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5 **IN THE COMPETITION**  
6 **APPEAL TRIBUNAL**

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

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8  
9 Salisbury Square House  
10 8 Salisbury Square  
11 London EC4Y 8AP

12 Wednesday 10 January 2024 – Thursday 11 January 2024

13  
14 Before:  
15 The Honourable Mr Justice Marcus Smith  
16 Ben Tidswell  
17 Professor Michael Waterson  
18 (Sitting as a Tribunal in England and Wales)

19  
20 BETWEEN:

21  
22 **Merchant Interchange Fee Umbrella Proceedings**

23  
24 **And**

25  
26 **Walter Hugh Merricks CBE**

Claimants

27  
28 v

29  
30 **Mastercard Incorporated and Others**

Defendants

31  
32 **A P P E A R A N C E S**

33  
34 **Philip Moser KC, Philip Woolfe & Oscar Schonfeld** (instructed by Stephenson Harwood  
35 LLP and Scott & Scott UK LLP) on behalf of the Stephenson Harwood and Scott & Scott  
36 Claimants

37 **Tristan Jones** (Instructed by Hausfeld) on behalf of the Primark Claimants

38 **Mark Brealey KC** (Instructed by Mishcon de Reya LLP) on behalf of Ocado

39 **Ben Lask KC** (Instructed by Pinsent Masons) on behalf of the Allianz Claimants

40 **Daniel Piccinin KC** (Instructed by Linklaters LLP and Milbank LLP) on behalf of Visa

41 **Matthew Cook KC & Owain Draper** (Instructed by Jones Day and Freshfields) on behalf  
42 of Mastercard

43 **Mark Simpson KC and Anneliese Blackwood** (Instructed by Willkie Farr & Gallagher  
44 (UK) LLP) on behalf of Walter Merricks CBE

45  
46  
47 Digital Transcription by Epiq Europe Ltd  
48 Lower Ground, 46 Chancery Lane, London, WC2A 1JE

49 Tel No: 020 7404 1400

50 Email:

51 [ukclient@epiqglobal.co.uk](mailto:ukclient@epiqglobal.co.uk)

Proceedings

(10.30 am)

(Delayed start)

(10.42 am)

**THE PRESIDENT:** Good morning, Mr Moser. Good morning in particular. I am not going to repeat my mantra about live streaming but I do have a few housekeeping points before you begin, Mr Moser. First of all, as is obvious, we have inverted the sitting arrangements. For that reason and because I think we have a different transcriber, could you carry on the very helpful practice of identifying yourselves because otherwise we will just get a continuation of the confusion yesterday.

Secondly, by way of further inversion, we are obviously expecting to hear primarily from counsel but the microphones are live in the third row and we will draw upon and indeed invite the interventions as appropriate of the expert economists to the extent that assists.

I am afraid we will oblige you to stand up, because we will not be able to see you otherwise. So if you wouldn't mind, as and when there is an intervention, that would be useful.

Moving on to matters of greater substance. These are points which I am sure will be addressed in the course of the submissions but I think it would be helpful if we made ourselves clear. We regarded yesterday as an extraordinarily helpful day and we are very grateful to the parties and in particular to the economic experts for the clarity that they have brought to our thinking.

We think, certainly in my mind, the direction of travel is now very clear. The first order of business, therefore, is if and to the extent some party does not like the direction of travel and has moderately fundamental objections to it, we want to hear from that party

1 or those parties first so that we can consider and deal with them before we go on to  
2 the more granular but still tectonic plate-like granular issues of how we implement the  
3 direction of travel, if that is indeed the route we go down.

4 So that is item one on the agenda. There are a number of other points that we want  
5 to just articulate, assuming we go down the route essentially articulated yesterday.  
6 First, we want to make it clear that we have found the assistance of the Merricks team,  
7 in particular Mr Coombs, hugely important and if we go down this route, we would want  
8 and expect in the data collection process the Merricks parties to take a full role.

9 We are, however, very conscious that no order has been made in regard to the  
10 participation of Merricks in Trial 2 one way or the other. We do not want to sleepwalk  
11 into a situation where one party -- that would be the Merricks party -- are assuming  
12 they are in and one party -- and that would be the defendant, Mastercard -- assuming  
13 that they are out.

14 We do not want to debate that today. We do want, however, the interested parties,  
15 and principally that is Merricks and Mastercard, but it is everyone else because we are  
16 talking about complex proceedings even without Merricks, we want the parties to think  
17 extremely carefully about how, if at all, Merricks is to be incorporated or whether one  
18 has a separate trial for Merricks, maybe at the same time, maybe not at the same time,  
19 dealing with a common data set which is assembled in the way that we are going to  
20 further discuss today.

21 We see no particular problems in any solution but that is because we have not really  
22 been thinking about it. The reason we have not really been thinking about it is because  
23 you cannot until you have got the direction of travel in terms of the trial of the pass-on  
24 question resolved and we made a huge amount of progress yesterday in resolving  
25 matters. We feel -- I feel at least -- far more comfortable about the ability of Trial 2  
26 than I did before the commencement of yesterday. It means that the question of

1 Merricks involvement in Trial 2 can be debated at an appropriate point in the future.  
2 The reason we do not need to debate it now is we see Merricks fully involved in the  
3 data collection process going forward. That is going to occupy some considerable  
4 time going forward, but we would like the parties to think very carefully about how the  
5 Merricks pass-on question should be dealt with, and I put that very neutrally, because  
6 we are neutral on that. We just don't want to sleepwalk into an outcome where one or  
7 other of you says that you decided this ages ago. Well, we haven't and we want to  
8 decide it expressly in light of the parties' mature consideration of how it all works.  
9 It would be, I think, unfair to do it now. We do not know yet the precise shape of Trial  
10 2 because we only now are beginning to grapple with the data collection.  
11 So that was my second point on what we want to be thinking about. But that is  
12 emphatically not a discussion point in any detail today. I don't want to shut out either  
13 Merricks or Mastercard from saying something if they want to, but keep it brief.  
14 Thirdly, the data collection process itself. We are wanting to be kept informed in  
15 granular detail as to what is going on. That is principally an obligation for Mr Moser's  
16 clients but it is obviously also an obligation for anyone who is involved in the  
17 information provision route, including in particular the specific claimants, Primark et al,  
18 we want to know what is going on even if it is going smoothly. In other words, even if  
19 there is -- I don't want to be too pessimistic -- but an altogether surprising outbreak of  
20 harmony amongst the parties, we still want to know what is going on. We anticipate  
21 there will not be a complete outbreak of harmony amongst the parties and we will  
22 therefore want to be informed in a way that does not involve a barrage of letters from  
23 multiple parties. We will want to know what the problems are because these will feed  
24 straight into the fortnightly case management meetings that we will be having and we  
25 will want to be grappling with those problems if they emerge, but we expect them to  
26 emerge, we will want to grapple with those there so that the parties can progress,

1 rather than carry on street fights in correspondence.

2 So that is the third point. The fourth point, which is related to the third: case  
3 management meetings. These will carry on. We hope -- and this is very much  
4 a reflection of what we understand to be the entirely correct problems that people have  
5 with 8 o'clock starts -- those issues are shared by Mr Tidswell and myself. We do not  
6 want them to take place at 8 o'clock if that can be avoided. The self-interest for all is  
7 obvious there. Ideally, we will try to list those in ordinary court day hours. The reason  
8 I can't be more concrete than that is because the reason we started at 8 o'clock was  
9 because of other commitments, including those of Mr Tidswell and myself, but also of  
10 the advocates during the court day on the Fridays.

11 So to the extent that we cannot do ordinary court hours, we will do them outside court  
12 hours, but we want to try and shunt these case management meetings to a slightly  
13 more godly hour, if we can do so. So we are very much up for a 10.30 start for these,  
14 with a hard guillotine after an hour and a half. But we recognise that that may not be  
15 achievable, not least by ourselves, and we will leave the minutiae to discussions going  
16 on. But in due course we want these to be shunted to a more helpful time frame for  
17 all concerned, for reasons that are, I think, obvious.

18 So those were the four main points. We very helpfully have been provided with a draft  
19 order. I think, Mr Moser, that is from you and is not agreed.

20 **MR MOSER:** That is correct. It is no criticism it is not agreed because it was produced  
21 shortly before the hearing. It took longer than expected to draft. I am informed,  
22 although I have not yet seen it, that there is an even later draft order being put forward  
23 by Merricks electronically more or less five minutes ago. I leave that to Mr Simpson.  
24 What this is is, if I may use the word, an ambulatory draft in an attempt to capture  
25 some of the things that we discussed yesterday. I am very happy, just briefly, to  
26 address you on it.

1 It captures, for instance, the mini CMCs every two weeks that you have just outlined,  
2 sir. It refers to permission for the economic experts as listed at 3. This is in anticipation  
3 of the sort of order that might be made without a selection of a particular methodology  
4 either way. That will be for the experts.

5 **THE PRESIDENT:** Well, Mr Moser, let me say once we regarded this as an extremely  
6 helpful draft, not least because it, I think, made clear at least to me that we could make  
7 matters a lot simpler in the sense that you have rightly said that a number of essential  
8 points are contained in this, assuming my first point that this is the direction of travel  
9 we go down.

10 But given that we are going to be actively mini CMCing every two weeks, we think that  
11 a lot of the detailed provisions can actually be removed and the candidates, just so  
12 that the parties can see our thinking, we felt that there was no need for paragraphs 4,  
13 5 through 7, 8 through to 13. We felt there was no need for any of this, not because it  
14 is not carefully drafted and not because it may not be necessary, but because we  
15 anticipate this is precisely the sort of stuff which will be aired at the fortnightly mini  
16 CMCs and resolved, if necessary, by order or by application, but, ideally, by the parties  
17 in the first instance taking a cooperative approach and only in the second instance  
18 saying: the order says this, you must abide by this. In other words, we are keen to  
19 trust the parties and the experts to get on with it and that trust is buttressed by the fact  
20 that if things get out of control, we will know at the latest a fortnight later that they have  
21 got out of control and we can pivot into an altogether more intrusive set of orders.

22 So it seems to us that the key thing which you have captured is paragraph 3, that we  
23 have the expert economists as experts, and then really paragraphs 14 and 18, which  
24 are the key deadlines for the production of positive cases and responsive cases and  
25 essentially everything else is very, very important but not necessarily for inclusion in  
26 an order, at least at this stage.

1 **MR MOSER:** That is again very helpful. If I may say something about direction of  
2 travel.

3 **THE PRESIDENT:** Of course.

4 **MR MOSER:** We are happy with the direction of travel, so you are not about to hear  
5 from me, going first, complaining about anything. In particular, the careful  
6 consideration of how to deal with Merricks. In particular, the way that it is proposed to  
7 deal with disclosure. I can give you a granular, reasonably granular update on what  
8 is happening since yesterday. We have contacted already four of the biggest  
9 claimants in various sectors and so far those talks have gone well. We are full of  
10 confidence that will not prove an insuperable obstacle in any case.

11 There is one important deadline in part of the order you have indicated you are not so  
12 interested in and that is in paragraph 8. That is where we volunteered to produce the  
13 active claimants and the list and so on by 19 January, so within a week from today.  
14 So at paragraph 8, potentially another key candidate for the order.

15 I am not going to die in a ditch over the general provisions and so on, as you rightly  
16 say. That can be a matter for cooperation. Of course, I would say this: that is provided  
17 cooperation happens. We are very happy to be cooperative, we feel we have been.  
18 I am not going to get into name calling and nitty-gritty, but there have been some  
19 parties with more and some parties with a bit less cooperation. If we can all cooperate  
20 in a proactive and helpful way, we do not see any difficulty in achieving this, I say  
21 hopefully.

22 **THE PRESIDENT:** Well, Mr Moser --

23 **MR MOSER:** So there we are.

24 **THE PRESIDENT:** -- that again is extraordinarily helpful. Just to provide an indication  
25 to Mr Brealey and Mr Lask and Mr Jones, we regarded the assistance provided by  
26 your respective experts yesterday as, again, enormously helpful and enormously

1 indicative of the fact that we are not at the moment going to have anything like  
2 paragraph 8 in the order, because the moment you start spelling out how things should  
3 be done, you create rather than resolve disputes. We feel that there are more than  
4 enough complex moving parts for us not to want, positively not to want, to articulate  
5 how essentially the economists and the parties providing information should do what  
6 is clearly a very complex job.

7 If and when -- and there will be a when -- problems emerge, we will resolve them on  
8 the granular level of the problems because we accept that even with fully cooperative  
9 parties, which is what we expect, there will be disagreements which need to be  
10 resolved.

11 Mr Moser, you can take it that if there are uncooperative parties, then they are going  
12 to see a different side of the Tribunal. But at the moment, we see no need to say more  
13 than that.

14 **MR MOSER:** In which case we are happy not to have paragraph 8, as long as  
15 everyone understands that this is how we are going to do it.

16 **THE PRESIDENT:** Absolutely. No. To be clear, the 19 January date and the  
17 information you have provided us with is gold dust. It is very important that we  
18 understand that the process can work and that at the moment it is unfolding in a way  
19 that is consistent with the needs of the process as articulated yesterday. There will be  
20 problems, there will be bumps in the road, but at the moment we see no need to do  
21 anything more than anticipate there will be bumps in the road and to indicate our  
22 extreme willingness to assist the parties to resolve them. Without the glass being  
23 rather more than half full approach, we will see until the glass is knocked over and  
24 problems emerge, in which case, we will act differently.

25 **MR MOSER:** Indeed. I will probably sit down shortly and allow somebody else to  
26 knock it over and see how we go.



1 **THE PRESIDENT:** That is what we are interested in. If anybody wants to knock over  
2 the glass now, I think now is the time.

3 **MR MOSER:** Before I do that --

4 **THE PRESIDENT:** Of course.

5 **MR MOSER:** -- just to explain, it is not an oversight that we have not yet included  
6 Mr Harman. That is because we detected yesterday the Tribunal saying we are not  
7 yet at that level of granularity. But, again, somebody can push back on that and we  
8 can talk about it.

9 It's a slightly different expertise. In Sainsbury's he was described as an accountancy  
10 expert. That is perhaps for the next phase.

11 **THE PRESIDENT:** We will see if anybody has a point to make on that. Thank you for  
12 drawing that to our attention, Mr Moser. We are very grateful.

13 So, who wants to knock the glass over?

14 **MR MOSER:** Not me.

15 **MR SIMPSON:** It won't surprise you for Merricks but we do have copies of a draft  
16 order which it may be is not of particular relevance now, given your indication to  
17 Mr Moser, but we hand it up because we circulated it anyway. There may be one or  
18 two paragraphs that inform the submissions I will be making. We will hand it up. It  
19 has literally arrived hot off the press. (Handed).

20 **THE PRESIDENT:** Well, what we will do is we will look at this, if convenient, during  
21 the transcriber break.

22 **MR SIMPSON:** Yes. I was going to refer to one or two paragraphs in submission.  
23 A running order has been agreed. I was anticipating going fairly early.

24 **THE PRESIDENT:** We are very happy to adopt a running order that parties are happy  
25 with, subject to the point that we do want to have a consensus about direction of travel  
26 before that happens. So since you are not in glass knocking over mode, we will hear

1 from you later, Mr Simpson. That is very helpful.

2 Mr Jones.

3 **MR JONES:** I hope I am also not in glass knocking over mode, but there has been  
4 a little bit of debate outside court about precisely how the Tribunal envisages the UK  
5 PLC figure to slot in and the role it would play. Now, the submissions I am about to  
6 make, I hope, are consistent with your approach. That is why I think I am not knocking  
7 over any glasses. But that may be because I have misunderstood it. I will just run  
8 through how we see that, if I may.

9 We entirely understand the Tribunal's desire to establish a UK-wide figure and we see  
10 why that would be helpful in a range of cases as a data point. We also welcome the  
11 indication that you gave yesterday that it would then be open to parties to say that  
12 there are particular sectors or particular sub-sectors, not being defined at this stage,  
13 which depart from that and which you would do with evidence and with reasoning.

14 In the case of Primark as an example, we will, of course, be providing Primark's data  
15 and supporting information, which we expect will feed into the UK-wide figure for those  
16 parties who are looking at the UK-wide figure.

17 But for our own purposes, it does not seem proportionate or necessary or perhaps  
18 even helpful for Mr Ramirez, for example, to be trying to generate a UK-wide figure  
19 and to be involved in that process. We expect that we will be focusing on Primark in  
20 its wider sector or sub-sector, that if that does generate a different figure to what other  
21 experts might generate for UK-wide, then we will be in the realms of explaining why  
22 there is a difference and, of course, we might be in the realms of looking at the  
23 UK-wide analysis to help explain why there is a difference.

24 So that is how we see it. We didn't understand that you were suggesting that all  
25 experts should be involved in the big process. If I have understood that correctly, I am  
26 not knocking over any glasses.

1 **THE PRESIDENT:** Well, I think that is essentially right. We see the UK PLC figure as  
2 very much Mr Coombs' and Mr Hunt's baby in the sense that they are the ones who  
3 will be compiling it and, provided they get the data they need, at the moment I don't  
4 have a problem with that.

5 I do want to be very clear about how we see the UK-wide figure, because there is  
6 always a danger in analogy and yesterday I used the analogy of actuarial tables and  
7 that is, in one sense, a helpful analogy, in another sense it is a deeply unhelpful  
8 analogy. It is probably worth my while just unpacking why that is.

9 It is unhelpful because actuarial tables in PI cases are statistically highly reputable.  
10 They have been used over the decades. Everybody knows that they are good starting  
11 points to mortality rates and, indeed, working lives. That is absolutely not the case  
12 with any UK PLC figure. It would have been derived for the first time in these  
13 proceedings and its value is altogether open to question.

14 So, to that extent, the analogy with life tables is a very bad one. The reason it is  
15 a helpful one is because of the interaction that exists between life tables and other  
16 factors and the case here, accepting that it is not a default in any way, shape or form,  
17 we will be wanting to adopt, as I said yesterday, some kind of triangulation process  
18 where tensions between different sets of figures are constructively explored. So you  
19 can certainly take it that however the UK PLC figures are compiled and however the  
20 Primark specific figures are compiled, and whatever other variants there are, the  
21 Tribunal will be interested in the differences and why they exist.

22 In the first order, it will be a question of the economists using their expertise to explain  
23 to us why they think those differences exist, so that we can get a handle on the way  
24 this interchange fee pass-on operates. It is obviously an elusive beast because rather  
25 like particles in nuclear physics, you kind of know it exists but you cannot track it. That  
26 is one of the big things that we will be discussing at trial and having to decide at trial:

1 exactly what it is, how it works, how it is to be treated. That is why the labels question,  
2 which cropped up many times yesterday, is so peculiarly unhelpful in the present  
3 context, because you cannot attach a label without actually applying your mind to that  
4 which it is you are labelling.

5 So that is why we see the interaction between the figures as hugely important, but we  
6 do not want until trial to be doing anything more than ensuring we have got data sets  
7 which will enable the economists to unpack the substance of how pass-on operates.  
8 That is what we want. We see enormous benefit in ranges of data with economists  
9 saying: I understand what the data shows, I actually agree with the manner in which  
10 the pass-on has been inferred in this particular data set, but that pass-on is  
11 uninformative or very informative or somewhere in between for these reasons. In other  
12 words, we don't want to have at trial an argument saying: well, we just don't agree  
13 anything about this table, including the granular mathematics and calculations. That  
14 is something that will serve no one any good, in particular the Tribunal, because you  
15 will end up with a situation where we are talking about formality and process, not  
16 substance.

17 So, I hope that is a rather full answer to how we see these things working. We cannot  
18 commit to the weight of any of this data because it has not been produced yet, but we  
19 see some value in pass-on metrics which have nothing to do with MIFs, because we  
20 are talking about pass-on generally and we are talking about something which cannot  
21 actually be measured directly. If it was something capable of being measured  
22 directly -- and I know some people suggest it may be, great, but most are saying it  
23 can't be -- in that case, we do need to nibble around the edges of the problem to see  
24 what inferences, what reasoning, could be drawn from those extraneous sets of data.

25 **MR JONES:** That is very helpful. Thank you.

26 **THE PRESIDENT:** I am grateful for you raising it, Mr Jones.

1 **MR PICCININ:** I have no interest in knocking glasses over on tables either, and I also  
2 understand and appreciate the value of what you have just said about flexibility and  
3 not trying to be over-specific in the order that follows from today's hearing, but I am  
4 also just keen to ensure that today's hearing does not turn into a bit of a blot test,  
5 an inkblot test, a Rorschach test, where different parties understand different things  
6 about what has been decided --

7 **THE PRESIDENT:** Well, that is why these interventions are very helpful.

8 **MR PICCININ:** So I would just like to make clear my understanding of what has been  
9 decided and what is being left open to be decided on future occasions.

10 My understanding is you have decided that there should be a process whereby some  
11 of the claimants produce data on prices and costs and things of that kind. That is more  
12 or less what was encompassed by paragraph 8 through to 10 of the draft that Mr Moser  
13 very helpfully produced.

14 I understand that you have also made it clear that at this stage, without ruling out later  
15 stages, but at this stage no permission is being given for any experts other than the  
16 expert economists or for any factual witness statements or for any disclosure of  
17 documents or production of other kinds of information beyond price and cost data and  
18 that those matters would need to be dealt with by way of an application with tight  
19 Tribunal control before they could be produced.

20 The reason I want to make that clear, accepting we are not going to make the order  
21 set out here, but if we could look at paragraph 11. So in paragraph 11, Mr Moser had  
22 proposed that the economic experts may request such qualitative information in  
23 relation to the data provided, so that is requests about what the data means, but in  
24 addition to that requests about the data providing claimants' businesses and, in  
25 addition to that, about the sectors in which they operate as they consider necessary.

26 My concern about that was going to be that it is a Trojan horse, and this is for later --

1 **THE PRESIDENT:** Well, this is precisely why we think a granular order in this case is  
2 likely to be unhelpful.

3 **MR PICCININ:** Yes.

4 **THE PRESIDENT:** Because what we end up doing is we end up arguing about what  
5 the order means, in circumstances where it was made for the problem that one is  
6 debating actually emerged. So to be clear, we are, for the moment, only admitting  
7 data --

8 **MR PICCININ:** Yes.

9 **THE PRESIDENT:** -- and the answer for everything else as of today is a no. But it is  
10 not a no saying that we have refused an application and therefore it needs to be  
11 moved on the basis of fresh material, it is not that sort of no. It is a not yet.

12 **MR PICCININ:** Yes.

13 **THE PRESIDENT:** It is we want to give the economists every opportunity to provide  
14 to the Tribunal meaningful data on what is a very slippery concept because how  
15 pass-on operates is so slippery that people have radically different ways of dealing  
16 with it, or saying how the Tribunal should decide what it is.

17 What we want to do is we want to give the economists carte blanche in terms of how  
18 they go about resolving this issue. Without carte blanche certain menu items will be  
19 selected.

20 We have indicated, and I am going to come back to data in a moment, we have  
21 indicated that data is to be provided and Mr Moser has been given the green light, as  
22 have the three specific claimants in terms of that provision. We would expect that the  
23 information around the fringes of that data to be essentially uncontroversial. If  
24 an economist says: "look, I don't understand what this is, can you please explain?"  
25 Then there may very well be a document which assist with that.

26 **MR PICCININ:** Absolutely.

1 **THE PRESIDENT:** It may be that the interpretation of the data is sufficiently  
2 controversial that it becomes an issue that needs to be resolved at trial. But let's be  
3 clear about this: if we get a situation where everyone is agreed what the data says, we  
4 are not going to want a factual statement saying what is agreed, we will want the  
5 economists saying: here is the data, it means this, because it is not controversial, and  
6 then -- which is likely to be controversial -- here is what I extrapolate from that.

7 So we want completely variable geometry, at least at this stage.

8 **MR PICCININ:** Yes.

9 **THE PRESIDENT:** Just to be clear though about the data-gathering exercise, I did  
10 articulate yesterday some pretty hefty qualifications in terms of the admission of data.  
11 Homogeneity, which I appreciate is not the right word, was one. Speed and cost were  
12 others. So if, contrary to expectations -- and I must say particularly the Primark  
13 contribution yesterday gave me very considerable hope that the organisations that  
14 Mr Moser is going to be producing will actually be able to produce data reliably, quickly  
15 and well -- it probably is not going to be a problem.

16 But if one gets to a situation where either the data cannot be provided except at great  
17 cost or it cannot be provided because it cannot be synthesised into the useful data  
18 that is going to be produced as a global set or it is simply data that is useless in the  
19 sense that one party says it is so off beam that we should not be looking at this, well,  
20 those are problems which we will want to address. I certainly do not want anyone to  
21 leave this courtroom thinking that these are points where we have simply pressed the  
22 button saying "Off you go and never darken our threshold again with any problems."  
23 We want the precise reverse. Off you go but every fortnight we are going to want the  
24 parties to say: this is what we have done, this is as far as we have got, no problems  
25 so far; or -- and I expect this is going to happen -- here is the issue, we have a problem  
26 here, we need the Tribunal's assistance. It may be that those things can be resolved

1 at the informal case management meetings. It may be, however, that there has to be  
2 a formal application with evidence and submissions from leading counsel. Well, we  
3 will see what happens.

4 **MR PICCININ:** Yes. I am very grateful, sir.

5 **THE PRESIDENT:** I am very grateful for you raising it. We do want everyone to leave  
6 with the clarity that an order ordinarily gives --

7 **MR PICCININ:** Yes.

8 **THE PRESIDENT:** -- but without the borderline battles that one gets about what  
9 an order actually means when it is laying down a rule in an intrinsically uncertain  
10 situation.

11 **MR PICCININ:** Yes.

12 **THE PRESIDENT:** So anyone who has got these concerns, please do articulate them.  
13 The reason I mentioned the knocking over the glass point is because if we have  
14 something fundamental, we do need to deal with that first, but to the extent no one has  
15 that sort of point then these points, please do feel free to articulate them, as long as it  
16 is profitable, because it is profitable.

17 **MR PICCININ:** Yes.

18 **MR TIDSWELL:** If I may, for all the reasons the president has indicated, it is quite  
19 difficult to legislate for this. I hope the experts in particular will have taken some  
20 guidance from the discussion yesterday. For example, I think it is very clear if you  
21 look at the data that is going to come from Allianz, for the reasons explained by Mr  
22 Murgatroyd they are going to need some context for that. That is really market context.  
23 It may be in some circumstances specific to Allianz but it is really about how does the  
24 insurance market work and how the data should be seen in that context. That, I think,  
25 is quite different from somebody suggesting that data from an individual merchant  
26 about the individual practices which there is nothing to think is representative of the



1 market should be produced and would be helpful.

2 So those may be -- probably not extremes, but they are certainly at differing ends of  
3 the spectrum. Obviously we are going to be more sympathetic to the former rather  
4 than the latter. But I think there probably is going to be a need for some degree of  
5 arbitration on some of this, because not only are there going to be hefty good cases  
6 made, but they are going to run up against cost and time considerations and  
7 implications for trial because, of course, the more factual evidence that gets put into  
8 the pot, the more pressure there will be to have cross-examination, witnesses in  
9 cross-examination, and the trial timetable is not going to take that.

10 So I think this has to be a dynamic situation, as the president has indicated. I think  
11 people need to think about it in terms of, for the experts, why is the information  
12 necessary and is it going to something which is going to provide us with a more  
13 generalised view of what is happening in the market or is it going to something which  
14 is not going to be terribly helpful, for the reasons we discussed yesterday, in relation  
15 to samples.

16 **MR PICCININ:** I think the only point which I wanted to clarify, sir, was really a  
17 procedural point, which is that before anything goes in that is not data, it needs to be  
18 raised at one of these mini CMCs with the Tribunal so that there is Tribunal control  
19 about what it is that is going in. My concern is if you provided or if the experts  
20 understood they had been given carte blanche to put in information about the industry  
21 and how things work and it is contextual and it is important to understand, then what  
22 we are going to end up with is through the back door material which is really factual  
23 and really is what we would say impossible to use to generalise about the sector as  
24 a whole and impossible to test properly at trial. Information of that kind is going to  
25 come and it is going to be difficult.

26 I was not asking you to decide if that was the case or draw the line, or any of that.

1 **MR TIDSWELL:** That's fine and understood, and I think that really makes my point,  
2 which is that there is going to need to be a degree of regulation of this. What I think  
3 would be disappointing would be if in an obvious case there was a need to raise it at  
4 the CMC. There are going to be some situations where I expect the experts are going  
5 to agree they are not going to understand the data without a bit more information. And  
6 I don't think they need Tribunal permission to ask for that. If no one is putting their  
7 hands up and saying there is a problem with it, there is no need to raise it with the  
8 Tribunal.

9 **THE PRESIDENT:** I couldn't agree more. I do not think that the notion of a consent  
10 for what is or what may not be data is needed, because what we will find is that if there  
11 is a direction of travel which is problematic for one or more parties, it will be raised as  
12 a problem at one of the case management meetings. That is the point of them. The  
13 fact is something can only go wrong for maximally 13 days. Then we can either say  
14 whoever is objecting is wrong, it is what we envisaged, or the objection is well made  
15 and in this state it does not go in. That is why we are stressing the importance that  
16 the Tribunal on a fortnightly basis be kept informed. The extent to which the Tribunal  
17 is informed is going to largely depend on the objections. We are going to want to  
18 know, even if it is all sweetness and light, what is happening because we may not be  
19 in agreement with the direction of travel, but if and to the extent there is disagreement,  
20 it will be dealt with in that way.

21 But Mr Simpson's general point, and we can only articulate as a general point, is this.  
22 We are not interested in information, including data, that will only help us resolve the  
23 individual case.

24 **MR PICCININ:** Yes.

25 **THE PRESIDENT:** The number of cases we have got is vast. The reason we are  
26 doing this is because we do not want the trial of these proceedings to stretch out over

1 decades, we want them resolved fast but fairly.

2 So that implies looking at the cases in the round. But what information assists in  
3 dealing with these questions on a statistical level, well, that very much depends. That  
4 is why we don't like orders at this stage.

5 **MR PICCININ:** I understand.

6 **THE PRESIDENT:** But we absolutely do want anyone who is even uneasy about the  
7 question, in other words even if it is not quite an objection but it is saying: we see  
8 a problem on the horizon, maybe you should start thinking about this, well, that is the  
9 sort of thing that we would expect to be articulated so that we are fully involved in the  
10 process. The way these case management hearings go, and I am sure a number of  
11 both economists and junior counsel know this, but the way they have worked is we  
12 have not actually made -- have we made any orders? I don't think we have made any  
13 orders.

14 What we have done is we have indicated how we expect the parties to behave and  
15 the parties have taken those indications with responsible seriousness, partly because  
16 it is in their interests because one gets a trial rather than an adjournment, but partly  
17 because they know if they don't do it, that orders will follow. So far, it has worked  
18 rather well and we intend to allow it to continue until it stops working rather well.

19 **MR PICCININ:** Yes. I am very grateful. That is very clear as well.

20 I just have three -- sorry, unless ...?

21 **MR WATERSON:** Can I raise three points as someone who has used data, including  
22 data from various sources in the past. I think there are three issues which may be  
23 issues that come up and, therefore, the extent to which we can head them off is  
24 important. The first issue might be that a company agrees to provide data and then  
25 resiles from that agreement, because someone higher up than the person that has  
26 been spoken to has said no.

1 The second one is it will be important in providing a list of data, and this is particularly  
2 concerned with Mr Moser, but also the other three on the right-hand side here, it will  
3 be important to know about the level of aggregation at which the data can be decided.  
4 This is often a matter which -- economists are promised data and then it turns out the  
5 data is simply too aggregated to be much use.

6 **MR PICCININ:** Yes.

7 **MR WATERSON:** So I think a careful explanation in the listing of the level of  
8 aggregation or possible levels of aggregation will be important.

9 The third one, and this is often when data is provided, there will be gaps, there will be  
10 queries, there will be changes of definition and so on. I think inevitably there will be  
11 some questioning along those lines. It is important that those sorts of matters are  
12 resolved. The problem, a problem I have faced at various points in time, is that  
13 a company in fact provides a data dump and then they lose interest in doing more. I  
14 think it is, you know, when someone comes back and says: well, why do these figures  
15 suddenly change from numbers which are in the tens to numbers which are in the  
16 thousands?

17 **MR PICCININ:** Yes.

18 **MR WATERSON:** That sort of thing really does happen. Then it has to be explained  
19 that, well, they were originally gathered by someone in pounds and then they gathered  
20 them in pence. These sorts of data, cleaning if you like, as economists call it, these  
21 issues are actually quite important because otherwise you can make gross errors. So  
22 I think, you know, these things should be carefully borne in mind when those that are  
23 the main parties providing the data understand what it is that they are providing and  
24 other people understand that.

25 This may all be obvious, but in practice I have found that it is not always obvious.

26 **MR PICCININ:** I am very grateful for that because that was actually my next point. If

1 I may, I will just expand very briefly on that. It really relates to non-paragraph 8, if I  
2 can call it that, from the draft order where Mr Moser has kindly offered to provide a high  
3 level summary of the data which is available from each data-providing claimant. It is  
4 just to unpack what one really means by high level summary.

5 Again, I am not asking the Tribunal to make any order on this. It is just to clarify what  
6 we think we need in order to do this expeditiously.

7 Firstly, there is the question of what data is available, what types of data. As to that,  
8 we have in mind revenues, volumes, prices with and without tax and costs. It will also  
9 be necessary for us to be told what time period and what geographies the data relates  
10 to.

11 The second point is your one, professor, about aggregation where, again, we strongly  
12 agree that we need to be told what levels of aggregation are available and, if possible,  
13 to be provided with multiple options. Because one problem which is one which you  
14 have just rightly averted is you get data which is too aggregated, but the opposite may  
15 also be a problem: if you get data that is too disaggregated and you end up with trillions  
16 of data points relating to individual hotel stays and it is impossible to clean and use in  
17 the very limited time we have available.

18 So all I am saying at the moment for each claimant that is volunteering to provide this  
19 data, they need to tell us what options they can produce in the time that is available,  
20 in terms of levels of aggregation.

21 **THE PRESIDENT:** Well, doesn't it go further than that, in that what is held and what  
22 the options are will be the first step. There will then have to be discussion --

23 **MR PICCININ:** Exactly.

24 **THE PRESIDENT:** -- amongst the economists as to what is the best way of producing  
25 substantively relevant data.

26 **MR PICCININ:** Yes.

1 **THE PRESIDENT:** Now, we quite understand that there might be several different  
2 ways of reaching a helpful data set. Now, we would not want there to be several  
3 different data sets, all of them arguably equally valid, for us to have to parse at a trial.  
4 We would much rather if there was an inability to agree which route of, let us say, three  
5 or four or five alternative reasonable routes be undertaken. We would not want the  
6 parties to be haring off and saying: well, I will do this for me, you do this for you, and  
7 leave it for the Tribunal. We would regard that as significantly dis-beneficial and one  
8 of those instances where even if the parties were saying: that is how we are going to  
9 do it, we would have, I think, something to say and would want to nip that particular  
10 route in the bud pretty early on.

11 So unless there is real benefit in going down different routes of the same data parsing,  
12 we would want one set.

13 Now, of course, there will be variants. Mr Jones' point about the Primark data being  
14 deployable both as part of the UK PLC data set and regression and it being  
15 a self-standing data set in its own right is an instance where the same data is used,  
16 quite understandably, in two different ways. But we would be pretty reluctant to say  
17 that there is a Mastercard version, a Visa version and a Primark version of exactly the  
18 same thing. That would be hopeless. We would want to understand exactly why each  
19 party was contending for a particular way of doing it and we would want, ideally, to  
20 say: no, we will do it this way, only because of trial efficiency and the need to focus on  
21 the points of dispute that matter.

22 So, again, this is a very helpful platform to enable us to articulate how we see the  
23 process going. So it also shows that excellent drafting of specific ways of going about  
24 things does not really work, because what it creates is an argument rather than a way  
25 forward.

26 **MR PICCININ:** Yes. That is all understood and very helpful, if I may say so.

1 My third point under this question about what menus we will be provided with is it is  
2 crucial that they are giving quite specific information about the (inaudible) in which the  
3 data is available and can be produced in the timescales that we are talking about. In  
4 particular, we really need this to be one or a very small number of consolidated data  
5 sets for each of the claimants' sets of data. It is no good being provided with hundreds  
6 or thousands of spreadsheets that contain various bits you need but then need to be  
7 collated and cleaned and compiled, because there just is not the time for that kind of  
8 exercise.

9 **THE PRESIDENT:** No, there isn't. Again, this is something that we would -- I mean,  
10 in this regard I would very much hope, and I must say I am basing myself on what  
11 Mr Ramirez said yesterday because what I heard from him yesterday was enormously  
12 comforting, that there was -- and I think it is fair to say amongst the claimants generally  
13 but he is an excellent example -- such a command of the data that this seems to us at  
14 the moment to be a concern that hopefully does not become an actual one.

15 But it does lead me to making another point by way of marker, which is that we would  
16 expect the economists to share the burden of the processing. So provided they are  
17 talking to each other and provided there is open access to the work product, we would  
18 not have a problem with, for instance, Mr Ramirez's firm taking the lead on processing  
19 the data, provided, of course, it is done in a manner that benefits the cases that  
20 everyone wants to run in due course. And we would not expect Mr Ramirez for  
21 Primark to be doing an exercise which is being precisely replicated by the Visa  
22 experts. That would be a costs nightmare.

23 I am sure, simply raising it, you see how absurd that would be. But, of course, the  
24 moment you entrust one party in what is after all an adversarial litigation, one party to  
25 do it, there is a concern that it be done in accordance with the specifications that  
26 benefit the party who is not doing the work. That is something we are, of course, alive

1 to and will need to be controlled for, but the way it is controlled for is by the experts  
2 collaborating and when that collaboration breaks down, for the reason for that  
3 breakdown to be brought back to us.

4 It really does go to underline the critical importance of these fortnightly meetings as  
5 a means of ensuring that, first of all, their existence means that these debates go  
6 away, but to the extent they don't, their existence means they can be resolved.

7 **MR PICCININ:** Yes. I am very grateful.

8 Moving on from the data, I have two other points that I just wanted to make about the  
9 overall framework. We get on to the dates for the expert reports. The first of those  
10 points concerns the questionnaire which has, I think, largely been superseded by the  
11 approach that you outlined yesterday. But there are two discrete elements of the  
12 questionnaire which we essentially agreed, I think they were actually agreed, between  
13 all the experts which we say would still be helpful to keep alive. They were, firstly,  
14 identifying which sectors each of the claimant entities fall into. There is a form of words  
15 that is in the draft questionnaire that deals with that.

16 The second one was the questions that we asked about surcharging. That is important  
17 too, because otherwise we do not have any mechanism in what has already been  
18 canvassed for how we could gather that information. Just to be clear, I am not  
19 suggesting -- previously it was thought that we needed to do the questionnaire first,  
20 before we could do any of the other data-gathering exercises, and that is because  
21 people were talking about sampling and so on. We are no longer talking about that.  
22 So this does not need to hold up the work we are talking about at all.

23 **THE PRESIDENT:** (Inaudible speech).

24 **MR PICCININ:** Yes.

25 **THE PRESIDENT:** In fact, this was something we were discussing amongst ourselves  
26 yesterday, about whether the questionnaire had completely vanished or whether it was



1 actually going to make a guest appearance today. Mr Tidswell's view was that it would  
2 certainly be appearing and our view is that if it is something which is consistent with  
3 the direction of travel that has been articulated and if everyone is agreed that it is likely  
4 to be so, then it should be undertaken.

5 The only proviso or point that I would invite the parties to think about is we don't want  
6 too many questionnaires going out. If there is a potential for it to be added to, then we  
7 might advise a degree of prudential caution in sending it out right away.

8 On the other hand, if -- and I completely understand this -- it is important to get this  
9 data in sooner rather than later, one may have to run the risk of there being multiple  
10 generic information requests. But I would only say that we really only want the three,  
11 as it were, nominal or nominate claimants and those selected out of Mr Moser's larger  
12 pool of claimants to be the ones who are regularly bothered with these processes. We  
13 would not want the stayed claimants to be frequently bothered with requests for  
14 information, because they have asked for and obtained stays for a reason. We would  
15 expect the active parties to pay due regard to that fact.

16 That is not saying no, it is saying let us be proportionate about it.

17 **MR PICCININ:** Yes. Perhaps if we just turn up the draft questionnaire, which is in the  
18 supplemental bundle. It is tab 26. It is page 221.

19 **THE PRESIDENT:** Yes.

20 **MR PICCININ:** So, really, all I was outlining is it would be useful to have questions 1  
21 and 5 and 9. Question 9, Mr Coombs is noted as regarding that as irrelevant to  
22 Merricks but not as having any objection to it. I think those questions were all agreed  
23 and it would be very useful to have answers to them to feed into the sector base work.

24 **THE PRESIDENT:** Well, let's treat this as a road test for the no order route that we  
25 are going down. We have indicated no particular problem in doing this. Let us see  
26 whether that consensus survives today and if it doesn't, and there is no agreement

1 about the matters that should form part of the questionnaire and when it should go out,  
2 well, that can be item one in the first mini CMC that will be directed. But you are  
3 certainly getting no pushback from us about the desirability of asking questions as  
4 appropriate. We think that where it is consistent with the direction of travel, it should  
5 be done sooner rather than later because we have got an awful lot to do.

6 **MR PICCININ:** I am grateful for that indication as well.

7 I have one more in a very similar vein, which the answer might well be the same as  
8 well. The direction of travel that you have articulated includes Mr Coombs and Mr Holt  
9 going down their sector-based analysis.

10 **THE PRESIDENT:** Yes.

11 **MR PICCININ:** That is all understood. Up until now, there has been discussion in the  
12 joint expert process between Mr Coombs, Mr Holt, Dr Niels and others, Dr Trento as  
13 well, as to what the sectors may be. A lot of different similar candidates have been  
14 put together. At the moment, there is no agreement on that.

15 Just listening to you yesterday, sir, talk about the need to triangulate and the need to  
16 have homogenisation between the different approaches so you can actually make  
17 a decision at trial, it just struck us in considering it that if we get to trial and you have  
18 two or three or four different sector groupings for the sectoral-type analysis, that is not  
19 going to be of assistance to you. So it would be helpful, we think, to have a date by  
20 which the experts should agree on a final set of sectors for sector-based analysis and  
21 then if there are any disagreements, they can be resolved at one of these mini CMCs  
22 before you.

23 **MR TIDSWELL:** It may be it is possible to have different sector groupings for different  
24 purposes. I see the order Mr Simpson handed up had a firm steer in that direction. It  
25 may be we need to have this discussion today, but it also may be that for the exercise  
26 Mr Coombs is carrying out, it does not matter so much, because he is producing a

1 single number for the economy-wide, it does not matter so much, at least so far as the  
2 rest of the parties are concerned, if they are doing something different. It may matter  
3 to Mr Simpson for the purposes of the Merricks outcome, but I wonder whether it is  
4 the case that everybody needs to do everything on the same set of sectors. I think it  
5 does follow that when you come to talk about what is the answer at a more  
6 disaggregated level, clearly you need to be disaggregating into the same sector, not  
7 different ones. And because of the concentration of the claimants into a very small  
8 number of sectors and a small number of claimants and other sectors,  
9 actually -- obviously it is essential to be clear about what we are looking at, about that,  
10 I see that, but I just question whether it is absolutely necessary. If this is a dispute  
11 between Mr Merricks and everybody else, is it necessary for that to be resolved at all,  
12 for the purposes of the trial.

13 **MR PICCININ:** I am certainly not asking you to choose the sectors today. What I  
14 wanted to float with you, what I am really trying to head off, is the difficulty that you get  
15 to trial and you are going to provide an answer for Mr Coombs' 12 sectors. Separately  
16 from that, you are going to propose a sector-based analysis from Mr Holt which uses  
17 overlapping but differently bounded sectors. There will be a risk that you then have  
18 inconsistencies or results that are difficult to reconcile where, say, you have a clothing  
19 sector that is defined in broadly this way, in Mr Holt's analysis, which you find there is  
20 a pass-on rate of 75 per cent, and then you have a sector which includes clothing from  
21 Mr Coombs for which you find it is 80 per cent and how do we reconcile the two. It is  
22 more work for you and it is potentially difficult work. Whereas if we have an agreed  
23 set of sectors, then at least for any sector-based work you will only be giving one set  
24 of answers.

25 **THE PRESIDENT:** It is less an agreed set of sectors and more an assurance that  
26 there is a common currency when an expert is talking about a sector.

1 **MR PICCININ:** Yes. Yes.

2 **THE PRESIDENT:** That is understood in the same way by the other expert. So  
3 looking at it from my point of view, if one had -- and I have no idea whether this is  
4 doable or not -- a Coombs work product that was essentially UK PLC, but  
5 disaggregated according to as many sectors as Mr Coombs thinks is helpful for his  
6 case, with an ability to run, whatever they are worth, individual sector-by-sector  
7 regressions out of that data, that would be rather helpful.

8 I would not have any particular problem in Mr Holt doing a differently informed exercise  
9 provided there was common currency between sectors. Because even if one got  
10 different results, one would then be saying: well, why are there different results when  
11 the sector is defined in the same way? What is the reason for this? There would then,  
12 one would hope, be some form of opinion evidence which would say, well, it is because  
13 of this particular aspect of the different way of doing things. That would then be  
14 an illustration of the kind of triangulation approach that we would want to take. But  
15 you are absolutely right. If you have one expert saying: I have defined the sector in  
16 this way, I have done my work in this particular way and, frankly, there is no way of  
17 comparing what I have done with what Mr Holt has done, because it is just not  
18 comparable in any rational sense, that is of no use whatsoever.

19 **MR TIDSWELL:** Can I make a suggestion here that the economists among  
20 themselves are agreed or are able to agree that a particular level of aggregation in the  
21 SIC codes, for example, is the appropriate one, then that will greatly assist in  
22 comparing the macro with the more detailed information.

23 **MR PICCININ:** Yes.

24 **MR TIDSWELL:** And, you know, I think probably the onus is on those who think SIC  
25 codes are not relevant to explain why, rather than the other way around.

26 **THE PRESIDENT:** So just to look at paragraph 3 in Mr Simpson's order. We are not

1 going to be making an order like that today. It may be necessary to make an order  
2 like that in the future, but I would rather that the experts actually focused on what  
3 output, given their different ways of doing things, is going to produce a helpful rather  
4 than unhelpful compare and contrast approach for the parties.

5 Now, if that cannot be done, the question is why can it not be done. It may be that the  
6 approaches are so different that, in fact, one has to treat the outcomes as separate  
7 data points. But if it is possible to produce a parallel between the different ways of  
8 doing it that means that one learns something from the differences of outcome, well,  
9 that would be something that we would regard as forensically important in resolving  
10 substantive matters.

11 So what we want to avoid -- we cannot avoid it completely because I am afraid black  
12 box regressions are going to be part of the process. What we do is compare what  
13 everybody agrees are reliable outcomes, understood to be derived from specific forms  
14 of data, where those outcomes can be understood by the Tribunal, and where they  
15 are in tension, the reasons for that tension rationally articulated so as to understand  
16 what pass-on is all about, rather than arguing there is unfortunately a difference in  
17 sector definition, which means that that tension is apparent rather than real.

18 **MR PICCININ:** Yes. I am grateful, sir. Perhaps the thing to do is for those behind  
19 me, who have of course heard all of those helpful indications, to just continue working  
20 together and see where they end up. If they can agree a set of sectors or if someone  
21 says a set of sectors needs to be ordered, that could be done at one of these mini  
22 CMCs.

23 **THE PRESIDENT:** What happens at these mini CMCs or case management  
24 meetings, however you want to call them, is that the economists are often, and it may  
25 be going forward generally present --

26 **MR PICCININ:** Yes.

1 **THE PRESIDENT:** -- and we find that there are some issues on which the  
2 intermediation of the lawyers is helpful. In some instances, it is positively unhelpful,  
3 simply because you are losing something in translation.

4 **MR PICCININ:** Yes. Absolutely.

5 **THE PRESIDENT:** And this, as it seems to us, is probably an instance where we  
6 would be wanting to interact directly with the economists in question to understand the  
7 nature of the problem and to assist them to resolve it.

8 So absolutely we do not want to shirk from having to decide something, but my feeling  
9 is that when one has got experts who all understand their obligations to the court when  
10 we engage with them, we will get, I think, fairly quickly to the substantive problem and  
11 may be able to resolve it. If we can't, then we will just have to have divergent data  
12 sets which aren't, as it were, common ground. But that is --

13 **MR TIDSWELL:** We want to be absolutely clear. We do expect the experts to discuss  
14 that and work out how they are going to do it. What we are not at the moment doing  
15 is saying what the answer to that should be and indeed whether there needs to be one  
16 single answer. That is for them to work out what the implications are. But there should  
17 be no lack of clarity among the experts about the expectation they are going to work  
18 out what the right answer is and be able to justify that to us, if there is a difference in  
19 view about it.

20 **MR PICCININ:** That is very helpful as well. Just one more point. My last point. We  
21 are really now getting on to the dates question. I have heard that you don't want to  
22 make orders of the form paragraph 8 to 13. But it is crucial that we know when the  
23 data is going to be provided in order that the experts can plan for when they are going  
24 to be doing their analysis of it. Yesterday I think you canvassed at one point, sir, end  
25 of February as a sensible date by which of data can be provided and we endorsed  
26 that. We think 29 February is a sensible longstop, really, for when the data should be

1 provided from these self-selected claimants.

2 If it is helpful just to put that in context, just by reference to paragraphs 14 and 18, the  
3 actual dates for the expert reports.

4 **THE PRESIDENT:** Yes. I think the key thing --

5 **MR PICCININ:** Is those.

6 **THE PRESIDENT:** -- is paragraph 14. So we have not (inaudible) the date about  
7 19 July, save Mr Moser will be saying that is a date that is achievable. It is roughly  
8 midway between the end of June and the end of July.

9 Yes. I see Mr Merricks has an earlier date, which is the first of the dates that I  
10 suggested yesterday. We will come to that. But within that, we are not going to say  
11 the data must be provided by a particular point in time, because the moment one does  
12 that, people work towards that date. What we are going to say is we want the data  
13 produced as fast as it possibly can and if we are finding that there isn't significant  
14 progress in the course of this month, then we are even at that point seeing problems  
15 and we will want to know why it is not happening.

16 That is why we are going to want reports before each case management hearing. If  
17 we were talking about an order, then I agree: end of February would be probably the  
18 date we go for because it seems to fit pretty nicely with both Mr Simpson's end of June  
19 and Mr Moser's middle of July date. But we are not going to say that because we are  
20 pretty confident we can beat that.

21 **MR PICCININ:** We can get it before that, yes.

22 **THE PRESIDENT:** Or, rather, we are pretty confident the parties can beat that.

23 **MR PICCININ:** That would be a very welcome development if that happened. All I  
24 am doing, then, is putting down a marker that we think if it runs beyond that, consistent  
25 with what you said yesterday, sir, we have a real problem with being able to --

26 **THE PRESIDENT:** I understand. I think the parties can all take it that no one is going

1 to be leaving case management hearings thinking that they are going to be allowed to  
2 let the grass grow under their feet. We will be asking what they are planning on doing.  
3 I think both the economists and the counsel who attended that will say that the  
4 pressure was both self-induced and coming from the Tribunal in terms of getting things  
5 done very quickly indeed.

6 So we will see how we go. But we are not going to do more than say that we are  
7 cracking the whip and we will continue to crack the whip, because we regard the gap  
8 between 11 January and the summer as not a very long period of time at all.

9 **MR PICCININ:** No, indeed. Those were my points, my structural points about the  
10 order. Perhaps I should now hand over to --

11 **THE PRESIDENT:** Very grateful. Thank you very much.

12 We are looking at, I think, a shorthand writer break now. Mr Cook, just to check, do  
13 you have anything you want to say?

14 **MR COOK:** I was not going to knock anything over too dramatically either, although I  
15 did knock over a whole jug of water at a previous Merricks hearing. That is slightly  
16 more literal rather than metaphorical.

17 I had five or six points on my notes that I was planning to raise, most have been  
18 canvassed by my colleagues. One that is left is geography. That is something that I  
19 would invite the Tribunal to make a firm ruling on today, that we need to know what  
20 we are assessing pass-on for, and there are still a number of claimants, often within  
21 big groups like hotels, where they have got claims for half a dozen -- I mean, I am just  
22 making up numbers to be clear, but they have claims that incorporate often within  
23 separate groups, separate companies within a group, a claim for hotels in Ireland or  
24 France or wherever it might be. We do think that is something the Tribunal should  
25 decide now, whether that is in or out. My submission is it should be out in terms of  
26 what it is practical for us to do by November is focus on the UK. That is how Trial 1



1 has been set up, but that is UK only, UK and Ireland strictly. But just in terms -- if we  
2 are going to start getting data from something like the Hilton group, to use an example,  
3 where it has individual subsidiaries in no doubt every European country or no doubt  
4 many of them, we are going to start running into language barrier problems. It may be  
5 Hilton does a lot of its internal accounting in English. It might be easy. But in any  
6 event, if we are trying to understand how the hotel market works in Stockholm --

7 **THE PRESIDENT:** Am I right in understanding these are minnows compared to the  
8 substance of UK pass-on?

9 **MR COOK:** I think certainly they are not the big ticket ones. That is fair to say. I am  
10 not the person to ask that question to. They are certainly not the big ticket ones, that  
11 is right.

12 **THE PRESIDENT:** Fair enough. This sounds remarkably like the point that was raised  
13 by the parties in the Trucks Wave 2 claim where pretty much everyone was saying: let  
14 us park the foreign jurisdictions because it is going to be really hard to do overcharge  
15 in that case for each of them. In some cases, they were absolutely tiny. What we said  
16 in that case, and I am not saying we will necessarily say in this case but it is worth  
17 thinking about, is if you hive off these minnows what do you do if they aren't resolved  
18 by settlement? Are you seriously anticipating a major pass-on trial in respect of, let us  
19 say, a minnow? The answer is we are not. We do think that there is something to be  
20 said for at least considering whether the application of the broadbrush means that one  
21 applies to these non-UK jurisdictions simply the UK rate, because litigating about the  
22 outcome of a minnow (and it really only works with small fry) if one is litigating about  
23 that then the costs are likely to exceed the difference between the pass-on rate as  
24 determined and the pass-on rate as simply read across from the UK process. Though  
25 whilst that is an intellectually dishonest way of dealing with things, it is, I think, at least  
26 arguably entirely consistent with the broadbrush. So we may want to end up with

1 a situation where proportionate use of non-UK data is permitted, according to its  
2 usefulness and the ease in which it can be incorporated, but if it cannot be used  
3 because of, say, language matters then one simply applies a different pass-on rate to  
4 these small jurisdictions.

5 So I leave that for you to think about. Certainly my preference would be, unless it  
6 really is grotesquely wrong in principle, would be to sweep everything in and get  
7 an approach which only distinguishes between jurisdictions where those jurisdictions  
8 are materially large for the work effort to be justified.

9 **MR COOK:** That may be all the indication I need.

10 **THE PRESIDENT:** That is helpful.

11 **MR COOK:** Certainly some of the -- I think Hilton was one of them -- those are  
12 companies that we think do have a number of no doubt smaller claims in relation to  
13 other jurisdictions but if we start getting data in relation to that, it is going to get difficult  
14 and complex quite quickly.

15 **THE PRESIDENT:** We will leave you with that thought. It may be that is enough to  
16 resolve it. If not, of course we will discuss it further because everyone is entitled to  
17 have a pretty clear idea of where they are going after today, so that we are not talking  
18 big picture points but granular points at case management meetings.

19 So it is --

20 **MR COOK:** The only other thing to say is we retain very serious concerns that there  
21 is going to be a correct proxy problem in this case and that that is basically going to  
22 be a real point of disagreement at trial between the parties. It is not going to be is the  
23 pass-on rate for oil prices into petrol 70, 80, 90 per cent. Basically, the experts are  
24 largely going to agree that the pass-on rate of oil into petrol is 90 per cent, the pass-on  
25 rate of overheads is 20 per cent, whatever it might be, but the dispute is going to be -  
26 those numbers are agreed - which is the best and most relevant proxy for these

1 purposes. We do anticipate there is going to be a need for something other than those  
2 two numbers for the Tribunal to try and get behind.

3 I very much understand what the Tribunal said. Essentially those are matters for  
4 another day and you have not ruled it out. Equally you are not making any rulings  
5 now. But it was more to flag that we very much do anticipate that there is going to be  
6 a need for something in relation to those issues because otherwise, you know, it is not  
7 something, and we have 150 pages of economic table that says it is not something  
8 that can be resolved as a matter of theory, because there are different views because  
9 it is fact-specific. Going back to the example of the longevity tables, we need to know  
10 who is a smoker, you know, in order to know if we are going to use the smoker table  
11 or the non-smoker table. There are obviously other points there. We are in a situation  
12 where we don't know if red hair or being tall makes a difference to your long survival  
13 prospects.

14 **THE PRESIDENT:** That is extraordinarily helpful, because it enables me to make this  
15 point, which is if one is talking about something which is in itself unobservable, which  
16 is the case here, we don't know how the interchange fee was treated, what the parties  
17 are going to have to work out is how they provide the Tribunal with evidence as to  
18 which set of figures is the applicable one. We cannot decide that in advance because  
19 it is by definition a trial matter. The expert economists are going to have to, like  
20 Dr Trento, work out first of all whether they have anything by way of relevant opinion  
21 evidence to provide, and if they don't, whether there is other form or forms of evidence  
22 which will assist, in which case we will control it according to its utility, or whether it  
23 comes down to a question of argument about how the Tribunal should, as a matter of  
24 fact, categorise these in light of a total absence of data, and if that is the case then we  
25 will decide it that way. I mean, it may be purely and simply a question of forensics by  
26 the advocates. I don't know.

1 **MR COOK:** That is very helpful, and I anticipate it is entirely a matter for another day.

2 **THE PRESIDENT:** Entirely a matter for another day.

3 **MR COOK:** It is something that there are, we are aware, strongly held views and  
4 disparate views between both the economists and the parties.

5 **THE PRESIDENT:** There clearly are. What is going to have to happen is if the  
6 economists have strongly held and disparate views which they can justify in the  
7 witness box because it is within their area of expertise, then we will hear them. If, on  
8 the other hand, they have strongly held and disparate views which are not within their  
9 area of expertise, then they are going to have to shut up and we will have to hear from  
10 someone else, if anyone. But that is, at the moment, a problem we are going to put  
11 very firmly in the parties' court and you will have to think about how you prove it.

12 **MR TIDSWELL:** Subject to one point which is obvious, really, but actually the trouble  
13 is that the conundrum leads you there which is that we are not going to get evidence  
14 from individual claimants to demonstrate what their individual positions are. So the  
15 challenge really is, fine, we see the problem, but somebody needs to come up with  
16 a theory or a methodology that fits within the practicalities. I know you know that very  
17 well, Mr Cook. That is the closing of the loop, isn't it?

18 **MR COOK:** We are not hearing evidence on individual claimants' positions. We may,  
19 in the same way that we are going to get data from individual claimants, be in a position  
20 of looking at that claimant as providing, you know -- I refer to our chairman -- as being  
21 a representative claimant. If it is that their position is representative of their sector, or  
22 at the very least the best representation of that sector we can do given the constraints  
23 of this trial, then evidence of what they did, you know, as an indication of price setting  
24 practices in their industry. I mean, hotels dynamic pricing is something where quite  
25 clearly we all know hotels change their prices on a daily basis and the consequences  
26 of that are in dispute. But looking at how Hilton engages in dynamic pricing is, you

1 know, that is an obvious thing to do in circumstances where we know in general that  
2 hotels engage in that kind of practice. Does it make a difference?

3 **MR TIDSWELL:** Absolutely. That, I think, is the door that we are saying is fairly open.  
4 I think the door that is not very open is the idea that if the theory were: oh, it depends  
5 on the decisions of every individual claimant, that is problematic, isn't it? That is a  
6 door that is not very open. So someone has to come up with a different theory about  
7 how we are going to reach a conclusion on them. I think that is the only point I am  
8 making.

9 **MR COOK:** That is understood, sir.

10 **THE PRESIDENT:** No. That is absolutely the case. We are not deciding individual  
11 cases: we are deciding an issue across a vast range of claimants where there are two  
12 interested defendants who would like the label to be one thing rather than the other.  
13 That is understood.

14 But as and when any party comes up with a way of resolving this generically, then we  
15 will hear from that party and we will decide in a case-specific way whether the evidence  
16 that you require is or is not to be admitted. At the moment it is a no, because there is  
17 no application before us. What we are not going to do is go looking down individual  
18 samples, but that is what we discussed yesterday. What we are going to do is wait  
19 and see what you come up with.

20 But I think you know, Mr Tidswell has made it very clear, what we are not going to be  
21 admitting is individual evidence.

22 We will resume then in ten minutes at 20 past.

23 **(12.12 pm)**

24 **(A short adjournment)**

25 **(12.28 pm)**

26 **MR MOSER:** Sorry, I note my learned friend Mr Simpson is about to say something.

1 May I -- I started before the break saying I don't want to hog the process but may I say  
2 something I hope cooperative and useful about the questionnaire that my learned  
3 friend Mr Piccinin addressed. We do not disagree, happily, that this is an area where  
4 some cooperation can happen. It may help to say that as far as surcharging is  
5 concerned, we think that -- well, first, we recall that a similar question was asked for  
6 Trial 1, so some information exists, and also we have been making further  
7 investigations into surcharging, so it may well be there is some constructive discussion  
8 between the parties to be had in relation to surcharging to give the information even  
9 without sending out a questionnaire.

10 Then the question of identifying which sector they fall into. Just perhaps to save some  
11 letters between everyone, it may be useful to explore whether that is going to be only,  
12 for instance, those active claimants that are providing data. So perhaps the  
13 hyperactive claimants going forward or otherwise. So that is all I wanted to say about  
14 questionnaires.

15 Perhaps to abuse this for another minute, a very important point made by Mr Piccinin  
16 about sectors. I don't want things to go off on the wrong foot about sectors. I expect  
17 we are going to hear from Mr Simpson in a moment about it because his 12 sectors  
18 are in his draft order. It is more than something that can simply be agreed between  
19 experts because there is a difference between the cases, a collective action brought  
20 by Merricks is economy-wide. The compensatory principle does not apply and they  
21 only need to arrive at some sum, a lump sum figure at the end of it, from which they  
22 can satisfy their funders and pay the lawyers and then distribute it to whoever makes  
23 a claim. Usually quite a low uptake. But that will do for Merricks. It is a completely  
24 different game that they are playing to the individual claimants, who are seeking  
25 compensation on the basis of compensatory principles as best accommodated within  
26 an umbrella scheme and suited to their own loss and what mitigation might apply.

1 Mitigation being the relevant pass-on aspect of our claims, it is not for Merricks --

2 **THE PRESIDENT:** I think, Mr Moser, what you are saying, and I will articulate it so  
3 you can tell us if I have it wrong, is you don't want the Merricks tail wagging the  
4 claimants' --

5 **MR MOSER:** Dog.

6 **THE PRESIDENT:** -- dog. I was trying to avoid saying that, but there we are. The  
7 trauma of starting with an analogy before you have thought out where it ends. Anyway,  
8 I think the point you are making is that you need to be able to frame your case which  
9 is by reference to the nature of the claimants that you are representing, and that whilst  
10 it is fine to have a different form of analysis as articulated by the Merricks claimants in  
11 the process, there is only so far that you can accommodate the shaping of that process  
12 by reference to a claim that is fundamentally differently made.

13 **MR MOSER:** Indeed. In the galaxy of Merricks claims, my claimants become just  
14 a speck in two sub-sectors. That is how they want to frame their case, that's fine. If I  
15 may be so bold, I think Mr Tidswell's thought is a liberating one, which is that it need  
16 not be inconsistent for the collective action to be looking at it one way and we are  
17 looking at it another way. The fact that perhaps the entire entertainment sector or  
18 indeed the whole UK sector, it does not matter for Merricks purposes, passes on at  
19 20 per cent and somebody in the more granular sectors we are looking at passes on  
20 at 30 per cent, not at all inconsistent.

21 So those are matters of submission and law, but my systemic direction type  
22 submission is that is not going to be an issue on which, with the best will in the world,  
23 there will be some cooperative agreement between experts because we are dealing  
24 with apples and pears.

25 **THE PRESIDENT:** Well, that is very helpful and we will not obviously make any further  
26 indications until we have heard from Mr Simpson on that. But I think the message we

1 are getting is you would want a steer from the Tribunal on this at least today.

2 **MR MOSER:** If possible, yes.

3 **THE PRESIDENT:** Before we hear from Mr Simpson, is there anyone else who wants  
4 to say anything about process? Mr Lask.

5 **MR LASK:** Good morning. I do have some submissions to make, including on  
6 process, but it may be more efficient if I make them all in one go. One of the points  
7 I will want to touch on is the issue covered just now by Mr Moser on sectors, but I  
8 propose I do it all in one go rather than in bits.

9 **THE PRESIDENT:** Thank you very much. Mr Simpson.

10 **MR SIMPSON:** So coming on, first of all, to the sector point. Mr Coombs' proposed  
11 approach accords exactly with the UK PLC approach that you mentioned yesterday.  
12 You have mentioned that as a triangulation point, as a cross-check of the overall  
13 exercise you are doing, and we would commend that as part of the process, whether  
14 or not there are separate considerations in the Merricks and the Merchant  
15 proceedings.

16 Now, as Mr Coombs explained, his sectors and sub-sectors are chosen on the basis  
17 of availability of value data for those particular sectors from the card association and  
18 from the UK payments council. They also contain sub-sectors, so some  
19 rearrangement is possible even using those sub-sectors, provided one has the overall  
20 value data across everything, because otherwise obviously you cannot generate the  
21 weighted average that you need for your triangulation point and also for the Merricks  
22 overall decision.

23 So Mr Coombs is flexible on sectors, as he indicated, but only to the extent that  
24 somebody -- and this would apply also to the UK PLC point, your triangulation  
25 point -- only to the extent that someone can suggest an alternative source of value  
26 data across all sectors of the UK economy, however you divide them, because it needs



1 to be universal to generate the weighted average.

2 Now, no other party has done that. I am not criticising that, but no other party has  
3 done that. Visa has suggested using 14 sectors based on its own classifications and  
4 there are, I think, up to 600 ultimate sub-sectors behind those classifications. But it,  
5 perhaps understandably, has not offered to provide the value data for each sector that  
6 would be needed to generate the weighted average.

7 So on that basis, we would submit -- we would also seek an indication, as Mr Moser  
8 seeks one, of the Tribunal's thinking on this, recognising that you are not going to  
9 make an order of the type of the paragraph that we put in our draft. But the indication  
10 we would seek is that so far as it can be achieved, the sectors for the pass-on analysis  
11 should be the 12 sectors suggested by Mr Coombs on the basis that those 12 sectors  
12 with the value data that you have from the other two sources are the only way of  
13 generating the weighted average that will give you your triangulation point and  
14 Mr Merricks' starting point.

15 So we would commend that recommendation to you as an indication. It may be that  
16 in light of the indications that you have given, that further discussions between the  
17 experts, particularly considering the more granular data underlying the payment  
18 council and the UK card association data, could be used to reorganise the sectors so  
19 that you can still generate your weighted average, even if they were organised slightly  
20 differently. It is not what you call them, it is that you can generate the average by the  
21 aggregate of the sub-sectors.

22 So in relation to Primark's point made this morning, of course, there is no need -- it is  
23 open to a party to put whatever evidence it wants before a Tribunal. Obviously there  
24 is no need for Primark to produce a UK figure, but we would assume that it would  
25 accept that if it doesn't, it will be bound by any UK figure but obviously it would be open  
26 to it to explain any differences from that UK figure by reference to characteristics

1 unique to Primark.

2 So we would say, with those points made, that it is important also to note that there  
3 are merchants within each of Mr Coombs' 12 sectors. It is not as if -- you will have to  
4 consider each of those sectors and some extrapolation exercise into those, and Visa  
5 and Mastercard very helpfully yesterday provided us with a list of the stayed claimants  
6 and on the provisional analysis that we have done, they fall into nine sectors; it could  
7 be more than nine sectors when that analysis is finished. But the population is only  
8 going to grow within different sectors. So there is limited traction, in our submission,  
9 although it matters a lot to Mr Moser who his clients are, as far as you are concerned  
10 you are going to have to, if you are asked to, produce a pass-on figure for merchants  
11 in each sector, whether stayed or not.

12 Now, in relation to Mr Coombs' methodology and returning to his position, in light of  
13 your helpful indications on data yesterday and today --

14 **THE PRESIDENT:** Are you moving off sectors now?

15 **MR SIMPSON:** No, I am on sectors. I am so sorry. In relation to Mr Coombs' sectors,  
16 he says that there is sufficiently publicly available data to produce a pass-on figure for  
17 eight sectors, three sub-sectors, amounting to about 65 per cent by value of the UK  
18 retail economy.

19 Now, in relation to -- I am dealing now with how your approach potentially affects  
20 Mr Coombs' approach, because it seems that there will now be data disclosure from  
21 maybe 10, maybe 20, we don't know yet, of the big players in the retail market.

22 Now, that is not quite what Mr Coombs envisaged but he recognises that he has to  
23 live with the data that he is given. So his position would be that, having discussed it  
24 with him overnight and obviously he would speak to it if you wished him to, his position  
25 would be that he will have to wield as broad an axe as you give him and he will carry  
26 out any extrapolation necessary.

1 That links with the point the president made a bit earlier in relation to geography. The  
2 axe may need to be very broad there. Mr Coombs' position is that you can extrapolate,  
3 perhaps as granular a way as you wish. There are publicly available studies in other  
4 countries in relation to pass-on. But if you take a very broadbrush in relation to  
5 geography where the claimants, the merchants are smaller, they may be minnows,  
6 they may be -- I can't think of a slightly bigger fish that isn't very big, but they are not  
7 as big as the big players.

8 Likewise, if you are going to perform a broad extrapolation exercise on geography, he  
9 will attempt to assist as far as he can. But if you are going to do a slightly less broad  
10 one into his sectors where he does not have publicly available data but there are still  
11 gaps, he will extrapolate so far as he can with the data available to him.

12 So there, sir, I am turning away from sectors.

13 **MR TIDSWELL:** If I may ask a question --

14 **MR SIMPSON:** Yes, of course.

15 **MR TIDSWELL:** -- that I put to Mr Piccinin and Mr Moser picked up.

16 **MR SIMPSON:** Yes.

17 **MR TIDSWELL:** Why does this matter? It does not matter if Mr Coombs does just  
18 what he suggests he is going to do and on the sectors he says he is going to do and  
19 he gives us the economy-wide figure that he comes up with. Why does it matter that  
20 Mr Holt and Dr Niels and Dr Trento and others are doing different things when it comes  
21 to our triangulation, because we are still going to get an economy-wide figure and then  
22 we are going to get some more specific data in relation to particular sectors. Does it  
23 matter that they are not done on the same sector basis?

24 **MR SIMPSON:** Well, you risk mismatches if you don't do things on the same sector  
25 basis. You risk the type of misunderstanding where if you have a merchant in one  
26 sector on Mr Coombs' analysis and another on another analysis and a yet further

1 sector on another analysis, it is not just that there is a Coombs and a non-Coombs  
2 position. The experts are not agreed on the number of sectors and our submission is  
3 merely this: that it would be extremely helpful, if it can be achieved, in light of your  
4 indications, that they coalesce around the Coombs sectors.

5 Because for instance, if I may take this example, Visa has underlying its calculations  
6 600 different sub-categories going into its 14 sectors. Now, the sector boundaries are  
7 slightly arbitrary, that you get to 14. But if those 600, for instance, could at least be  
8 rearranged into the Coombs 12, then you would not be comparing apples with pears  
9 or putting one merchant in one sector and one merchant in another sector, according  
10 to which expert you were talking to. That would be helpful as a --

11 **MR TIDSWELL:** Well, that is only the case if we are looking at Mr Coombs' results by  
12 sector, isn't it? If it is on the economy basis it all comes out in the wash, it does not  
13 matter, does it? That is the bit I don't understand. Maybe you are suggesting we  
14 should be looking at Mr Coombs by sector. We have Mr Holt doing that so in a way I  
15 think we have always seen Mr Coombs being the most generalised reference point  
16 and then Mr Holt as being the more specific and necessarily more aligned with what  
17 the claimants' -- not only the claimants' position is but what the nature of the claimant  
18 representatives is.

19 Because, of course, the problem is if you don't start this with the nature of the claimants  
20 and, if you like, the lowest level of identification in the sector, then you start to lose  
21 focus on their particular characteristics and you get all sorts of other claimants, other  
22 businesses who are not actually in the claimant group, coming in and it gets less and  
23 less useful.

24 So there is something to be said for the position that I understand Mr Moser is taking  
25 which is you should, at least as far as the claimants' cases are concerned, you should  
26 be starting with what do the claimants look like.

1 Now, I can understand obviously that is not what Mr Coombs is doing and clearly there  
2 seems to me to be a value in letting Mr Coombs do exactly what he wants to do as set  
3 out. It is going to lead to a different construct of number, but the number we get is the  
4 thing we care about.

5 **MR SIMPSON:** Okay. Well, can I flesh that out slightly?

6 **MR TIDSWELL:** Please.

7 **MR SIMPSON:** The issue then is that, yes, Mr Coombs would be perfectly happy and  
8 Merricks, Mr Merricks, perfectly happy with you finding an economy-wide pass-on  
9 figure and using his sectors. Now, if you don't use his sector, now sectors are used  
10 because there are different characteristics of different merchants, there is different  
11 competition in different sectors. I would say only this: that provided Mr Merricks comes  
12 out of this with a pass-on figure for the UK economy, that is what he is aiming for. That  
13 is one of the triangulation points that you are going to use.

14 There may be issues of consistency if you have different sector boundaries with  
15 different numbers of merchants in them. This is where -- the president talked  
16 yesterday about the harmonisation of a top down and a bottom up approach. So we  
17 see there could be some difficulties in that harmonisation if you are using different  
18 sector boundaries and so we say only this: so far as achievable, if it can be achieved,  
19 we would like an indication that it would be good to use the Coombs boundary so that  
20 mismatch does not occur.

21 But if ultimately you decided not to, there may be a consistency issue. You are going  
22 to decide a UK PLC figure, Mr Coombs, Mr Merricks is happy with that, Mr Coombs is  
23 also happy to use any data to inform his calculations. But there is, in our submission,  
24 a potential mismatch problem when you combine the top down and bottom up  
25 approach.

26 **MR TIDSWELL:** Well, I think I put it to you: I don't think the mismatch matters that

1 much. Mainly because we have Mr Holt. I mean, if we did not have Mr Holt, it might  
2 be a different question. But Mr Holt is effectively doing the same thing as Mr Coombs,  
3 except he is doing it by reference to -- well, we hope he is doing it by reference to the  
4 framework that is agreed between the other experts for the sectors.

5 **MR SIMPSON:** Yes.

6 **MR TIDSWELL:** So I think that is really -- I mean, I am not sure that you have  
7 convinced me. I can see there is a potential for inconsistency, but is it one that  
8 matters? That is really the question I am asking you. Of course that may be a question  
9 more for us than for you, because it rather depends on what we have --

10 **MR SIMPSON:** Well, on the basis -- sorry to interrupt. On the basis that one never  
11 really knows until one delves into, as the president I think adverted to, you never really  
12 know until you get into this whether an inconsistency is going to matter or not. So we  
13 would simply say if you are going to go down this route, you could eliminate even the  
14 possibility of having that inconsistency if you indicated that those were the 12 sectors  
15 to be used.

16 **THE PRESIDENT:** I see that would be very desirable. We are not going to be giving  
17 that indication. But we understand why you are asking for it.

18 In a very real sense, this is an excellent preview as to the role that Merricks plays in  
19 the proceedings that for the moment comprise Trial 2, the umbrella proceedings. We  
20 don't want to, as I indicated earlier, resolve that but I think it is showing an interesting  
21 perspective on where the fault lines arise.

22 So let me just articulate a few general propositions which are intended to show that at  
23 least we get the problem. We cannot, obviously, direct any expert to do an exercise  
24 that cannot be done and so there is that constraint on the things that this Tribunal will  
25 direct, which is being constrained by the very real limits that exist, albeit they are  
26 unknown limits at the moment, that all of the economists will be working under. We

1 will have to operate in the realm of the possible, rather than the impossible, when we  
2 are telling the economists what they should and should not be doing.

3 Following on from that, the next broad point is that we need the evidence to be  
4 appropriately framed according to what case the claimant is putting. That is  
5 Mr Moser's point, which is that he cannot be tied to framing his case -- and that is true  
6 for all the claimants in the umbrella proceedings -- in a manner that is not the way in  
7 which their case needs to be framed, given who Mr Moser is acting for.

8 Equally, that informs the role of the defendant's evidence -- and I am looking  
9 particularly here at Visa because Mastercard, of course, have two hats here; they have  
10 a role in the Merricks case and a role in the main trial -- but the defendants have  
11 obviously got to be responding, like for like, with what Mr Moser's clients are saying.  
12 We can leave burden of proof and things like that to one side. There needs to be  
13 a correlation between the way Mr Moser's evidence works and the way the rebuttal  
14 evidence from the defendants works, otherwise we really are in trouble on the Moser  
15 action.

16 Now, exactly the same applies to you. You have got a responsibility for putting your  
17 case in a manner that aligns with the claim that you are advancing. Equally, the  
18 defendant to that claim -- here I can look only at Mr Cook -- has got to respond by, as  
19 it were, parity of evidence in saying your case is right or wrong by reference to the way  
20 you articulated your case.

21 What one would like is for there to be a precise correlation across the two streams so  
22 that one can translate what one learns from your evidence into Mr Moser's claims and  
23 vice versa.

24 Now, that would obviously be desirable, because it enables a sort of triangulation  
25 between streams to occur. But it is only desirable to the extent it is achievable in  
26 a realistic and proportionate way. If it cannot be done, or if it cannot be done without

1 doing undue violence to the claimants in the umbrella proceedings case, then it won't  
2 be done.

3 If, on the other hand, it is in the camp of the low hanging fruit that the data is available  
4 and can be portered into your case so as to assist you in making your case, provided  
5 Mastercard equally have a parity of arms ability to respond, then we are up for that.

6 We do not know the answer to any of these things. All we will say is that each stream  
7 has to produce the best evidence that suits their case or defendants or enables them  
8 to defend their case and that the outcome of that consideration is likely to be a material  
9 factor in where the Merricks claim is located in terms of Trial 2, in that the greater the  
10 mismatch between the way in which you are putting your case through Mr Coombs  
11 and the way Mr Moser and the other claimants are putting their case in the umbrella  
12 proceedings, if there is a major fault line then that rather suggests that the Merricks  
13 evidence and the Merricks arguments ought to be degraded from the umbrella  
14 proceedings arguments.

15 If, on the other hand, there is a useful synergy between the two claims, such that one  
16 can learn something about them, albeit that they are differently put, then that would  
17 rather suggest that they be heard together. But that is exactly why we are wanting to  
18 push the precise configuration of Trial 2, so far as Merricks is concerned, not into the  
19 long grass but into the future. Because we would like to know not from the lawyers  
20 but from the economists what the synergies are and what the fault lines are.

21 So we are certainly not going to direct anything by way of how the sectors should be  
22 configured, but I hope all the economists are listening when we say that the more  
23 usefully comparable data that we can have, the happier we will be. But we are not  
24 going to force the issue, because we recognise that we are actually trying individual  
25 claims. They are, of course, self-evidently, in your case, a single broadbrush class  
26 action and they are not quite the same. They are umbrella proceedings in the case of



1 the other claims.

2 But equally, we have made it very clear that we are proceeding on a broadbrush  
3 statistical basis in order to answer these questions, rather than on a let us take each  
4 case of each claimant individually.

5 The question of how those two streams cohabit is not for today. We would only say  
6 that we would want those streams to be as close together as possible, to the extent  
7 that could consistently be achieved with a proper articulation of each individual case.

8 **MR WATERSON:** Could I raise the point here. This is a question, and I don't expect  
9 either Mr Cook or Mr Piccinin to answer this now, but is there a, sort of, Rosetta Stone,  
10 if you like, which relates the card companies sectors to, for example, SIC sectors or  
11 not? But as I say, I don't expect you to -- if you can answer now, that would be very  
12 useful.

13 **MR COOK:** I think there is basically an understanding of what lies behind the 12  
14 sectors that Mr Coombs is saying. It will not surprise you to know that we don't agree  
15 with his 12 sectors, which would seem to us to be largely designed to avoid the data  
16 problems that Mr Merricks faces, as represented by the fact that I can count three  
17 catch-all categories of mixed businesses, number six, other retailers, number 11, and  
18 other services, number 12.

19 So you have a list of 12 sectors which has three which are just some others and some  
20 others and some others. So there is a lot underlying that and it will not surprise anyone  
21 perhaps to realise that with some of those categories we are going to be saying you  
22 have lumped a whole lot of completely disparate businesses in and, you know, you  
23 can't produce a sensible number.

24 The Supreme Court indicated back in the original Merricks Supreme Court decision  
25 that that may be the outcome: that there are certain sectors or certain areas where the  
26 Tribunal will do the best it can, but there reaches a certain point where you cannot just

1 make data up.

2 So a lot of the battleground is going to be whether this is meaningful, whether actually  
3 there was data to do these things. So there are going to be disputes about exactly  
4 this material.

5 **THE PRESIDENT:** That is interesting. I mean, again, if you cannot answer, don't, but  
6 if you can it might in future be worth cogitating upon. Is Mastercard envisaging quite  
7 materially different stances in the two sets of proceedings in which it is involved? It is  
8 not Visa's problem, obviously. But is that the way Mastercard sees that unfolding: that  
9 the defence in the context of Merricks is going to be different?

10 **MR COOK:** Well, the reality is, you know, we are not going to contradict ourselves  
11 because there is going to be two sets of people in the room who will point out very  
12 enthusiastically at any point when I or anybody else contradicts ourselves.

13 One of the issues that arises here and the reason why, you know, submissions that  
14 obviously I have drafted but will not be saying today but will, no doubt, in due course,  
15 in a month or six weeks' time be saying, is there is a reason why Mr Merricks should  
16 not be in the room for trial 2A, as we have called it, but there should be a separate  
17 way of dealing with it.

18 Because the time periods do not overlap and, you know, the time periods don't overlap  
19 and there are all these other sectors which are not represented by the claimants who  
20 are here. Dr Niels has produced his own sectorisation which I think comes to 31  
21 sectors, of which only 15 are actually represented in this room and a number of those  
22 are very small minnows that really will not be dealt with. So that is going to be the  
23 battleground and there are a series of factors that we will be relying on which will  
24 indicate why, we say, pass-on rates in the 1990s are likely to be very different or  
25 potentially different from the pass-on rates in the 2010s.

26 That is really what we are battling about. The claimants are all 2010s, essentially:

1 largely 2011 onwards. Mr Merricks is '92 to 2008 and there are going to be differences  
2 there.

3 **THE PRESIDENT:** That is certainly a very fair point. But, of course, it is not  
4 necessarily a reason for wanting to hear them separately, because there may well be  
5 something to be learned from the very differences that you are articulating.

6 **MR COOK:** I am not trying to win the point at all now, sir. I appreciate there are  
7 arguments on both sides and, you know, the arguments by Mr Simpson will no doubt  
8 be deployed effectively against me in due course, etcetera. But there are reasons  
9 why, you know, we will have to be logical in our position and we can't just say, you  
10 know, 100 per cent pass-on against these claimants, zero against Mr Merricks and  
11 look absurd in doing so.

12 However, what we can do is point to the fact that -- you know, dynamic pricing is  
13 a good example in hotels. Dynamic pricing was present in the 2010s; I don't think it  
14 existed in the 1990s. We have Bet365 who represents 17 per cent of the claim from,  
15 it seems, the Stephenson Harwood claimants, an online gambling platform. Online  
16 gambling basically didn't exist in the 1990s, it was in its infancy in the 2000s and then  
17 made an immense amount of money in the 2010s.

18 So those are the kind of differences and there are all sorts of myriads of others why  
19 we would be saying -- internet shopping is a very strong one -- you get potentially  
20 different arguments. The sectorisation underlying here will be in disagreement  
21 because it tries to conceal serious data problems and we will be keen to point out  
22 some of those data problems.

23 **THE PRESIDENT:** That is very helpful, Mr Cook. I think then it does leave us with  
24 my broadbrush propositions and the points that were made that we absolutely need  
25 a synergy between the Holt analysis and the claimants' analysis, otherwise we really  
26 will have damaging ships passing in the night. But equally, we are going to need

1 a synergy between your defence of the Merricks case and the Merricks case, and we  
2 will have to park the extent to which those two discrete exercises -- albeit arising out  
3 of a largely common pool of data -- how far they helpfully or unhelpfully inform each  
4 other. That is a matter for later on, because it has a bearing on the role that Merricks  
5 will play in the trial and that is in itself informed by the way in which we will resolve the  
6 different sets of proceedings before us. But I think beyond that, we cannot go.

7 So, Mr Simpson, the most you get is we would like the best data set in each set of  
8 actions and ideally the best for hearing them together. But beyond that, we cannot  
9 go, because we don't know what is and what is not achievable at proportionate cost  
10 by the economists in the room. But we would expect problems or solutions to be  
11 articulated at the hearings that are going on, so that we can get a better grip of this as  
12 the parties begin to articulate much more closely what exactly it is they want to produce  
13 by way of evidence before this court.

14 **MR SIMPSON:** Yes. I see the time. Perhaps I can either respond now to one or two  
15 of Mr Cook's points or I could come back at 2 o'clock.

16 **THE PRESIDENT:** Well, seeing the time. We are okay for time, aren't we?

17 **MR SIMPSON:** As far as we are concerned, yes.

18 **THE PRESIDENT:** I mean, if the parties could reach a common position on the date  
19 for positive cases and the date for responsive cases, we are broadly happy with both,  
20 though we would always say that if one could have a realistic soonest date with  
21 an ability to extend time, that is probably better than having a realistic date without the  
22 ability to extend the time. I think that 20 September 2024 is a date that could not be  
23 moved, given the trial date.

24 So given that there will always be a liberty to apply to extend time, if you move  
25 20 September forwards, have a think about whether that is doable. But I quite  
26 understand, Mr Moser, why you put the 20 September date in. I had, I think, the end

1 of September yesterday in reference. You have given us ten more days.  
2 But do think very hard about what is the most aggressive feasible date and we will  
3 then think about whether we should order that, so the parties have something very  
4 aggressive to work to which can then be relaxed if there is a need. Rather than  
5 working to a slightly less aggressive date and then suddenly discovering that when  
6 you get towards the end, you are asking for time that does not exist.

7 **MR MOSER:** Yes, we will.

8 **THE PRESIDENT:** I am grateful. We will resume then at 2 o'clock. Thank you very  
9 much.

10 **(1.07 pm)**

11 **(The short adjournment)**

12 **(2.00 pm)**

13 **THE PRESIDENT:** Mr Simpson.

14 **MR SIMPSON:** Returning then very briefly to the sector point raised before lunch,  
15 I think the gravamen of what you were saying before the break was that you wouldn't  
16 want to constrain Mr Moser from the evidence that he wants to put in, but if one steps  
17 back, because this is a pass-on defence being asserted by Visa in that part of the  
18 claim, Visa has asserted a sectoral approach by reference to calculating the pass-on  
19 rate in sectors, and the merchants have to meet that. Now, you have correctly said  
20 you won't countenance claimant-specific evidence in the proceedings, and so to that  
21 extent, Mr Moser is constrained, and he is meeting a case based on sector pass-on.  
22 In that context, we would say that we are very closely aligned with Visa in the overall  
23 approach, so talking about, Mr Tidswell, the point that it didn't really matter whether  
24 there was one approach or the other, the fact is that the merchants are facing  
25 a positively asserted 14 sector case by Visa, and so it may be that any mismatch is  
26 not as great as might be thought, because that simply has to be met. So this may be

1 more a point for any participation issue, the nature and extent of Merricks' participation  
2 down the line, but it is worth making that point if one is thinking, well, it's all a bit of  
3 a mess and you can't really reconcile them. There are two aspects: one, there is  
4 a sectoral approach there from Visa anyway, although Mastercard aren't aligned to  
5 that; and two, the sectoral approach is one which Mr Coombs takes in a very similar  
6 way, and it may be in the light of what you've said over the last day or so that the  
7 experts can align more closely in due course.

8 Unless I can help you further on sectors, briefly moving on to the linked issue of  
9 participation, I'm not going to make submissions for or against, but it would of course  
10 be very helpful for Mr Merricks to know whether he is participating in Trial 2 as soon  
11 as possible. That's probably after data is received and the experts have conferred  
12 further, but after that the sooner the better, really, because otherwise we have a trial  
13 booked, the experts will be liaising, and Mr Coombs will not need to liaise with many  
14 other experts, and would be free to use whatever methodology he saw fit without taking  
15 that into account, if he's not participating in Trial 2, whether by way of umbrella order  
16 or by way of simply attending that trial. I make only that point.

17 **THE PRESIDENT:** That's a very fair point, Mr Simpson, and I anticipate that that is  
18 one of the few points on this issue that you would be aligned with Mr Cook.

19 **MR COOK:** I was just going to rise to make exactly that point, sir. A rare point of  
20 common ground.

21 **THE PRESIDENT:** Can I say this: your teams clearly need to keep this under close  
22 review. What I think needs to be done, because I don't want us drifting into this, is that  
23 at a point which you, Mr Simpson, will choose, but you will want to make sure that you  
24 pick the right time, and that will involve I think discussions with Mastercard, make  
25 an application that the Merricks case be brought in. I think you should make it,  
26 because that gives you agency in terms of when you do so. You're right, the timing

1 needs to be such that both sides can articulate the synergies that exist in terms of the  
2 data that make it a good or a bad idea, and we've had a flavour of good idea/bad idea  
3 today, but it is something where we would want both sides to be able to inform us from  
4 a position of strength rather than weakness what those synergies are or are not, and  
5 so I think you're absolutely right, it needs to be when you have a reasonably good  
6 handle on the data. At that point in time I think that an application should be made.  
7 Whether that is a formal application, in the sense that essentially both sides have  
8 a clear view and a common view as to what should happen, then the application will  
9 be more or less a formal one, but I think nevertheless should be made. If, as is more  
10 likely to be the case, there is dispute about it, then you ought to ensure that you have  
11 an agreed timetable for the exchange of evidence or submissions, if that's all that's  
12 required, so that we can decide matters and whether it needs to be done at a hearing  
13 or on the papers -- my preference would be for the former rather than the latter; I think  
14 this is something which we would want to hear the parties if it was contentious -- and  
15 get it done obviously before the first round of positive cases in the summer. So it looks  
16 like it will be a February or perhaps very early March application, and that I think is as  
17 far as I can go, but we obviously want to deal with it as early as is practically possible,  
18 which is when you have a good grip on the data.

19 **MR SIMPSON:** I'm grateful, sir, and that to decide the issue of whether we're under  
20 the umbrella, or we're heard with, or perhaps an issue is hived, whatever it may be, or  
21 whether we are not in.

22 **THE PRESIDENT:** Exactly.

23 **MR SIMPSON:** A global decision.

24 **THE PRESIDENT:** How it's dealt with, all of the ramifications. The thing is we  
25 absolutely want to get everything done as swiftly as possible, and we would want all  
26 of the angles to be considered so that whatever happens we are proceeding in the

1 most efficient way.

2 The short answer is that it obviously looks like a far better idea that you're in than out,  
3 but that's only because these things have a beguiling simplicity to them which then  
4 explode when you actually get to the proof of the pudding in the eating, and it does  
5 seem to me that the more we talk about it, the more complex the question appears,  
6 and we do need to get it right, because Trial 2 is going to be complex enough as it is,  
7 and we really do need to get a sense of the net benefit or net disadvantage, or whether  
8 it is simply neutral. If it's neutral I think we pull you in, but it's the question of benefit  
9 versus disbenefit.

10 **MR SIMPSON:** Yes. I don't want to complicate it more now, sir, so I'll leave it with  
11 that and we can canvas those issues as and when the application is made.

12 Subject to that, I won't say anything more on sectors unless you would like me to help  
13 on anything.

14 I then want to briefly go through hitting some of the topics we've covered in the last  
15 day. On data provision it seems to be common ground that should be as  
16 disaggregated as possible, and Professor Waterson has spoken on that, having great  
17 experience of it. That will allow flexibility in tailoring it to the various experts' needs.

18 Mr Ramirez's evidence yesterday was extremely helpful we found as to what it might  
19 look like, because he gave numerous ways in which the Primark data could be  
20 disaggregated, and we commend that approach and would expect similar types of  
21 disaggregation for the bigger merchants such as the ones Mr Moser mentioned  
22 yesterday. We would suggest it should also be at the highest available frequency, the  
23 maximum number of data points. Our position is you can't have too many data points  
24 in today's world which can be computed very quickly. So the maximum data available  
25 that we could have, we would appreciate.

26 I want to deal briefly with one other potential category of data relating to supplier



1 pass-on, which was dealt with Mr Harman yesterday, even if no order is going to be  
2 made in relation to that at this stage. Mastercard has pleaded supplier pass-on in the  
3 merchant proceedings, very briefly, and Visa even more briefly. I'll come back to that.  
4 Yesterday Mr Harman started by saying that disclosure on this issue would be  
5 relatively narrow, a small number of documents, but the more he waxed lyrical about  
6 it, the more it became clear that in fact it could be quite a substantial disclosure  
7 exercise involving extensive documents on budgeting process, management  
8 accounts, and some qualitative data.

9 Disclosure of that data would be potentially significant in time and cost, both for the  
10 disclosing party and for those to whom it's disclosed and analysed by them, in  
11 a context in which we say that the pass-on defence does not come near meeting the  
12 *Stellantis* test, which you're doubtless very familiar with. We don't have all the  
13 pleadings in the merchant proceedings, but it's just worth -- we haven't really gone to  
14 the bundles very much, I just want to go to one paragraph if I may. That's at 1.1,  
15 tab 24, page 375.

16 This is the pass-on defence in the Pendragon case, and it's pleaded identically in the  
17 two other cases in the bundle, the Levi's defence and the Primark defence. If I could  
18 just ask you, supplier pass-on is dealt with at 120 to 122, and merchant at 123. If I can  
19 ask you to read 120 to 122, the nub of it being 122. **(Pause)**.

20 **THE PRESIDENT:** Yes.

21 **MR SIMPSON:** I'm sure I don't need to take you to *Stellantis*, where in fact there had  
22 been voluntary particulars which went very much wider than this and it was struck out.  
23 On that basis, we would suggest these paragraphs in the Mastercard pleadings, these  
24 are carried across all the pleadings that we have, are obviously inadequate, and that  
25 we would suggest the Tribunal should consider exercising its case management  
26 powers at this stage to strike them out, whether or not -- perhaps giving Mastercard

1 an opportunity to revise them if it indicates that it intends to do so, or that it can do so.  
2 But whether or not they are struck out, we say that they are an inadequate basis for  
3 any disclosure of the type envisaged by Mr Harman, because at the moment you don't  
4 have a *Stellantis*-qualifying defence on supplier pass-on.

5 So Visa's position is set out at paragraph 45 of their skeleton. That's at tab 33 of the  
6 supplemental bundle. In essence, what they say is that they've pleaded it only in  
7 outline in order to protect against the possibility that the Tribunal considers it  
8 necessary to delve into the detail of merchants' costs and price-setting processes,  
9 which the Tribunal's clearly not going to do. So Visa's pleading on that issue, which  
10 is more vestigial, falls away. So we say that the pleaded cases are not a basis, unless  
11 amended and permitted to proceed, for any disclosure of the kind envisaged by  
12 Mr Harman.

13 **THE PRESIDENT:** That's helpful and interesting. Mr Cook, you don't need to rise at  
14 the moment, because we're not very keen to have issues like this, still less issues at  
15 trial, decided by reference to the pleadings. What we see as the route by which we  
16 will decide all issues will be the exchange of position papers that we are envisaging.  
17 It therefore seems to us that the route forward is this: we have not given permission  
18 for Mr Harman to be named as an expert, but that's only because Mr Cook hasn't  
19 asked for it. I'm not inviting an application now, but only because I think Mr Harman  
20 is entitled to think quite carefully about how he, in the light of the route that we're going,  
21 how we would be minded to enable an expert in his position, and he himself, to render  
22 an opinion about supplier pass-on. I think he's entitled to time to think about that, and  
23 to enable Mastercard in due course to make an application for further evidence to be  
24 adduced in the shape of an expert evidence with the methodology that Mr Harman has  
25 described.

26 If, to take an extreme case which Mr Harman abjured yesterday, so it is on that level

1 a bad example, if Mr Harman were to say: well, the only way I can establish my  
2 supplier pass-on is by an extensive disclosure process across the entire class of  
3 claimants, then that's not going to happen, and Mr Cook knows that. If, on the other  
4 hand, it is: here are five documents that I need from each of the Mr Moser claimants  
5 and the other nominated claimants, and once I have that I can actually provide you,  
6 Tribunal, with an opinion, then matters are rather different, and we would be I think  
7 inclined to allow the matter going forward on that basis.

8 The true position is probably somewhere between those two extremes, but we are not  
9 going to go down the route of are we amending, are we not amending the pleadings.  
10 I very much hope that the pleadings are going to be receding into the rearview mirror,  
11 and we will be looking instead at a series of expert formulations with submissions from  
12 the lawyers as to what we get out of that, rather than starting with the pleadings, which  
13 in this sort of case, well, we haven't been using them for a long, long time, and for  
14 good reason, we've been using the list of issues that we directed 18 months or so ago,  
15 when we're talking about pleadings in these actions.

16 So that's how we're going to do it. Whether that means Mr Harman is in or is not in is  
17 very much in his and Mastercard's hands, and the same goes, albeit on a contingent  
18 basis, with Visa. I don't know whether you'll be piggybacking on Harman or doing your  
19 own thing. At some point you're going to have to work out how the contingency plays,  
20 Mr Piccinin, but that's a matter for you, because the point in time at which you need to  
21 have a final position is at the time of the finding of positive cases, and everyone is  
22 entitled to take a breath to work out how they're going to do it, because until yesterday  
23 we didn't really have an inkling.

24 **MR SIMPSON:** I'm grateful for that indication. I can move on then to one issue of  
25 disclosure that hasn't been canvassed so far, which is disclosure of card usage data.  
26 As you will have seen, issue B3 is the width of the market in which cards were

1 | accepted, in essence the width of the commerce in which -- whether the cost increase  
2 | was market-wide. All the experts agree that B3 is a relevant factor, because  
3 | a market-wide cost is more likely to be passed on than a merchant-specific cost.  
4 | Mr Coombs has said that data on the extent of card usage will be helpful in this regard,  
5 | and Mr Holt agrees with him. All the experts, other than Mr von Hinten-Reed, agree  
6 | that gathering at least some information on this factor would be helpful, and on that  
7 | basis, sir, we made a suggestion in our order, which I come back to with some  
8 | diffidence given the indications earlier, but it shows the type of thing that we were  
9 | looking for.

10 | Paragraph 4 of the draft order suggests that Mastercard should provide the card usage  
11 | data it holds for the period 1992 to date, and Visa shall provide the card usage data it  
12 | holds for the period 2006 to date. That's sought on the basis that Visa's obviously not  
13 | a defendant in the Merricks claim, going back to 1992, and it's reasonable to assume  
14 | that merchants tend to accept both schemes or neither, and if we had data from both  
15 | schemes from 2006, it should be possible to confirm that or extrapolate backwards.  
16 | So we're not seeking to put a burden on Visa to disclose data in relation to a claim  
17 | period for which they're not a defendant to our claim. That was the reason for choosing  
18 | it. But that is subject to any submissions anyone else may have to make on this point.  
19 | The experts seem to be agreed you need this, this is the obvious data to give it, and  
20 | we would suggest that if that is the happy agreement, that an order should be made  
21 | for that now on the basis of what we see in the expert reports.

22 | **THE PRESIDENT:** It's helpful that you've made this application, and I can give what  
23 | is intended to be a general indication about how we're handling it. We've given the  
24 | indication I think a couple of times already, but I think it's now time to make it a definite  
25 | so we can draw a line under this. We're not in the business of making orders at this  
26 | stage. I'm sure that Mastercard and Visa's lawyers have heard, and I'm even more

1 | sure that the economists behind them have heard what you've said about the utility of  
2 | this material, but we aren't going to call upon either Visa or Mastercard to respond to  
3 | that, because we are not going to make an order. What we are expecting is  
4 | a proportionate and a cooperative approach. I can see that one of the points that  
5 | might well be taken in opposition to this is, particularly from Visa, "It's nothing to do  
6 | with us, why are you bothering?" That immediately opens up the question of, again,  
7 | Mr Merricks' involvement in Trial 2. I don't want to get into that.

8 | What I want to say is that we are anxious, subject to questions of cost and  
9 | proportionality, to ensure that we are litigating not the technical procedural points, but  
10 | that we are litigating in November the substance, but there is always going to be  
11 | a tactical question, which we're not interested in, but there's always going to be a cost  
12 | and complexity question when there will already be many, many burdens on the  
13 | economic teams instructed here, and it is that which we are going to be primarily  
14 | looking at. So if this is an easy win that can be done straightforwardly, then that is  
15 | a factor that will weigh quite heavily on us, but if it is more complex than that and is  
16 | likely to distort the primary process, which is getting the substantive matters to trial,  
17 | then the answer will be slightly less helpful.

18 | **MR SIMPSON:** Which of course fits with what you said yesterday on the merchant  
19 | data. I'm grateful for the indication.

20 | **THE PRESIDENT:** I want these questions raised, but I want them in the first instance  
21 | raised at the economist level so that one can work out how easily or otherwise they  
22 | can be packaged. The fact is there will be a lot of data which will be irrelevant or  
23 | susceptible to multiple issues, and that's one of the things that one mustn't lose sight  
24 | of in this situation, but it is for the present purposes an arid debate for today, and the  
25 | reason I think it's useful to raise it is only because it gives us an opportunity, and in  
26 | this case a further opportunity, to show the parties and the economists in question the

1 colour of our money, which is that we are doing this on a very tightly controlled, but at  
2 present order-free, basis.

3 The only other point I would make is please don't tempt us to go down the order-heavy  
4 route, because every now and then I like drafting an order which is swingeing, but  
5 I don't think you really want to push us in that direction.

6 **MR SIMPSON:** I'm grateful for that indication, sir, I wasn't intending to.

7 **THE PRESIDENT:** No, I know you weren't, but I just throw that out there as a point  
8 that I hope we don't have to come to.

9 **MR SIMPSON:** You can consider the word "order" is struck out of the rest of my  
10 submissions. I'll only refer to it, if I do, for information only in future.

11 Moving on, it's still worth saying something, if I may, about qualitative evidence. There  
12 is, we say, an understandable reluctance on the Tribunal's part to let in qualitative  
13 evidence, and we understand that the threshold for that would be reasonable  
14 necessity, combined with proportionality in the context of also, the third one,  
15 practicality in getting us to trial, and providing that is understood by everyone, then  
16 I believe that to be the threshold from what I've heard, and I see the president nodding.  
17 But also that would apply to the further expert evidence. I think the category that's  
18 been canvassed most, but in argument, both by the Tribunal and by the parties, for  
19 potentially industry experts, and I think the Allianz submissions yesterday hinted at  
20 a possible insurance industry expert, but again, we would suggest that the threshold  
21 that should apply would be that, the reasonable necessity in the context of  
22 proportionality and practicality, with applications being made as necessary, if they are,  
23 after the data is in.

24 The final points on my agenda are, sir, you made a decision yesterday, or it was  
25 published yesterday, I think in Trucks, using a positive and negative as far as provision  
26 of expert reports or evidence was concerned. As I understand it, Mr Moser used the

1 word "positive" -- he's used "responsive", so he's not going down that procedural route,  
2 and as long as his order only means exchange of expert reports, then we're happy  
3 with that. We don't read it as saying anything more, but I'd leave it to him to say  
4 anything more, if he is saying anything more. I didn't mean to get him to rise.

5 **MR MOSER:** Was there anything more?

6 **MR SIMPSON:** Just a very minor point.

7 **THE PRESIDENT:** Mr Moser, we'll hear from you in a moment.

8 **MR SIMPSON:** Geography I've dealt with, broad axe we would be very happy with.  
9 Claimant-specific evidence, it seemed to be gentle background music in Mr Cook's  
10 submissions earlier that he might like to leave the door open to that. As we understood  
11 it, the door was closed to that, and we would submit that that is the correct approach.  
12 Sir, unless you have any further questions, then those are our submissions.

13 **THE PRESIDENT:** Thank you very much, Mr Simpson. We have nothing more.  
14 Does that mean we move, Mr Moser, to you and the granularity of what is intended to  
15 be not a very granular order?

16 **MR MOSER:** It, I think, does not yet mean that, because I suspect some of my learned  
17 friends on my left will want to say something about the matters of substance. I rose  
18 merely in direct response to the question of negative or responsive. I'm not fussed  
19 about the exact adjective. The nature of the responsive report is it responds to the  
20 positive case. So it's not that you then put forward as the other side's responding  
21 expert a whole new theory or methodology or regression analysis for the first time, but  
22 you are responding to what you have. That's the meaning of it.

23 **THE PRESIDENT:** That's right, which is why I think in Trucks we did use the word  
24 "negative". But the Trucks process, although it's articulated in rather general terms, is  
25 what we have in mind here, that we have two rounds, a positive round and  
26 a responsive or negative round. Each round is all-inclusive in that you don't do

1 a disaggregation of pleadings, witness statements, factual reports, it all comes in in  
2 one go, it all interrelates, it has a wrapper around it which is an explanation of what  
3 you're saying and where we can find things --

4 **MR MOSER:** Yes.

5 **THE PRESIDENT:** -- which is, if you like, a pleading or, if you like, a statement of  
6 case, but a wrapper to explain what it is that's being served up, and that is what we  
7 get on simply two occasions. So you get all the benefit of preparing a single package,  
8 and clearly in these cases the lead will be the economist, who will act, I think, as the  
9 ringmaster in terms of adducing those evidential areas which are necessarily part of  
10 the economist's report, but on which the economist cannot directly speak, either  
11 because they're questions of fact, or because they're questions of expertise lying  
12 outside the economist's expertise.

13 So if, for instance, an economist has to say "It's my understanding that the insurance  
14 industry operates in this way," or "I assert that it operates in this way" but that is  
15 contentious, it may be that you need a short expert report from an insurance expert  
16 explaining that. If, on the other hand, it is the case that everyone is agreed that that  
17 is how the insurance industry works, we can jettison the insurance industry expert and  
18 we can simply focus on the significance of the expert's articulation of what is common  
19 ground about how the industry works. That's the advantage of this process, you  
20 enable the parties to concentrate on a complete package, first on positive, and, as you  
21 say, the second one responsive or negative, and not bringing a new case that requires  
22 a process to be started all over again.

23 **MR MOSER:** I'm extremely grateful. That is exactly what we had in mind. So, for  
24 instance, Dr Trento has already said he wants -- I'm not reopening the discussion, but  
25 he wants to use as part of his methodology a pricing expert, and that would be  
26 embedded within, (or whatever) his methodology, and it's intrinsic within it, because of



1 course as Mr Cook has rightly pointed out, the real meat is likely to be what's the  
2 correct proxy.

3 **THE PRESIDENT:** Yes, but just to catch on this question of additional material, of  
4 course we expect a single package, but we are also expecting an articulation of  
5 permissions as to what goes into the package --

6 **MR MOSER:** Absolutely.

7 **THE PRESIDENT:** -- before that.

8 **MR MOSER:** Almost the first thing that we're going to ask for, if it's useful to  
9 pre-advertise, is going to be that pricing expert for Dr Trento, because he needs to  
10 know more or less from the beginning how he's going to be selecting his proxy. His  
11 method is that he will test and select his proxy with the assistance of Mr Economides.  
12 And that's because what everybody knows in these cases is we're not going to be  
13 regressing the MIF itself, we're going to be trying to do it via a proxy. So what really  
14 matters, and this is Mr Cook's point, is what is the right proxy. That's why the data  
15 itself will not somehow magically reveal --

16 **THE PRESIDENT:** Indeed. I think it seems to me quite likely that we are going to  
17 have a moderately major battle about the evidence that goes to the establishing of this  
18 point, what is and what isn't probative. I can see the need for that, but I would want to  
19 have the data collection process and the proceedings running on rails fairly clearly  
20 before we had such an application, because it seems to me that the economists are  
21 not going to be able to say with any great authority what is missing and what they  
22 cannot provide without that process having been embarked upon. So I see this as  
23 something happening, obviously it can't happen late in the day, but it seems to me it's  
24 probably a Marchish time of thing.

25 **MR MOSER:** Februaryish or Marchish. We could certainly embark on it, we're going  
26 to get the process going, we don't need this before then.

1 **THE PRESIDENT:** Absolutely.

2 **MR MOSER:** So the process starts now. The battle over industry experts, pricing  
3 experts, just to be realistic so there's no false expectations, is unlikely to be able to  
4 wait entirely until all the data is in, simply because it's a logically prior issue. So, for  
5 instance, Dr Trento can't articulate where he's starting from until he knows that he can  
6 use the assistance of a pricing expert.

7 **THE PRESIDENT:** Yes, I think this is why the process of expert engagement is so  
8 important, because what I'm discerning is that actually the need is not common ground  
9 amongst the economic experts; I may be wrong about that, but my sense is that  
10 actually there is not a common demand for pricing experts across all of the parties,  
11 and that being the case, that's why you don't have in the draft order that we are talking  
12 about an equivalent of paragraph 3. Everyone is accepting that one needs the  
13 economist experts, therefore you're going to get permission. We can see that there is  
14 going to be a need for a supply side Harman-like expert, but we've indicated the  
15 answer at the moment is let's see what Mr Harman needs before we give consent.  
16 The same I think is going to be the case here. We will consider the application in the  
17 light of the importance of the evidence that is being adduced for the issues, and in light  
18 of the proportionality or otherwise of the material that's going in. So you'll need to  
19 make the application from a position of strength rather than weakness, and at the  
20 moment, I know it's late in the day, but that's only because we've late in the day worked  
21 out how we're trying these things. We are going to have to get our feet pretty firmly  
22 under the table as to how this process is working in order to understand the  
23 reasonableness or otherwise of that application, but of course you do need to start  
24 thinking about it now, and I'm sure you've been thinking about it many months before  
25 then.

26 **MR MOSER:** Indeed. I like to think I'm making it from a position of strength, and to

1 | some extent in one way or another all the parties have to grapple with it.

2 | **THE PRESIDENT:** They do.

3 | **MR MOSER:** This is Mr Piccinin's ipse dixit point. If you look at one thing particularly  
4 | Mr von Hinten-Reed, concentrated on yesterday, but also the other experts, how to  
5 | identify the correct proxy, effectively. Everybody apart from Mr Coombs and Mr Holt  
6 | says expressly "This is really important, we have to identify a proxy". Mr Holt is the  
7 | only one who is openly doubtful, but in fact even Mr Holt and Mr Coombs of course  
8 | use a proxy, they use a costs-type proxy as well. So everybody is using a proxy, and  
9 | it's going to be necessary for the Tribunal to test that. Allianz has already said it may  
10 | be useful to have an industry explanation. That's exactly what we're saying, except  
11 | we're not saying it for one claimant, Allianz, we're saying it for all of the claimants  
12 | collectively by use of --

13 | **THE PRESIDENT:** Don't get me wrong, first of all I know that this is a hugely  
14 | significant issue. It hasn't gone unnoticed by any of us that most of the experts were  
15 | very keen to tell us what the answer to the issue was, rather jumping the gun. What  
16 | we're interested in is how we work out what the answer is, and on that basis there  
17 | seems to be a significant divergence between the parties. I can't say who's right and  
18 | who's wrong, because I don't think the exact way in which the point is going to be  
19 | established has been made, but it's obviously going to have to be resolved. To the  
20 | extent its resolution requires evidence, we will have to make orders in that regard as  
21 | well.

22 | **MR MOSER:** Indeed. I'm dipping my toe into it not to irritate --

23 | **THE PRESIDENT:** No, you're flagging what's coming down the line.

24 | **MR MOSER:** This is coming down the line, and it's coming down possibly faster than  
25 | one thinks, because Dr Trento will need it in March, so the process will have to start  
26 | some time in February, so it might be more February than March. But there it is.

1 **THE PRESIDENT:** That's absolutely fine. All I would say is we want all of these issues  
2 aired so that the battle lines are clear amongst the parties, specifically the economists,  
3 first, because if it were to be the case that there are other ways of slicing this particular  
4 issue, as clearly there seem to be, then those need to be considered in the background  
5 before we want to be troubled with it.

6 **MR MOSER:** That's right, and Mr Cook's expert has his own way of doing it, and so  
7 on.

8 **THE PRESIDENT:** Indeed.

9 **MR MOSER:** I'm going to sit down and come back with the dates when my learned  
10 friends have said what they need to say, if that's all right.

11 **THE PRESIDENT:** Yes, of course.

12 **MR LASK:** Sir, thank you, I can be quite brief. Allianz very much welcomes the  
13 Tribunal's proposed approach to Trial 2, as described yesterday and elaborated on  
14 today. We think it's right in principle and we think it's achievable in practice. I would  
15 like to emphasise three brief points if I may.

16 Firstly, as Mr Murgatroyd touched upon yesterday, insurance is somewhat different  
17 from other industries, not least in the way that prices are set by reference to complex  
18 statistical modelling rather than direct input costs. So we are grateful for the  
19 opportunity to adduce an insurance-specific analysis of pass-on, and Allianz are happy  
20 to be the primary source of evidence for the insurance sector. They are a significant  
21 player in the insurance industry and are well placed to play a representative role. It's  
22 worth noting that the experts have not to date identified any existing empirical studies  
23 relating to the insurance sector or publicly available data that would facilitate  
24 an empirical analysis without disclosure, but if those who are producing the UK-wide  
25 analysis wish to draw on the insurance sector, Allianz will provide what it can, and it  
26 will in any event be gathering it for the insurance-specific analysis that Mr Murgatroyd

1 intends to conduct. I echo the submissions of Mr Jones for Primark. Allianz doesn't  
2 intend to produce its own UK-wide analysis. We understand that any concerns as to  
3 the feasibility of responding to data requests are a matter for the mini CMCs and so  
4 we will address them in that context if and when they arise.

5 Just briefly on sectors, it won't surprise the Tribunal to hear that we can't agree to the  
6 12 sectors identified by Mr Coombs and set out in Mr Merricks' draft order because  
7 those sectors don't provide for insurance as a separate sector. It's worth being clear  
8 on why they don't provide for insurance as a separate sector. As we understand it, it's  
9 because Mr Coombs doesn't have the data. The entities that he relies on for the data  
10 he wants to use for his weighted averages don't identify insurance as a standalone  
11 sector. So it's for that reason that Mr Coombs' 12 sectors don't identify insurance  
12 separately, not because there is some substantive basis for lumping insurance in with,  
13 for example, financial services. We say that absence of data that Mr Coombs faces  
14 shouldn't prevent Allianz from advancing its case on an insurance-specific basis.

15 Two of the six Allianz claimants are insurance brokers rather than underwriters, Allianz  
16 Business Services Limited and Home & Legacy Insurance Services Limited. Broking  
17 only represents a small amount of the overall claim for Allianz, but, as  
18 Professor Waterson observed yesterday, it may raise different considerations to  
19 underwriting, and Mr Murgatroyd will consider that.

20 My second point is that, as he explained yesterday and as Mr Tidswell recalled this  
21 morning, Mr Murgatroyd is likely to require some qualitative factual evidence in order  
22 to produce a robust analysis. As will be well familiar to the Tribunal, qualitative  
23 evidence, whether in the form of documents or perhaps witness evidence, can assist  
24 in interpreting the data and informing modelling choices. To give you an example, in  
25 *Trucks* the qualitative evidence proved to be very important in enabling the Tribunal to  
26 reach a view on the relative merits of the experts' modelling choices.

1 So we welcome the Tribunal's indication that whilst it expects the data to do the heavy  
2 lifting, it will be supportive of properly justified proposals to rely on qualitative evidence  
3 where appropriate.

4 Mr Piccinin and Mr Simpson have been keen today to restrict the evidence very tightly  
5 to pure data, but as we understand it, the Tribunal's intention is that these sorts of  
6 disputes are again matters for the mini CMCs. In that respect, we welcome the  
7 indication that the Tribunal urges on the parties a pragmatic approach, namely that the  
8 experts or the parties don't need to apply to the Tribunal every time they wish to rely  
9 on a piece of qualitative evidence where that evidence is agreed to be relevant  
10 between the experts. It's obviously important, given the tight timescales to which we'll  
11 all be working, that the experts aren't forced to press pause on their analysis while  
12 waiting for the next mini CMC to approve their use of relevant factual evidence.

13 My third point, which I can deal with very briefly, is confidentiality. Whilst Allianz is  
14 happy to be the primary source of evidence for the insurance sector, some of that  
15 evidence will require protection. I can't be more specific at this stage, but we are  
16 mindful of the Tribunal's new Practice Direction on the management of confidential  
17 information, and will consider that carefully when making proposals.

18 Unless I can help the Tribunal further, that's all I intend to say.

19 **THE PRESIDENT:** Thank you very much.

20 **MR JONES:** Sir, I also want to make just a few short points on the topic of evidence  
21 and also peeping forward to the forthcoming CMCs, with hopes of helpful indications  
22 of where Primark thinks the debate may go and where we may be able to help.

23 On the question of data, we will produce the data that we are able to produce as  
24 speedily as possible. It will be highly disaggregated. Mr Ramirez yesterday described  
25 that to you. I heard Mr Simpson's request for data to be as disaggregated as possible.

26 That may be too blunt, because in --

1 **THE PRESIDENT:** I remember him saying that daily --

2 **MR JONES:** Daily, yes. You have the point, sir. We will, and I'm sure all claimants  
3 will take a sensible view on the cost disaggregation approach which is appropriate.

4 **THE PRESIDENT:** We want the experts to discuss it, and what we don't want is for  
5 unilateral views to be taken by any party. We want these views to be aired amongst  
6 the economists. We expect there to be really, certainly daily, quite possibly more than  
7 daily, communication between the experts, so that these issues can be sorted out.  
8 What we don't want is unarticulated disputes coming before us. We want very  
9 narrowly focussed issues upon which we can then give a steer.

10 **PROFESSOR WATERSON:** Can I just mention in relation to this point, and I hope  
11 the economists will take the same view as I do on this, that what's really relevant is  
12 the appropriate timing of decision-making from the point of view of aggregation. In  
13 other words, if decisions are taken monthly, then there will be no variation across the  
14 month, if you like. But if decisions are taken daily, then there will be variation, then  
15 daily data is the appropriate level of aggregation it seems to me. It's a question of  
16 what you can gain from the data that's available. In some cases, in the case of  
17 insurance, for example, it may be that decisions are taken during the day. You know,  
18 if I apply for car insurance at 9 am and I apply again at 5 pm, I might get a different  
19 answer, I don't know.

20 **MR LASK:** Frankly, sir, nor do I at this stage, but as I mentioned, I do know that there  
21 is complex statistical modelling involved, and that is something we'll obviously want to  
22 be able to explain to the Tribunal.

23 **PROFESSOR WATERSON:** Yes.

24 **MR JONES:** So those are very helpful indications which we will take away, and the  
25 parties will I'm sure work together cooperatively to find the best solution. There are  
26 going to be lots of factors. Frequency of decision-making may be one of them. The

1 availability of costs data might be another, because whether you want it daily for one  
2 but you only have it monthly for the other. The cost of gathering the data. There are  
3 all sorts of variables --

4 **PROFESSOR WATERSON:** That depends on your contracts position, if you like. If  
5 you contract weekly with suppliers, then you won't get any variation within the week.

6 **MR JONES:** Absolutely. With the data, we will provide what I'll describe as a data  
7 dictionary, which was also mentioned yesterday, which is standard descriptions of the  
8 data so the experts can understand it.

9 Apart from that data and data dictionary, we do also anticipate that it will be necessary  
10 to provide the experts and the Tribunal with an explanation of how Primark treats their  
11 costs in their formulation of prices, and you've heard a lot already about this. It is  
12 necessary to have that, we say, to feed into the analysis of the data and into  
13 an understanding of the sector. As Mr Lask said a moment ago, this takes us into the  
14 question of potential qualitative evidence. You have left that for future CMCs. I want  
15 to just say a few short points about how Primark sees there may be a workable path  
16 here in which Primark hopefully can play a positive role.

17 Firstly, that sort of material is, we think, something which would need to be supported  
18 by a statement of truth, so probably a witness statement or similar document. It's not,  
19 in other words, something that would come from the economists because it's client  
20 instructions to describe what the process is.

21 Secondly, we anticipate that it would be very brief, by which I mean a couple or a few  
22 pages at most.

23 Thirdly, of course, we fully understand that it will need to be debated at a CMC if it's  
24 not agreed, and perhaps even if it's agreed, we will need to show the Tribunal what's  
25 been agreed.

26 Fourthly, and this is why I'm saying Primark might be able to be helpful here, we will



1 produce ours as promptly as we can. I appreciate that we appear to have a bit of  
2 a head start on the data front over some of the claimants. We'd like to use that to  
3 benefit the procedure as a whole. It seems to us that if we can get our description up  
4 and running, others can look at it, add to it, take aim at it, we can debate it pretty  
5 promptly at a CMC. It perhaps goes alongside the point Mr Moser was just making  
6 about other expert evidence. Of course, they have a slightly different approach of  
7 wanting industry and pricing experts.

8 But, sir, that is our intention, to move forwards as quickly as we can and to bring that  
9 debate over qualitative evidence to the boil and to the Tribunal as quickly as we can.

10 **THE PRESIDENT:** Thank you. Mr Brealey.

11 **MR BREALEY:** I have nothing substantially to add. We know the process. Our glass  
12 is full for the moment. Unless the Tribunal have any questions for me, we know where  
13 we're going. I'm not sure Mr Piccinin is going to buy me a drink in March or April, but  
14 we'll cross that bridge when we come to it. But we know the process, we have to  
15 provide the data, and the Tribunal knows essentially that the Claimants here, their  
16 position on some degree of qualitative evidence, but that will be March, April,  
17 whenever it is.

18 **THE PRESIDENT:** Thank you, Mr Brealey.

19 **MR MOSER:** Sir, before lunch my team was tasked with seeking to agree maybe  
20 some different or the same dates for at least two points, as far as I'm concerned,  
21 positive cases and responsive cases. The position as at 2.25, because discussions  
22 did go on online further, is that everyone, with one exception I'll come to, seems to  
23 think that 19 July is the day for the positive cases. That is provided the joint experts'  
24 statement is moved back to 11 October. I suppose that may have a knock-on effect  
25 on the PTR as well.

26 **THE PRESIDENT:** Sorry, provided that we adjust 20 September to 19 October?

1 **MR MOSER:** No.

2 **THE PRESIDENT:** Sorry, I misunderstood then.

3 **MR MOSER:** What did I say that was wrong? I haven't come to that yet.

4 As my learned friend Mr Woolfe tells me, it's clearer if I say at the same time that the

5 same parties all say the responsive cases by 20 September.

6 **THE PRESIDENT:** Okay.

7 **MR MOSER:** And then 11 October.

8 **THE PRESIDENT:** I didn't say it this morning, but I'd actually put a line through

9 paragraph 19, not because we don't think that joint experts' statements aren't

10 sometimes useful, but the fact is how useful they will be in this case is likely to depend

11 very much on the nature of the positive and responsive cases that come in, and we

12 very much want, because we don't yet know the nature of the beast we're dealing with,

13 to have locked-down dates which are clear for deliverables that clearly will be needed,

14 and everything else we are more inclined to debate at some later date.

15 Similarly I had actually put a line through paragraphs 21 through to 24 of your very

16 helpful order, not because these things aren't necessary, but because we don't need

17 to waste brain power on them now.

18 **MR MOSER:** Fair enough. I should have said that there's an outlier. The one party

19 that didn't come back to us again is Merricks, and their last indication at lunchtime was

20 they prefer 28 June and 6 September. But as far as I'm aware, everybody else is

21 happy with 19 July and 20 September. I don't know whether Merricks ...

22 **MR COOK:** We're content with that.

23 **MR MOSER:** I'm grateful.

24 **MR COOK:** I might rise very briefly to make clear that my agreement is marginally

25 conditional on the basis of what has been talked about, by the claimants in particular,

26 about other evidence in whatever format that might come forward, and that may be

1 something where we would positively be saying as and when an application is made  
2 to adduce matters like that, that should come in essentially before the expert reports.  
3 But essentially that is very much just putting down a marker that when somebody  
4 applies for other material, we will have to consider that it might have to have a different  
5 date associated with it.

6 **THE PRESIDENT:** I think you can take it as a fairly clear indication that we are not  
7 very attracted by the idea of piecemeal positive cases or piecemeal responsive cases.  
8 The way we see this working is you get one date, it all goes in on that one date, and  
9 you need to make your applications for material consistent with an ability to provide it  
10 by then. These dates I think work, but they are remarkably tight, and that's why we  
11 were so keen to have this hearing in January rather than in March, which was the other  
12 date being floated, because frankly if we'd been hearing this in March, we would be  
13 adjourning Trial 2. Here we have a good chance of achieving Trial 2, but only if 19 July  
14 is seen as a pretty hard date, and whilst we think there might be room for a little bit of  
15 manoeuvre around both these dates, it is extremely tight, and all it does is underline  
16 the critical importance of cracking on with the data and working out what the data  
17 analysis requires by way of additional evidence in order to understand it, and what  
18 additional evidence over and above that is required, and the fact is we will be  
19 evaluating the admissibility or admission of such evidence in light of this extremely  
20 aggressive trial timetable. In a sense, it goes back to Mr Piccinin's point in his  
21 skeleton, where he identified, rightly in my view, the impossibility of doing a sampling  
22 exercise in the time frames allowed.

23 Now, we're well beyond sampling, we've jettisoned that, but the basic point that was  
24 made remains: we are very much in the room before the last chance saloon in terms  
25 of this case. We may even be in the last chance saloon. We will manage the matter  
26 accordingly, but we frankly expect all parties to regard these dates as reasonably hard

1 | dates which we would be quite reluctant to move unless we were assured that  
2 | a mid-November trial could be sustained in light of such a shift, and the fact is July  
3 | sounds a long way away from November, but it's only a long way away  
4 | from November if one forgets about the responsive case, and the responsive case is  
5 | very, very important. 20 September is extremely close to mid-November, and the  
6 | latitude is really very, very fine.

7 | So that is the framework in which all of this additional evidence is being debated, and  
8 | frankly, my response has been when someone like Mr Piccinin stands up and says  
9 | "We don't want any further evidence", my inclination would be to say, "Oh, you must  
10 | have some wriggle room", but when Mr Jones stands up and says "We have to have  
11 | all this extra evidence", my inclination is to say "Get lost, we're not going to do it". We  
12 | need to see the context, and that's why the structuring of matters by reference to  
13 | requests that are aspirational without being concrete is just not something that we're  
14 | really going to engage in. We are clear what the process is, we are clear what the  
15 | timetable is, we are not going to say anything more about admission, because it's  
16 | going to depend on what it is and how it fits into these somewhat immutable factors.

17 | **MR MOSER:** Very clear, and I'm grateful. One question: in the strikings out, was the  
18 | Tribunal also striking out our 20, which is the PTR, or is that something that could be  
19 | ordered?

20 | **THE PRESIDENT:** No, we retain that.

21 | **MR MOSER:** In which case, may I return to my previous submission that it be  
22 | 11 October, if we've moved the others, which was the suggested agreed date.

23 | **THE PRESIDENT:** That seems fine. So the week commencing the 14th.

24 | **MR TIDSWELL:** Monday is 7 October.

25 | **MR MOSER:** I've been given the date of 11 October. If that's not the beginning ... the  
26 | week of the 14th, I'm sorry.

1 **THE PRESIDENT:** That's understood. Yes, we should be locking in a PTR. And  
2 equally we liked paragraph 25, and we had no problems with 26 and 27.

3 **MR MOSER:** I'm grateful.

4 **MR BREALEY:** Could I just ask, on paragraph 2, are the mini CMCs to start now,  
5 I appreciate the Tribunal will be burdened with Trial 1, I just question when you would  
6 prefer ...

7 **THE PRESIDENT:** What we will do is we will seamlessly move from Trial 1 mini CMCs  
8 to Trial 2 mini CMCs. We have a PTR on Trial 1 tomorrow which we hope will mean  
9 that the mini CMCs in Trial 1 will not be needed, but we will have, and just because  
10 diaries are a little bit difficult because we've been doing it so far, we will have the next  
11 one in I think is it a week's time? It will be two weeks from tomorrow. So that will be  
12 the next mini CMC, but I think we will make it a Trial 2 CMC.

13 **MR BREALEY:** February, March, April.

14 **THE PRESIDENT:** Exactly so. We will try, and I think we will have a degree of  
15 success in moving it from the early morning 8 o'clock slot for the future. The next one  
16 will be 8 o'clock. After that we will try and get it to 10.30.

17 **MR BREALEY:** Thank you.

18 **MR MOSER:** That was two weeks from tomorrow?

19 **THE PRESIDENT:** Yes.

20 **MR MOSER:** I'm grateful. I don't know if there's anything more on dates? Yes,  
21 Mr Piccinin. Oh, not on dates.

22 If there's nothing more on that, on the basis that there is a little time, something that I  
23 was going to raise anyway, it's just convenient to raise now, it is something completely  
24 different, there has been correspondence, including correspondence copied to the  
25 Tribunal, about volume effects, you may recall. I could take you to it.

26 Volume effects were identified in the course of expert discussion, we see that in the

1 joint expert statements at page 3878 of the bundle. I needn't turn it up, it's a matter of  
2 fact. There's no application for a specific amendment, but we have written, and other  
3 claimants also have written, to the Tribunal to seek permission in principle to amend  
4 in volume effects as an issue to happen at a convenient moment alongside other  
5 amendments. There has been no objection from the schemes about this, so there has  
6 been agreement in principle that we can amend it in at a convenient point. It is  
7 a matter that, in my submission, follows axiomatically if you're starting to talk about  
8 pass-on and you move away from a position where there is no pass-on, if there is  
9 some pass-on, then there may have to be a consideration of volume effects. No doubt  
10 the schemes will say no, there doesn't have to be, or something, but at the moment  
11 we would be grateful for an order in principle that this may proceed. It won't affect  
12 matters. There is the --

13 **THE PRESIDENT:** This is a Trial 3 issue, is it?

14 **MR MOSER:** It is, essentially, yes. But there is the issue about disclosure, so the  
15 same sort of disclosure ought to go to volume effects. It might be convenient for that  
16 to proceed in parallel. I could take you to the exchange of letters, but the letters simply  
17 say what I've just told you. So I seek an order in principle that we be allowed to amend  
18 in volume effects, and then we can see where that takes us as far as cooperation  
19 between the parties is concerned.

20 **MR PICCININ:** Sorry, I'm not clear what order you were seeking, an order to amend  
21 what?

22 **MR MOSER:** An order that we have permission in principle to amend into our claim  
23 forms the issue of volume effect, which I think we've written to your solicitors and  
24 there's no objection.

25 It's also agreed that this is not a matter for Trial 2.

26 **THE PRESIDENT:** Okay. I'm detecting a degree of consensus here. In that case,

1 | yes.

2 | **MR MOSER:** I'm most grateful. You see how the cooperation is working, it's beautiful.

3 | **THE PRESIDENT:** It's almost infectious.

4 | **MR MOSER:** I have nothing further, I'll just check.

5 | **THE PRESIDENT:** Mr Piccinin.

6 | **MR PICCININ:** I'm very sorry.

7 | **THE PRESIDENT:** Not at all.

8 | **MR PICCININ:** I just have a couple of concerns that arise really from remarks of some  
9 | of my friends on the far left, if I can call them that, which dovetail with some of the  
10 | observations you've just made, sir.

11 | The first point is we can see a storm brewing quite soon on this critical issue of what  
12 | additional evidence is going to be admitted. That's going to be a very important issue.  
13 | There's already been quite a lot of ink spilt on it in the skeleton arguments for this  
14 | hearing, but I understand we're obviously not going to decide it today, but my concern  
15 | is that that CMC at which it is going to be decided is going to have to be soon, and  
16 | there are really two points about it --

17 | **THE PRESIDENT:** When you say it's being decided, do you mean the evidence that  
18 | is required?

19 | **MR PICCININ:** That is what I mean, yes, sorry. Not the substantive issue of which  
20 | proxy is best, not that at all, but the question of what evidence will be admitted. The  
21 | trial is going to have to be decided quite soon, and that's the position upon which there  
22 | has been quite a bit of ink spilt. That is quite an important issue, and we are concerned  
23 | that if it gets relegated to a short mini CMC, which will be attended only by junior  
24 | counsel --

25 | **THE PRESIDENT:** No, we're not going to decide a point of that importance at a mini  
26 | CMC. I would like us to get a feel for how the data collection exercise is running, and

1 | what the economists can say about the data they have seen in order to get a feel for  
2 | this very significant issue. The fact is I know that the parties have been thinking about  
3 | this for some time, but the fact is we, the Tribunal, have been thinking about how do  
4 | we actually get this case to trial, and I think you need to understand that our mindset  
5 | before we began yesterday was that I actually didn't see how we could try it, and we've  
6 | now got to a stage where we have a narrowing of the problem issues from a generic  
7 | one of "I don't see how this can be done" to we now have a series of rather narrower  
8 | points which need to be addressed. This is one I do want to think about quite carefully,  
9 | the process having bedded down, because it is quite an interesting philosophical  
10 | question in terms of how a known unknown which has to be proxied, which can be  
11 | proxied, except in two ways which result in radically different outcomes, but where  
12 | because you can't see what's going on, because you need to use proxies, you can't  
13 | actually choose very easily between one or the other, is a very difficult question. We  
14 | can see that there may be some scope for saying that subjective evidence as to how  
15 | it's done, how it's treated, matters, but I must say that seems to me to run great risk of  
16 | unravelling the moment one starts assuming that there is a profit-maximising thinking  
17 | going on behind any rational undertaking.

18 | **MR PICCININ:** Yes.

19 | **THE PRESIDENT:** So I'm not sure how far the subjective question takes us.

20 | **MR PICCININ:** No.

21 | **THE PRESIDENT:** That takes you to a theoretical stance. So we may well be left  
22 | with a situation where it is actually a situation where it becomes an evidence-free  
23 | zone. I imagine you might quite easily stipulate, Mr Piccinin, that you were prepared  
24 | to argue about this at trial on the basis of an assumption that, provided it wasn't  
25 | conceded but open for argument that there was a subjective intention to classify this  
26 | particular cost in a particular way, the argument could be on the basis that that was



1 true but irrelevant, and we would debate the question of theory versus subjective  
2 intention and which were to prevail. That might be the way to do it, rather than getting  
3 in all the evidence about subjective intention when the argument is in fact it doesn't  
4 matter two hoots. That is perhaps something the parties ought to take away to think  
5 about and to see whether there isn't some other information that can't objectively  
6 enable us to resolve matters, because if it is simply a question of economic theory  
7 versus subjective intention, then it may be we decide it in the abstract and then we get  
8 the evidence to follow.

9 **MR PICCININ:** Yes. All I wanted to say about this topic right now is just that --

10 **THE PRESIDENT:** It needs to be done sooner rather than later.

11 **MR PICCININ:** But also at a CMC that can be attended by --

12 **THE PRESIDENT:** By leading counsel.

13 **MR PICCININ:** By leading counsel.

14 **THE PRESIDENT:** I accept that.

15 **MR PICCININ:** The one further point about that of course is we're about to commence  
16 Trial 1 and there will therefore need to be some flexibility in the way that it is listed, so  
17 it can be listed in a way that parties can actually attend properly and prepare  
18 submissions. I don't need to say more about that.

19 **THE PRESIDENT:** No, you don't. What I think the parties need to think about is less  
20 the argument about admissibility of evidence, I think that is actually a red herring.  
21 What the parties I think need to think about is how one is going to, in a manner that  
22 one can explain in a judgment, articulate which proxy is to be selected, and the  
23 question is, is it a two-sentence answer or is it something that can be unpacked further.

24 **MR PICCININ:** Yes.

25 **THE PRESIDENT:** So what I'd like you to think about is, is there any other form of  
26 process or evidence to look at which enables you to make submissions more than "it's

1 a matter of theory" versus "it's a matter of subjective treatment or intent", and as  
2 a non-scientist, I hesitate to use a scientific analogy, but it's like scientists trying to  
3 work out whether the Higgs boson exists; what you're doing is not looking for the Higgs  
4 boson, but looking for the traces that it makes in other particles in order to understand  
5 its true nature. It may be that that is the sort of analogy that we ought to be applying.  
6 What would one expect to see in the manner in which the entities before us are doing  
7 business which shows that they must have treated the unlawful overcharge,  
8 untrackable and untraceable as it is, in a certain way rather than in a certain other way.  
9 That is something which I think bears a degree of thought. It's an interesting and very  
10 difficult question, absolutely needs to be argued by leading counsel, because it is very  
11 significant in terms of bottom line at the end of the day, but beyond that I think today  
12 we cannot go.

13 **MR TIDSWELL:** May I just add a thought. This is just a thought and it's really  
14 designed with consideration of the point the president has just made, and I suspect  
15 some of you have thought of it already. It seems to me that some scrutiny of the  
16 possible outputs from the data might help us in framing how we go about resolving this  
17 point. By that I mean presumably in choosing a proxy there are a number of different  
18 options, and options that are chosen will produce different answers, and the difference  
19 between those answers may be great or may not be great. Also the selection of the  
20 proxy may be more visibly open to criticism or less visibly open to criticism. That might  
21 depend a little bit upon what's being said about the reasons for it.

22 But to take an example, if there's something which is fundamentally very different from  
23 the character of the MSC, then one might quite easily say "That doesn't appear to be  
24 a very good proxy and I would prefer a different one", and there are lots of reasons  
25 why it might or might not be the same, but all that suggests that if the experts have the  
26 data and are able to experiment a little bit with the proxy and think about how they

1 might correspond with the MSC, this might be a more productive discussion rather  
2 than if it happens before that. I appreciate there's a bit of chicken and egg there  
3 because the experts have to write their reports, but I think I'm really endorsing  
4 an observation made by the president earlier that it's not necessarily a good thing to  
5 try to resolve all these points before people have had a chance to look at the data,  
6 where the data might actually help us quite a lot in deciding how to deal with them.

7 **MR PICCININ:** I can see the merit of that suggestion, sir, absolutely. The only issue  
8 that immediately comes to mind is that then you're not talking about February  
9 or March.

10 **MR TIDSWELL:** I appreciate that. I'm just putting it in the pot for consideration. I'm  
11 not saying it's the overriding point, but actually, just to take an example, it might well  
12 be that once people have looked at the data it might not make a lot of difference that  
13 proxies are to be offered up.

14 Now, one rather assumes that in those circumstances someone might find another  
15 proxy, I don't know, but there is going to be a limit, isn't there, as to the extent of the  
16 proxy cost that can be chosen that could be said to correspond with the MSC, and  
17 there does seem to be a certain futility about arguing about that without really knowing  
18 how big the gap is between them.

19 **MR PICCININ:** Yes. The one qualification to that that I would give is from what we've  
20 already seen in the extensive economic opinions that have been expressed in the  
21 reports, there is a fairly sharp divide between the economists who say that what you  
22 need to do is analyse the MSC in the way that an economist would analyse it,  
23 consistent with decades of orthodox economic theory, and say, well, look, it's  
24 a variable cost.

25 **MR TIDSWELL:** That's the theory point. The point I'm making is if you run your  
26 regression on two different proxy costs, at the moment we have no idea what the

1 difference of those outcomes would be. If someone were to choose a proxy cost -- to  
2 take an example, I think Mr Jones is setting up his argument that it's going to be part  
3 of, I think it was referred to by Mr Ramirez as the MSC being warehouse and admin  
4 cost and overhead somewhere, and no doubt it's going to be said that therefore some  
5 other proxy costs and admin and overhead is what you would look at. Now, it would  
6 be quite useful to know what it looks like when that's been done compared with the  
7 way Mr Holt is doing it before we have a huge argument about which of those is right.  
8 I absolutely understand the chicken and egg point. I'm not suggesting you wait until  
9 trial to do this, or indeed that it's something we can leave so late that the experts don't  
10 have some sense of what they're doing going into the July reports, but I do wonder if  
11 a little bit more knowledge might be helpful.

12 **PROFESSOR WATERSON:** Could I just illustrate perhaps with an example which  
13 may or may not be helpful, you can tell me. Supposing, just for the sake of argument,  
14 one uses a change in VAT as an example of a proxy. Following that change in VAT,  
15 just to make it simple, you see no change in prices, but you see a reduction in costs  
16 which appears not to happen for any other external reason, then I think that that would  
17 be consistent with the idea that suppliers are having to absorb this.

18 **MR PICCININ:** Or are engaging in supplier pass-on, would be the other explanation  
19 to that.

20 **PROFESSOR WATERSON:** Yes.

21 **MR PICCININ:** But yes, VAT is one of the proxies that have been canvassed between  
22 the experts in the joint statements. I think that's probably one for this further day's  
23 discussion.

24 The other point I just wanted to raise, which relates to the same category of evidence,  
25 is that I'm afraid again on my far left there has been a degree of backsliding from this  
26 Tribunal's finding on legal causation in the July 2022 judgment. That's something I'm

1 very concerned about for two reasons. One is just in principle, when things are  
2 decided it's very important that we move on from them and build on them rather than  
3 go back and do it all again. It's hopelessly inefficient.

4 The other point is that this argument about legal causation raises the prospect of a kind  
5 of "gotcha" moment at trial, where everyone has been proceeding on our side on the  
6 basis of the determination that's already been made by the Supreme Court and then  
7 been interpreted by this Tribunal back in 2022, and then we arrive at trial and it's said,  
8 ah, well, well done, you've proved there was factual pass-on for Primark, but that  
9 doesn't qualify as legal pass-on if you can't show that the MSC was in a category of  
10 costs that the price setters have been looking at when they made their decisions.

11 If I can just show you where this arises in the skeleton arguments, so you can -- you've  
12 clocked that already. It's paragraph 24 of the Primark skeleton. As I say, I am  
13 concerned about that, that's not a point that we can let slide all the way through to trial,  
14 certainly not, for the reason that I've just given.

15 I expect you're very familiar with your own judgment in July 2022. I don't know if it's  
16 helpful for me to go through that again but --

17 **THE PRESIDENT:** Well, not at 3.25. We have to have a transcriber break. I think  
18 you need to think about how the point is to be brought to a head.

19 **MR PICCININ:** Yes.

20 **THE PRESIDENT:** It seems to me that you ought to frame it as a strike out application,  
21 and the relevant bits of the ... well, I hesitate to say pleadings, because I don't really  
22 want this focussed on the pleadings, but I'm sure we can find a way of making clear  
23 that this point either can or cannot be run, and if we've decided it with no wriggle room,  
24 then we've decided it and that's that. If there is wriggle room, and I anticipate that that  
25 will be the position of the parties who have taken the point, then that needs to be  
26 articulated.

1 **MR PICCININ:** Yes.

2 **THE PRESIDENT:** We would be very happy to have a process -- there's no evidence  
3 needed on this -- of an exchange of written submissions in a brisk but not too brisk  
4 style, and we'll decide it on the papers.

5 **MR PICCININ:** Okay. I understand that, and we can work with that. The only point  
6 is that does need to be done quickly, because that has profound implications for the  
7 evidence that needs to be brought at trial.

8 **THE PRESIDENT:** Why don't you propose a process with those who are taking this  
9 point, see if you can agree a process. If not, then that is a matter which we can deal  
10 with at a mini CMC.

11 **MR PICCININ:** As to what the process is, yes.

12 **THE PRESIDENT:** As to what the process is. Again, if it has to be argued, we accept  
13 that set piece applications need to be dealt with outside the mini CMCs, we can't put  
14 KCs completely out of business after all, that would be retrograde step and we don't  
15 intend to do that.

16 Just moving back, though, to your first question, the proxy question, and which proxy,  
17 and it's really a question of which proxy. Let's assume that the data tells us nothing,  
18 contrary to the point Mr Tidswell was raising, and let us assume that it is the consistent  
19 position of all economists that they have nothing to say on the point, except for what  
20 economic theory says.

21 **MR PICCININ:** I'm sorry, sir, could you repeat that, I'm just struggling a bit.

22 **THE PRESIDENT:** Let's assume the data tells us nothing, and let's assume that one  
23 has an argument that an economist is proposed to subscribe to, which is on economic  
24 theory, the appropriate proxy is X, but it is purely and simply an abstract thesis based  
25 upon economic theory, with no more than the economist's opinion to support it, and  
26 then against that one has the assertion, which I'm sure could be backed up by

1 evidence, but the assertion that it is how the individual claimant accounts for it which  
2 is set against economic theory, and one has those two opposing lines.

3 If that is the case, making that assumption, first of all, can the question of fact, what  
4 the subjective intention was, await the determination of whether it actually matters? In  
5 other words, you allow the evidence gathering of intention to await the finding of  
6 whether it matters or not, the first question.

7 Secondly, assuming that that is right, and assuming that it is, as a counterweight to  
8 that, only the question of economic theory, if we don't accept economic theory and we  
9 don't accept the relevance of individual subjective intention, is it simply a matter that  
10 the Tribunal has to decide more or less in the abstract, based upon argument? I mean,  
11 what other evidence is there?

12 **MR PICCININ:** Yes, those are very interesting questions, sir, and it's a bit difficult for  
13 me to answer them now. I would just say this: I think I know what you mean, but I don't  
14 accept the characterisation of it as pure economic theory in the abstract, and nor do  
15 I accept the previous phrase that you used, which I think was "evidence-free zone."  
16 That's not Mr Holt's approach, and that's not what Visa has been advocating at all. On  
17 the contrary, there is orthodox economic theory about which types of costs are passed  
18 on and to what extent and what matters, and basically where that takes you to is to  
19 the question of is it factually a variable cost, and is it factually incurred on a relatively  
20 homogenous basis between competitors in the market? Those are factual questions,  
21 so Visa is not advocating for the application of economic theory in the abstract.

22 **THE PRESIDENT:** Yes, all right. I think I regard that as merely a rather long winded  
23 way of saying "pure economic theory".

24 **MR PICCININ:** In that case we're talking about the same thing. But the question of  
25 whether the MSC is variable or not is a factual question, it has an obvious answer, but  
26 it is a factual question.

1 **THE PRESIDENT:** I think that that is actually oversimplifying, because labels are  
2 extremely unhelpful, and at the end of the day a variable cost is actually not really  
3 a factual statement, it's a statement of judgment about what is a cost, and we are back  
4 into economic theory. We may have different views as to what the label "economic  
5 theory" means, which I think is all it is. I'm not saying that if and when Mr Holt gives  
6 evidence on this, he says "I'm an economist, and this is the proxy, thank you very  
7 much." He's obviously going to have to say far more than that. But that's what I mean  
8 by "abstract economic theory".

9 **MR PICCININ:** Yes, I thought that's what you meant, I just wanted to make sure.

10 **THE PRESIDENT:** One doesn't have the ability in the economist to say, "This is my  
11 theoretical answer, and by the way, if you look at this data, you can see that I'm right".  
12 The beauty of a bigger cost that is being passed on is that you can say economic  
13 theory dictates X, and if you look at the data, I'm right. So you can do the triangulation  
14 which we've been banging on about for two days.

15 **MR PICCININ:** Absolutely.

16 **THE PRESIDENT:** So what do we do in a triangulation-free zone, assuming we don't  
17 buy into the, "Here is how as a business we do it" approach? Well, the answer has to  
18 be we listen to the theory, we listen to the argument about whether how a business  
19 organises itself matters, and we decide it, and it becomes a remarkably short point.

20 **MR PICCININ:** Yes. That is the approach that we've been advocating on our side.

21 **THE PRESIDENT:** But it may be that we can short circuit the difficulties by saying  
22 that we have the argument about whether you're right or not, and we bring in all of the  
23 business-specific how one handles the costs matters after we've decided whether it  
24 does matter. If that's the way we do it, unless there's other ways of deriving an answer,  
25 then it becomes not simple in terms of outcome, but rather easy in terms of process.  
26 But I see, Mr Brealey, you're on your feet.



1 **MR BREALEY:** Easy in terms of process, but I'm afraid Mr Piccinin has to live with it.  
2 If he's going to exclude the facts and just go economic theory, and he rocks up in  
3 November and he doesn't prove his case, because the legal burden of proof is on his  
4 client to prove pass-on, he loses. We don't go back another time and say, "Oh, well,  
5 it does matter now, and we're going to have a trial in 2025." That's why he has to be  
6 very careful what he wishes for. Because if they're wrong, and economic theory does  
7 not show on a balance of probabilities that there was any pass-on, then he loses.  
8 I would just add, it's quite unfair for him to say we want facts, we want the data, but  
9 we don't want facts which explain the data. It just doesn't seem right to us, and there  
10 has to be some flexibility in this trial which allows the merchants to explain the data.  
11 That is not the sort of trial we had in Sainsbury's, but the merchants have to be allowed  
12 to explain how the data should be interpreted and where the costs go.

13 **THE PRESIDENT:** Mr Brealey, certainly no-one is saying that that isn't the case, but  
14 the question is, if the explanation is simply inherent in the expert economist's reports,  
15 then you're home and dry, you have that.

16 **MR BREALEY:** Yes.

17 **THE PRESIDENT:** The question -- it's back to Mr Tidswell's point about what does  
18 the data teach us -- is what does one do in order to explain the data, and we've already  
19 said several times, but I will say it again, we will consider that in light of the nature of  
20 the explanation that is being delivered, because we are keen to understand what the  
21 data is, we're not keen to have by the back door, and I'm sure you don't have this in  
22 mind, a self-serving justification that gets you home on this rather difficult question.  
23 So that is a borderline we know exists, and we are going to have to grapple with it, but  
24 not today.

25 **MR BREALEY:** No.

26 **THE PRESIDENT:** What I'm getting at, though, is that if you are right, and a light gloss

1 over the pure figures that are produced actually produces an answer, well great, we're  
2 home and dry. I think Mr Piccinin's point is that won't be enough, and what does one  
3 do in order to resolve the question beyond that? We're not going into a detailed  
4 subjective parsing of intention or business structure. We will be very happy to evaluate  
5 the question of what the data teaches us with a permitted gloss, if we permit it, but if  
6 that is all that's to it, then we actually are very close to resolving the process, we just  
7 haven't resolved the substantive answer, but that is a matter for trial.

8 **MR BREALEY:** It is, yes.

9 **THE PRESIDENT:** So I do think the parties need to be quite clear what actually it is  
10 that they are actually asking for in terms of the run up to trial. I know what you want,  
11 whether you get it or not depends on how much you're pressing for. I know what  
12 Mr Piccinin wants, he wants a nice canter through what is a variable cost and what it  
13 means.

14 **MR BREALEY:** And profit maximising and that's it, two sentences.

15 **THE PRESIDENT:** We're very happy to have an economic debate, I'm excited  
16 already.

17 **MR BREALEY:** All I'm saying, Sir, is that if Mr Piccinin and Visa come to court  
18 in November and say, "It's all about economic theory", and the merchants are being  
19 shut out from factual evidence about how the costs data should be interpreted, and  
20 we find out that actually all the costs analysis, the regression, doesn't amount to a row  
21 of beans, doesn't tell you anything, then they lose, because the burden of proof is on  
22 them.

23 **THE PRESIDENT:** Mr Brealey, that is putting not quite what I was saying.

24 **MR BREALEY:** No, but that's my submission.

25 **THE PRESIDENT:** If that's the course that Mr Piccinin takes, then fine, but at the  
26 moment we are in a situation where you have the data in, provided it meets the criteria

1 that I articulated yesterday, you don't have the gloss in, so actually the ball is in your  
2 court to work out what it is you're producing. But I've heard all three of you say -- well,  
3 you didn't, but your colleagues did, "Oh, we can produce witness statements,"  
4 et cetera et cetera. That I internalise as saying yes, this is definitely a no, we'll see  
5 when the material actually is produced, whether it goes in or not, and the parties know  
6 what our attitude will be on that.

7 But the question, which seems to be resolving itself, is that I'm not sure that there's  
8 much substance to the application that Mr Piccinin is quite rightly saying needs to be  
9 made, because we know the limits on each side of the evidence. There's a massive  
10 gap which can only be filled by the judgment of the Tribunal.

11 **MR BREALEY:** So if, for example, our expert report says that data set is not worth  
12 a candle, because it doesn't consider this, this, and this, then I come back to my  
13 submission that they haven't discharged their burden of proof.

14 **THE PRESIDENT:** What I think the parties need to take away from this is actually  
15 a very precise framing of what the question is that is being decided, because what  
16 you're very cleverly inserting into the equation is the notion that your experts can go  
17 away and say the record before the Tribunal at the substantive trial was incomplete,  
18 and I'm not sure that you will be permitted to make that point, because the whole point  
19 of this process is to procure a complete record.

20 To be clear, when we have this row about admissibility, we're not going to be very  
21 interested, if we resolve it against you, for you to say, "Ah, well, that resolution means  
22 that we can now say that the gap was so probative that the Tribunal got it wrong and  
23 therefore the whole decision needs to be revisited". That's not what we're doing. If  
24 we exclude the evidence, it will be because it isn't probative in the light of this way of  
25 trying matters.

26 **MR BREALEY:** I understand that.

1 **THE PRESIDENT:** So it all comes back to the nuts and bolts of what it is that you  
2 want to bring in in order to make the case good, and we've made absolutely clear that  
3 we are not doing a case by case line, we are doing something which is on the statistics.

4 **MR BREALEY:** Ocado will be representative, a large retailer.

5 **THE PRESIDENT:** Exactly. So let's see what happens. If you can make that case  
6 good in that way, then it's going to be weight of factual evidence versus weight of  
7 economic evidence. That's great, we can deal with that. But again, I'm not sure what  
8 is the subject matter of a major debate. It may be that the major debate is we would  
9 like to get in evidence that we're not permitting to get got in, well, of course. If that is  
10 something that needs to be resolved in order for there to be a fair trial, of course we'll  
11 resolve it.

12 **MR BREALEY:** Okay. I think I've made my point.

13 **THE PRESIDENT:** No, it's been extremely helpful, this debate, because it's unpacked  
14 again from a legal standpoint what was the issue from an economic standpoint  
15 yesterday, and we have a way forward. We don't have a resolution of the critical  
16 points. We probably don't have a resolution of the evidential points. The betting on  
17 my part is that the resolution of the specific evidential points is precisely that. It will be  
18 context-specific and context-driven. If that's wrong, then we're probably adjourning.

19 **MR BREALEY:** I come from a gambling family, so ...

20 **THE PRESIDENT:** I'm glad one of us does. I'm grateful to you.

21 **MR COOK:** 15 seconds, sir, just simply to say that Mastercard obviously sits both  
22 literally and figuratively in the middle of that debate, which is the reason why we accept  
23 some of that kind of material will be desirable, so we are not on the wrong end of that  
24 kind of submission, that says we failed to do exactly the thing which we need to actually  
25 address. I appreciate, obviously, if the Tribunal rules out evidence entirely, then those  
26 submissions won't stand, but that's why we do sit in the middle.

1 **THE PRESIDENT:** The Tribunal has to exercise, quite clearly, the closest control over  
2 a process which inherently involves large numbers of, in this case, claimants. That is  
3 both a benefit, in terms of procedure and data availability, and a disbenefit, and we  
4 have to triangulate between those two extremes, which is why the single answer from  
5 different directions that both sides have been seeking to foist upon us won't do. It's  
6 too simple.

7 So we have I think a process for resolving matters. That isn't to say that the matter is  
8 straightforward, but it does seem to me that the parties do need to consider exactly  
9 what issue needs to be framed for decision in terms of application of evidence,  
10 because at the moment I'm not sure there is one. I think I see the granular problems  
11 on this side. There's no problem in having the economic argument at trial. Do we  
12 need anything more than that?

13 **MR PICCININ:** No, sir, the way it will arise is when someone somewhere to my left,  
14 not just the far left this time, makes an application to adduce some form of evidence  
15 other than an expert economic report. That's when it's going to come, and that's the  
16 hearing that I was asking, and I think everyone's agreed now, will be a substantive  
17 hearing.

18 **THE PRESIDENT:** You can take it that this Tribunal will do its level best to ensure  
19 that the matter is determined in a way so as to ensure an effective Trial 2. That's  
20 obviously cardinal.

21 **MR PICCININ:** Yes. I think we've taken this as far as possible.

22 **THE PRESIDENT:** I think we have. It's been a helpful debate, but we're hitting  
23 groundhog day.

24 What we'll do is we'll rise for ten minutes, enable a transcriber break. If there's  
25 anything more, we can deal with it then. I'm not expecting there to be very much, but  
26 we will rise for ten minutes to enable you to consider that.

1 **MR COOK:** Sir, I apologise. I think, looking around, that none of us think that there  
2 is anything else. If we were to agree on that ...

3 **THE PRESIDENT:** Are you going to make more than two seconds to agree that?  
4 There's nothing.

5 In that case, we stand adjourned until the first mini CMC. Thank you all very much.

6 **(3.47 pm)**

7 **(The hearing concluded)**

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