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

1266/7/7/16 & 1517/11/7/22

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

Tuesday 5<sup>th</sup> November 2024

14  
15 Before:

16  
17 The Honourable Justice Michael Green  
18 Ben Tidswell  
19 Professor Michael Waterson  
20

21 **Merchant Interchange Fee Umbrella Proceedings**  
22

23  
24 **A P P E A R A N C E S**  
25  
26  
27

28 Ben Lask KC and Thomas Sebastian on behalf of Allianz (Instructed by Pinsent Masons  
29 LLP)

30  
31 Matthew Cook KC, Sonia Tolaney KC, Owain Draper & Daniel Benedyk on behalf of  
32 Mastercard (Instructed by Jones Day and Freshfields Bruckhaus Deringer LLP)

33  
34 Tristan Jones KC on behalf of Primark (Instructed by Hausfeld & Co. LLP)

35  
36 Daniel Jowell KC & Isabel Buchanan on behalf of Visa (Instructed by Linklaters LLP and  
37 Milbank LLP)

38  
39 Philip Woolfe KC, Kieron Beal KC, Reuben Andrews & Oscar Schonfeld on behalf of the  
40 SSH Claimants (Instructed by Stephenson Harwood and Scott+Scott)

41  
42 Mark Simpson KC and Jack Williams on behalf of Mr Walter Merricks CBE (Instructed by  
43 Willkie Farr & Gallagher (UK) LLP)

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1  
2 **Tuesday, 5th November 2024**

3 **(10.30 am)**

4 **MR JUSTICE MICHAEL GREEN:** Good morning. I just need to read out the script.  
5 Some of you are joining us live stream on our website. I must start therefore with the  
6 customary warning. An official recording is being made and an authorised transcript  
7 will be produced but it is strictly prohibited for anyone else to make an unauthorised  
8 recording, whether audio or visual of the proceedings and breach of that provision is  
9 punishable as contempt of court.

10 Right. Good morning everyone.

11  
12 **SUBMISSIONS RE TRIAL TIMETABLE**

13 **MR BEAL:** May it please the Tribunal, I believe it falls to me on behalf of the SSH  
14 Claimants to kick things off with the Tribunal's permission.

15 I appear with my learned friend Mr Woolfe KC, who sits to my right, leading Mr  
16 Schonfeld and Mr Andrews, who sit behind me. To my far left we have Mr Lask for  
17 Allianz, leading Mr Sebastian. To my immediate left we have Mr Jones, KC, who is  
18 here himself. On the far right we have Mr Simpson, KC, leading Mr Williams, who is  
19 next to him. To his left we have Mr Jowell, KC with Ms Buchanan behind him. Then  
20 we have Mr Cook and Ms Tolaney, KC, leading Mr Draper, who is sitting behind them.

21 I should add Mr Jowell is for Visa, Ms Tolaney is for Mastercard, Mr Simpson KC is for  
22 Merricks, Mr Lask is for Allianz and Mr Jones is for Primark. I hope that is everyone.  
23 Exit stage left at this point.

24 Can I say straight away that we are very grateful for the intervention from the Registry  
25 yesterday which was able to achieve something which we have failed to achieve,  
26 which was persuading Visa and Mastercard to fill in the helpful spreadsheet of times

1 required for cross-examination. I hope the Tribunal has the updated version of our  
2 timetable, which shot everything back by a day from 27th to 28th and 29th November.  
3 We do with respect see a strong benefit in trying to resolve issues of fact and hot  
4 tubbing within the first two weeks along with opening submissions, but it will be readily  
5 apparent that where we are is that we have two camps with effectively four experts  
6 each. Those two camps are each bidding for time and that time cannot be squeezed  
7 into the time available, so cuts will have to be made.

8 MR JUSTICE MICHAEL GREEN: Yes.

9 MR BEAL: We respectfully suggest that there are three points of principle which may  
10 help resolve the quantum of who gets what time. Firstly, who should go first; secondly,  
11 should there in principle be parity of treatment between the two opposing camps; and,  
12 thirdly, and this is a follow-on, assuming that time is allocated to the two camps, as we  
13 are suggesting, should those camps be required to coordinate amongst themselves to  
14 work out who gets what time and to what extent is that practical.

15 Now, with respect, on the first issue of who goes first, that ought to be straightforward.  
16 These are Umbrella Proceedings. The SSH Claimants are what is left of a list of active  
17 Claimants, which encompassed a number of other Claimants represented by other  
18 firms who have since settled out. We are also joined for the purposes of Trial 2A by  
19 Allianz and Primark, even though they were initially non-active Claimants. They are  
20 now taking a full part in this trial.

21 The Merricks collective proceedings, I don't need to tell this Tribunal, were not initially  
22 part of the Umbrella Proceedings. They were brought in in the middle of this year in  
23 order to take part in Trial 2A. With the greatest of respect, they have therefore joined  
24 our party. With the greatest of respect, it is a little unsatisfactory for Mr Merricks to  
25 seek to dictate the order of Trial 2A. It is a bit like a gate crasher attending your party,  
26 telling you what drinks you ought to serve and what music you ought to listen to. We

1 respectfully suggest that is not the conventional approach.

2 The conventional approach is that where Visa and Mastercard are the Defendants in  
3 the Umbrella Proceedings and they bear the burden of showing pass-on, they should  
4 go first. The reason we tweaked our timetable from the conventional analysis was to  
5 recognise that Mastercard essentially has or seeks to have a foot in two camps. That's  
6 a choice it has made. It does add a wrinkle to matters, but that doesn't, we respectfully  
7 suggest, mean that the conventional approach should be subverted of. It should be  
8 subverted only to the limited extent of having Mastercard go third of the three to  
9 recognise the dual or Janus-like position it is choosing to adopt, looking both forwards  
10 and backwards depending on the time period.

11 MR JUSTICE MICHAEL GREEN: Your suggestion is Visa goes first, Mr Merricks  
12 second and Mastercard third.

13 MR BEAL: Yes, and that the experts should follow that process. There's a practical  
14 point, which is that Mr Holt deals with obviously the evidence that my clients have  
15 served and provided the data they have provided. That will essentially determine a lot  
16 of the analysis for the purposes of the later SSH claim period. Mr Coombs builds on  
17 that analysis and then seeks to run it backwards to 1992. So there's also a logical  
18 order within the experts' own analysis in which Mr Holt goes first, Mr Coombs goes  
19 second, because he builds on the analysis of claimant data from the Merchant  
20 proceedings. So that's that point.

21 Mr Coombs could then explain whether it is appropriate to run any analysis from the  
22 later period back to the earlier period and he could then explain to extent there are  
23 significant differences what his differential position from Mr Holt is, because otherwise  
24 the experts largely follow broadly similar analysis, broadly similar strategy.

25 So in terms of Mr Merricks' suggestion that somehow Primark and Allianz deserve less  
26 weighting than anyone else, the reality is that this Tribunal has given permission for

1 four experts on the part of the Merchant Claimants and four experts on the part of the  
2 Defendants and Mr Merricks. So we are in a position whereby the Tribunal has  
3 granted permission and therefore acknowledge that evidence is going to be given by  
4 a total of eight experts and they need to be accommodated. It doesn't matter in  
5 a sense who has the biggest claim. What matters is each of those experts has given  
6 detailed evidence and it is therefore in the interests of a fair hearing that each of those  
7 experts has the opportunity to (a) put their case and (b) put responsive points through  
8 their counsel team to the other experts who criticise them, because otherwise you end  
9 up in a position whereby an expert having given his or her evidence is criticised by  
10 a later expert, but it would be an implication from Mr Merricks' suggestion that less  
11 time is accorded to two of those experts that they don't have a fair crack of the whip of  
12 rebutting through cross-examination the points that are made against them. We  
13 respectfully suggest that that's not consistent with allowing each expert sufficient time  
14 commensurate with the importance of the evidence they give to have their evidence  
15 explored.

16 MR JUSTICE MICHAEL GREEN: You are saying, are you, that the Claimants'  
17 experts, there should be the same amount of time for them as the other three's  
18 experts?

19 MR BEAL: No, on the contrary. If the other camp don't want to, I can't say simply  
20 Defendants because it encompasses Mr Merricks, but if the other camp wish to take  
21 a particular expert lightly, that is a matter for them. What I am saying feeds into the  
22 analysis is that each of those experts necessarily has responsive points to the  
23 criticisms that have been made in responsive evidence, that their counsel will need to  
24 make on their behalf in cross-examination.

25 So Mr Jones and Mr Lask can't simply slipstream behind my cross-examination, for  
26 example, of Mr Holt, because Mr Holt also points his cannons at their respective

1 experts, Mr Murgatroyd and Mr Ramirez. So the criticisms of each of those I was not  
2 planning on dealing with, for example, with Mr Holt. If the criticisms of them simply  
3 are not dealt with, then that is unfair to those two experts, for whom permission has  
4 been given by this Tribunal.

5 MR JUSTICE MICHAEL GREEN: So what is the dispute? You say you need longer  
6 than Mr Merricks is prepared to give you.

7 MR BEAL: No. The dispute is that we have cut our cloth internally and seek the  
8 30 hours that we have indicated on the spreadsheet. We don't seek to move from  
9 that. To the extent that the Tribunal were able to find an extra day either through  
10 moving something forward to the second week, one of the experts forward to the  
11 second week, such as the beginning of Mr Holt, if an extra day is available we don't  
12 mind it going to the other camp and they can do with it what they like. So that would  
13 leave 13 days for cross-examination, which Visa says is sufficient, of which we would  
14 have six and they would have seven. That's one way of splitting the difference if it  
15 comes to it, but that does involve the imperative of finding an extra day somewhere in  
16 the timetable.

17 Now at the moment, for example, looking at the spreadsheet that has been very  
18 helpfully filled in as of yesterday afternoon, we have a position where we have asked  
19 for 30 hours and the other camp have asked for 52. Now on any view that does not  
20 produce a parity of treatment. If one takes the total that is shown on the spreadsheet  
21 and applies it to the hours that are, in fact, available on, for example, a 13 day basis  
22 or 12 day basis, then that would produce a reduction of about two-thirds.

23 So the other way of looking at it would be to say that their camp needs to reduce their  
24 estimate by two-thirds. That would give Visa approximately -- sorry -- by one-third.

25 That would give Visa approximately nine hours, Mastercard approximately  
26 15.75 hours and Merricks 10.25 hours. That would be a way logically once you have

1 worked out broad parity of treatment, subject to the one day I have identified, is  
2 appropriate, if you then apply pro rata the time between the parties, then you end up  
3 with roughly those sorts of figures.

4 What we have at the moment, of course, is each of Merricks, Mastercard and Visa are  
5 treating themselves as perfectly entitled to as much time as they think they need and  
6 that produces a massive overallocation of time for their case, which simply with  
7 respect is not fair. It is not fair to the Claimants for the reasons I have outlined.

8 The fact that Mastercard is choosing to, as I have indicated, put a foot in each camp  
9 does not with the greatest of respect provide a justification for us being squeezed  
10 inappropriately in the time that's available. Sir, you have happily avoided some of the  
11 joys of Trial 1 but Trial 1 was, I am afraid, marked out by significant overruns in time  
12 estimates in the course of cross-examination and we have made the point in our  
13 skeleton that that's not fair to the bench, to the advocates frankly and to the Tribunal  
14 staff and transcribers who have to sit very long hours. So I for one are hoping we don't  
15 have to have a repeat of very long sitting days that we had in Trial 1.

16 MR JUSTICE MICHAEL GREEN: You have only just received the estimates from  
17 Mastercard and Visa. Is that right?

18 MR BEAL: That is correct. We pushed for them. They said "No, we will just deal with  
19 it on a broad brush basis". We foresaw trouble ahead with that approach because we  
20 thought that if you added up the time Merricks was asking for on the basis of parity of  
21 treatment, that would leave Visa and Mastercard with a day and a half each once  
22 Merricks had elected to have three and we thought that was unlikely to be the final  
23 position. The answer is either we are squeezed or they overrun, neither of which is  
24 satisfactory.

25 So the great advantage of the Registry forcing Visa and Mastercard to commit to times  
26 is we now know what we are looking at. As I have said, the disparity is 30 hours to us

1 and 52 to them.

2 MR JUSTICE MICHAEL GREEN: Have you had an opportunity to discuss it amongst  
3 yourselves? You haven't.

4 MR BEAL: No. The updated times arrived yesterday.

5 MR JUSTICE MICHAEL GREEN: Right.

6 MR BEAL: For various reasons I have had bundling issues, because I didn't attend  
7 the CMC. I have been trying to sort out my bundles overnight. I now have them.  
8 Whether that's an advantage or not I will let you know. The short point is I am afraid  
9 I haven't had a chance to speak to my learned friends about their time estimates.

10 MR JUSTICE MICHAEL GREEN: I mean, the simple fact of the matter is we have to  
11 fit this all in before Christmas one way or another. Your point is that there should be  
12 parity between Claimants and the others.

13 MR BEAL: Yes. To the extent there is any additional time yielded, we don't mind that  
14 going to the other side. We are happy to cut our cloth to the 30 hours that we have  
15 identified. That does encompass four experts and three parties.

16 MR JUSTICE MICHAEL GREEN: If we are able to shave off some of the opening time  
17 and also some of the factual witnesses' time, that will presumably help.

18 MR BEAL: Yes. I am not asking for any more time if any time is shaved off. What  
19 I have tried to do is come up with a solution. The solution is any more time goes to  
20 them but they have to work out between themselves how they deal with it.

21 Unless I can be of any further assistance. At the moment those are our submissions  
22 on the timetabling issue specifically.

23 MR JUSTICE MICHAEL GREEN: Thank you very much: who is next.

24 Mr Lask.

25 MR LASK: Good morning, sir. Can I add one point, broadly we entirely endorse  
26 everything Mr Beal has said particularly the point about parity, but just a point of



1 emphasis, which is perhaps implicit in Mr Beal's submissions. When one looks at the  
2 table of the parties' cross-examination requests and one looks at the total of six days  
3 at the bottom of the Merchant column, that six days does not reflect, certainly from my  
4 perspective, what I think I need to cross-examine the other party's witnesses, expert  
5 witnesses. What it reflects is a pragmatic solution that the Merchant Claimants have  
6 reached based on a starting point of 12 days being available, six of those days being  
7 available to the Merchant Claimants and then us cutting our cloth within that. That  
8 was the only point I wanted to emphasise, sir.

9 MR JUSTICE MICHAEL GREEN: Of course, we also have the hot tub where your  
10 experts and the other sides' experts will have an opportunity as well of putting forward  
11 their case.

12 MR LASK: And the time available for cross-examination will expand or contract  
13 depending on how long the hot tub is.

14 MR JUSTICE MICHAEL GREEN: Yes. Thank you. Who is going next?

15 MR JONES: I have nothing to add for Primark. There is nothing to add to what has  
16 been said.

17 MR JUSTICE MICHAEL GREEN: Ms Tolaney.

18 MS TOLANEY: The starting point is that everybody recognises that we have to finish  
19 by Christmas and we are all cutting our cloth pragmatically. This is obviously a time  
20 window that we have to use appropriately. The only disagreement that I would have  
21 with my learned friend, Mr Beal, is it is not right to say that there are essentially two  
22 camps and approach it as Claimants and Defendants with Mr Merricks in the  
23 Defendants' camp. There are, in fact, two sets of proceedings. Mastercard is in the  
24 position where it is the only party to both sets of proceedings and therefore has to  
25 cross-examine Mr Merricks' experts in the Merricks proceedings that have been joined  
26 to this action, as Mr Beal said. We have to cross-examine the merchants' experts as

1 well in those proceedings and there is some cross-examination of Mr Holt, Visa's  
2 expert, which explains why Mastercard is in the position of needing more time. So  
3 parity is a little difficult on Mr Beal's analysis because it is not split in the way that he  
4 is suggesting it is split. We would accept that it should be split when you look at one  
5 action, between the Claimants and the Defendants, that is Visa and Mastercard and  
6 the Claimants in parity. You then have to look at the other action and give parity to  
7 that between Merricks and Mastercard.

8 MR JUSTICE MICHAEL GREEN: The merchants want to cross-examine Merricks'  
9 expert, Mr Coombs.

10 MS TOLANEY: They seem to.

11 MR JUSTICE MICHAEL GREEN: Yes. There is a crossover, isn't there?

12 MS TOLANEY: There is a crossover but obviously they are not, in fact, party to that  
13 action but they have the ability to cross-examine Mr Coombs and --

14 MR JUSTICE MICHAEL GREEN: But the effect of the order that effectively  
15 consolidates these proceedings for the purposes of this trial, means that presumably  
16 the evidence in either case is available in the other case.

17 MS TOLANEY: I fully accept, I think the only purposes for your present consideration  
18 is that you are looking at how much time a party reasonably needs in order to deal  
19 with the allegations in either case. Just for those purposes one has to anticipate that  
20 Mastercard, who are the primary recipients and proponents of certain arguments in  
21 the Merricks action will need more time to deal with Mr Coombs, for example, than the  
22 Merchants, for whom it is a nice to have for, but they are not in the same position.

23 Just to put this point to bed, as I see it is regularly trotted out, obviously Mastercard's  
24 position is different in the two actions because of principled reasons about the time  
25 period and differences between the legal principles plus the facts in each action. So  
26 it is not, as my learned friend loves to say, that we are taking different positions where

1 it suits us. We are taking different positions on a principled basis for good reasons  
2 and they are in different actions.

3 The Tribunal will see the full picture and we don't shy away from that but obviously we  
4 need to be able to explore both of those actions appropriately.

5 So what we would say is, with the Tribunal's blessing, we are very happy with shorter  
6 openings. We can see that time can be saved there. We are happy to limit the factual  
7 witness cross-examination time. We are not convinced that that evidence is of great  
8 assistance to the Tribunal in these proceedings with respect to the witnesses.

9 MR JUSTICE MICHAEL GREEN: You will be cross-examining the factual witnesses.

10 MS TOLANEY: We will, but we are happy to cut our cloth.

11 MR JUSTICE MICHAEL GREEN: Okay. What are you saying with for that? Two  
12 days?

13 MS TOLANEY: Two days. We think that's tight but we will manage with it. The hot  
14 tub we don't know how long the Tribunal would like. It may shorten things, it may not,  
15 but we do think we will need more time than Mr Beal's estimate allows us and therefore  
16 we don't think it is a simple parity. We think a little bit more time has to be weighted  
17 to Mastercard.

18 MR JUSTICE MICHAEL GREEN: How do we find that time? Are you saying that the  
19 merchants should not have their 30 hours?

20 MS TOLANEY: I am saying that I am afraid. I am saying that everybody is going to  
21 have a take a reduction of what they want. You can see that on the timetable.  
22 Everybody is going to have to take a reduction, but the reduction should be done we  
23 say on a principled basis, so not by parity of reduction, but by having regard to the fact  
24 that Mastercard will have a greater role and so does require a little bit more time than  
25 a simple parity.

26 MR JUSTICE MICHAEL GREEN: If we manage to gain some time by cutting off the

1 openings and the factual witnesses, as I understand it, they are happy for you to have  
2 that extra time.

3 MS TOLANEY: That may be a solution.

4 MR JUSTICE MICHAEL GREEN: Right. Okay.

5 MS TOLANEY: I am sorry, my Lord, not to be more helpful, but at the moment they  
6 are all moving parts, but we just wanted to make the point of principle that the parity  
7 analysis of two camps doesn't really work, so can't inform the Tribunal's assessment.

8 MR JUSTICE MICHAEL GREEN: Right.

9 MR JOWELL: In terms of the first issue, the order, we are perfectly content as  
10 proposed to go first and we think that that is the natural way of things in these  
11 proceedings. In terms of the timetable we do echo what Ms Tolaney has said. It is  
12 wrong to think of this as being two camps. There are really three camps with  
13 Mastercard being in the middle. That is reflected in the timetable with the spreadsheet  
14 because you can see, for example, that Mastercard propose to cross-examine  
15 Mr Coombs for ten hours and indeed they propose to cross-examine our expert,  
16 Mr Holt, for five hours. Now those are not going to be friendly cross-examinations.  
17 Those are hostile cross-examinations by their nature. So it is wrong to make the  
18 division that my learned friend Mr Beal makes. It is a false dichotomy.

19 So we say that -- we do suggest that -- we don't feel particularly strongly about it, but  
20 we do suggest that we have got the balance right in terms of the length of the openings  
21 and also the time we propose for cross-examination of factual witnesses, so that's two  
22 and a half days each. We would suggest that if time is to be found, it could be found  
23 by perhaps provisioning for extra hours or an extra day, if needs be, but we suspect  
24 that actually when things unfold, that it is unlikely that everybody is going to need quite  
25 as much time for these cross-examinations as they propose. I think we will save that  
26 time going on. So I am hopeful -- we are hopeful that, in fact, that won't be

1 necessary -- it won't be necessary to slip in an extra Friday or to sit longer. That's our  
2 prediction.

3 MR JUSTICE MICHAEL GREEN: Does this also depend on what I think most of you  
4 have been asking for, namely a direction that not every single point has to be put to  
5 every witness?

6 MR JOWELL: Yes, indeed. As we have said, subject to the proviso that if a material  
7 or important point is not put at all by anyone, then we can make submissions and say  
8 "Well, it wasn't put" and that goes to weight, but no hard application of the no challenge  
9 rule, if I can call it that, would apply. That would be sensible.

10 MR JUSTICE MICHAEL GREEN: All right. Thank you.

11 MR WILLIAMS: Sir, I appear on behalf of Mr Merricks. If I take Mr Beal's three points  
12 in the order that he took them. The first was he sought to characterise Mr Merricks as  
13 a gate crasher. We certainly don't see ourselves in that light at all. In my experience  
14 latecomers to parties usually bring the party, but we certainly don't intend to dispute  
15 with Mr Beal or my learned friend for Visa, Mr Jowell, the ordering of opening  
16 submissions. We are very content to go second in between Visa and Mastercard so  
17 that takes that issue off the table. That's the first point Mr Beal made.

18 The second point was his two camps point of principle. I adopt in full the submissions  
19 of my learned friends for Visa and Mastercard. There are not two camps in this case  
20 and one can see that from looking at the spreadsheet in question with parties  
21 cross-examining one another across the board and their experts across the board.  
22 We completely accept the point of principle of parity, but the question becomes "parity  
23 as between what?" It is not parity between two camps but in my submission it is parity  
24 between the issues and when I come on to look at that spreadsheet in a moment, one  
25 will see it is parity of the issues in dispute. You can see that between the hours that  
26 are allotted between the parties for the respective cross-examination of one another's

1 experts. It is not two camps. It is wrong in my submission to assign between the  
2 Merchant Claimants on the one hand and Visa, Mastercard and Merricks on the other.  
3 It appears that's made on the basis of those who are contending for low pass-on, being  
4 the merchants in the Merchant claim period against those who are contending for high  
5 pass-on in the Merchant claim period. That is Merricks, Visa and Mastercard.  
6 However, there is a great oddity in this case, as you may have picked up on, and  
7 I appreciate that Mastercard will not see this as an oddity at all, but Mastercard argues  
8 for very high pass-on by and large in the Merchant claim period. That's because it  
9 suits it because there is no consumer claim in that period, but then simultaneously  
10 argues for very low pass-on rates in the earlier Merricks claim period where it suits it  
11 because there is no Merchant group in that earlier period.  
12 Now Mr Beal's skeleton, in my submission, puts that aptly describing Mastercard as  
13 straddling a very uncomfortable fence, but what that means in terms of how it cashes  
14 out in timetable terms is there is not simply two camps, but we, on behalf of  
15 Mr Merricks, and the very many millions of consumers that he represents needs to be  
16 able to put our case fully against Mastercard.  
17 My learned friend, Mr Beal, this morning suggested we have around ten hours in total  
18 across all Claimants' experts and Mastercard's experts as well, but in our submission  
19 we need a minimum of ten hours just with Ms Webster for Mastercard to put our case  
20 against Ms Webster, Mastercard's expert. It is not, in my submission, at all going to  
21 be sufficient to only have ten hours to put our case against the Merchant Claimants'  
22 experts, who argue for very low pass-on rates based on the willing claimant Merchant  
23 data.  
24 The reason we will be putting points to those experts, sir, is because the very limited  
25 evidence in this case from the Merchant Claimants' data only concerns that period,  
26 the Merchant claim period. So we have to be able to challenge the regression

1 analyses of those 13 Willing Claimants' data to put our case that those regression  
2 analyses are too low on their own terms before one gets to whether one can  
3 extrapolate backwards to the Merricks' time period. So there is cross cutting points  
4 across the whole case, sir. It is not --

5 MR JUSTICE MICHAEL GREEN: You say there are two camps. It is just that  
6 Mastercard are in both.

7 MR WILLIAMS: One can certainly put it that way, sir. In terms of where that cashes  
8 out in the timetable my learned friend tried to suggest that it is 30 hours against 52  
9 hours, and my simple point from that is one cannot cut it up like that, which is precisely  
10 why Mastercard take the exact same position and are fully aligned with us that we  
11 need to put our cases independently to one another. That's my submission in respect  
12 of two camps.

13 The third and final point responding to Mr Beal before we have a look at the  
14 spreadsheet and actually make this practical, is in relation to Allianz and Primark. This  
15 is relevant to the opening submission time. I don't think it is actually relevant to the  
16 allocation of experts. The reason I say that is because there is a suggestion on behalf  
17 of the Merchant Claimants that they each have half a day each. So Primark would  
18 have half a day, Allianz have half a day and the SSH Claimants, which is around 2,000  
19 Claimants, as I understand, or at least was originally, would also have half a day.

20 Now in my submission that's too much for Allianz and Primark considering they only  
21 represent one individual merchant in one individual sector, whereas the SSH  
22 Claimants, Visa and Mastercard have to address all 12 sectors or the whole UK retail  
23 economy, however one wants to divide it up. That is not to obviously downplay the  
24 significance of their experts, who we will wish to cross-examine, but one can see by  
25 looking at the spreadsheet that the time for the cross-examination of Mr Ramirez on  
26 behalf of Primark and Mr Murgatroyd on behalf of Allianz, that's already accounted for

1 in the much-reduced time allocated to those experts. That's why I say I think it only  
2 cashes out the point on opening submissions.

3 In Mr Merricks' proposed timetable there would be two days in total for opening  
4 submissions and that would split between two hours for the SSH Claimants,  
5 Mastercard, Visa and Mr Merricks respectively and one hour each for Primark and  
6 Allianz to open their case. That would be a full two days if that time is necessary.  
7 Obviously, if we need to save time, my primary point would be we can save time with  
8 openings rather than experts later down the line.

9 MR JUSTICE MICHAEL GREEN: So you are saying that Visa, Merricks and  
10 Mastercard and SSH should have two hours rather than half a day.

11 MR WILLIAMS: Each. That is correct. That would take us to a total of ten hours. My  
12 calculations are based on five hours of a court day.

13 MR JUSTICE MICHAEL GREEN: Yes. I assume we will be receiving pretty full on  
14 skeleton arguments.

15 MR WILLIAMS: Yes, sir, and you will already have --

16 MR JUSTICE MICHAEL GREEN: And all the reading we will be doing as well. We  
17 don't need excessively long openings.

18 MR WILLIAMS: That's right. There is 80 pages for the written openings and that is in  
19 addition to the positive and responsive case wrappers which already have legal  
20 submissions, factual background and a summary of the parties' positions. We don't  
21 anticipate needing the full 80 pages. We suggested less, but nevertheless I suspect  
22 we are going to get a very large tranche of material in addition to the thousands of  
23 pages of expert reports, sir. We hope that will be sufficient, but obviously two hours  
24 for each party, we would hope, enables the Tribunal to put any questions and canvass  
25 any issues upfront before the cross-examination.

26 Then in terms of the -- taking things in order, in terms of the factual witness



1 statements -- sorry -- the witnesses, not the witness statements -- there are I think 15  
2 factual witnesses being proffered for cross-examination. I say that because the M&S  
3 witness statement has been put in as hearsay. The witness is not being called by the  
4 SSH Claimants. So I understand there are 15 factual witnesses. It is entirely possible  
5 that Mr Merricks will not cross-examine any factual witness.

6 Why do I say that? That's because they are being formally proffered in the Merchant  
7 proceedings against Visa and Mastercard, who can be expected to cross-examine  
8 them fulsomely, I suspect, and because of our position on the irrelevance or  
9 immateriality of the witness evidence as we see it. There might be a few mop-up  
10 questions, if any at all, from Mr Merricks.

11 MR JUSTICE MICHAEL GREEN: You have seen the witness statements. You have  
12 not yet made a final determination as to whether you want to cross-examine because  
13 it will be very short if you do.

14 MR WILLIAMS: That's right, sir. So that's the witnesses. On the hot tub, which is  
15 next on the agenda, two days --

16 MR JUSTICE MICHAEL GREEN: How long are you suggesting for factual witnesses  
17 then?

18 MR WILLIAMS: Two days. That will be on my timetable the Wednesday and Thursday  
19 of that week, which obviously gives over spill time if absolutely necessary on the Friday  
20 morning, or we could already put in longer sitting days in advance for the Wednesday  
21 and the Thursday just because of the time to call the witnesses. I don't think anybody  
22 anticipates lengthy cross-examination of the witnesses but the practicalities of people  
23 coming in and out of the witness box may take some time.

24 So it might be sensible for the transcribers to know in advance that the day may be  
25 ending at 5 o'clock rather than 4.30, for example.

26 This then I think takes us on to the hot tub. I think there is broad consensus that two

1 days should be sufficient for the hot tub.

2 MR JUSTICE MICHAEL GREEN: We were working on the basis that one and a half  
3 days would be sufficient.

4 MR WILLIAMS: We are in the Tribunal's hands.

5 MR JUSTICE MICHAEL GREEN: There is an extra half day available then. Right?

6 MR WILLIAMS: That then takes us to the more hotly contested topic of the  
7 cross-examination times of the experts. Sir, you have my points already about what  
8 parity needs to be compared against. If one looks at the spreadsheet with everyone's  
9 items, if the Tribunal has that -- I don't have a bundle reference for that. It is only  
10 loose-leaf.

11 MR JUSTICE MICHAEL GREEN: I have it in hard copy.

12 MR WILLIAMS: I am grateful, sir. We anticipate there being a total of 14 days'  
13 cross-examination on our timetable. That's accounting for two days for openings, two  
14 days for factual witnesses, two days for the hot tub. That leaves 14 court days left  
15 over.

16 MR JUSTICE MICHAEL GREEN: Yes.

17 MR WILLIAMS: Or, if one is doing it in hours, 70 hours. Now one can immediately  
18 see by looking at the bottom right of the spreadsheet that the total hours are 84 hours  
19 rather than 70 hours and 17 days rather than 14 days. So there will need to be some  
20 cutting of cloth accordingly based from what's on this spreadsheet.

21 So where is the excess fat? Now one can see in the table we and Visa have very  
22 much cut our cloth. These estimates are from Mr Merricks' perspective not nice to  
23 have. In an ideal world we would have significantly more time. We have really put  
24 our best estimate here, not an estimate which is a target, knowing it may well be cut  
25 down.

26 There is a little bit of fat in Mastercard's estimates, but one can see that the fat very

1 much falls within the Merchant Claimants' camp, around double the amount of time  
2 that Visa and we each have. Now, as I say, although there is a little bit of fat in  
3 Mastercard's estimates, we do appreciate, of course, because they are facing claims  
4 from merchants and consumers and they have chosen to face two ways amongst  
5 those two proceedings, they will need more time than us and Visa, which you can see  
6 in the total hours amount there. There is plenty of scope even based on those current  
7 estimates and if they are cut down a bit for Mastercard still to have more time than us  
8 and Visa, which we do recognise and appreciate.

9 So the overriding principle in my submission is indeed one of parity, but it is about  
10 parity between similar amounts of time between corresponding parties, interests and  
11 experts. That's a better indication in my submission of where interests overlap or  
12 diverge.

13 So, for instance, both we and Mastercard have happily agreed on this occasion that  
14 we need ten hours each with our main experts. That's ten hours for Mastercard for  
15 Mr Coombs and ten hours of us against Ms Webster. But the SSH Claimants, just to  
16 give an example, want five hours with Mr Coombs compared to us wanting a total of  
17 just under four hours with their four experts, that's Economides, Dr Trento, Mr Ramirez  
18 and Mr Murgatroyd. So one can see there is a disparity on the Merchants' side of  
19 things of just over an hour. That gives an indication of lack of parity.

20 Similarly when one is comparing what Mastercard and we have asked for in terms of  
21 the main experts, ten hours, nonetheless the Merchants want 12.5 hours with Mr Holt,  
22 who is the corresponding main expert from their perspective. So the fact we say very  
23 much is in respect of the Merchants' column there in terms of where we are going to  
24 find this extra couple of days. I can go through and make granular suggestions but my  
25 overarching point is that it is that first column which needs to come down significantly  
26 from 30 hours and Mastercard's ever so slightly down.

1 MR JUSTICE MICHAEL GREEN: Yours doesn't need to come down?

2 MR WILLIAMS: Sorry. Sir?

3 MR JUSTICE MICHAEL GREEN: Yours doesn't need to come down. Is that right?

4 MR WILLIAMS: That is my position, sir.

5 MR JUSTICE MICHAEL GREEN: Okay.

6 MR WILLIAMS: We are already at 15 hours which is low considering the size of this

7 claim on behalf of over 40 million consumers, the amount of issues in question and

8 the amounts at stake. Three days in my submission of cross-examination is far from

9 excessive in the nature of this sort of a claim.

10 MR JUSTICE MICHAEL GREEN: Right. You are happy with Visa's hours, are you?

11 MR WILLIAMS: Yes. They appear quite reasonable. In fact, they are lower than ours,

12 so I couldn't say otherwise.

13 MR JUSTICE MICHAEL GREEN: Right.

14 MR WILLIAMS: Unless I can assist further.

15 PROFESSOR WATERSON: Can I just raise a question here? You said earlier that

16 you want to question all the experts, including the individual Claimants' experts, but

17 then you said, of course, we were talking about a much earlier period. So I am not

18 quite sure what your position is, is it that the experts' evidence is of no use in your

19 earlier period or are you saying it nevertheless is some use?

20 MR WILLIAMS: Sir, I should be entirely clear. There are 12 sectors of the UK economy

21 that Mr Coombs divides the total UK economy into. For six of those sectors he cannot

22 find reliable or sufficient public data and public data -- to run his regression analysis

23 on. Public data is on his case the primary and best source of evidence. So he then

24 has to look for alternative sources for evidence.

25 Now in those six sectors he looks at the Merchant data and runs his regression

26 analyses on those and considers whether that's sufficient in and of itself or whether

1 one can reliably extrapolate backwards in time from that data and he finds that one  
2 can.

3 I should say out of those six Merchant Claimants that he looked at they fall into five of  
4 the sectors and for three out of five of those sectors he also does look at public data  
5 in a sub sector but the other Merchant falls into another one.

6 To put that into concrete terms for the "Other Retail" sector he looks at the jewellery  
7 data, the public data, and he looks at Pets at Home for the Merchant data. Obviously  
8 they fall into two different sub sectors of the broader Retail sector, so they are  
9 complementary analyses. That's why we will be cross-examining the Merchant  
10 Claimants' experts on the regression analyses of those Claimants' data that  
11 Mr Coombs runs his analyses on. That is how it all inter-relates. Although they were  
12 from a different period, one has to assess whether any conditions would have changed  
13 in the earlier Merricks period, but that's the best available data there is in  
14 circumstances where public studies, public data may not cover a particular sector in  
15 full.

16 Unless I can be of any further assistance.

17 MR JUSTICE MICHAEL GREEN: Right. Thank you, Mr Williams.

18 MR BEAL: Can I just deal with the timetabling points. The 30 hours we have asked  
19 for reflects three, four different experts' views from three different parties. That is  
20 Allianz, Primark and SSH Claimants. Each of them have a different claimant -- expert  
21 and we have two experts, because we have Mr Economides as well. So it is that  
22 expert evidence that needs to be addressed in this hearing. It's no good with respect  
23 Mr Williams saying "Well, our claim is very valuable, it is worth more than yours",  
24 because that does not explain why there are 400 pages from, for example, the Allianz  
25 and Primark experts. They are dealing with the issues. It is not the value of the claim  
26 that determines the length of the expert report.

1 So what we need to deal with is the evidence that is going to be given to this Tribunal  
2 and upon which the Tribunal is being asked to adjudicate.

3 MR JUSTICE MICHAEL GREEN: The estimates for cross-examination of Primark's  
4 and Allianz's experts is much lower than the estimate for your expert. Isn't that  
5 an indication that somewhat less time should be allocated to them?

6 MR BEAL: Our expert -- our time period that we have sought for Mr Holt reflects not  
7 just my cross-examination of Mr Holt, but also the cross-examination from Mr Lask  
8 and Mr Jones. Each of us is not terribly happy with the internal allocation that has  
9 been reached, because each of us thinks we have less time than we properly need,  
10 but we have cut our cloth internally on this side of the Tribunal in order to  
11 accommodate what we think is a realistic pitch overall for all three of us.

12 MR JUSTICE MICHAEL GREEN: On the basis that we simply don't have enough  
13 days to fit everyone in with what they would like, even you having cut your cloth so far,  
14 it is going to have to be cut somewhere and the question is where do we apply those  
15 cuts?

16 MR BEAL: Sir, if I could volunteer this. The opening submissions, the strong steer  
17 I am getting from the Tribunal is you don't need three days. So be it. If the position is  
18 each party save Allianz and Primark has two hours, so be it, with respect. Allianz and  
19 Primark can then share a two hour slot between them. That way we have ten hours'  
20 worth of opening submissions in two days. That produces a day. If it is right, and this  
21 is not for me, because all I am proposing to do is tender them, or my juniors will tender  
22 them for examination-in-chief and then cross-examination, my timetabling for the  
23 factual witnesses is tiny. My uniform practice is not to put a great deal by way of  
24 re-examination to a witness.

25 If the other camp say that they only need two days, so be it. We save another day.  
26 So we are up to 14 days already rather than 12. I have already indicated that we are

1 not pitching for any additional element of that additional two days.

2 MR JUSTICE MICHAEL GREEN: Even with that we still have to lose three days from  
3 the estimates.

4 MR BEAL: Therefore one needs to reflect why are the estimates as high as they are  
5 from the other side? The reality is that from our perspective we are facing Mr Holt's  
6 analysis. That will go first, as I understand the timetabling now to reflect the opening.  
7 So Mr Holt will give his evidence first. That will be where I put the bulk of my  
8 cross-examination points on matters of principle and theory.

9 Mr Coombs follows a broadly similar approach, so I don't need to put all of those points  
10 to Mr Coombs. So there is only points of difference with Mr Coombs that need to be  
11 dealt with plus a very generic overall heading where I go through with Mr Coombs any  
12 particular salient short points that can be put to him without going into the detail.  
13 Mr Coombs has chosen to engage with the Merchant data. He has chosen to engage  
14 with each of our three primary economic experts. That's not simply something, I am  
15 afraid, that we can simply put to one side and say "It's Mr Coombs, he's in Merricks, it  
16 doesn't count", because the evidence will be before this Tribunal and therefore we  
17 need to address it.

18 We have sought five hours between the three of us for Mr Coombs even though he  
19 adopts criticism of each of our respective experts. That's something we need  
20 cross-examination of him. So there is not an awful lot of fat to be trimmed from our  
21 side. Essentially those are the two keys areas.

22 Then we have Ms Webster. Ms Webster is in a position where she has chosen in her  
23 second report to go further than she had arguably in her first report saying that there  
24 has been Merchant pass-on. That therefore means that we have to seek to  
25 cross-examine her as well. If there were I suppose any room for trimming a bit of fat,  
26 it would be with Ms Webster, but I haven't had a chance to speak to Mr Jones or

1 Mr Lask about this, so I don't know how long they are planning to be with her. One  
2 could be perhaps slightly quicker with her, but not by much. Again she has chosen to  
3 raise a case against us which we have to meet.

4 The reason why we are stretched here and I am going to make no bones about it is  
5 because Mastercard have chosen to run two opposing arguments for two different  
6 periods. That we say has put a squeeze on things. It is simply not fair when we are  
7 facing an attack on pass-on from Mastercard for us to be squeezed in our response to  
8 it, because simultaneously they are trying to say something different in their claim  
9 against Merricks.

10 MR JUSTICE MICHAEL GREEN: Given that Mastercard have adopted that position,  
11 it is not right, is it, that you can really say that there are two camps in which there ought  
12 to be parity?

13 MR BEAL: The two camps, if I can put it this way, is there merchant pass-on or not  
14 for our claim, to which Visa says, yes, there is merchant pass-on and Mastercard says  
15 "Well, we think now there might be". That seems to me probably the height of their  
16 position. We therefore have to deal with that. They are certainly advancing  
17 a suggestion that it is open to you through a process of drawing adverse inferences to  
18 conclude that there is merchant pass-on.

19 So from my perspective I am in a camp saying there is no or no significant merchant  
20 pass-on that can be established in this case and the people that are opposing me are  
21 those sat to my right, each of them. When I describe that as two camps, I am afraid  
22 that's how I see it. It is a relatively straightforward proposition.

23 The fact that there is then the bolted on CPO proceedings brought by Mr Merricks  
24 where Mastercard is choosing to argue a somewhat different point is not our -- I won't  
25 say it is not our fault -- it is obviously not our fault, but in any sense it is not something  
26 we should be required to accommodate.



1 When the President joined the Merricks proceedings back in I think it was May this  
2 year, it was on the basis that that wasn't to be a disruptive process. It wasn't meant  
3 to derail the case management of Trial 2 as it was envisaged at the time. So if the  
4 consequence of Mastercard having to deal with the Merricks position is that  
5 Mastercard is now saying "Well, we need much more time than everyone else for  
6 reflecting our unique position of looking both ways", then that is something that  
7 shouldn't come out of our time allocation, with respect. That's something that can be  
8 accommodated by the two extra days that we say can be freed up if one takes the  
9 factual evidence and openings more shortly than was envisaged.

10 MR JUSTICE MICHAEL GREEN: The trial had already been fixed by the time  
11 Merricks were brought in.

12 MR BEAL: It had been fixed for a longer period.

13 MR JUSTICE MICHAEL GREEN: The time estimate didn't go up as a result of  
14 Merricks coming in.

15 MR BEAL: No. I think if anything the time period was shortened to deal with  
16 availability issues. We are where we are. It has never been part of my ambition to  
17 cause problems for the Tribunal, rather than try to find solutions.

18 MR JUSTICE MICHAEL GREEN: Pleased to hear it.

19 MR BEAL: My solution, at least at this stage, is that we give them the extra two days  
20 and they can split it how they like. That's the timetabling point.

21 MR JUSTICE MICHAEL GREEN: The extra two days that we have saved on the  
22 openings.

23 MR BEAL: And on the factual evidence.

24 MR JUSTICE MICHAEL GREEN: We don't have those two days before Christmas,  
25 do we?

26 MR BEAL: We would if we bring forward Mr Holt to the end of the second week, so

1 we would then have Mr Holt on 28th and 29th November.

2 MR JUSTICE MICHAEL GREEN: What do we do about the hot tub then? That will  
3 have been the beginning of the week.

4 MR BEAL: Exactly. It would be Monday and Tuesday. We then have Wednesday,  
5 but we understand, sir, you can't sit. We have Mr Holt Thursday and Friday of that  
6 week. He then has roughly half a day on the following Monday. We are then into  
7 Mr Coombs and everything runs from there. We would move Mr Economides back to  
8 a suitable point in the week beginning 9th December.

9 MR JUSTICE MICHAEL GREEN: So are you saying that you then get your six days.  
10 Is that right?

11 MR BEAL: We would have our 30 hours split between the three of us and we would  
12 work out between us how that played out, but it would be, for example, with Mr Holt  
13 we have sought 12 and a half hours for him, which is roughly two and a half days and  
14 then Mastercard would then be the afternoon of that Monday, 2nd or 3rd December.  
15 Mastercard would have that afternoon and the following morning with Mr Holt, insofar  
16 as they end up on their allocation with a full five hours for Mr Holt.

17 Now the missing piece in all of this is how the internal reallocation for that camp, and  
18 I am going to call it that camp, plays out. Now it is a matter for them either to suggest  
19 a pro rata division between the three time estimates if they accept the three time  
20 estimates between themselves, or they make a pitch between themselves as to how  
21 long each of them wants from the total time allotted to them, which I reiterate will now  
22 be out of 14 days it will be eight days. So they will have --

23 MR JUSTICE MICHAEL GREEN: Your estimate for Mr Holt, as you put into the  
24 timetable, is two and a half days, which is just your estimate, the Merchants' estimate  
25 for cross-examination.

26 MR BEAL: Between the three of us.

1 MR JUSTICE MICHAEL GREEN: So it doesn't account for Mastercard as well.

2 MR BEAL: No, it doesn't, because we have only just got the Mastercard figures.

3 MR JUSTICE MICHAEL GREEN: No, I know.

4 MR BEAL: The total of that would produce three and a half days for Mr Holt, for  
5 example. Then the time devoted, for example, to Mr Harman is broadly consistent  
6 with it being just over a day. I suspect again if we needed to trim any fat from our side,  
7 then we could have perhaps arguably slightly less from Mr Harman and slightly less  
8 from Ms Webster, which might free up some time.

9 Again we have talked about this internally and we have come up with an internal  
10 allocation of time which, as I say, has pleased no-one, but we have put it, as Mr Lask  
11 said, as a realistic pitch as to what we thought would give both parity of treatment and  
12 a fair allocation.

13 So that's tinkering in a sense around the edges. I think the core point of principle is to  
14 work out how much time is allocated to what I do unabashedly still call the two camps.  
15 Once that's done it is really a matter for Visa, Mastercard and Merricks to work out  
16 who gets what. If there is any dispute about that, they may have to come back to the  
17 Tribunal and argue it between themselves. That would be with the greatest respect  
18 the easiest way of splicing it at the moment.

19 MR JUSTICE MICHAEL GREEN: So you are saying basically the two days that we  
20 gain from the openings and the factual witnesses, they should go to the other camp.

21 MR BEAL: Yes. They have eight days, 40 hours.

22 MR JUSTICE MICHAEL GREEN: To decide what they want to do.

23 MR BEAL: And split it between themselves bearing in mind we have three parties this  
24 side and there are three parties that side by reference to experts.

25 So that's what I say on timetabling. In terms of the suggested direction based on the  
26 Tribunal's approach in the Le Patourel where there was a direction in relation to expert

1 evidence the full case did not need to be put, we are very happy with the basic Le  
2 Patourel direction to be given. There has been an elaboration of it which we fear gives  
3 raises complexity and gives rise to satellite arguments, which is simply unnecessary.  
4 Visa and Mastercard will make submissions about the evidence that's given regardless  
5 of what I say or the Tribunal directs in a Le Patourel direction. That's not going to be  
6 avoided. They can say what they want in a sense.

7 What we are seeking to do is to have the Tribunal recognise that I can't conceivably  
8 in five hours of cross-examining Mr Holt, deal with everything he says that is contrary  
9 it to my case.

10 Does that need to be given to the factual witnesses? With the greatest respect I am  
11 not actually sure it does. The Le Patourel direction was restricted to expert witnesses.  
12 The difference with a factual witness is it is a significant allegation to say that a witness  
13 of fact has got something wrong in fact. That's the sort of allegation that usually has  
14 to be squarely put to the witness so the witness can respond to it.

15 With the greatest respect it is a somewhat different thing to suggest that an analysis  
16 from an expert has pursued the wrong methodology or gone down the wrong course.  
17 We will, of course, put all the points to the experts so they are in no doubt that the  
18 contours of the case are clear to them. That's obviously what we will do. If there is  
19 a factual mistake at paragraph 12.26, sub-paragraph (c) of a particular expert report,  
20 I may not waste my time going to that, but I don't want it to be said that we have agreed  
21 something at the end of the day.

22 The other way of me doing it --

23 MR JUSTICE MICHAEL GREEN: We need to be sensible about this.

24 MR BEAL: I agree, with respect.

25 MR JUSTICE MICHAEL GREEN: And practical given the time we have for  
26 cross-examination, we can't expect every single point to be put to every witness. That

1 is just pointless.

2 MR BEAL: We recognise with respect that also goes to the factual evidence to  
3 a certain extent. It would only be if it was being suggested a witness has something  
4 flatly wrong or has, heaven forbid lied in their evidence, one would expect that to be  
5 put. It is highly unusual, with respect, to get the sort of you don't need to put every  
6 significant adverse point to a witness of fact, it is highly unusual to get that direction  
7 from any court or Tribunal but it is sensible with respect to make that direction for  
8 experts.

9 Unless I can be of any further assistance, those are my points in reply.

10 MR JUSTICE MICHAEL GREEN: Thank you.

11 MR LASK: We don't yet know which of the Claimants' factual witnesses, the  
12 Defendants and Mr Merricks may wish to cross-examine. It would be very helpful to  
13 know that so arrangements can be made for their attendance or non-attendance if  
14 they are not being cross-examined.

15 MR JUSTICE MICHAEL GREEN: I assume that can be done in pretty short order. He  
16 nods. So hopefully you will get that soon. Anybody else want to say anything?

17 MR JOWELL: If I may just briefly on (inaudible). I have a few additional points. For  
18 Visa, we have set out the amount of time that we need to cross-examine Mr Trento  
19 and I stress the word "need" because we did not regard this as an opening shot in  
20 a sort of negotiation as to how much time we would get and on that basis we have  
21 suggested six and a half hours. Now the absurdity of what Mr Beal says when he talks  
22 about two camps and suggests sorting it out between us, one can see that when one  
23 considers five of Mastercard's hours are cross-examining our expert, Mr Holt, and ten  
24 of them are cross-examining Mr Coombs, as I said.

25 So the idea that somehow we should split that allocation of the cross-examination of  
26 our witnesses should somehow come off our already curtailed time would clearly be

1 unjust. So if one looks at the figures, one sees it is 17.75 hours proposed to  
2 cross-examine Mr Holt. That can be compared to just 13.75 for the equivalent  
3 Mr Trento and it is obvious that the time has to come off the cross-examination of  
4 Mr Holt and then one sees an 18.75 hours for Ms Webster and 15.5 hours for  
5 Mr Coombs.

6 So if one wants to start shaving these times off, it has to come off the  
7 cross-examination of those experts where they are seeking a disproportionate amount  
8 of time. That's the fair way to do this, not to make a false division between two camps  
9 and then say to us to sort it out.

10 MR JUSTICE MICHAEL GREEN: Is it fair to say you and Mr Merricks are in the same  
11 camp?

12 MR JOWELL: Yes. That is a fair statement.

13 MR JUSTICE MICHAEL GREEN: Right.

14 MR JOWELL: But it is not right to say it with regard to Mastercard.

15 MR JUSTICE MICHAEL GREEN: I understand that.

16 MR JOWELL: It wouldn't be just for us to somehow have to pro rate down from the  
17 very modest six and a half hours that we have put, which really is the bare minimum  
18 for Mr Trento. I just wanted to stress those points, if I may.

19 MR WILLIAMS: Very briefly on that last point, we are broadly in the same camp as  
20 Visa. The additional aspect that we have to cross-examine on is the temporal  
21 extrapolation between the Merchant claim period and the Merricks claim period. Visa  
22 doesn't face that issue because it is only facing the merchants, whereas we essentially  
23 have to deal with the full period, or both periods, from 1992 right the way onwards, so  
24 from the beginning of the Merricks claim period right the way through to the end of the  
25 merchant period, whereas Visa are just addressing the merchant claim period. That's  
26 why we have some additional cross-examination time needed against Mastercard that

1 Visa don't.

2 That said, we have cut our cloth accordingly with Visa knowing that our interests are  
3 aligned. That explains the very low estimates of half an hour and 45 minutes with  
4 some of these experts and up to an hour, for example, with Mr Harman. The idea, as  
5 I said earlier, that three days is at all excessive in a claim of this nature and volume is  
6 absurd, to adopt Mr Jowell's language.

7 The last point I wish to make is to reply in relation to the witness evidence and whether  
8 the Le Patourel order, as we have been calling it, the no duplicative cross-examination  
9 order, should also apply to factual witnesses. In my submission it should in this case  
10 because otherwise we will face a particular situation of duplication that I or  
11 Mr Simpson will have to be putting this very same cross-examination that other parties  
12 will.

13 To give a practical example of that, one point that we will be making is about the  
14 channels or mechanisms by which the MSC, the Merchant Service Charge, flows  
15 through into pricing and pricing decisions, however one wants to capture it. It will be  
16 our position at trial (and it is evident from the papers already, so I am not revealing  
17 any Crown jewels here), is that there are many mechanisms by which the MSC can  
18 pass through to prices without them having to be directly considered in their pricing.

19 Visa make the exact same point that there are lots of these channels. Mr Holt's  
20 evidence is replete with examples of how the MSC can be taken into account, if it is  
21 factored into profitability decisions or price margin targets for managers, how it is then  
22 taken into account. All of those points are likely to be put by Visa to the factual  
23 witnesses, that they took into account competitor prices or profitability in their pricing  
24 decisions.

25 The idea that it would then be for us to pop up and make the exact same points with  
26 them already having been made, as you say, sir, will lead to an additional day of

1 cross-examination because it is just not needed, because our interests are fully  
2 aligned. The points will be the exact same once.

3 MR JUSTICE MICHAEL GREEN: Can we make a direction at this stage or can't we  
4 wait and see? If it turns out that Visa does actually make all the points that you would  
5 otherwise have made, then we can say "We don't need to -- you don't need to  
6 cross-examine. We will take it as you having had those points put by Visa's  
7 cross-examination".

8 MR WILLIAMS: That would be fine if there is no formal order to the extent that my  
9 learned friends for the Merchant Claimants won't pop up and say "Mr Merricks has not  
10 put his case to the witnesses". Now obviously if nobody has put the case, whether  
11 that be Visa or Mastercard, who are both likely to be aligned on the point that I have  
12 been making about implicit ways of taking the MSC, then fine I will have to pop up and  
13 put some questions to the factual witnesses, but I am working on a scenario it has  
14 already been put.

15 MR JUSTICE MICHAEL GREEN: If it has been put by somebody, I don't think the  
16 submission from the Merchants will get very far.

17 MR WILLIAMS: In which case we are fully aligned, sir. I am grateful.

18 MR TIDSWELL: Given that it has taken over an hour just to talk about timetabling, we  
19 probably ought to take a little bit of time just to work out how we are going to get  
20 through this before Christmas. So we will just have a ten minute break, which is  
21 probably needed for the transcribers anyway.

22 (Short break)

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#### RULING RE TRIAL TIMETABLE

25 MR JUSTICE MICHAEL GREEN: Thank you very much for your submissions in  
26 relation to trial timetable and the order of events. The position that we got to in relation



1 to order is that parties are agreed that in terms of the openings, Visa will go first,  
2 Mr Merricks second, Mastercard third and then the Claimants. We also reached the  
3 position that the timing for openings should be reduced from three days to two days in  
4 accordance with Mr Williams' submissions that each party should have two hours and  
5 with the Claimants and Allianz and Primark sharing the four hours remaining. So that  
6 will be openings completed in two days.

7 The factual witnesses we think has also been agreed between the parties that this can  
8 be reduced to two days. So we should complete all the openings and the factual  
9 witnesses in the first week.

10 Now in relation to the economic expert evidence it is clear that we need to find some  
11 time across the board. Everyone needs to cut their cloth. We are grateful to the parties  
12 for putting forward their estimates in which it certainly does appear that efforts have  
13 been made to cut their cloth and in particular it seems to us that Visa have particularly  
14 restricted the time that they wish to use in cross-examination. This is always going to  
15 be a slightly rough and ready exercise and we understand the difficulties involved in  
16 estimating how long cross-examination will take.

17 We do think that it is correct to divide all the parties into two camps, as was suggested  
18 by Mr Beal. Rather we consider that both Merricks and Visa, and I think this was  
19 accepted by them, are essentially in the same camp for this purpose, the Merchants  
20 are another camp and Mastercard is somewhat out on its own. It is in the difficult  
21 position, as recognised, that it potentially looks both ways, but we do consider that the  
22 estimates that Mastercard have provided are over-generous in the circumstances and  
23 in particular the request or the estimate of 15 hours for the cross-examination of  
24 Mr Holt and Mr Coombs we think needs to be trimmed quite substantially.

25 So what we have come up with is that we are going to direct that Mastercard needs to  
26 reduce its estimate by a day. We think that Merricks and Visa combined need to

1 reduce their time estimate by half a day. They will need to work out between them as  
2 to how that will work and in relation to the Merchants also half a day. That obviously  
3 only saves two days and we needed to gain three days, having got the two days in  
4 relation to the first week, but what we hope is that the cross-examination will speed up  
5 over the course of the trial as points have already been put and may not need to be  
6 explored with some of the later witnesses. I also query whether that much time is  
7 needed for re-examination.

8 We can also obviously sit for longer hours. So we are hoping that by trimming the  
9 estimates by two days will still enable this trial to be completed at least in its first stage  
10 by Christmas and would ask the parties to endeavour to agree a timetable based on  
11 what I have just said.

12 So can that be done? Can the new timetable be lodged and then we can try and stick  
13 to that?

14 MR WILLIAMS: How long will the hot tubbing take? Will that be a day and a half or  
15 two days?

16 MR JUSTICE MICHAEL GREEN: Good point. One and a half days is what we think  
17 we need. So we will stick with that. All right. Anything arising out of that? Okay.

18 Next on the agenda is Mr Economides or the other application.

19 MR LASK: There is something arising from what has just been discussed and it is the  
20 scope of the hot tub, the agenda for the issues that are going to be dealt with. The  
21 Tribunal may have seen there is a helpful list of expert issues, which I suppose  
22 provides a menu from which the agenda might be derived, but I think that does need  
23 to be considered between the parties and ultimately with the Tribunal's endorsement?

24 MR JUSTICE MICHAEL GREEN: Obviously Professor Waterson will be taking the  
25 lead on that. I think the plan is that a list of areas that we intend to cover in the hot tub  
26 will be provided to the parties hopefully in good time before the start of the trial.

1 PROFESSOR WATERSON: But in this context it would be useful if -- I mean, the joint  
2 list is quite long and we can't possibly cover all those issues with that many people.  
3 So if a revised version of that list could be produced in fairly short order, that is this  
4 week essentially, then I will endeavour to produce a list for consideration by my  
5 colleagues early the following week.

6 MR LASK: That can be done between the parties.

7 MR JUSTICE MICHAEL GREEN: It is slightly unusual, this hot tub, isn't it, that it is  
8 not really to deal with specific issues, although we will obviously indicate what issues  
9 we want to cover, but it is not going to restrict the parties in their cross-examination,  
10 whatever they want to cross-examine the witnesses on in due course.

11 MR LASK: Yes.

12 MR JUSTICE MICHAEL GREEN: Yes.

13 MR BEAL: I was about to make the same point about the list of issues. It already  
14 reflects a cull from 84 issues down to 23, which I anticipate the Tribunal will be pleased  
15 about, but certainly from our understanding it was not intended to be exhaustive or  
16 binding. I was not going to make a song and dance about it because it will come out  
17 in the wash after a hot tub as to where we are.

18 PROFESSOR WATERSON: Are you suggesting that another version won't be  
19 produced but --

20 MR BEAL: On the contrary, sir, we are very happy to take away your suggestion of  
21 a refined list that tries to drill down into the core issues rather than perhaps some of  
22 the less important ones that have also found their way in there.

23 PROFESSOR WATERSON: If that can be produced preferably by the end of this  
24 week.

25 MR BEAL: I am sure that can be done.

26 MR JUSTICE MICHAEL GREEN: All right. Are we dealing with Mr Economides?

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APPLICATION RE MR ECONOMIDES

MR COOK: (Inaudible) Mr Merricks and not need to be here so I propose that we clear the decks of everything other than Mr Merricks' application.

Sir, Mastercard objects to the admission of section 4 of the supplemental report of Mr Economides filed by the SSH Claimants with their responsive case on 9th October.

The context of this issue is as follows. As the Tribunal -- certain members will be very familiar, other members will be becoming increasingly familiar, the claims by the Merchant Claimants almost exclusively relate from the period from 2010 onwards whereas Mr Merricks' claim relates to the period 1992 to 2010, with a two-year run-off period. So in practice the claims relate to separate periods. Just to clarify there is a tiny overlap with a couple of merchants at the end, but in practical terms it is separate periods, consecutive periods.

Now Dr Trento is the expert economist instructed by the SSH Claimants. He has produced two very large expert reports which address pass-on rates for the Merchant Claimants. He doesn't address pass-on for the Merricks claim period or the wider sectors that are relevant to the Merricks claim period, because that's not relevant to the Merchant Claimants.

In April 2024 the SSH Claimants applied for permission for an additional expert on the basis that he, Mr Economides, would provide what was described as factual expert evidence on pricing matters that Mr Trento considered were necessary for input into his analysis of the Merchant Claimants' pass-on rates. They identified two narrow issues which were said to fall within Mr Economides' pricing expertise.

Firstly, the identification of the most appropriate proxy for each of the Claimants who put forward data or sectors where Dr Trento was carrying out analysis; secondly, how the conclusion on pass-on for the sectors where there was a claimant that provided

1 data could be read across to other sectors or sub-sectors where there wasn't data but  
2 there was a claimant who was there in the wings but hadn't put forward data.  
3 For the Tribunal's reference the letter in which they made that request is in the  
4 bundle at C, 2054. On the pdf it is page 2212.

5 MR JUSTICE MICHAEL GREEN: This is the bundle for today.

6 MR COOK: It is the core bundle for today, sir. In the bundle reference it should be  
7 2054. The core bundle, sir. Given the time, I was going to make my points without  
8 needing to go to the document itself.

9 What they sought permission for was to put forward certain qualitative evidence to  
10 provide Dr Trento with the information he needed to assess pass-on across the SSH  
11 Claimants' claims. So the focus, as you would expect, is on things that the economist  
12 needed to assess pass-on for the Merchant Claimants. They sought factual pricing  
13 evidence by reference to those two categories and by reference to a letter from  
14 Mr Economides, which is in the bundle at C, 2399.

15 So based on the fact that it was those narrow categories of evidence in support of  
16 an assessment of pass-on by the Merchant Claimants Mastercard did not oppose that  
17 request for permission.

18 When the reports came in, Dr Trento -- first round reports, Dr Trento did quite rightly  
19 address pass-on in relation to the Merchant Claimants. Mr Economides addressed  
20 the two issues, proxies and read across again in parallel to Mr Trento.

21 What happens then is in October in his supplemental report Mr Economides now has  
22 one whole chapter addressing what we say is an issue of economics, namely the  
23 relevance of the shift towards card payments over time and influencing pass-on rates.  
24 Now that's an issue in dispute between Mastercard and Mr Merricks in relation to the  
25 Merricks claim period. That was a period 1992 to 2010 where cards were accepted  
26 much less widely. You could use them in far fewer shops and they were used more

1 rarely, particularly credit cards, which is what that claim relates to. It is not an issue  
2 that has any particular impact on pass-on rates during the Merchant Claimants' claim  
3 period. By that point we are at the stage where it is near enough ubiquitous  
4 acceptance and very high rates of card usage.

5 MR JUSTICE MICHAEL GREEN: It is responding to something that Ms Webster  
6 raised in their reports.

7 MR COOK: In relation to the Merricks' claim period. We say that was not within the  
8 scope of what he was given permission to do. There is no relevance to his clients in  
9 addressing that period. He was meant to be providing evidence in support of  
10 Mr Trento -- Dr Trento's analysis. Dr Trento is not using this or addressing that period  
11 at all.

12 We simply say there is no good reason for Mr Economides to be getting into an issue  
13 which is not relevant to his clients, an issue of economics which is not his area of  
14 expertise in any event.

15 Essentially it is a matter of procedural fairness that comes about here. The dispute in  
16 relation to the Merricks claim period is between Mastercard and Mr Merricks.

17 MR JUSTICE MICHAEL GREEN: What is his expertise?

18 MR COOK: He is meant to be a factual pricing.

19 MR JUSTICE MICHAEL GREEN: Factual --

20 MR COOK: Factual pricing experience, how merchants price. I mean, we will be  
21 certainly saying that there are doubts about --

22 MR JUSTICE MICHAEL GREEN: A mix between factual and expert evidence, is it?

23 MR COOK: He is described as giving factual expert evidence.

24 MR JUSTICE MICHAEL GREEN: Factual expert evidence?

25 MR COOK: That is the description. Without going through the history we expressed  
26 very serious doubts at the time about how much he can add in any event, but that's

1 water under the bridge. So at this point we will be certainly saying something about  
2 the value of that evidence in due course but that is the category.

3 Then we have an issue that's in dispute between the expert economists and  
4 Mastercard and Mr Merricks in relation to the relevance of the changing card usage,  
5 card acceptance numbers. It has been fully canvassed between them. At the reply  
6 stage Mr Economides barges into that party. We say it is a question of fundamental  
7 fairness. Mr Merricks never said he wanted factual pricing expertise. If he had done  
8 so, we would have had the opportunity to consider whether we wanted to respond to  
9 that. We didn't within the narrow categories Mr Economides was going to address.  
10 He has now gone beyond that. If that had happened, it would also have come in at  
11 the positive case stage, not in October basically a month before trial.

12 The short point is it is well beyond what Mr Economides was meant to be addressing,  
13 we were told he was going to address. It is outside his area of expertise and we end  
14 up being sandbagged with late evidence about something which has no relevance to  
15 his clients at all.

16 MR TIDSWELL: (Inaudible) or potential drivers are for pass-on, doesn't that open  
17 everything up? In other words, if Ms Webster is making observations about what  
18 drivers might have been different, doesn't that open up the question as to the weight  
19 one puts on those drivers and the importance of them and isn't he then -- putting aside  
20 the question of expertise, but just in relation to the cleanliness of the cut between the  
21 first period and the second period, doesn't it blur that?

22 MR COOK: The starting point is Ms Webster does not say anything about whether  
23 there are any factors which changed significantly during the course of the Merchant  
24 claim period which impacts on it. If it was the case this was a response to a suggestion  
25 you should assume half pass-on in 2010, 2015, one could see why the Claimants  
26 would have an interest in responding to it. Mr Economides would have done. So what

1 I am saying is he is addressing something which is only a live issue in relation to  
2 a claim period which is nothing to do with his clients.

3 MR TIDSWELL: I am putting a slightly different point to you, which is if, for example,  
4 Ms Webster she gets on to the question of the relative size of the cost in people's P&L,  
5 so let's just say for argument's sake at the earlier stage it would be a smaller number  
6 in the merchants' P&L, I think what Mr Beal is going to be saying to us is that once you  
7 have made that point about that being a driver for pass-on, he is entitled to comment  
8 on that as a driver for pass-on and make some observations about whether or not he  
9 thinks it is material or not at any point in time.

10 MR COOK: (Inaudible) point which they narrowly thought was relevant and frankly if  
11 that was the case, it should have come in their primary cases dealing with it, that would  
12 be a different matter. The issue here is -- the analysis he puts forward is expressly in  
13 relation to the question whether the factors are likely to have been the same across  
14 both periods. So he is not addressing in the Merchant claim period were certain factors  
15 relevant, because we have not placed weight on those. What he is doing is saying  
16 there is this identification of what is undeniably factual differences between the two  
17 periods and we have an expert for the merchants Claimants who have no interest in  
18 the Merricks claim period. Not opining on has there essentially been a change in  
19 pass-on rates between the two, and that coming in at a reply stage without warning of  
20 that evidence.

21 We do say that is just, you know -- the Tribunal has very closely case managed this  
22 process in terms of what evidence was permitted and to have evidence of this kind  
23 come in that late without warning without the opportunity to know it is coming is, with  
24 respect, simply wrong. There is just no reason to allow that expansion of material from  
25 an expert who on the face of it has no good reason to respond, you know. How it  
26 came about he felt it was appropriate to do so is a different question. I am not going



1 to take the lead from other counsel in the room who speculate wildly on motivations  
2 but it is not a matter for trial and evidence like that should not be permitted when it is  
3 outside all of the aspects of permission of the Tribunal that has been granted.

4 MR JUSTICE MICHAEL GREEN: Why couldn't you just make these submission at  
5 trial? We leave it in there. If you say it is irrelevant to that part of the claim, you can  
6 just dismiss it at trial.

7 MR COOK: As you will have seen from the strength of Mr Merricks' skeleton,  
8 Mr Merricks is seizing on this and saying "Look". This is one of the dynamics here that  
9 makes us question why it has come about is the most vehement defence of  
10 Mr Economides putting forward evidence comes from Mr Merricks, because  
11 Mr Merricks did not have this evidence, did not have permission for it. Did not put it  
12 forward as part of his positive case and suddenly it has come in from another party  
13 who didn't have permission for it either, and Mr Merricks thinks it is very useful.  
14 So that is as much as anything the reason why we object to it because Mr Merricks is  
15 seizing upon a side wind getting material in that had he tried in October to apply for  
16 permission for a pricing expert to put this in, there would have been a lot of very good  
17 reasons for the Tribunal to say no.

18 MR JUSTICE MICHAEL GREEN: Will Merricks be entitled to rely on it at the trial if it  
19 is not related to the period of his claim?

20 MR COOK: Well, that's the problem.

21 MR JUSTICE MICHAEL GREEN: If they are relying upon it, presumably they won't  
22 be able to cross-examine him on it or will they?

23 MR COOK: A couple of points there, sir. Firstly, the problem is that he does opine  
24 upon the Merricks claim period. Mr Economides is putting views forward about the  
25 Merricks claim period, which is the objection as much as anything else. You say  
26 Mr Merricks will not be able to cross-examine on it but he doesn't want to because it

1 supports his position he says. Mr Merricks doesn't want to challenge it.  
2 The way it is done, of course, pretty much any party can challenge evidence by  
3 anybody else if they wanted to do within the realms of the time permitted but he doesn't  
4 want to. He has a set of evidence which, as I say, he wouldn't have got permission to  
5 put in if he had asked for it to come in as late as he did, or there would have been a  
6 consideration of responsive evidence and appropriate timetable for it. We say it is not  
7 something that can be left to wait. Obviously we will make those submissions in due  
8 course, but it would be much better to have clarity that it is not part of the material  
9 which should be before the Tribunal and so simply should be out.  
10 Then it is another point that will add to time constraints. It is another category of  
11 material that needs to be dealt with. We are tight for time. It would be better to have  
12 that clarity now.  
13 MR JUSTICE MICHAEL GREEN: Thank you, Mr Cook.  
14 MR BEAL: I am afraid I do need to take you to a couple of documents for accuracy.  
15 Please would you turn up page 337 of the PTR bundle? I am afraid the manuscript  
16 reference rather than the pdf number. Somebody will no doubt shout at me what the  
17 pdf number is. It should be PTR/337 para 44 of a ruling from the CAT on the third  
18 ruling on evidence to pass-on. What we see there in paragraph 44 -- I am just  
19 confirming the pdf page number.  
20 MR JUSTICE MICHAEL GREEN: 341.  
21 MR BEAL: Thank you very much. The Tribunal at this stage was saying:  
22 "We endorse the disclosure expert approach but we stress we have not resolved and  
23 what we cannot resolve at this stage is precisely which industry experts will need to  
24 be retained and what they will be instructed to do. However, we want to be clear that  
25 we regard this approach as led by the economic experts and we are unwilling to allow  
26 industry experts free range as to the questions they address."

1 So the President at the time was envisaging --

2 MR JUSTICE MICHAEL GREEN: What are we looking at? This is a judgment?

3 MR BEAL: This is part of a ruling that was given in October I think it was  
4 2022 -- October 2023 if one looks at PTR/307, it is a ruling evidence on pass-on. It is,  
5 in fact, the third ruling in a series of three rulings this Tribunal gave in relation to the  
6 formulation of the issues and evidence for trial 2, what is now Trial 2A, which was trial  
7 2 at the time.

8 Going back to page -- I think you said, my Lord, 341.

9 MR JUSTICE MICHAEL GREEN: Yes.

10 MR BEAL: Paragraph 44, what was envisaged was that the experts would say "What  
11 do we need a pricing expert for? What do we need an industry expert for?" and the  
12 expert would then indicate the parameters of the evidence that that expert considered  
13 would be useful. That's essentially what happened.

14 The application for permission to adduce pricing evidence is at page 2055 of bundle C,  
15 the main core bundle that was before the CMC back in October. If the Tribunal has  
16 that, that should be page 2213 of the pdf I think. That is a little curious but that's what  
17 my pdf is showing me. C/2055 paragraph 7, if the Tribunal has that. It is a letter from  
18 Stephenson Harwood. I am cutting to the chase. Paragraph 7.3, please, where what  
19 is sought is:

20 "Factual expert evidence from a pricing expert, Mr Vassilis Economides, his CV and  
21 statement of expertise have been provided covering the matters identified by Dr Trento  
22 in section 2.4 of the expert table", which I will come on to in a moment.

23 Then in paragraph 8:

24 "In addition, Dr Trento's approach is to estimate pass-on as precisely as possible for  
25 the ten largest sectors and then to seek to match each of the similar sectors to one of  
26 the top ten sectors which most clearly resembles it. For that purpose he seeks support

1 from a pricing expert to assist with the matching process."

2 So the query you had, sir, about factual expert evidence, it is essentially opinion  
3 evidence from an expert in an industry as to how pricing is done, which isn't  
4 necessarily -- I mean, it is obviously not factual evidence because it is opinion  
5 evidence from an expert as to how in the opinion of the industry expert certain matters  
6 are dealt with routinely by businesses when they price. That is very much the evidence  
7 that Mr Economides then gave.

8 However, we do need to divert very briefly, if we may, please, to the joint expert  
9 statement at C/1734, which should be at page 1892 of the pdf. This comes under  
10 a section, if one scrolls up to the previous line at the bottom of the page 1733, we see  
11 the overall approach suggested by Dr Trento on behalf of my clients is the matter that's  
12 being discussed and it is a proposed empirical approach.

13 The second paragraph down at page C/1734:

14 "If a direct estimation is not feasible one may consider an alternative approach  
15 whereby it is not the pass-on of the MSC which is estimated but the pass-on of  
16 a different cost borne by merchants whose pass-on is likely to be similar to the pass-on  
17 of the MSC and may be more readily estimated."

18 So that is the proxy approach. He then says:

19 "In the proxy econometric estimation it is critical to identify a suitable proxy cost. For  
20 this I understand that the Claimants are finding a letter from a pricing expert which  
21 among other things carries out a preliminary assessment of potential proxy costs."

22 So that's one of the things he is going to be considering.

23 Then at the top of page 1736 we see in line 4 Dr Trento is suggesting pricing experts  
24 are to identify any appropriate proxy costs and give evidence as to features of pricing  
25 in the relevant sectors.

26 If we then, please, scroll to 1764, which should be at page 1922 of the pdf. Right at

1 the bottom of that page is a section from Dr Trento where he is dealing with at this  
2 stage whether the changing costs is temporary or long-term. There in the second to  
3 last row on that page he says:

4 "Evidence on this factor would be relevant for they econometric proxy approach either  
5 de novo or from existing studies. It should assist the pricing expert to identify the  
6 correct proxy costs."

7 So already built into the expert's request for what the pricing expert can usefully  
8 engage in is a question of whether or not the changing cost is temporary or long-term  
9 and it brings in the temporal element to it.

10 If we then look at C/1797, which should be page 1955 of the pdf. Again last row on  
11 that page we have Dr Trento opining on whether imperfect information and costs of  
12 adjustment other than price effective merchants pricing and budgetary decisions.  
13 That's at the top of page 1796, but on that, ie looking at Merchants' pricing and  
14 budgetary decisions, what Dr Trento says is evidence may be gathered through  
15 (inaudible) based disclosure led by a pricing expert.

16 So what's envisaged is a pricing expert will explain how in a given sector pricing  
17 typically works. That will hopefully narrow the need for individual disclosure from  
18 individual Claimants.

19 If we then scroll down to page 1801, again last row on that page, Dr Trento says:  
20 "As discussed in factor B2", this is the right-hand column, "whether a firm takes  
21 a certain cost into account in its pricing decisions may ultimately only be ascertained  
22 by a pricing expert via disclosure of merchants, ie interviews with persons pricing" and  
23 so on.

24 Finally, please, at page 1811, page 1969 of the pdf, right-hand column, last row,  
25 Dr Trento says:

26 "The evaluation of pricing strategies would have to be carried out by a pricing expert

1 who is better placed to indicate the most efficient way of gathering evidence in this  
2 regard."

3 Now the formal application to rely upon pricing evidence was then made by my learned  
4 friend Mr Woolfe KC on 24th April 2024. That's at C/796. It is in the transcript of that  
5 particular April hearing where the applications were made.

6 MR JUSTICE MICHAEL GREEN: Do you have the pdf reference for that?

7 MR BEAL: The pdf reference for that is page 894. The beginning of the application  
8 is from line 22 onwards where Mr Woolfe indicates he wants to talk about LEK, the  
9 pricing expert point. LEK is the consultancy firm Mr Economides works for. The  
10 response from Mr Justice Marcus Smith was:

11 "As we have made clear, we don't want to close out material that forms part of your  
12 positive case. We want the parties to see this as an exercise in advocacy and  
13 persuasion. I would therefore hope that the general approach is that you get your  
14 permission and it is not opposed at this stage, but again putting down a marker we are  
15 all concerned about triability. If it is the case that you present a positive case that is  
16 simply not triable in the seven weeks or so that we've got, then we will have to have  
17 a think about how it can be pruned back. So my thinking is both regarding Mr Harman  
18 and LEK is that you ought to be given your leave, subject to the general control of the  
19 Tribunal, in order to make sure that the process is manageable."

20 Now I am not going to start detracting from the focus of this particular application, but  
21 it is notable, for example, Mr Harman in his first report does not deal with proxy costs  
22 at all responsively, because it's been raised by Mr Economides, he does deal with  
23 proxy costs in his second report but that's an aside.

24 At the bottom of page 797, pdf page 895 we see:

25 "Yes. You see, if we have the argument in advance, we will then have to work out  
26 exactly how much court time Mr Harman or LEK would take in order to have the

1 evidence that we would want to know what evidence in response you need to adduce  
2 and we are in the same problem."

3 So the approach of the Tribunal is you can have permission to adduce the positive  
4 case. If there is then any objection, we will deal with it in due course, and that's the  
5 course that the Tribunal then took.

6 Now, as my learned friend said, Mr Cook said, it is right that no objection was raised  
7 about Mr Economides' first report. What we then fall back on is the overall directions  
8 that were given, and this is in the PTR bundle, the supplementary bundle that was  
9 prepared for this PTR rather than the CMC at page 404. I hope that matches the pdf.

10 There's been a revised pdf circulated last night. It is the PTR.

11 MR JUSTICE MICHAEL GREEN: I think it is four pages out.

12 MR BEAL: PT 404 is the manuscript reference. It should be a set of directions from  
13 the Tribunal.

14 MR JUSTICE MICHAEL GREEN: 13th January. Is that right?

15 MR BEAL: That's the one. Thank you. We see there is a direction at 406 for positive  
16 cases and so Mr Economides filed his positive case in accordance with that direction  
17 and then responsive cases. Forget the date because that was moved. The responsive  
18 case is intended to cover under direction 4B the totality of the evidence, documentary,  
19 witness and expert, subject always to the control of the Tribunal, as will be relied upon  
20 at trial in support of the same.

21 So that was an existing direction into which the expert evidence now of Mr  
22 Economides was slotted. That existing direction applied to him. That gives him  
23 permission to file responsive evidence.

24 So if we could now please look at exactly what Mr Vassilides (sic) did, he was  
25 responding in his second report -- it is described as supplemental report but it is  
26 a responsive report pursuant to the direction the Tribunal gave in January. He

1 responds to Ms Webster's first report. In order to see what he is responding to I do  
2 need very briefly to just draw out the key points from Ms Webster's evidence. That's  
3 in a bundle of documents that is apparently labelled "Cases" or relates to the positive  
4 and responsive cases. There was a separate pdf that was provided for the CMC back  
5 in 22nd October I think it was. I hope the Tribunal has that, because I don't. My juniors  
6 have it.

7 MR JUSTICE MICHAEL GREEN: I don't have it.

8 MR BEAL: Do you have Ms Webster's first report, volume 1?

9 MR JUSTICE MICHAEL GREEN: Probably somewhere.

10 MR BEAL: There is a certain irony here that you are being asked to rule out evidence,  
11 an entire chapter from a responsive expert's report without actually having been taken  
12 to the report.

13 MR JUSTICE MICHAEL GREEN: Is it in the core bundle? Which bundle?

14 MR BEAL: It was a separate pdf called positive and responsive cases from the parties  
15 which was separate from the core bundle. The CMC core bundle did not include the  
16 experts' reports. I have decided not to weary you with my observations about the  
17 bundling process in this case, but if the Tribunal could lay hands on Webster 1,  
18 page 119, first volume, that would be very useful, because otherwise one does not  
19 know the responsive evidence that's going in, what it's responding to.

20 MR WILLIAMS: (Inaudible) The pdf on it with that bundle that you can flick through.

21 MR BEAL: I am sorry about this.

22 MR JUSTICE MICHAEL GREEN: I think we can share.

23 MR BEAL: Thank you very much. I will try to make this as painless as possible by  
24 making it relatively quickly. If we could start at page 119 of the report, which should  
25 be paragraph 6.29. What Ms Webster essentially -- internal pagination of the report.  
26 It is paragraph 6.29 of volume 1 of her first report. It should be under a heading that



1 | says --

2 | MR TIDSWELL: (Inaudible).

3 | MR BEAL: It should be paragraph 6.29 under "Card usage". In a nutshell what  
4 | Ms Webster does is refer to some data sets. She then indicates on a graph overleaf,  
5 | figure 2, what is perceived to be -- she is dealing with the treatment of MSC as variable  
6 | or fixed in merchants' pricing decisions. That's the heading that this comes under.  
7 | There is then card usage. So she's addressing how merchants treat MSC costs. What  
8 | she then does is looking at data sets in figure 2, she says "Ah, there's been a big spike  
9 | in card usage admittedly largely through the COVID period it where upticks  
10 | substantially." She then says under 6.31, "Figure 3 shows that these trends were  
11 | particularly pronounced for some retail sectors." And she separates them out.

12 | At 6.32, page 121 she says:

13 | "All else equal, during the Merricks claim period, the lower proportion of transactions  
14 | undertaken using cards along with difficulties that merchants are likely to have faced  
15 | in calculating equivalent payment costs for the more commonly used payment  
16 | methods in that period, the more likely it is that merchants treated these costs in their  
17 | pricing decisions in the manner that economic theory would imply."

18 | So yes, she is making an economic point but she is saying:

19 | "Looking at the statistics, looking at the data for card usage, that supports my  
20 | suggestion that there was an uptick in usage of the card. Therefore, it was a more  
21 | significant means of payment. Therefore, it was a more significant cost and therefore  
22 | it featured more regularly in Merchant pricing".

23 | That's essentially the point that's being made.

24 | To support her approach at 6.34, page 122, she turns to Mr Harman's expert report.

25 | Mr Harman's expert report is dealing in terms with the available factual evidence that  
26 | some merchants have offered. Now whether or not it is a matter for Mr Harman to be

1 opining on what the factual evidence shows is a matter I will need to take up with him  
2 in due course, but suffice it to say at 6.34 and 6.35 Ms Webster is seeking to locate  
3 what is a theory that she says is backed up by some statistical analysis with an  
4 analysis of factual evidence from the witnesses, albeit given by Mr Harman.

5 The overall conclusion that she reaches then is set out at page 126, in particular at  
6 paragraph 6.44, 6.45 and at 6.44 she says:

7 "As I have discussed, there is evidence that MSC costs were smaller for merchants in  
8 the Merricks claim period than in the Merchant claim period and this may suggest  
9 a lower rate of pass-on if MSEs were treated in the manner economic theory would  
10 imply. According to economic theory in these circumstances any reduction in MSC  
11 costs in the counterfactual would likely have been smaller in the Merricks claim period  
12 and less likely to have triggered the changes in merchants' decisions regarding  
13 investment, expansion and so on."

14 So she is tying in both periods and she's giving evidence about our period, not just  
15 about the Merricks' period. She is saying the reaction that merchants should have and  
16 would have had to the uptick in card usage and to increasing level of cost generated  
17 from using cards is reflected in what is likely to be the response to pass-on in the later  
18 SSH claim period.

19 In 6.45 she then says:

20 "In order to understand the extent to which in practice such decisions were triggered  
21 to a more limited extent in the Merricks claim period, it would be necessary to consider  
22 factual information on the expected profitability associated with investment", etc. "This  
23 would facilitate an assessment of the extent to which a reduction in these MSC costs  
24 would have been likely to alter those decisions in each period and therefore potentially  
25 allow one to reach conclusions as to the likely materiality of any differences in MSC  
26 pass-on across the two periods."

1 So she is purporting to give evidence across the entire history of the dispute.  
2 "However, such information is not publicly available and would need to be collected  
3 from individual merchants for both the Merricks and Merchant claim periods. As with  
4 the analysis of the level of competition in the market this would be a complex, intensive  
5 and evidence-heavy exercise."  
6 It is that analysis based on data collected from individual merchants That  
7 Mr Economides has given evidence about. He has looked at how merchants have  
8 chosen to respond to price increases. In the course of looking at the proxy he has  
9 tried to work out how merchants respond to different costs and he then does  
10 a compare and contrast exercise as to how likely it is that merchants would respond  
11 to changes in a very small cost like the multi-lateral interchange fee or MIF. That's  
12 precisely what he does.  
13 Faced with this evidence, we then need to consider the response from Mr Economides  
14 to that. That should be -- well, it is in the electronic bundle I am afraid that you don't  
15 seemingly have. If we could turn, please, to Mr Economides second, supplemental  
16 report, which is the one my learned friend seeks to have chapter 4 excised from. It is  
17 a report dated 9th October 2024. Mastercard seek for a ruling from you at this stage  
18 that the entirety of chapter 4 must come out and be refiled.  
19 Can we pick it up, please, at chapter 4? This is page 135. At page 135 of that report,  
20 if the Tribunal has it, there should be a heading "Relevance of the shift towards card  
21 payments over time in influencing pass-on rates". Please can we turn overleaf to  
22 page 136, paragraph 4.1? Mr Economides says:  
23 "During my review of the matters available during my previous two reports and  
24 Ms Webster's first report, I note that Ms Webster opines on the relevance of the shift  
25 towards card payments. Through my experience as a commercial strategy consultant  
26 advising firms on pricing, including regularly reviewing the cost structure of businesses

1 and advising on how these cost structures can most effectively be managed, I have  
2 developed my own views on the impact of the shift towards card payments, which  
3 I believe to be relevant to the Tribunal's consideration."

4 What you then see at 4.4 -- paragraph 4.4 is a critique of the statistical analysis that  
5 has been deployed by Ms Webster. He says "Well, you are relying on particularly  
6 elongated period and then the uptick at the end is a COVID period, generated uptick.  
7 Therefore to give a more sensible appreciation of the change in card usage you need  
8 to extrapolate the data from a shorter time period."

9 He deals that at 4.7. Whether that's right or wrong will have to be a matter for the  
10 Tribunal to decide in the light of the cross-examination of Mr Economides, but that's  
11 what he says.

12 At 4.9 and onwards, page 138, he turns to his own data set. So Ms Webster has  
13 introduced a data set that she has relied upon. Mr Economides reviews that data set  
14 and draws his own conclusions. He then advocates reliance on a separate data set  
15 he identifies. So this is essentially a statistical analysis as to the factors that go to  
16 determine to what extent has card usage increased. It is acknowledged that it has  
17 increased but it is the degree of the increase that is challenged.

18 We then see at page 140, paragraph 4.18 and onwards he sets out essentially the  
19 conclusions he drew from his first report. Here from his first report he is trying to  
20 identify suitable proxy costs based on an assessment of empirical and factual  
21 evidence. He comes up with a series of factors which should be taken into account,  
22 which from a commercial pricing perspective, not from a purely economic or theoretical  
23 one, how businesses actually deal with prices in the real world. That's where he's  
24 giving his evidence and saying the way that businesses deal with prices in the real  
25 world suggests that an appropriate proxy for the MSC would be one of the following.  
26 That's his first report.

1 He then looks at by reference to each of those factors tying it back into the evidence  
2 given in his first report. He says to what extent does the change in card usage over  
3 the period of time postulated lead me to conclude that those factors are different now  
4 than they would have been back in the day. So, for example, over time is it right that  
5 the position -- the way that the charge is dealt with, the MSC charge is dealt with,  
6 somehow moves in the profit and loss account from being treated as an overhead to  
7 now being treated as a cost of goods sold. Do we see that happening? Answer No.  
8 He then goes through each of the factors he is dealing with, so tying it all back into his  
9 first report, and he reaches the conclusion at paragraph 4.60, albeit a typographical  
10 error in the first row where he refers -- the second reference to overhead should be  
11 a reference costs (inaudible). He then goes through each of the characteristics that  
12 are derived from his first report and says whether or not the changing card usage  
13 properly adjusted to reflect the actuality over time leads him to draw a different  
14 conclusion. The ultimate conclusion he reaches at page 152 is:  
15 "Based on my assessment above, I conclude" -- paragraph 4.61, "I conclude that  
16 there has been no change in the majority of the characteristics that the MSC  
17 influencing pass-on rates, which suggest that the influence of the MSC in management  
18 decision-making has remained broadly similar. There has been a change only with  
19 respect to two characteristics, one the size of the MSC as a share of total business  
20 costs has increased and the essential nature of the MSC" ie everyone uses cards,  
21 "has also increased over time."  
22 Then the remainder of his conclusions at 4.64. He expects MSC pass-on rates to be  
23 similar across both periods, namely the period of the Merricks claim and the period of  
24 the claim of the merchants, and that is responding to Ms Webster's suggestion that  
25 there is a difference in approach over the two separate periods.  
26 MR TIDSWELL: (Inaudible) the difference between the Merricks period and the

1 claimant period. I mean, I can understand, as I put to Mr Cook, why there are some  
2 things that Ms Webster puts in issue that he might want to comment on because they  
3 are relevant to your claim period, but he goes further than that, doesn't he? Why does  
4 he need to go further and make any observations about what happened 20 years ago?  
5 MR BEAL: He doesn't actually. What he does, if I may say so, he adopts the reverse  
6 position. He says "You, Ms Webster said it was different back then and has changed  
7 now. I am saying it has not changed now, because looking at what has happened  
8 now, I can't imagine that it was any different back then". He approaches it from the  
9 other way round. He is saying "You are not right to have identified a change in  
10 a material factor which suggests that merchants now are pricing with more sensitivity  
11 to the MSC than they were previously".  
12 That's what his evidence is going to. What he is essentially saying is businesses are  
13 not doing anything any differently now by reference to my seven key factors, however  
14 many there are, than they were previously. Looking at what they actually do now it  
15 can't have been any more significant as a cost back then save in two respects and he  
16 doesn't think those two respects changed the dial of the magnitude of the importance  
17 of the cost.  
18 MR TIDSWELL: So are you saying that the implication of what Ms Webster says about  
19 the change has a potential ramification for the way in which you look at it in the  
20 Merchant period and so he is rebutting the change?  
21 MR BEAL: Yes. Exactly. She has chosen to straddle two periods, as have  
22 Mastercard, and he is responding to the implication things are different now than they  
23 were. Therefore, this is a significant cost. Therefore, it leads to an inference of  
24 pass-on. He says no, that's not right. Let's look at what they do, extrapolating back it  
25 can't have been any different. Therefore, there is no change. If there is a change, it  
26 is minor and certainly it hasn't moved the dial for pass-on. That's in a nutshell what

1 he is doing.

2 So it is responsive and it is entirely responsive in the way that Mr Harman has seen fit  
3 to take pot shots at Mr Economides proxy cost suggestions. He has taken it upon  
4 himself to voice an opinion on those even though he is not an industry pricing expert.  
5 We are going to deal with that by way of cross-examination and submission. We are  
6 not seeking to have his evidence in Harman 2 excluded at this stage.

7 The three essential objections taken against this is firstly it goes beyond the grant of  
8 permission. I hope I have shown you that the grant of permission allowed the  
9 evidence to come in as a first report. It went in as a first report. It hasn't been objected  
10 to. There is then a responsive report that is pursuant to a direction by this Tribunal in  
11 January 2024. So permission has been given. Admittedly, and I accept this, it is  
12 subject to the control of the Tribunal.

13 So what is the control of the Tribunal that's being urged by my learned friend Mr Cook?  
14 The answer is he says this is Mr Economides going off piste. He is dealing with  
15 economic matters and not with pricing matters. I have just shown you chapter 4 says  
16 right at the start "I am dealing with this as a commercial pricing expert familiar with the  
17 way industries generally price. I am responding to this as a pricing expert". He deals  
18 with it very much on the real world analysis, the factors that go into pricing by  
19 businesses. He doesn't go into economic theory and he doesn't deal with  
20 econometrics. He is dealing with it as a pricing expert. So the suggestion that he's  
21 somehow admission creep or over-stepped his remit as an expert is I'm afraid simply  
22 wrong.

23 Then the third objection is really to do with manageability. It is something of a variation  
24 of a theme of expert competence. It is said that this will require a whole suite of  
25 cross-examination of Mr Economides. The bid that Mastercard put in for their  
26 cross-examination time with Mr Economides is one hour, and frankly if one hour

1 | throws us off course, then we have bigger problems ahead of us I think than this.  
2 | Finally there is a very short point to all of this, which is the point that the learned  
3 | Chairman made, which is why can't this all be dealt with by way of submission and  
4 | cross-examination? That is the answer that would commend itself to the Tribunal if  
5 | the Tribunal read, as I am sure it has in the past, the Shagang Shipping Company  
6 | Limited, decision of the Supreme Court, paragraphs 57 to 59, which is at page 799 of  
7 | the PTR bundle. It essentially says that it is open to this Tribunal to make decisions  
8 | about admissibility and weight when they have seen the totality of the evidence and  
9 | see how it all falls out. That's the stance we are adopting with Harman 2 and that's  
10 | the stance with respect that Mastercard should have adopted with Economides 2.  
11 | The suggestion that the complaint lies in the fact that Mr Merricks is relying on it is not  
12 | for me. It is for Mr Merricks to justify his reliance on it. I am not about to do so.  
13 | Unless I can help any further, those are our submissions.

14 | MR WILLIAMS: Unless I can assist the Tribunal by answering any queries, I am  
15 | prepared to adopt my learned friend's submissions and maintain those in  
16 | paragraphs 15 to 21 of our skeleton argument. I don't propose to elaborate on those  
17 | in any way. It has not been addressed in full by Mr Cook and Mr Beal has already  
18 | taken up some of the points from the authorities in them. So unless I can assist the  
19 | Tribunal, I propose to sit down on this one.

20 | MR JUSTICE MICHAEL GREEN: So you want it to stay in?

21 | MR WILLIAMS: Yes. We support its admissibility. It is clearly responsive to  
22 | Ms Webster. So the suggestion that Mr Merricks should have put it in his positive case  
23 | is, I think, what we call a somewhat surprising suggestion by Mr Cook, considering he  
24 | is responding to Ms Webster's positive case. This was no part of our case theory that  
25 | matters changed over time between the Merricks period and the Merchant period. In  
26 | fact, Mr Cook rather gave the game away earlier in his submissions, because he



1 stated that Ms Webster does not seek to make any change in the Merchant claim  
2 period, but does seek to make a change in the Merricks claim period.

3 Now the Merchant claim period is a period from 2007 at the earliest, but by and large  
4 they start in 2010 right the way through to 2024. Now one can see the inevitable  
5 inconsistency there between suggesting that there should be a change in the Merricks  
6 claim period but no change in the Merchant period whatsoever. That is the  
7 inconsistency and it is an inconsistency in both sides of the case. It is an inconsistency  
8 for the merchant claim period for the reasons Mr Beal has just given, and that's why  
9 they themselves have clearly sought to address this evidence on their own behalf.

10 We didn't ask for Mr Economides to address these matters. Once we have seen  
11 Mr Economides' position, we will in the alternative to the position advanced by  
12 Mr Coombs, adopt it, because it is all premised, of course, on the basis that it is  
13 relevant to how merchants treat the MSC. Our primary position is that's an irrelevant  
14 consideration for economic theory reasons that we don't need to go into now, but to  
15 the extent that the Tribunal thinks that merchant treatment of the MSC is relevant, then  
16 Mr Economides attacks in my submission torpedoed Ms Webster's reasons for, the  
17 complementary reasons given to those of Mr Coombs.

18 So the suggestion by Mr Cook that this is an expansion of material which is otherwise  
19 not going to be covered is simply incorrect. Ms Webster has put this material in. We  
20 will be cross-examining her on it, and to the extent there is an additional  
21 complementary prong of the attack, that's evidence in the case and this case is, of  
22 course, Umbrella Proceedings where all evidence stands across the proceedings.

23 MR JUSTICE MICHAEL GREEN: In your responsive case you haven't dealt with this  
24 point from Ms Webster's --

25 MR WILLIAMS: Sir, we are certainly have. You will actually see the two charts, in  
26 particular the card usage chart, cut and pasted into our responsive case and we attack

1 that on its own terms utilising evidence that Mr Coombs has already put in. Frankly  
2 a lot of the evidence that's in Mr Economides' reports attacking the card usage charts,  
3 such as Ms Webster's cutting off the COVID period just so it can suggest a higher  
4 percentage change to suit her clients' case, is common sense reasons that we will be  
5 putting to Ms Webster in any event. Mr Economides supplements Mr Coombs'  
6 position and the position that we have taken in our responsive legal wrapper by adding  
7 the change of characteristics and the treatment of the MSC into the mix, because our  
8 primary case is that that's irrelevant, but the fact of the matter is that Ms Webster's  
9 position is wrong on either count, because you have Mr Coombs, who is Mr Merricks'  
10 expert, saying it is just wrong as a matter of common sense and economic theory and  
11 then, on the other hand, you have Mr Economides taking Ms Webster on at her own  
12 game. To the extent that the treatment of the MSC is relevant at all, it is also flawed  
13 for a series of reasons that he gives and it is already the SSH Claimants' position. So  
14 it is not expanding an issue in these proceedings in any way.

15 We have asked for 45 minutes to cross-examine Mr Economides. We will not be  
16 cross-examining him on that particular evidence, but we will be challenging the  
17 foundation of it. The relevance of the treatment of the MSC in what we say is  
18 subjective labelling at one point in time by thirteen merchants we say is pretty irrelevant  
19 to the consideration of what happens across the UK economy across a 20-odd year  
20 period.

21 MR JUSTICE MICHAEL GREEN: Thank you.

22 MR COOK: If I could briefly, sir, my learned friend for the SSH Claimants took you to  
23 various bits of the joint expert statement. None of them suggested Dr Trento, or  
24 indeed Mr Economides, would be addressing the Merricks claim period or that  
25 Mr Economides would be giving evidence on the economic significance of card  
26 acceptance rates. So, with respect, I am absolutely right to say that he was put

1 forward to provide material to help Dr Trento on the two narrow areas that was the  
2 case.

3 Next in relation to Ms Webster's report my learned friend took you to a section,  
4 section 6.3, which is headed "Assessing the applicability of my conclusions for the  
5 merchant claim period to the Merricks claim period". So what Ms Webster did is she  
6 reached some conclusions on the merchant claim period, the only bit I would say  
7 where the Claimants have an interest, and then considered how far, if at all, she could  
8 read those backwards to the earlier claim period. She looks at features that might  
9 suggest they can't be read back. Then that is what Mr Economides responds to.

10 So I say you are absolutely right to make the point, sir, there is just simply no proper  
11 interest for the Claimants in addressing that question of "Can we read this back?",  
12 because these are not factors where they are saying they impact on pass-on in the  
13 merchant claim period. It is an analysis that says "These are reasons why the results  
14 that we are fighting about the merchant claim period may not be able to be read back".  
15 We get exactly that from Mr Economides, that what he actually does and the crux of  
16 his conclusion, which is 4.64, he said, "I therefore expect MSC pass-on rates to be  
17 similar across both periods". The Claimants had no proper interest and this was no  
18 part of, any part of -- ever discussed before the Tribunal Mr Economides giving  
19 evidence about matters that dealt with can you read back results from the merchant  
20 claim period to the completely different Merricks claim period? So it is outside anything  
21 that was ever put to the Tribunal, is not a proper matter for the Claimants to be calling  
22 evidence on.

23 So we do say the fact that Mr Merricks wants to seize on it, there is no room for  
24 evidence of this kind to come in at responsive case stage at all, from an expert who  
25 was never meant to be addressing these matters.

26 MR JUSTICE MICHAEL GREEN: Probably the best thing is we will break off now and

1 we will give a judgment when we come back at 1.50. Then we will proceed with the  
2 other application. Sorry.

3 MR JOWELL: Would you mind if we and perhaps others are not present in the  
4 afternoon?

5 MR JUSTICE MICHAEL GREEN: Of course.

6 (12.47 pm)

7 (Lunch break)

8 (1.50 pm)

9 MR JUSTICE MICHAEL GREEN: I am going to ask Mr Tidswell to deliver our ruling.

10

11

#### RULING RE MR ECONOMIDES

12 MR TIDSWELL: Mastercard seeks an order excluding the evidence of Mr Economides  
13 contained in section 4 of his expert report in support of the SSH Claimants' responsive  
14 case. Mr Economides has provided an expert report in the SSH Claimants' positive  
15 case in which he gives opinion evidence as to pricing practices adopted by merchants.  
16 Section 4 of his latest report responds to evidence from Ms Webster in her first report  
17 in which, having considered pass-on rates in the period of the merchant claim, she  
18 considers whether and to what extent that might have been different in the Merricks  
19 claim period.

20 Mastercard's objection is essentially that, firstly, Mr Economides had no permission to  
21 get into that issue, as permission was limited to other matters. That is they say  
22 because the SSH Claimants should have no proper interest in what happened in the  
23 Merricks claim period.

24 Secondly, Mr Economides is straying into economic expert evidence which he is not  
25 qualified to give evidence on. Thirdly, Mastercard has not had an opportunity properly  
26 to deal with material which should have been put into the SSH Claimants' positive

1 case.  
2 Mr Beal, KC, for the SSH Claimants has shown us the sequence of events by which  
3 permission for Mr Economides was given and we agree with him that that permission  
4 included the filing of the responsive evidence and the Tribunal's order of 30th  
5 January 2024 and is sufficiently broad in the way it is put to encompass  
6 Mr Economides' evidence.

7 We also accept that Mr Economides has dealt with the issue as an extension of his  
8 analysis of pricing and to the extent that that amounts to a proper subject of expert  
9 evidence, then the material in section 4 is arguably within that description.

10 It also appears to be the case that the analysis of the Merricks period is relevant to the  
11 merchant claims, at least insofar as there might be flaws in Ms Webster's approach  
12 exposing inconsistencies between Mastercard's approach in the two claim periods. Of  
13 course, we express no view whatsoever at the present time as to the substance of that  
14 point.

15 Finally, as Mr Williams for Mr Merricks in support of the SSH Claimants on this point  
16 observed, it is difficult to see how Mr Economides could have raised the points in his  
17 positive case, given he is responding to Ms Webster's first report.

18 Mastercard's application therefore fails for these reasons. The appropriate course is  
19 for any questions as to the admissibility and weight of Mr Economides' section 4 in his  
20 report to be dealt with at trial.

21

22

#### SUBMISSIONS ON COSTS

23 MR BEAL: Thank you very much for that ruling. I am instructed to ask for a bespoke  
24 costs order for this particular item, ie Mastercard pay for our costs of defending their  
25 application which the Tribunal has just rejected. It is not likely to be a great sum and  
26 there will be some complex maths to work out exactly what the hours devoted to this

1 part of the application are, but that's an application we make in principle for a bespoke  
2 costs order for this part of the application that has been rejected.

3 MR JUSTICE MICHAEL GREEN: Mr Cook, can you resist that?

4 MR COOK: We are all here for the PTR anyway. I don't imagine there was any  
5 anyone on the front bench who was not under brief in relation to the trial. No-one is  
6 being paid separately in relation to this. These are the kind of points one deals with  
7 at pre-trial reviews. The idea that these are incremental costs that it would be  
8 proportionate to try to identify is not something the Tribunal should get into. It is going  
9 to be more costly than the sums in question.

10 MR BEAL: I have already indicated that we will need to do some work to identify the  
11 specific items, but that doesn't mean we shouldn't get them.

12

13

#### RULING ON COSTS

14 MR JUSTICE MICHAEL GREEN: We are agreed that this is -- everyone is here  
15 principally for the PTR. Apparently most of you are on your briefs already for the trial.  
16 We think this is essentially an item that had to be considered at the PTR, and although  
17 you have succeed in resisting the application, the usual costs of a PTR should follow,  
18 namely costs in the case.

19 MR BEAL: Thank you.

20 MR JUSTICE MICHAEL GREEN: Right. Next Mr Simpson.

21

22

#### APPLICATION RE MASTERCARD'S EXPERT

23 MR SIMPSON: Afternoon, sir, members of the Tribunal. Sir, Ms Tolaney and I have  
24 agreed that we will divide the time equally. I will move very quickly where I don't refer  
25 to individual documents. Of course, if you want to see them, I will put a reference.  
26 I have also asked Ms Tolaney and Mr Cook to say if I am going to a document that

1 they would like me to take the Tribunal to more of.

2 MR JUSTICE MICHAEL GREEN: You say you are dividing the time equally. How  
3 much is that time?

4 MR SIMPSON: I was hoping you might be able to sit until 5 o'clock, sir, but obviously  
5 we can see how things go and perhaps take a decision at the break or you could take  
6 a decision at the break.

7 MR JUSTICE MICHAEL GREEN: Well, we have read your extensive written  
8 submissions.

9 MR SIMPSON: I am grateful.

10 MR JUSTICE MICHAEL GREEN: We are well aware of what the issues are. So I think  
11 we can proceed quite quickly, if possible.

12 MR SIMPSON: I am only going to pick up new points in the skeleton. So if we turn  
13 then to Mastercard's skeleton. I do mean I will move very quickly. Paragraphs 78 to  
14 83. That's at PTR page 104.

15 MR JUSTICE MICHAEL GREEN: Paragraph?

16 MR SIMPSON: Paragraph 78 is where I am starting, sir. Now this section of the  
17 skeleton concerns Mr Merricks' allegation that Mastercard misled the Tribunal as to  
18 the reasons for applying to proceed with Ms Webster as its sole economist for trial 2.  
19 If I could just ask you to skim 78 to 80. (Pause.)  
20 Then picking up at 81 the intro line, the actual premise is false of the allegation. That's  
21 talking about the premise at 79 that Mastercard represented to the Tribunal the reason  
22 and the only reason for choosing Ms Webster was cost savings and efficiencies.  
23 Now the key point I am going to start with here is, as I will show, it is the only reason  
24 that Mastercard have ever given for the switch to Ms Webster.

25 MR JUSTICE MICHAEL GREEN: Was it a reason?

26 MR SIMPSON: That's something I will come to, sir, because that is obviously a key

1 question and I will go back in the correspondence and show that it was for the switch  
2 to Ms Webster in the context in which Mastercard have said repeatedly it has dealt  
3 with Mr Merricks expert shopping in full.

4 We are now told at 81 of the skeleton for the first time that there are other reasons  
5 than the one I will park, whether it was a reason for the moment, that Mastercard does  
6 not waive privilege over them and that the reason, if it was a reason, Mastercard has  
7 given to date wasn't.

8 So this came as something of a surprise to Mr Merricks, but the question you asked,  
9 sir, in order to understand exactly how radical a departure it is from their previous  
10 position, we need to look at what questions Jones Day's letter of 19th June was  
11 purporting to answer. I will come to that in a moment, and what representations  
12 Mastercard has made since about the content of that letter of 19th June.

13 The letter of 19th June was purporting to answer the concerns set out in a letter from  
14 Wilkie Farr sent on 13th June, seven days after Mastercard applied to substitute  
15 Ms Webster for Dr Niels. It sets out Mr Merricks' concerns on expert shopping at that  
16 point. It is at core tab 75, page 2116. I will move quickly through it. In essence after  
17 an intro --

18 MR JUSTICE MICHAEL GREEN: This is 2166 of the pdf?

19 MR SIMPSON: It is C/2116. I am going to use the ones on the bottom right because  
20 there is a mismatch. It should be a letter from Wilkie of 13th June. Paragraphs 2 to 8  
21 of that letter set out the law. The next section says Mastercard has not provided  
22 sufficient reasons for the change. 9(a) says it is not enough just to say it prefers  
23 a single expert, which is what it said in the letter of 6th June to the Tribunal.

24 MR JUSTICE MICHAEL GREEN: Sorry.

25 MR SIMPSON: It is moving on in the letter.

26 MR JUSTICE MICHAEL GREEN: Wait a minute.



1 MR SIMPSON: Have I given the wrong reference? I am sorry. The best laid plans.  
2 MR JUSTICE MICHAEL GREEN: 2118.  
3 PROFESSOR WATERSON: (Inaudible). I managed to find this one. Some previous  
4 ones passed me by.  
5 MR JUSTICE MICHAEL GREEN: C/2276, is that it?  
6 MR SIMPSON: It should be C/2116, Wilkie Farr letter of 13th June.  
7 MR JUSTICE MICHAEL GREEN: I have it now.  
8 MR SIMPSON: That intro paragraph. Then we have legal principles set out and then  
9 scrolling down to paragraph 9 at (a) it said -- Wilkie said it is not enough just to say  
10 Mastercard prefer a single expert which was the reason they gave in the letter of  
11 6th June. In other words, they need to give a reason.  
12 9(b) to (c) are in effect one point. If there is to be a single expert there's been no  
13 explanation as to why it would be Ms Webster rather than Dr Niels, who has been  
14 involved throughout.  
15 Then 9(d) there is a third question. Why are you making the change now? Sir, these  
16 are the three questions which from the outset Mr Merricks has been asking.  
17 One, why are you switching to a single expert rather than two? Mr Merricks' point on  
18 that is that absent explanation, it seems irrational to make a switch to a single expert  
19 seven weeks before expert reports are due in a context in which Mastercard said at  
20 the UPO hearing that the crux of its submission opposing the UPO was based on the  
21 heavy burden on Mastercard to exchange reports by 19th July.  
22 The second question: why are you switching to Ms Webster rather than using  
23 Dr Niels -- switching to Dr Niels as a single expert? Again it seems completely  
24 irrational to make that switch when Dr Niels has been involved in the inter-expert  
25 process throughout, contributed to the expert meetings in the JES and Ms Webster  
26 has had no involvement in that inter-expert process.

1 Third, why are you doing this now? Ms Webster's letter of 23rd April, served in  
2 opposition to the UPO -- just to give the reference -- I am not going to go to it -- core,  
3 tab 49, 1913 -- and Mastercard's skeleton argument for the UPO hearing at core  
4 tab 52, page 1953, were based on the premise that both Dr Niels and Ms Webster  
5 would give evidence, but only 14 days later we are told that Mastercard are swapping  
6 to Ms Webster.

7 The next section of the letter is present concerns. They remain concerns and they  
8 have been reiterated numerous times since.

9 11(f) picks up and reiterates two of the three questions. One, why a single expert now  
10 and, two, why Ms Webster rather than Dr Niels as that single expert.

11 Then we get 11(h) and (i). This is all about Sainsbury's. At that point Mr Merricks'  
12 concerns were based on the fact that in Sainsbury's Dr Niels gave evidence that was  
13 highly supportive of Mr Merricks' case. He doesn't yet know but he's asked at the  
14 CMC on 7th June how much Ms Webster's evidence is going to diverge from Dr Niels  
15 evidence other than on this point, but the point being made here is that Dr Niels said  
16 in his Sainsbury's report, just taking the bold top of that quotation:

17 "I conclude there is a strong economic presumption that the rate of pass-on of UK MIF  
18 and hence any overcharge on MIF is very high."

19 MR JUSTICE MICHAEL GREEN: You have all that evidence. I mean, you know  
20 exactly what Dr Niels has said.

21 MR SIMPSON: We do know what Dr Niels has said.

22 MR JUSTICE MICHAEL GREEN: So you can deploy that at the trial.

23 MR SIMPSON: We can.

24 MR JUSTICE MICHAEL GREEN: And no doubt you will.

25 MR SIMPSON: Well, could I -- yes, but we say that the ability to do that now is not  
26 adequate in the light of the circumstances that I am going to develop.

1 MR JUSTICE MICHAEL GREEN: Okay.

2 MR SIMPSON: At the end of the letter Mr Merricks reserves his position on change  
3 pending receipt of a proper application dealing with the points above.

4 12(a) he wants Webster's explanation of the propositions of JES, which she agrees  
5 and disagrees with, explaining the disagreements.

6 12(b), they want a Webster statement asking for four things. Mastercard do serve  
7 a letter from Ms Webster on 14th June. That's C, tab 51, page 1939, but in that she  
8 addresses point one. So it is October '23 when she was appointed as expert, not  
9 points 2, 3 and 4. It is clear from the letter that she was not asked them, para 2 of the  
10 letter.

11 So the response to that was Jones Day's letter of 19th June. That's at core tab 77,  
12 2155. I don't know if you have that.

13 MR JUSTICE MICHAEL GREEN: Remarkably I think I do.

14 MR SIMPSON: I am grateful. 4 to 7 of that letter say there's been no change of expert  
15 so there's no expert shopping.

16 Paragraph 10 opposes any disclosure.

17 Paragraph 11 opposes the order for Dr Niels to be cross-examined.

18 Para 12 is the paragraph cited in the paragraph 81.2 of Mastercard's PTR skeleton  
19 which I started with.

20 Now in summary, therefore, this letter is giving the only reasons that Mastercard is  
21 giving for the swap to Ms Webster. You see that from the fact that it is answering the  
22 queries in the letter of 13th June and it doesn't give any reasons for the swap up till  
23 now because it is dealing within no singular -- it is not a change of expert and you can't  
24 have further disclosure and you can't call Dr Niels. So this is the reason and the only  
25 reason being given.

26 Now I am not hanging my hat completely on this, sir, because I will take you to the

1 reiteration of it later, but it is the only reason that has been given for the swap to Ms  
2 Webster and it says in summary and purport --

3 MR JUSTICE MICHAEL GREEN: Which paragraph are you on?

4 MR SIMPSON: Paragraph 12. So this is we say clearly answering Mr Merricks' first  
5 question why one expert rather than two? The answer is the obvious cost savings and  
6 efficiencies in the run-up to and at trial that that would entail.

7 Now note, please, if you will, that the letter doesn't give any answer to the second or  
8 third questions why Ms Webster should be the single expert rather than Dr Niels. We  
9 still haven't had an answer to that question. Ms Webster, who was added to the  
10 inter-expert chain on 6th June. Dr Niels who was involved throughout. Why now?  
11 Why on 6th June, seven weeks before reports are due? That question still hasn't been  
12 answered.

13 Now the two questions and a variant of the third were raised again in Mr Merricks'  
14 responsive case. I will not go to it, but the reference there is -- it is responsive and  
15 positive, so I will refer to it as RP. RP, tab 43, page 4560, paragraph 70. I will not go  
16 to it, but it is reiterating the questions 1 and 2. "Why the move to a single expert?"

17 MR JUSTICE MICHAEL GREEN: This is the one that was served on 9th October.  
18 (Overtalking).

19 MR SIMPSON: In fact, I think it was served on the 10th. That's right, but it reiterates  
20 it. "Why now, given what you said in your skeleton for the UPO hearing, which was  
21 based on two experts and 31 sectors?"

22 Now Willkie Farr follow this up -- no need to go to it -- on 10th October. That is core  
23 tab 210, page 2739, and they write specifically following up the expert shopping  
24 allegations and asked for a response to them by midday on 15th October.

25 Now at 11.57 on 15th October Jones Day reply at core tab 224, page 2867. This is  
26 an important letter.

1 MR JUSTICE MICHAEL GREEN: This is two months after the positive case was  
2 served.

3 MR SIMPSON: This is two months after the positive case.

4 MR JUSTICE MICHAEL GREEN: And nothing was said in those two months.

5 MR SIMPSON: Nothing was said in those two months.

6 MR JUSTICE MICHAEL GREEN: What is the reference?

7 MR SIMPSON: The reference is core tab 72, pages 2104 --2867.

8 MR JUSTICE MICHAEL GREEN: Core, page 2867?

9 MR SIMPSON: Yes. They say:

10 "Mastercard has addressed Mr Merricks' allegation of expert shopping previously and  
11 in full including in our letters to the Tribunal dated 6th June 2024 and 19th June 2024.  
12 Ms Webster has also addressed the differences in her letter of 14th June."  
13 It says that Merricks is mischaracterising Ms Webster's evidence and relevant  
14 background, including the content of Dr Niels' evidence and maintains the allegations  
15 are inappropriate.

16 Now in the letter of 14th June to which they refer Ms Webster said that she had been –  
17 at paragraph 1 -- she had been the expert in competition economics instructed in the  
18 Merricks proceedings since October 2023 when she replaced Mr Parker.

19 MR JUSTICE MICHAEL GREEN: That's right, isn't it?

20 MR SIMPSON: It depends what sense you mean it, sir. I will come to this in  
21 a moment. We don't dispute that Frontier may have been instructed as experts, but  
22 the question is whether they were part 35 experts and that's a very important  
23 distinction I will come to in the context of the Tribunal's October ruling, which indicated  
24 that all parties' experts were to participate in the process which led to the JES in due  
25 course. Can I come back to that specific point as to the role in which she was  
26 appointed in a moment, but in the rest of the letter she makes no reference at all to

1 any work that she's done at any point as the expert. All the references she gives to  
2 work being done are work done by Frontier Economics and Dr Niels.

3 Now the expert shopping allegations were then picked up at paragraph 20 of  
4 Mastercard's skeleton argument for the CMC and that is at core tab 6, page 35. It  
5 should be paragraph 20.

6 MR JUSTICE MICHAEL GREEN: What was the reference?

7 MR SIMPSON: Core tab 6 at page 29-35.

8 MR JUSTICE MICHAEL GREEN: Core?

9 MR SIMPSON: Core. That's what I have written down. I think it was initially core.

10 MR JUSTICE MICHAEL GREEN: I am being very slow. Core bundle, which tab?

11 MR SIMPSON: Tab 6, page 29. Rather confusingly the tab number isn't given in the  
12 pagination.

13 MR JUSTICE MICHAEL GREEN: No.

14 MR SIMPSON: These things are sent to try us.

15 MR JUSTICE MICHAEL GREEN: All right.

16 MR SIMPSON: Core 35. So this is picked up then in the skeleton. Mr Merricks' expert  
17 shopping allegation:

18 "Mr Merricks has threatened in correspondence an unspecified application relating to  
19 expert shopping. It has resuscitated late in the day an allegation made in June. The  
20 allegation was addressed in full when it was first raised."

21 I point out first of all that it was not addressed in full. One reason which is now said to  
22 be not a reason given but the two other questions that Mr Merricks asked have never  
23 been answered. Why the swap to Dr Niels -- to Ms Webster rather than Dr Niels if you  
24 are going to have a single expert, and the third question has never been answered,  
25 which is why on 6th June? It looks suspiciously as if it is caused by the UPO, which  
26 brings Merricks into trial 2, but --

1 MR JUSTICE MICHAEL GREEN: You are going to explain why they were obliged to  
2 answer those questions.

3 MR SIMPSON: Yes, I am.

4 MR JUSTICE MICHAEL GREEN: Okay.

5 MR SIMPSON: Now it is said here that no questions or concerns were raised initially.  
6 In the responsive case he now purports to have serious concerns over Ms Webster's  
7 evidence and submits that Mastercard urgently needs to explain, amongst other  
8 things, why it elected to proceed with one expert economist for Trial 2A rather than 2.  
9 What is said here is in the footnote:

10 "Mr Merricks appears to have overlooked Mastercard's letter dated 19th June 2024."  
11 So in this skeleton argument it is being said that we have overlooked the explanation  
12 that is given in Mastercard's letter of 19th June and the explanation that is given at  
13 paragraph 12 of the letter of 19th June is cost savings and economies.

14 So as recently as their skeleton for the CMC Mastercard were saying "This is the  
15 explanation".

16 Now with that in mind we turn back to paragraph 81 of Mastercard's skeleton for this  
17 hearing. We are told at 81.3 that paragraph 12 of Jones Day's letter of 19th June does  
18 not purport to give Mastercard's reasons for preferring Ms Webster to Dr Niels.

19 Now indeed it does not purport to give those reasons. Those reasons have never  
20 been given, and privilege is now claimed over them. That's Mr Merricks' question 2.  
21 Why Ms Webster rather than Dr Niels, who has been involved throughout? Those  
22 reasons have never been given, despite Mastercard saying repeatedly that they have  
23 dealt in full with Mr Merricks's allegations.

24 Then at 81.1 of their skeleton for the first time Mastercard acknowledge that there are  
25 such reasons which they have not given, but now they decline to give them on grounds  
26 of privilege, which they are relying on for the first time in this skeleton argument, but

1 we say that contrary what Mastercard now appear to say at 81.3, paragraph 12 of  
2 Jones Day's letter of 19th June undoubtedly does purport to give Mastercard's answer  
3 to Mr Merricks' question of one, why the move from two experts to a single expert?  
4 The answer is the cost savings and efficiencies associated with a single expert. That  
5 is the only reason Mastercard have ever given for the change and having said that,  
6 they have explained it in full, and the first we hear it has not been explained in full is in  
7 the skeleton argument on Friday.

8 MR JUSTICE MICHAEL GREEN: That can't have been a reason for going with  
9 Ms Webster rather than Mr Niels, can it?

10 MR SIMPSON: We say that's exactly right but that is the only reason that was given.  
11 The fact that it is incredible does not mean that it was not put forward as a reason. It  
12 was and it was reiterated and it was reiterated as recently as the skeleton argument  
13 for the CMC, paragraph 21 where we are said to have overlooked it when we have  
14 asked for an explanation.

15 Now that's the natural and ordinary meaning of paragraph 12 of the letter of 19th June,  
16 particularly when it is read in light of Willkie Farr's letter of 13th June, the reiteration of  
17 15th October and Mastercard's CMC skeleton served as recently as 15th October as  
18 well.

19 So they are now saying that that isn't the reason. Now it is particularly striking we say  
20 that Mr Cotter says nothing about this point. Putting it at its lowest, the letter of 19th  
21 June can be construed as representing the reasons for the switch to Ms Webster as  
22 single expert was cost savings and efficiencies, and Mastercard knows that Mr  
23 Merricks has construed it that way and the Tribunal has construed it that way.

24 Mastercard itself construed it that way at paragraph 21 of its skeleton argument for the  
25 CMC, but Mr Cotter does not acknowledge that in either of his statements or explain  
26 that he did not mean that or that obviously wasn't the reason or it was a mistake. He



1 just doesn't say anything about it, even though he relies on what is said in the letter  
2 on 19th June both in Cotter 1 and Cotter 2 and he exhibits it to both statements.

3 Now going back to paragraph 81.1, we are now told in Mastercard's skeleton for the  
4 first time there are other reasons for the swap, over which Mastercard is not waiving  
5 privilege. Now we say that that does not sit comfortably with Jones Day's letter of  
6 15th October, in which they said that Mastercard had dealt with Mr Merricks'  
7 allegations previously and in full. There was no mention in that letter of there being  
8 any other reasons for the swap to Ms Webster which Mastercard was not going to give  
9 because they were covered by privilege. Again Mr Cotter does not explain any of this  
10 in his statement or foreshadow the claim of privilege that Mastercard is now asserting  
11 in its skeleton argument for this hearing. The first we hear of it is on Friday.

12 Mastercard then say at 81.4 that there may be all sorts of reasons other than expert  
13 shopping for a party preferring one expert to another and the parties are entitled to  
14 retain the benefit of privilege over litigation decisions and they now do assert privilege.  
15 They also say they are entitled to assert it and that as a matter of law no adverse  
16 inference can be drawn from Mastercard's failure to waive it.

17 Now three points in response to that. The first point against this is that first by definition  
18 if swapping expert is really nothing to do with the content of the advice the first expert  
19 has given, then the reasons for the swap will not be privileged. Mastercard is quite  
20 right. There may be all sorts of reasons for a party changing expert. The expert may  
21 be ill or want to retire. They may have tripled their rate. They have may have had  
22 a personality clash with the client. They may have been criticised by another court or  
23 Tribunal. None of those reasons will be privileged, because they have nothing to do  
24 with the advice the expert has given in contemplation of litigation.

25 That links to the second point. Mastercard has misinterpreted the law on privilege and  
26 waiver in the context of expert shopping. So if we go to paragraph 82 --

1 MR JUSTICE MICHAEL GREEN: This is a decision being taken with the benefit of  
2 legal advice one assumes?

3 MR SIMPSON: Yes.

4 MR JUSTICE MICHAEL GREEN: So why is that not privileged?

5 MR SIMPSON: The legal advice is privileged, yes, but if the reason was that the  
6 expert has retired, that wouldn't be a privileged reason and the fact it was mentioned  
7 in legal advice wouldn't (inaudible) it in privilege.

8 MR JUSTICE MICHAEL GREEN: Right.

9 MR SIMPSON: So looking at the second point, if we look at 82.2 of Mastercard's  
10 skeleton for the PTR, Mastercard refers to paragraph 9 of Edwards-Tubb as authority  
11 for the proposition at 82.2 of its skeleton on adverse inferences, but paragraph 9 of  
12 Edwards-Tubb does not give the whole picture of what the Court of Appeal said about  
13 waiver privilege in Edwards-Tubb.

14 That's authorities 3, page 24. Could I ask you -- do you have it?

15 MR JUSTICE MICHAEL GREEN: I have it.

16 MR SIMPSON: If I could ask you to read paragraphs 9 to 11. (Pause.)

17 The point I draw from that is.

18 9. Where a party doesn't withdraw privilege in a prior expert report from their expert  
19 no adverse inference can be drawn from that.

20 10. Sometimes there may be a practical necessity to waive privilege, for instance, if  
21 a party wants to bring a claim against its former solicitors, it is trite law (inaudible).

22 11. A court or Tribunal can properly impose a condition of waiver of privilege on the  
23 permission to rely on a new expert. That is not overriding the privilege, because the  
24 claimant can elect to stand upon his right to it.

25 So Mastercard can indeed elect not to waive privilege and it has done so. That is their  
26 choice, but it has consequences and that leads to my third point, which is that a party

1 must adduce good reasons for changing expert. That runs throughout the cases, but  
2 authority for it, if it is needed, Court of Appeal Gun Trip -- I am not going to it.  
3 Paragraphs 17 to 18, that's at authorities tab 4, page 40.

4 Now some of the factors which will be relevant to the exercise of the discretion in  
5 whether you allow a new expert or not were summarised again by the Court of Appeal  
6 in Murray v Devenish. That's authorities tab 8.

7 MR JUSTICE MICHAEL GREEN: If you don't have a good reason for changing  
8 experts or you don't offer a reason, you are saying you then need to waive privilege in  
9 order to be able to rely on that expert.

10 MR SIMPSON: Not ipso facto. Not as a simple proposition, sir. What I am saying is  
11 there is an exercise of discretion. It is axiomatic that if a party is going to seek to  
12 persuade a court, a Tribunal to exercise its discretion, it needs to put information  
13 material before it in order to do that. The cases show that if you are going to change  
14 experts you need to put reasons before the Tribunal. Although it is your election not  
15 to put any reasons before them, if you don't that will go into the weight of the exercise  
16 of the discretion, whether you can get the Tribunal over the hurdle to give you the  
17 permission.

18 MR TIDSWELL: (Inaudible) to persuade the Tribunal that there's no expert shopping.  
19 So it's a bit circular, isn't it?

20 MR SIMPSON: Not quite, sir, because the starting point is if you are changing expert,  
21 you need to persuade the Tribunal to do it. So there is no right to. So if you are going  
22 to do that you need to persuade the Tribunal to exercise its discretion. If you are going  
23 to do that, you need to give it reasons. If you give it no reasons then you are starting  
24 from a very low base if you want it to exercise its discretion.

25 We say that the only reason that has been given so far has how been withdrawn, but  
26 can I go to the broader picture because I am trying to move at speed and I can

1 obviously come back to that. If I am moving too fast, excuse me. I am sorry.

2 MR JUSTICE MICHAEL GREEN: Carry on.

3 MR SIMPSON: What I am coming to in Murray v Devenish sets out the four factors  
4 that Murray non-exhaustively says go to the exercise of the discretion. That's at tab 8  
5 of the authorities bundle. Paragraph 16. That's at authorities page 181. It is clear  
6 a party does not have -- this is Court of Appeal -- an unqualified right to change an  
7 expert. Conversely not every change of expert either will be disallowed. Nor is it to  
8 be characterised in pejorative terms. In deciding whether what has happened  
9 constitutes expert shopping is to be discouraged or refused, the court will first have  
10 regard to the state of the litigation at the time; second, the reason given for the  
11 proposed change; third, the interests of justice and, fourth, the candour with which the  
12 application is approached."

13 And he says they are non-exhaustive.

14 Just going through those four reasons quickly, the state of the litigation at the time.  
15 The time Mastercard applied on 6th June was the Tribunal had just made the UPO  
16 and there is seven weeks to go until the exchange of expert reports.

17 The reason given for the proposed change. The only reason we thought had been  
18 given until last Friday was cost savings and efficiencies. That has now been  
19 withdrawn. No other reasons have been given or we are now told will be given, even  
20 though we are told such reasons exist. Privilege is asserted over them even though it  
21 has nothing to do with the advice of the expert. If it were retirement, cost,  
22 personality clash or the expert being criticised elsewhere, for instance, which would  
23 not be privileged, then they should be given.

24 Third, the interests of justice. Now we say it is obviously not in the interests of justice  
25 a party should be able to swap at will from a highly inconvenient expert to a convenient  
26 one. That point is particularly stark in the present case where exceptionally the

1 inconsistencies between Dr Niels' views and Ms Webster's views are plain to see.  
2 That is from Sainsbury's, and now that Ms Webster's report has been served the JES.  
3 Fourth, the candour with which the application has been approached. We submit that  
4 there has not been candour here and that continues even now, despite the Tribunal  
5 making it clear at the CMC that if ever there was a time for candour, this was it.  
6 In conclusion on privilege Mr Merricks is not asking the Tribunal to draw an adverse  
7 inference from the fact that Mastercard is now saying it won't waive privilege over the  
8 reasons they swapped from Dr Niels to Ms Webster. He is saying simply that it is  
9 a fundamental requirement of a party who wants to change expert should give a clear  
10 explanation of the reasons for the change. It is open to them to elect not to give the  
11 reasons but to assert privilege, but if they do so they cannot expect we say the Tribunal  
12 to exercise discretion to change expert in their favour in particular in circumstances in  
13 which the only reason they put forward to date, if it was a reason, is no longer relied  
14 on. The explanation for that is it was never made and there has been a complete lack  
15 of candour in even acknowledging the existence of any other reasons until the skeleton  
16 argument on Friday.  
17 Finally on this point in this context it is important to note that Mastercard has still not  
18 answered any of Mr Merricks' three questions first asked in Willkie Farr's letter of  
19 14th June.

- 20 1. Why swap to a single expert rather than two on 6th June with reports due on  
21 19th July when we are told there is far too much work to do anyway by 19th July as  
22 a basis of opposition to the UPO?
- 23 2. Why swap to Dr Niels -- this is a critical one -- from Dr Niels, who had been involved  
24 throughout rather than Dr Webster, who had not, if not expert shopping? There's been  
25 no answer to that.
- 26 3. Why do it on 6th June in a context which only two weeks before you have based

1 your opposition to the UPO on the fact that there is going to be Dr Niels, Dr Webster  
2 and 31 sectors.

3 Now it is difficult to see how the answers to any of those questions could be privileged  
4 if, as Mastercard say, the swap was nothing to do -- the answer to the questions rather  
5 than them being referred to in legal advice, the answers to the questions could be  
6 privileged if, as Mastercard say, the swap was nothing to do with the advice given by  
7 Dr Niels, if it was an extrinsic reason.

8 So even if those reasons were privileged we say Mastercard needs to put the reasons  
9 before the Tribunal if it is to persuade it to exercise its discretion in its favour. They  
10 face the jeopardy of not doing so if they don't. It has a choice to waive, or risk the  
11 Tribunal exercising its discretion against it.

12 MR JUSTICE MICHAEL GREEN: The odd thing about this is that in your proceedings  
13 there was not actually a change of expert, was there?

14 MR SIMPSON: Well, yes, there was because if you go back to the order of 30th  
15 January, the only named expert is Dr Niels. I am coming to this topic, sir. I am just  
16 going to deal with it, but I am going to deal with whether there has been a change,  
17 which is a fundamental plank. I was starting with this particular point because it is said  
18 to be at the heart.

19 So I will go back over that history, if I may, in a moment. I am only not going out of my  
20 course as I usually would because of time constraints.

21 Now it is said here that Mr Cotter's evidence is a total answer to Mr Merricks' shopping  
22 allegations and that's said at paragraph 20 -- at Mastercard's paragraph 51 of its  
23 skeleton it refers to paragraphs 20 and 29 of Cotter 2 and it is worth going to  
24 paragraph 51 of Mastercard's skeleton, because it quotes the two passages.

25 Mastercard are now simultaneously saying Dr Niels' views on pass-on are not the  
26 reason. That is what Mr Cotter says, but we are not going to tell you what the reasons

1 | where. We say that's very unsatisfactory. On the one hand Mastercard now assert  
2 | privilege over the actual reasons. On the other, they want the Tribunal to accept  
3 | unquestioningly that Dr Niels' views were not the reason when it appears to be the  
4 | obvious reason in the absence of any other. We submit they can't be permitted to rely  
5 | on that proposition if they are not prepared to waive privilege to support it. Again it is  
6 | not a case of drawing adverse inferences from the failure to waive privilege. It is just  
7 | saying that the price of Mr Cotter's statement at paragraph 20 being relied upon is  
8 | a waiver of privilege. You can't say "That's not the reason but we are not going to give  
9 | you the reasons" in this context.

10 | MR JUSTICE MICHAEL GREEN: Are you saying you don't believe what he said?

11 | MR SIMPSON: I am saying that the circumstances here indicate that there is some  
12 | doubt about whether it was entirely unrelated to the views of Dr Niels. Yes, I am saying  
13 | that.

14 | MR JUSTICE MICHAEL GREEN: So you are saying it is an untruthful statement  
15 | signed with a statement of truth?

16 | MR SIMPSON: I am saying there is reason to doubt the credibility of that statement.

17 | MR JUSTICE MICHAEL GREEN: A senior lawyer, a partner at Jones Day. That's  
18 | a very serious allegation.

19 | MR SIMPSON: It is and I have thought long and hard about making it.

20 | MR JUSTICE MICHAEL GREEN: But you do make that.

21 | MR SIMPSON: I make the allegation only that it does not -- as we know witnesses  
22 | can convince themselves of the truth of things and believe that they are true, but we  
23 | are told in cases like Gestmin admittedly about historical points that the documents  
24 | give us a better picture. Now that should not any less be true in relation to a current  
25 | statement than a past statement. So what we say is you look at the history here. You  
26 | look at what appears to be the obvious reason for the swap and you say "We require

1 more corroboration". I have been at pains, at pains not to say that Mr Merricks is  
2 making an allegation that there is dishonesty or impropriety right here. At pains to say  
3 that.

4 MR JUSTICE MICHAEL GREEN: What else can you be saying that since you are  
5 suggesting this is not telling the truth about what formed part of Mastercard's decision?

6 MR SIMPSON: I put it no higher than that there is a reason for the Tribunal to require  
7 as the price of relying on that statement if that is correct that there should be disclosure  
8 of the documents which surround that decision. The ipse dixit of a solicitor in these  
9 circumstances, it cannot be the trump card which stops Mr Merricks in his tracks in  
10 this context.

11 MS TOLANEY: May I just interrupt, if I may, just to say that that last answer was not  
12 satisfactory, because Mr Simpson has been asked by the Tribunal is he accusing Mr  
13 Cotter of putting in a dishonest statement what I am saying is he has been clear about  
14 that.

15 MR JUSTICE MICHAEL GREEN: As you said, he's been clear about that and he is  
16 making that allegation. Whether it is appropriate to have done so is probably a matter  
17 for us to decide in due course.

18 MS TOLANEY: Indeed and I will be addressing you on this but you can understand  
19 why we have said we need sufficient time given the way this is being advanced.

20 MR TIDSWELL: Mr Simpson, when we met last week, you laid out your stall as to  
21 why there may be some questions to answer here. My response to that to Mr Cook  
22 was Mr Cook had a choice as to whether he wanted to go away and come back with  
23 a statement which made the position plain. Mr Cotter has done that. It would be most  
24 surprising if the focus having been put on him in that way, Mr Cotter were to go away  
25 and do so carelessly. There can't really be any suggestion that Mr Cotter has not  
26 thought long and hard about what is recorded in paragraphs 49 and 50 of the skeleton



1 and has put in his second witness statement. Are you seriously suggesting that he  
2 could have inadvertently got it wrong in those circumstances?

3 MR SIMPSON: As a barrister who specialises in professional conduct, I am very well  
4 aware that when one is challenging the credibility it can be read as saying (inaudible)  
5 I have been at pains -- if the Tribunal -- I think Ms Tolaney misquoted me and I want  
6 to be clear. I am not saying Mr Cotter is lying. I am not saying it is a dishonest  
7 statement. I am not saying (inaudible).

8 MR TIDSWELL: What are you saying?

9 MR SIMPSON: I see the puzzlement. What I am saying is that in these circumstances  
10 to assert that this was not the reason but say it of itself is a waiver of privilege to say  
11 that that was not the reason -- you cannot say it is not the reason but I am not going  
12 to tell you the reasons. If the conclusion the Tribunal comes to is Simpson's argument  
13 cannot work because he is not going as far as saying that Mr Cotter has behaved  
14 improperly, so be it. I am not, and if that is the end of my application, so be it. If the  
15 Tribunal finds itself unable to reconcile any questioning, any questioning of Mr Cotter's  
16 statement here with the statement that no allegation of impropriety is made, so be it  
17 and the application fails, because I am not saying that. I am very, very well aware of  
18 the seriousness.

19 MR JUSTICE MICHAEL GREEN: What are you saying then? You are saying that he  
20 is mistaken, some sort of negligent misstatement?

21 MR SIMPSON: I am saying, sir, that privilege is now being claimed over reasons that  
22 we have never heard of before. What is being said is a negative pledge. It's a negative  
23 declaration. If this is to go forward, then it is implicit in saying that this is not the reason  
24 that there is a waiver of privilege over anything that is relevant to that.

25 Now there must be reasons. We are told it is not the reason, but if it is not the reason,  
26 why are we not being told what the reason is?

1 MR JUSTICE MICHAEL GREEN: But if you are being told clearly that it was not the  
2 reason for the change that Dr Niels' views on pass-on were unacceptable to  
3 Mastercard, you know that's not the reason, then where does that leave the expert  
4 shopping allegation, because it is only if that was the reason or was arguably the  
5 reason that expert shopping gets off the ground, doesn't it?

6 MR SIMPSON: Mr Cotter isn't the solicitor acting in the Merricks proceedings. He is  
7 acting in the merchant proceedings.

8 MR JUSTICE MICHAEL GREEN: Now you want it both ways. You are applying for  
9 the change of expert in the Merchant proceedings but you are saying we can't rely on  
10 what Mr Cotter has said in the Merchant proceedings. I am not really sure what you  
11 are saying.

12 MR SIMPSON: I am sorry if I have stated it inaccurately. The change of experts has  
13 been a swap from Dr Niels in the Merchant proceedings and Ms Webster in the  
14 Merricks proceedings from 23rd April we were told she was coming in to Ms Webster  
15 alone. The objection isn't to the switch to a single expert. It is to the switch from  
16 Dr Niels to Ms Webster in a context in which just after the UPO it becomes clear we  
17 say that Dr Niels' views will be extremely inconvenient for Mastercard in the Merricks  
18 proceedings.

19 Now what we say is that if you look at the history of this, the only reason we have been  
20 given so far was in the letter of 19th June. We regarded that as a reason. Mr Tidswell  
21 mentioned that in his reasoned order at paragraph I think 4(c) of 5th July. He  
22 mentioned that as having been said. Now that has been reiterated on numerous  
23 occasions, that we have given the full picture. We have given the full reasons.

24 Now in the context in which Mr Merricks' question why Dr Niels to Webster, why to  
25 Webster, not Neils, who has been involved throughout, and the question why now after  
26 the UPO simply haven't been answered. I don't think, and I use that hesitantly as an

1 advocate, I don't think that it is necessarily to be taken as impugning the truthfulness  
2 of a solicitor not acting in the Merricks proceedings but acting in the Merchant  
3 proceedings, where the interests are completely different, to say that if you are going  
4 to say that, you should give us the reasons now.

5 Now Mr Cotter could well truthfully say in the Merchant proceedings, of course, that in  
6 the Merchant proceedings that wasn't the reason, because in the Merchant  
7 proceedings Dr Niels' views are extremely helpful. In the Merchant proceedings the  
8 merchants want full pass-on. So Mr Cotter can truthfully say as the solicitor in the  
9 Merchant proceedings.

10 MR JUSTICE MICHAEL GREEN: I think you said the merchants  
11 wanted pass-on -- I think you meant Mastercard.

12 MR SIMPSON: Mastercard wants full pass-on from the merchants, yes.

13 MR JUSTICE MICHAEL GREEN: I am still trying to get my head round it.

14 MR SIMPSON: It has been a while for me. Mr Cotter as the solicitor in the Merchant  
15 proceedings can with hand on heart say the swap had nothing to do with Dr Niels'  
16 views on pass-on, because Dr Niels' views on pass-on are entirely helpful in the  
17 Merchant proceedings. The solicitors who have been acting from the outset in the  
18 Merricks proceedings are Freshfields.

19 MR JUSTICE MICHAEL GREEN: Are you saying they have different reasons for  
20 wanting to change the experts?

21 MR SIMPSON: Absolutely.

22 MR JUSTICE MICHAEL GREEN: And you are entitled to know both of their reasons?

23 MR SIMPSON: No, I am entitled to know the Merricks reasons. I am not entitled to  
24 know the Merchant reasons. I am entitled to know the Merricks reasons and the  
25 Merricks solicitor has been silent. I can say nothing about the Merricks solicitor's  
26 views. The Merricks solicitor has said absolutely nothing about all this.

1 MR JUSTICE MICHAEL GREEN: If we assume that what Mr Cotter says represents  
2 Mastercard's view about this and he has confirmed that it is nothing to do with Dr Niels'  
3 views on pass-on that the decision was made, and we assume that is correct, where  
4 does that leave your expert shopping allegation?

5 MR SIMPSON: If the single line against all the background in this witness statement  
6 from Mr Cotter, now saying that it had nothing to do with Dr Niels' views on pass-on, it  
7 is accepted as true, then that is the end of the expert shopping allegation.

8 MR JUSTICE MICHAEL GREEN: And you are not saying he's lying?

9 MR SIMPSON: I am not.

10 MR JUSTICE MICHAEL GREEN: But you are saying "We don't think it is the whole  
11 truth". Put it that way.

12 MR SIMPSON: I don't think we have had the whole picture.

13 MR JUSTICE MICHAEL GREEN: Right, and you are entitled to that.

14 MR SIMPSON: Yes. Not just that we are entitled to that, but that a court seeking  
15 to -- where a discretion is -- so where we are -- you set aside the conditional order that  
16 Mr Tidswell made. For good reason it was conditional. No criticism of that. Then the  
17 question is do you exercise the discretion to allow Ms Webster in the Merricks  
18 proceedings? Then that is -- I hate the word -- a multi-factorial exercise of discretion.  
19 You have to look at the entire circumstances. You have to look at how matters have  
20 developed from the beginning. I must confess, sir, that in seeking the word  
21 multi-factorial I slightly lost the question that you had asked.

22 MR JUSTICE MICHAEL GREEN: Maybe I can ask this instead of going back to that  
23 one. Your main application is to set aside the order that was made.

24 MR SIMPSON: Yes.

25 MR JUSTICE MICHAEL GREEN: Which means what? Which means we go back  
26 about ten days before the trial is due to start to who is Mastercard's expert or experts?

1 | I mean, is that a serious proposition to be making ten days before the start of the trial?

2 | MR SIMPSON: It is not a promising start as an advocate to be asked that, but yes,

3 | given the history of what has gone on here, which I have not yet completed, there is

4 | more to come, but obviously the questions you are raising are extremely serious, but

5 | perhaps if I could develop the remainder of my submissions.

6 | MR JUSTICE MICHAEL GREEN: I think there has to be a certain amount of realism

7 | in this application.

8 | MR SIMPSON: Yes.

9 | MR JUSTICE MICHAEL GREEN: So close to trial what you can realistically achieve.

10 | I would have thought it is highly unlikely that the experts who have now put in their

11 | reports for a trial due to start on 18th November, are going to be changed by the

12 | Tribunal.

13 | MR SIMPSON: I accept that. If the Tribunal were not minded to do that, we seek

14 | an order that Dr Niels be called so that we can cross-examine him.

15 | MR JUSTICE MICHAEL GREEN: On what?

16 | MR SIMPSON: The first thing I would cross-examine him on, not to give too much

17 | advance notice of this, would be the stark divergences between his views and those

18 | of Ms Webster.

19 | MR JUSTICE MICHAEL GREEN: You pointed out lots of those in your skeleton

20 | argument and to a certain extent given advance notice to Ms Webster at least of the

21 | lines of cross-examination. You have those lines of cross-examination with

22 | Ms Webster, haven't you?

23 | MR SIMPSON: Yes.

24 | MR JUSTICE MICHAEL GREEN: It just over complicates matters to require

25 | Mastercard to call an expert they decided they don't want to call and --

26 | MR SIMPSON: Let me take an example.

1 MR JUSTICE MICHAEL GREEN: What are they meant to do in preparing for the trial  
2 now? Are they meant to prep him? Is he meant to put in a report? How is that going  
3 to work?

4 MR SIMPSON: No, he is not going to put in a report and they are not going to prep  
5 him.

6 MR JUSTICE MICHAEL GREEN: So he is just going to be cross-examined on all the  
7 material you have anyway which you can put to Ms Webster.

8 MR SIMPSON: Let me take an example. A fundamental part of Mastercard's case  
9 based on Ms Webster's report is that you cannot fill the evidential gap in relation to the  
10 Merricks time period. There isn't enough evidence. Therefore you can't arrive at  
11 sector all pass-on rates. Therefore either Merricks fails or you take the presumption  
12 of extrapolating back to a very low rate.

13 Now Dr Niels said in the joint expert report which at the time we thought he was acting  
14 in both claims, he said you can fill the gap. You can fill the gap with pricing evidence.  
15 If you can't get third party disclosure and you can't get Merchant disclosure -- this is  
16 what Mastercard were objecting to -- there go my glasses. May I retrieve them? That's  
17 what Mastercard were objecting to earlier. They were objecting to Economides'  
18 evidence and the reason they were jumping like scalded cats, to rehash a phrase  
19 I used last time, is it is extremely unhelpful to them. Dr Niels said you could use it.  
20 Were I not staring at the ashes of an argument on expert shopping after the  
21 interventions of the last few minutes, then I would be saying that one obvious reason  
22 for the swap to Dr Niels is Dr Niels says you can fill the gap and yet Mastercard have  
23 not filled the gap. So I would like to explore with Dr Niels what he thinks of Ms  
24 Webster's evidence on this point in a context, sir, which you have to remember in my  
25 submission that we have been told that there is no inconsistencies between them, that  
26 the expert shopping allegations are complete nonsense.

1 So in that context if we are told there is no difference, we are entitled we say to explore  
2 whether there is or not and, if so, what the implications are for Mastercard's case.

3 I say this in relation particularly to that point, because the whole edifice of Mastercard's  
4 case collapses if you can fill the gap. The whole edifice of Mastercard's case in relation  
5 to the earlier Merricks claim period is you cannot fill the gap. It is unfillable and yet  
6 Dr Merricks says you can.

7 So we would like him to be called so that we can explore that with him and so that we  
8 can put that one Mastercard expert who has been jettisoned to another Mastercard  
9 expert who is now giving evidence. So that's the reason that we would like Dr Niels to  
10 be called.

11 Of course, if time had to be given up in Mr Merricks' allocation, well, that would have  
12 to be it as far as we wouldn't be taking up any extra time, but it would in this -- I am so  
13 sorry, sir. You are behind a pile of books.

14 PROFESSOR WATERSON: Is Mr Economides' evidence of any help to you?

15 MR SIMPSON: It is extremely helpful, of course, which is why Mastercard were  
16 objecting to it, but Mr Economides is not dealing specifically with whether you can fill  
17 the evidential gap as a matter of principle in the way that it applies to the Merricks  
18 proceedings. Now it is very helpful evidence, but another powerful reason for the swap  
19 to -- this is why it is so surprising that it is said that it is nothing to do -- albeit it is said  
20 by the Merchant solicitor, it is nothing do with the difference of view. We have  
21 a complete difference of approach to sectors. We have three broad groups instead of  
22 31 sectors. We have a complete difference of approach now recognised implicitly in  
23 Mastercard's skeleton on the high pass-on across the economy.

24 Mastercard have sub silentio dropped their allegation that Dr Niels doesn't say that.  
25 In their last skeleton argument they said Dr Niels would not agree with that proposition.  
26 That has been dropped in this skeleton argument. Then the fact of what use is pricing

1 evidence. Pricing evidence Dr Niels said could fill the gap. Ms Webster says that it  
2 can't.

3 So on all those topics, if it is not expert shopping and the Tribunal is minded to accept  
4 the single ipse dixit of a solicitor in the Merchant proceedings against all the evidence  
5 pointing against that in the context in which privilege is also claimed, then so be it, but  
6 if there is to be a proper opportunity to Mr Merricks to deal with this, then it should at  
7 least be as a fallback position that we are entitled to ask Dr Niels about these  
8 divergences.

9 It also goes, sir, to credibility, because Mastercard has repeatedly asserted that there  
10 is no distinction. There is not a cigarette paper between Dr Niels and Ms Webster to  
11 see off the expert shopping allegations. Now how would the credibility of that look if  
12 Dr Niels said "Well, actually I do completely disagree with Ms Webster on this.  
13 I completely disagree with her on that and I completely disagree with her on the other".  
14 We say at the very least, sir, we should be allowed to cross-examine Dr Niels.

15 I will deal briefly with the inconsistency point, which was intended originally to reinforce  
16 an argument that there has been expert shopping here, but they are relevant to  
17 credibility as to the inconsistency point whether or not the expert shopping point  
18 survives.

19 First, sectors. That is dealt with at paragraphs 62 to 66 of Mastercard's skeleton. The  
20 change of approach is acknowledged finally at paragraph 63. So Mastercard have  
21 finally ceased to deny the undeniable, but they are continuing to persist with  
22 an explanation for Ms Webster's change of methodology, which we say bears no  
23 scrutiny, because what you need from Ms Webster's methodology is qualitative  
24 evidence. We have known from April on that there were only going to be ten  
25 merchants giving qualitative evidence. That's dealt with -- I need not go to it -- in our  
26 responsive case wrapper at paragraphs 55 to 63. That's PR tab 43, tab page 4556.



1 | There has been no answer to that by Mastercard.

2 | Now what's quite interesting is that what Mastercard have done in this skeleton is they  
3 | have essentially replicated one inconsistency, what they said in their CMC skeleton,  
4 | but they have at paragraph 58 of their PTR skeleton, just turning back -- this is dropped  
5 | in from paragraph 40 of the CMC skeleton but a crucial sentence has been omitted in  
6 | dropping it in. What they said in their CMC skeleton was:

7 | "It is in relation to this factual issue how merchants actually treated MSC costs for the  
8 | purpose of setting prices that Ms Webster has to rely on qualitative evidence."

9 | Now that line appears in the CMC skeleton but it doesn't appear in the corresponding  
10 | paragraph in this skeleton. The obvious reason for dropping it is that Mastercard know  
11 | how damaging it is to their explanation for Ms Webster's change of position.  
12 | Ms Webster knew in April/May that she was only going to get qualitative evidence from  
13 | ten merchants, and yet we are told there is going to be no change of methodology.  
14 | Yet there is a massive change of methodology from 31 sectors to three sectors. So  
15 | the explanation given simply does not meet that.

16 | Now as to pass-on across the whole economy, that formed the initial basis of the  
17 | allegation of expert shopping, that Dr Niels says something completely different in  
18 | Sainsbury's from the case now being run by Mastercard now we are in the same set  
19 | of proceedings.

20 | If we turn to paragraph 53 of Mastercard's skeleton for this hearing, now if we look at  
21 | 53, this -- actually starting with 52:

22 | "In the light of Mr Cotter's statement the supposed inconsistencies between Ms  
23 | Webster's evidence and Dr Niels using earlier reports in these proceedings can be  
24 | dealt with briefly."

25 | Then it says this. Now this is smoke and mirrors. It says:

26 | "First, Dr Niels' supposed view of pass-on across the whole economy would be

1 expected to be very high. This doesn't reflect the evidence given by Dr Niels in the  
2 JES."

3 Now two really important points there. In the original draft in the CMC skeleton at  
4 paragraph 36 it was said Ms Webster would not agree with the proposition -- this  
5 proposition in 53. Importantly, nor would Dr Niels.

6 Now, sir, that has been dropped. It is no longer maintained that Dr Niels would not  
7 agree with that proposition. It is dropped sub silentio. It's not flagged that we are  
8 withdrawing it, but it is just dropped. That's really fundamental. It's really fundamental,  
9 because what we have been saying since June is don't let them expert shop, because  
10 they don't like the views in Sainsbury's. What was said in the last skeleton is Dr Niels  
11 would disagree with his own view, which we quoted from Sainsbury's. That has been  
12 dropped.

13 More importantly, what is now said is this doesn't reflect the evidence given by Dr Niels  
14 in the JES to which Mr Merricks himself refers. Now that is a complete distortion of  
15 the position. Mastercard is absolutely right that it doesn't reflect the evidence given  
16 by Dr Niels in the JES. That is because Dr Niels, as you will recall, says nothing at all  
17 in the JES about pass-on across the whole economy. It is a completely irrelevant  
18 averment in the context in which Mr Merricks' allegation of expert shopping is not  
19 based on what Dr Niels said in the JES. It is based on what he said in Sainsbury's.

20 So we are saying he says very high pass-on in Sainsbury's. That's his view. Initially  
21 that view is denied as being held when reliance on the JES, but now that denial has  
22 been dropped and we just say he doesn't say that in the JES. It's hardly surprising  
23 that he doesn't say that in the JES, because the JES does not deal with economy wide  
24 pass-on.

25 Contrary to what Mastercard implies here, therefore, Mr Merricks has never referred  
26 to the JES as the source of the proposition that Dr Niels' view is that pass-on across

1 the whole economy would be expected to be very high. He has and has always only  
2 ever referred to Dr Niels' report in Sainsbury's.

3 Now simultaneously with dropping the denial they have dropped the averment that  
4 Ms Webster would not agree with the proposition. I will not take you to it, because  
5 I haven't got time, but if you look at the corresponding paragraph in Mastercard's CMC  
6 paragraph, which is paragraph 36, they also said that Ms Webster would not agree  
7 with the proposition that pass-on across the whole economy would be expected to be  
8 very high. They have dropped that as well, and they have dropped it because  
9 otherwise it would be stark. They are now admitting that Neils thought it and they are  
10 also saying that Ms Webster doesn't say it, so they have just dropped the whole thing.  
11 Why have they dropped it? We don't know, but the obvious reason would be the AAM  
12 case in which Mastercard amended their defences in September 2022 based on  
13 reports from Dr Niels and Mr Harman to plead a primary case of 100% pass-on in all  
14 three cases. Now we don't yet have redacted copies of those reports. Mastercard  
15 have agreed to provide them, but there's been a delay, which is not Mastercard's fault,  
16 in obtaining the approval of the redactions.

17 Now, sir, the degree to which Mastercard is seeking to gloss over the fact that it has  
18 made an absolutely fundamental change of position between its CMC and now on the  
19 core issue which we have alleged from the outset to be the core issue, is obvious from  
20 paragraph 55 of their skeleton.

21 Now we look at paragraph 55 and we read it.

22 "At the CMC Mr Merricks' response to this was to say nowhere in the JES does  
23 Dr Niels say ..."

24 I will come back to that, because it is like one of those theatre reviews you see outside  
25 the theatres in the West End.

26 So he has changed his mind on the broad principle.

1 "There will be high pass-on across the whole economy. The JES is inconsistent with  
2 such a broad principle."

3 Now we need to go to what I actually -- let's go to what I actually said. We need to go  
4 to the PTR bundle and it's tab 17, page 597, which is the transcript of the CMC.

5 MR JUSTICE MICHAEL GREEN: Page?

6 MR SIMPSON: Page 118 internal. It is PTR/597.

7 PROFESSOR WATERSON: Presumably this is a point you will put to Ms Webster.

8 MR SIMPSON: Yes, sir. The point I am making now is that Mastercard are not  
9 acknowledging that they have made between the CMC and now a fundamental  
10 change of position. At the CMC they denied that Dr Niels' view was there was very  
11 high pass-on across the whole economy and said Ms Webster didn't agree with it  
12 either. They have dropped both of those, just dropping it from the paragraph. They  
13 refer in denying it to the JES, which has nothing about pass-on in the whole economy,  
14 and they misquote me egregiously here in seeking to make the point good.

15 If I can ask you to read from page 118, line 5 to 25, if you have it. (Pause.) The bit  
16 quoted in Mastercard's skeleton is from line 19. Mastercard say:

17 "Nowhere in the JES does Dr Niels says he's changed his mind on the broad principle."

18 Quoting me. What I actually said is:

19 "Nowhere in the JES does Dr Niels disavow his approach in Sainsbury's."

20 So it is turned from a point I am making about the JES into a point I am making about  
21 the JES from the point I was actually making, which was Dr Niels doesn't disavow his  
22 report in Sainsbury's. So those were crucial words because what I was saying was "It  
23 is all very well you saying the JES doesn't mention this but nowhere in the JES does  
24 Dr Niels say "I repent or otherwise of my approach in Salisbury's."

25 So with those words omitted, the whole point I was making and the whole basis for the  
26 original expert shopping allegation, which was Dr Niels report in Sainsbury's is lost.

1 With the admission of those words Mastercard doesn't have to deny at paragraph 55,  
2 because it can't deny and isn't denying any more that Dr Niels' reports in Sainsbury's  
3 is inconsistent with any such broad principle.

4 Now there's one final linked point on inconsistencies. At paragraph 68 of their skeleton  
5 argument -- 67 of their skeleton argument Mastercard cite the proposition in Merricks  
6 responsive case wrapper that Dr Niels made no suggestion that pass-on rates may  
7 have changed over time.

8 At 68 they say there is again no inconsistency in Mr Merricks' summary of Dr Niels'  
9 evidence is inaccurate.

10 They then rely on the April '23 report in the JES. It is Mastercard who are being  
11 inaccurate.

12 At 66 to 67 of Mr Merricks' responsive case, which is at PR tab 43, page 4559, he was  
13 referring specifically to Dr Niels' evidence in Sainsbury's.

14 So what's being said here is that the summary is inaccurate because we were referring  
15 to the JES to the April report. No, it is accurate. Mr Merricks' summary of Dr Niels'  
16 evidence is accurate, because it is a summary of what was said in Sainsbury's. So  
17 again that is being omitted.

18 Now the Chairman raised with me earlier the issue of when Ms Webster was instructed  
19 on pass-on, and I will deal briefly with that, if I may. To make this clear, if what  
20 Mr Cotter means by testifying expert is someone who would ultimately testify in the  
21 Merricks proceedings if Mastercard called on her to do so, then there is nothing  
22 between us, but if Mr Cotter means in his statement that she was appointed as  
23 a testifying expert in the sense of a Part 35 expert in October 2023, then in our  
24 submission that's more problematic for the reasons we identified at the CMC and in  
25 our skeleton argument for this hearing.

26 Now Mr Cotter --

1 MR JUSTICE MICHAEL GREEN: Had there been any direction for expert evidence  
2 in the Merricks proceedings?

3 MR SIMPSON: Yes, there have. That is exactly the point. It is in the October hearing.  
4 There was a judgment in that. It's in the authorities bundle. I don't know quite why,  
5 but it is in the authorities bundle, tab 21. I will pick it up at paragraph 35.  
6 "Directions for the resolution of the question of pass-on.  
7 35. We are in no doubt as to the general directions that need to be made in order to  
8 try ..."

9 I am sorry, sir. I am running ahead. Do you have of the reference?

10 MR JUSTICE MICHAEL GREEN: Yes, I have it.

11 MR SIMPSON: "We set these directions out in the general terms in the following  
12 paragraphs. It will be necessary to embody them in order in due course, but we will  
13 leave it to the parties to agree."  
14 Then we go to 37. This is a crucial paragraph:  
15 "It is obvious ..."

16 What this is doing, as Mr Tidswell will recall, is that it is seeking to set the evidential  
17 parameters for trial 2. What it says is:  
18 "It is obvious those factors are and those factors are not relevant to whether pass-on  
19 has or is likely to have taken place in response to the overcharge. It is not a legal  
20 question but a question of economic fact. It seems to us that clear direction from the  
21 expert economists retained by the parties as unintermediated as possible by legal  
22 forensics is extremely important."

23 Then we go to 56, which is the Tribunal control of the process. We pick up the  
24 reference to the experts instructed or retained by the parties. Then 56 picks this up.  
25 "Clearly the experts will need to work closely with one another."

26 Could I just ask you to read 56 and 57? (Pause.) Then we get to a rather selective

1 quotation unfortunately by Mr Cotter. It is worth -- let me take the point first and then  
2 I can make it good in his statement.

3 At 74 and 75 these are key paragraphs, because they indicate the presumption that  
4 Mr Merricks is going to participate in trial 2. Now Mr Cotter cites these paragraphs in  
5 footnotes of his second statement and he cites everything that doesn't deal with that  
6 presumption. So what he cites is at 74 he cites from:

7 "As we have noted" through to "Mastercard". Then he misses out the next bit. At 75  
8 he misses out the first three lines. In fact, he misses out the first five and a bit lines and  
9 picks it up, "... as if Ms Dimitriou submitted".

10 Now those are crucial. Mr Cotter is explaining why he hasn't got his expert involved  
11 in the process. They are crucial because it says:

12 "As matters stand" -- this is omitted from his quotation -- "we consider that this process  
13 is far better undertaken as part of trial 2 rather than as a separate self-standing trial  
14 taking place at some point in 2025."

15 He omits then the next bit:

16 "Accordingly, we direct the class representative in the Merricks Collective Proceedings  
17 to participate in the process we have described in paragraphs 36 to 51 with a view to  
18 participating in trial 2. We do not make a final direction in relation to trial 2 participation,  
19 although we expect that to happen simply because we don't know precisely what  
20 evidence ..."

21 Now this is very inconvenient for Mr Cotter, because if he cites he has to explain why  
22 with the presumption that Merricks is going to participate and with an order from the  
23 Tribunal that all experts participate, why if Ms Webster was the Part 35 expert  
24 appointed at that time, she did not participate. I will just go, if I may, then to the  
25 disposal.

26 MR JUSTICE MICHAEL GREEN: We need to take a break at some point for the

1 transcriber? Do you want to just finish this point?

2 MR SIMPSON: I am not far off finishing, sir. I am nearly there, but I will take a break,  
3 if I may. It would be a relief.

4 MR JUSTICE MICHAEL GREEN: All right. We will have a ten-minute break.

5 (Short break)

6 MR JUSTICE MICHAEL GREEN: Yes, Mr Simpson.

7 MR SIMPSON: The authorities, page 676, we were in it. I was just finishing off in that  
8 judgment of 5th October. It is tab 21, page 676.

9 MR JUSTICE MICHAEL GREEN: Which paragraph are we on?

10 MR SIMPSON: 7405. Then I was going to go back to draw attention to one point in  
11 75, which is that the Merricks expert is directed. It is not just given an option to  
12 participate in the joint expert process going forward. There is a direction they have to  
13 do so at 75.

14 Then we go through to the order at the end or the disposition at the end. Paragraph 8.  
15 This is at page 680:

16 "The class representative in the Merricks (inaudible) should participate in the process  
17 we have described in paragraph 82 with a view to participating in trial 2."

18 Then 10:

19 "The economic expert should produce a joint report." That is the JES. Then at 11:

20 "All economic experts should be available to be sworn and give evidence on the  
21 matters covered by the reports referred to above."

22 Then, sir, the next point I want to pick up is the order of 5th December, which follows  
23 from that 2023. That is at PTR bundle, tab 10, page 397. The page I am interested  
24 in is page 403. This is the order the parties agreed on the basis of 5th October  
25 judgment.

26 Mr Cotter again quotes paragraph 21 of the order, but he doesn't quote the entirety of



1 it. He only quotes the first clause in his statement. He quotes:  
2 "The class representative shall participate in the process set out above and in the  
3 further evidential hearing with a view to participating in trial 2."  
4 That's where he stops his quotation. The next bit is:  
5 "Unless the Tribunal makes a direction in due course that a separate trial for the  
6 resolution of pass-on issues in the Merricks proceedings is appropriate."  
7 That indicates that at the time from October on it was the presumption of the Tribunal,  
8 as we see from 74 and 75 of the judgment, and as we see from this part of the order,  
9 that Merricks would participate. All the parties' economists are to participate in the  
10 joint expert process and Mr Coombs is ordered, not just given the option to come in if  
11 he wants to, but he is ordered, he is directed to participate in the process, and in that  
12 context we are told -- if we are told only that Ms Webster was appointed as an expert  
13 unseen, that's no problem at all. What's more difficult is if she was, in fact, appointed  
14 the Part 35 expert, why she didn't participate in the process, and that just isn't  
15 explained. Mr Cotter doesn't deal with it at all. In fact, he just omits all mentions of it  
16 being the presumption that Merricks would participate in trial 2.  
17 Then another point that he relies upon in relation to the fact that he says Ms Webster  
18 was appointed from October is at paragraph 74 of their skeleton argument.  
19 Mastercard quote an e-mail of 17th October, which we dealt with at the CMC, and this  
20 was relied upon heavily. What's said is that this shows that Ms Webster was appointed  
21 what's called a testifying expert, whatever that means, from October.  
22 If you read 74.1 of the skeleton, it says:  
23 "Mastercard informed the other parties by e-mail Frontier Economics were instructed  
24 in the Merricks proceedings but Dr Niels would represent both the Frontier team and  
25 his own team, Oxera, in the upcoming meetings. See the e-mail quoted at Cotter."  
26 Now let's just go to that e-mail. It is at PTR, tab 10, page 155.

1 MR JUSTICE MICHAEL GREEN: You will need to wind it up pretty soon.

2 MR SIMPSON: I am winding it up soon. This is it.

3 MR JUSTICE MICHAEL GREEN: Where are we going?

4 MR SIMPSON: We are going to PTR, tab 10, page 277. We need not go to it

5 necessarily. It is misquoted by Mastercard, because all it refers to, the actual e-mail,

6 is "An upcoming meeting". Now it is just possible that one expert might represent

7 another at an upcoming meeting for logistics, etc, etc. What is not plausible is what

8 this e-mail is now relied upon for, which is Dr Niels it is now said represented

9 Ms Webster right through all 10 or 11 meetings that happened between October and

10 May, that he represented her at the meetings prior to the JES, that he represented her

11 in the JES and that he represented her in the hot tub all without this ever being

12 mentioned.

13 We go for that proposition to paragraph 75 of Mastercard's skeleton where at the fifth

14 line down:

15 "Dr Niels was Mastercard's expert in the Umbrella Proceedings only but was, as

16 Mr Merricks was informed in October 20'23" that's this e-mail, "effectively representing

17 the Frontier team in the joint expert process. It is unclear why Mr Merricks now finds

18 this difficult to believe."

19 Well, Mr Merricks brings a healthy scepticism to it, given the e-mail only refers to

20 a meeting. There's no mention of that at all until it is raised under the expert shopping

21 allegations. This approach is simply not compatible with Part 35. An expert can't

22 represent another expert. An expert has an independent duty to the Tribunal. If

23 Ms Webster was the Part 35 expert then following the directions of the Tribunal she

24 should have been participating in this process.

25 Now in my submissions -- this is the first time it's been said. So for the very first time

26 now Mastercard are saying that she was appointed -- Dr Niels was appointed

1 Ms Webster's representative for the whole shabang, and there's no evidence for that.  
2 It is completely contrary to Part 35 under which experts can't represent each other.  
3 In my submissions at the CMC I said that the 17th October e-mail and the inclusion of  
4 the Frontier team in the trial 2 and PSR confidentiality rings look like window dressing.  
5 Now the full quote is at paragraph 76 of Mastercard's skeleton. To be clear, I was not  
6 suggesting that Mastercard never had any intention to use Ms Webster as their expert  
7 in the Merricks proceedings and this was all a sham. Clearly there was such  
8 an intention if and when it suited Mastercard's purposes.  
9 On that basis there was nothing improper with her being included in the confidentiality  
10 ring and the Frontier team being included, but the purpose for which Mastercard are  
11 now relying on that e-mail of 17th October simply reinforces the impression that  
12 referring to Dr Niels as Ms Webster's representative in that e-mail was indeed window  
13 dressing. The idea of one expert representing another is not consistent with Part 35  
14 but that wording is now being relied upon that is showing Mr Merricks knew from  
15 October 2023 that Dr Niels was to be Ms Webster's representative at all the expert  
16 meetings in the JES and in the hot tub in January.  
17 Unless I can assist you further, those are our submissions.  
18 MR JUSTICE MICHAEL GREEN: We have heard from Mr Simpson and he accepted  
19 I think that if we were to accept Mr Cotter's statement in paragraph 20 of his witness  
20 statement and not prepared to go behind it and ask for further information as to how  
21 the decision was made, that's the end of his application. And it is. We are not prepared  
22 to go behind it. So that probably is the end of the application, but if you wanted to say  
23 something about the allegations that have been made, then now is your opportunity.  
24 MS TOLANEY: I am grateful for that opportunity to address the allegations that have  
25 been made about expert shopping. There are a few points I should make. They are  
26 going to be relevant to costs which is why I'm going to make them . The first point

1 I regret to say this application needs (inaudible).

2 The reason I say that is that it began life in a way that was highly disruptive. So the  
3 relevant background -- just let me just give you this very briefly -- is that what  
4 happened was that Mr Merricks applied to be joined to these proceedings. It was said  
5 upon the joinder application by Mr Cook that it may well be that we would move to  
6 a single testifying expert, Ms Webster, and in June we applied for permission and were  
7 granted permission without any conditionality, contrary to what was said today to call  
8 Dr Niels.

9 Indeed, the President made it plain that he was not surprised that we were moving to  
10 a single expert. Ms Webster was, of course, the expert in the Merricks proceedings,  
11 which is why the whole allegation was inherently flawed in the first place, as you, sir,  
12 recognised.

13 It was then that Ms Webster served her report on 9th August and the allegations made  
14 about expert shopping primarily, and I won't take you to this, but primarily, and I think  
15 almost entirely relied upon Ms Webster's report on 9th August, but this application was  
16 not issued till 16th October and so it was seemingly held back. There is no reference  
17 as far as we are aware to the reply reports, because it was served at the time that  
18 work was being done on various responsive documents.

19 MR JUSTICE MICHAEL GREEN: The application was actually on something like 28th  
20 or 29th October.

21 MS TOLANEY: Indeed. The first one was, going through the chronology, 16th  
22 October, which was after skeleton arguments had been filed and before the CMC. So  
23 it couldn't properly be dealt with at the CMC. It was then raised at the CMC before  
24 Mr Tidswell. What was so shocking about that was that my learned friend, and it is  
25 one of the reasons a letter had to be written, then took most of the time, leaving only  
26 I think 10 or 15 minutes for Mr Cook to respond, as the clock was run down, and in the

1 CMC various allegations were made orally for the first time of dishonesty.  
2 For example, it was said that Mastercard's legal advisers had taken certain steps,  
3 namely writing letters to lay a paper trail of window dressing and suggesting  
4 Ms Webster had been involved. Those allegations and similar allegations were made  
5 for the first time orally.

6 MR JUSTICE MICHAEL GREEN: I am not really sure what the allegation of window  
7 dressing is. What were they window dressing or said to be window dressing?

8 MS TOLANEY: I can show you the CMC transcript. What was said was the letter  
9 stating that Frontier Economics were Mastercard's expert economists in the Merricks  
10 proceedings and including Ms Webster and her team in the trial 2 confidentiality rings  
11 was window dressing to lay a paper trail of apparent involvement so that it could be  
12 said that she had been involved when she had not been.

13 MR JUSTICE MICHAEL GREEN: So the thinking at the time last October was that  
14 this situation might arise --

15 MS TOLANEY: This October just gone.

16 MR JUSTICE MICHAEL GREEN: No. 2023 when these documents were said to have  
17 been setting a paper trail. You were anticipating this issue arising.

18 MS TOLANEY: Exactly.

19 MR JUSTICE MICHAEL GREEN: It is a little far-fetched.

20 MS TOLANEY: A lot of it is far-fetched. What then happened was the current form of  
21 the application -- just so you are aware, an application was issued on 16th October  
22 seeking all sorts of privileged material and then a further application, the current form  
23 dated 29th October is the one you have seen and it is before you. You can see from  
24 that application that Mr Merricks was seeking to set aside the Tribunal's order  
25 permitting Ms Webster to give evidence for Mastercard on the basis that Mastercard  
26 has made material misrepresentations. In the third paragraph it is said that

1 Mastercard is unable to provide any further corroboration of the truth of the  
2 representations it has made and therefore they are not true."

3 This mirrored what was said at the CMC orally. It was said that Mr Merricks needed  
4 to see the disclosure he had sought in this application to see the actual truth as to why  
5 this expert shopping had taken place.

6 Sir, what has then since happened in this application, as you heard today, is that the  
7 evidence of Mr Cotter, a senior partner at Jones Day, has been challenged and  
8 challenged in terms that it was not true and that was done both in the skeleton  
9 arguments and orally and in correspondence.

10 So there are all sorts of other allegations, which I will just summarise in a moment, but  
11 just pausing there, there was a lot of movement on that orally, but in response to one  
12 question Mr Simpson said to you "Yes, I am making that allegation". He also said, you  
13 will remember, that he was a specialist in professional conduct and therefore he  
14 considered very seriously whether he could make these allegations. He also made it  
15 plain then that he had thought very carefully about what he was saying in response to  
16 Your Lordship's question.

17 MR JUSTICE MICHAEL GREEN: (Inaudible) what allegation he was making.

18 MS TOLANEY: That's right because it was then backtracked and he did the same  
19 thing at the CMC to say he was suggesting it wasn't credible. He wasn't suggesting,  
20 because I think Mr Tidswell asked at the CMC was he accusing Mastercard of  
21 dishonesty and there was some backtrack, but actually there was no other way to read  
22 the allegations made for the first time orally and again the combination of the skeleton,  
23 there's also a letter that makes it quite plain that it's a material misrepresentation with  
24 the test of deceit was what was in mind and the application itself, plus the oral  
25 submissions.

26 Now it is absolutely extraordinary to stand in open court and accuse a senior solicitor

1 of dishonesty and then to try to poke through some inconsistencies where there just  
2 simply are none, but what I would also say is that assertions were also made against  
3 Freshfields and aspersions about why they hadn't given a statement and all of this was  
4 said to be some form of conspiracy effectively that Mastercard was advancing in order  
5 to have an expert that it preferred in some way, but when -- I am sorry to develop this  
6 and I won't take up the court's time for very long, but the nub of the complaint that you  
7 heard today, which was going to be one of my submissions, was not that Mastercard  
8 had expert shopped by changing to Ms Webster, but that Mr Merricks was upset that  
9 he didn't have the opportunity to cross-examine an expert that he thought he was  
10 going to get if he joined these proceedings.

11 So actually this was never an expert shopping case at all. It was an attempt to ambush  
12 at the last hour the Tribunal. You know that because we have just gone through all  
13 the timetabling and it wasn't suggested that Ms Webster wouldn't be cross-examined.  
14 Indeed, Mr Simpson's junior gave his estimate. What, in fact, the relief that's being  
15 sought was to try to find a way of asking the Tribunal to force Mastercard to call  
16 Dr Niels, who has not produced a report in these proceedings for this trial, as some  
17 sort of collateral purpose.

18 So the whole application has been flawed, but the way in which it has been advanced  
19 we suggest is entirely inappropriate.

20 I have just been asked also and I should do this, that one of the complaints that was  
21 made was to suggest that junior counsel, Mr Draper, had misled the Tribunal when he  
22 certainly did not and I can develop that if I need to, but I should put that on the record,  
23 that not only did Mr Cotter not mislead the Tribunal, neither did Mr Draper, who has  
24 been accused of it, and neither have Freshfields.

25 So none of those allegations should have been made and we suggest they should be  
26 formally withdrawn and an apology given.

1 One of the other points I should make to the Tribunal, and again I can develop this if  
2 it becomes necessary, is that the supposed inconsistencies I should tell you that  
3 a number of the alleged inconsistencies -- I am sorry to say make up quotes purporting  
4 to attribute them to experts when they were not actually quotes given at all.

5 That is very serious. Things were attributed to Ms Webster, and I can give you the  
6 one example, and this is not the only example, but it was paragraph 51 of Mr Merricks'  
7 skeleton, which advanced a new argument that Ms Webster does not consider  
8 evidence from a pricing expert to be a substitute for qualitative evidence from  
9 merchants whereas Dr Niels "believes the evidence can fill the gap". The passage is  
10 put forward in quote marks that meant -- the reader is meant to believe is a verbatim  
11 quote from Ms Webster, namely that only qualitative evidence from merchants in each  
12 sector can answer this question. It is deliberately intended to give the impression of it  
13 being Ms Webster's evidence, because it is footnoted at footnote 77 as a supposed  
14 reference to her report and three specific paragraphs are referred to in her first report,  
15 but none of those paragraphs contain that quote. It is not an error of cross-referencing  
16 because we have checked. Ms Webster has never said the quoted words or anything  
17 of that kind.

18 Neither was Dr Niels the enthusiast for pricing expert evidence which Mr Merricks  
19 suggests.

20 Now that is just one example of the way this has been pursued that goes as a separate  
21 complaint to the allegations of dishonestly and conspiracy. I could go through all of  
22 them to demonstrate why they are all quite wrong but, sir, I won't develop it beyond  
23 that, but to simply put a marker down that this was brought on to disrupt trial  
24 preparation. It has been advanced in an extraordinary manner and the reason -- there  
25 are two reasons I ask you to make an order for indemnity costs.

26 The first is that this cannot be the way the rest of the trial is conducted. It has caused



1 an extraordinary amount of work as well as concern, because various people have  
2 been accused of dishonesty.

3 A second point is it is not right to stand in open court and accuse reputable people  
4 who appear regularly in this court of dishonesty. I think the words were convincing  
5 themselves -- convincing himself of things. It is disrespectful. It is deeply  
6 inappropriate and it was also completely wrong, and it wasn't even clear by the end of  
7 Mr Simpson's submissions whether he was actually pursuing the allegation.

8 MR JUSTICE MICHAEL GREEN: Thank you, Ms Tolaney. Do you want to say  
9 anything in response?

10 MR SIMPSON: Just briefly. (Inaudible) I make it clear (inaudible) that we recognise  
11 the allegation is serious. However, it is important to note at the outset that Mr Merricks  
12 is not seeking a finding of any individual has deliberately misled the Tribunal. That is  
13 not the threshold setting aside an order, nor was the application made or expressed  
14 to be on the basis of deceit, nor have I ever suggested that anybody is lying. It may  
15 be taken that I have questioned seriously the credibility of statements on the basis of  
16 extrinsic facts, but we have been at pains not to make any allegation of dishonesty.

17 The example of junior counsel at the hearing on 19th June is a particularly bad one,  
18 because I don't have it off the top my head, but we specifically said in our responsive  
19 case that no allegation of -- we expressly said this because we realised the  
20 seriousness of this -- no allegation of deliberate misleading was made against junior  
21 counsel. That's in a footnote, the number of which I can't quite remember.

22 Before we go further it is also important to recognise that this Tribunal recognise that  
23 there were questions to answer here.

24 Now this Tribunal has also been satisfied by Mr Cotter's statement and is not going to  
25 go behind it. That is its decision, but before we are criticised for taking it further, at the  
26 hearing of the CMC Mr Tidswell made it quite clear to Mastercard unless they

1 answered which they have and the answer is accepted, there had been enough factual  
2 background, enough of what I said to raise some serious questions that needed to be  
3 answered.

4 MR TIDSWELL: (Inaudible) expert shopping.

5 MR SIMPSON: I do understand that.

6 MR TIDSWELL: Not about any question of misleading or dishonesty.

7 MR SIMPSON: I totally understand that.

8 MR TIDSWELL: That came about primarily because Mr Cotter's first statement no  
9 doubt for perfectly good reasons, as was explained, had not addressed directly the  
10 question (Overtalking).

11 MR SIMPSON: You made absolutely clear you were not coming to a decision or  
12 conclusion but that you said that Mastercard were in jeopardy unless they --

13 MR TIDSWELL: No, I didn't say they were in jeopardy. I said they faced jeopardy,  
14 which is a different point altogether.

15 MR SIMPSON: They faced jeopardy unless there was evidence put in. So there was  
16 sufficient for the point to be pursued. Now it might be said against me "You should  
17 have just accepted Mr Cotter's word in that statement and gone no further". We didn't.  
18 We pursued it further. We pursued it to this hearing, but at no point, and you can  
19 parse the documents, at no point have we made an allegation that anybody has  
20 deliberately misled the court and we have been at pains not to at every stage, and  
21 mention of deceit is just not right.

22 MR JUSTICE MICHAEL GREEN: I am still somewhat confused as to what you were  
23 alleging then about Mr Cotter's statement. Are you saying that he was just mistaken?  
24 He must have missed the fact that there were other factors that were taken into  
25 account in --

26 MR SIMPSON: I don't know and I can't -- because I can't make an allegation of deceit,

1 I can't speak as to what was going on in Mr Cotter's mind but I do know it was perfectly  
2 possible to reconcile the fact that it was known -- Mr Cotter is structured. There has  
3 been a delineation between Jones Day and Freshfields on Merchant and on Merricks  
4 proceedings and the Merricks -- from Mr Cotter's point of view, of course, there would  
5 be no question of expert shopping, because Dr Niels is favourable. So he could hand  
6 on heart say what he said, but in a context in which it is merely asserted in a context  
7 in which the reasons, if they have really nothing to do with the expert shopping, if they  
8 are really nothing to do with what Dr Niels said in his report, then they would not be  
9 privileged and we wanted to hear those reasons and we have not been given them.  
10 In fact, we have only learned they existed for the first time on Friday, so obviously in  
11 these circumstances Ms Tolaney is going to say "It is absolutely terrible these  
12 allegations of dishonesty and lying have been made". If you go back and look at the  
13 underlying document that has never been said and it wasn't said and I am making it  
14 quite clear it is not said now.  
15 Indeed, at the outset -- sir, you may well "Well, Mr Simpson, you were just putting  
16 a complete roadblock in the face of your application here, because in paragraph 6 of  
17 your skeleton argument for this:  
18 "It is important to note at the outset Mr Merricks is not seeking a finding any individual  
19 has deliberately misled the Tribunal."  
20 You can say that's the end of it and you have said that's the end of it. That was the  
21 basis of it and the minute you said it I accepted that was the end of it. It is, but I don't  
22 want it said that we have made wild allegations of dishonesty, particularly this point  
23 about junior counsel. That is something we specifically said in our responsive case  
24 that we were not saying that he was -- there was no allegation of deliberately  
25 misleading the court. That is cited in Mastercard's skeleton argument.  
26 I didn't have -- I was focusing on the other allegations at the point, but I didn't pick up

1 the passage that Ms Tolaney said was a deliberate misquotation or misleading in our  
2 responsive case or our skeleton argument, and I just would be grateful for the  
3 opportunity just to find that, if I could be referred to the paragraph, because obviously  
4 if we have done anything misleading ourselves, then I apologise for that. What was  
5 the paragraph number?

6 MS TOLANEY: 51.

7 MR SIMPSON: 51.

8 MS TOLANEY: (Inaudible). This is the letter of 23rd October in which the last  
9 paragraph says:

10 "Mr Merricks will submit to the Tribunal that they were made by Mastercard (and,  
11 where relevant, Ms Webster) knowing them to be false, or without belief in their truth,  
12 or recklessly as to the truth."

13 That appears to be the allegation being made about Mr Cotter's evidence.

14 MR SIMPSON: Exactly what one does in these circumstances, you don't make  
15 an allegation without seeking an explanation. An explanation has been given. Even  
16 when the explanation was given we did not pursue an allegation of deliberate  
17 misleading, but -- so you can't turn "If no explanation is given, we might pursue this  
18 point as deliberately misleading" into "We are saying you are deliberately misleading",  
19 because we expressly said that we were not saying that when it came to it when the  
20 explanations were given, and we were at pains not to.

21 It may be that I have to have a look at Ms Tolaney's point at another point, because it  
22 seems quite involved. I drafted that sentence. It is not -- it refers to several  
23 paragraphs. If I got that wrong, of course I apologise, but though Ms Tolaney said that  
24 there were numerous examples, she has not given them. Of course I apologise if  
25 I have misquoted. Absolutely a wrong thing to do, but at the moment I would need to  
26 go back to the underlying passages to find out whether I have or misstated the

1 proposition. It is certainly not my practice to put in quotation marks something that's  
2 not an actual quotation, as I think the Tribunal will be aware from previous arguments  
3 and previous documents that we filed.

4 MR JUSTICE MICHAEL GREEN: We'll take ten minutes just to deliberate and then  
5 we will deliver our judgment.

6 (Short break)

7  
8 RULING RE MASTERCARD'S EXPERT (extracted)

9  
10  
11 SUBMISSIONS ON COSTS

12 MS TOLANEY: Thank you, sir. I seek my costs on an indemnity basis of the  
13 application. At its lowest, Mr Merricks should have accepted the evidence of Mr Cotter  
14 and that would be sufficient and the application should not thereafter been pursued,  
15 but in addition you have the inappropriateness of the allegations per se, the way it has  
16 been pursued and the timing and tactical nature of it, all of which take it out of the  
17 ordinary and the fact it is days before the trial (inaudible).

18 MR JUSTICE MICHAEL GREEN: Up to the CMC I think it's difficult for you to say that  
19 the application such as it was at that time was out of the norm. It was dealt with in the  
20 way it was and Mastercard were invited to respond in some way or other and it was  
21 only really, as you say, after Mr Cotter's witness statement came in that maybe it could  
22 be said that Mr Merricks should have dropped their application.

23 MS TOLANEY: Sir, I put it in this way. The first is that following (inaudible).

24 MR JUSTICE MICHAEL GREEN: I think the application was issued after Mr Cotter's  
25 witness statement went in. Is that right?

26 MS TOLANEY: I think that's right.

1 MR JUSTICE MICHAEL GREEN: I mean, there was a letter of application earlier  
2 before the CMC.

3 MS TOLANEY: It was.

4 MR JUSTICE MICHAEL GREEN: So what costs are we talking about? The costs  
5 since the application was issued?

6 MS TOLANEY: Well, preparation today, the skeleton, attendance by counsel and this  
7 isn't part of -- this application wouldn't be part of any genuine brief. It is a very serious  
8 application that has really disrupted this part of the tactics, but that's the first point. It's  
9 a marker that this should not have happened through (inaudible) costs prior to that  
10 and whether that's on an indemnity basis or a standard basis is a matter I fully accept  
11 is (inaudible) prior period is that this application, if it was a genuine application,  
12 (inaudible).

13 First of all, (inaudible) 9th August.

14 Secondly, there is simply no justification given as to why the letter on 16th October  
15 was sent after skeleton arguments had gone in in that very disruptive way.

16 Thirdly, at the CMC Mr Tidswell was faced with an application that was advanced in  
17 a way that was not reflected in that letter or the skeletons for an hour and a half where  
18 very serious allegations were made orally, and I can show you those if the Tribunal  
19 would like to see them or be reminded of them, of falsity and window dressing.

20 So we would say that there are, with respect, three stages. There is the first period of  
21 the 16th October application being issued by letter and why it was held back; secondly,  
22 the next stage of what happened at the CMC and the presentation; and the fact that  
23 Mr Tidswell ordered -- he didn't order -- I beg your pardon -- suggested a shortcut in  
24 the circumstances in which the Tribunal found itself of producing the evidence to sort  
25 of get rid of the issue doesn't mean Mr Tidswell was sanctioning the way in which the  
26 application was made and brought on.

1 In any case what is clear --

2 MR JUSTICE MICHAEL GREEN: It was clear from their responsive case that they  
3 were making a point about this.

4 MS TOLANEY: Yes, it was. What was the date of that?

5 MR JUSTICE MICHAEL GREEN: 9 October.

6 MS TOLANEY: That's right, but it wasn't clear why that had been held back to that  
7 point.

8 MR JUSTICE MICHAEL GREEN: They had not said anything.

9 MS TOLANEY: Then why an application wasn't made in good time before the CMC  
10 with a skeleton argument and a proper opportunity for Mastercard to deal with it, and  
11 then why the nature of the application -- I don't know, sir, if you wish me to show you  
12 this -- why the nature of the application then changed orally, because, of course, the  
13 oral submissions made very serious allegations not set out either in the letter or in  
14 writing in the same way. There was never shifting allegations of increasing severity.

15 MR JUSTICE MICHAEL GREEN: It went beyond what was said in the responsive  
16 case and their skeleton argument.

17 MS TOLANEY: It did, because it made the allegation such as window dressing and  
18 saying that Mr Merricks was seeking to find the truth of why things had been done as  
19 if -- it being quite clear the inference was what had been said was false. Then you  
20 have the third period following service of Mr Cotter's witness statement.

21 So the starting point is, going back to basics, we have defeated the application in  
22 whatever form it was made, and it follows that we are entitled to our costs, irrespective  
23 of conduct points.

24 I suggest that in the circumstances, given the conduct points, it is very clear that as of  
25 the CMC we should have our costs, and that's going back before today, on  
26 an indemnity basis. I suggest actually in the circumstances indemnity costs for the

1 whole period would be appropriate from 16th October, given the way this was brought  
2 on and given, with respect, the very tactical feel about it, which suggests it was out of  
3 the ordinary.

4 I don't know, sir, if it would help you if I showed you the sort of statements that were  
5 made at the CMC and the letter of 16th October, if that would assist you. Mr Tidswell  
6 will remember.

7 So, in short, we say that we are obviously entitled to our costs. We suggest that we  
8 should have indemnity costs for the whole period from 16th October to date, and I have  
9 given you the three different time periods in fairness and explained why in each case  
10 the three periods are out of the ordinary.

11 MR SIMPSON: Sorry, sir. I have lost my ...

12 On the chronology of this to start with, sir, the positive cases were served on  
13 9th August and I have to say that I was away until September, and we had about  
14 a month to do our responses. The positive cases were about (inaudible) off the top of  
15 my head -- I'm sure I will be corrected -- but extremely substantial. (Inaudible).

16 So it was only -- of course, when one looks back with hindsight, it looks like the only  
17 issue we were dealing with, but it wasn't. It is paragraphs 46 to 73 of a long responsive  
18 case. So it is not as if -- also, sir, what has happened here is what was called a car  
19 crash CMC, which was originally supposed to happen shortly after the responsive  
20 cases, and for whatever reason that was deferred. As it happened, we -- I can't say  
21 factually exactly what would have (inaudible) likely to raise it then. What, in fact,  
22 happened is the CMC was deferred from what was originally intended to be the end  
23 of July to a much later path into October, and if Mastercard were going to -- if we were  
24 going to raise this allegation, then it was clearly going to need a hearing and the only  
25 hearing which it was going to be heard at was the CMC.

26 MR TIDSWELL: There was a CMC on 16 September.



1 MR SIMPSOM: Was that a mini CMC, sir?

2 MR TIDSWELL: No, it wasn't. I think that probably would have been --

3 MR SIMPSON: I think that was about disclosure and --

4 MR TIDSWELL: That was I think the original purpose of what was unfortunately  
5 named the car crash hearing.

6 MR SIMPSON: I see. The way I had understood it was that turned ultimately into a  
7 disclosure exercise. I didn't attend it because it was about -- I think you went through  
8 the disclosure I seem to recall. I didn't -- I wasn't aware that that was supposed to be  
9 a CMC of import other than in relation to disclosure, but you are right. I do recall that  
10 now occurring.

11 At that point we were assimilating a very, very large number -- amount of material, and  
12 so although it looks like the only thing, it wasn't. It was everybody's cases and all the  
13 reports associated with it. We thought long and hard about whether to make the  
14 allegations and ultimately we did in the responsive case.

15 Now one looks at what would have happened in the counterfactual, because the  
16 immediate response was "There's nothing to see here". Well, that's a perfectly fair  
17 response ultimately, but it was persisted in and it was persisted in until the CMC when  
18 there was a hearing when Mr Tidswell said, quoting:

19 "It seems Mr Simpson has at least created enough smoke to suggest there might be  
20 some fire".

21 At that point the evidence has gone out. I will deal with that later up to that point, but  
22 there was certainly no tactical deferral, as has been implied, of taking expert shopping  
23 until the responsive case on 10th October, because between coming back from  
24 holiday -- I can't recall my precise holiday dates and I don't want to be said to  
25 misrepresent them -- I think it was the end of the first week of September -- I had  
26 a month to assimilate everything, all the expert reports, and during that month we had

1 to draft a fifty, sixty page responsive case, whatever it is.

2 So I can't give evidence, but there was not a thought in my mind that, "We had better

3 defer this until the end October". It was just we were going to do the responsive case

4 and that was the point to raise it.

5 Then --

6 MR JUSTICE MICHAEL GREEN: You mean you were well aware that we were getting

7 very close to the trial --

8 MR SIMPSON: I was.

9 MR JUSTICE MICHAEL GREEN: -- and that this could have been extremely

10 disruptive or has been quite disruptive, quite a distraction I imagine.

11 MR SIMPSON: Well, again it has disrupted. I can say that the intention -- there was

12 no intention to disrupt. (Inaudible), but what happened here was that, against

13 Mr Merricks' urgings, we wanted this dealt with. I haven't gone to the correspondence,

14 but we repeatedly say we want this dealt with. We are told it can't be. We understand

15 why. It was so tight. Again people forget that between 7th June and 19th July

16 originally, 7th August ultimately, there was this vast amount of work going on on the

17 positive cases, and Mr Tidswell rightly said I think at the 21st June CMC, "We just can't

18 do this, because everybody is working flat out and it is too -- it is the wrong time to do

19 it", but we wanted it taken then and we pressed and pressed.

20 MR JUSTICE MICHAEL GREEN: It wasn't taken then. Then the decision that was

21 made "Allow them to use Ms Webster, but let's see what she says when the positive

22 cases are served, ie on 9th August, and we will take it from there".

23 MR SIMPSON: Yes, yes.

24 MR JUSTICE MICHAEL GREEN: Nothing happens. I mean, I understand you need

25 a holiday. Everyone needs a holiday at some point.

26 MR SIMPSON: (Inaudible), but I was on holiday. I wasn't --

1 MR JUSTICE MICHAEL GREEN: I imagine you are not the only person in the team.

2 MR SIMPSON: I was not reading the positive case, of course, when I was on holiday.

3 MR JUSTICE MICHAEL GREEN: There was a trial looming and this was capable of  
4 being quite disruptive to a trial certainly if it is deferred to a month before the trial is  
5 going to start.

6 MR SIMPSON: I do accept that, sir. I do accept that, but let's look at the position per  
7 impossible, us being right and us having a point, which looks somewhat ironic. So  
8 you take a point. Now if it is the only time at which you can take it, then you take it  
9 then. So that's what happened, because we wanted to take it in the summer.  
10 Circumstances dictated against.

11 Now let's assume for a second there had been something in the allegation. Let's  
12 assume it was right and there was expert shopping, as Mr Merricks submitted. You  
13 found it wasn't, but if it was right, then when else should we have taken it, because we  
14 pressed and pressed, because we thought that there would be a problem if it came  
15 along this close to trial. What would happen was that the inertia factor would set in  
16 whereby the reports had been served, the swap had been allowed and that would then  
17 be a fait accompli, which is why we pressed and pressed to take it in the summer.  
18 There's a certain irony now, Mastercard blaming us for doing this tactically just before  
19 trial when it was the only time we could do it, because we were told "no" and  
20 Mastercard said, "No. Let's wait and see when the reports are in what they" --

21 MR JUSTICE MICHAEL GREEN: Why not give them some notice before the skeleton  
22 arguments went in?

23 MR SIMPSON: Completely frankly, sir, because I was reading all the reports and  
24 I started focusing my mind on these issues and what we should raise in our positive  
25 case about a week before we served it. We had an enormous amount of material. Sir,  
26 you will understand of everybody here how much material there is to assimilate in this

1 case and there was a vast amount. It is not as if I was sitting reading  
2 a fifty page expert report. I have reading as much as I could of what came in, which  
3 was vast, with a vast amount of decisions to be made about the points we would take  
4 in our responsive case. So in that fog of war we did not take the point and I can  
5 honestly say that it did not occur to me.

6 In the context of doing all the work we were doing we started focusing on the way we  
7 were going to put things in drafting our response. That's the explanation. I mean, if it  
8 is seen as tactical, so be it, but first it was not delayed by us. It was delayed, of course  
9 rightly in the circumstances, by the Tribunal ultimately and on the urging of Mastercard.  
10 Having urged us to defer it, there is this inertia factor which we feared. We had got all  
11 the reports. We had to assimilate them when we were back from holiday. There was  
12 no tactical element whatsoever in the delay. Of course, we articulated the allegations  
13 extremely clearly in our responsive case on 10th October and we set them out in  
14 paragraphs 46 to 73. It is not as if it wasn't obvious where we were going with this. It  
15 is said there was no formulated application. So Mastercard insisted on an application.  
16 So we made an application for disclosure.

17 Now we might be criticised -- we have been criticised I think for pursuing after  
18 Mr Cotter's statement, but in my submission the time perhaps to focus on is after his  
19 statement. You found we shouldn't have pursued it at that point. Well, so be it, but  
20 we say that pursuing it after that point does not deserve to be visited in indemnity  
21 costs.

22 MR JUSTICE MICHAEL GREEN: Are you resisting standard costs?

23 MR SIMPSON: I am starting and then going back. I would adopt -- I recognise this is  
24 a bigger application, but I adopt Mr Cook's submission that we would all be here in  
25 any event for a PTR.

26 MR JUSTICE MICHAEL GREEN: Not at 5 o'clock.

1 MR SIMPSON: I accept that. It is possible. I accept that. I would simply adopt  
2 Mr Cook's submission on that, that this is a PTR. We raised a PTR issue. We have  
3 lost on it. Everyone is on brief, as Mr Cook said. So in our submission the same point  
4 applies as to Mr Beal's application.

5 I think I was starting with indemnity, because obviously it is such a strong allegation  
6 and one wants to try to rebut it, but I say the same applies in this situation as applied  
7 in relation to Mr Cook's submissions on Economides. Economides took, what,  
8 45 minutes and we took probably three hours, but this is a PTR. These issues are  
9 dealt with at PTRs. So we say the same result follows.

10 MR JUSTICE MICHAEL GREEN: It is not often you have a PTR where you are  
11 discussing expert shopping --

12 MR SIMPSON: I accept that. That's the point against me.

13 MR JUSTICE MICHAEL GREEN: -- and then days before trial. It is very unlikely.

14 MR SIMPSON: So we say no costs order against us on that basis --

15 MR JUSTICE MICHAEL GREEN: Right.

16 MR SIMPSON: -- but, if made, then this is not sufficient -- in the circumstances of this  
17 case this is not sufficient that we pursued it against the word of Mr Cotter in the  
18 statement that you found sufficient and an absolute answer.

19 Now when you put that to me, sir, could I say to my own -- I won't say defence,  
20 because it sounds defensive -- but when you put it to me, "Well, if we accept Mr Cotter  
21 on this, what is the result?", well, the answer is right. Now in the context you might  
22 say "Well, Simpson, you are stupid, because what you did was you said, 'Well, we are  
23 not alleging dishonesty. We are not alleging deliberate wrongdoing here', but you  
24 have got Mr Cotter, so the two butt up against each other. We accept Cotter and that's  
25 it". Well, you might say stupid, but stupid isn't in the list for indemnity costs, but  
26 obviously --

1 MR JUSTICE MICHAEL GREEN: It wasn't out of the norm.

2 MR SIMPSON: It wasn't out of the norm and stupid, but it is a low point for  
3 an advocate's submission when he has to say that. So obviously we had our reasons.  
4 They have been not accepted, but we say this is not out of the norm for indemnity  
5 costs and if you look at the chronology of how things developed, we have  
6 taken -- contrary to what Ms Tolaney said, we have taken a restrained view and have  
7 not thrown out allegations of deliberate wrongdoing. In fact, we have disavowed them.  
8 I think Ms Tolaney said that I said, "We need to seek to find the truth". It didn't  
9 sound -- I haven't been back to the transcript, but I don't recall saying, "We need to  
10 seek to find the truth". Maybe I did, but seeking to find the truth doesn't mean  
11 everybody else is lying. So if that is the high point, it is not a great point.

12 Sir, unless I can assist you further on submissions.

13 MR JUSTICE MICHAEL GREEN: Ms Tolaney.

14 MS TOLANEY: I have a few key points. We are certainly, sir, entitled to our costs.  
15 Mr Merricks made the application twice for expert shopping and lost that application.  
16 He did so on the basis of very serious allegations. Those were not accepted and we  
17 would not be here, which is demonstrated by the fact that Mr Merricks put in an entirely  
18 separate skeleton application, a very lengthy skeleton (inaudible) contradistinction.  
19 So there is no comparability to what he said about the expert shopping allegations.

20 In relation to the basis for the costs there are five independent bases on which you  
21 can order indemnity costs and we would urge you to do so.

22 First are the allegations of fraud and dishonesty that have been made. That entitles  
23 us enough to indemnity costs because they were considered to be inappropriate, as  
24 the Tribunal found. They should never have been made.

25 Secondly, the timing and delay and the tactical nature of the application, which again  
26 the Tribunal has found. I think you said that there was a tactical feel to it. That takes

1 it out of the norm.

2 Thirdly, the way in which it has been conducted orally at the CMC and today with  
3 ever-changing allegations of a very serious nature, which we described as an ambush  
4 at the CMC.

5 Fourthly, the fact that the allegation of expert shopping appears to have been targeting  
6 a collateral purpose, which was to require Dr Niels to be made available, which is  
7 really what Mr Merricks wanted.

8 Fifthly, their pursuit after Mr Cotter's second statement.

9 The first four bases obviously cover the whole time period we would say. The fifth  
10 obviously covers the last period, but we would say that the fact that there are five  
11 independent bases which have, at least some of them, been recorded in the Tribunal's  
12 judgment demonstrates why this is a case that cries out for indemnity costs, and it is  
13 appropriate to put a marker down where this type of behaviour has been present.

14 MR JUSTICE MICHAEL GREEN: We will take five minutes.

15 (Short break)

16

17 RULING ON COSTS(extracted)

18

19

20 MS TOLANEY: Thank you very much to the Tribunal and thank you for sitting late.

21 MR JUSTICE MICHAEL GREEN: Very good. We will see you in ten days' time.

22 **(5.13 pm)**

23 **(Hearing concluded)**

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