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

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

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

12 Wednesday 22 May 2024

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15 Before:

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17 The Honourable Mr Marcus Smith
18 Ben Tidswell
19 Professor Michael Waterson

20
21 BETWEEN:

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23 **Merchant Interchange Fee Umbrella Proceedings**

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25 and

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27 **Walter Hugh Merricks CBE**

Class Representative

28
29
30 v

31
32 **Mastercard Incorporated and Others**

Defendants

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35 **A P P E A R A N C E S**

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37
38 Mehdi Baiou on behalf of the Stephenson Harwood and Scott & Scott Claimants and HMRC
39 (instructed by Stephenson Harwood LLP, Scott+Scott UK LLP, Simmons & Simmons LLP)

40
41 Tristan Jones KC on behalf of Primark and Allianz (instructed by Hausfeld & Co. LLP and
42 Pinsent Masons LLP)

43
44 Daniel Piccinin KC and Aislinn Kelly-Lyth on behalf of Visa (instructed by Linklaters LLP
45 and Milbank LLP)

46
47 Matthew Cook KC and Owain Draper on behalf of Mastercard (instructed by Freshfields
48 Bruckhaus Deringer LLP and Jones Day)

49
50 Mark Simpson KC and Jack Williams on behalf of Walter Merricks CBE (instructed by

Willkie Farr & Gallagher (UK) LLP

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(2.00 pm)

Housekeeping

THE PRESIDENT: Mr Simpson, good afternoon. Before we begin, just a couple of points of housekeeping. These proceedings are being live-streamed on our website. An official recording and an authorised transcript are being made. But, otherwise, it is prohibited for anyone else to photograph or to record or to transmit these proceedings and a breach of that would be a contempt of court. So, that's the pro forma introduction.

More helpfully, thank you all very much for your written submissions and reports. We have read pretty fully into this, and of course we have been thinking about this application not for weeks but for months, so we are pretty well up on the issues.

Mr Simpson, I think the thing that would help us most is not so much why it is that it would be a good thing for Merricks to come in, but why the issues or the disadvantages of Merricks coming in are not as great as Mastercard suggest. That's obviously the critical question, because the derailing of Trial 2 is something we really can't contemplate. It is complicated enough as it is, and that's something on which we need a degree of assurance.

Just so that we understand who we are calling upon, is it just going to be you, Mr Simpson, and you, Mr Cook? Should we rely on others to intervene when they want to, or do we need to go through the whole roll call?

MR SIMPSON: No, I gather Mr Piccinin has about ten minutes and Mr Jones has about five. These are estimates. I would suggest Mr Cook and I seek to divide the remaining time.

THE PRESIDENT: Fair enough. Is it appropriate for you to go first, then for Mr Piccinin and anyone else to follow, and then for Mr Cook, as the person who is

1 really opposing because I think, Mr Piccinin, you are essentially neutral.

2 **MR PICCININ:** Yes, sir.

3 **THE PRESIDENT:** We will hear the advocates for the neutrals and then the advocates
4 against in that order, if we may. Mr Simpson, over to you.

5

6 **Submissions by MR SIMPSON**

7 **MR SIMPSON:** I'm grateful, sir. Sir, you have had our skeleton. It sets out the benefits
8 and I have anticipated you would want to hear from us about what Mastercard says in
9 theirs about the disbenefits, and so we have dealt with the points of fundamental
10 principle that we say Mr Merricks should participate, and I want to look at the reasons
11 that it is said that he shouldn't.

12 So, the first one is at paragraphs 8 and 9 to 20 of Mastercard's skeleton, and that is
13 that Trial 2 is already in jeopardy. Now, I can deal with this briefly, sir.

14 It is right to say, as we are all aware, that there are indeed two months for positive
15 cases, and a lot to do in that time, but it is not right for Mastercard to imply, insofar as
16 they do, that this has come out of the blue. It has been known about since January.
17 Mr Merricks' involvement has been raised for around two years. Mr Coombs has
18 made abundantly clear what his approach is and exactly what evidence he will
19 primarily be relying upon. Now, the same is not true of Ms Webster, but I will come
20 back to that in a moment.

21 So, Mastercard has known all this for a long time and has until September, ultimately,
22 to respond to the positive case, insofar as there may be anything unexpected in it from
23 Mr Coombs. But, reading Mastercard's submissions, you would think that it was
24 starting from scratch now for its positive case in July, but of course it isn't. It has had
25 years to think about it. Dr Niels produced a highly developed statement for the joint
26 expert report in December.

1 In any event, sir, the status of the proceedings is not Mr Merricks' fault. We have been
2 participating as fully as we can and are not responsible for the delays, and it would be
3 highly prejudicial, we say, to Mr Merricks to exclude him from the trial because of
4 the late production of other parties' data.

5 So, unless I can assist further on that point, I will move to what I anticipate may be the
6 real nub of this application now, which is Mastercard's second point, which is that there
7 is substantial additional work needed if Mr Merricks participates.

8 Now, in support of this proposition, it relies on two statements from Ms Webster of
9 Frontier Economics. Before we go to those statements, sir, which I will, it is first
10 important to note that Mastercard does not yet have permission to rely on a second
11 economics expert who has exactly the same area of expertise as Dr Niels.

12 You will remember, sir, that pursuant to the 30 January Directions Order, where all
13 participated, they only have permission for one economic expert, Dr Niels. They have
14 not applied to have a separate expert in the Merricks proceedings. Only Dr Niels, and
15 not Ms Webster, has been attending the expert meetings to date, and only Dr Niels
16 contributed to the joint expert report on behalf of Mastercard.

17 The first Mr Merricks heard of Ms Webster being the proposed economic expert in the
18 Merricks proceedings was when her first statement was served on 23 April 2024.

19 It links to points I am going to make later, sir, but if Mastercard do wish to rely on
20 a further economic -- I'm not taking a technical point here, but if they do wish to rely
21 on a further economic expert in Trial 2, they need to make an application to do so or,
22 at the very least, to explain exactly why they need a second expert of exactly the same
23 discipline to cover substantially the same field and why in a context, sir, in which they
24 are saying themselves there is not enough time in Trial 2.

25 So, what's happening is, we have Mastercard adding another expert for unexplained
26 reasons and saying there's not enough time available for Mr Merricks to participate.

1 **THE PRESIDENT:** Just to unpack that a little bit, can I gauge the extent to which there
2 would be opposition to such an application, were it to be made, from Merricks and
3 indeed any other parties, it being taken as read that the Tribunal would be exercising
4 its usual high degree of case management control such that we wouldn't be allowing
5 Mastercard, by dint of an additional expert, to take over a disproportionate amount of
6 court's time? In other words, if it was simply a sharing of the burden amongst two
7 experts, both of whom could do the job, is that an issue for Merricks and the other
8 parties, but we will start with Merricks, or would the application actually be one, if
9 made, that would not receive particularly strong opposition, if at all?

10 **MR SIMPSON:** If it were a true sharing of the burden, different aspects of it dealt with
11 by different experts, and Mastercard would say, therefore, it will take up no more time
12 because you will be hearing on these issues from this expert and these issues from
13 that, I haven't got instructions, but I would anticipate that there would be much less
14 opposition than there is to the current scenario. But, sir, could I perhaps return to that
15 when I have pointed out the overlap apparently between the two experts at the
16 moment?

17 Our primary submission is, if there is an increase in time, then what has to give is that
18 second expert being called by Mastercard, not Mr Merricks' participation in the trial.

19 Now, Ms Webster says -- I needn't go to it -- in her second statement, and this is at
20 1/25, page 481-2, that "Mr Merricks' participation in the merchant proceedings would
21 not enhance the range of expert evidence available in the merchant proceedings as it
22 would result in estimates that are duplicative of those that the experts in these
23 proceedings propose to produce".

24 Now, what Ms Webster fails to explain, and Mastercard have to date failed to explain,
25 is how her own involvement as a second expert on the same discipline for Mastercard
26 would enhance the range of expert evidence available and how her own involvement

1 will not involve -- this is the point we raise, sir -- substantial duplication. What is she
2 bringing, we ask, to the party that Dr Niels cannot?

3 So we say, as a starting point of his submissions, today Mr Cook should explain
4 exactly why Mastercard needs a second expert with exactly the same expertise as
5 their first.

6 Now, sir, Mr Merricks submits that the obvious explanation for Mastercard wanting to
7 call two economic experts in separate trials is that they consider tactically they need
8 one economic expert to support the case of full pass-on and the other to support
9 a case of limited pass-on; a single expert couldn't do that, and it will be very
10 inconvenient for two experts to do it in a single trial.

11 Now, apparently without recognising that irony, the second expert is now saying there
12 is not enough time available in Trial 2 for Merricks to participate, in a context in which
13 her own -- I will come to this -- duplicative evidence will add substantially to the
14 evidence to be heard in Trial 2.

15 So, I turn then to that evidence. I want to examine it first generally and then by
16 reference to two major topics, which is sectoral scope and temporal scope.

17 Now, Ms Webster's evidence, if read carefully -- I shouldn't have said that, should
18 I? -- when read carefully is most conspicuous for what it does not say. In particular, it
19 is scrupulously careful not to state any positive case at all on any of the issues which
20 arise both in the merchant proceedings and in the Merricks proceedings, in a context
21 in which her report, if there is a Trial 2, is due in two months -- the positive case based
22 on her report, if I can take that as shorthand.

23 Ms Webster does not say, other than in the most vague and unspecific terms, what
24 extra work will be required as a result of her having to engage with Mr Merricks' case;
25 that is because she does not state, even in the broadest outline, what her views are
26 on any of the relevant issues, unlike Mr Coombs. Both of her statements are full of

1 phrases such as "may potentially be necessary", "may be the case", "may include, for
2 example", and "may, therefore, include". I won't give you page references; they are
3 scattered throughout.

4 Now, just by way of example, and it is worth turning to this, this is at tab 24, page 470.

5 It's at 1/24/470 and internal paragraph 34. My junior, Mr Williams, reminds me that
6 I missed the prefatory remark that I will be referring to the supplemental bundles by
7 number, and then if I refer to April-bundles, I will say "April", I'm sorry.

8 So, it is the supplemental bundle 1 at tab 24 and paragraph 34. Paragraph 34 begins,
9 "Similarly, the differences in temporal scope". It is a very brief paragraph. Could I ask
10 you to read it briefly.

11 She says:

12 "The difference in the temporal scope of the merchant and Merricks claims imply that
13 Mr Coombs' pass-on estimates will not be directly relevant to the merchant
14 proceedings."

15 But, only two months from positive cases, she doesn't say what her evidence will be
16 on whether they are relevant to the merchant proceedings -- between the Merricks
17 and merchant proceedings. How, then, can she say that Mr Coombs' participation on
18 this point will add significant time to Trial 2?

19 Then she goes on to say:

20 "There is scope for the factors that affect pass-on to have changed over time, such
21 that any pass-on estimates that are specific to the Merricks claim period may not be
22 applicable to the merchant claim periods."

23 Now, those are so vague as to be meaningless, and certainly no basis for submitting
24 that Mr Coombs is going to add anything extra because the question is: to what? We
25 just don't know what she is going to say.

26 Now, she doesn't say whether her evidence will be the factors that affect on pass-on

1 have changed over time, over what time periods and to what extent or what factual
2 evidence she will be relying on that topic. So, for all she knows -- well, she may know,
3 but we don't, and you don't -- she and Mr Coombs may actually agree on many of
4 the relevant points.

5 Now, the high, or perhaps low, point of all of this is reached in relation to the
6 fundamentally important issue of sectoral scope. Ms Webster's wording on this point
7 is very careful. Dr Niels, Mastercard's expert, in the merchant proceedings splits the
8 economy into 31 sectors, only 17 of which are covered by the merchant claimants. Of
9 course, the more sectors you split into, the easier it is to say there are a large number
10 of sectors in the Merricks claim which are not in the merchant claim. If you have 100
11 sectors, well there are 88, depending on the sectors. There are merchants in all of
12 Mr Coombs sectors.

13 But the key statement that you will not find anywhere in Ms Webster's
14 statement -- I won't call them reports -- the key statement you won't find -- I shouldn't
15 have done the parentheses -- is that she agrees with Dr Niels' 31-sector analysis and
16 herself considers that there are 31 sectors relevant to the Merricks claim. I have
17 looked very carefully at both these reports, and she does not say that. The problem
18 with her making such a statement would be twofold.

19 First, it would make it absolutely clear that all she is doing is duplicating Dr Niels'
20 evidence, thus there is no justification for her evidence being admitted in addition to
21 that of Dr Niels.

22 Second, it would tie her hands going forward in a context in which she has, as
23 yet -- and I will return to this -- said absolutely nothing about the crucial topic in the
24 Merricks claim of how she is going to deal with economy-wide pass-on.

25 Paragraph 25 of her report is where she deals with this, and that's at page 468 of
26 the bundle in the same place that we were. If I could ask you to read this with this in

1 mind, members of the Tribunal: it does not say that she agrees with Dr Niels' sectoral
2 analysis or that she will be adopting it. It is vague in the extreme, whilst giving the
3 casual reader the impression that she will adopt it. And nor does it explain, sir, and
4 nor is it explained anywhere in her statement, why, even if she does actually adopt
5 Dr Niels' sectoral analysis, it will be necessary to consider all the other 14 of Dr Niels'
6 sectors in a context in which the exercise being carried out in the Merricks claim is
7 ultimately, the generation of a UK-wide pass-on figure. I will return to that point in
8 a moment.

9 So, we then turn, in that context, sir, to what's said in Mastercard's skeleton on sectoral
10 scope. Again, that is very carefully worded. We turn to 26(2) of their skeleton. It is
11 bundle 2, tab 93, page 769, internal paragraph 26(2).

12 What this says is, this is the prefatory paragraph:

13 "The two sets of proceedings differ substantially in sectoral scope and, at an even
14 more fundamental level, the approach to sectorisation, the merchant claims do not
15 cover anything like the whole economy ..."

16 Of course, unless you adopt Mr Coombs' sectors:

17 "... and are heavily skewed towards a smaller number of sectors." If you adopt
18 Dr Niels' sectors.

19 "The sectors used by Mr Coombs do not map onto the sectors identified by
20 Mastercard's expert [singular]."

21 And the only expert who has identified any sectors at all is Dr Niels. So, it looks here
22 as though they're referring to Dr Niels' report.

23 So, we then turn on to paragraph 32, and I observe parenthetically that unless
24 Ms Webster, who is Mastercard's proposed expert in the Merricks proceedings, is
25 going to adopt Dr Niels' 31-sector analysis, then the point being made in these
26 paragraphs of Mastercard's skeleton is completely meaningless and irrelevant.

1 So, if we look then at 32(1):
2 "For the purposes of estimating pass-on rates, Mastercard's expert [again singular]
3 splits the economy into 31 sectors ..."
4 Mastercard and their counsel team and their solicitor team are very careful with words,
5 and they are very careful with singulars and plurals and this singular again is telling: it
6 looks as though it is Dr Niels, whilst giving a penumbra of an impression in these
7 paragraphs that Ms Webster is going to adopt these 31 sectors.
8 Now, "splits the economy into 31 sectors, only 17 of which are covered by the
9 merchant claimants". Webster 1. Now, Webster 1 itself refers -- it isn't Webster 1
10 saying, "This is what I'm going to adopt"; it says, "This is what Dr Niels is doing".
11 Accordingly, on Mastercard's analysis -- not Ms Webster's analysis -- there are 14
12 additional sectors that would have to be addressed in Trial 2 in order to be able to
13 respond to Mr Coombs' economy-wide analysis.
14 Now, in his response submissions, sir, we submit that Mr Cook has to make
15 Mastercard's position absolutely clear. He needs to say, because this is of
16 fundamental importance to his application, unequivocally whether what Ms Webster
17 means at paragraph 25 of her statement, I just took you to is that she is going to be
18 adopting and relying on the 31 sectors.
19 If she is, why is Mastercard calling two experts? Why can Merricks, in those
20 circumstances, not be accommodated in Trial 2, leaving everything else I said, by
21 Mastercard dropping its further duplicative expert?
22 Now, if Ms Webster is not adopting -- this is why it is so crucial, sir. If she is not
23 adopting Dr Niels' 31-sector categorisation, that is the end of Mastercard's case at this
24 application on differing sectoral scope because they don't have a case on sectoral
25 scope against Merricks. If that is right and she is not adopting them, then the entire
26 sectoral scope point has been smoke and mirrors to give the impression she is

1 adopting them but not actually saying so.

2 **MR TIDSWELL:** When you say it is not a sectoral approach in Merricks, as
3 I understand it, Mr Coombs is going to look at a bunch of different sectors and he is
4 going to aggregate them to get his industry-wide pass-on rate, and so, in that exercise,
5 he is going to be looking at public data for -- I'm not sure -- I can't remember how many
6 different sectors he says there are.

7 **MR SIMPSON:** 12.

8 **MR TIDSWELL:** 12. So he is going to think it is 12 different sectors and he is going
9 to look at those.

10 **MR SIMPSON:** Yes.

11 **MR TIDSWELL:** I understand the points you're making, but if one just stands back for
12 a moment, he will produce his results of that, probably in responsive evidence rather
13 than in the positive case. Mastercard would need to deal with whether they thought
14 his analysis by sector was right, wouldn't they, because that's the building block of -- as
15 I understand it, when he goes from sector to industry, it is just a weighting aggregation.

16 **MR SIMPSON:** Yes, sir. Two points, sir. First of all, it would be surprising if they held
17 it back at that point because they know very well what his 12 sectors are and why
18 they --

19 **MR TIDSWELL:** They may do the analysis upfront.

20 **MR SIMPSON:** Of course, sir, you will remember -- indeed, you and I had an
21 exchange in January on this -- and this is really important. The reason Mr Coombs
22 chooses the 12 sectors he does is because there is volume/expenditure data for those
23 sectors and, therefore, you can generate a weighted average.

24 **MR TIDSWELL:** Absolutely, I understand that.

25 **MR SIMPSON:** So that takes me back to the next sentence --

26 **MR TIDSWELL:** Before you do, I just want to make sure -- I actually understand why

1 you're making the point about the interplay between Dr Niels and Ms Webster, and the
2 way it has been put, but I want to get it square in my own head, and I'm not pushing
3 you either way on this. I just want to get it square in my own head.

4 Inevitably, if Mr Coombs is to be dealt with by Mastercard, or indeed anybody else, in
5 these proceedings, somebody is going to have to, either in positive or responsive
6 evidence, go through the exercise of effectively duplicating what he's doing.

7 **MR SIMPSON:** Yes.

8 **MR TIDSWELL:** But, equally, as I understand it, Mr Holt is doing something similar,
9 albeit not necessarily matching the same sectors and not necessarily using the same
10 data. So, there is an exercise that's going on that has to be dealt with then as well. Is
11 that broadly right?

12 **MR SIMPSON:** Well, sir, we don't know how Mr Holt is going to do it because there
13 is another fundamental point. There is only one way of generating a weighted average
14 here because there is only one set of card expenditure data out there, and that's the
15 UK Payments Council material that Mr -- there are two sources which Mr Coombs
16 relies on. So, if you want to generate a UK-wide pass-on, you need a weighted
17 average, so you need card expenditure data.

18 Now, Mastercard does not have any relevant data before 2011. There's been a data
19 loss. So that really is the only data out there. And so, a really significant question that
20 we say Mastercard has to grapple with and has been ducking, and ducks it here as
21 well, and they need to deal with it, is: how is Ms Webster or Dr Niels going to deal with
22 Merricks' case, which is based on a UK-wide pass-on figure, if they themselves do not
23 adopt those sectors?

24 That may be unsatisfactory, as a matter of other factors, but, given that that's the only
25 show in town, as far as the data that can give you a weighted average, the crucial
26 question that Mastercard has not addressed, not begun to address, is what sectors is

1 Ms Webster going to use.

2 Now, we say that it is highly likely that she is going to have to use those 12 sectors
3 because there's no other data out there, and so Mastercard's shyness on this topic,
4 we say, speaks volumes, because what appears to be happening here is, there's
5 a general -- I used the word "penumbra" earlier, I don't want to use it again -- a general
6 impression that she is going to use the 31 sectors, but she doesn't actually say that,
7 and, if not, then what is she going to use? Could I just take you --

8 **MR TIDSWELL:** Before you move on, I just put a marker down with you and I don't
9 think you've quite got to the point I wanted to get to.

10 **MR SIMPSON:** I'm sorry.

11 **MR TIDSWELL:** No, I am happy to let you get to it, but I just want to be really plain
12 about what I'm trying to get to.

13 It seems to me, and just accepting what you have just said, let's say Ms Webster is
14 given permission and they are allowed to have two experts, but she is going to cover
15 the Merricks angle and she is going to use the 12. Then the thing we are really
16 interested in here is how much extra work that involves and why Mastercard should
17 be put in a position where they have to do that for Trial 2. That's the sharp point of
18 this.

19 **MR SIMPSON:** It's the sharp point.

20 **MR TIDSWELL:** And I appreciate why you are going in the order you do --

21 **MR SIMPSON:** I do understand that sir. But we say we would be having different
22 arguments if Mastercard were coming to this court and saying, "Well, in fact, she is
23 going to use Coombs' 12 sectors", because then you would say, "Well, in fact, there's
24 not all the mismatch" --

25 **MR TIDSWELL:** All right. I understand why you make those submissions. I suppose,
26 if we are trying to deal with this, and if we are trying to make sure Trial 2 works and

1 can be managed, regardless of how much we know about -- and we have to anticipate,
2 I suppose, and maybe Mr Cook is going to tell us some things that will help us, but, at
3 the end of the day, the two sharp points that really seem to matter about, if one can
4 call it, the additional work, are, firstly, this question of, if Mr Coombs is doing the 12
5 sectors bit by bit and it is different from what Mr Holt is doing, then someone has to
6 deal with that. That's the first point.

7 The second point is, just coming back to the temporal point, how much additional work
8 there is involved for whoever it is, Ms Webster or Dr Niels, to the extent that the
9 exercise that Mr Coombs carried out is not one that would be carried out otherwise.

10 I understand the point about how he's taking data all the way back to 1990-something
11 anyway for most of the sectors. So, the real question is, in that light, what do the
12 problems brought by Mastercard really reveal as to the extra time and work involved.

13 I completely understand why you make the point you do, but certainly speaking for
14 myself, those are the points we are really interested in.

15 **MR SIMPSON:** Taking Visa, how are they going to do it? We don't quite know, sir,
16 because, again, the same puzzlement arises in relation to Visa. I think Mr Holt has 14
17 sectors. But he's going to generate an economy-wide pass-on figure, that's clear from
18 the skeleton argument, for exemption. But we don't know how he's going to do that
19 without using Mr Coombs' 12 sectors.

20 But it is a big point, we say. It is a big point whether ultimately Ms Webster is going to
21 be forced to adopt the 12 sectors because, if she does, there are merchants in each
22 of the 12 sectors. The synergies are very, very significant. There won't be at least
23 a big fight about which sectors to adopt or the contradictions between the different
24 sectors -- you and I discussed this in January, sir -- and it looks more like -- we say it
25 is very strongly in favour already, but you take away an objection, which is what the
26 president said a moment ago, if you have 12 sectors, in essence, that were agreed by

1 all parties being the ones which could generate the UK-wide pass-on figure.
2 It is not just a forensic point. It is, we say, an evidential point as well. Mastercard's
3 objection appears to be based on the very large differences -- a large tract of their
4 skeleton is devoted to the differences between 31 and 12 and the lack of synergy
5 between the two. You take that away and a very substantial underpinning goes.

6 So if sectoral scope, as is the subheading of their skeleton, is the same ultimately
7 because it has to be, because those are the only sectors for which you have
8 volume/expenditure data, well, that whole underpinning of the opposition to us goes.

9 **MR TIDSWELL:** You've still got the point that, if you are in, then
10 somebody -- Ms Webster or Dr Niels or someone -- has to embark on the 12 and, if
11 you are not, they don't. That's really the point of the question. I am accepting, in
12 a way, that the mismatch between the 12 and the 31 isn't really the target here; the
13 target is, what does bringing the 12 into the discussion actually add in terms of extra
14 work. That's what I'm really pushing you on, I think.

15 **MR SIMPSON:** Sir, since the scope of -- you have the scope of the Coombs sectors.
16 You have merchants in each of those sectors. One of the exercises that Visa is going
17 to perform -- we presume at Trial 2, looking back from the exemption trial to the
18 evidence to be given at Trial 2, because that would be the logical place for it -- is
19 themselves to generate an economy-wide figure.

20 So, we don't accept that it's different in substance. We do accept that you have to
21 look at Coombs' 12 sectors. But we would also say that there is a very positive utility
22 to that and to the UK-wide pass-on generation, which is the President's triangulation
23 point.

24 So, if you have got Mr Coombs with his 12 sectors, you've got a cross-check for each
25 of the merchants in those sectors, and there is at least a merchant in each of
26 the sectors, and you also have a UK-wide rate being generated by Merricks,

1 Mr Coombs and by Visa as a cross-check for the overall position, in a context where
2 there are some evidence gaps, and these things are going to be, we say, important as
3 cross-checks and as extrapolation points, because another point made against us is,
4 "Well, there's going to be a lot of extrapolation with you", but you're already going to
5 have to extrapolate -- the Tribunal will have to extrapolate, the parties will have to
6 extrapolate -- merchant to merchant within sectors because we have only got data
7 from some merchants within certain sectors, and also potentially at cross-sectors
8 where there is a dearth of information.

9 So, far, we say, from being a disadvantage of having a 12-sector analysis, it is an
10 advantage of another analysis. When I see the president frown, it troubles me a little
11 bit.

12 **THE PRESIDENT:** I'm really just going to try to repackage Mr Tidswell's point --

13 **MR SIMPSON:** That means I haven't answered it.

14 **THE PRESIDENT:** I confess I see the force in the point I think he was making, which
15 is this: we have quite deliberately timed this application so that we have a moderately
16 firm grip on the evidence that will be produced at Trial 2, and it is, at the moment,
17 evidence that is only going to be used for Trial 2, and you are coming in having fully
18 participated in the control of the material that is coming in. So, we know the shape of
19 the trial. And although, of course, your expert will be referring to public data, there is
20 not going to be any data disclosure in addition to that which we are permitting to have
21 coming in.

22 Now, if that is the case, we have got a fairly tight control over the material that will
23 have to be traversed in Trial 2, whether Merricks comes in or not, and if all we are
24 talking about is how that material is parsed and whether, in order to do the parsing,
25 Mastercard should have one expert or two, then I'm not sure I see the problem with
26 that. Indeed, I'm not even sure I see the problem if Ms Webster's position is

1 substantially unarticulated.

2 We have made absolutely clear that we are going to do this trial in the time that we
3 have set down and that we are going to control the parties so that it is done within
4 time, but fairly amongst the parties, then I'm not sure that we need worry too much
5 about exactly how it is that Mastercard are going to fight on two fronts.

6 Now, it may very well be that you're having to tilt at windmills rather than substance
7 because you haven't been told by Mastercard what the extra work is.

8 **MR SIMPSON:** Yes.

9 **THE PRESIDENT:** Well, that's understandable because you haven't been told. But --

10 **MR SIMPSON:** I understand what you say, sir --

11 **THE PRESIDENT:** -- if it is no more than triangulation --

12 **MR SIMPSON:** No, if we take with a fixed point of Trial 2, which we are, and
13 Mastercard want to use some of their time in Trial 2 and say, "We need experts of
14 the same expertise, but they are going to give different evidence", well, so be it, it
15 doesn't affect us.

16 The nub of it at the moment is, "Well, we want a second expert. We don't know what
17 she is going to say. She is going to take up time", and in a context in which Mastercard
18 is saying we should be out of Trial 2. If the premise is we are in Trial 2, the discussion
19 becomes rather different.

20 Coming back, if I may, to Mr Tidswell's point, what is important to remember, sir,
21 is -- I think the President mentioned this -- it is all the same merchants. So, you have
22 got the underlying merchants, you have got the underlying data, you have got the
23 public data. The sectoral divisions are a way of ultimately, in the merchant claims,
24 finding a pass-on figure for merchants and, in the Merricks claim, finding a UK-wide
25 pass-on figure. So, you are starting, in that sense, bottom-up: this is what you have
26 got, and the experts may divide the sectors differently, but that's not going to add any

1 significant time to the trial, we say, and it will add much less time if they actually end
2 up dividing them the same.

3 So, I just want to carry on, if I may, where I was in Mastercard's skeleton, which is
4 32(2). This is very important, sir, because it indicates Mastercard surely can't actually
5 misunderstand this. They say at 32(2):

6 "Further, Mr Coombs splits the economy into sectors based on products rather than
7 categories of merchant business."

8 Now, that is fundamentally wrong, and it is a crucial statement. Mr Coombs made it
9 absolutely clear in the January hearing that his sectors are based on the availability of
10 card expenditure data for each sector, and that's reiterated in his letter at
11 paragraph 2.3 of 18 April. I needn't go to it. The reference is 1/10/113. And the
12 reason is the card expenditure data is available for the 12 sectors.

13 Now, it is that UK-wide pass-on rate, which is the Holy Grail, the ultimate goal, of
14 Mr Merricks and which Mastercard, if they are going to have a positive case against,
15 are going to have to deal with, they are going to have to say what their case is. They
16 could just say, "We don't know, it is all that vague, go away", but the much more likely
17 thing is they will advance a positive case on it ultimately when they finally tell us what
18 it is.

19 Even now, two months before positive cases, they haven't said that, or indicated how
20 they are going to do it, without using the only sectors for which card expenditure data
21 is available.

22 Now, the paragraph goes on:

23 "There is no direct read-across between Mr Coombs' sectors and those used by
24 Mastercard's expert."

25 Now, that's Dr Niels. It has to be Dr Niels. We just don't know what Ms Webster is
26 going to use, although the smoke and mirrors appear to indicate she might use 31, but

1 will she? That's for Mr Cook to answer in his response.

2 But the crucial point here is that both Ms Webster and Mastercard have completely
3 ducked the fundamentally important question of how she is going to generate
4 a UK-wide pass-on rate, and so it is very difficult to see how -- I mean, let's just have
5 an alternative hypothesis from Mastercard as to how they might do that, but we have,
6 as yet, heard nothing.

7 So, unless I can help you further on sectoral extrapolation, those are our submissions
8 on that.

9 In essence, we are two months from positive cases. Mastercard must know what its
10 case is on this. It needs to explain today how it is going to generate a UK-wide pass-on
11 figure without using Coombs' 12 sectors.

12 Moving, then, to temporal extrapolation, which is the second of the issues which
13 Mastercard raises, I have already dealt with the vagueness of Ms Webster's evidence
14 on this, and we pre-empted this line of argument in our skeleton at paragraphs 34(b)
15 to 36. There is nothing in Mastercard's skeleton which deals with that.

16 I emphasise the following points briefly: there is currently a minimal temporal overlap,
17 but, more pressingly, though, since Heureka -- it is possible that the appeal against
18 limitation, relying on Heureka, could succeed and therefore the -- particularly possible,
19 and therefore the merchant claimants will have a claim that extends back to 1992. In
20 those circumstances, there is a lot more overlap.

21 But, given the potential uncertainties of how appeals may play out, the issues that the
22 Tribunal needs to be concerned with are issues of principle in both sets of proceedings
23 which will need to be resolved in Trial 2.

24 So, putting aside Heureka, first, the issue of temporal extrapolation is actually very
25 limited. In short, this is because Mr Coombs already has public data from across
26 almost the whole claim period, even in the period prior to the merchant claims, so the

1 extrapolation required is in fact very limited. That's at the Coombs letter of 18 April.
2 I won't go to it. It is 1/10/118 at paragraphs 3.3 to 3.5.
3 In those circumstances, it is hardly surprising, sir, that Mastercard resorts to
4 hypothetical examples and doesn't engage at all with those paragraphs of Mr Coombs'
5 letter.
6 Second, in any event, extrapolation is already happening in Trial 2, even without
7 Mr Merricks. As we note in paragraph 35 of our skeleton, as I briefly said a moment
8 ago, you have intra-sector extrapolation and inter-sector extrapolation going on, in any
9 event.
10 This is all leaving aside the point that, since Ms Webster doesn't state what her
11 evidence is going to be on any of this, her statements, on which Mastercard rely, give
12 no support at all to the proposition that having Merricks in Trial 2 will add substantial
13 additional work, and this is in stark contrast to Mr Coombs, who makes it clear what
14 his evidence is going to be on each issue and why it won't take extra time. You have
15 a vacuum in Ms Webster's report, but you have facts and Mr Coombs' opinion as to
16 why it will not take more time, or significantly more time, in his letter.
17 Unless I can help you on those, I will turn next to the causation point, the range of
18 interchange fees in issue. I can deal with this relatively briefly, and I will, seeing the
19 time, which I used to be able to see, but I think it is 14:50.
20 The submissions here by Mastercard rest on the causation judgment with which you
21 are familiar. Now, three preliminary points on that.
22 First, on the issues-based approach which has been adopted in this case, the potential
23 for a causation judgment going either way has always been clear. This is not a new
24 point.
25 Secondly, Merricks has sought leave to appeal.
26 Third, even if leave is not granted, Mastercard themselves acknowledge, at

1 paragraph 36 of their skeleton, that Merricks still has an arguable claim. Mastercard
2 has proposed preliminary issues to dispose of that, but they will not be heard before
3 Trial 2, Mr Justice Roth has made clear.

4 In the face of all this, Mastercard has now come up with a brand-new point, as we read
5 it, which appears to be that judgment in Trial 2 will now need to be given on two bases.
6 It appears to be supported by three propositions. We don't understand it. It is at
7 page 783 of the bundle, at paragraph 40 of their skeleton.

8 They say that, depending on the outcome of the causation trial, this could affect things
9 at the acquirer level. Now, insofar as we understand this, this is just a bad point. At
10 the acquirer level, as you remember, there is 100 per cent pass-on for IC++, and for
11 blended contracts there's been no suggestion, nor could there be, that the acquirers
12 set the MSCs by reference to the percentage of transactions which were cross-border,
13 and which were not.

14 40.2 is imaginative, but we say equally bad. At 40.2, this relies on the fact that
15 cross-border transactions may be distributed differently in different sectors. You can
16 see that perhaps in the travel sector it might be different from alcohol, or whatever it
17 might be.

18 But in a context in which Mastercard cannot produce any transaction data at all and
19 the sectoral data on which Mr Coombs relies is all aggregated, it is a phantom problem
20 based on non-existent evidence.

21 I won't turn you to it, but at bundle 1, tab 24, page 467, the Webster evidence, on
22 which it is based, is totally vague and speculative, like the rest of her evidence. Above
23 all, she says nothing about the evidential basis on which this phantom problem would
24 be solved.

25 The final point is that pass-on by merchants in the EEA would be a materially more
26 important issue in the Merricks collective proceedings than in the merchant umbrella

1 proceedings.

2 In the next sentence, Webster 1, paragraph 20 is referenced, so let's go and look for
3 the exiguous evidential basis for this statement, which is bundle 1, tab 24, page 466.

4 Looking at that paragraph:

5 "The narrowing of the scope of the Merricks claim would result in transactions with
6 merchants outside the UK representing a materially larger proportion of claim values
7 currently the case. As a result, for the purpose of the Merricks proceedings, it may
8 potentially be necessary to conduct pass-on analyses."

9 And that's the limit of it: it might be necessary. Well, will it? If you are going to say we
10 need to be thrown out of Trial 2, you are going to need to say it will be necessary to
11 do it, or that's simply not an evidential basis for anything.

12 So, we turn then to point 3, which is the limited utility of Merricks' involvement. It's
13 paragraph 43 of Mastercard's skeleton. Mastercard say this:

14 "Mastercard respectfully agrees with the Tribunal that it is, in general, better to have
15 more sources of evidence and greater variety of approaches to estimating pass-on."

16 We respectfully agree with Mastercard on that. It then says:

17 "Mastercard's own expert methodology involves a broad or holistic approach, having
18 regard to various different sources of evidence."

19 Whose methodology? Whose methodology is Mastercard saying involves that?

20 Because the only expert they are thinking of calling in our trial hasn't told us what her
21 methodology is. Then we go to 44.1:

22 "Mastercard therefore accepts it would be a downside in refusing to the application if
23 this would lead to a material reduction in the breadth of analytical approaches and
24 sources of evidence available."

25 Fortunately, that's not the case here.

26 "Mastercard's expert team has considered this issue carefully by reference to the

1 detailed information each expert has provided about his or her proposed methodology
2 and sources of evidence."

3 Now, the expert who has conspicuously not provided any detailed information at all
4 about her methodology or what evidence she is going to adduce or rely on is
5 Ms Webster, and, in that context, Mastercard cannot possibly say that Mr Coombs
6 would not materially increase the evidence base or quantitative analyses available,
7 and the suggestion that Coombs adds nothing because his methodology is so similar
8 to Holt, which is what Ms Webster says in the passages of her report that are relied
9 upon here, goes directly against the suggestion that Mr Coombs is going to add
10 substantially to the length of the trial.

11 Then 44.2:

12 "This is largely because Mr Coombs' methodology relies principally on publicly
13 available information."

14 But what does Ms Webster's methodology rely on? We don't know.

15 Fourth, "Limited prejudice to Merricks". Now, when you read the heading of this
16 section, you expect it to be about the limited prejudice that is going to be caused to
17 Mr Merricks, explaining why, for instance, there is limited prejudice to him from yet
18 further significant delay in the resolution of his claim, from his inability to challenge and
19 test evidence from the merchants, and from the ability of Mastercard to ride
20 two different horses at two different trials. But we don't see any of that. It doesn't
21 grapple with any of the potential prejudices to Mr Merricks, other than to say he can
22 have the evidence from Trial 2.

23 So, we say, in conclusion, sir, that Mastercard's opposition to Mr Merricks' participation
24 is transparently tactical and based on a manufactured set of reasons. The simple,
25 most fundamental fact here is that Mastercard wants inconsistent judgments and
26 Mr Merricks' participation in Trial 2 will prevent that from occurring.

1 Unless I can assist you further?

2 **THE PRESIDENT:** Thank you. Mr Piccinin?

3

4 **Submissions by MR PICCININ**

5 **MR PICCININ:** I can be quite brief, sir. Really, there are two points, and on one point
6 we agree with Mastercard, and on the other point we agree with Mr Merricks, if I can
7 put it that way.

8 On the first point, we have seen what Mastercard has said in writing about the present
9 state of preparations for Trial 2, and this is the point where we agree with Mastercard,
10 and you have heard our concerns the last time we met and also the last time that
11 various other members of the team met. So, we endorse what Mastercard says about
12 that.

13 We had very real concerns about the way that it's progressing, and those are only
14 growing over time. This isn't really the occasion to have a debate about that or what
15 needs to be done about that, but I did just want to note that, on that point, we share
16 Mastercard's concerns.

17 **THE PRESIDENT:** Mr Piccinin, can I put it this way: you have, and your juniors have
18 in the case management hearings articulated concerns very clearly both at the
19 in-principle level and granular level and we are alive to them. But is it the case that
20 those concerns are materially changed by the addition of the Merricks action? In other
21 words, do we have this problem whatever we do today?

22 **MR PICCININ:** Sir, as so often, you have stolen the thunder of my next point, because
23 that is indeed where I was going next, which is the second point, where we part
24 company from Mastercard and agree with what my learned friend for Mr Merricks has
25 just said, which is that we don't see what any of the present difficulties with
26 preparations for Trial 2 have to do with Mr Merricks or the addition of Mr Merricks. In

1 fact, it's striking, reading Mastercard's skeleton argument for this hearing, the extent
2 to which one can see that the difficulties that they identify have all been caused by the
3 approach of the merchant claimants to the preparations for Trial 2 and the particular
4 sources of data that they have been seeking to rely on and the delays in their
5 disclosure of that data. We can't see or detect any problems that have arisen from
6 Mr Merricks' role, which is not surprising, given the approach to proving pass-on in
7 Trial 2 that Mr Merricks proposes to take.

8 So, really, the question is not so much that but whether the exclusion of Mr Merricks
9 would help in any way with the problems that have arisen on Trial 2 and, there again,
10 we struggle to see how it could be said.

11 Now, Mastercard has identified three respects in which they say that Mr Merricks adds
12 materially to the work that needs to be done at Trial 2, and obviously we would also
13 be concerned if the work that everyone needs to be engaged with for Trial 2 was
14 greatly increased by Mr Merricks' involvement.

15 But it might just help if I very briefly give Visa's perspective on each of those three
16 things --

17 **THE PRESIDENT:** It would help a great deal.

18 **MR PICCININ:** -- because it does seem to us that, in each of the three of them, the
19 extent to which it really is additional to what we are doing anyway has been overstated
20 and, also, where there is an addition, there are ways it could be dealt with.

21 So, the first of the three that I wanted to deal with is the suggestion that Mr Coombs'
22 attempt to calculate an economy-wide pass-on rate or deal with additional sectors to
23 those that are raised by the merchant claimants adds materially to the work that needs
24 to be done there, and this also picks up on your question, sir, Mr Tidswell, about the
25 approach to sectorisation.

26 I fear there is a bit of confusion on the part of Mastercard as to how this work is going

1 to happen, at least on our side, on Visa's side, because what Mr Holt has previously
2 explained about the work he is doing is that he is going to look at many different
3 sources of evidence of pass-on rates that can be found in the public domain. You
4 have heard before about the various existing public studies that are already out there
5 which obviously relate to particular datasets from particular products being sold, and
6 also various public datasets on which he can do his own econometrics, and also of
7 course we have the merchant data that has been disclosed in these proceedings.
8 Each, and each of these pieces of evidence will then be analysed for what it tells you
9 are pass-on rates arising out of those pieces of evidence. So, that's one part of
10 the work that needs to be done, and everyone is going to be looking at some of
11 the same data sources and also some different data sources across the experts.
12 Separately from that, there is then the question of, what do you do with all of these
13 different pass-on rates that you find. You've got an 80 per cent from one study that
14 was done on, I don't know, oil, you've got 60 per cent from another study that was
15 done on shoes. What do you do with all of this? The answer to that is twofold.
16 One is, you need to allocate them to sectors so that you can then match them off
17 against particular claimant merchants; and the other reason we want to allocate them
18 to sectors is that Visa has always said that, for the exemption trial, Visa is going to
19 need to calculate a UK economy-wide pass-on rate, and so that's why Mr Holt has
20 proposed to date to use 14 sectors that are drawn from Visa's categorisation where
21 you can then use Visa's data to aggregate up to a weighted average for the economy
22 as a whole. So that's a thing he is going to do with his 14 sectors.
23 The important point is this: you, the Tribunal are going to be able to triangulate
24 between all of the different pieces of analysis of the primary evidence, if I can call it
25 that, so the studies and the new econometrics and the merchant claimant
26 econometrics, all of that, and you can then map those to sectors of your choosing,

1 really, from what's been presented to you or from whatever you want to do with it. So
2 there's a distinction between the primary work of the econometrics or the analysis of
3 the existing public studies, on the one hand, and how you map those to sectors, and
4 it's not the case that because Mr Holt is using these 14 sectors and Mr Coombs is
5 using a different set of sectors and Dr Niels is using a different set of sectors
6 again -- that isn't going to make the work they're doing incompatible for you, it is not
7 going to upset your triangulation exercise of the Tribunal, because you can map the
8 individual results in a different way to the way that any particular expert has presented
9 and reach your own results for particular sets of merchant claimants or sectors.

10 So, that's why we say the addition of Mr Coombs doesn't really add a lot in terms of
11 additional work at trial or in preparation for trial because it won't be the same work that
12 Mr Holt has done, but it will be similar in spirit and aimed at the same end objective in
13 terms of its coverage -- I mean sectoral coverage, not temporal coverage, which is
14 what I'm coming on to.

15 Before I move on to temporal coverage, does the Tribunal have any questions about
16 that? I know Mr Tidswell had quite a few before? No.

17 So, in terms of temporal coverage, this is really the only real addition that we can see
18 from Visa's side from Mr Merricks' involvement in Trial 2, because obviously it is
19 correct that Mr Coombs needs to come up with pass-on rates for a different time
20 period, a largely different time period, from the time period that we are concerned with,
21 and so I accept that that is an addition, but, again, I'd just like to confirm from Visa's
22 perspective that what Mr Simpson had to say about extrapolation in Trial 2 as it is
23 correct because you have already seen, if we go back to January and to the various
24 public studies that were discussed, the economists have already been looking at,
25 Mr Holt has been looking at, some studies that come from outside the claim period
26 and then also there will need to be extrapolation across times within the claim period,

1 | which is itself a long period.

2 | So, the issue of how you approach extrapolation and what to do with it is going to be
3 | one that is live in any event.

4 | **THE PRESIDENT:** In a sense, this is a retread of the triangulation point.

5 | **MR PICCININ:** Yes.

6 | **THE PRESIDENT:** If you are looking at a rather slippery concept like (interference),
7 | you may want to look outside the area of the claim because it may -- "may" -- shed
8 | light on a phenomenon within the claim. We can't say of course now whether it will
9 | help or not, but we are quite -- we made this very clear from the beginning, we are
10 | quite reluctant to exclude in circumstances where we can't be absolutely convinced
11 | that it won't be utterly useless.

12 | So, if it is likely or potentially helpful, we ought to look at it and say in the judgment
13 | why it's been useless, rather than say here and now we won't look at it.

14 | **MR PICCININ:** Absolutely, sir, and that concern and the fact that one can't say now
15 | whether extrapolation is going to work or not or to what extent, actually ties back into
16 | something you said two years ago almost to this day, sir, which is, we don't know
17 | now -- well, the point is, we don't know now if you had two different Tribunals, one or
18 | the other or both would conclude that extrapolation does work, but it is at least possible
19 | that both -- or that Mr Merricks' one will find that it is possible and it does work, and if
20 | that happens, and these two trials have been conducted separately, then obviously
21 | there is an acute risk of -- I think the way you put it, sir, was that you would have
22 | decisions that wouldn't stand up to the man on the Clapham omnibus; they just
23 | wouldn't understand a pass-on rate of X in one case and, you know, eight times X in
24 | the other case. You also said that that would give rise to results that were unsafe, in
25 | the sense that they end up back before the Court of Appeal, just like we had three
26 | judgments on liability last time. So, we are very alive to that concern.

1 It is more your problem than mine, if I can put it that way, sir, slightly impertinently. But
2 it is not just your problem because of the point you made that, actually, it is no good
3 to the parties either if that's where we end up, that we have our judgment appealed on
4 the basis that someone else has said something different about the same evidence.
5 It is just very unsatisfactory.

6 So, that's why our philosophy of approach has really been the way we presented it in
7 writing, which is that, unless we could identify some major practical problem -- it would
8 have to be a really major practical problem -- it just doesn't feel right for us to be a dog
9 in the manger and say they can't take up some of our time at trial.

10 The final category of additional work that my learned friends for Mastercard have
11 identified is a new one on me, I have to say, which was that there may be a difference
12 in the scope of the MIFs that are in play in the Merricks proceedings and the rest of
13 the proceedings, particularly if the causation issues in the proceedings go the way that
14 Mastercard would like them to go. Obviously, I have nothing to say at all about that.
15 I have no dog in that fight at all.

16 The only observation I would make is about our proceedings because, of course, there
17 are different kinds in play: there are the domestic MIFs, there are the cross-border
18 MIFs and there are the interregional MIFs, we have all the MIFs, the commercial MIFs,
19 some of which are still in play at least until you give judgment in Trial 1.

20 In any event, we are not going to have a trial at exemption until sometime in the future
21 after you have already determined Trial 2. So, if it really matters, and I don't think
22 I have seen any clear explanation as to why it does, but if it does matter which MIFs
23 are in play for pass-on purposes, that's not something we are going to know when we
24 get to Trial 2, about the merchant proceedings anyway, because of course it's possible
25 that we will go through Trial 2 and then we will go through an exemption trial and we
26 will win for some categories of MIFs but not others because the arguments and the

1 evidence are different. So, that doesn't seem to us to be a clear point of distinction or
2 addition either.

3 The one other point I just wanted to flag was that, of course, if Mastercard can identify
4 something that is truly additional, and it's so additional that it causes a problem with
5 getting it all done, if I can put it that way, in Trial 2, then we don't have to throw the
6 baby out with the bathwater. There are other ways of managing this, like tacking on
7 to the end of Trial 2, either immediately following or later, the additional work, like on
8 the question of what conclusion should we draw from all the evidence that you have
9 heard about the early period which is outside the scope of these proceedings.

10 **THE PRESIDENT:** Yes, it had occurred to us that we have already a bifurcated trial
11 at the end of this year and two weeks of closings, so it's not as if there isn't already
12 a bit of a stretching of a single trial into two sections.

13 **MR PICCININ:** Exactly, sir. That's what we had in mind, and that could be extended
14 if it needed to be extended.

15 Unless there are any further points from the Tribunal, those are really our submissions.
16 In a nutshell what it is, I said at the start -- you asked me are we neutral, yes, we are
17 neutral in the sense we are not objecting because we do feel like if we were to object
18 it would need to be on the basis of a pretty big red flag and we have not seen any.

19 **THE PRESIDENT:** That's very helpful. Thank you very much.

20 **MR PICCININ:** I'm very grateful.

21 **THE PRESIDENT:** Mr Jones?

22

23 **Submissions by MR JONES**

24 **MR JONES:** Sir, I appear today on behalf of Primark and Allianz. Mr Piccinin's
25 position might fairly be described as neutral but warm; mine is neutral but concerned.
26 We are concerned because of the uncertainty regarding the implications of Merricks'

1 participation and, in particular, to what extent Mastercard would, if Mr Merricks
2 participated, be able to run its defence to the Merricks claim in the way that it currently
3 says it wants to run its defence and taking the time that it says would be required. That
4 obviously is the debate between Mr Simpson and Mr Cook, and I am not going to try
5 to assist in resolving that debate because we don't have a dog directly in that fight, but
6 it is that which gives us cause for concern because one only needs to read both the
7 Merricks application and supporting documents, but also the Mastercard responses,
8 to see that there is, at the very least, the potential for Mr Merricks' participation to
9 generate a lot more work.

10 What I have to say in that regard is this, that if you agree with Mr Simpson's
11 submissions, which are that Merricks' participation would not involve substantially
12 more work -- that's how they put it in their skeleton argument: it wouldn't involve
13 substantial more work -- if you agree with that today and, therefore, permit Mr Merricks
14 to participate, that will need to be policed extremely firmly by the Tribunal going
15 forward, and I know that you would have that well in mind, but it would mean, in my
16 submission, not only limiting what Mastercard can do, because of course they are at
17 the moment saying they want the whole range of -- we don't know all the details, but
18 factual evidence, and so on, which could add up to a few weeks at trial, so it would
19 mean not only limiting that and making sure that does not happen, but it could
20 mean -- it could mean -- limiting what Mr Merricks' representatives do.

21 We would be concerned that you start from the position that has been outlined to you
22 today by Mr Simpson, that it is not going to add much work, but then, over the next
23 few months, as more evidence gets put in and as we get closer to trial and as we start
24 to discuss the division of submissions, and so on, at trial that that "not substantial"
25 develops into something rather different. And of course, the team on behalf of
26 Mr Merricks are very effective at making sure that all their points are heard, as they

1 should be -- that's not a criticism at all; on the contrary. But the idea that at trial they
2 may need to be constrained is one which I will just mention now because that, to our
3 way of seeing things, would be an important consequence of letting them participate
4 on the basis that they have asked to participate.

5 **THE PRESIDENT:** Mr Jones, that's a point well made. In a sense, it is why we have,
6 over Merricks' fairly vehement opposition, indicated that we are going to deal with this
7 application now rather than sooner, because we consider that we have got as good
8 a grip as we can have about the material that needs to be adduced. That's why we
9 have been having these case management hearings, with a view to getting as firm
10 a grip as we can on the evidence that will come into Trial 2.

11 Now, of course you are right to raise a red flag in terms of the fact that, although we
12 have heard what Merricks needs in order to try their pass-on questions in Trial 2,
13 Mastercard quite rightly have not been engaging with Merricks at all. They have been
14 engaging with the evidence that they need for Trial 2. So, there is an asymmetry there
15 which we are alive to.

16 But I'm not sure that we can do anything more than endorse what you say, that we will
17 effectively trial manage this and see, if we grant the application, where things go; or,
18 as a counter, to sort of say, "Well, there's an unknown here. Because we are a little
19 bit scared of the unknown, we will sacrifice the triangulation advantages that we
20 perceive potentially to exist and run the risk of the sort of inconsistent results that
21 Mr Piccinin has referred to because we are not confident that we can manage
22 matters".

23 Now, that's really what you are saying.

24 **MR JONES:** Yes, that is right, sir.

25 **THE PRESIDENT:** We have got to back our judgment.

26 **MR JONES:** Mr Cook is going to have to explain -- and it is really not my place to say

1 anything about the evidence that he would want to put forward, and so on. But you
2 will see our predicament is that what we absolutely don't want is for Mr Merricks to be
3 permitted to participate on a footing which turns out to be wrong. That's what we want
4 to avoid.

5 In terms of what the implications would be if there were to be substantial additional
6 work generated by his participation, could I just make the point that it is not only the
7 practical concerns around the trial which concern my clients, as they concern everyone
8 here, but also the costs implications, because the costs of these proceedings are
9 already expensive, especially for those who have brought individual claims. The
10 possibility of adding Mr Merricks to that will generate more costs, and my clients would
11 be involved in, at least to some extent, needing to respond to Mr Coombs because, of
12 course, the purpose of having him involved would be consistency, so, to some extent,
13 at the least, they would be involved in that additional work stream, certainly as regards
14 looking at the merchant data for the merchant claim period, possibly as regards the
15 wider implications, because there may be wider interconnections.

16 The participation of Allianz, Primark, in these group proceedings obviously helps other
17 claimants, we appreciate that. Many of them are competitors, but there it is. The data
18 from Allianz and Primark is valuable data in their sectors; it helps the wider claim. That
19 data is also available to Mr Merricks in the documents which have been provided, that
20 is banked in the Merricks claim. Of course, at the start of Mr Merricks' application, he
21 had in his budget money for third party disclosure applications, so that seems not to
22 be necessary for his claim because he has the benefit of my clients' participation and
23 data and documents. But it really would, in my submission, be a step too far to say
24 that, on top of that, my clients should participate in a significantly more expensive trial
25 in order to get Mr Merricks' participation, and the -- yes, the real, but real and limited
26 benefits of consistency that that would bring.

1 Just one final comment, and it is picking up on Mr Piccinin's last comment. There are,
2 of course, other ways to skin this cat, and you may recall that a few months ago
3 Mastercard suggested a different approach. They called it Trial 2A and Trial 2B.
4 Trial 2A was essentially Trial 2, so the merchant overcharge in the merchant period.
5 And the suggestion from Mastercard at that stage was, well, Mr Merricks could
6 participate in that, and there could be then a Trial 2B, which would resolve
7 extrapolation and all the other issues which arise in Mr Merricks' claim, and the benefit
8 of that would be that he would be bound by the results of Trial 2A because he would
9 have participated in it.

10 We said in the Primark and Ocado document, which Allianz have also agreed to, that
11 we would think that that might be a pragmatic way to proceed. Since then, Mastercard
12 has said it won't be practical. I don't know why that wouldn't be practical, but they
13 have stepped back from it.

14 Of course, one can imagine other possible approaches, and you just had a discussion
15 with Mr Piccinin around that. All I would say is, what we absolutely would want to
16 avoid is any suggestion that there is a second trial which impacts on the merchant
17 claimants and which we would therefore have to attend because that's what
18 immediately catapults us into the substantial more work/more cost world.

19 So, if they can be neatly separated out, we would be all for it. Sir, those are my
20 submissions.

21 **THE PRESIDENT:** Thank you, Mr Jones. We do have, which is where we ended with
22 Mr Piccinin, a degree of room for manoeuvre in the fact that we have got closings
23 detached from (interference).

24 Now, it would be, I think, irresponsible to say that we would use that room for
25 manoeuvre in any particular way because the point of this application is to deal with
26 these proceedings and Merricks' proceedings' issues in one go. But we do have a little

1 bit more room for manoeuvre, which is perhaps a factor to take into account even to
2 be able to say how we deploy that.

3 So, if I can characterise your position, I think it is probably on the negative side of
4 neutral rather than cold. It is you are concerned. You would rather not have Merricks
5 in, but you can't identify a firm reason for doing so, but you have quite properly
6 articulated a possible concern which would impact negatively on you.

7 **MR JONES:** Yes, I think I would put it like this: my clients' preference would be for
8 them not to participate because, on any view, it will add cost. Realistically, of course
9 there is a benefit in consistency, and of course we accept that, and that's why we have
10 not formally objected and said that we can see that it may make sense for them to
11 participate.

12 The problem is, there clearly comes a point at which that equation no longer makes
13 sense, and that is what we are concerned about, and that's really the marker I want to
14 put down; one needs to police that borderline very carefully.

15 **THE PRESIDENT:** Thank you. Mr Baiou, are you going to address us?

16 **MR BAIOU:** Sir, I'm happy to address you very briefly.

17 **THE PRESIDENT:** Only if you have got something to say.

18 **MR BAIOU:** Nothing particular. We remain neutral, albeit in a qualified way. We are
19 satisfied that the Tribunal's concerns are aligned with ours and that it does not wish to
20 disrupt either the trial date, the trial length or the timetable or to add evidential burden
21 and costs on the merchant claimants. So, that being the case, we are happy to let
22 others debate the actual impact of Mr Merricks' involvement.

23 **THE PRESIDENT:** What we will do then is, we will rise for no more than five minutes,
24 and we will then resume. We have a fairly hard stop at 4.30, so, Mr Cook, you get the
25 vast lion's share of that hour. I'm not really sure this is something where a reply will
26 assist us very much. Mr Simpson, you may get a couple of minutes.

1 But we will rise for five minutes.

2 **(3.27 pm)**

3 **(A short break)**

4 **(3.34 pm)**

5 **THE PRESIDENT:** Mr Cook, over to you. Before you start, just one point. Obviously,
6 if we accede to the Merricks application, the question of Ms Webster's role looms front
7 and centre.

8 We, I think, want to make very clear that we would expect an application to have an
9 additional expert put in explaining the reasons. But, for our part, subject of course to
10 those reasons being articulated, we think that Mastercard would, and ought to, be
11 given every latitude to put in a further expert who will be subject to precisely the sort
12 of controls that has Mr Jones articulated in terms of managing the trial, but we would
13 be very much inclined to allow Mastercard the latitude to respond to what is, after all,
14 an importation of a new set of proceedings, admittedly proceedings that have been
15 around for a long time and whose admission we have been considering for a long time.
16 But I think it is probably appropriate we make that clear sooner rather than later.

17

18 **Submissions by MR COOK**

19 **MR COOK:** Sir, that's certainly very helpful to have that indication. To be clear, from
20 my perspective, I am putting my case on the basis of the additional work to be done,
21 not exactly which testifying expert puts forward that additional work, because that is
22 an additional burden in a very short time period and it is an additional burden on the
23 trial, as you say.

24 There will not be duplication. The appropriateness of a single testifying expert on all
25 of the issues in any event, but that is the category of additional work. They have known
26 about Ms Webster, or about Frontier's, involvement in Merricks for a very long time

1 and we have had the two experts running there. It may be appropriate to move to one
2 expert, namely, Ms Webster. But, in any event, I'm not saying anything in relation to
3 that because we have had two experts historically, that is something which is going to
4 have an impact on this process. This is about the additional work in total, regardless
5 of who it is done by and who it is put forward by. But thank you for that, sir.

6 My starting point here is, this is, to some extent, I would say a balance of disadvantage
7 situation. Sir, I think you started -- your first question to my learned friend just after
8 lunch was, what is the disadvantage to Mr Merricks of this being heard separately, and
9 he barely addressed that point. He came back to it only very briefly at the end of his
10 submissions and, with respect, he didn't develop any real problem with Mr Merricks
11 being dealt with separately, and he is right to do so.

12 There is no real prejudice, we would say, here from Trial 2 going ahead as planned,
13 Mr Merricks having access to all the data and the material there, and then the Merricks
14 pass-on issues being dealt with. It would be sensible to be dealt with by the same
15 Tribunal for consistency matters and points like that, but, beyond that, we would say
16 there is no prejudice to Mr Merricks in it being done in that order which doesn't put
17 intolerable pressure on Trial 2 and the Trial 2 preparations.

18 So, what are the points that can be said here? Obviously, Mr Merricks continually
19 refers to delay, but all that can really be said is the resolution of one issue, the pass-on
20 issue, will be delayed. It is unlikely -- I mean, it would be very nice if we managed to
21 say zero per cent pass-on, perhaps, to the Merricks claim, but absent that outcome, it
22 is very unlikely that pass-on is going to resolve all of the Merricks -- resolve the
23 Merricks proceedings.

24 So this is really only a scheduling point. There are a number of issues in Merricks to
25 be resolved. They can be resolved in different orders. But it is relatively unlikely to
26 make a significant difference to the eventual timing of the outcome of that case.

1 It was also suggested that Mastercard is going to try and run two contradictory cases.
2 Now, my learned friend would, in fact, no doubt be delighted if Mastercard stood up
3 and said something, you know, in a Trial 2B Merricks trial which was directly
4 contradicted by something that it had said six months earlier, nine months earlier,
5 because we would obviously look absurd, foolish and would lose any credibility with
6 the Tribunal. So, we are absolutely not going to be that foolish.

7 We obviously have to say things that are logical and consistent. That does not mean
8 that we are going to be saying there is a single answer for a 30-year period across the
9 entire economy. Of course not. But that is completely different from a situation where
10 we are going to try and pretend that we haven't said a lot of things in Trial 2 if we have
11 to fight Mr Merricks separately.

12 So, with respect, these are entirely sort of illusionary arguments for any real prejudice
13 towards Mr Merricks if this is dealt with in a sensible way separately from trying to
14 force it into this process at what is a very late stage.

15 Set against that, we do say that this is a situation in which, against that, you have the
16 disadvantage to Mastercard and to the Trial 2 process, but obviously to some extent
17 I'm most interested in the prejudice to Mastercard, they're my client, but also, in reality,
18 the prejudice is primarily to Mastercard. I mean, it runs as problems for the Trial 2
19 process anyway, but the burden is always going to be primarily upon Mastercard
20 because we are the ones where the burden of most of the additional work is going to
21 fall in relation to this.

22 Other parties -- you know, Mr Coombs is going to do what he would always want to do
23 anyway, some of the other parties may also have to be involved in aspects that relate
24 to them. But, you know, nobody apart from Mastercard and Mr Merricks has a dog in
25 the fight in relation to what the pass-on was in the 1990s.

26 So, the bulk of what Mr Merricks/Mr Coombs are going to be doing is going to be

1 something we need to address, not anybody else. So, the burden of the prejudice falls
2 very squarely upon Mastercard, we say.

3 **MR TIDSWELL:** You can take it in two steps, can't you, because Mr Coombs is going
4 to produce a by-sector and an economy-wide figure for pass-on across the whole
5 period in which he has data, and so that would include the period for merchant
6 claimants and it will therefore feed into a comparison with the work Mr Holt is doing,
7 which Mr Piccinin has described, but also all the other indicators we have of what
8 pass-on might be. So, presumably, in relation to that, it's everybody's problem or
9 benefit, depending on how you look at it.

10 And there is a second point, isn't there, which is, to the extent that either he seeks to
11 extrapolate that back where there are gaps or where there might be some reason to
12 doubt the consistency, if you like, of his analysis from the very beginning through to
13 the very end, in other words, the period before the merchant claimants, causal
14 question, something around that, that's an exercise that falls very much only in your
15 lap, as I understand it.

16 **MR COOK:** Sir, you are absolutely right to say that. There is going to be an
17 additional -- if Merricks/Mr Coombs is involved in Trial 2, there will be an additional
18 voice in the room dealing with sectors which are the same sector that Primark is in,
19 Allianz, but certainly he will be dealing with those, of course.

20 Ultimately, as you say, the second stage is some would say the much more important
21 purpose of Mr Merricks' claim which is how far any part of that analysis can be pushed
22 back, analysed back, to be applicable to 1992 to 2008, and that's the second half
23 where the burden is almost exclusively upon us.

24 So, yes, you are right to say it can be split slightly in two: the shared burden initially
25 and then the bulk of the work about the history, because none of the other parties need
26 to worry about what the world was like in the 1990s, the early 2000s. That's just not

1 a matter for their concern at all in the umbrella proceedings.

2 **MR TIDSWELL:** There may be a danger of getting too much into where the experts
3 have yet to get their teeth in -- at least we haven't seen what they have got their teeth
4 into -- but if Mr Coombs is analysing a dataset for a particular sector that runs from
5 1995 to 2022, are you saying -- and that obviously is going to produce the numbers it
6 produces for both the first period, which is the Merricks claim period, and the merchant
7 claim period, which is substantially after that, are you saying that it is a different
8 exercise and requires a great deal more work to look at each of the periods, or is it not
9 actually just the same work to analyse whether his approach is right, his methods are
10 right, viability of the outputs and so on? Why, if it is a single dataset from 1995 to
11 2022, does it create more work to look at the first bit of it rather than the second bit of
12 it?

13 **MR COOK:** There is obviously the process issue, which is unfairly called the maths,
14 which is simply taking the dataset, applying the analysis the economists will do with
15 their judgments and everything else to it, which is one step of the work. There is then
16 going to be the process of, you know, trying to decide what comes out of that process
17 and the relevance of it to what Mr Merricks wants to do with it, and whether that is by
18 reference to Allianz data for the insurance sector, which I think then Mr Coombs is
19 going to try to use that to generate a financial services sector analysis from the
20 insurance company much later, or whether you're looking back at that and saying,
21 "Well, you've got some data, it's in relation to a subset of a wider sector which is
22 actually very disparate", and those are where a lot of the extra work and the fight is
23 going to be, is, you know, you've got a dataset, how relevant is what Mr Coombs
24 actually wants to do with it, which is generate, in the first instance, 12 sector-wide
25 pass-on figures and then the final step, which is turning it into a UK PLC figure. But in
26 reality that again is simply arithmetic, that is simply taking them and weighting them

1 by reference to card expenditure.

2 So, we do absolutely say that there are a whole series of analytical steps which is
3 going to be looking at the kind of changes in a whole host of different retail markets,
4 also the acquiring market, over that time period. So, it's going to be evidence based,
5 you know, the resources of that material, which is publicly available material, and how
6 far you can actually do what Mr Coombs is trying to do, which is to say, "I've got some
7 analysis for this subsector. I want to apply it for a longer period. I want to apply it to
8 a wider group of businesses that are not, one would think, obviously the
9 same -- entertainment being a good example". That's a sector that there is
10 a -- Mr Coombs wants to use entertainment because we have data that shows that
11 expenditure on cards in the entertainment sector was X million, hundred million,
12 whatever it might be, in particular periods, but that actually includes hotels,
13 restaurants, a whole variety of very, very different kinds of businesses with quite
14 different pricing models.

15 So that's going to be -- so, we do say that there are -- you know, that is going to be
16 the sort of substantive exercise here of looking back, and we have given you some
17 examples --

18 **MR TIDSWELL:** Before you do turn to that, I want to distinguish between the
19 extrapolation backwards in time, because I understand what you meant about that.
20 But if you have a single dataset -- let's take an industry -- I can't remember which one
21 has a full dataset, but let's just assume there is one he has a full dataset for. So, what
22 I mean by that is that covers a substantial -- a significant period of the Merricks claim,
23 and a significant period of the merchant claim, so it's useable in both.

24 I understand you to be saying there will be a threshold question as to if it relates to,
25 say, I don't know, sandwich shops, I think as an example, but I'm not picking that
26 because of the example you've given, but anything, really, that is within a sector,

1 or -- hang on. Mr Coombs is doing it on the basis of a sector anyway. He's got data
2 for a sector, hasn't he?

3 **MR COOK:** Well, no, and that is going to be the complexity. What he wants to produce
4 is data for 12 sectors because those 12 sectors are sectors for which there is card
5 expenditure data. But that doesn't mean he has actually, in his analysis, subdivided
6 up even those 12 sectors into a variety of subsectors. I think it is 30 plus or so. So he
7 recognises there are subsectors within them. And sometimes there is data for
8 a subsector within a sector. Sometimes the data he thinks is more widely available.
9 But, you know, the reality is, the data on PPI/CPI does not marry up with entirely
10 independent data on card expenditure, which is, you know, going to be a lot of
11 the battleground, particularly when we get further back.

12 **MR TIDSWELL:** And the data on card expenditure is helpful why? Because that helps
13 you with the weighting exercise or because it helps you with -- I appreciate your point
14 that card usage may make a difference and it may have changed over time, but surely
15 if the data is showing what the pass-on was, then that's the data that shows the
16 pass-on, isn't it? Why do we then need to get into whether patterns were different in
17 1995, if he's got data that gives an output for that? I may be completely missing the
18 point here, but I'm not sure I understand, just on the case of where there is a full
19 dataset throughout the whole period, why there needs to be an argument about any
20 sort of extrapolation or applicability.

21 **MR COOK:** What Mr Coombs does in terms of that data, though, he would potentially
22 produce a calculation that says sectors A, B and C, keep it very simple, there is
23 100 per cent pass-on in sector A, 80 per cent in sector B, 60 per cent in sector C.
24 In order to produce a UK-wide pass-on figure, he then weights those by reference to
25 card expenditure data, which is the reason why he has picked his sectors like that, not
26 because they are necessarily -- and we would say in many respects they are

1 manifestly inappropriately, but not because they are necessarily the right sectors to
2 consider collectively for pass-on, because they are businesses that are likely to exhibit
3 similar pass-on rates, like entertainment. You know, commonsense suggests that
4 hotels and restaurants have relatively little in common with each other, but there is an
5 entertainment number, and so he wants to simply say, well, I want to produce
6 a sectoral pass-on rate for entertainment so he can multiply it by the weighted pass-on.

7 **MR TIDSWELL:** And you're saying that there then will be an argument about how
8 reflective that is of the sort of claims we have got here. I understand that. But that's
9 going to happen regardless of which period it is, isn't it?

10 **MR COOK:** What he's got is CPI data that might be in relation to a subsector, or it
11 might be in something like Allianz, for example, where (overspeaking).

12 **MR TIDSWELL:** Stick with the CPI/PPI because that's really --

13 **MR COOK:** That's not by reference to sectors. There are not 12 sets of CPI/PPI data
14 by reference to those sectors. There is a number of them by reference to different
15 subsectors which he identified. That's where the battleground is going to lie, the
16 relevance of his CPI/PPI analysis in any event. But then how you extrapolate from
17 that -- from what are -- you know, data in relation to a subset, extrapolate that out to
18 much wider sectors that are of very -- you know, that are very much not homogeneous
19 businesses, but they can -- you know. Entertainment being a very good example
20 because entertainment is a very loose category of what one might say is discretionary
21 expenditure, but there's a whole variety of different businesses within that -- I haven't
22 got the detail, but, you know, gambling, horse racing, hotels, restaurants. You know,
23 you can see those are all very, very different kinds of businesses, not largely
24 competing with each other, within the different categories.

25 So, we do say that, you know, this whole kind of exercise falls down into principally
26 sort of the two types of -- the difference in time periods, but also difference in sectors,

1 whereas where -- there is going to be a whole lot of analysis here which is going to be
2 different when we are looking at the 1990s/2000s. So, even if we were looking at it in
3 2010, it might be very different, in any event, because all sorts of factors associated
4 with how different businesses are has changed over time.

5 We have given the example of dynamic pricing in the hotel industry which -- you know,
6 again, these are all matters that evidence will need to be -- you know, look for evidence
7 about when those kinds of materials came in. But we know -- you will recall that is
8 a relatively recent phenomenon. It is not the days of going into a hotel and they had
9 sort of printed on the board the hotel room rates which were sort of unchanged -- which
10 changed on 1 April each year. So, those are the kind of factors which will change over
11 time.

12 So, even if it is a similar exercise of saying how far are hotels and restaurants disparate
13 businesses in the 2010s, looking at that in the 1990s, 2000s, which is going back and
14 looking at, you know -- and what we are talking about here, of course, is, it is not one
15 or two sectors, not one or two segments, it is looking back to certainly over 30, and
16 that's something where Mr Coombs himself acknowledges there are subsectors within
17 his sectors.

18 There isn't some sort of colossal difference here. We differ perhaps in terms of how
19 easy it is to lump subsectors together. Mr Coombs acknowledges there are these
20 subsectors in this part.

21 So, what we do say in relation to that is, this is why it is a substantial and different
22 exercise we have to do, because we are going back to look at very, very different time
23 periods, and that's, you know, true of individual industries, it is also true, very
24 importantly, in relation to acquirer pass-on, where we are looking, again, at a very
25 different kind of banking industry that existed in that time period, and these are all
26 going to be matters for getting the material which shows the changes over time, but

1 just to give you a thumbnail of where we expect it to come out, to some extent from
2 where we have got to in evidence in Merricks already, for example, that essentially
3 Interchange++, as my learned friend said, well, that's just 100 per cent pass-on, that's
4 very easy, but broadly that was a phenomenon that didn't exist before 2000 -- it may
5 be 1999, it may be 2001, I'm not trying to give evidence, but that is something that
6 really didn't exist until the turn of the century, turn of the millennium. It crept in for
7 large merchants during the course of the 2010s, so much that we know when we come
8 to the umbrella period, even quite large merchants in the umbrella period were on
9 blended MSCs at the start of the sort of claim period, and then Interchange++ comes
10 through for sort of the vast majority of the medium and large merchants throughout the
11 period we are really concerned with, which is 2011 or so onwards.

12 So, we have already got there -- and obviously that will need to be made good on the
13 evidence in due course -- exactly when those changes happened, what the
14 percentages of those different kinds of contracts were. But that already shows you
15 that we are looking at a market that has changed very significantly over the time
16 period; the extent to which merchants, for example, had single banking relationships
17 over the time period, in the days when card acceptance was far less important.
18 Obviously, you might have different pass-on rates if you were going out to negotiate
19 a card-acquiring contract with a big merchant individually or as part of your overall
20 banking facilities.

21 So, all of those kind of issues are something that is going to be -- in order to go back
22 to a time period, we have got some data, which is going to be PSR from acquirers,
23 which is going to be fairly recent, 2015 or so onwards, talking about a world in which
24 certainly the vast majority of transactions take place at merchants who have
25 Interchange++ contracts, 100 per cent pass-on, acquiring pass-on is therefore not an
26 issue there, and we are going to be looking, you know, back historically to what that

1 meant.

2 Was that anything like that world? The evidence is likely to show it was a very different
3 kind of world. What the consequences of that are going to be. So, these are the kind
4 of analytical elements that are going to be different. How the world has changed over
5 a 30-plus period which -- essentially, no-one is going to need to worry in the umbrella
6 trial that there have been key changes over that time period in that kind of a way. We
7 are moving back in time periods where there are these very dramatic changes already.

8 **PROFESSOR WATERSON:** Are you saying that at some stage you will have to do
9 this work, in any case, but you don't want to do it for Trial 2? Is that the burden of what
10 you are saying?

11 **MR COOK:** That's slightly unfair. I'm saying it would put an incredibly unfair burden
12 upon my clients to expect that work to be done, at this point, in the next eight weeks,
13 given where we are in the umbrella proceedings, and that is, you know, to be honest,
14 the crux of the position.

15 Getting into blame is always pointless, in any event, but it is always we are where we
16 are. We are less than two months out from positive cases. The amount of additional
17 analysis that will be required is, we would say, substantial. It is just simply not fair to
18 expect that work to be done in a way which would allow a timetable that would maintain
19 Trial 2 as it stands.

20 So, we do put it in terms of going back over time periods that add, essentially, an
21 additional 16 years or so in a very different kind of world. We have given some other
22 examples -- internet shopping being a clear one, price comparison websites -- that
23 have changed the way in which people can shop and the extent to which merchants
24 are, therefore, in price competition with each other in a clear way. These are all --

25 **THE PRESIDENT:** It is additional analysis, not additional data, isn't it? It is taking
26 a common dataset and looking back a little bit further, which, in any event, may be

1 helpful for triangulation purposes? So, we are not talking about a fresh course of data
2 coming in in order to try Merricks, we are talking about Merricks piggybacking on an
3 existing and very controlled form of Trial 2 data which then is looked at and sliced in
4 different ways.

5 **MR COOK:** With respect, sir, it depends on what you mean by "data". When one
6 talks, for example, about the proportion of contracts which were Interchange++, that
7 is not going to be millions of data points. There is, however, going to be a need to
8 gather information from what's publicly available about where Interchange++ came
9 from, how significant a proportion of the market it was at different times, and then apply
10 that to the analysis. Otherwise, we are ignoring a critical factor because, you know,
11 we are in the situation where the majority of the merchants in the umbrella proceedings
12 have Interchange++ contracts, so acquirer pass-on is not an issue for them. That is
13 very much not the case -- to what extent will bear out in evidence, but very much not
14 the case when we come back to the 1990s and 2000s, 1990s in particular. We expect
15 it to show that everybody was on blended contracts during that time period.

16 So, we do say that it's a question of going back to look at those kinds of changes over
17 a much, much longer period. Changes that probably didn't -- you know, that only took
18 place in the historical period, not in more recent years, is the first one.

19 Secondly, then, there is the question of sectoral scope. You know, my learned friend
20 says, well, Mastercard has to say how it's planning to use a UK PLC number, but, of
21 course, the burden isn't upon us to do so.

22 What we will be doing is identifying what material is there; where there is material
23 which allows a number to be calculated for a sector or a subsector, we will engage
24 with that, but, equally, part of that process will, in respect of the defendant, also be
25 saying there isn't potentially data for that subsector, you can't infer. And, you know,
26 one of the categories that Mr Coombs includes within his analysis is "Other Retailers",

1 so it is just a sort of catch-all of everybody.

2 We will certainly be saying in relation to something like that, you know, if you have got
3 one or two data points in relation to that you can't infer from a whole collection of
4 disparate businesses anything from that.

5 So, the burden is not upon us, therefore, to accept the 12 sectors Mr Coombs has
6 come up with because it makes his analysis easy. That is something that there will be
7 disagreements in relation to. That is going to be the crux of the disagreement in
8 relation to Merricks, period. So that's the sectoral scope issue.

9 There is also then the range of interchange fees at issue. Again, we do say this is
10 a point that is of real importance in relation to the Merricks claim because we do have
11 these two extreme possible outcomes which are so different in scale. You have seen
12 the figure; it is a 20-fold increase in the claim. We do say that's an incredibly important
13 potential difference here, and it would be wrong in principle to have an analysis which
14 ignored those two potential outcomes.

15 The Tribunal wants to be able to give a judgment. If this can't take place before there
16 is resolution of the scope of the Merricks claim, then there needs to be a pass-on
17 consideration which is broad enough to encompass the two possible scenarios. The
18 scale of an overcharge is something that has previously been recognised in Trucks
19 cartel litigation as being quite an important consideration for the pass-on.

20 Just to put it in scale, and, again, I'm giving you numbers that will need to be made
21 good on the evidence, et cetera, but they are a best attempt at the moment, that if we
22 are talking about cross-border, we are maybe talking about 2 per cent of credit card
23 transactions being Mastercard cross-border. If we are talking about Mastercard
24 domestic, that will be 40 per cent of credit card transactions.

25 Now, in circumstances in which it is likely there was a single blended MSC, many or
26 most merchants, or all merchants, would cover both Mastercard and Visa. We do say

1 one can see quite easily, analytically why an overcharge on 2 per cent of card
2 transactions and an overcharge on 40 per cent of card transactions involve different
3 analysis in terms of pass-on. It is critical, we say, that there is that kind of analysis we
4 want to put forward and the Tribunal reaches a resolution which encompasses the two
5 extreme outcomes.

6 There has simply been no engagement from Mr Merricks because obviously he hopes
7 to win big, which is understandable, but in terms of the efficient progress of
8 the Merricks litigation, the judgment on pass-on needs to cover both possible
9 outcomes here.

10 So, you know, now it's been said obviously there is a range of possible outcomes in
11 umbrella. People haven't particularly tried to sort of establish different outcomes or
12 different pass-on rates depending on what it is there. However, in the Merricks
13 proceedings, where we do have this night-and-day situation of such extreme and
14 different outcomes, it is obviously something that Mastercard is going to be pushing,
15 that distinction, and it is legitimate that we are entitled to do so.

16 So, all of these -- and the point being with each of them is, if it was one sector, if it was
17 two sectors, it would be a relatively easy process, but, you know, we are looking at 12
18 sectors, actually, with a lot of subsectors that everyone accepts are subsectors. They
19 might not agree on how many exactly there are, but even Mr Coombs accepts there
20 are a lot of subsectors within the sectors. It is more like 30 -- everyone agrees
21 it's -- how you split it exactly is a matter of disagreement, but there are around that
22 kind of numbers plus of subsectors, at least, that we are adding for this time period.
23 We are looking at the acquiring market as well over such a time period with such
24 significant changes.

25 With respect, we say the idea that this is something that, as suggested by my learned
26 friend, could be dealt with in two or three days of a hearing or can be folded into the

1 enormous amount of work that needs to be done over the next eight weeks before
2 positive cases is just -- it beggars belief to think that -- those kind of submissions just
3 ignore the reality of the way in which Mastercard will be challenging the very simplified
4 set of analysis that Mr Coombs wants to put forward and Mr Merricks wants to adopt
5 because it essentially assumes away all of the problems that do exist with this
6 analysis, and of course it's to our advantage to show those problems do exist with it.

7 **MR TIDSWELL:** Help us just with this point about the change in the size of the claim.
8 Am I right that what you're saying, I think, is if as a result of -- at the one extreme of
9 your two extremes you end up with just -- I think it is the 7 per cent, isn't it, of the claim,
10 being comprised largely of --

11 **MR COOK:** 7 per cent is cross-border. But, in terms of looking at the pass-on for the
12 UK market, 2 per cent actually relates to pass-on by foreign merchants.

13 **MR TIDSWELL:** Put that aside for a minute because I will make a separate point
14 about that.

15 **MR COOK:** Essentially, it is the difference between 5 per cent of the claim being
16 cross-border or -- not quite 95 per cent, but close to 95 per cent being domestic
17 transactions.

18 **MR TIDSWELL:** Yes, and you said --

19 **MR COOK:** And the overcharge, asserted overcharge, is broadly the same kind of
20 number, around the 1 per cent mark, which is why the value of the claim is roughly
21 20 -- value of the asserted claim is 20-fold difference.

22 The question when you come to acquirer pass-on, which we are going to say is the
23 important point, is, you are talking about a blended -- certainly for many merchants,
24 possibly all, for different time periods, you're talking about a single blended MSC.
25 They will have agreed with a merchant, "You will have an MSC that's 2.5 per cent for
26 all transactions".

1 The question is, would that have been influenced if just the cross-border transactions
2 had had a lower MIF, or would it have been influenced if the EEA and domestic
3 transactions had a lower MIF.

4 **MR TIDSWELL:** And you're saying the counterfactual for assessment of the pass-on
5 might be different as between the Merricks and the merchant proceedings because of
6 the nature of the acquirer conduct; is that right?

7 **MR COOK:** At that point – at the moment, I'm dealing with the two possible extreme
8 outcomes in the Merricks proceedings.

9 **MR TIDSWELL:** Yes. I just want to understand the logic of why you say it makes
10 a difference to the acquirer pass-on point. You say it's because of the blended
11 contracts and you say the response to – but isn't pass-on a question of whether it has
12 been passed on? It is a question of fact, isn't it? It is not a question of counterfactual?

13 **MR COOK:** The question of whether something has happened has to involve
14 a question of causation question: would it have been different in a different scenario.
15 So, you are looking at if --

16 **MR TIDSWELL:** Well, does it? I'm not sure that's right, is it? Because aren't you
17 asking yourself the question as to whether, as a matter of fact, merchants pass on to
18 consumers --

19 **MR COOK:** No, we are at the previous stage, it is the acquiring stage.

20 **MR TIDSWELL:** I'm so sorry, acquirers pass on to merchants --

21 **MR COOK:** Which involves the question were MSCs higher than would otherwise
22 have been, which is essentially a question you have to say, if the EEA MIF was zero
23 or if the EEA MIF was 1, would the MSC have been different? That's the causation
24 aspect of pass-on. Though we do say --

25 **MR TIDSWELL:** I would put it a slightly different way, which is that what are the
26 practices of the acquirers of passing on their costs? Is this what you're saying -- it

1 | may be if I put it a different way, which certainly makes more sense to me, that if an
2 | acquirer's practice is not to pass on its costs in a particular way when it has a blended
3 | contract which otherwise of course it would do if it had an IC+; is that what you are
4 | saying?

5 | **MR COOK:** I'm saying certainly the way in which cases have looked at this previously
6 | is that a large cost, everything else being equal, is certainly more likely to be passed
7 | on than a small cost because you may not simply change your prices for a small cost.
8 | Certainly, that was one of the factors relied upon in the Trucks cartel case: it was
9 | a relatively small factor and therefore it wouldn't have fed through in the same kind of
10 | way to prices.

11 | **MR TIDSWELL:** But there's an oddity about that, isn't there? That's not really what
12 | we are doing here, in a way. Firstly, because once you start to slice up the different -- I
13 | mean, you can make that point about all the different MIFs. Once you start to slice
14 | them up and focus on them individually, if you reached an answer that was different
15 | from the aggregate of them, it would be a bit odd, wouldn't it?

16 | **MR COOK:** Once we are into Interchange++, it doesn't matter.

17 | **MR TIDSWELL:** No, but just in the context of a blended contract. I'm taking up your
18 | time. Maybe it doesn't really matter. I'm just wondering if that really makes any
19 | difference to the analysis that you are dealing with. If what you are trying to do is work
20 | out what the practice of the acquirer was in passing on costs, you know, if their practice
21 | was, however it was, to appoint to their costs to issuers, then they presumably would
22 | pass it on if it was part of that weighting exercise.

23 | **MR COOK:** At this stage, of course, I'm not trying to persuade you I'm right
24 | (overspeaking) --

25 | **MR TIDSWELL:** No, I'm saying (overspeaking) --

26 | **MR COOK:** Mastercard does see this as being an important factor, the size of

1 the charge. It does raise the possibility of there being a different conclusion.

2 I mean, to put it simplistically, if somebody sets an MSC at 2.5 per cent, the idea that
3 it would have been set at 2.48 if you didn't have cross-border MIFs, on the face of it,
4 looks moderately unlikely because somebody has picked a sort of simple price point
5 of 2.5 per cent, which is --

6 **MR TIDSWELL:** (overspeaking) that's really the point I'm making --

7 **MR COOK:** Yes, but if you were talking about a cost that was, as we are talking about
8 in umbrella proceedings, interchange fees for all kinds of transactions, then one can
9 see potentially a different kind of analysis being put forward.

10 These are all kinds of points that the experts have agreed that sort of intensity of
11 competition, size of costs and pricing practices are all factors that are potentially
12 relevant to the pass-on analysis. The point I'm making is that it arises in a particularly
13 stark way in the Merricks proceedings, where you have really quite radically different
14 scales of the costs under consideration.

15 So, there is going to be that aspect of the analysis which -- it suits, obviously,
16 Mr Merricks just to ignore it, but looking back at the way in which this was approached
17 in the Trucks cartel case, for example, it has a real potential difference to that kind of
18 analysis, which is not to say in any way I'm accepting there would be pass-on at
19 acquirer level if it is the domestic as well; it is simply saying the case is easier and
20 stronger for showing low pass-on the smaller the cost is.

21 But, again, the experts -- given it is acknowledged in the previous expert statement
22 that the size of costs and pricing practices are all factors that are potentially of
23 relevance here, it is those kind of points, looking back at the 30-year history, that
24 makes Merricks different from the umbrella proceedings and those points arise in
25 relation to the acquiring market, in relation to multiple different sectors, changes in
26 markets that have sort of been quite dramatic, like internet retailing, price comparison

1 | websites and matters like that.

2 | That's what makes it substantial because you are looking at so many different sectors.

3 | Even if you are just looking at doing a day's work on each sector -- I wouldn't suggest

4 | that's realistic in any way at all -- that's taking up -- that's 12 days' work, which is a very

5 | large part of what is left. But, of course, you are going to do a lot more than a day's

6 | work in terms of understanding how a sector has evolved over a 30-year period, the

7 | acquiring market has evolved over a 30-year period, and digging out the material from

8 | public resources, for example, showing how those changes took place, when, to what

9 | extent, analysing the impact of those.

10 | With respect, sir, we do say that this is something that is putting an enormous burden

11 | upon Mastercard at a point when, to be quite frank, Trial 2 is obviously creaking at the

12 | seams.

13 | I'm not suggesting in any way at all that it can't be maintained as it presently stands,

14 | but putting an additional burden on the trial is, firstly, unfair, we would say, to

15 | Mastercard, but causing a very real risk of there being problems with the material that's

16 | been put forward, i.e. positive cases that don't deal sufficiently comprehensively with

17 | points. So points end up coming in in reply reports that would have been better to be

18 | put in positive cases, where the experts aren't in a position to put forward joint

19 | statements that are as informative to the Tribunal as they should be.

20 | So, you know, Trial 2 does end up reaching a stage, which none of us want, where

21 | aspects of it become impossible to try in a fair way.

22 | **THE PRESIDENT:** Is it --

23 | **MR COOK:** It is not acquirer pass-on. I have developed that to some extent because

24 | I need to give you some examples to show this is a real point.

25 | **THE PRESIDENT:** I think if it is not just about acquirer pass-on, tell us a bit more

26 | about retailer pass-on.

1 **MR COOK:** To some extent, sir, the examples we have given in relation to retail
2 pass-on -- it is paragraph 29 of our skeleton where, again, we have given some
3 illustrations and I'm criticised for using the word "hypothetical", but that's because I'm
4 not seeking to give evidence or show that I'm right at this stage. I'm pointing to the
5 kind of changes which have -- that all of us, as a matter of just sort of having lived here
6 for the last 30 years will recollect, the kind of changes of things like internet shopping,
7 which -- the critical difference about that, with internet shopping, is, rather than being
8 tied to shops that are within 10 miles, 20 miles, suddenly you can shop from hundreds
9 of retailers spread across the country/the world; price comparison websites which
10 allow you -- which give you price transparency in a way which didn't exist before, and
11 the same thing is true of internet shopping. I can tell if Tesco is a better place to go
12 and buy a particular product or Sainsburys is on a live, day-to-day basis.

13 **PROFESSOR WATERSON:** This is material that has all been considered by
14 Ms Webster?

15 **MR COOK:** These are the kind of points that were -- had it been considered by her in
16 what sense? These are the kind of --

17 **THE PRESIDENT:** What's Ms Webster been doing? Is she moving from a standing
18 start or --

19 **MR COOK:** No, Frontier have been involved for some time, so they are not moving
20 from a standing start, sir, but that is very different from -- the focus has very much
21 been on existing Trial 2 preparation, not --

22 **THE PRESIDENT:** Yes, that's been Dr Niels.

23 **MR COOK:** Yes, sir. No, we are not moving from a standing start, sir, but moving
24 from actually trying to do positive cases in eight weeks' time, that's a big change and
25 that is -- there are a lot of these changes which are not easy to map, given the history.

26 Sir, respectfully, we do say this is a situation where there is no real prejudice to

1 Mr Merricks in doing so. The burden it will place upon Mastercard over the next
2 eight-week period when that's already creaking at the seams is extreme. It is unfair
3 and unnecessary at this point.

4 If you are not with me on that, there are ways that this can be done in more of the Trial
5 2 and Trial 2A basis that we have floated previously. There are problems, of course,
6 with trying to sort of do expert processes in parallel with listing Trial 2, but certainly,
7 sir, with respect, trying to cram all of this into positive cases in eight weeks' time and
8 then into a trial process that starts in November, with respect, we say that is simply
9 one that should not be countenanced by the Tribunal as a matter of general fairness
10 to Mastercard, but, in any event, in terms of ensuring that the outcome is one which
11 properly takes account of the evidence that will be put forward with a fair and
12 reasonable opportunity to do so.

13 **THE PRESIDENT:** Where would you split Trial 2A from 2B? Where is the line? Is
14 that where you start to get into the questions of, if we had Mr Coombs turn up with his
15 datasets and everybody then produced a UK-wide pass-on rate and that all went into
16 Trial 2, and if you had chance to comment on that -- of course, it is relevant to
17 everybody -- and then there were specific points that were Mastercard only, is there
18 a clean line for this that is Mastercard only.

19 **MR COOK:** I can't give you a clean line today --

20 **THE PRESIDENT:** But there is?

21 **MR COOK:** Lines are never going to be necessarily clean. Ultimately, of course, the
22 simplest line is to say the Tribunal is focusing on the period relevant to the umbrella
23 proceedings. Mr Merricks and Mr Coombs can be involved in that process.

24 The question of how far you can use that to backdate to the period pre 2008 would be
25 a clear dividing line. So, that is the sort of easiest way of splitting it, by reference to
26 that time. That would allow Mr Coombs to have his analysis forward, but not the

1 question of the significance of that analysis for the 16-year period, the wider sectors,
2 the different potential outcomes of Merricks which we do say would need a significant
3 part of hearing time to be dealt with, but that could be done in due course.

4 **THE PRESIDENT:** Mr Simpson, briefly, because we will want to take five minutes to
5 discuss if we have any other questions ourselves.

6 **MR SIMPSON:** I am grateful. I will speed through.

7

8 **Reply submissions by MR SIMPSON**

9 **MR SIMPSON:** Just to take an example, temporal extrapolation. I won't take you to
10 it because we haven't got time, but if you look at paragraphs 3.3 to 3.5 of Coombs'
11 letter at 1/10, page 118, you see we already have most of the data. So we know the
12 pass-on rates from that. So, it doesn't matter that there's been any more internet, any
13 more card usage, et cetera, et cetera. That is reflected in the data which we have
14 which gives a pass-on rate.

15 On extrapolation, as on everything, Mr Cook's submissions are pure speculation. Let's
16 take card expenditure data, for example. He said, I think the words were, "there is
17 going to be a whole lot of analysis here". But what he doesn't say at a granular level,
18 either for this or anything else, is what Mastercard's case is on extrapolation of card
19 expenditure data.

20 Mr Coombs says it is going to be straightforward, and he produces the data he's going
21 to be relying on. Ms Webster, Mr Cook, on the basis of her evidence, doesn't say even
22 what data she is going to rely on. For all we know, it's going to be the same data and
23 they are going to agree on extrapolation.

24 Now, Professor Waterson raised the point, is this all about, it is going to have to be
25 done some time but not now? So the question is, on this burden point and the burden
26 that is coming in July, the burden that's coming in September, what exactly are they

1 saying they could not have done earlier and why? And why are these points not
2 possible to address by September in the responsive case? I think I heard Mr Cook
3 say that UK-wide pass-on rate is not for Mastercard to make good, but Mr Merricks.
4 So, it sounds as if it is going to be dealt with responsively anyway, which is
5 in September.

6 Let's stick with card expenditure data, which he used an example of the difficulty that
7 he's going to have. That data isn't coming from the merchants. That data is out there.
8 Mr Coombs has given that data since Coombs 7 on 13 March 2023. He's made it
9 quite clear that he's relying on these 12 sectors and this data because they are the
10 sectors for which card expenditure data is available.

11 If Mastercard haven't done their analysis of that, then that is their problem. It shouldn't
12 lead to Mr Merricks being booted out of Trial 2. Even now, Mastercard doesn't say
13 what data it's going to be using.

14 Mr Cook says we need to go back to look at changes over a much longer period for
15 Merricks, but why haven't they done that before? He hasn't explained it. If this is
16 a burden point, what is it that he has not had that he needed to do this by July, if he's
17 going to do it by July, if he's going to run a positive case? A fortiori, if he's going to be
18 a responsive case in September.

19 Very little of this is about merchant data: card expenditure data isn't, card usage data
20 isn't -- sorry, card acceptance data; card usage data isn't.

21 So, what is Mr Cook saying has imposed this burden? It sounds as though it's been
22 imposed by Mastercard just not getting ready in time, and so that shouldn't lead to
23 Mr Merricks leaving Trial 2.

24 The tone of what Mr Cook is saying is that Mastercard actually have no case at all on
25 any of this and they are just waiting to react to any case Mr Merricks puts forward and
26 try and take potshots at it. Now, if Mr Merricks is in Trial 2, that will be in September,

1 and it has been set in September since January.
2 Finally, to be as brief as I promised to be, there was deafening silence on whether
3 Ms Webster is going to use these 31 sectors. It does appear, therefore, that
4 Mastercard's arguments on difference of sectoral scope are indeed just smoke and
5 mirrors. If she was going to use 31 sectors, as her report implied but did not say, as
6 Mastercard's skeleton implied but did not say, then Mr Cook would have said so.
7 Unless I can assist you further, those are Merricks' submissions.

8 **THE PRESIDENT:** Thank you. We will reserve our judgment and we will endeavour
9 to get something out as quickly as possible.

10 What I have in mind is that we will deal with the Merricks umbrella proceedings
11 application in the same judgment as the judgment that will deal with the two open items
12 in the shopping list for any new matters, because there is a certain degree of nexus,
13 but we will try and do it in May, and obviously we don't want to hang about because
14 the parties clearly do need to know.

15 But I can say this without in any way anticipating (interference) the parties should
16 proceed on the basis that Merricks is in rather than out, and to the extent you have
17 spades in your hands, don't put them down. Thank you very much. We will get back
18 to you as soon as possible.

19 **(4.28 pm)**

20 **(The hearing concluded)**

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