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4 record.

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

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

7
8
9 Salisbury Square House
10 8 Salisbury Square
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12 Thursday 21st March 2024

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

19
20 **MERCHANT INTERCHANGE FEE PROCEEDINGS**
21 **And**
22 **WALTER HUGH MERRICKS CBE**

23
24 v

25
26 **MASTERCARD INCORPORATED AND OTHERS**
27
28 **HEARING (LEGAL CAUSATION)**

29
30 **A P P E A R A N C E S**

31
32 Ben Lask KC (instructed by Pinsent Masons LLP) on behalf of Allianz

33
34 Tom Coates (instructed by Hausfeld & Co LLP) on behalf of Primark

35
36 Mark Brealey KC (instructed by Mishcon de Reya LLP) on behalf of Ocado

37
38 Oscar Schonfeld (instructed by Stephenson Harwood LLP and Scott & Scott UK LLP) on
39 behalf of the Stephenson Harwood and Scott & Scott Claimants

40
41 Laurence Rabinowitz KC & Aislinn Kelly-Lyth (Instructed by Linklaters LLP and Milbank
42 LLP) on behalf of Visa

43
44 Owain Draper (Instructed by Jones Day and Freshfields) on behalf of Mastercard

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Proceedings

(10.30 am)

THE PRESIDENT: Well, before you begin, I will give the usual live-stream warning. As you can see, these proceedings are being live-streamed on our website and a transcript will be produced, along with an official recording. I would like no one else to either transmit, photograph or record, whether by audio or visual means, these proceedings and it would be a breach punishable by contempt for that to take place. But with that, can I say that we have read the very helpful Visa submissions. We have looked at the correspondence from the other parties and we have read in around that. It did seem to us, but we are in the parties' hands., given that Visa's position is very well and fully set out, Mr Rabinowitz, whether it might be helpful first to hear from the claimant groupings. I don't know whether there is a running order here but it may be that we ought to hear first from, as it were, the non-SSH claimants, because you are, as it were, later joiners and see where we go from there. I don't want to deprive anyone of the first word.

MR RABINOWITZ: My Lord, we are in your hands and that with respect seems, given that we have set out our position very clearly, I was just going to take you through the judgment but it is your judgment and I apprehend the Tribunal knows what it says very well so I am very content to hear what the respondents say.

THE PRESIDENT: Well, Mr Rabinowitz, unfortunately anything that shows gaps in our knowledge you can flesh out when you do get to plead. So let's proceed in that way.

MR RABINOWITZ: I am grateful.

Submissions by MR BREALEY

1 THE PRESIDENT: Mr Brealey, are you taking the lead on this?

2 MR BREALEY: That is always a bad sign. Always a bad sign. So the claimants were
3 going to divide up, we have an hour, so I was going to kick off and then I think Mr Lask
4 for Allianz and then I think Mr Coates, then Mr Schonfeld will wrap up for the SSH
5 claimants. So there are four of us. I don't want to, obviously, duplicate proceedings
6 and as much as has been said it is slightly presumptuous of us to say what the Tribunal
7 intended. But what I would like to do is make some headline points on how the
8 Tribunal looked at proximate cause in the May hearing. Because we say when one
9 looks at the pages, and we can't get into the Tribunal's mind of course, but when one
10 looks at the pages and the background we say that Visa is not excused from having
11 to prove a sufficiently close causal link.

12 So with that in mind, could I go -- and I don't know if you have the hard copies there?

13 THE PRESIDENT: Yes.

14 MR BREALEY: It would be -- they are slightly oddly listed but it is volume 1, file 1, and
15 I want to look at some documents in volume 1, file 1, which is the pleadings and the
16 judgments. The pleadings and the judgments. So it is volume 1, file 1.

17 THE PRESIDENT: Volume 1, file 1. Which tab?

18 MR BREALEY: So if we go to tab 18.

19 THE PRESIDENT: Now, I have the claimants' request for further information.

20 MR BREALEY: Yes. That is exactly it. As the Tribunal will have seen, we gave three
21 reasons in our skeleton as to why Visa is not exempt from having to prove a sufficiently
22 close causal link. What I would like to do is concentrate on the third one, which is how
23 the Tribunal approached proximate cause, because you may not have seen in Visa's
24 skeleton how they actually address it. It is actually quite silent as to how they address
25 our third point, which is that going forward the Tribunal clearly envisaged some
26 evidence on proximate causation.

1 So on tab 18, this is the Pendragon case. But the request is exactly the same in
2 the Dune proceedings. I mean, I can give you the document if you want, but it is in
3 exactly --

4 THE PRESIDENT: No. No. We will look at the example.

5 MR BREALEY: It is paragraph 96 of Dune and here it is paragraph 75. It is important
6 to recognise that these pleadings were in the bundle before the Tribunal in the May
7 hearing. So what has happened is there has been a one sentence allegation in the
8 defences of pass-on. You have not suffered any loss because you have passed it on.
9 It was one sentence. What the claimants have done here is referred to NTN
10 Corporation v Stellantis and we will go through it:

11 "The burden of proof when pleading causation is on the defendant to demonstrate that
12 there is a legal and proximate, causal, connection between the overcharge and the
13 act of mitigation." , that this connection is "realistic", "plausible" et cetera. Then it goes
14 on to say that all that Visa has done is say:

15 "The Claimants passed on any such overcharge to their customers", that is the one
16 sentence in the defence, "without providing any plausible factual basis for that
17 allegation. Please therefore particularise precisely the factual basis for the plea at
18 paragraph 75", or 96 of Dune).

19 So then what happened, and again that is before the Tribunal and we will come on to
20 how the Tribunal looked at this. If we go to tab 19, we see here how Visa give
21 particulars of the factual -- and I emphasise factual basis -- for the causal link. So we
22 will take this slowly, since I am going first. So Visa's response to the claimants' request
23 for further information. Now, the claimants ask Visa to particularise precisely the
24 factual basis for the plea that the claimants passed on any overcharge to their
25 customers. Then pending disclosure, Visa responds as follows.

26 We will go through it but we will see the very familiar statements of economic theory

1 and regression that the Tribunal has seen on many occasions in Holt number 5 and
2 Holt number 7. So, for example, paragraph 1 refers to the MSC being a variable cost
3 incurred in the ordinary course of business. That is paragraph 1. Paragraph 2 sets
4 out that it is a common cost and, again, the Tribunal will start to get familiar with how
5 Mr Holt has described the process.

6 Then paragraph 3, there is the reference to numerous public statements by the OFT
7 and the Commission and the British Retail Consortium. That goes on over the page
8 to page 291 of this bundle.

9 Then at paragraph 4, this is all concerned with how Visa intends to particularise the
10 factual issue of causation:

11 "The claimants and their competitors were therefore likely to believe that MIFs were
12 reflected in their competitors' prices."

13 Well, we know that is what they rely on. Then at paragraph 5, they say:

14 in the counterfactual the Claimants would have essentially had the incentive to offer
15 lower prices.

16 Now, as I say, these are all the factors that feed into the factual causation. Then we
17 have at paragraph 6 -- remember that this is a response to the claimants' request for
18 further particulars:

19 "Therefore, in the light of the above, the Claimants would have offered lower prices in
20 the counterfactual without an overcharge. The overcharge was accordingly
21 a proximate cause of the difference between the Claimants' prices in the real world
22 and the prices the Claimants would have charged in the counterfactual."

23 So there is a clear averment there going forward of a proximate cause.

24 They then go on, paragraph 7, to rely on the methods by which they will prove this
25 proximate causation:

26 They "will rely on econometric analysis, both in publicly available studies on the links

1 between costs and prices generally, and using cost and price data relating to the
2 Claimants obtained through disclosure, to demonstrate both the fact and the extent of
3 the factual causal link between any overcharge and the Claimants' prices at trial."
4 So there was a clear statement before the Tribunal that Visa intended to plead and
5 prove proximate causation and it gave an indication as to the methods by which it
6 would do that.

7 So can I then, essentially, then go to our third round in our skeleton which is how the
8 Tribunal dealt with this. That is at tab 5 of this bundle. So you obviously know the -- it
9 is page 83, so obviously you know this well.

10 If we first go to page 100 at paragraph 34. There is a reference to the pleadings and
11 I refer in particular to footnote 18, because at footnote 18, and the Tribunal refers back
12 to the footnote subsequently, it refers to the Dune pleadings. We select it simply as
13 an example. They say:

14 "The Claimants passed on any such overcharge to their customers..." This plea has
15 been expanded by way of further information."

16 Now, that expansion by way of further information includes that averment of proximate
17 causation.

18 So then we get, in my respectful submission, to the critical point in this judgment which
19 is at section E, which Visa really do not address in their skeleton, which is at
20 paragraph 59. This is, in my submission, the critical part but also it shows that one
21 has to read this judgment as a whole.

22 I should have actually, if one goes to -- sorry. If I go to page 108, yes, to the pleading
23 point. At paragraph 52, the Tribunal says:

24 "We have described the state of the pleadings in the case of Visa in footnotes 18 and
25 19 above."

26 So this is paragraph 52:

1 "It is fair to say the plea in paragraph 96 of Visa's Defence is very short [that is
2 the Dune one] but it has been expanded in the further information provided."
3 That is what we have just seen, where Visa specifically avers proximate causation and
4 the methods by which it will prove it. Then 53:
5 "The state of the pleadings is helpfully set out in the written submissions of the
6 Umbrella Interchange Fee Claimants."
7 We do not need to go to that but we see that there is a paragraph 27. If we look at
8 page 109 we see reference in (c) to proximate causation. So we know that proximate
9 causation is at large here.
10 Then at paragraph 54, we get to the relevant paragraph, which essentially dismisses
11 the matter of Hanover Shoe policy, the SSH argument that there should be
12 a conscious decision to pass-on. That was rejected as a matter of legal policy.
13 It is paragraph 59 which is important when one is reading this judgment as a whole,
14 because it says:
15 "Pleadings in competition..."
16 And I ask the Tribunal to note that it is about the framing of the issues and the adducing
17 of future evidence. Because clearly, we know at this stage -- we don't know really
18 what evidence is going to be adduced, so this judgment is all about framing the issues
19 and then how we are going to allow the parties to adduce future evidence.
20 But 59:
21 "Pleadings in competition cases are exceedingly important given the very difficult
22 issues that arise for determination in such cases. In particular, pleadings serve the
23 very important purpose, at least in competition cases, of not only defining the issues
24 that arise for determination but the way in which those issues are going to be proved."
25 Again, emphasising this is how evidence is going to be adduced. The Tribunal then
26 specifically refers to the NTN Corporation v Stellantis case, which was the subject of

1 the request for further information and the response by Visa to the request, and sets
2 out:

3 "The burden of proof when pleading causation is on the defendant to demonstrate: (a)
4 that there is a legal and proximate, causal, connection between the overcharge and
5 the act of mitigation."

6 So the Tribunal is there setting out the need to prove a proximate causal connection
7 and the Tribunal then says:

8 "We respectfully agree that this statement captures what..."

9 And I think it should be "the pleadings are intended to achieve."

10 So it is a recognition that the Tribunal has already at paragraph 52 described the state
11 of the pleadings lodged by Visa and in my submission that is a recognition that Visa
12 has acknowledged that it has to prove a proximate causal link. Just like any other
13 person who has got to prove pass-on.

14 So that is paragraph 59, why it is important, because there is an acknowledgment
15 there by the Tribunal that causal connection is an issue in the case and it is
16 an acceptance that Visa has acknowledged it, because it is clearly referred to in
17 paragraph 6 of its response.

18 Then at paragraph 60, the Tribunal says, well, I know what the issues are, there is
19 a causal link, it has got to be a proximate causal connection, now I am going to indicate
20 how as part of my extensive case management powers I can control -- this is 60 -- the
21 evidence that it receives in order to determine the issues that arise for determination
22 in the cases before it.

23 In my submission, what the Tribunal is not doing here is in some form exempting Visa
24 from having to prove a proximate causal connection which it said it was going to do in
25 its pleadings. It is going to control the evidence.

26 So it is very, very important when one is looking at paragraph 50 and the no-brainer

1 and others, and we will come to this, the no-brainer, to read the judgment as a whole,
2 to see that before the Tribunal the pleadings were from Visa, I acknowledge that I have
3 to prove a proximate causal connection and this is how I'm going to do it. My
4 regression analysis is going to do that.

5 Then at 60, how I'm going to control the evidence in order to prove this sufficiently
6 close causal link.

7 As the Tribunal would have picked up, we say that it has not just set up some sort of
8 irrebuttable evidential presumption on Day 1 as a result of the Supreme Court and
9 Sainsbury's, that there is always a sufficiently close causal link, that in all cases, no
10 matter how the evidence pans out at the trial, the Tribunal has shut its mind to any
11 reference or reliance or consideration of a proximate causal link.

12 We say that because we pray in aid the October 2023 ruling and we should just go to
13 that. You will have read it. It is important for completeness. That is at tab 9, at
14 page 138. We know at 138, this was a ruling, basically, over a year later. We know it
15 is a ruling, on page 139, ruling evidence on pass-on. So it is continuing to deal with
16 the question of evidence and as the Tribunal will have seen from our skeleton, it is
17 important to look at page 176, and the Tribunal has to ask itself the question: have I
18 shut myself out from ever considering proximate cause?

19 Here, the Tribunal is squarely positing a proximate cause, because this is how the
20 evidence may pan out. So on 176, this is paragraph 60, subparagraph 5, sub-
21 subparagraphs 1 and 2. It sets out the Tribunal's judgment in Sainsbury's and then, if
22 this is right, and this was Visa's contention:

23 "Pricing strategy is an irrelevance. One way or the other, perhaps over a period of
24 time, a firm will recover its costs. This latency – recovering an increased cost later in
25 time through a temporally later increase in price - is in a sense obvious and we would
26 expect to be included in the list of factors the experts identify as being relevant to pass-

1 on. Firms do not change their prices every instant."
2 You can read it. But the important bit is at the end of this paragraph:
3 "There is potentially a further question, namely whether, if an overcharge is passed-
4 on after a significant delay and only as part of a general price increase, that satisfies
5 the legal test for mitigation, that is to say, a proximate connection between the
6 overcharge and the price increase."
7 See the judgment of the Supreme Court at paragraph 215.
8 And it would be odd, to say the least, for the Tribunal to say on 6 July, oh, well,
9 claimants, there is an irrebuttable evidential presumption of sufficiently close causal
10 link because the MIF is in the budget and then have a statement to this effect.
11 It is important because, as the Tribunal will have picked up, none of the experts are
12 going to do a regression analysis on the MIF itself. Mr Holt says it is a signal to noise
13 problem. We just can't tell. Therefore, we are going to have to do it by other methods.
14 When you get to the stage where I'm going to do it by other methods, you are going
15 into the realms of an assumption upon an assumption upon an assumption, is the MIF
16 the same as VAT, do firms recover all variable costs and to what extent are they price
17 maximising? There will be, I am sure, an assumption upon an assumption upon
18 an assumption at trial too.
19 The notion that the Tribunal has shut its eyes to considering whether those
20 assumptions upon assumptions are sufficiently proximate, in my respectful
21 submission, the Tribunal did not intend to do that on the face of the judgment
22 in May 2022 and then in July 2022.
23 Can I just, by way of postscript, because I just want to mention a complete -- my
24 co-claimants are going to deal with sufficiently close causal link. But it is important to
25 see how the common law approaches causation and in the bundle, there is a new
26 authorities bundle at tab 6A. I don't know if one has the authorities, the new authorities

1 bundle, at 6A.

2 THE PRESIDENT: 6A, did you say?

3 MR BREALEY: Yes, 6A. It is *Wilsher v Essex Area Health Authority*. We put it in the
4 bundle. The reason we put it in the bundle is because in our response we said *Visa*
5 didn't define what it meant by legal causation. Now, as we know, legal causation can
6 mean many things. It can mean a pure policy consideration, and we will come on to
7 that in a moment. It can mean perhaps remoteness, as Lord Justice Green said in
8 *Trucks*. It can mean intervening acts. Legal causation can encompass many things
9 and that is another reason why we say it would be very odd for the Tribunal to have
10 shut its eyes completely to any consideration of proximate cause when it comes to the
11 trial and it hears the evidence.

12 But it is important just to see how the common law just, as a matter of factual
13 causation, looks at the matter. So this is at 6A, 132. If you just read the headnote,
14 then I will just make a couple of submissions on it. (Pause)

15 Maybe you are familiar with it. But it was a sad case of an infant going blind at birth
16 and the question was whether the doctors had been negligent in giving the poor child
17 an excess of oxygen. The relevance, the bright line point that one takes from this, is
18 that it is a matter of well-established common law that the person proving causation
19 has to show that it is a material cause, that the wrong is a material cause. We will just
20 look -- it is not -- you don't have to, *Visa* and anyone else who is proving causation
21 does not have to show it is the only cause, because that is too difficult. But it has to
22 show that it is a material cause and that is just well-established, plain *McGregor on*
23 *Damages law*.

24 So we see from the headnote that the House of Lords saw on the evidence there were
25 various possible causes of the blindness: excess oxygen may have been one, but
26 there were other causes, other possible causes. It could not be said that the alleged

1 negligence of the doctors in giving excess oxygen was a material cause and,
2 therefore, the House of Lords ordered a retrial. It is important just to pick up passages
3 which support what I have just said. I should not have to, I am sure Visa will accept it,
4 but if one goes to page 1084 of the judgment.

5 THE PRESIDENT: Yes.

6 MR BREALEY: That is 132.11 of the bundle. 132.11 of the bundle. At F. And we are
7 talking here about factual causation. Now, remember that Visa in paragraph 6 of its
8 response was talking about factual causation and proximate cause. Lord Bridge here
9 says:

10 "The starting point for any consideration of the relevant law of causation is the decision
11 of the House in Bonnington Castings."

12 Then Lord Bridge goes on. It is over the page that I just pray in aid as the well-
13 established principle of causation, which is at page 1085 of the case, just below B:

14 "It would seem obvious in principle that a pursuer or plaintiff must prove not only
15 negligence or breach of duty but also that such fault caused or materially contributed
16 to his injury."

17 There is ample authority for that proposition both in Scotland and England. I can find
18 no reason or authority for the rule being different where there is a breach of statutory
19 duty.

20 Then at the end, we see that the retrial -- so this is at page 1092 of the judgment -- the
21 retrial is ordered and we pick this at 1092 at B:

22 "Leave to appeal was given by the Court of Appeal on terms the authority should not
23 seek [its] costs."

24 It goes on at C:

25 "For the reasons I have indicated I would allow the appeal, set aside the order of the
26 Court of Appeal save as to costs and order retrial of the issue whether the negligence

1 of the authority, as found by the Court of Appeal, caused or materially contributed to
2 the plaintiff's [blindness]."

3 Essentially, we say that - as indeed we submit Visa acknowledged in its response -
4 that that issue of materiality is wrapped up with proximate causation. It is a question
5 of fact.

6 The last point I just want to make then, which I will let the others pick up is when at
7 paragraph 50, the Tribunal was referring to the no-brainer, in my submission the
8 Tribunal was considering the issue of the conscious decision to pass on and whether,
9 as a matter of policy, that should be allowed. The Tribunal was not looking at any
10 factual issue at paragraph 50 and we know this from paragraph -- if one quickly goes
11 to it, then I will let the others -- so if we go to paragraph 50 and it is page 107. So I am
12 asking the essential -- essentially the Tribunal to look at the main paragraph above
13 subparagraph 3, starting "It seems to us very difficult", we will have a look at that. So
14 one essentially has to compare this paragraph with paragraph 59 and all the
15 references to proximate causation. So we rely on paragraph 59 as the Tribunal
16 recognising proximate causation. Visa rely on paragraph 50 and that paragraph says:
17 "It seems to us very difficult to identify any policy reason why B should nevertheless
18 continue to be able to claim the overcharge from A, despite having passed it on to C.
19 Indeed, one can see very strong strong reasons for not permitting B to persist in such
20 a claim."

21 In fact, it is a no-brainer. Now, I make two points on this. The first is this is a policy
22 consideration and in my submission, once you have got to this policy consideration,
23 Visa should have satisfied the burden of proving a sufficiently close causal link.
24 Because once Visa has shown a sufficiently close causal link between the overcharge
25 and downstream higher prices, one then gets into a policy reason why Ocado or
26 anybody else should continue to claim damages. But that is begging the question as

1 to why, how, it has been passed on and by what criteria. You only get to a policy
2 reason once you have proved pass-on. You prove pass-on by showing a proximate
3 causal link. That is my first point on this paragraph.

4 The second point is that the Tribunal was not identifying any factual issue, it could not,
5 because we simply didn't have the evidence here. But when one looks at footnote 34
6 and the question of the burden of proof, the "burden of proof question arises in relation
7 to legal causation because it is a question of law, not a question of fact".

8 So the reader of this judgment is clearly of the view that what the Tribunal is referring
9 to in this no-brainer paragraph is a legal point, policy, whether there is a policy is
10 a legal issue, and the Tribunal has identified that -- when it is referring to legal
11 causation, it is referring to policy and a question of law. It is not exempting in this
12 paragraph what Visa says it would do at paragraph 6 of its response, prove proximate
13 causation by the various factors listed in that response and the methods.

14 So I appreciate I have had to go first and that is obviously often a very difficult task
15 when one is responding to a strike-out. But in my submission, the judgment has got
16 to be read as a whole. This paragraph 50 is a question of law, of policy, and read with
17 paragraph 59 it was not shutting its eyes to any consideration in the future of
18 a sufficiently close causal link.

19 MR TIDSWELL: Yes. Mr Brealey, I want to understand what you mean by proximate
20 cause in the context of legal causation and factual causation and I appreciate that they
21 are not always that easy to separate. But it does seem to me, unless I have
22 misunderstood you, that you are applying it both in the context of factual causation
23 and legal causation or is it your intention only to, when you refer to proximate
24 causation, to be talking about legal causation?

25 MR BREALEY: My answer to that is that as a question of factual causation, one has
26 to show a material contributing factor. It has to be material. That is not a legal -- that

1 is not legal causation.

2 MR TIDSWELL: Just to pause there for a minute. So there is a test, isn't there, of
3 likelihood in relation to whether or not there has been factual causation. Whether the
4 evidence shows the requisite test that the overcharge was passed on. That is
5 accepted?

6 MR BREALEY: That is a very good point and the answer to that, and to be quite frank,
7 Visa conflate that issue sometimes by referring to the counterfactual. Causation is
8 a matter of historic fact. Causation is not – pass-on is: did pass-on occur? One then
9 gets to the counterfactual, well, if pass-on did occur prices would have been lower.
10 But the starting point, and that is why Visa never really referred to causation and
11 causation in higher prices, but causation is a question of past fact: did it occur? You
12 have the Lord Hoffmann statement, that is a binary analysis on the balance of
13 probabilities. If it is more likely than not, it is certain. If it is less likely, it is zero. So it
14 is a balance of probabilities.

15 MR TIDSWELL: So what has Wilsher got to do with that then?

16 MR BREALEY: You have to prove on a balance of probabilities that the material act
17 contributed to, here, the higher prices.

18 MR TIDSWELL: Well I am not sure that is the test. It is that, I think, isn't it, the balance
19 of probabilities, whether it is, as you just said, whether it did or not. Isn't it just simply
20 whether it did or not, on the balance of probabilities?

21 MR BREALEY: Well, in order to show that it did, you have to show that it was
22 a material -- it caused it. What does one mean by cause? It is very well to say, for
23 Visa to say, we bear the burden, the factual burden, of proving causation as a matter
24 of fact. But what does that mean? What are the considerations of causation? And
25 the reason I took you to Wilsher is because you have to show -- the House of Lords is
26 saying it is not any old possible cause, it has to be a material cause.

1 MR TIDSWELL: Well, let's not dwell too much on that. I suspect it probably is
2 something that is better left, that particular point of what the test is, is a Trial 2 point.
3 But am I right in thinking that the way you have just put that suggests that you see
4 Wilsher as being an authority in relation to factual causation?

5 MR BREALEY: I missed that, sorry.

6 MR TIDSWELL: You see Wilsher as being an authority in relation to factual
7 causation?

8 MR BREALEY: 100 per cent, yes.

9 MR TIDSWELL: So it is not getting into the question of legal causation.

10 MR BREALEY: No. There is no reference to legal causation there. It is just saying
11 have I proved that the thing happened.

12 MR TIDSWELL: Yes. Fine. So just putting that to one side for a minute. When you
13 look -- when you talk about the Visa reply and the Visa -- information, and you see the
14 reference, you pick up the reference to proximity in there, are you suggesting that that
15 is talking about factual causation or legal causation?

16 MR BREALEY: Well, it depends in what bracket you put proximate cause. I think
17 Mr Lask is going to say it doesn't really matter. If you ask me, proximate cause is more
18 a question of remoteness rather than -- and remoteness is linked to causation,
19 because one knows, again, as a matter of theory, that you can't have a cause which
20 is too remote because the law -- remoteness is all about the law imposing some sort
21 of limit in time and place on the defendant being liable for damages.

22 MR TIDSWELL: That's a policy consideration.

23 MR BREALEY: Yes. But when one talks about, you know, it is policy, it is -- that is
24 not a legal point as such. Remoteness is a question of fact and it is wrapped up with
25 all the facts relating to causation.

26 MR TIDSWELL: Well, yes, of course. I think it is probably common ground that when

1 | you come to apply any legal policy, whether it be remoteness or the mitigation
2 | principles or whatever it is, I mean, I think everybody accepts there needs to be some
3 | factual basis to do that. You don't do it in the abstract. But the question here I think
4 | is whether we have reached the conclusion that the facts are so obvious that they
5 | need no further explanation at Trial 2, based on the --

6 | MR BREALEY: So that is immaterial because if Visa come to court in November and
7 | say: there is pass-on, but I don't know whether it was because of this, this and this or
8 | the overcharge. I don't know --

9 | THE PRESIDENT: I am sorry. If there is pass-on, it is pass-on of the overcharge at
10 | some point in the exercise.

11 | MR BREALEY: Yes but if he comes to court and says it could be the higher cost of
12 | goods, it could be because unions wanted higher labour, but it could have been the
13 | MIF, the overcharge, and I can't say which one, but it could be one of the three.

14 | MR TIDSWELL: That is the classic -- that is the factual causation.

15 | MR BREALEY: Correct. Yes. So parking -- so we are on the same page on that. But
16 | then there are instances where you can say that it has caused something, but it is too
17 | remote, as Lord Justice Green said in Trucks.

18 | MR TIDSWELL: Yes. We are back into the policy point. The --

19 | MR BREALEY: The question is when the Tribunal at paragraph 50 said policy and
20 | no-brainer, was the Tribunal referring to policy in all its guises: remoteness, intervening
21 | acts, principle of effectiveness et cetera. Because when one looks at the October
22 | ruling and essentially the Tribunal is postulating, well, over a period of time, maybe in
23 | the long-term, you would recover costs. In my submission, that was really recognising
24 | the remoteness issue rather than a causation issue. Because the Tribunal in October
25 | was saying, well, I can see that the MIF gets wrapped up in the cost somehow in the
26 | long-term, but is that sufficiently proximate as a matter of law? In my submission,

1 when in October the Tribunal is referring to proximity, that was in the sense of
2 remoteness.

3 In my respectful submission, I don't believe that paragraph 50 of this judgment is
4 disapplying the question of remoteness.

5 MR TIDSWELL: That obviously is the whole point of the discussion and we will come
6 back to it. I want to be clear we have buttoned down what you mean by proximate
7 cause and I appreciate Mr Lask is going to come on to talk about it. But I don't want
8 to let you escape without being clear about -- because really you are suggesting that
9 in the Visa response, and in parts of the July judgment, the use of the words "proximate
10 cause" or something like that have expressly left open an aspect of legal causation.
11 That is the submission you are making, I think. Is that right?

12 MR BREALEY: Yes.

13 MR TIDSWELL: So when you use that expression you are confining it, I think it is part
14 of your argument, that it has to be seen as being an expression which is confined to
15 legal causation.

16 MR BREALEY: Yes.

17 MR TIDSWELL: Yes.

18 MR BREALEY: We don't read this paragraph as disapplying either material
19 contribution, we can park that, but also the question of remoteness. Remoteness may
20 be very, very important in this case because, as I say, Visa's expert is saying I can't
21 do a regression analysis because of the signal to noise, I am going to have to do it
22 another way. It may well be that Mr Holt comes to court and does exactly what the
23 Tribunal said in October.

24 MR TIDSWELL: Why would remoteness apply to the quality of the exercise that the
25 experts could do? I mean, that is just back to the question of factual causation, isn't
26 it?

1 MR BREALEY: Correct. Yes, it is. One gets hung up on this legal causation and
2 factual causation issue as, I think, the Tribunal and Court of Appeal said in Trucks.
3 One should emphasise the legal test and the legal test is: have you proved
4 a sufficiently proximate causal link.

5 MR TIDSWELL: Well yes but I think you can't just ignore the distinction between legal
6 and factual because you are doing different things, aren't you? One is applying
7 a question of --

8 MR BREALEY: Legal --

9 MR TIDSWELL: One is applying ordinary causation principles, however one does
10 that, and to determine whether in fact something that has happened was caused by
11 something else, and one of them is implementing a policy consideration, whether it is
12 remoteness or something else.

13 MR BREALEY: That's right. Now, until Lord Justice Green referred to remoteness as
14 a part of the legal causation in Trucks, I would have been submitting that the
15 remoteness is actually all part and parcel of factual causation because you can't prove
16 something on the balance of probabilities by reference to a tenuous remote causal
17 link. It does not sit right.

18 MR TIDSWELL: Well, I am not sure -- plenty of people have things to say about that.
19 The question I just wanted to be clear with you about is how remoteness fits
20 into -- because I think we went round in a bit of a circle there. I think the question of
21 whether, say, the defendants' expert analysis makes assumptions seems to me to go
22 to the question of the reliability of the evidence and therefore whether the threshold
23 for causation is met. Sorry. That seems to me to be quite different from the question
24 of remoteness, which is whether the character of the loss suffered is so far away from
25 the wrongdoing that as a matter of legal policy it should not be connected. I am not
26 sure --

1 MR BREALEY: I just want to go back to the October judgment. So if I can just go
2 back to page 176 at tab 9. In my submission, that is exactly what the Tribunal was
3 recognising. So it is the last bit of subparagraph 2. There is potentially a further
4 question, namely whether if an overcharge is passed on after a significant delay and
5 only as part of a general price increase, that satisfies the legal test for mitigation i.e. a
6 proximate connection between the overcharge and the price increase.

7 Now --

8 MR TIDSWELL: Absolutely. So I think you are saying that is an example of an aspect
9 of remoteness that requires some factual material.

10 MR BREALEY: Factual material. Yes.

11 MR TIDSWELL: But I think the Visa answer to that is that does not arise in this case
12 because the overcharge, if there was an overcharge, the overcharge had been in
13 place for decades. It is not a question of the price being raised.

14 MR BREALEY: That is all a question of argument and fact. Visa might say it does not
15 apply in this case, but let's assume Mr Holt does come to the Tribunal and say it does
16 apply. Let's assume there is a passage very similar to this. Then we say, well, that is
17 an issue of proximate causation to which the Tribunal will say, well, that is no longer
18 a point anymore. You can't run proximate causation. The oddity is all the evidence
19 that goes to factual contribution and material contribution would be relevant to
20 proximate causation. There is no new evidence as such. It is just a judgment as to
21 whether a cause is sufficiently close.

22 MR TIDSWELL: I'm not sure that is right, is it? Because at the moment the way we
23 are approaching Trial 2 is more top down than bottom up. Surely to get to an answer
24 to this question you would have to go bottom up, wouldn't you? Because they would
25 be different for different claimants. Some may have passed on immediately and some
26 may have passed on over a year's budgeting process.

1 MR BREALEY: It may well be you can answer this by reference to remoteness by
2 a top down approach. We don't buy into the idea that proximate causation means that
3 you are going to have 600 specific claimant trials or people coming along. Proximate
4 causation can be -- one can answer proximate causation here.

5 My question to the Tribunal is if this sort of argument is run at Trial 2, are we shut out
6 from saying: well, that is too remote, that is proximate causation?

7 It would be, in my submission, rewriting the law on pass-on and rewriting the law on
8 causation to say that a defendant or a claimant is excused, somehow exempt, from
9 proving a sufficiently close causal link.

10 Turning it the other way around, what then does Visa have to show? Just some
11 cause? So if it is not -- can it -- so if you take out the word "close", obviously the
12 opposite of close is remote, if one takes out the word "close", can Visa come to court,
13 the Tribunal, in November and say "this is a remote causal link"? And you, Ocado,
14 are not entitled to say -- you can't rely on proximity. "Close" has gone. That is the
15 question for the Tribunal: whether it has deleted the word "close" from the test that
16 Visa has to satisfy.

17 Now, I appreciate the case management issues and I appreciate there is much to offer
18 by way of evidence, is it top down, is it in between. I mean, we know it is not going to
19 be bottom up. But has the Tribunal -- did the Tribunal on 6 July delete the word "close"
20 from the test?

21 Now, you may be saying no, but that is essentially what is being argued for. You are
22 going to strike-out the word "proximate" from the claimants' pleadings, I assume, if you
23 are going to strike-out the word "proximate" from the claimants' pleadings you will also
24 strike it out from Visa's response.

25 THE PRESIDENT: I am not sure that is the question at all. I think we are in grave
26 danger of writing a further edition of Hart and Honoré on Causation, and I am really

1 not in that business.

2 MR BREALEY: No. That is issue estoppel rather than --

3 THE PRESIDENT: Let's work out what actually is before us and see if we can move
4 forward. There is greater danger I think in having a debate that is both academic and
5 abstruse and neither of those are particularly helpful. The judgments that you have
6 been taking us to were essentially concerned with evidential control. That is what we
7 were all talking about. We are trying to work out what evidence we need to hear in
8 order to resolve the pass-on question.

9 Now, let's assume that Visa and Mastercard go down in Trial 1 and an unlawful
10 overcharge is found, which will of course by definition initially have been borne by the
11 claimant classes represented before us. So let's take that as a given.

12 The question then, is: were the prices charged by the claimant groupings inclusive or
13 exclusive of that overcharge? In other words, did the overcharge rest with the claimant
14 class or did it drift down? That is the question which we are resolving. The real
15 question is not how does causation work, but what evidence is the Tribunal going to
16 have to hear in order to resolve that point. That is what we have been discussing over
17 a series of questions and we have, I think, resolved it on the basis that we are doing
18 essentially a top down approach, which we are assessing on a basis that I don't need
19 to go into, because you all have been participating in our fortnightly sessions to control
20 the evidence on this point.

21 So that is what we are doing. The reason, I think, this application is being made by
22 Visa is because they want to know that that is it in terms of the evidence that we will
23 be hearing in order to resolve these matters. I don't know whether Mr Rabinowitz will
24 be saying that if we make absolutely clear that that is the evidence we will be hearing
25 and no more, that we can all pack up and go home and avoid this interesting
26 discussion or whether you are, in fact, making this argument with a view to

1 incorporating into the back end of Trial 2 further evidence which we have not
2 contemplated.

3 So my question to you is, assuming that there is something in this debate, what extra
4 material, evidential material, are you envisaging will come in to Trial 2 so that we can
5 get a grip on it. Because my understanding is there isn't anything.

6 MR BREALEY: Well, that is very, very helpful. There are two answers to that. The
7 first is that whatever evidence is adduced, whether it is just pure top down and
8 whatever we have -- we have the evidence in the bundles, in the electronic bundles,
9 in Trial 2. In my submission, proximate cause still applies. Because that is the law.
10 That is the legal test. So the second point -- I understand that the other claimants are
11 going to deal with this. But the answer to the second point is that clearly the claimants
12 are having to live with a broad top down approach, rather than a bottom up approach.
13 The Tribunal will also know that the claimants' co-defendant, Mastercard, wants some
14 degree of qualitative evidence as to how prices are regarded. Because they say that
15 they need a small amount of proportionate qualitative evidence in order to perform,
16 and I emphasise this word, the sector's price because it is all well and good just to
17 have raw data on price and cost. We are not doing it on a claimant-specific basis, we
18 know that. We are doing it on a sector basis, we know that. Because Mr Holt and
19 Mr Coombes, if he is in, is doing it on a sector basis.

20 Once you realise you are doing it on a sector basis and not on a claimant-specific
21 basis, the question is: is the Tribunal going to allow any further evidence of
22 a qualitative nature as to how a sector would price in general? That is a debate that I
23 believe we are going to have some time for in April because Mastercard are going to
24 make an application for certain qualitative evidence and it would be qualitative
25 evidence, as I understand it -- it may be from the claimants but it would be with a view
26 to it being representative of the sectors which Visa pray in aid. So Visa have its 12 or

1 14 sectors, Mastercard say we would like some evidence to show the Tribunal how
2 these sectors go about pricing in general.

3 Now, whether the Tribunal allows that is perhaps -- Mastercard, I think, are here -- but
4 I certainly can't say that the evidence that is being adduced to date is it. What I can
5 say, with 100 per cent certainty, is that the scaremongering in Visa's skeleton about
6 all this claimant specific evidence that would change the nature of the trial, in my
7 submission, rings hollow because it is just not going to happen.

8 THE PRESIDENT: Well, yes. That is very much the theme. I mean, I am sorry to put
9 it this way, but I do wonder why we are all here. Because tribunals are instinctively
10 entirely reluctant to rule in or out evidence that they haven't understood on the basis
11 of an abstract form of test. I mean, we will see what Mr Rabinowitz says, if it was the
12 case that on the basis of the evidence that we are presently contemplating one has
13 an argument at the back end of Trial 2 about causation in the round, I don't imagine
14 Mr Rabinowitz would have much problem with that. His problem is one has got
15 to attempt in arguing about this to bring into the evidential process that we are
16 controlling at the moment further evidence that is going to derail the trial. That is
17 something which we are not in the business of doing.

18 What we have been doing in these rulings is not trying to work out what the law of
19 causation is. What we have been trying to work out is what evidence needs to be
20 admitted in order fairly to resolve causation. The one thing we have clearly kicked out
21 is this notion of a subjective state of mind, being relevant to pass-on or not. That is
22 something which has been argued and obviously affects the shape of the evidence.
23 We say, well, that is just not material.

24 Now, we are in the process of shaping the evidence that is going forward and if this is
25 an attempt by both sides, effectively, to control the Tribunal's approach on evidence,
26 then I'm not sure it is a very helpful one because we want to control the evidence such

1 that one has a manageable evidential burden on the parties and on the Tribunal, so
2 that we have an effective Trial 2.

3 Now, that is --

4 MR BREALEY: From my perspective, sir, we are --

5 THE PRESIDENT: Right. Okay.

6 MR BREALEY: But the proximate causation, as I say, one could look at that October
7 ruling and ask yourself the question whether proximate causation applies to that
8 abstract fact. But my main point is that --

9 THE PRESIDENT: As has become clear in your exchange with Mr Tidswell, actually
10 no one has a clue what proximate causation really means in this context. It is a very
11 clear indicator that we are not being assisted by a kind of academic bright line which
12 then before the event operates as an ex ante control over what evidence we are going
13 to be admitting when we have been trying to articulate what evidence we want to have
14 in, which is why we have been having all these top down, bottom up --

15 MR BREALEY: And I don't mean to push back against any of that because we
16 understand that. We do not want to lose the word proximate but we are fully -- we fully
17 recognise that the Tribunal has a difficult task in dealing with the umbrella
18 proceedings. The extent to which it is the top down approach that Visa wants, in
19 distinction to Mastercard, as I say, may be the subject of a further application in April.
20 It may well be that the Tribunal says no to Mastercard, no to any further qualitative
21 evidence, and we just go as we are with the evidence that we have.

22 I think the claimants would be, to a certain extent, supporting Mastercard on that but
23 there is absolutely no way there is going to be hundreds of claimant-specific subjective
24 statements and evidence.

25 THE PRESIDENT: You see, Mr Brealey, what I don't want to be faced with is, as and
26 when Mastercard move a point about the shape of the evidence, for either side to be

1 saying: you have resolved that question in advance by this very debate. I mean, I
2 would like to think that our rulings to date, and the case management meetings we
3 have been having following on from those rulings, mean that everyone knows where
4 the Tribunal is going.

5 MR BREALEY: Yes.

6 THE PRESIDENT: And if that is the case, then why are we making what is
7 undoubtedly a difficult trial harder by debating these rather --

8 MR BREALEY: Well, we are only here because Visa have applied to strike out --

9 THE PRESIDENT: These are concerns that you are using the wordings in the
10 pleadings as a back door to re-opening a question that I think we have already
11 decided. We have not decided matters on the basis of what the law of causation is,
12 we have decided on the basis of what evidence in broad shape we would need to hear
13 in order to resolve Trial 2. So we are proceeding down one track which I regard as
14 wholly irrelevant to the question that is actually before us. We have lots of interesting
15 academic questions and we have the practical question of how we resolve the factual
16 issues before us. It is the latter that we are trying to control, not the former.

17 I mean, bearing in mind where we came from, right at beginning, we had a long list of
18 issues which we said we wanted to have populated so we would know what evidence
19 was being adduced. The claimants were remarkably coy about what they wanted to
20 produce in terms of evidence, because what they wanted to maintain was the notion
21 of: we will produce a series of individual matters from individual claimants and that is
22 how we are going to discuss pricing. We are going to have, essentially, a subjective
23 approach. Now, we have shot that hare. We then had a debate about sampling and
24 the representations of that and we have shot that hare. We are now going down an
25 econometric assessment across a pool of claimants, whose shape we are trying to
26 control, and my question, again, is how is this debate assisting us in controlling the

1 evidential question that we are going there?

2 So I quite understand why Visa are here. They want a degree of confidence that there
3 is not going to be a further rabbit pulled out of a hat saying: oh, yes, you have been
4 dealing with one aspect of causation. That is great. We have the evidence under
5 control but we are going to have a whole raft of extra stuff which is apparently open
6 on the pleadings, which no one has articulated yet, which we are going to be
7 shoehorning into a trial which means we are going to be adjourning it. That is not
8 going to happen.

9 MR BREALEY: We certainly don't want an adjournment. Visa set out the methods
10 and factors they say leads to a proximate causation. It may well be Mastercard want
11 other factors in addition to what Visa -- that is, Mastercard are going to make
12 an application and it will be for the Tribunal to say no or yes or maybe, you can have
13 this, you can have that. That is going to happen, as I understand it, in April some time.
14 Come April, maybe the end of April, we will know exactly where we are, but it is not
15 the fault of any word of proximate, because it was not the intention of the claimants by
16 insisting on proximate to get in thousands of subjective witness statements. It just
17 wasn't. It is to make sure that the legal test is in place for Trial 2.

18 THE PRESIDENT: Well, I mean, Mr Draper, you have been very helpfully participating
19 in our case management meetings.

20 MR DRAPER: Yes.

21 THE PRESIDENT: I don't want to draw you on the very considerable case
22 management problems that remain in terms of working out our list, doing our data trawl
23 and all of the things we have been engaged in over the last few weeks. There I feel
24 we are making progress. What is the bit that requires an application from Mastercard
25 over and above that?

26 MR DRAPER: You may recall from the last CMC that the claimants have mentioned

1 an intention to rely on witness statements that they suggested would come in July with
2 their primary case. What we have said is for there to be witness statements, they
3 should come sooner and come accompanied by documents. That is the application
4 we are bringing and we will ask to be heard in April, if possible.

5 That isn't affected by the debate today, because at that hearing, when we make the
6 application, what we will have to persuade you, as the Tribunal, is that the material we
7 want is relevant to factual causation. That it will go to whether pass- on occurred,
8 aiming at a "but for" standard. So we are quite happy to have this question of legal
9 causation clearly squared away. We know what target we are aiming at and, in our
10 respectful submission, Visa is right about the legal causation point and we should clear
11 the decks.

12 THE PRESIDENT: Yes. So what you are articulating is a need to resolve an evidential
13 scope uncertainty, going to Trial 2, arising out of the very clear limits that I think we
14 have laid down in the judgments to date. It is not a re-opening of a new area, it is
15 simply a continuation of the process that we are operating to date.

16 MR DRAPER: Yes. In our submission, principally there is going to be a largely top
17 down methodology. What the Tribunal has left open is the extent to which bottom up
18 material can assist in that.

19 THE PRESIDENT: Yes.

20 MR DRAPER: But answering that question, to what extent will it assist, we say it is
21 very clear that it is assisting in determining "but for" causation. It is not about looking
22 at the sufficiency of a link as a matter of law, it is not about proximity, those we say
23 are the matters that have been resolved already.

24 THE PRESIDENT: So if I can put it this way. In terms of the academic question that
25 I had expressed a certain lack of interest in, you are *ad idem* with Visa. Where I think
26 there is a difference perhaps between Visa and Mastercard is in the evidence that is

1 required in order to resolve the issues in the way that we have indicated in our prior
2 rulings we want to resolve them. I think it is no secret that Visa's approach is much
3 more, significantly more, top down than Mastercard's.

4 MR DRAPER: Entirely. If I may put it this way. Visa and Mastercard might disagree
5 about how one gets to "but for" causation, but we agree that once you have got there,
6 that is the end of the inquiry. One does not say: well, let's look at this causal link and
7 put it into this sufficient or insufficient box as a matter of law. We say that question
8 has been determined. It was determined in 2022.

9 THE PRESIDENT: Now, Mr Brealey, given that that is an open point and not a closed
10 point, and one that we can't possibly determine today, is any ruling that we make
11 today, one way or the other, actually going to help manage the evidential flow coming
12 in?

13 MR BREALEY: In my submission, there should be no strike-out of any reference to
14 the word "proximate". We disagree with what has just been said and we can have
15 a whole debate about what "but for" means because, again, "but for" has its own
16 meaning in causation. In my submission, we should not have a debate, an academic
17 debate or a legal debate about proximate cause. The only issue remaining in my
18 submission is whether there should be an element of bottom up evidence. I take issue
19 with what has just been said. I have read the letters. It is not dependent on the
20 claimants wanting to adduce witness statements. It was Mastercard itself wanting its
21 own qualitative evidence to inform its regression analysis, to inform itself.

22 Now, whether you call that the factual causation, we can debate that. But the bottom
23 line is we should park the reference to proximate cause. In my submission that wasn't
24 finally determined for the reasons I have articulated, paragraph 59 of the judgment.
25 We can have the last chance saloon on any bottom up qualitative evidence in April
26 and then we proceed to the cases to be served in July.

1 But Mastercard's application in April has got nothing whatsoever to do with proximate
2 causation. It is all to do with they want more information to get a better understanding
3 of the data, which we actually agree with.

4 THE PRESIDENT: Yes. You just disagree with their characterisation.

5 MR BREALEY: Yes.

6 THE PRESIDENT: Which I think is a microcosm of the problem we are facing now.

7 Mr Rabinowitz, I quite understand why you are making this application. But you have
8 made the application out of pragmatic not theoretical realms. The reason Visa have
9 made the application is because they don't want, by the back door, questions which
10 we have determined being re-opened.

11 MR RABINOWITZ: Precisely.

12 THE PRESIDENT: It does seem to me that treating this as a debate in the abstract
13 from the evidential questions that we are controlling on a weekly basis is unlikely to
14 assist. So the question, I suppose, is the extent to which the assertions, rulings, that
15 we have made evidentially so far and the very clear indication that we have not
16 embarked upon a Trial 2 process with a view to admitting evidence that will derail it
17 are enough for the purposes of today.

18 MR RABINOWITZ: Can I approach that in this way? The Tribunal has made certain
19 decisions with a view to guiding what Trial 2 is going to be about. Those decisions,
20 and I think this is what my Lord has said, has produced a situation in which what is
21 going to be tried at Trial 2 is whether as a matter of fact the overcharge was passed
22 on. We have cleared out of the way the possibility of legal causation, policy if you like,
23 playing a role either in the production of evidence for Trial 2 or in submissions that you
24 will get at the end of Trial 2 which say, for example, well, it is all very well that you
25 have been able to establish overcharge as a matter of fact of being passed on but
26 there is no evidence here sufficient to show sufficiency of link.

1 My learned friend keeps coming up with different phrases. They are all basically, as
2 your Lordship knows because we had this discussion, the Tribunal knows they all
3 come under the rubric of legal policy. It is all a way of filtering the circumstances in
4 which there is legal causation, factual causation, that the law is willing to recognise
5 a situation of -- where it will recognise there has in fact been causation, whether loss
6 or anything else. It is a legal policy question and that is what the Tribunal decided in
7 your July judgment.

8 But practically, I don't, with respect, disagree with the Tribunal. What we are
9 concerned about is, we made clear in our skeleton, are two things. Number one, the
10 idea, my learned friend bandies around these expressions, remoteness, proximity,
11 legal policy, we don't want those to be used as a Trojan Horse for getting in evidence
12 which is outside paragraph 5, for example, of paragraph 59 of the Tribunal's July
13 judgment, because the evidence is to be about whether, as a matter of fact, the
14 overcharge was passed on.

15 Number two, we don't want to land ourselves in a situation and the Tribunal in
16 a situation where at the end of Trial 2 someone says, this is all very well but all you
17 have established is factual causation. There is no evidence here sufficient to
18 establish, whether you call it sufficiency, proximity, legal policy, they are all the same,
19 there is no evidence here sufficient to establish that, so you lose on your pass-on
20 claim.

21 That is the gotcha point which we identified. So we don't make this for the purposes
22 of having an interesting debate as to stare decisis, whether you can be bound in a case
23 when it was happening in other cases, in my respectful submission that is all terribly
24 clear anyway and there was a decision about what the law is here. We are not
25 interested in the academic debate, interesting though it may be. We are interested in
26 the practical consequences of this point lurking underneath, as the Tribunal put it in

1 the judgment, the discussions about what evidential material should be allowed in or
2 indeed what might be said at the end of Trial 2, on the basis of what evidential material
3 should be allowed in. We don't want to fall into some trap and we also don't want
4 Trojan Horses running around, bringing with them piles of evidence which neither we
5 nor the Tribunal expected.

6 That is why we give, in some detail in our skeleton, the context which gave rise to this
7 application. Indeed, we only made this application because my learned friends on the
8 other side would not tell us exactly what they meant, what they had in mind. So our
9 hand was forced. My learned friend Mr Brealey can say Visa brought us here,
10 completely unnecessary. With respect I am not interested in blame but we are here
11 for the very good reason that they were producing, with respect, completely inchoate
12 points without explanation of where they were going to lead, all in the context of
13 discussions about evidence, and that gave rise to a real concern on our part as to
14 where this was all leading and whether it was going to undermine what the Tribunal
15 decided in July 2022.

16 Now, I am very happy to have the debate. My learned friend says you have to look at
17 the whole judgment and then he doesn't. He looks at one paragraph. He also says
18 you have to look at the judgment as a whole. With respect it would help if you read
19 the judgment from front to back rather than back to front in order to understand what
20 was decided. In our respectful submission, it is pretty clear what the Tribunal decided
21 there. All of it untouched, I would say, by the Court of Appeal, other than to not allow
22 permission in this particular case.

23 So we do have a ruling here. It is on a point of law. It does explain how legal causation
24 for this particular case will work. And my learned friends are bound by it. There was
25 an argument earlier about whether they should be bound by it because some of them
26 weren't here. That is gone. We are just dealing with what in fact was decided and

1 whether there is a way in which they can say it doesn't cover what we are talking about.
2 But I don't want to prolong what has already been a long session in order to draw out
3 from the claimants what it is they had in mind and really so that the Tribunal
4 understands where our concern is coming from. Which I think is very much where the
5 Tribunal recognises where our concern is coming from.

6 THE PRESIDENT: We will rise for a shorthand writer break in a moment. But just to
7 frame the question without reference to these abstract questions of law or policy. If I
8 were to define the issue for us in Trial 2, is it this: assuming an unlawful overcharge,
9 as a matter of fact, did the claimants bear that overcharge or did they include it in the
10 prices that they charged their own customers.

11 MR RABINOWITZ: If that is -- we would be content.

12 THE PRESIDENT: Now, Mr Brealey, is that what we are deciding?

13 MR BREALEY: No.

14 THE PRESIDENT: Right. What are we deciding?

15 MR BREALEY: You are deciding whether as a matter of fact the overcharge caused
16 higher downstream prices. In order to show causation you have to show, as a matter
17 of law, that there was a sufficiently close causal link. That has been -- that is what the
18 Court of Appeal ruled in Trucks 2, agreeing with the Tribunal at first instance. Yes,
19 you have to show causation and that is obvious. Pass-on is an element of causation.
20 But first of all, the question should be -- it is not that it is reflected in the prices because
21 that does not give any justice to the four options. You have to show a sufficiently close
22 causal link between the overcharge and higher downstream prices. That is the exam
23 question.

24 The exam question is not by reference to a counterfactual "would prices have been
25 lower", because that does not encapsulate what the legal test is.

26 THE PRESIDENT: Why is it not simply the inclusion of the overcharge in the price?

1 Why isn't that the question?

2 MR BREALEY: Well, it has to be in higher prices. We are going to have this debate.

3 Pass-on is not just about recovery of an overcharge. I vividly remember Mr Hoskins

4 making that submission at first instance in Sainsbury's v Mastercard and the Tribunal

5 just looking blank at him, because it is not about recovery of the overcharge. Why?

6 Well, because all firms try to recover their costs. As the Supreme Court said, and the

7 Tribunal said in Sainsbury's, there is a myriad of ways in which the overcharge can go

8 into -- it is the sweet shop example. So it is very important to identify the relevant

9 question. The relevant question is: did the overcharge cause higher downstream

10 prices?

11 MR TIDSWELL: If I can (inaudible) again. The position in relation to legal causation

12 is absolutely clear in paragraph 215 of the Supreme Court's judgment. It says where

13 a business seeks to recover its costs, in its annual or regular budgeting, the question

14 of legal causation is straightforward. And that must include remoteness as well,

15 mustn't it?

16 MR BREALEY: Then why, I ask rhetorically, do we have that paragraph in the October

17 ruling? Because equally, the MIF would be in a budget but it is recovered several

18 years down the line.

19 MR TIDSWELL: Well, I don't think that follows at all. I think it may be a reference, it

20 is most likely to be a reference to the period between the budgeting, isn't it? And most

21 businesses do budget on an annual basis or less. So I'm not sure that the paragraph

22 really helps you that much.

23 MR BREALEY: Okay. Let's try to put it another way. I know you want to break. The

24 Tribunal in Trucks, and endorsed by the Court of Appeal, identified various factors

25 which are relevant to, we can call it factual pass-on. Is it small? Was it considered?

26 How was it treated? Is it a variable cost? Is it an overhead?

1 MR TIDSWELL: I think those are legal causation points, aren't they? The point about
2 Trucks is it was a secret cartel and this is not a secret cartel. This is where everybody
3 knows what the overcharge is, to the extent if it is made out to be an overcharge, of
4 course. Not only that, it is quite a big number for quite a lot of merchants.

5 MR BREALEY: But that's a question of fact that needs to be determined at the time.
6 The fact --

7 MR TIDSWELL: Well it is not because it has been determined by the Supreme Court
8 already in Sainsbury's.

9 MR BREALEY: With respect, no. All you are doing is reading paragraph 215. One
10 has to then go on and read paragraph 216 -- paragraph 216 says it is very important
11 to know how the undertaking treats its costs. If it was just the case that paragraph
12 215, the one sentence, means in every single case there is a sufficiently close causal
13 link and you are not going to look at the size of the overcharge, you are not going to --
14 paragraph 215 would seemingly apply to the Trucks case. It was of a general point.
15 It was not just limited to the MIF.

16 So it is quite clear that the claimants cannot be shut out from saying the MIF in the -- if
17 you take -- again, the large groceries, billions of pounds of turnover, lots of overheads,
18 lots of moving parts. The Tribunal cannot possibly shut out Ocado from saying: well,
19 the sector in general does not look at this cost, it is a very small cog in a much bigger
20 wheel. That is the sort of -- that is not claimant specific evidence. That is just a --

21 MR TIDSWELL: No. I'm not sure what evidence -- what exactly is it that you
22 are -- moving from the abstract. What in terms of actual factual material are you
23 suggesting feeds in here in order to deal with this question?

24 THE PRESIDENT: And, if I may add, going to legal causation as opposed to factual
25 causation. Yes. I mean, let's just ask what it is you have in mind, evidentially speaking,
26 when you just made that rather broad general proposition.

1 MR BREALEY: How large groceries treat their cost. How large groceries would treat
2 the MIF. We also know --

3 THE PRESIDENT: I mean, what exactly is it that you are proposing be introduced?

4 MR BREALEY: Well, someone has to give evidence at Trial 2, as to how, whether it
5 is the economist basing their opinion on conversations with the various supermarkets,
6 whether it is a pricing expert -- as far as Ocado is concerned, we are looking at experts
7 based on discussions with --

8 THE PRESIDENT: Right. So this is in fact the repackaging of the subjectivity point
9 that we did decide a while ago? That is what it is. It is what did we think when we
10 were pricing. What costs did we think we were including in our prices. That is what
11 you want to go down.

12 MR BREALEY: But I asked --

13 THE PRESIDENT: No, is that right?

14 MR BREALEY: Well, on a sectoral basis, it has to be.

15 THE PRESIDENT: Right. So you want a sampling of subjective intention as to pricing
16 strategy and thinking?

17 MR BREALEY: Well, I mean, to be fair, sir, Mr Holt in his report, in his seventh report,
18 maybe we should go and look at that, deals with all these points as a matter of factual
19 causation. But he says the cost is variable.

20 Now, do we just accept that or are we allowed to adduce evidence to say, well, that is
21 a rather simplistic way of looking at how you look at costs. It is actually regarded as
22 an overhead.

23 Now, it is a variable overhead. That is treated differently to the wholesale cost of
24 goods. So clearly, if Visa are going to come to court and say there is pass-on because
25 all costs are variable and you always pass on variable costs, the claimant must be
26 entitled to say: well, that's a very simplistic way of looking at it. This is the way the

1 industry looks at this type of cost. This is how it prices. So, yes. That is clearly going
2 to be an important part of any Trial 2.

3 The market. We get Mr Holt saying, well, in perfect competition it is 100 per cent pass-
4 on, and if less than perfect, then it would be 90. Well, no. You have to look at actually
5 the market of the sector. Is it super competitive? Are the consumers price sensitive?
6 Because if their consumers are price sensitive in a particular market that means, as
7 a matter of practicality, that the undertaking cannot readily pass the cost on.

8 MR TIDSWELL: But that goes back to causation again. We are going to deal with
9 that at trial, aren't we? We know we are. We know that there may well be some
10 expansion of the top down evidence in order to allow us to consider those points and
11 that is the point the President said we are tightly controlling. That is a completely
12 different question to whether there is something which goes to the policy point that you
13 want to introduce. That does not go to the policy point.

14 MR BREALEY: I am sorry, I misunderstood. When I said the smallness of the
15 overcharge is relevant, I thought you were saying to me that is a question of legal
16 policy.

17 MR TIDSWELL: No, I think I was saying the analysis in Trucks is not really very helpful
18 and I think that is recognised by all the case law in relation to interchange fees.
19 Because it is a different factual situation where the parties -- everybody knew that the
20 charge existed, if it is held to be an overcharge. Some people knew it was a big
21 number so they can't say they didn't notice it. Therefore the analysis that takes place
22 in Trucks in the context of a secret cartel where people didn't know that they were
23 being charged is quite different. So I don't think we gain much assistance --

24 MR BREALEY: We would want to make submissions on this secret -- because it can
25 work both ways. Actually if one thinks about it, so there is the cost of a truck and you
26 know the cost of a truck but you don't know that it is 5 per cent more than it should be.

1 Then you have the MIF. Well, you know the MIF. Now it is said, well, that means it is
2 more readily that it is passed on. Well, maybe not. Maybe the -- all of a sudden, as
3 soon as you are introducing the word "secret" and you don't know about it, you are
4 introducing an element of subjectivity.

5 MR TIDSWELL: I don't think so. I think you are just addressing the point made in
6 paragraph 215 of the Supreme Court's judgment, which is that if you carry out
7 a budgeting exercise with any reference at all to costs, then you are going to know
8 that you are being charged something and you are going to treat it in a particular way
9 and the Supreme Court thinks that it is pretty normal you would expect to recover your
10 costs, which is consistent with broad economic principle, at least in the long run. So
11 none of that is really very controversial.

12 MR BREALEY: That, with respect, is only the start of the analysis. Because as the
13 Supreme Court also recognises simply to recover your costs does not mean to say
14 you have passed it on.

15 MR TIDSWELL: That is the factual point. We seem to go round in circles all the time,
16 we always seem to end up with factual causation when what we are really talking about
17 is actually quite different.

18 MR BREALEY: I will let others because I know -- I will let others speak in a moment.
19 The smallness of the overcharge, where it is -- how it is accounted for is highly relevant
20 to the question of factual causation.

21 THE PRESIDENT: Okay. We will take our break. But Mr Lask?

22 MR LASK: Sir, with the Tribunal's permission at some point I do have some
23 submissions I would like to make on the merits of the applications. It may be, given
24 the Tribunal's comments, that the applications are academic but I am concerned given
25 some of the exchanges that have taken place between the Tribunal and the
26 defendant's counsel, my concern is that these issues are not actually academic and

1 the concern from Allianz's perspective is that whilst there is, of course, a procedure in
2 place for the Tribunal to manage the evidence that is going to be admitted for Trial 2,
3 the concern is that we are not shut out from adducing certain evidence or making
4 certain submissions on the basis that they go to an issue that that has already been
5 decided when we say it has not been decided.

6 THE PRESIDENT: Yes. Well, look, we will rise now. I speak entirely for myself and
7 we will have a discussion in the course of the break, but going back to paragraph 50
8 of our 2022 decision in tab 5 of bundle 1 and looking at the distinction we drew there
9 between factual causation and legal causation, the more we discuss, the more it
10 seems to me that 50(2)(ii) is exactly right and if we are going down the route of policy,
11 well, we are not. That is, I think, absolutely clear.

12 We are obviously going to have to deal with factual causation and the evidence that is
13 required for that is something which we are managing going forward and is not
14 a matter for debate today. So whether we go through all the pleadings and put lines
15 through wording that is regarded as offensive or not, I am not sure that's a particularly
16 profitable course. But I think we do need to make clear -- again, I am speaking entirely
17 for myself here -- it seems to me that the more we engage in a discussion between
18 ourselves, and certainly Mr Brealey, the policy question is just I don't understand what
19 it is in this case. Maybe you can help us, after the break.

20 The factual causation question I do get. It is difficult. But that is something we are
21 resolving outside the scope of this debate. So I think the question that you will need
22 to deal with, Mr Lask, and, Mr Brealey by all means think about it and go first, is what
23 difficulty do Allianz have with 50(2)(ii), making absolutely clear that we are not
24 interested because we do not consider it arises in the question of legal causation.

25 Now, I think that is absolutely plain. It does not affect, as I say, the ambit of the
26 evidence for factual causation but the evidence we want to hear is to do with factual

1 causation and factual causation alone.

2 MR BREALEY: I will let the others deal with that. My straight answer to that is that if
3 by policy a Tribunal is ruling out any consideration of remoteness, which is a factual
4 question, it is not a legal question because the Tribunal at footnote 34 said policy is
5 a question of law. Remoteness is not a question of law. Remoteness is a question of
6 fact.

7 THE PRESIDENT: Well, I mean, how is remoteness going to arise here? What
8 evidence are we going to need in order to grapple with remoteness?

9 MR BREALEY: Mr Rabinowitz mentioned Trojan Horse and traps. We are not into
10 the Trojan Horse, we are not into timeo danaos et dona ferentes and it is not a trap
11 either. If the evidence at Trial 2 is all costs are variable, you have looked at the
12 competitors' prices, we assume the competitors have passed it on. There are all
13 various assumptions. At some point you may want to say all this is too remote. Yes,
14 the MIF is in the budget, but the recovery is a distance. It is not sufficiently close.

15 THE PRESIDENT: What you are saying there is not a remoteness point. It is
16 an evidential fragility point. What you are saying is that the basis upon which we
17 decide pass-on is so exiguous that we can't safely arrive on it. That is not remoteness.
18 That is --

19 MR BREALEY: It has occurred to me that - and I am not necessarily disagreeing with
20 you on this, we will have a break - because factual causation is on the balance of
21 probabilities, you need to adduce evidence on the balance of probabilities. If that sort
22 of analysis is the fragility of the evidence then we may --

23 THE PRESIDENT: Remoteness, in my understanding, is the placing of an artificial
24 limiter on the consequences of an action because, as we all know, causes have
25 causes and consequences have consequences. At some point the law has to say the
26 chain is going to be severed. That is not the case here. It is a very short chain. It is

1 | just whether an overcharge we are hypothesising moved from your claimants to
2 | someone else. That is a dead short chain.

3 | Mr Lask, we will rise now for ten minutes. You will address us on that?

4 | MR LASK: Sorry, sir, did you say ten minutes?

5 | THE PRESIDENT: Ten minutes.

6 | MR LASK: Thank you.

7 | (12.13 pm)

8 | (A short adjournment)

9 | (12.26 pm)

10 | THE PRESIDENT: Mr Brealey, I don't want to shut you out so if you have anything to
11 | say.

12 | MR BREALEY: No, I think I have had my time.

13 | THE PRESIDENT: Very good. Mr Lask.

14 |

15 | Submissions by MR LASK

16 | MR LASK: Sir, thank you. I do wish to make some supplementary submissions on
17 | behalf of Allianz. Not least so that everyone is clear what the Allianz claimants'
18 | position is on the interesting matters that have been debated so far this morning. We
19 | agree with the submissions made by Mr Brealey on behalf of Ocado and we make
20 | these additional points.

21 | We say the answer to the applications is straightforward for three key reasons that we
22 | set out in our written response and which I propose to summarise. First, in order to
23 | establish pass-on in law, a defendant must prove a direct and proximate causative link
24 | between the overcharge and any increase in prices by the claimant. That is the correct
25 | legal test for causation in this context. It is not disputed in principle by the defendants
26 | and nor could it be, because it has very recently been confirmed by the Court of Appeal

1 in Trucks. I will take you to the Court of Appeal's judgment in Trucks because it is
2 helpful on this issue and on some of the other issues that have been canvassed.

3 Secondly, the application of the legal test requires an assessment of the facts. The
4 existence or absence of the requisite causal link cannot be determined in the abstract.
5 That assessment requires all relevant factual matters to be weighed in the balance in
6 order to decide whether the requisite degree of proximity has been established.

7 Four particular factual matters have been identified as relevant in the case law but
8 those factors are non-exhaustive. Importantly, as Mr Brealey said, it is not enough for
9 a defendant to say that all costs are taken into account in the claimants' normal
10 planning and budgetary processes. Importantly, the required factual assessment is
11 not simply a matter of deciding whether the claimants' prices would have been lower
12 in the counterfactual. That may establish a causal link but a defendant must also
13 prove that the causal link is sufficiently proximate. There has been a degree of debate
14 as to what that means and the Tribunal's judgment in Trucks provides a striking
15 practical illustration of the point. There the majority found that the defendant had failed
16 to establish that the claimants' prices would have been lower in the counterfactual.
17 But it then also found, on the evidence, that in any event it did not consider there to be
18 the necessary proximate and direct causative link. That was because none of the four
19 factors were present and because the evidence showed that the claimants' price
20 setting involved a complex process overlain with regulatory, public interest and
21 commercial judgments.

22 So there, even if the defendant had established through its expert evidence that the
23 overcharge had resulted in higher price setting, the pass-on defence would have
24 failed. That is obviously an argument we would want to have open to us at trial.

25 The proposition that a causal link is not on its own sufficient is well established in
26 a mitigation context. A good example is the Fulton Shipping case. It is not in the

1 bundle but I have copies if the Tribunal would find it helpful. In my submission it is
2 inherent in the requirement for a sufficiently close causal link that an overcharge may
3 trigger an increase in the claimants' prices without necessarily satisfying the legal test
4 for causation.

5 Now, we don't understand the defendants to dispute that the legal test requires an
6 assessment of the facts. On the contrary, their applications are motivated at least in
7 part by a concern as to the factual evidence that will be required.

8 Thirdly, in order for the applications to succeed, the defendants must show that
9 the July 2022 judgment effectively dispensed with the requirement to prove a direct
10 and proximate causal link in these proceedings or at least decided that the requirement
11 was incapable, incapable, of making a difference in any of the claims before the
12 Tribunal. We say the Tribunal decided no such thing in the July judgment.

13 Firstly, it would have been a very significant decision for the Tribunal to make, because
14 it would effectively have deprived the claimants from relying on this point at trial. And
15 in those circumstances, if the Tribunal had made such a decision, one would expect it
16 to be clearly spelt out in the judgment. Yet there is no express decision of the kind
17 contended for by the defendants.

18 On the contrary, as Mr Brealey showed you, the Tribunal expressly acknowledged the
19 legal test for causation as then articulated in *Stellantis* by the Court of Appeal, but it
20 didn't say anything to suggest that it had already dealt with a core component of that
21 test.

22 Secondly, it bears emphasis that since the requirement for a direct and proximate
23 causal link requires a factual assessment, it is very difficult to see how the Tribunal
24 could have curtailed that requirement fairly or properly without conducting any factual
25 assessment. There was no evidence before the Tribunal at the May 2022 hearing that
26 resulted in the July judgment that would have enabled it to decide the point. In my

1 submission the defendants have offered no good answer to that.

2 Thirdly, the defendant's case in fact rests on a misinterpretation of certain parts of
3 the July judgment. In particular, paragraph 50(2)(ii) and then 55.

4 But in my submission, all the Tribunal did in the first of those passages, the no-brainer
5 passage, was observe that it was hard to see any policy reason for allowing a claimant
6 to recover an overcharge that it had passed on. In making that observation, in my
7 submission, it was positing a scenario in which pass-on had been proved in
8 accordance with the legal test for causation. This was not a decision at all but
9 an expectation that in those circumstances an additional inquiry into policy reasons
10 was unlikely to be fruitful.

11 The Tribunal may be aware that in the Trucks decision, the Tribunal looked at this
12 paragraph of the July judgment and explained what it thought it meant. It is entirely in
13 accordance with the interpretation I have just articulated and, indeed, the Tribunal's
14 explanation in Trucks was then endorsed by the Court of Appeal. I can show you the
15 relevant references.

16 In the second passage relied on by the defendants, paragraph 55, all the Tribunal was
17 doing was explaining its conclusion that a conscious decision to increase prices in
18 response to an overcharge was not a necessary part of the defence. We take no issue
19 with that. But that is all it was doing in paragraph 55. Neither passage says or means
20 what the defendants want it to.

21 In essence, in my submission, they are seeking to circumvent a core component of
22 the test for causation and establish a shortcut for their pass-on defences. But there is
23 nothing in the July judgment that permits them to do so.

24 Those are the points in outline and what I propose to do is now take you to some of
25 the underlying decisions to make them good.

26 THE PRESIDENT: Well, I think you can go fairly briefly on those.

1 MR LASK: Indeed.

2 THE PRESIDENT: Because we are very --

3 MR LASK: We are pushed for time. I appreciate that.

4 THE PRESIDENT: -- [overspeaking] cases and, more to the point, we have well in
5 mind the passages that you are going to refer to. So you can move fairly quickly.

6 MR LASK: What I might do, at the very least, if I may, is take you to the
7 Court of Appeal's judgment in Trucks and then one or two of the passages in the
8 Tribunal's judgment, which we have not yet seen today.

9 So taking up the Court of Appeal's judgment first. It is in the authorities bundle, volume
10 2 for today, at tab 19. I would like to pick it up, please, on page 1259 where the
11 Court of Appeal turns to what was ground 2, which was pass-on. It is 1259.

12 What one sees, firstly, at paragraph 150 is a reference to the elusive distinction
13 between legal causation and factual causation and the Chancellor, who is giving this
14 judgment, endorses what this Tribunal said in the July judgment. The reference to
15 paragraph 83 is 83 of the Court of Appeal's judgment where it sets out paragraph 50(2)
16 of the July judgment, though it is endorsing the distinction articulated by this Tribunal:
17 "Factual causation involves consideration of whether the effect of the mitigating
18 conduct was in fact to reduce or eliminate the claimants' loss, whereas legal causation
19 concerns whether, even if the effect of the mitigating conduct was in fact to reduce or
20 eliminate the claimants' loss, as a matter of legal policy, it should serve to reduce or
21 eliminate the damages payable by the defendant to the claimant."

22 It is right to note that the judgment then gives some examples, including an example
23 given by Lord Justice Green in argument, where he referred to remoteness.

24 THE PRESIDENT: Yes.

25 MR LASK: You will see at the end:

26 "In my judgment, the CAT in the present case [so the Trucks case] correctly identified

1 at 212 of its judgment, on the basis of the [July 2022 judgment], the distinction
2 between factual and legal causation."

3 The next paragraph is key:

4 "In terms of factual causation, DAF could only succeed in its argument on [pass-on] if
5 it could establish that the prices charged by Royal Mail and BT to their customers were
6 higher because of the overcharge, in other words, if it could establish that the
7 overcharge had been passed on to those customers."

8 This is important, this next bit:

9 "The CAT was unanimous as to this requirement at 223 of its judgment where it said:
10 'we consider that DAF must prove that there was a direct and proximate causative link
11 between the overcharge and any increase in prices by the claimants. That means that
12 there must be something more than reliance on the usual planning and budgetary
13 processes into which the overcharge was input and at some point prices increased'.

14 I agree with Mr Ward KC that the CAT was applying the correct legal test, as recently
15 restated by this court in *Stellantis*."

16 That is the legal test that I am relying on.

17 THE PRESIDENT: Well, yes. But 151 is simply marking the Tribunal's homework in
18 that particular case. 150 is the articulation of the test.

19 MR LASK: Well, sir --

20 THE PRESIDENT: No. I mean, 151 is setting out what on the facts of the case that
21 were before the DAF Tribunal. They said we have a quotation as to what the CAT
22 said in 223, which is *nihil ad rem*, for our purposes, and we have an endorsement of
23 what the Tribunal there said, but it is no more than that. 150 is the paragraph that you
24 have quite rightly have drawn to our attention.

25 MR LASK: Well, sir, in my submission, both the paragraphs are equally important.

26 What 151 --

1 THE PRESIDENT: No. 150 is dealing with the general test and endorsing what was
2 said in our judgment. 151 is going on to what the Tribunal said in DAF and is saying
3 that that particular formulation in regard to those particular facts in that particular case
4 was right.

5 MR LASK: Well, sorry. I hear what you are saying. My submission is that what the
6 Court is there doing is approving the legal test articulated by the Tribunal in Trucks
7 and it is doing so by reference to Stellantis, which was another Court of Appeal case
8 and it is the one that is cited in paragraph 59 of the July judgment.

9 THE PRESIDENT: Are you saying 151 is qualifying 150?

10 MR LASK: I'm not saying it is qualifying it.

11 THE PRESIDENT: Well, then what is it doing?

12 MR LASK: What 151 is doing is zeroing in on what the Court of Appeal understood
13 the test for causation to be.

14 THE PRESIDENT: So it is qualifying it?

15 MR LASK: -- for causation to be.

16 THE PRESIDENT: What does 151 bring, beyond a marking of the wording of the
17 specific judgment over and above 150?

18 MR LASK: 150, in my submission, is articulating the distinction between legal
19 causation and factual causation and 151 is articulating the legal test for causation laid
20 down by the Tribunal in Trucks and now being endorsed by the Court of Appeal.

21 MR TIDSWELL: And that legal test in 151 is a mix of factual and legal causation, isn't
22 it?

23 MR LASK: Well, it looks like it may be. One interpretation of 151 is that the
24 Court of Appeal is treating the requirement for legal and proximate causal link as
25 a question of factual causation. That is one reading of 151. In my submission, it does
26 not matter which bucket you put it in because whichever bucket you put it in, it was not

1 | decided by this Tribunal in the July judgment.

2 | MR TIDSWELL: Well, I think it does matter what bucket you put it in, because you are
3 | asking different questions. As I understand Stellantis, Stellantis is setting out
4 | a composite test for causation which encompasses both the legal and factual aspect.
5 | What we have to do here is disentangle those. You can see in 152 the point I made
6 | earlier to Mr Brealey about the distinction between Trucks and the facts in these cases
7 | which I think supports the President's observation that 151 is of limited help to us.
8 | Once you have understood the point at 150.

9 | MR LASK: I entirely accept the facts in this case are different from the facts in Trucks.
10 | In my submission that does not dispense with the need for a careful factual
11 | assessment on the evidence. But I do maintain that what 151 is doing is articulating
12 | a legal test for causation and whether it is factual causation --

13 | MR TIDSWELL: You say a legal test for causation, well qualify legal because it is a
14 | bit confusing. When you say "a legal test for causation". Let's qualify the legal for a
15 | minute, because it's a bit confusing. We are talking about a test for causation.

16 | MR LASK: Yes.

17 | MR TIDSWELL: And it is a test for legal and factual causation. That is your
18 | submission, I think, isn't it?

19 | MR LASK: Well, I make no positive submission on whether it is a combined test or
20 | whether it is purely factual causation --

21 | MR TIDSWELL: I think if you are going to argue it is purely factual causation then you
22 | need to do so because Mr Brealey I think is accepting that proximate causation is
23 | a test for legal causation. If you are going to go down the path that says that is not
24 | right, it is something else, I think you need to say so. Because that is certainly not
25 | where we are, I don't think.

26 | MR LASK: Well, I am perfectly content to accept that the test articulated in Trucks is

1 a composite test. As I say, I think it is arguable.

2 MR TIDSWELL: The test as is articulated in 151?

3 MR LASK: Yes, which is an endorsement of the test set out by the Tribunal in Trucks.

4 THE PRESIDENT: We have your point.

5 MR LASK: Thank you.

6 Yes. What the Tribunal was doing in the July judgment, in my submission, was

7 observing that it was hard to see a policy reason why a claimant should be able to

8 continue to claim an overcharge that it had passed on. As I say, in my submission, it

9 was positing a scenario in which the test for causation had been met. I say that for

10 three reasons.

11 The first is that, as I have already submitted, the Tribunal was not in a position to

12 determine that the requisite proximity would necessarily be established because it

13 didn't have the factual evidence that would have enabled it to do so.

14 Secondly, a few paragraphs later -- as Mr Brealey has emphasised -- the Tribunal

15 articulated the legal test. I don't have to call it the legal test. Articulated the test for

16 causation as set out in Stellantis. But it didn't say anything to suggest that it had

17 already determined part of that test.

18 Thirdly, you have the October 2023 ruling, where the Tribunal did, in my submission,

19 recognise that there could be circumstances in which pass-on had occurred as

20 a matter of fact, but the requisite proximate connection had not been established.

21 Just on that point, may I briefly show you one or two passages from the Tribunal's

22 judgment in Trucks to illustrate that point. This is in volume 2 of the authorities bundle

23 at tab 17.

24 THE PRESIDENT: Yes.

25 MR LASK: If we could pick the judgment up, please, at page 963.

26 THE PRESIDENT: Yes.

1 MR LASK: We see at paragraph 228, this is the unanimous conclusion of the Tribunal
2 on the relevant legal principles. At 228, you will see by way of summary on the legal
3 test for causation, and that is why I used the expression legal test for causation. We
4 respectfully conclude, and then you see the passage that we just saw in the
5 Court of Appeal's judgment.

6 Then you have four potentially relevant factors set out: knowledge, size, relationship
7 between what the overcharge is incurred on and the product whose prices have been
8 increased and finally whether there are identifiable claims by identified purchasers.
9 229: not an exhaustive list.

10 Then 230 is important in my submission. Picking the paragraph up halfway through:
11 "What the experts were seeking to show was whether the downstream prices charged
12 by the claimants were higher in the actual world with the overcharge than they would
13 have been in the counterfactual where there was no overcharge. But even if that can
14 be shown, it would have to be demonstrated whether there is the necessary proximate
15 and direct causative link required by the legal test for causation, based on the above
16 factors."

17 Then we see how the Tribunal determined this on page 1079. This is now the
18 judgment of the majority.

19 THE PRESIDENT: Yes.

20 MR LASK: Paragraph 573:

21 "In the circumstances, we do not..."

22 Sorry, this comes after a number of pages of factual assessment.

23 THE PRESIDENT: Yes. Why is this helping us?

24 MR LASK: Because it illustrates the point that you can have a causal link without it
25 necessarily being a sufficient causal link for the purposes of the test for causation.

26 THE PRESIDENT: But, Mr Lask, we are not going to be deciding a Trucks overcharge

1 case. We are going to be deciding a MIFs overcharge case.

2 MR LASK: No, but -- I don't need to detain the Tribunal with this, if it has the point.

3 The only point I make is one of principle which is you can have circumstances where

4 an increase in prices is shown to be the result of an overcharge, but there is

5 nevertheless not the requisite proximity to meet the test for causation. That is the

6 argument we want to have open to us at trial.

7 The only other paragraph I was going to show you, I will just give it to you for your

8 note, is paragraphs 688 and 691, which set out the majority's final conclusions on why

9 there was not the requisite proximity in that case.

10 I don't need to take you back to the July judgment. Mr Brealey has gone through it, in

11 some detail. I do have my submission that I have already made on the October 2023

12 ruling and, again, I don't need to take you to it because Mr Brealey already has. But I

13 do wish to respond very briefly to three points that Visa makes on the passage we rely

14 on. We say none of them assist.

15 First, Visa says that since the overcharge -- you will recall, there is a passage where

16 the Tribunal is giving an example of latency. It suggests there could be a question

17 over whether if an overcharge was only passed on after a significant time and as part

18 of other price increases whether there would be the requisite proximity.

19 So we do say that is a recognition by the Tribunal that this point remains live. Visa

20 says, firstly, that since the overcharge was a consistent underlying cost latency is

21 unlikely to be of any probative value in this case. But in my submission, quite apart

22 from being a matter of evidence, that misses the point because the Tribunal's

23 observation provided an example of the sort of issue that might arise as regards

24 proximity. It is the fact that the Tribunal was willing to hypothesise circumstances in

25 which proximity might be important that matters for present purposes. Because in my

26 submission, it would not have engaged in that thought experiment if it had already

1 decided that the requirement was otiose.

2 Secondly, Visa says the Tribunal's observation can't disrupt the clear finding in the July
3 judgment that the key question in this case is one of fact. We agree that the
4 requirement for a proximate causal link depends on an assessment of the facts and
5 that is one reason we say the Tribunal cannot have decided it in the July judgment.

6 Then finally, Visa says that if the claimants passed on the overcharge, albeit only after
7 a significant delay and as part of a general price increase then they should not receive
8 compensation as a matter of legal policy. The short answer to that is whatever Visa
9 may believe is right or wrong, it cannot wish away the requirement for a direct and
10 proximate causal link which is part of the test for causation. That requirement means
11 that a simple causal link is not enough for a pass-on defence to succeed.

12 Sir, in terms of the practical implications of all of this, my learned friends are going to
13 make submissions. The only point I would make from Allianz's perspective is that we
14 have well in mind the Tribunal's concerns about evidence and we have well in mind
15 the Tribunal's stated approach for dealing with evidence. As you have heard, there
16 are going to be some applications coming forward that go to the specific evidence
17 concerned. For Allianz's part, we don't envisage that the evidence we would want to
18 rely on, to make submissions on proximity, would be different from the evidence we
19 would want to rely on anyway in relation to pass-on. But what we don't want is to be
20 shut out from adducing any particular evidence or making any particular submissions
21 on the basis that the requirement for a direct and proximate causal link has already
22 been effectively decided when we say it hasn't.

23 THE PRESIDENT: Mr Lask, just by way of articulating our expectations for the hearing
24 we have tomorrow, which is one of our regular guidance hearings. I think it would be
25 extremely helpful if those claimants that are minded to make an application were not
26 to make the application, but to put some considerable flesh on the bones of what it is

1 they are intending, so that we are not blindsided by an application coming out and can
2 instead give some without prejudice indication as to whether we consider that sort of
3 application to be helpful or not. Because generally speaking, we would rather these
4 matters were dealt with on a consensual basis and it seems to me the fact that you
5 are flagging up an application is rather indicating that it is going to be contentious,
6 rather than not.

7 MR LASK: Well, sir, I certainly didn't mean to give that indication. I am not sufficiently
8 on top of the detail to do so.

9 THE PRESIDENT: I am not asking you to address us on that now. I am putting down
10 a marker for whoever is attending tomorrow that we are going to want to just
11 understand a little more closely what is going on, because there are quite enough
12 moving parts to the Trial 2 evidential control process that we are involved in for us to
13 be any longer satisfied with somewhat elliptical references to applications that might
14 or might not be made in the future. It is quite clear that Allianz have something in mind
15 and we would like to know what it is.

16 MR LASK: That is well understood and very helpful, sir. Thank you.

17 MR TIDSWELL: One other question. You referred to Visa's point about the
18 factual -- the test for pass-on being met at the factual level. I think the point they are
19 making is actually more subtle than the one you are answering. I think they are saying
20 that if you are running arguments along the lines of we don't price in a particular way
21 that would identify costs and then pass them on to customers; if it turns out as a matter
22 of factual causation that you do actually pass the prices on to customers, then that
23 argument loses any potency at all as a policy point. That is the point I think that is
24 being made.

25 MR LASK: Well, that may well be the point that is being made. The short answer, in
26 my submission, is that that all depends on the evidence. It may well be and we may

1 well want to argue that notwithstanding the different factual context as in Trucks there
2 was just too much noise in the price setting process to enable the Tribunal to reach
3 a confident conclusion that causation is established between the overcharge and the
4 output prices.

5 MR TIDSWELL: That really is again back into the factual causation point, isn't it?
6 Because in the situation we have, forget about Trucks for a minute, either you are
7 going to be right about it or wrong about it. If you are right about it then there is no
8 factual causation and the problem doesn't arise. If you are wrong about it, then it is
9 difficult to see how you could possibly run it as a policy point. So you are back to the
10 point, which is the same, the President's point, that the same material that is required
11 for factual causation will answer the question once and for all without having to get
12 into further evidence. That is really the indication of it.

13 MR LASK: That may be right. What we don't say is that apart from the issue of a direct
14 and proximate causal link, there are other policy reasons we may wish to rely on. But
15 we do see that that is what was decided in the July judgment and we don't seek to
16 re-open that. But what I don't want to be left -- the situation I don't want to be left in is
17 being at Trial 2 and making submissions on the evidence and wishing to make the
18 submission, for example, on a regression that uses a proxy that we say does not tell
19 you very much about the real causal link between the MIF and prices in the insurance
20 sector.

21 What I don't want to be told is, well, you can't argue that that is not sufficiently
22 proximate or too remote because that has already been decided.

23 MR TIDSWELL: What has proximity got to do with that? It is about causation. It is
24 not about proximity at all.

25 MR LASK: But proximity is part of causation. It is part of the test for causation. We
26 have seen that from Trucks.

1 THE PRESIDENT: Mr Lask, one of the advantages of having a docketed Tribunal is
2 we don't do rabbits pulled out of hats because you get a continuous attention by the
3 same Tribunal. What you seem to be doing is either considering that we are likely to
4 behave in a capricious and unfair way, which we won't do, or you are trying to box us
5 in into allowing at trial rabbits to be pulled from hats on your part. Now, neither course
6 is one that we are going to entertain. So if you have a concern about what you might
7 or might not be able to argue at trial, well, we are having fortnightly meetings. Raise
8 it.

9 MR LASK: Yes. It certainly will be raised once we have seen the evidence. But --

10 THE PRESIDENT: But you are adducing the evidence and we don't know what it is.

11 MR LASK: We have not adduced the evidence yet and we will have to see what the
12 evidence says. Far from trying to box the Tribunal into anything, what I am doing is
13 resisting my clients being boxed into something in advance of the evidence. We don't
14 know what the evidence is going to show.

15 MR TIDSWELL: No one is going to be stopping you saying this evidence is not good
16 enough to reach a conclusion that it has been passed on as a matter of fact. I mean
17 that is clearly all in play and if that is what you are concerned about, all of this is
18 a sideshow. It doesn't matter. Because what you are inviting us to do is import into
19 this analysis some sort of policy consideration which is quite different from assessment
20 of the quality of the evidence and its effectiveness to determine the outcome. They
21 are quite different questions. The second is absolutely in play and the first was what
22 we intended to put out of play in the judgment in July of 2022.

23 MR LASK: What this exchange is illustrating is a potential distinction between what
24 the Tribunal has in mind when it speaks of policy reasons and what I have in mind
25 when I refer to a factual assessment that goes to proximity.

26 THE PRESIDENT: Mr Lask, this is going back to the abstruse and the academic.

1 Frankly, we are not helped by this because what we have is a somewhat nebulous
2 attempt to get some sort of guarantee in advance that the evidence which you intend
3 to put in but which you have not told us about is going to get put in. I can tell you now,
4 we will decide that when you make the application. Not now.

5 MR LASK: I completely understand that.

6 THE PRESIDENT: Right.

7 MR LASK: I'm not seeking to say anything different from that. I am simply responding
8 to the applications that have been made against us and --

9 THE PRESIDENT: Visa are in the same position. Visa has this sense there is
10 something coming down the road and they would like to know what it is. And so would
11 I.

12 MR LASK: That is all going to come out as part of the process the Tribunal has laid
13 down. Before making this application, Visa did not write to us and ask us what
14 evidence we were going to put in. They just put in the application. We are now going
15 to have that process of dealing with evidence and dealing with it at the mini CMCs and
16 potentially a more substantive CMC, in advance of the positive cases.

17 So you have my submission there. May I have a moment to check whether there is
18 anything else? Those are my submissions. Thank you.

19 THE PRESIDENT: Thank you, Mr Lask. Thank you very much.

20

21 Submissions by MR SCHONFELD

22 MR SCHONFELD: I am very conscious of the time and I will try and keep this as brief
23 as humanly possible. The one point I want to make is a coal face point -- because I
24 like you, sir -- and I have been at the coal face, sir, repeatedly. I like you, sir, was
25 wondering why we are really here when preparing for this and hearing the arguments
26 this morning, and that is because when one gets down to the brass tacks, and you

1 have heard reference to Mastercard's upcoming application for qualitative evidence
2 and you have asked for flesh on the bones, but actually the proto application is in the
3 bundle. If I may, I will just take you to less what they asked for, but more why they ask
4 for it. It is behind tab 32A in your bundles for today, not the January-bundles.
5 Page 654.1.

6 THE PRESIDENT: So which number folder?

7 MR SCHONFELD: It is called a supplementary bundle for me.

8 THE PRESIDENT: Right.

9 MR SCHONFELD: It is the same bundle that the skeleton arguments are in, for
10 example.

11 THE PRESIDENT: I have that. Which tab?

12 MR SCHONFELD: 33A.

13 THE PRESIDENT: 33A.

14 MR SCHONFELD: Page 654.1.

15 THE PRESIDENT: Yes.

16 MR SCHONFELD: This is a letter from Jones Day to the claimants so you probably
17 won't have seen it before. A ten page letter followed by a ten page note from
18 Mastercard's economics expert and forensic accounting expert, or proposed forensic
19 accounting expert. I propose to focus on the experts' words themselves, rather than
20 the letter. That begins at 654.10A. About ten pages in.

21 THE PRESIDENT: Yes.

22 MR SCHONFELD: Actually, at the back of that note, we see what they ask for. It is
23 the last two and a half or -- the last two and a half pages. It is a series of documents.
24 I don't propose to go through all of it, sir, but it might be instructive for you given your
25 concerns about knowing sooner rather than later what people are asking for. What I
26 do want to go to, sir, is why these experts need this. That is back at paragraph 3 of

1 | this note, the first page of this note.

2 | THE PRESIDENT: The note or the letter?

3 | MR SCHONFELD: The note itself.

4 | THE PRESIDENT: Very good.

5 | MR SCHONFELD: At paragraph 3 they say:

6 | "Factual information is of substantial importance to the assessment of price pass-on

7 | for three key reasons: it will inform the choice of proxy, it will inform the empirical

8 | model [and] it will inform the interpretation of the empirical analysis."

9 | Now, they expand on those three reasons over the subsequent pages but the key

10 | paragraph that probably will do for my purposes is paragraph 4 on the same page and

11 | the sentence beginning about halfway through, crucially:

12 | "Crucially it is not ex-ante clear and not agreed upon by the experts which cost

13 | components provided in the data menu for the willing claimants should be considered

14 | as the appropriate proxy. This is because the choice of proxy is not a straightforward

15 | exercise but the result of careful evaluation of the nature of MSCs and candidate

16 | proxies."

17 | THE PRESIDENT: Yes, this is the (inaudible) point, as I call it, isn't it?

18 | MR SCHONFELD: I am sure he would be flattered.

19 | THE PRESIDENT: Where we have a concern is that the choice of proxy will in and of

20 | itself determine the question at trial.

21 | MR SCHONFELD: Quite.

22 | THE PRESIDENT: What we have said before, and it must be right, that we can't at

23 | an interlocutory stage decide what the proxy will be if it is going to be determinative of

24 | the outcome at trial.

25 | MR SCHONFELD: Of course. The crucial part for today's purposes is just over the

26 | page, the end of that sentence:

1 "The result of careful evaluation of the nature of MSCs and candidate proxies with
2 respect to a range of factors, including their role in the pricing process and their likely
3 mechanism for pass-on."

4 So what the experts from Mastercard, who do support the application today, say is
5 they need to understand the role of MSCs in the pricing process and the likely
6 mechanism for pass-on in order to pick a proxy in order to assess whether pass-on
7 has occurred as a matter of fact.

8 So what we have there is a need for evidence from Mastercard's experts, and I would
9 add our experts, to understand the likely mechanism of pass-on in order to assess
10 whether it, in fact, happened.

11 THE PRESIDENT: Yes.

12 MR SCHONFELD: The Tribunal will control what evidence they are allowed to have
13 in order to reach that understanding but if they are to be allowed that understanding,
14 which is a prerequisite for their methodologies to work, all the Tribunal then needs to
15 have at trial in order to assess whether there is a direct or close link, whether there
16 are any issues of legal causation, any of the myriad conceptual distinctions we have
17 been talking about today, you will have the evidence. Which is why I struggle to see
18 why the strike-out application today really has any bearing on what we are trying to do
19 to get to Trial 2.

20 The only bearing I can see it might have is, if it is allowed, there will be disputes at
21 Trial 2 based on the mechanism of pass-on identified on the evidence, whether
22 an argument to do with that is one that was struck out or not one that was struck out,
23 because the fine grain distinctions that we have all been struggling with to different
24 extents, between legal causation, factual causation, direct and proximate policy
25 issues, what arguments fall into each of those buckets, is not straightforward. But it is
26 not something that needs to be decided today. Indeed, if it were decided today it is

1 likely to lead to arguments down at Trial 2 on the back of the factual evidence about
2 gateway arguments, about whether you can make an argument at the back of Trial 2.
3 Far better to see the evidence that the experts need anyway and then the Tribunal can
4 take the small step, should any arguments be run, of saying that is sufficient
5 connection. Given, as I have understood the judgment in July 2022, particularly in
6 light of the helpful guidance and indications we have been getting in the fortnightly
7 CMCs, it is very strong guidance that the Tribunal is not minded to look favourably
8 upon policy arguments. That is very helpful and will no doubt colour what policy
9 arguments, if any, our clients bring. It may be straightforward for the Tribunal to
10 identify any viable arguments on legal causation, policy, direct and proximate that it
11 had not anticipated at the time of the July 2022 judgment that come out of the facts,
12 or to say no, as we anticipated, none of these arguments carry any water and we are
13 dismissing all of them.

14 That seems to me the practical way forward and what it does not require, sir, is
15 a strike-out today. Indeed, a strike-out would be positively unhelpful. It is far too blunt
16 an argument in this case, in these circumstances, particularly with a view to the
17 uncertainties around what exactly we are talking about and where exactly the lines are
18 drawn from a simple regression analysis at one end through to arguments of grand
19 policy at the other.

20 So that is what I thought I could contribute here. Of course, I will come back to you
21 tomorrow morning at 8 am about what we might say about our application. I won't try
22 to answer you on that today.

23 THE PRESIDENT: No. I am very grateful, Mr Schonfeld. Thank you.

24 Mr Coates.

25

26 Submissions by MR COATES

1 MR COATES: Sir, Primark has let others very bravely take charge on this issue and
2 we have very little to add to what they have said. I am not going to repeat therefore,
3 given the time, the submissions we made in writing, which the Tribunal has at tab 6 of
4 the supplementary bundle. The only thing that we would add is to adopt what
5 Mr Schonfeld said, namely we have heard the Tribunal's indications about what might
6 be necessary to resolve the factual question and obviously there is a live debate left
7 by Mastercard about what evidence may be necessary there and Primark is
8 considering what Mastercard is asking for and is considering whether it might want to
9 give such evidence, which may, as Mr Schonfeld said, be relevant to any questions of
10 proximity that remain.

11 THE PRESIDENT: We are grateful, Mr Coates. Thank you.

12 Mr Rabinowitz, we don't think it is necessary to call on you, subject to one point, which
13 I want to understand how far you are going to press the application. We are going to
14 make extremely clear what we see the shape of Trial 2 as being. We consider that, if
15 we do that, going through the pleadings and making various deletions, tempting
16 though it might be from a cathartic point of view, isn't going to be particularly
17 productive. We are trying these cases on the issues, the list of issues, that will
18 constitute the essential point of reference and the fact is we have too many pleadings
19 for them, effectively, to serve their purpose.

20 So my question to you is are you going to press us to take out -- I'm not sure what
21 colour pencil is needed, but let's call it red -- a red pencil and scythe through various
22 bits that you consider objectionable? Or whether a ruling as to what we intend, or
23 intended to have said, in our earlier judgment is enough.

24 MR RABINOWITZ: I am not going to press the Tribunal to take out any colour pencil
25 at all, but can I just say this to the Tribunal. The more I have sat here and listened to
26 my learned friends, in particular Mr Brealey and Mr Lask, the more in my respectful

1 submission it is important for the Tribunal to make clear what you have said in
2 paragraph 50(2) is binding on these parties.

3 The reason I say that is, with respect to my learned friends, we had submissions which
4 slid from talking about the legal test for causation to legal causation to remoteness
5 being something separate from legal causation, to the suggestion that when you talk
6 about policy at paragraph 50(2) -- and, indeed, as endorsed by the Court of Appeal in
7 paragraph 150 -- that leads something to the side in relation to legal causation, be it
8 remoteness, sufficient connection.

9 My learned friends were not there at the hearing which we had in March 2022 and they
10 probably don't know -- but they could have if they had looked at the transcript -- we
11 went through all of this. When the Tribunal talks about a test for legal causation which
12 equates to policy, there can be no doubt, in my respectful submission, because those
13 were the submissions, that that was intended to encapsulate any formulation of legal
14 causation, slippery though they may be, that my learned friends have tried to slide in
15 on the basis: well, as long as we are still entitled to argue about remoteness or
16 sufficiently close, or whatever, we are not going to argue about policy. With respect,
17 that is not what the Tribunal intended, that is not what you decided, that is not what
18 the Supreme Court said in paragraph 215.

19 In our respectful submission, it is perfectly clear and with respect to my learned friend,
20 it has been an astonishing performance by them. We come here, they first say they
21 are not bound by your decision at all. The argument then is: well, it does not mean
22 what, with respect, it plainly says. That is intended to be established by looking at
23 some other Court of Appeal case which approves you. They don't look at
24 paragraph-something of your October 2023 judgment. What they never do is deal with
25 what you said.

26 In our respectful submission, we sat here with increasing alarm listening to them,

1 because they do not, with respect, address what we have said, they do not address
2 what the Tribunal has said. We are more concerned than ever about what is actually
3 going on.

4 So, no. With respect, no pencils need come out. But in our respectful submission, it
5 really would assist if the Tribunal made it even clearer than it already is what was
6 intended by paragraph 50(2)(ii).

7 THE PRESIDENT: Thank you very much, Mr Rabinowitz. We are very grateful.

8 MR LASK: I am so sorry. Just one point. I absolutely did address what you said in
9 paragraph 50(2)(ii) of the July judgment.

10 THE PRESIDENT: You did.

11 MR LASK: I don't think I need to go over it again, but I just wanted to make that clear
12 for the record.

13 THE PRESIDENT: I don't think there is a need to go over it again. I am very grateful
14 to you all.

15

16

17

RULING (extracted)

18

19 MR RABINOWITZ: I am very grateful to the Tribunal. May I ask for the costs of
20 (several inaudible words: microphone off). We have not made the Tribunal take out
21 the pencils or the pens. But what we asked to be done and our concerns, in our
22 respectful submission, were well founded and it was appropriate that we should come
23 here and get the clarification from the Tribunal that we have obtained.

24 THE PRESIDENT: Is that resisted?

25 MR BREALEY: Yes, it is resisted. It should be the costs in the case. This is part of
26 the way that the Tribunal is managing the evidence. That is all, really, I think we can

1 say on that.

2 I mean, clearly, all the clarification the Tribunal has made is that legal causation is out.

3 But I am afraid one still does not know whether it is the word "close" that is being taken
4 out -- though it is now just a question of causation -- whether it is "proximity" that has
5 been taken out or it is a pure policy decision. So, for example, I don't believe that
6 many people are going to be looking at the exceptions policy. But is remoteness ruled
7 out in Trial 2?

8 So on the costs, we would submit that this has been helpful to actually articulate where
9 we are going and Visa is in a better position as to where it is going and we are in
10 a better position to know where it is going and it has been helpful to the Tribunal.

11 So it is not a complete win on Visa's part. As I say, it is more nuanced than that. So
12 we do resist the costs and we would say it should be costs in the case.

13 THE PRESIDENT: I am grateful. Mr Lask?

14 MR LASK: Sir, we would endorse that and, if I may, just add one brief comment. In
15 our submission, Visa and Mastercard did not need to bring these applications in the
16 abstract. One thing that has been illustrated quite clearly by this morning's hearing is
17 that it was not helpful for them to be brought in the abstract, ahead of any particular
18 disputes over particular evidence.

19 So for that reason, in addition to those given by Mr Brealey, we too say there should
20 be costs in the case.

21 MR COATES: Same for us. I have nothing to add to what Mr Brealey and Mr Lask
22 have said.

23 MR SCHONFELD: I won't repeat what was said, but I would say that in consequence
24 of the application as brought and as pressed until this morning would have been our
25 cases would have been struck out in all of our claims, on anything relating to legal
26 causation or proximity, which would have prevented exactly the process that you

1 described, sir, of in exceptional cases. Those arguments are still being brought before
2 the Tribunal.

3 The outcome has not reflected the application brought: it has been somewhere in the
4 middle. So more of a score draw than a clear victory for Visa there.

5 MR DRAPER: Just to simply say, Mastercard applies also on the same basis.
6 Obviously, for much more modest costs.

7 THE PRESIDENT: Well, I would have very much hoped so, Mr Draper.

8

9

RULING ON COSTS

10 This is a case where the respondents to the application should pay the costs to be
11 assessed, if not agreed, on the standard basis of Visa and Mastercard. We consider
12 that this is an application that absolutely did need to be brought. That is because there
13 has been an introduction of a lack of clarity, which we deprecate and we consider that
14 the deprecation needs to be flagged in costs.

15 We therefore make that order.

16

17 MR RABINOWITZ: Thank you.

18 THE PRESIDENT: I am very grateful to you all. Thank you very much for your
19 submissions. I look forward to seeing some of you at an ungodly hour tomorrow
20 morning.

21 But thank you all very much. We are much obliged.

22 (The hearing adjourned)

23 (1.28 pm)

24

25

26