5 89:15 99:5 114:5 114:17,24,24 123:5 really (12) 4:20 12:20 22:14 25:23 29:24 49:3,19,25 59:1 111:1 138:19 139:21 reason (27) 5:8 9:25 15:20 22:2 23:2 24:1 35:10 36:10 67:4 79:6 84:4 95:25 97:6 99:8 101:23 102:3 104:8 105:4 106:7,11 118:13 119:15 120:23 121:6 128:16 131:17,20 reasonable (5) 32:15 49:4 54:11,16 64:17 reasonableness (4)</p>	<p>47:18,19 48:20 49:10 reasonably (2) 49:14 116:21 reasoning (1) 4:18 reasons (4) 9:16 84:15 95:6 121:22 receipts (2) 73:2,3 receive (5) 72:14 73:22 123:25 124:18 134:14 received (10) 16:13 16:22 25:13,17 76:5 84:25 86:10 91:12 98:25 123:24 receives (1) 16:17 receiving (3) 73:23 87:5 124:7 recharge (1) 82:16 recharging (1) 81:20 recital (2) 2:11,25 recitals (1) 4:8 recognise (1) 138:9 recognised (5) 7:22 33:6 35:24 43:13 79:1 recognises (1) 42:15 recommended (1) 81:25 recorded (1) 137:11 recover (3) 34:11 44:7 98:2 recoverable (2) 29:18 38:4 recovery (1) 37:20 red (1) 103:24 REDACTED (2) 53:6 147:7 reduce (1) 15:15 reduced (6) 30:21 56:6 85:5 86:16 87:25 117:5 reduction (10) 20:14 44:4 54:18 60:4 80:11 82:21,25 89:12,19 92:3 refer (3) 98:19 112:8 136:1 reference (5) 5:5 60:12 132:3 141:15 141:18 referred (4) 13:16 84:12 133:4,22 referring (1) 63:6 refers (3) 15:7 132:5 135:13 reflect (5) 18:7 56:25 79:9 97:16 98:24 reflected (3) 54:12 93:4 95:21 regard (2) 91:23 136:9 regarded (2) 16:20 104:3 regards (2) 68:18 136:13 regime (1) 28:9 registered (1) 128:14 regulation (9) 7:21 76:2,3 79:14,18 80:2 82:24 141:23 142:2 regulators (1) 131:1 reject (1) 111:10 rejected (1) 96:10 related (1) 135:2 relates (3) 133:21 134:11 145:23 relating (5) 3:2 22:10 49:17 142:21,22</p>	<p>relation (55) 7:21 12:2 16:24 18:1 23:3 26:2,19 27:25 29:8 29:11 41:23 53:17 53:19 54:10,25 55:7,11,14,22 57:8 57:23 58:18,24 59:14 62:10,13 65:12,13 75:10 85:8 86:6 87:12 97:4 100:23 101:8 102:23 104:12 107:3,8,9,10,13 108:1,10 109:12,14 110:7 111:25 115:2 116:7,24 119:7,18 119:25 123:14 relationship (7) 70:6 73:10 103:12 105:16 109:3 112:20 140:5 relationships (2) 101:19 112:23 relative (3) 28:24 58:17 67:9 relatively (7) 53:13 60:15 66:6,21 77:19 90:23,24 relevance (1) 139:6 relevant (27) 12:21 16:20 19:24 20:25 33:17 34:6,14,18 36:5 38:25 73:19 74:19 75:17 83:15 86:1,4 94:13 95:13 101:1,2,3 105:25 115:4 134:4,10,16 137:20 reliance (1) 12:25 relied (3) 76:11 101:4 126:18 relies (1) 140:17 reluctant (1) 101:15 rely (7) 56:12 69:13 72:16 96:7,15 112:4 114:1 relying (4) 12:16 13:6 49:8 139:19 remain (1) 52:21 remained (1) 94:2 remains (2) 41:3,4 remedies (2) 120:4,11 remember (8) 13:18 18:2 43:9 51:1 84:23 101:21 114:15 138:18 remembers (1) 131:14 remind (2) 52:13 131:7 reminding (1) 31:14 reminds (1) 26:19 remote (2) 117:8 120:13 removed (1) 97:13 removes (1) 98:5 remunerated (1) 6:4 rendered (1) 38:14 repeat (2) 53:21 62:14 repeatedly (1) 49:20 replace (1) 39:18 replaced (1) 36:19 replacements (1) 36:25 replacing (1) 38:15 reply (6) 3:7 70:20 125:16 128:24 144:8 147:10 report (11) 8:1,2 16:3</p>	<p>51:1 69:4 73:25 75:9,13 126:23 140:21 141:17 reports (2) 74:17 75:10 representative (4) 76:22,25 108:13 109:1 represents (1) 9:9 required (6) 87:1,15 88:21 91:24 97:8 119:21 requirement (6) 14:11 14:22 17:16 68:7 108:16 120:2 requires (1) 126:3 res (1) 33:22 Reserve (4) 7:19,21 14:3,4 respect (5) 29:9 46:17 81:16 83:11 97:21 respectful (1) 142:24 respects (1) 116:9 respond (2) 53:23 88:13 response (5) 40:6,7 77:21 78:7 131:6 responsibility (7) 119:24 123:20,22 124:20,21,22,25 rest (1) 71:23 restriction (5) 24:11 24:15,21 135:7,11 restrictive (5) 134:9 134:16 136:23 137:14,16 result (28) 8:4 28:2,23 30:2,8,23 33:10 35:23 36:3,7 37:19 38:2,6 39:22 40:13 42:19 49:15 59:4 73:10,22 81:5 82:19,21 85:1 86:11 88:8 89:17 89:21 resulting (2) 126:24 137:19 results (8) 10:22 20:11 139:15,23 141:9,11,12,15 Retail (2) 130:17 141:15 retailer (2) 49:4 141:6 retailers (6) 123:8 130:9,13 132:6,7 132:10 retire (3) 39:3,5 144:16 retreated (2) 11:1 73:25 retrospective (1) 117:8 return (2) 78:20,23 revenue (7) 16:2 73:23 79:7 83:2 86:16 89:19,20 revenues (20) 6:9 13:9,9,10,17,25 14:12,14 15:3,12 15:15 16:7 17:7,25 26:24 27:9 79:10 79:25 82:22 104:22 reversal (1) 81:8 review (1) 13:20 revolvers (3) 25:20 27:4 76:14 reward (8) 19:15 76:4 77:3,14,16,25 82:20 85:3</p>	<p>rewards (13) 19:16,21 80:3,5,9,21,23 83:3 83:22 84:2,20,21 85:5 Reya (1) 52:22 Reynolds (2) 88:16 94:5 right (27) 1:23 2:20 6:14 18:22 21:18 22:24 33:20 42:18 43:12 55:21 56:10 63:9 72:5 78:21 82:13 86:7 97:23 99:10,13 107:21 114:5 118:8 124:14 124:18 125:19 132:24 135:16 rights (1) 21:7 ring (1) 52:19 rise (1) 7:4 risk (2) 117:8 120:13 risky (1) 107:12 roadmap (1) 30:14 Rochet (1) 9:22 Roger's (1) 92:23 role (1) 109:1 Rolls-Royce (1) 22:12 rose (1) 13:3 rough (7) 6:12,20 9:7 13:5 14:15 18:4 21:16 roughly (1) 21:18 round (4) 11:25 28:17 39:17 118:9 route (2) 98:12 140:16 rules (5) 42:8,9 70:3 123:11 134:11 rumblings (2) 130:12 130:21 run (3) 53:9 78:13,18 run-in (1) 76:2 running (1) 46:9 Rysman (1) 10:6</p>
---	--	---	---	--	--	--

99:6,8,14 100:22 100:22 101:7,7,8 102:18,19 104:14 104:15 107:10,12 107:13,18 108:10 108:12,13,16,17,18 108:19,20,21,24,25 109:5,6 111:3 112:1,2,5,9,11 113:16,20 114:8,8 114:9 115:3,8,18 116:13,17,18,21 117:10 119:5,8,11 120:5,9 123:6,7 124:6,16,22 132:4 141:4,8,13 sale (2) 92:21 93:4 sales (6) 5:10 9:24,25 10:22 11:14 28:7 sample (5) 132:15 139:10 140:16,20 142:4 satisfied (4) 30:18 77:10 80:20 122:11 satisfy (1) 143:19 save (2) 40:17 116:10 saving (1) 41:13 savings (4) 36:1 38:7 87:11,14 saw (7) 47:13 55:24 80:7,24 107:17 109:4,11 saying (38) 5:3 6:16 8:13 17:5 24:17 27:2 32:18 39:23 45:14 49:1,3 61:5 86:4 88:2,7,18 89:7 98:20 101:2 102:25 106:21 107:23 108:21 111:19 112:1 116:18,20 117:18 118:14 119:1,11 126:1 130:16 137:8 138:1 138:9 139:14,23 says (23) 7:5 9:5,13 13:6 17:4 35:24 49:19 62:19 68:12 68:12 69:7 73:12 75:16 81:24 83:19 84:19 85:4 89:5,11 121:3 135:17 142:17,19 scale (1) 50:23 scenario (3) 28:25 56:9,10 scenarios (2) 54:9 55:13 schedule (2) 61:17 70:1 scheme (10) 16:18 19:20 21:14 26:22 27:5 45:10 61:8,25 109:13 143:7 schemes (8) 19:18 58:1 64:23 65:1,2,3 65:4,20 scope (2) 29:24 129:20 Scotland (2) 112:17 112:17 scratch (2) 101:9,10 scuppers (1) 123:21 second (24) 2:7 8:1 10:19 13:8 17:23 27:7 29:11 30:13 32:14 37:9 48:9 49:9 60:23 61:1 67:25 69:3,3 95:22	115:2 136:6 141:3 141:7 143:9 145:18 secondary (1) 87:8 Secondly (2) 67:14 86:1 section (9) 55:22 72:2 72:4,18 85:16 87:20 88:22 92:23 110:3 see (69) 2:6,19,22,25 4:22,25 7:8 8:10 16:14 17:11 19:8 20:14 21:13 25:15 32:7 35:10 39:4,22 41:14 45:23 46:20 47:8 48:21 49:20 50:12 56:16,20 59:10,24 60:11,14 62:15,19 67:10 69:10 70:6 80:15 81:23 82:1 83:17 87:18,25 99:2 100:22 104:7,20 105:8,11,14,18 106:10 107:21 108:23 109:2,16,18 109:25 112:13 113:13 114:17 125:25 126:12 127:2,5,19 133:5 133:11 135:13 136:14 seeing (2) 15:15 28:18 seeking (1) 11:21 seemingly (1) 140:17 seen (5) 19:16 47:22 82:18 95:6 110:20 sees (9) 100:8 103:21 107:1,7,8,9,13 116:23 128:19 self-employed (1) 105:13 selling (2) 108:15,18 Sempra (9) 85:22 90:6 92:16,20 97:8,10 97:18,19,22 send (1) 70:3 sends (1) 130:1 sense (14) 6:14 16:13 19:14 21:11 26:1 30:22 52:9 62:17 65:10 79:17 105:2 112:5 131:3 141:16 sensible (2) 118:13 121:5 sentence (9) 1:18 3:10 4:19 14:6 68:17 87:23 89:4 126:4 140:3 separate (10) 10:14 102:25 105:10,19 106:9 126:25 127:8 127:11 135:3 137:16 separately (3) 30:10 35:10 51:12 separation (1) 126:24 served (4) 75:9,10,11 75:13 service (5) 10:8,13 11:7 19:11 41:1 services (3) 15:13 19:6 113:21 session (11) 1:3 27:19 52:6,10 53:3,6,8 147:3,5,7,8 set (33) 9:16 10:14 15:19 18:1,11 20:11 29:7 31:7,8	35:9 50:24 53:19 62:13 64:25 66:12 72:23 73:4,17 85:9 90:10 92:25 95:14 97:5,25 98:17,23 99:24 100:2 116:25 117:1 133:5,8,23 sets (1) 37:3 setting (2) 30:14 86:13 settlement (1) 19:12 seven (3) 24:13 94:1 138:21 shadow (1) 79:14 share (9) 15:25 16:1,8 19:19 20:20 63:14 134:14 139:9 143:9 shareholder (3) 93:20 94:7,9 shareholders (1) 94:14 shares (1) 127:22 shelf (1) 39:7 shift (1) 47:5 shop (14) 10:20,21 11:5 38:1,3 43:16 43:18 44:1,7 46:24 46:25 47:5 106:5 141:5 short (11) 46:9 53:1,4 71:14,15,17,21,23 97:9 99:21 125:14 short-term (1) 92:21 shorter (1) 71:7 show (6) 6:19 9:17 28:15 37:24 44:3 91:24 showed (2) 8:20 48:6 showing (2) 54:8 82:4 shown (9) 4:8 13:15 26:3,5 35:19 82:7 82:12 96:20 97:2 shows (10) 17:1 20:19 59:15 63:9,20 79:11 80:1 83:13 99:6 112:24 shrift (1) 46:9 shut (3) 117:18,19 133:6 side (5) 22:4 35:12 43:17 120:24,24 Sidenius (2) 17:24 27:7 sides (4) 19:3,5 21:5 124:4 signed (1) 114:16 significance (1) 36:20 significant (11) 13:2 23:5 56:7 66:8 74:2 119:24 123:20,22 124:19,21,22 significantly (3) 13:3 56:6 84:15 similar (5) 64:2,5 65:11 70:9 138:19 simple (5) 70:11 94:19 98:11 99:11 99:12 simplification (2) 54:21,22 simply (55) 6:22 8:21 10:7 11:18 19:23 20:17 25:10 26:8 36:21 39:6 45:11 54:7 55:16,16 57:12 59:14,16 65:8,9 66:23 69:6 69:10,13,17,19 70:12 74:8,9 78:9	78:21 80:7 84:3,19 87:1 88:9,11,16,24 90:8,12,16 92:1,14 94:11 95:4 96:1 97:12,12 110:24 113:1 115:21 116:20 120:10 128:4 145:3 simultaneous (1) 129:13 single (25) 90:24,25 93:23 100:3,4,12 100:13,19 101:13 101:16,18,21,22 102:22 110:11,22 111:4 113:3,24 114:4,25 126:2,10 126:15 128:6 singularly (1) 144:4 sir (18) 6:7 14:17 17:1 18:23 30:18 48:12 53:12 67:15,24 70:25 71:13,25 72:1 99:24 103:14 122:18 123:9 133:20 sister (2) 100:16 111:7 sit (2) 2:17 70:22 sitting (1) 145:19 situation (16) 34:2 40:4 56:13 58:13 74:15 79:18 82:17 96:5 100:20 102:24 103:20 104:3 116:6 116:15 117:9 118:6 situations (6) 35:9 100:17 101:25 105:12,18 107:1 six (4) 59:2 92:1 96:21 96:25 size (5) 54:11,16 91:13 140:5,7 sizes (2) 139:18,25 slavish (1) 5:16 slight (1) 113:21 slightly (5) 6:11 39:20 64:13 128:3 137:1 slipped (1) 23:22 slowly (2) 61:3 91:3 small (14) 22:23 64:12 66:6 71:7 90:23,24 91:3 132:14 138:14 138:20,22 139:21 141:20,24 smaller (5) 65:7,17,21 66:3 138:17 Smith (58) 16:11,25 17:11,20 18:19,25 19:5,9 20:22 21:22 22:2,7,17,20 23:2 23:17 25:8,13,23 26:8 27:12 30:9,19 36:16 38:10 39:1 40:17 41:12 43:16 43:24 44:10,14,18 44:21 46:15,22 47:4,8,13,17 48:2 66:9,12 67:10,14 67:23 85:18 90:6 93:5 103:9 104:1 105:2 117:14 118:18 122:4 129:6 142:22 143:10 smuggle (1) 69:1 solely (1) 13:12 somebody (7) 103:17 104:16,25 105:12 105:15 110:22	118:14 somewhat (2) 58:8 117:8 soon (1) 24:20 sooner (1) 39:5 sophisticated (3) 58:11,15 69:18 sorry (14) 3:13,24 19:8 23:1 26:17 29:21 38:10,18 44:13 47:20 106:2 134:2 138:25 139:2 sort (17) 18:16 20:9 28:13 44:24 48:13 70:6 75:25 94:8 103:14,24 104:24 113:21 115:23 117:24 118:13 119:21 128:5 sorts (3) 26:4 45:6 123:7 sought (3) 35:25 67:8 69:1 spaces (1) 40:25 spades (1) 103:21 speaking (2) 20:22 118:19 specific (9) 52:3 54:3 76:6 81:1 90:18 95:17 96:13 113:10 132:16 specifically (3) 126:5 143:16,20 speech (1) 72:20 speed (1) 56:18 spend (4) 29:2 58:14 84:22 140:18 spending (2) 84:24 85:6 spent (2) 23:4 117:15 spheres (1) 106:13 spirited (1) 47:14 Spitz (9) 74:6,25 76:21 81:12 82:5 84:12 85:18 86:5 90:6 split (4) 26:5,9 54:14 75:24 splitting (1) 4:21 spot (1) 68:14 spreadsheets (1) 54:25 square (1) 38:10 stack (1) 88:9 staff (3) 18:25 38:3 114:8 stage (4) 35:17 61:5 62:22 63:23 stages (1) 34:22 standard (1) 119:21 start (20) 1:17 24:20 27:17,21 30:2 50:18 59:13 71:11 71:15 75:23 80:13 80:16 92:13 125:20 129:3 133:20 141:4 141:6 143:12,12 started (1) 140:24 starting (4) 61:16 72:6 90:5 134:25 starts (9) 2:6 56:21 60:22 89:4 91:17 127:3 130:5 140:10 144:20 state (3) 43:4,13,14 statement (5) 14:24 27:21 115:22 130:1 145:5 statements (2) 75:11	90:11 statutory (2) 97:14 98:11 stay (1) 130:11 staying (1) 56:12 steering (2) 109:13,13 step (3) 43:1 91:18 131:4 steps (9) 32:16 33:1,2 33:10 34:11 37:21 39:15 43:8 48:11 sticking (1) 130:15 stop (3) 16:10 42:6 87:22 stopped (1) 81:8 store (4) 10:4 40:8,11 108:19 stores (1) 93:6 story (4) 56:20 131:7 131:8,9 straight (3) 28:4 131:19 132:24 strategy (1) 109:21 stressed (1) 30:1 strong (2) 20:1 132:2 strongly (1) 4:17 structural (1) 112:22 structure (1) 105:6 structured (1) 21:25 struggling (1) 12:21 studies (4) 3:17,18 20:12,15 study (4) 4:1,6 12:7 20:17 stuff (1) 3:23 subject (2) 42:13 93:13 subjective (4) 117:14 118:18,21,24 subjectively (1) 117:21 submission (18) 5:4 6:19 11:19 14:5,21 14:22 19:19 26:2 26:23 29:8 30:5 35:22 41:25 74:24 77:9 134:4 140:15 142:24 submissions (31) 1:4 1:15,18 8:15 9:19 12:4 14:8 15:19 21:20 24:5 25:6 48:16 53:11 54:6 55:9,10 62:2 69:3 72:4 76:6 82:14 85:9,17 94:19 125:10,16 129:2 136:16 147:4,9,10 submit (5) 14:11 29:12 42:17 99:15 143:17 subsequent (4) 33:13 41:16,18 115:24 subsequently (2) 5:23 13:22 subset (4) 1:20 18:9 20:5 26:4 subsidiaries (9) 101:25 102:5,11,16 112:5 127:4,6,25 128:12 subsidiary (6) 12:2 100:8 127:8,11,16 127:19 substantial (4) 11:13 20:14 73:22 78:17 substantially (7) 20:11 135:8,12 137:25 138:2,6,10	substantive (2) 4:8,18 succeed (1) 20:21 successful (3) 19:20 62:10 124:12 sue (1) 119:17 sued (1) 120:13 suffer (2) 36:13 72:15 suffered (20) 28:1,18 30:4,8 32:24 34:8 36:3 37:18,22,24 38:5 39:12 42:19 44:8,16 45:4,12 50:11,12 88:18 suffers (2) 41:6 45:7 sufficient (4) 58:3 127:9 134:17 136:22 sufficiently (2) 58:2 76:25 suggest (14) 4:17 15:2 15:6 30:23 34:8,18 40:17 74:6 81:13 94:5 99:4 101:15 112:19 118:1 suggested (8) 81:15 82:5 88:1 94:4 101:14 102:1 115:16 125:3 suggesting (8) 92:2 94:21 101:17 106:23 107:1 121:16,21 130:20 suggestion (7) 65:8 77:1 91:6 93:18 96:3 119:11,13 suggests (2) 56:15 74:3 sum (1) 23:16 summarise (1) 24:8 summarising (1) 24:22 summary (1) 81:24 Sumption (1) 116:10 Sumption's (1) 116:6 sums (4) 65:23 93:19 94:22 95:25 super (1) 42:22 superior (1) 32:1 supermarket (3) 40:24 102:19 106:8 Supermarkets (1) 108:25 supplemental (1) 75:11 Supplies (1) 46:21 supplying (1) 120:22 support (3) 27:5 138:19 139:20 supported (1) 27:9 supports (1) 42:17 suppose (9) 11:5 21:22 40:6,17,23 44:2 46:23 70:25 105:8 sure (13) 19:1 22:12 22:14 26:6 40:3 42:6 67:8 122:4 128:8 129:7 136:12 138:22 145:25 surely (1) 40:4 surplus (1) 10:10 surprising (1) 111:20 survey (5) 12:17 140:17 141:10,13 141:16 suspect (2) 23:13 113:25 sustained (1) 73:1 sweet (9) 38:1 43:16
---	---	--	--	---	--	--

117:25 118:22	142:10,19	255 (1) 110:18	6.6 (2) 59:6 67:10
121:18	134 (1) 127:14	27 (5) 62:3,15 63:3,8	6.6p (1) 66:18
Wright (2) 9:22 10:6	137 (1) 127:23	63:12	600 (1) 110:17
write-offs (6) 1:22 3:2	13th (1) 144:20	28 (1) 4:2	601 (2) 98:18 99:4
3:16 4:23 5:12 7:3	140 (2) 126:22 128:2	28-day (3) 4:11,14	602 (2) 110:6 126:19
writers (2) 71:23	141 (1) 48:5	25:17	629 (3) 83:16,17 84:5
145:16	142 (1) 38:11	280 (1) 76:13	653 (2) 56:2,20
writing (2) 53:20,22	142B (1) 41:15	284 (1) 81:19	654 (1) 56:22
written (3) 25:5 88:14	144 (1) 147:11	2A (1) 134:2	656 (1) 56:3
115:7	146 (1) 49:16		663 (1) 126:22
wrong (25) 5:20 9:2	15 (1) 135:25	3	6639 (2) 81:19,23
9:19 11:18 22:14	15-minute (1) 53:9	3% (1) 63:3	665 (3) 81:2,4 82:14
23:24 27:24 28:2	156 (1) 140:14	3.12 (1) 125:13	676 (2) 68:1,16
30:3 33:11 35:23	16 (5) 3:8,9,10 4:19	3.15 (1) 70:23	68 (1) 132:20
36:7,24 72:10,12	131:2	3.20 (1) 125:15	690 (1) 33:4
73:12 75:16 81:17	16.6 (1) 84:13	3.3 (1) 131:25	
86:3,11 119:2,2,21	163 (1) 138:15	30 (1) 79:19	7
122:20 125:5	16th (1) 1:1	30% (1) 21:13	7 (2) 72:4 129:19
wrongdoing (2) 115:5	18 (2) 129:5,8	30/70 (1) 26:6	70% (1) 21:15
118:23	186 (1) 139:7	31 (2) 2:3,6	701 (1) 143:23
	187 (3) 139:7,13	31% (1) 68:12	709 (1) 96:8
X	140:2	32 (2) 2:8 3:11	716 (1) 97:5
X (2) 31:4 82:18	19 (1) 136:11	348 (1) 135:25	718 (1) 97:5
	1904 (1) 31:17	35 (1) 99:22	72 (2) 130:8,18
Y	1905 (1) 31:17	350 (2) 1:19 6:24	75 (1) 65:25
year (14) 4:3 35:18,20	1906 (1) 31:17	350A (1) 7:9	75% (1) 15:21
81:4 83:2,25 92:1	1908 (1) 31:19	352 (1) 7:18	76% (1) 68:13
93:23,23,23,23		353 (1) 7:25	797 (2) 95:14 98:23
94:3,6,22	2	355 (1) 9:16	798 (2) 95:14 98:24
years (13) 28:9 31:20	2 (3) 2:3 99:22 119:17	358 (1) 12:3	
31:21,21 32:4	2.30 (1) 99:20	359 (1) 12:5	8
36:17 39:2,8 59:8	20 (7) 35:18,20,21	361 (1) 12:23	8 (6) 85:16 129:23,25
60:19 62:6 92:1	138:20,22 140:9,14	363 (1) 17:23	138:17 142:9,10
114:15	2002 (2) 1:21 130:5	364 (1) 18:4	80 (3) 67:18,22
yellow (8) 27:18	2003 (6) 56:19,21,22	364A (1) 18:11	120:17
52:11,12 53:6,8	57:5,19 60:17	366 (2) 20:8,13	83 (3) 2:11,12,13
87:20 147:6,8	2006 (4) 12:10,11	367 (1) 21:11	84 (3) 2:12,13,22
yesterday (3) 1:13	59:3 129:15	38A.7 (1) 133:25	842 (3) 116:25 117:2
8:15 93:5	2007 (13) 12:8,10,13		117:3
Yorkshire (1) 62:8	12:25 13:6 59:1,3	4	845 (2) 125:22 128:4
	59:15 60:11,17	4 (3) 65:22 66:10,12	85 (1) 132:22
Z	61:6 74:14 131:16	4.00 (1) 146:6	86 (2) 2:12,13
zero (3) 63:19 120:17	2008 (2) 12:7 74:14	401 (1) 64:21	868 (2) 108:3,12
123:15	2009 (1) 93:9	402 (1) 64:24	869 (1) 108:23
	2012 (2) 76:11 83:5	405 (1) 87:10	87 (4) 2:19,25 4:8,18
0	2013 (4) 96:10,14,22	424 (1) 28:22	88 (5) 2:12,13 3:4 4:8
0.2 (1) 8:8	96:22	43 (6) 126:22 133:25	4:18
0.3 (3) 82:25 83:10	2014 (1) 80:13	134:4,7 138:5,12	892 (1) 109:15
120:8	2015 (11) 12:10,17	430 (1) 31:15	
0.30 (1) 79:19	75:9,12,25 79:13	431 (1) 32:10	9
0.35 (1) 8:9	80:2,14 82:15	434 (1) 72:17	9 (3) 59:22 60:10
0.75 (2) 7:9 8:4	83:13,23	435 (1) 73:17	67:20
	2016 (1) 1:1	4351 (1) 138:16	9.2 (5) 59:5 65:5,18
1	209 (3) 133:1,6,23	438 (1) 136:11	65:24 66:3
1 (7) 69:2 119:16	209/210 (1) 132:20	439 (1) 69:7	90% (1) 129:18
126:21,22 138:17	21 (3) 129:5,5,8	446 (1) 49:19	91 (2) 2:12,13
147:3,4	21/168/180 (1)	448 (1) 50:1	933 (1) 115:6
1% (2) 22:11 99:12	137:23	452 (1) 50:7	938 (1) 115:20
1.10 (1) 71:16	210 (1) 133:7	455 (1) 50:19	942 (2) 115:6 117:2
1.31 (2) 7:11 8:4	215 (1) 131:14	456 (1) 51:1	945 (1) 124:23
1.45 (2) 71:15,18	22 (9) 3:8,12,13	457 (1) 51:13	953 (1) 124:24
10 (4) 28:9 63:5,9	128:25 130:8,10,11	460 (1) 52:3	
130:1	132:18 142:9	4895 (1) 131:18	
10.00 (1) 1:2	228 (2) 135:25 136:2	4896 (1) 131:23	
100% (2) 50:22	23 (1) 133:5		
105:15	234 (1) 137:11	5	
101 (3) 69:21 116:1,5	236 (1) 133:8	5 (3) 129:13,15,16	
101(3) (2) 134:8 144:1	237 (1) 133:9	5% (1) 68:12	
109 (3) 132:17 133:3	24 (1) 142:19	50% (7) 7:7,11 9:7	
133:22	240 (1) 94:6	20:5 50:22 51:18	
11.14 (1) 53:2	241 (4) 133:9 136:14	56:25	
11.30 (1) 53:5	136:18 137:4	53 (4) 147:5,6,8,9	
116 (1) 1:15	242 (6) 133:10,13	551A (1) 88:14	
12.41 (1) 53:7	136:11,14 137:5	559 (1) 87:19	
125 (2) 128:13 147:10	138:11	57 (1) 135:13	
127 (1) 27:14	25% (6) 7:6,10 9:7		
131 (1) 127:5	15:22 16:8 20:5	6	
132 (4) 127:7 142:8	250 (4) 93:23 94:3,7	6 (1) 67:19	
	94:22		

