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**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

1517/11/7/22

Salisbury Square House  
8 Salisbury Square  
London EC4Y 8AP

Monday 18<sup>th</sup> November- Friday 20<sup>th</sup> December 2024

Before:

The Honourable Justice Michael Green  
Ben Tidswell  
Professor Michael Waterson

**Merchant Interchange Fee Umbrella Proceedings**

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

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

Daniel Jowell KC, Jessica Boyd KC, Isabel Buchanan, Ava Mayer & Aislinn Kelly-Lyth on behalf of  
Visa (Instructed by Linklaters LLP and Milbank LLP)

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

Mark Simpson KC, Jack Williams & Alastair Holder Ross on behalf of Walter Merricks CBE  
(Instructed by Willkie Farr & Gallagher (UK) LLP)

Monday, 18 November 2024

(10.30 am)

(Proceedings delayed)

(10.42 am)

THE CHAIRMAN: Good morning. I just need to read this statement before we start. Some of you are joining us live stream on our website, so I am going to start, therefore, with the customary warning: an official recording is being made and an authorised transcript will be produced, but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings, and breach of that provision is punishable as contempt of court.

Right.

Opening submissions by MR JOWELL

MR JOWELL: May it please the Tribunal. I appear with Ms Boyd KC for Visa, with Ms Buchanan, Ms Mayer and Ms Kelly-Lyth. Mr Beal KC appears with Mr Woolfe KC and Mr Schonfeld and Mr Andrews for the SSH Claimants. Mr Lask KC appears with Mr Sebastian for Allianz. For Mr Merricks, we have Mr Simpson KC, Mr Williams and Mr Holder Ross. For Mastercard, we have Ms Tolaney KC Mr Cook KC, Mr Draper and Mr Bedyk.

I should note one thing before I start and that relates to confidentiality. For my part, I hope to get

1 through my opening submissions without having to go into  
2 private session at all, and indeed generally I am going  
3 to try to avoid referring to confidential information,  
4 save perhaps on one or two occasions where I will invite  
5 you to read it.

6 The same, I should note, will not be true for the  
7 cross-examinations, because the cross-examinations the  
8 day after tomorrow are going to involve delving into the  
9 pricing practices of the claimants -- of the willing  
10 claimants, and so you will need to make a decision in  
11 due course as to when, for the purposes of those  
12 cross-examinations, you wish to go into private. It is  
13 going to -- at least for my part, the cross-examinations  
14 are almost entirely going to be on confidential  
15 material.

16 THE CHAIRMAN: Right. So we may have to have the whole of  
17 those two days in private?

18 MR JOWELL: In effect. I say it is confidential ...

19 THE CHAIRMAN: There are so many witnesses to get through,  
20 and slipping in and out of ... it is going to be  
21 logistically very difficult.

22 MR JOWELL: That was indeed my thought. We will waste a lot  
23 of time if we do that.

24 THE CHAIRMAN: Well, I imagine the other cross-examinations  
25 will also be trespassing on confidential matters.

1 MR JOWELL: I would predict that is the case.

2 THE CHAIRMAN: Okay. Well, we will have a chat about that  
3 nearer the time, but --

4 MR JOWELL: I am grateful.

5 THE CHAIRMAN: Yes.

6 MR JOWELL: I would like to begin, if I may, by identifying  
7 the issue the Tribunal has to determine in this  
8 Trial 2A, and also reminding the Tribunal how this issue  
9 fits into the proceedings more generally. I appreciate  
10 that this will be mostly familiar, but there are one or  
11 two points that bear emphasis, particularly in light of  
12 the way the claimants put their case in written  
13 openings.

14 The key issue for Trial 2 is whether, and to what  
15 extent, the prices charged by the merchants to their  
16 customers would have been lower had they not had to pay  
17 the MIFs by reason of Visa and Mastercard's rules in the  
18 claim period. We proceed on the assumption, which is of  
19 course not accepted by Visa but it is an assumption for  
20 the purposes of this trial, that Visa and Mastercard's  
21 rules restricted competition during the claim period and  
22 that the MIF amounted to or contained an unlawful  
23 overcharge.

24 Now, the issue of pass-on in the present proceedings  
25 is a particularly challenging one to resolve, and that

1 is quite simply because these proceedings comprise not  
2 one or two merchants but a vast number of claimants.  
3 Even with some settlements, we estimate that there  
4 remain around 600 claimant groups consisting of over  
5 2,000 legal entities and the claimants' businesses range  
6 across most of the major sectors of the UK economy. The  
7 relevant period of time spans up to some 17 years, and  
8 what is more, by virtue of the joinder of the *Merricks*  
9 collective proceedings, the pass-on rate determined in  
10 this trial will provide the basis for determining the  
11 pass-on to the *Merricks* class.

12 Now, the joinder of *Merricks* was, if we may say so,  
13 an obviously eminently sensible exercise of case  
14 management. Given the overlap of several years of the  
15 claim periods, it avoids the potential for directly  
16 inconsistent decisions by this Tribunal, but it does  
17 also, however, highlight the scale of the challenge and  
18 the breadth of the assessment that is required. The  
19 *Merricks* class by its nature spans all sectors of the UK  
20 economy and, more generally, as you will appreciate, the  
21 *Merricks* class of consumers are, for the period of  
22 overlap, seeking compensation for the very same  
23 overcharge as that sought by the merchants in that  
24 period.

25 Now, both sets of claimants cannot both be entitled

1 to compensation for the same alleged overcharge. Either  
2 it was retained by the merchants or it was passed on to  
3 the class, and if you give too much to one or other, you  
4 are simply robbing Peter to pay Paul.

5 Now, plainly the method by which a rational court or  
6 Tribunal proportionately estimates pass-on rates for  
7 hundreds of claimants, spanning the whole economy, and  
8 for a vast consumer class, cannot realistically be the  
9 same method as the way it estimates pass-on for a single  
10 claimant or even for a single group of claimants. There  
11 is simply not time enough or courts enough to examine in  
12 detail the particular circumstances of each of the 600  
13 groups of individual claimants. There are significant  
14 challenges in figuring out the extent of pass-on of a  
15 cost like a MIF for one claimant business, let alone  
16 over 600. Consequently, after grappling with this issue  
17 over several interlocutory hearings, the Tribunal has  
18 effectively directed, in our understanding, that pass-on  
19 rates should be estimated by reference to the industry  
20 sectors in which the claimants operate, including by  
21 reference to top-down econometric analysis, and that is  
22 certainly how all of the experts, bar one representing  
23 Allianz, one individual claimant, proceed.

24 So the issues for this trial are not really what is  
25 the pass-on for merchant A or merchant B or merchant C,

1 but, rather, what is the pass-on rate for the relevant  
2 sectors of the economy. In due course the Tribunal will  
3 also need to consider, based upon those sectoral  
4 assessments, what is the appropriate pass-on rate for  
5 the economy as a whole in the *Merricks* period.

6 So those, as we see them, are really the issues.  
7 But how do those issues of sectoral and economy-wide  
8 pass-on fit into this litigation more broadly?

9 Well, looking backwards, there has been Trial 1,  
10 which concerned liability in respect of Article 101(1)  
11 with judgment of course awaited. Looking forward, it is  
12 important to appreciate that the conclusion reached in  
13 these proceedings, or in this trial, rather, will also  
14 be relevant for Trial 3, which should not be lost sight  
15 of. Trial 3 you may remember, considers whether the MIF  
16 itself, or the MIF up to a particular level, meets the  
17 conditions for an individual exemption under  
18 Article 101(3) or section 9 of the Competition Act, and  
19 in light of the judgment of the Supreme Court in  
20 *Sainsbury's*, that issue will turn in part on whether  
21 merchants as a group, as distinct from end-consumers as  
22 a group, are net beneficiaries of the MIF.

23 Now, whether merchants as a group are net or -- to  
24 the consumer group are each net beneficiaries of the MIF  
25 depends on the extent to which the merchants as a class

1 in fact bear the cost of the MIF or whether they pass it  
2 on to consumers and to what extent. So the pass-on  
3 issue that you will be resolving also has important  
4 implications for the legality of the MIF when one comes  
5 to the exemption issue in Trial 3 in due course.

6 Looking wider still, the conclusion on pass-on  
7 reached in these proceedings may well have wider  
8 repercussions. It would not be surprising, for example,  
9 if the UK's payment regulator, or other regulators  
10 responsible for regulating MIF levels, were to take into  
11 account the conclusions and assessments reached in these  
12 proceedings as to the extent of pass-on when reaching  
13 their own judgments as to the appropriate level of  
14 interchange fees.

15 So that, by way of introduction, is the --

16 THE CHAIRMAN: No pressure then.

17 MR JOWELL: No pressure, indeed.

18 That is the issue and that is how it fits in to the  
19 wider picture.

20 Now, there is not time enough in a two-hour opening  
21 to cover everything, of course, and certainly not even  
22 everything of importance. Nor do I think that you would  
23 be assisted if I were simply to describe the parties'  
24 cases and witnesses as is sometimes done in opening.  
25 I am sure you are already aware of all of that.



1           What I would hope to do instead is to focus on a few  
2           key points and to respectfully point the Tribunal in the  
3           direction of where it might find most useful assistance  
4           for a more detailed reading of the documents because, as  
5           you will see, these proceedings have generated no  
6           shortage of paper, so I do consider it may assist you if  
7           I was to point you to some of the important parts of the  
8           evidence that may merit further scrutiny at your  
9           leisure, and I make no apologies for the fact that I am  
10          going to focus very largely on our evidence; no doubt my  
11          learned friends will stress their own.

12          So, with your permission, and just so that you know  
13          my direction of travel now, we wish to divide our  
14          submissions into four main parts. First, I want to  
15          remind you briefly of the proper approach in law to  
16          pass-on in the particular context of MIFs and in the  
17          context of proceedings of this nature. After that,  
18          I will show you in quite a bit of detail the approach of  
19          Mr Holt, the expert economist that we have instructed,  
20          and in his -- who, in his two reports, highlights  
21          a number of important points, and to take you through  
22          his methodology and to show you some parts that then  
23          I would invite you to read, perhaps, as I said, at your  
24          leisure in more detail.

25          The third aspect I want to go to is to discuss the

1 alternative approach of the experts for the SSH  
2 Claimants, Mr Trento and Mr Economides. I am going to  
3 leave Mr Coombs, Ms Webster and Mr Harman, with no  
4 disrespect, but I am going to leave those to be  
5 addressed by others, because I am sure they will, and  
6 what I would like to draw your attention to, in large  
7 part, is the extensive critique of Mr Trento's work that  
8 is made by Mr Holt, particularly in his second report.

9 Then you will be relieved to hear I am going to sit  
10 down, and Ms Boyd KC will address you briefly on the  
11 particular Allianz claim and the issues arising in that.  
12 We are hoping there will be time for that. If there is  
13 not, we will have to leave that for closing submissions.

14 THE CHAIRMAN: We will of course have to have a break  
15 mid-morning.

16 MR JOWELL: Yes, indeed.

17 Turning then, if I may, to the first part, the law.  
18 Now, in the ordinary course we will need to debate the  
19 law and the legal issues in detail in closing  
20 submissions, and I certainly do not want to go through  
21 all of the relevant authorities today, that will have to  
22 wait. But I do want to say a short word about the  
23 proper approach to law and I do so for two reasons.

24 First, because there have been some, to our minds  
25 slightly surprising assertions in this regard made by

1 the claimants by reference to case law that covers very  
2 different facts and circumstances. The second reason  
3 I think I do need to touch on the law is because we are  
4 particularly fortunate in this trial in that we, almost  
5 uniquely, have not one but two relatively recent  
6 Supreme Court decisions that provide very helpful  
7 guidance as to the proper approach in law, not just to  
8 estimating pass-on generally, but to estimating pass-on  
9 in this very specific type of case, where one has  
10 potential pass-on of MIFs by merchants to end-consumers.  
11 What I want to show you is that the approach the  
12 claimants are urging on you is very different to that  
13 which is set out by those Supreme Court judgments and  
14 indeed also departs from the prior judgments in  
15 interlocutory proceedings by this Tribunal, in this  
16 case, and we think it is right to just briefly correct  
17 those misconceptions at the outset.

18 So the first of the Supreme Court judgments that  
19 I would like to take you back to is to the judgment in  
20 *Sainsbury's* in the Supreme Court, which is in the bundle  
21 at {AB-D/21/1}. The hearing was in January and the  
22 judgment was given in June 2020.

23 Now, *Sainsbury's* is not a claimant in these  
24 proceedings because the case has since been settled, but  
25 it is a directly analogous case, also concerning MIFs

1 and pass-on. Indeed, *Sainsbury's* is said to be one of  
2 the close competitors of some of the claimant companies.

3 Now, the background to the case I am sure will be  
4 familiar to the Tribunal, and I am not going to take you  
5 to the judgments at first instance or in the Court of  
6 Appeal, but just to remind you of the background. At  
7 first instance, the Competition Appeal Tribunal had  
8 considered whether *Sainsbury's* passed on any MIF  
9 overcharge in the prices charged to its own customers  
10 and it found, in summary, that whilst from an economic  
11 perspective there was likely to have been significant  
12 pass-on, the legal requirements for pass-on were not  
13 met.

14 In particular, the Tribunal found that there were  
15 two requirements for there to be pass-on in law; the  
16 first being that there had to be a claim from customers  
17 at the next level to whom the loss was passed on; at  
18 that time *Merricks* was not launched, of course. The  
19 second requirement was a proximity requirement. The  
20 approach of the Tribunal appeared to be, although it is  
21 not entirely clear from the judgment, that for proximity  
22 to arise, the loss had to be passed on in the form of an  
23 identifiable price rise of particular goods for there to  
24 be sufficient proximate causal connection, and it found  
25 that -- held that neither of those requirements were

1           made out. On that basis, the Tribunal found that there  
2           was no pass-on when it came to the calculation of  
3           damages.

4           However, at the same time, the Tribunal held in  
5           relation to estimating the amount of interest due on the  
6           award of damages that 50% of the loss had in fact been  
7           passed on and so interest was only due on half the  
8           award.

9           Mastercard appealed to the Court of Appeal on the  
10          grounds that there was a material manifest inconsistency  
11          between the finding of pass-on for the purposes of  
12          interest and the finding of pass-on for the purposes of  
13          damages.

14          Now, the Court of Appeal in its judgment indicated  
15          that it disagreed with the Tribunal's first requirement  
16          for legal pass-on, namely that there had to be a viable  
17          claim by a downstream class of consumers as an absolute  
18          condition for invoking the pass-on defence. However, it  
19          held that there was no inconsistency between the award  
20          on interest and on damages by, in effect,  
21          re-interpreting the finding on interest as one based not  
22          on pass-on to downstream customers, but instead internal  
23          pass-on in the form of lower expenditure and costs.

24          Now, the Court of Appeal did not directly opine on  
25          the content of the requirement for a sufficiently

1 proximate causal connection; in other words, on the  
2 supposed requirement to be able to identify the  
3 overcharge and then identify how that tracks through  
4 into the price of particular goods, and that is perhaps  
5 not particularly surprising because the point was not  
6 directly appealed. The appeal was on this point of  
7 inconsistency.

8 But the Court of Appeal did state that the broad axe  
9 principle that applied to the estimation of damages did  
10 not apply to the estimation of pass-on, and it was that  
11 last point that Mastercard took as a point of principle  
12 on appeal to the Supreme Court.

13 So it was in that rather roundabout way, by  
14 reference to the broad axe principle, that the proximity  
15 issue indirectly found itself before the Supreme Court.

16 THE CHAIRMAN: It really was a roundabout way, was it not?

17 MR JOWELL: It really was. In any event, that is the story  
18 so far, if I can put it that way.

19 If I could now pick it up in the judgment of the  
20 Supreme Court at paragraph 175 {AB-D/21/62}, you will  
21 see the broad axe issue, and we see an articulation of  
22 the issue that was before the court. The issue is  
23 concerned with the degree of precision that is required  
24 in the quantification of mitigation of loss where  
25 a defendant to a claim for damages arising out of

1 a breach of competition law asserts that the claimant  
2 has mitigated its loss through the passing on of all or  
3 part of an overcharge to its customers.

4 We see in paragraph 176 the Court of Appeal's  
5 statement that was the object of the appeal, where they  
6 state, as you see in the quote, that the broad axe  
7 principle does not apply:

8 "There is no scope for the application of any such  
9 principle where the burden lies on the defendants to  
10 establish a pass-on of the unlawful overcharge in order  
11 to reduce the amount recoverable by the claimant."

12 Now, we see in paragraph 177, below that, the Court  
13 of Appeal's further statement that -- perhaps if we can  
14 go over the page, at 178 it notes the -- forgive me,  
15 could we go back to 177. I should have shown you  
16 the ...

17 So we see in 177 it notes the issue, as I described  
18 it:

19 "The Court of Appeal's statement is part of its  
20 discussion of a ground of appeal based on the assertion  
21 that the CAT had been inconsistent in rejecting  
22 Mastercard's case that the merchants had mitigated their  
23 loss by pass-on while making an allowance when awarding  
24 compound interest, for pass-on, which it estimated at  
25 50% of the claimed loss ... Mastercard has not renewed

1           that submission in these appeals, but, as we explain  
2           below, the debate around this issue widened in the  
3           course of the hearing."

4       THE CHAIRMAN:  So Mastercard was not even -- I mean, the  
5           whole -- the issue of pass-on was not before the  
6           Supreme Court?

7       MR JOWELL:  Yes and one, no douBT...

8       THE CHAIRMAN:  Nor was the inconsistency with the CAT's  
9           finding on compound interest?

10      MR JOWELL:  That is absolutely right.  No douBT one imagines  
11           that the reason for that is that it did not consider  
12           that the particular finding on pass-on or compound  
13           interest were suitable for the Supreme Court as a point  
14           of interest of general public importance, and so they  
15           appeal on that point, on broad axe instead.

16      THE CHAIRMAN:  But, as they say there, "the debate around  
17           this issue widened".

18      MR JOWELL:  It did.  It did.  It widened in particular in  
19           relation to burden of proof, but also, I think, somewhat  
20           beyond that as well, because they -- as you will see,  
21           the issue of really how the broad axe should be applied  
22           in a case like this is very clearly telegraphed by the  
23           Supreme Court.

24           If one goes forward, please, to the next page --

25      THE CHAIRMAN:  Do we know what submissions were actually



1           made on this issue by the parties; if it was not  
2           actually an issue before the Supreme Court, but the  
3           Justices were obviously interested in it in some way or  
4           other and raised it or widened the debate, do we know  
5           what the submissions were?

6       MR JOWELL: Yes, there were -- I was not personally present  
7           but others were. But my understanding is that the  
8           Supreme Court asked for further submissions, both  
9           written and oral, particularly on the issue of the  
10          burden -- on whom the burden of proof lies, and those  
11          submissions were made.

12       THE CHAIRMAN: Right.

13       MR JOWELL: I am sure they can be provided to you, if that  
14          would be of interest.

15       THE CHAIRMAN: But we are not particularly interested --  
16          where burden of proof is now established, we are more  
17          interested in the sort of wider comments about pass-on.

18       MR JOWELL: That is exactly it, and that is what I want to  
19          take you to, if I may.

20                One notes in 180, they talk about the fact that  
21                there were further submissions invited by the court on  
22                which party bears the burden of proof.

23                If we could go to the next page, please. The court  
24                then, from 182 onwards, sets out the European law  
25                position, noting the need for a compensatory remedy to

1       those harmed by a breach of competition law that  
2       satisfies the principle of effectiveness.

3           If we could pick it up, please, at the bottom of the  
4       page, at the bottom of page 67, please {AB-D/21/67}, we  
5       see that in paragraph 194 it reminds us of the  
6       well-familiar principle that damages for a tort are  
7       intended to be compensatory. Then over the page, please  
8       {AB-D/21/68}, we see at paragraph 197 it draws the  
9       conclusion that:

10           "There are sound reasons for taking account of  
11       pass-on in the calculation of damages for breach of  
12       competition law. Not only is it required by the  
13       compensatory principle but also there are cases where  
14       there is a need to avoid double recovery through claims  
15       in respect of the same overcharge by a direct purchaser  
16       and by subsequent purchasers in a chain, to whom an  
17       overcharge has been passed on in whole or in part."

18           That is of course precisely this case, now that  
19       *Merricks* have come within the umbrella proceedings.

20           If one goes, please -- well, the court then embarks  
21       on an analysis of whether the merchants are entitled to  
22       plead, as a prima facie measure of their loss, the whole  
23       of the overcharge within the MSC, and I do not think I  
24       need to trouble you with the case law and the reasoning  
25       because, as you are well aware, it concludes, based on

1           an analysis really of the common law case law, that they  
2           are entitled to so plead.

3           If I could then please go to page --

4       THE CHAIRMAN: They do not have to prove a loss of profit?

5       MR JOWELL: They do not have to, absolutely correct. They  
6           do not have to. That is not the correct way to approach  
7           it.

8       THE CHAIRMAN: Yes.

9       MR JOWELL: But if one goes, please, to page 70

10           {AB-D/21/70}, one sees in paragraph 205 it describes the  
11           various commercial options available to merchants that  
12           pay the overcharge, and it notes, in particular, at  
13           option (iii) reducing costs by negotiation with its many  
14           suppliers might reduce the merchant's loss, and  
15           importantly, for present purposes, it concludes at  
16           option (iv) that pass-on by increasing prices to their  
17           own competitors would reduce the merchant's loss,  
18           subject to any abatement for loss of volume.

19           If I could then go forward, please, to page 73

20           {AB-D/21/73}, and we see paragraph 215. The court says:

21           "We are not concerned in these appeals with  
22           additional benefits resulting from a victim's response  
23           to a wrong which was an independent commercial decision  
24           or with any allegation of a failure to take reasonable  
25           commercial steps in response to a loss. The issue of

1 mitigation which arises is whether in fact the merchants  
2 have avoided all or part of their losses."

3 Then it quotes from the test in *British Westinghouse*  
4 where it says that the action must be one "arising out  
5 of the transaction".

6 THE CHAIRMAN: *British Westinghouse* is not even a tort case,  
7 it is a contract case.

8 MR JOWELL: Indeed, indeed. But I think the test is very  
9 similar in both, I think it is really the same, in terms  
10 of this aspect.

11 THE CHAIRMAN: Right.

12 MR JOWELL: They note:

13 "Here also a question of legal or proximate  
14 causation arises as the underlined words show."

15 So just pausing there. The court is treating the  
16 question of legal causation and proximate causation here  
17 as effectively one and the same, and that is  
18 significant, because the claimants appear to be seeking  
19 to argue that although there is legal causation,  
20 nevertheless there is not proximate causation. In this  
21 context of the MIF, and in light of the Supreme Court's  
22 discussion of it, we say legal causation and proximate  
23 causation are effectively one and the same thing, and  
24 the --

25 THE CHAIRMAN: Is that what they are saying? They are

1           saying that they are the same, legal --

2       MR JOWELL:  They say -- I think they are using them, in this  
3           context at least, as terms that are equivalent, because  
4           they say:

5           "... a question of legal or proximate causation  
6           arises as the underlined words show."

7       THE CHAIRMAN:  I know they say that, but is that what they  
8           are intending to mean?

9       MR JOWELL:  Well --

10      THE CHAIRMAN:  That it is one and the same thing, "legal or  
11           proximate causation"?

12      MR JOWELL:  In my submission, they are in the context of the  
13           MIF.  That comes -- I think that becomes very clear as  
14           we go forward, because they go on to say:

15           "But the question of legal causation is  
16           straightforward in the context of a retail business in  
17           which the merchant seeks to recover its costs in its  
18           annual or other regular budgeting.  The relevant  
19           question is a factual question: has the claimant in the  
20           course of its business recovered from others the costs  
21           of the MSC, including the overcharge contained therein?  
22           The merchants, having acted reasonably, are entitled to  
23           recover their factual loss.  If the court were to  
24           conclude on the evidence that the merchant had, by  
25           reducing the cost of its supplies or by the pass-on of

1           the cost to its customers (options (iii) and (iv) ...)  
2           transferred all or part of its loss to others, its true  
3           loss would not be the prima facie measure of the  
4           overcharge but a lesser sum."

5           It is clear to us that this is not restricting  
6           pass-on to mechanical cost-plus pricing. Indeed,  
7           *Sainsbury's* itself did not involve pricing on  
8           a straightforward cost-plus basis. The only question in  
9           a scenario like *Sainsbury's* is a factual one: to what  
10          extent, if at all, were the costs passed on? This is  
11          also stressed, in our submission, in the Supreme Court's  
12          decision in *Merricks*, and it is a broad axe question,  
13          one to be determined as best one can on the evidence  
14          available, which may be factual or expert or  
15          a combination, and will depend also upon what is  
16          proportionate and appropriate in the circumstances of  
17          the particular case.

18          If we go on to --

19       THE CHAIRMAN: What it means by "pass-on" is not actually  
20          defined, is it?

21       MR JOWELL: Well, it is the avoidance of loss by the -- by  
22          the prices charged to their own customers, and I think  
23          it is set out what that means.

24       THE CHAIRMAN: What it says is transferring --

25       MR JOWELL: Which we see --

1 THE CHAIRMAN: Transferring the loss to others.

2 MR JOWELL: Yes, in paragraph -- well, yes, in effect  
3 transferring --

4 THE CHAIRMAN: There is an actual transferring a specific  
5 loss to other parties, that is what it seems to  
6 contemplate.

7 MR JOWELL: Well, it is -- I do not think it is a specific  
8 loss and we will come on to that.

9 THE CHAIRMAN: Okay.

10 MR JOWELL: But, in any rate, in paragraph 216 we see that  
11 it then states its conclusions on the burden of proof.  
12 It says:

13 "The legal burden lies on the operators of the  
14 schemes to establish that the merchants have recovered  
15 the costs incurred in the MSC. But once the defendants  
16 have raised the issue of mitigation, in the form of  
17 pass-on, there is a heavy evidential burden on the  
18 merchants to provide evidence as to how they have dealt  
19 with the recovery of their costs in their business.  
20 Most of the relevant information about what a merchant  
21 actually has done to recover its costs, including the  
22 cost of the MSC, will be exclusively in the hands of the  
23 merchant itself. The merchant must therefore produce  
24 that evidence in order to forestall adverse inferences  
25 being taken against it by the court which seeks to apply

1 the compensatory principle."

2 This too is of some importance in this case, because  
3 the defendants have all raised the issue of mitigation  
4 in the form of pass-on, and so that then places the  
5 claimants under a heavy evidential burden. The  
6 claimants have not overcome the evidential burden of  
7 establishing no pass-on in fact. They certainly have  
8 not done so on the basis of their very limited  
9 qualitative evidence that they have served. That is not  
10 least because it has only come from a handful of  
11 claimants out of 600, and no one can say, at least not  
12 with a straight face, that those willing claimants are  
13 representative.

14 Now, of course, they can try to show, based on  
15 econometric and pricing expert evidence, that there is  
16 no pass-on, but, as I will go on to show you, that  
17 evidence does not pass muster.

18 The Supreme Court then turns to the particular issue  
19 raised on the appeal and you will see that in  
20 paragraph 217:

21 "The court in applying the compensatory principle is  
22 charged with avoiding under-compensation and also  
23 over-compensation. Justice is not achieved if  
24 a claimant receives less or more than its actual loss.  
25 But in applying the principle the court must also have



1        regard to another principle, enshrined in the overriding  
2        objective of the Civil Procedure Rules, that legal  
3        disputes should be dealt with at a proportionate cost.  
4        The court and the parties may have to forgo precision,  
5        even where it is possible, if the cost of achieving that  
6        precision is disproportionate, and rely on estimates.  
7        The common law takes a pragmatic view of the degree of  
8        certainty with which damages must be pleaded and proved  
9        ..."

10        Now, the principle of proportionality is of course  
11        of enormous importance in a case like the present where  
12        one has so many claimants that an individual  
13        consideration of each claimant would be completely  
14        unmanageable.

15        You then see, in the first sentence of  
16        paragraph 219, they say:

17        "We see no reason in principle why, in assessing  
18        compensatory damages, there should be a requirement of  
19        greater precision in the quantification of the amount of  
20        an overcharge which has been passed on to suppliers or  
21        customers because there is a legal burden on the  
22        defendants in relation to mitigation of loss."

23        So, importantly, there, they are stating that the  
24        legal burden does not actually resolve the issue of the  
25        broad axe in relation to pass-on. On the contrary, the

1 broad axe applies as much in relation to estimating  
2 pass-on as it does in relation to the estimation of the  
3 prima facie damages.

4 Then, over the page, please, at 220 {AB-D/21/75}, we  
5 see:

6 "As we have said, the relevant requirement of EU law  
7 is the principle of effectiveness. The assessment of  
8 damages based on the compensatory principle does not  
9 offend the principle of effectiveness provided that the  
10 court does not require unreasonable precision from the  
11 claimant. On the contrary, the Damages Directive is  
12 based on the compensatory principle."

13 Then it refers to the European Commission Guidelines  
14 and it states that they make clear that:

15 "... the compensatory principle 'underlies the  
16 entire Damages Directive and must be understood as  
17 requiring that a person entitled to claim compensation  
18 for the harm suffered must be placed in the position in  
19 which that person would have been had the infringement  
20 not been committed'. It goes on to state that pass-on  
21 may be invoked by an infringer as a shield against  
22 a claim for damages and by an indirect purchaser as  
23 a sword to support the argument that it has suffered  
24 harm ..."

25 Again, that is critical, because if you apply too

1       stringent a test for pass-on, you then shut out the  
2       claims by indirect purchasers, who will have been  
3       potentially the people who in reality will have suffered  
4       the loss, and therefore you offend the compensatory  
5       principle as regard those indirect purchasers. In this  
6       case, that is the *Merricks* class.

7             If one goes on to paragraph 224, please, on page 76  
8       {AB-D/21/76}, you see the court there says:

9             "As the regime is based in the compensatory  
10       principle and envisages claims by direct and indirect  
11       purchasers in a chain of supply, it is logical that the  
12       power to estimate the effects of passing-on applies  
13       equally when pass-on is used as a sword by a claimant or  
14       as a shield by a defendant."

15            So, in other words, there has to be symmetry here.  
16       You cannot become terribly generous about pass-on when  
17       you are faced with a claim by an indirect claimant and  
18       then incredibly stringent when you are faced with  
19       a claim by a direct claimant. They have to be treated  
20       in the same way. That is why -- part of the reason why  
21       the broad axe principle does apply in these contexts and  
22       why one cannot apply an extremely sort of stringent type  
23       of test that the Competition Appeal Tribunal did at  
24       first instance in *Sainsbury's* in these types of cases.

25            Then if one goes to paragraph 225 {AB-D/21/76}, you

1           see they say:

2           "The loss caused by the overcharge included in the  
3           MSC was an increased cost which the merchants would in  
4           all probability not address as an individual cost but  
5           would take into account along with a multiplicity of  
6           other costs when developing their annual budgets. The  
7           extent to which a merchant utilised each of the four  
8           options, which the CAT identified and we described in  
9           para 205 above, can only be a matter of estimation. In  
10          accordance with the compensatory principle and the  
11          principle of proportionality, the law does not require  
12          unreasonable precision in the proof of the amount of the  
13          prima facie loss which the merchants have passed on to  
14          suppliers and customers."

15          So just pausing there, that is a clear indication  
16          from the Supreme Court that it is not an impediment to  
17          estimating pass-on merely because the merchant does not  
18          address MSCs as an individual cost, but rather takes  
19          them into account when developing an overall annual  
20          budget, and a very clear steer indeed that, even in  
21          a case with just one claimant, like *Sainsbury's*, the  
22          court should not have required a defendant to prove with  
23          unreasonable precision a deliberate, conscious singling  
24          out of a particular cost in question, still less than  
25          a subsequent identifiable price rise into a particular

1 line of goods.

2 That is, as --

3 PROFESSOR WATERSON: Can I just ask: if in the circumstances  
4 you can use the MSC, then presumably there is no bar to  
5 that, it is simply that if you --

6 MR JOWELL: Absolutely, absolutely, yes.

7 PROFESSOR WATERSON: Thank you.

8 MR JOWELL: Yes. Of course, if the MSC, or perhaps with one  
9 or two other costs, are included in the accounts, well,  
10 then, that is an a fortiori case, but it is no bar if  
11 they are not -- if they are melded in with other costs.

12 MR TIDSWELL: Mr Jowell, just to tie that back into the  
13 earlier discussion about proximity. I think you are  
14 saying to us that this is really just a but-for test; in  
15 other words, am I right in thinking you are removing  
16 some of the layers that the claimants apply to the  
17 slight proximity and directness. I may be interested to  
18 hear what you say about directness. But you are saying  
19 all we are really doing is, because of the observations  
20 about legal causation here and elsewhere, you are saying  
21 we are just a looking at but-for; is that the position?

22 MR JOWELL: That is more or less the position. Of course,  
23 it is based on the particular facts of this case,  
24 where -- and I accept that -- where the MSC is an  
25 identifiable charge, where it is of a reasonable size,

1           and so on. But it is -- it seems to us that the  
2           clear -- the clear question that the -- the clear  
3           approach that the Supreme Court is directing here is to  
4           say estimated on a but-for basis; and the emphasis is on  
5           "estimated" on a but-for basis, you do not have to get  
6           precision.

7           That point is really underlined in bold three times  
8           in the next case that I would like to take you to, which  
9           is the *Merricks* case.

10       MR TIDSWELL: Just before we do that. So what you are --

11           I think you are saying that proximity does not come into  
12           that, because that is a legal causation concept, and  
13           legal causation should be taken as read here.

14       MR JOWELL: Yes.

15       MR TIDSWELL: So proximity might well be a filter for  
16           something like that, might it not? You might apply  
17           proximity as a filter in a legal causation lens to make  
18           sure that, as it is put in *Westinghouse*, there is  
19           a connection, a sufficient causal connection to costs  
20           arising out of.

21       MR JOWELL: Yes.

22       MR TIDSWELL: So what is -- is there a filter that is still  
23           applied to the but-for here? What is the filter that is  
24           applied once you have lost proximity? Is it directness,  
25           or is it a competing causative -- or competing causative

1 events?

2 What sort of -- when you come to look at this, and  
3 we have the difficulty of there being a multiplicity of  
4 other costs, what is it that the estimation is pushing  
5 against?

6 MR JOWELL: Well, in my submission, there is no sort of --  
7 in the case of the MIF, at least, the court is saying  
8 there is no further test that is required because ...  
9 based on the particular circumstances.

10 I accept that in other cases, and the Trucks case is  
11 an example, it may be appropriate to impose filters, as  
12 has been done, or, if you like, to try to  
13 articulate: well, how does one spell out from the  
14 Supreme Court's approach here what other sort of factors  
15 get you into a world where you are just looking at  
16 a but-for estimation?

17 But I think in a sense for the present -- for this  
18 case, one really does not need to be, as my children  
19 would say, too deep about it, because the Supreme Court  
20 has said, effectively, this is the approach you must  
21 take, you must take an estimation, and, as I said,  
22 particularly in a case where you have a collective  
23 proceedings, which is where we see -- which we see from  
24 *Merricks*.

25 MR TIDSWELL: What about directness then? Because that is

1           the other expression that is used, I think "directly  
2           proximate" is what Mr Beal's submissions say. So in  
3           directness -- do you say directness is a filter that  
4           does not apply here as well?

5       MR JOWELL: Well, I think it must arise out of the  
6           transaction, I think is the expression used in British  
7           Westinghouse, is it not, and they say that therefore  
8           there must be some kind of a link between the two  
9           things. But they say where the cost comes into the  
10          annual budget, which they then seek to recover, in  
11          a case like this one, a MIF case, and they do not spell  
12          out necessarily what all of those circumstances are, but  
13          they say -- then it is, as the Tribunal later put it,  
14          this Tribunal later put, it is a no-brainer.

15       MR TIDSWELL: Yes. It is difficult, is it not, because  
16           I think -- in some ways I am not sure this becomes any  
17           easier once you do start splitting out legal and factual  
18           causation as separate concepts, because you have  
19           referred back to *British Westinghouse*, and actually  
20           arising out of the transaction, I think as a test, as  
21           I understand it, and similarly as it is expressed here,  
22           it is a test of legal causation.

23       MR JOWELL: Yes.

24       MR TIDSWELL: Clearly there must also be a factual causation  
25          connection, which is just that it has caused it, and you



1           might say that that is no different from showing that it  
2           arises out of a transaction --

3       MR JOWELL:   Yes.

4       MR TIDSWELL:  -- because it has to be connected to it in  
5           some way in order to be causative.  But once we start  
6           splitting these things up, actually I am not sure that  
7           some of the authorities are that helpful or that clear  
8           about how one looks at them individually as opposed to  
9           the composite --

10      MR JOWELL:  No, I agree.  It is a very thorny and difficult  
11           issue in some cases, but it is not in this case because  
12           of what the Supreme Court has said.

13           One does also need to bear in mind this question of  
14           proportionality, which the Supreme Court mentions in  
15           *Sainsbury's*, and which, again, we come on to in  
16           *Merricks*, which is you have to -- one has to do what one  
17           can do with the material you have in the case that is  
18           before you, and where the case is an industry-wide,  
19           economy-wide case, you cannot sensibly look at  
20           a separate sort of direct causal requirement for each  
21           individual claimant.  You have to -- you really have no  
22           option other than to address it on a broad brush  
23           estimate, based on a but-for test, and based upon the  
24           econometric evidence really, informed if necessary by  
25           some qualitative evidence, but, as we will see, not --

1           there is not much information that one gets out of the  
2           qualitative evidence in this case.

3       MR TIDSWELL:   Thank you.

4       THE CHAIRMAN:   Are you saying the Supreme Court is saying  
5           that it is sufficient if the MSC cost was included or  
6           taken account of in a claimant's annual budgets?

7       MR JOWELL:   I think that is sufficient for -- they are  
8           saying in the circumstances of the MIF, that is  
9           sufficient to establish legal causation.   But of course  
10          one still needs to then establish factual causation, and  
11          that -- they are leaving that open.   They are not saying  
12          necessarily all of the MIF was passed on.   They say they  
13          are indicating probably there was pass-on, but they are  
14          not finding -- they are not determining that factual  
15          issue, and what they are -- and that is a matter then to  
16          be determined on all the evidence in the particular  
17          case.

18       THE CHAIRMAN:   I mean, any overcharge in any case would  
19           obviously be included in some way or other in every  
20           company's annual budgets.

21       MR JOWELL:   Well, yes.

22       THE CHAIRMAN:   It would be tucked in there somewhere, one  
23           would assume.   So does that mean that in every -- is  
24           that why you say the Supreme Court said that legal  
25           causation is straightforward?

1 MR JOWELL: Well, I say that on the facts of the MIF case,  
2 they are saying it is straightforward. One can -- one  
3 can try to extract further principles, if you like, that  
4 distinguish the MIF case from other cases where, for  
5 example, the nature of the overcharge is radically  
6 different in form where you have, say, a capital  
7 expenditure, and then that is said to be translated into  
8 prices.

9 But in the cases of -- in a case like the MIF, where  
10 it is charged on every card transaction, and it is  
11 a discernible cost, it is really not a difficult issue  
12 to say the proximity is there, even if one needs to, of  
13 course, delve into the evidence in order to discern what  
14 the extent was, even perhaps if there was in  
15 a particular case no pass-on, but that is a factual  
16 issue that turns on the econometric and, if available,  
17 qualitative evidence.

18 So if I may turn on to *Merricks*, which is in  
19 {AB-D/23/1}. Again, this is now part of these umbrella  
20 proceedings and bound by the outcome, so this is in  
21 effect a judgment in this very set of proceedings,  
22 albeit about certification.

23 Now, the hearing in *Merricks* was in May 2020, so  
24 a month before the Supreme Court had handed down its  
25 judgment in *Sainsbury's*, but the judgment was delivered

1 in December 2020 after the *Sainsbury's* judgment, and the  
2 majority decision is given by Lord Briggs.

3 If we could go, please, to page 18 {AB-D/23/18},  
4 where we see in paragraph 30 Lord Briggs notes that the  
5 Tribunal rejected the certification on two grounds, the  
6 first being that the claims were "not suitable for an  
7 aggregate award of damages". The second was that the  
8 proposals for the distribution of damages award "did not  
9 respond ... to the compensatory principle".

10 If we could go over the page, please, to  
11 paragraph 31 and paragraph 32 {AB-D/23/19}, he says:

12 "The first reason requires some unpacking.  
13 Mr *Merricks* supported his application by an expert  
14 report from Dr Veljanovski, an economist, and  
15 Mr Dearman, a forensic accountant, which sought to  
16 explain (inter alia) the methodology by which it was  
17 proposed to support an award of aggregate damages for  
18 the losses cumulatively suffered by an enormous class  
19 over the Infringement Period. That methodology included  
20 dividing the retail goods and services market into some  
21 11 sectors, seeking to establish the degree of merchant  
22 pass-on in each and then deriving a weighted average  
23 across the retail market as a whole. Expressed as  
24 a fraction or percentage, that average could be used to  
25 estimate the amount of the overcharge (separately

1 identified) passed on to consumers, and therefore the  
2 amount of the overcharge which represented the aggregate  
3 loss of the consumers, as opposed to the merchants, as  
4 a separate class."

5 Then in paragraph 32, he notes that:

6 "After a hearing which included questioning of the  
7 experts by the members of the CAT and some  
8 cross-examination by counsel for Mastercard, the CAT  
9 concluded that the experts had not demonstrated  
10 a sufficient likelihood of there being available at  
11 trial sufficient data for all those sectors across the  
12 whole of the Infringement Period to enable that  
13 methodology to generate a sufficiently reliable result.  
14 The CAT did not by this conclusion mean that they  
15 regarded it as impossible, or even unlikely, for  
16 Mr *Merricks* to be able to prove at trial that the class  
17 had suffered some loss. Rather, their concern was as to  
18 the probable unreliability of the quantification of that  
19 loss, on a class-wide basis as permitted by the  
20 procedure for an award of aggregate damages."

21 Their conclusions -- it then quotes part of their  
22 conclusions, noting that there would not be:

23 "... sufficient data ... for this methodology to be  
24 applied on a sufficiently sound basis."

25 If I could ask that we go forward to page 24, please

1 {AB-D/23/24}, and if you see paragraph 46 at the bottom:

2 "The issues which gave rise to the forensic  
3 difficulties which led to the CAT's refusal of  
4 certification in the present case all relate to the  
5 quantification of damages, both at the class level  
6 (where the claims were held to be unsuitable for  
7 aggregate damages) and at the individual level (where  
8 the method of distribution was found to pay insufficient  
9 respect to the compensatory principle). In this  
10 follow-on claim Mr *Merricks* and the class he seeks to  
11 represent already have a finding of breach of statutory  
12 duty in their favour. All they would need as individual  
13 claimants to establish a cause of action would be to  
14 prove that the breach caused them some more than purely  
15 nominal loss. In order to be entitled to a trial of  
16 that claim they would (again individually) need only to  
17 be able to pass the strike-out and (if necessary)  
18 summary judgment test ..."

19 Then if you perhaps read -- if you could read  
20 paragraphs 47 and 48 to yourselves please {AB-D/23/25}.

21 (Pause)

22 This principle of estimation, if necessary by  
23 guess-work, and doing the best one can on the material  
24 available to estimate the appropriate sum for  
25 compensation, is stressed again and again in the

1 judgment. For your note, 50, 53, 54, 55 and 58.

2 Then at page 35, at paragraph 72, Lord Briggs  
3 returns to this theme of the need to do what it can with  
4 the available evidence. Again, if I could invite you to  
5 read paragraphs 72 to 74 {AB-D/23/35}. (Pause)

6 THE CHAIRMAN: The CAT owes a duty to the represented class.

7 MR JOWELL: Forgive me?

8 THE CHAIRMAN: The CAT owes a duty, apparently, to the  
9 represented class to carry out that.

10 MR JOWELL: Indeed. That is what the Supreme Court tells  
11 us.

12 THE CHAIRMAN: Yes.

13 MR JOWELL: I should show you briefly two further short  
14 judgments of this Tribunal. I know that that might be  
15 regarded as unnecessary, but I do so because I am  
16 conscious that the composition of the Tribunal has  
17 changed.

18 What the judgments show is that this Tribunal has  
19 already rejected the idea that in the case of the  
20 present MIF overcharge there is, at least as a general  
21 matter, any remaining issue of legal or proximate  
22 causation that it is necessary to resolve.

23 So could we go, please, to the judgment in what we  
24 call the causation ruling, which is at {RC-D/7/1}. If  
25 we go, please, to page 23 {RC-D/7/23}, we see that the

1 Tribunal set out paragraphs 215 and 216 of the judgment  
2 of the Supreme Court in *Sainsbury's* that we have just  
3 looked at, and it breaks those paragraphs down into four  
4 propositions, A, B, C and D, and the critical one is the  
5 one in B, which starts with the words "Here also  
6 a question of legal or proximate causation arises",  
7 which we looked at.

8 If we could go, please, to the next page, page 24  
9 {RC-D/7/24}, we see at paragraph 50, subparagraph (2),  
10 the Tribunal said this:

11 "This is a reference to the fact ..."

12 The proposition being:

13 "This is a reference to the fact that causation  
14 (which, as we have said, the second aspect of mitigation  
15 turns on) itself has two aspects, 'legal' causation and  
16 'factual' causation:

17 "(i) Factual causation is the more obvious of the  
18 two: it involves consideration of whether the effect of  
19 the alleged mitigating conduct was, as a matter of fact,  
20 to reduce or eliminate B's loss.

21 "(ii) Legal causation concerns the question of  
22 whether - even if the effect of the alleged mitigating  
23 conduct was, as a matter of fact, to reduce or eliminate  
24 B's loss -- as a matter of legal policy it should serve  
25 to reduce or eliminate the amount of damages that A



1       should pay B. The question arises quite frequently and  
2       is an elusive one. Thus, the fact that a claimant  
3       receives an indemnity by virtue of a contract of  
4       insurance is regarded as 'collateral' to the defendant's  
5       liability and thus will not affect it. In personal  
6       injury cases, the fact that the claimant receives some  
7       benefits as a result of his or her injury is also  
8       generally regarded as 'collateral'."

9       If one looks over the page, please, at paragraph 51  
10      {RC-D/7/26}, we see:

11      "We consider that there is no point of law that we  
12      need to resolve. Although the Supreme Court was  
13      referring to retail businesses, we consider exactly the  
14      same to be true of the other types of businesses (for  
15      example, councils, local authorities and universities)  
16      that feature in the proceedings before us."

17      Then we turn to the question of the pleadings.

18      Now, that was not clear enough for the claimants and  
19      they sought to raise, again, the question of legal or  
20      proximate causation. That was scotched by the Tribunal  
21      in a further ruling. If we could go to that at  
22      {RC-D/26/1}. If we could go to page 3, please  
23      {RC-D/26/3}.

24      You see:

25      "The point on which ..."

1           We see at paragraph 3:

2           "The point on which the Visa Defendants seek  
3 clarification on is set out in the first paragraphs of  
4 their written submissions ... The first three paragraphs  
5 of these submissions appropriately set out the battle  
6 lines:

7           "1. This is Visa's skeleton argument ... concerning  
8 the test of causation for pass on to be established in  
9 these proceedings.

10          "2. The question for Trial 2 is fundamentally one of  
11 economic fact. That question is whether if the merchant  
12 service charges ... had been lower, the claimants would  
13 have charged lower prices to their customers and, if  
14 not, whether they would have agreed to pay higher prices  
15 to their customers. In other words, would the claimants  
16 have charged lower prices to their customers or paid  
17 higher prices to their suppliers but for the  
18 overcharge."

19          That is the but-for test that Mr Tidswell mentioned.

20          "3. Contrary to that established position, the  
21 claimants now appear to suggest that at the substantive  
22 trial they will argue that something over and above  
23 factual causation I required. In other words, they want  
24 to be able to deny that a pass on occurred, even if the  
25 aforementioned question of economic fact is answered in

1 the affirmative. They make two core arguments in  
2 support of that proposition. One, that the Tribunal has  
3 not excluded proximity as a relevant consideration in  
4 the test for causation in these proceedings, or, two,  
5 that to the extent it has done so, the Tribunal's  
6 statements are not binding on the claimants or are not  
7 binding on all of them."

8 Then it says:

9 "4. The scope of the issues to be determined in  
10 Trial 2 is a matter that has troubled the Tribunal on  
11 a number of previous occasions. It is time to put this  
12 emphatically to bed. We have considered whether we need  
13 to make an additional ruling at all and our judgment is,  
14 in fact, that no additional ruling is required beyond to  
15 say that what we have said in the past is clear and  
16 determinative of the scope of Trial 2."

17 Then it is paragraph 6. It goes on:

18 "The first sub-sub-paragraph ... deals with  
19 [explaining its previous ruling] factual causation,  
20 which is the subject matter of Trial 2. There is,  
21 ongoing before us, a debate about what evidence is  
22 needed in order to resolve the questions of factual  
23 causation ... Those questions are being considered  
24 elsewhere and are not for today. Nothing in this Ruling  
25 is intended to say anything about the evidence that is

1 or ought to be admitted for the purposes of resolving  
2 the questions of factual causation articulated in  
3 [50(2)(i)]."

4 That is because the question of whether there should  
5 be any qualitative evidence was up in the air at that  
6 point.

7 Then it goes on:

8 "Legal causation is the subject matter of the next  
9 sub-sub-paragraph ... The intention of this paragraph -  
10 and we consider the wording to be very clear - was to  
11 state our conclusion that the questions of legal  
12 causation there articulated were not before the Tribunal  
13 because, as propositions, they were not arguable as  
14 a matter of law. That is the clear meaning of the last  
15 two sentences of [50(2)(ii)], where we referenced and  
16 adopted the Supreme Court's approach to questions of  
17 legal causation, going so far as to describe this  
18 approach as a 'no-brainer'. We are comforted in this  
19 assessment by the endorsement of our statement by the  
20 Court of Appeal in *Royal Mail Group Limited v DAF* ...  
21 which states the law as it has previously been stated by  
22 the Supreme Court and this Tribunal."

23 The Tribunal then goes on at paragraph 11  
24 {RC-D/26/5} to note that:

25 "These are emphatically not collective proceedings,

1           and we have in the past indicated that we are sensitive  
2           to the fact that there are a range of claimants with  
3           different claims who are being represented in the  
4           efficient way we have articulated. We have, in the  
5           past, discussed the need for what is termed an  
6           'exceptions process', a process whereby it is possible  
7           to deal with the exceptional case after Trial 2 has  
8           concluded. At the moment, no such exceptional cases  
9           have been identified; and we have made it clear that the  
10          exceptions process is one that we will visit after  
11          Trial 2 and not before.

12                 "12. At the moment therefore, as matters stand, all  
13          claimants are going to be bound by the outcome of  
14          Trial 2, whatever that outcome might be. We want to  
15          make clear that we regard as intrinsic to the exceptions  
16          the early articulation of the exceptional case as soon  
17          as it is capable of identification. We will take a dim  
18          view of someone contending, right at the end of Trial 2,  
19          that they are in some way exceptional and that  
20          therefore, the general conclusion of Trial 2 does not in  
21          some way therefore apply to them. For an exceptional  
22          case properly to be run, then it must be articulated as  
23          early as it can be, so that we can take it into account  
24          and work out whether it can be dealt with within the  
25          scope of Trial 2 or thereafter."

1           So the Tribunal leaves open the possibility of an  
2           individual claimant identifying that legal or proximate  
3           causation is a live issue on the particular facts of  
4           their particular claim and notes also that there would  
5           have to be a very early articulation of that. We cite  
6           in our written openings that that was emphasised over  
7           and over again, and, further, the need for early  
8           articulation was emphasised over and over again at  
9           subsequent case management meetings.

10       THE CHAIRMAN: You say that is legal or proximate causation  
11       that is being left over --

12       MR JOWELL: Yes, for particular --

13       THE CHAIRMAN: Just looking back at paragraph 50(2)(i),  
14       which is the -- or 50(2)(ii), which is the one that was  
15       emphatically not part of this trial, and that talks  
16       about whether there is a matter of legal policy which  
17       "should serve to reduce or eliminate the amount of  
18       damages", and there is reference to contracts of  
19       insurance as being collateral, etc.

20       MR JOWELL: Yes.

21       THE CHAIRMAN: There is no reference to proximity in that.

22       MR JOWELL: Well, I think there is -- I think one does see  
23       a reference to proximity in the -- it is quoted in the  
24       original Supreme Court judgment, where they say "legal  
25       or proximate".

1 THE CHAIRMAN: I know that. But this was referencing the  
2 earlier Tribunal ruling and the way the matter was  
3 defined there, namely paragraph 50(2)(ii), and the legal  
4 causation issue there raised is legal policy, not -- are  
5 you saying it is all the same thing?

6 MR JOWELL: It is all the same thing.

7 THE CHAIRMAN: Right.

8 MR JOWELL: I mean, one talks about the legal policies. Res  
9 inter alios acta, is it not, it's a thing in itself, and  
10 that is essentially saying it is not sufficiently  
11 proximate, it did not arise out of the transaction. It  
12 is all just different ways of saying the same thing.

13 So we say that really this has been resolved, this  
14 issue, and firmly resolved, and not once but twice by  
15 this Tribunal already.

16 Now, the claimants continue, in their latest rounds  
17 of submissions, to try to keep alive the proximity  
18 argument, and they do so not by reference to legal  
19 causation, because they know that is not available to  
20 them, they try instead to smuggle it into factual  
21 causation, and they rely in particular on the judgments  
22 of the Tribunal and of the Court of Appeal in  
23 *Royal Mail v DAF*.

24 Now, I am not going to address you now on the Trucks  
25 issue, I am running behind time already, but suffice it

1       to say that that reliance is clearly misplaced, because  
2       the facts and circumstances of those individual  
3       proceedings were very different, and indeed the  
4       judgments in Trucks repeatedly draw an express contrast  
5       with the facts of that case, and the facts of the MIF  
6       cases, as regards the identifiability of the overcharge,  
7       its nature, its size, whether there is a downward class,  
8       and so on.

9       As I have said, I will come back to all of that in  
10      closing argument. But the short answer is that this  
11      attempt, outside the ambit of the exceptions procedure,  
12      to resurrect the proximity argument, in our submission,  
13      is just not open to the claimants in light of the  
14      Supreme Court judgment and the rulings of this Tribunal,  
15      and if they wanted to keep that point alive they should  
16      have appealed those rulings and they have not done so.

17      If one stops to think about it, it is not only wrong  
18      in law to suggest that the proximity argument is open,  
19      it would also be completely impractical, given the  
20      procedure that has been adopted. If the defendants are  
21      now expected -- if we are now expected to show proximate  
22      causation, we do not have the material to do it. We  
23      have not had standard disclosure, or even anything  
24      approaching standard disclosure, even from the willing  
25      claimants, but still less from a sufficient and



1           representative sample of claimants. It was reasonably  
2           judged not to be practicable to take that approach. To  
3           oBTain full and fair disclosure from a representative  
4           sample of sufficient claimants, one would need to  
5           actually adjourn this trial and start again, and that is  
6           surely out of the question.

7           So we say that the claimants really should and must  
8           stop flogging this very dead proximity horse, and we  
9           accept, of course, that the Tribunal did leave open the  
10          possibility, at least in theory, of this exceptions  
11          procedure. Their people were obliged to do so promptly  
12          and we say they have not done. We have Allianz; we  
13          have -- LVMH has popped up very recently; and SSH  
14          apparently wants to generally keep their options open.  
15          We say, with respect, that is all far too late, but that  
16          is for another occasion.

17          So, you have a broad axe. You have to wield that  
18          broad axe. How do you do it? The answer to that is --  
19          if I may, I would like to take you to Mr Holt.

20       THE CHAIRMAN: Would that be a convenient time?

21       MR JOWELL: Yes, that would.

22       THE CHAIRMAN: We will have a ten-minute break.

23       MR JOWELL: Thank you.

24       (11.50 am)

25                               (Short Break)

1 (12.00 pm)

2 MR JOWELL: Mr Chairman, just on timing. I think we started  
3 15 minutes late, so if I may be indulged to finish at  
4 quarter to? I am still going to have to take it at  
5 quite a canter, because I am --

6 THE CHAIRMAN: We will try not to interrupt you too much.

7 MR JOWELL: So if I can show you, then, how Mr Holt  
8 addresses the broad axe issue that is before you --

9 THE CHAIRMAN: Yes.

10 MR JOWELL: -- of establishing the pass-on rates for these  
11 sectors of the economy and then for the economy as  
12 a whole.

13 If one goes first, if I may, to Mr Holt's eleventh  
14 report, which is in the bundle at {RC-F/19/1}, and if we  
15 could go, please, to table 2.1 which is on page 35  
16 {RC-F/19/35}.

17 EPE OPERATOR: I am just waiting for the page to load.

18 THE CHAIRMAN: Which page did you say?

19 MR JOWELL: 35. I do not know if you have a hard copy.

20 (Pause)

21 Does the Tribunal have it up?

22 THE CHAIRMAN: Mine is being a bit slow as well, actually.

23 MR JOWELL: It is always when you are in a hurry that  
24 the~...

25 THE CHAIRMAN: Yes. Go back to hard copies, maybe.

1           Actually I probably have that.

2           MR JOWELL: If you would not mind, I think you should, yes.

3           (Pause)

4           THE CHAIRMAN: Tab 19, page 35, did you say?

5           MR JOWELL: Page 35, please.

6           THE CHAIRMAN: Here we are. I think we have that.

7           MR JOWELL: You have it.

8           THE CHAIRMAN: Yes.

9           MR JOWELL: So in the first column, you see you have the  
10           various Visa sectors that he divides it into, and all of  
11           the experts have slightly different sectors and they  
12           have attempted to reconcile those. Then in the next two  
13           columns you have the share of Visa card expenditure and  
14           Visa's MIF expenditure for each of them.

15           Then, really out of interest, you also have the  
16           number of claimants in absolute terms for each sector,  
17           and the number of -- in brackets also, which is  
18           informative -- the number of willing claimants for each  
19           sector. You will see that the total number of claimants  
20           add up to over 1500. The willing claimants, who are  
21           those who have supplied their individual data, are just  
22           14. It is actually 13, but Marks & Spencer is in two  
23           categories. In relation to some sectors there are no  
24           willing claimants at all. In many cases there is just  
25           one willing claimant and there is never more than two.

1           Also, it is worth noting that not all of those  
2 willing claimants have supplied witness statements or  
3 documents. Some have just disclosed data.

4           Now, if one goes back, please, to page 32, you will  
5 see a diagrammatic representation or an overview of  
6 Mr Holt's approach. What he does is to use three  
7 sources of data and analysis, namely existing studies,  
8 secondly, public domain data and, thirdly, claimant  
9 data. He arrives at estimates for each sector, where he  
10 can, for each of those sources of data, and then he  
11 combines them to arrive at pass-on rates for each  
12 sector.

13          Having done so, his plan is then to put each  
14 individual claimant into the appropriate sector bucket,  
15 and then make an allowance for surcharging for those  
16 that have engaged in direct surcharging of MSCs, and  
17 then he will come up with his results for each claimant.

18          Now, it is important to stress, because the contrary  
19 has been mischaracterised, that it is not the case that  
20 Mr Holt's approach is one based entirely on economic  
21 theory. Yes, he does use economic learning, both  
22 theoretical and empirical, to inform the selection of  
23 appropriate economic proxies, and that should really be  
24 wholly uncontroversial, at least for any economist worth  
25 their salt. But, no, he does not rely heavily on

1 economic theory to determine what the pass-on rates are;  
2 rather, he uses very extensive and careful analysis of  
3 data to arrive at the actual pass-on rates.

4 So just to expand on that, in a perfect, ideal  
5 world, what one would do, I think everybody agrees, is  
6 you would oBTain data on the MSCs themselves, recording  
7 their fluctuations over time, and then data of end  
8 prices over time, and you would compare the two by way  
9 of regression analysis. But unfortunately that just  
10 simply does not work, and the reason is explained  
11 succinctly in paragraph 29 of Mr Holt, which you see  
12 there on page 32.

13 He says this:

14 "As discussed in my previous reports and  
15 acknowledged by the other experts who contributed to the  
16 pass-on JES [that is the previous joint statement] it is  
17 not possible to observe the impact of changes in MSCs on  
18 prices due to the low signal to noise ratio. In  
19 statistical analysis the signal to noise ratio refers to  
20 the ratio between the true underlying economic  
21 relationship (signal), and the variability or randomness  
22 present in the data (noise). The higher the signal to  
23 noise ratio, the more accurately the model captures the  
24 true relationship with less influence from random  
25 unobserved factors. Here, as I have said, the low

1       signal to noise ratio means that the relationship  
2       between MSCs and prices cannot be observed directly with  
3       any precision or reliability. Instead, suitable proxies  
4       must be identified that are (a) comparable to MSCs based  
5       on their economic characteristics, meaning that economic  
6       theory suggests that the proxies should have the same  
7       pass-on rates as MSCs, and (b) sufficiently large and  
8       variable to allow for statistical analysis."

9               So everyone really agrees, other than perhaps  
10       Allianz and their particular case, that one cannot use  
11       the MSCs themselves, one has to use a proxy.

12              But Mr Holt's approach is not not to use proxies at  
13       all and just rely on abstract economic theory. He does  
14       not say, oh, well, an economic model, you know,  
15       theoretical model tells us that in a perfectly  
16       competitive market pass-on rate is 100%, in  
17       a monopolistic market they are 50%, and I create a model  
18       and come somewhere between the two. No, not at all. He  
19       chooses -- his use of economic theory, if it can even be  
20       called that, is just choosing proxies that are mostly --  
21       that most closely share the key economic characteristics  
22       of the MIF, and then, having done so, he embarks on  
23       a very detailed empirical analysis.

24              Now, what are the key economic characteristics? He  
25       identifies those, if you go, please, back to

1 paragraph 21 {RC-F/19/29}. I think the feed is now  
2 working. Perhaps if I could just invite you to read  
3 paragraph 21. (Pause)

4 THE CHAIRMAN: One will need to scroll down for the end of  
5 21. I think over the page, sorry {RC-F/19/30}.

6 MR JOWELL: So those are the three factors. He discusses  
7 them in greater detail in his first report in paragraphs  
8 96 to 127, and I would invite you, at your leisure, to  
9 read those.

10 He also considers other potential factors or  
11 characteristics that might be relevant, but mostly he  
12 finds that they are not ultimately helpful in the  
13 selection of proxies. So, for example, he explains that  
14 some of these, like the extent of competitiveness in the  
15 market or the shape of the demand curve in the market,  
16 are relevant, but he says, well, that will all be  
17 reflected in the empirical analysis that I will now  
18 carry out, because they will be, if you like, flushed  
19 out in the results of the regressions, so we do not need  
20 to look at them specifically.

21 He then identifies a number of specific proxies or  
22 types of proxy that he thinks share these three crucial  
23 characteristics of being a variable cost, like the MSC,  
24 of being a firm -- an industry-wide cost, not  
25 a firm-specific cost, that is a point actually that the

1 Supreme Court in *Sainsbury's* itself actually observed as  
2 bound to be an important factor, and then the duration,  
3 the fact that it is a semi-permanent or extremely  
4 long-lasting change, because one is talking about a time  
5 period of between ten and 17 years.

6 The proxies he identifies, one can see on page 186  
7 of the report, if we could go -- forgive me,  
8 paragraph 186, at page 77 {RC-F/19/77}.

9 EPE OPERATOR: Forgive me, it is very slow.

10 MR JOWELL: We see:

11 "My assessment of comparability is based on the  
12 economic characteristics of the MSCs that are relevant  
13 to pass-on. In particular, as described in Section 3,  
14 I find that MSCs are variable costs that are likely to  
15 be common across close competitors (ie, changes in MSCs  
16 are likely to be industry-wide). I also find that  
17 changes in MSCs would have been perceived as permanent  
18 as opposed to transitory. Suitable proxies must  
19 therefore share these characteristics. In most sectors  
20 I find the most suitable proxies are [cost of goods  
21 sold], labour costs and/or taxes."

22 He explains that in (a), (b), (c) and (d) in  
23 a little bit more detail, particularly noting that cost  
24 of goods sold are most relevant for retail sectors,  
25 labour costs are particularly relevant for services



1 sectors, because they are the main variable input cost  
2 and likely to -- in the same -- they are likely to  
3 face -- people in the same sector will face similar  
4 labour costs, and then sometimes it is a mix of labour  
5 and COGS, and sometimes changes in VAT or excise taxes  
6 are also informative.

7 So it is not sort of one, it is not just one proxy,  
8 it is actually multiple proxies and dependent on the  
9 sector.

10 Now, it is suggested in SSH's written opening that  
11 somehow there is some kind of internal inconsistency in  
12 our case, because it is said that we accept that costs  
13 of goods sold, and overheads, on the other hand, will be  
14 passed on at different rates. So they say we must  
15 accept that the mechanisms by which prices are  
16 influenced by costs depends on how those costs are  
17 characterised. In other words, whether they go in the  
18 accounts as overheads or as cost of goods sold.

19 It is important to note that that is wrong. We do  
20 accept that cost of goods sold and overheads tend to be  
21 passed on at different rates, but that is not  
22 a consequence of their accounting classification which  
23 is the basis of the SSH Claimants' approach. It is  
24 because the composition of the costs within COGS, as  
25 compared to the composition within overheads, tend to be

1 different in terms of their key economic  
2 characteristics, and that is because COGS and these  
3 other proxies that I have shown you, like labour costs  
4 and VAT, are typically variable and industry-wide,  
5 whereas overhead costs are largely neither of those  
6 things.

7 You will see all of that explained by Mr Holt in  
8 more detail in his second report in sections 4.2 and  
9 4.3, which I will not take you to right now.

10 But having identified the proxies that share those  
11 three key economic characteristics, Mr Holt then  
12 considers the three sources of data that were available  
13 to him, as we have seen, the existing studies, publicly  
14 available data and the willing claimants' data. He does  
15 not exclude any of them, he takes them all into account.

16 If one starts -- if one takes the studies, Mr Holt  
17 describes the very scrupulous process by which he  
18 identifies the relevant and reliable and peer-reviewed  
19 studies and how he filters out the studies that are not  
20 those things, and that is all described in some detail  
21 in paragraphs 263 to 280 of his first report.

22 So he then winnows it down to 73 selected studies,  
23 from which he extracts 80 estimates, and then he  
24 converts pass-on elasticities in some cases to pass-on  
25 rates, and then he matches those to the various Visa

1 sectors.

2 Again, for your note, you can see a summary of his  
3 initial results in paragraphs 42 to 43 of his first  
4 report. He has better coverage in some sectors than in  
5 others from the studies, and you will see his headline  
6 results really are that they range pretty consistently  
7 in the 80 to 100% range, or at least 60 to 100% range,  
8 with an average and a median of 88 and 89%.

9 This is all -- you can see a more detailed analysis  
10 in paragraphs 289 to 344, and he subsequently updated  
11 the table in the annex to our openings at {RC-A/4}, we  
12 have set it out as you see in our opening submissions in  
13 our annex.

14 Now, in passing, Mr Holt mentions one particular  
15 study that he does not actually take into account, but  
16 I think is worth bearing in mind, and that is the  
17 Interchange Fee Regulations study. Now, that regulation  
18 was a European regulation that implemented a cap on  
19 interchange fees in the EU, and the EU Commission was  
20 required to submit a report to the European Parliament  
21 and to the Council on the effect of the Interchange Fee  
22 Regulations that capped the interchange fees.

23 For that purpose it commissioned a study, and one of  
24 the aspects of the study was, well, what was the pass-on  
25 rate by the merchants to end consumers? Mr Holt -- the

1       reason Mr Holt does not include that in his own study is  
2       that it is a meta study. It takes into account a whole  
3       number of studies that he also takes into account. So  
4       it effectively would be double-counting. But it is  
5       informative to look at its conclusions, and in the time  
6       available I am going to just give it to you, if I may,  
7       for your note. It is in {RC-J1.6/114/1}, and if you  
8       look at pages 170 and 175 {RC-J1.6/114/170}  
9       {RC-J1.6/114/175}.

10       Interestingly, they also, for the purposes of those  
11       looking at studies, they also interviewed merchants, and  
12       the merchants they interviewed overwhelmingly said that  
13       it was a variable cost that they almost, with one  
14       exception, said was a variable cost that went into their  
15       prices.

16       So a marked contrast between those that were  
17       interviewed by the Commission and the willing -- what  
18       the willing claimants are saying in this case, and I  
19       suppose it is not surprising when you have self-selected  
20       claimants.

21       One then turns, if I may, to Mr Holt's next source  
22       of information, which is publicly available data, and  
23       here what he does is he identifies price indices  
24       representing the main variable costs facing firms  
25       producing products or services in the various Visa

1 sectors, and he then performs a regression analysis to  
2 identify the relationship between those costs and the  
3 prices. He excludes outliers, and we see that, again,  
4 he reaches a median of 88%, and three-quarters are in  
5 the 38% to 130% range. Again, for your note, you will  
6 see a graph of his initial results in figure 2.4, which  
7 is on page 40 of his first report. Now, those have  
8 since -- those figures have since been superseded but  
9 not changed dramatically.

10 He, again, identifies in great detail which of the  
11 sets of public data are both closely mapped to the Visa  
12 subsectors, and which of the regression results are  
13 sufficiently reliable, and you see all of this from  
14 paragraph 417, and from paragraph 424 he then conducts  
15 sensitivities on those -- on all of that to make sure  
16 that -- to ensure which are the reliable -- which of the  
17 sources of data give reliable results. So that is the  
18 second.

19 Then the third source of data comes from the willing  
20 claimants, the 13 claimants who were willing to give  
21 their data, and he goes through all of them and he  
22 chooses appropriate cost proxies. He considers the  
23 witness evidence, and in each case he then finds  
24 appropriate variable common costs that he can use as  
25 a proxy, and he arrives then at econometric estimates

1           where he can.

2           He feels he cannot at all for two of them, for Sony  
3           and the University of Manchester. For another two he  
4           arrives at results, but he finds that they are too  
5           sensitive to reasonable permutations to be relied on,  
6           and that is Wagamama and some of the M&S datasets. He  
7           sets out his results for that in figure 2.5, which is on  
8           page 42.

9           Then, finally, in section 9, he arrives at  
10          consolidated sector pass-on rates, and from  
11          paragraph 650 he identifies the advantages and drawbacks  
12          for each of the three datasets he has used, and then in  
13          paragraph 651 he identifies various -- the various  
14          averaging methods he has used, and then from pages 229  
15          onwards he uses that to arrive at an economy-wide  
16          estimate.

17          So that is Holt 1, and it is a very meticulous,  
18          comprehensive, careful approach.

19          Now, his --

20       THE CHAIRMAN: You say Holt 1.

21       MR JOWELL: Forgive me, Holt 11.

22       THE CHAIRMAN: 11, yes.

23       MR JOWELL: Absolutely right. For our purposes, if you  
24          like, it is, but you are absolutely right, Holt 11.

25          His twelfth report, which is served as part of our

1 responsive case, is equally meticulous. It is divided  
2 into two parts and actually both parts are important.  
3 In the second part he largely addresses the alternative  
4 approaches of the other experts and he explains his  
5 points of difference, and I am going to come to that  
6 shortly. But in the first part he largely updates his  
7 original estimates in light of the observations of those  
8 other experts and he makes three adjustments.

9 Perhaps if we can just go to that. It is outlined  
10 in paragraph 519 which is in his second report which is  
11 {RC-G/17/164}. Thank you.

12 If one looks at 519, you will see he takes into  
13 account the evidence of the other experts, and he says  
14 in section 10.1:

15 "I discuss additional evidence from existing  
16 empirical studies of pass-on and how these can be  
17 incorporated into my analysis."

18 In section 10.2, he summarises how:

19 "... I have consolidated my findings based on the  
20 public domain data with the analysis undertaken by the  
21 other experts."

22 In 10.3, he combines pass-on estimates derived from  
23 willing claimants' data with those that he presented in  
24 Holt 11.

25 So it is not a dogmatic stance. He incorporates the

1 evidence on the studies from Mr Webster -- Ms Webster,  
2 forgive me, and Mr Coombs, and he -- they identify 149  
3 additional studies, which he pared down to 60 papers  
4 after taking out those that are not peer-reviewed or  
5 applying his other criterion, and then he focuses on the  
6 ones that are -- that are relevant to those sectors  
7 where he had a paucity of studies.

8 He takes into account -- you will see the results of  
9 that are set out in table 10.5, which is on page 171.  
10 He also takes into account Mr Coombs' and Ms Webster's  
11 analysis of the public data regarding their approaches  
12 as reasonable and complementary to his own. Then,  
13 finally, from paragraph 555, he takes into account the  
14 analyses of the other experts of the willing claimants'  
15 data. Then he recalculates his sectoral conclusions,  
16 his averages and the final weighted economy-wide  
17 average, and that is all set out in table 10.16 on  
18 page 190, which, again, is set out in our opening  
19 submissions.

20 Now, I should just correct one or two more details,  
21 mischaracterisations, in the SSH Claimants' written  
22 opening as regards Mr Holt's approach. First of all, it  
23 is suggested that Mr Holt asserts that all costs are  
24 variable and will likely wash through to pricing through  
25 the operation of the process of competition. You see



1           that in the SSH Claimants' skeleton argument at  
2           paragraph 2.4 and paragraph 5.

3           Now, just to be clear, that is not Mr Holt's view  
4           and it is not Visa's case. On the contrary, Mr Holt  
5           recognises that there are costs that are fixed,  
6           semi-fixed and variable, MSCs he considers are variable.  
7           Incidentally, it does not matter that they are not  
8           incurred on every single transaction, just because some  
9           customers pay in cash. The point is they are paid on  
10          every card transaction, and every retailer will, in  
11          practice, be able to make a reasonable estimate of the  
12          proportion of their transactions that are card and cash  
13          and an estimate of the blended MSC rate for their  
14          transactions. So, in short, MSC costs vary reliably  
15          with transaction numbers and that suffices to make them  
16          variable.

17          Now, another point that is made by the SSH Claimants  
18          in opening is that it is wrong to consider the  
19          long-term, they say, the almost permanent nature of the  
20          cost change under consideration, and that is because,  
21          they say, without citing evidence, well, prices are set  
22          in the short to medium term, they say, and then they are  
23          not re-set in the long-term.

24          Well, with respect, that rather misses the point.  
25          Yes, prices are mechanically set from time to time at

1 fairly frequent intervals by many retailers, but those  
2 price changes are liable themselves to reflect the  
3 application of the wider targets and budgets that are  
4 set less frequently, and it is relevant in that context  
5 that in this case the claim period has a duration of  
6 over ten years, because that does mean that what is  
7 appropriate to consider is what has been the effect of  
8 an essentially permanent reduction in cost, and that is  
9 significant, because that longer duration allows all of  
10 these -- the various indirect channels, like re-setting  
11 margin targets, to take full effect. Those may take  
12 some time to take full effect, they may even take  
13 a few years once they have their effect on -- full  
14 effect on day-to-day price setting.

15 Now, to be clear, it could be that the facts would  
16 be different. So suppose one had a cartel, and the  
17 cartel lasted one or two years, prices rose during the  
18 period of the cartel and then fell. Then you could not  
19 say, well, let us look at all these various longer term  
20 methods by which cost changes can feed their way into  
21 prices, because there would not be enough time for those  
22 to take effect.

23 But that is not our situation here. We are  
24 envisaging a scenario in which MIFs would be zero or  
25 much lower over ten years or more, and that allows

1 changes that operate more indirectly to take effect.

2 Finally, before I leave Mr Holt, I should also  
3 correct one very blatant straw man that is raised by the  
4 claimants in their written opening, where they say that  
5 our case, they say, is that all costs, fixed and  
6 variable, are passed on in the long run, and they say  
7 this cannot be true, they say, because it would mean  
8 that solvent merchants could almost never bring a claim  
9 for damages.

10 But, again, it is just not our case that all costs,  
11 whether variable or fixed, are necessarily passed on in  
12 the long run in all markets. We are not contending for  
13 100% pass-on in most -- many of these sectors. Rather,  
14 Mr Holt accepts that many factors, like the shape of the  
15 demand curve and competitiveness or the extent of  
16 competitiveness in the market, are liable to affect the  
17 precise degree of pass-on, and that is why he goes to  
18 this enormous care to identify, first of all, the  
19 proxies that share the key economic characteristics of  
20 MSCs, and then to these remarkable lengths to test  
21 empirically what the approximate rate of pass-on is  
22 likely to have been by reference to this very wide range  
23 of evidence.

24 So that is Mr Holt.

25 In the final 15 minutes I would like to say a few

1 words, if I may, about the SSH Claimants' approach which  
2 is rather different.

3 Their approach is to say, in effect, throw away all  
4 of that work meticulously reviewing and evaluating all  
5 of the public studies. They say forget about the public  
6 data, and also ignore what your economic textbooks tell  
7 you about what are the relevant proxy costs. Instead,  
8 their approach has essentially five steps.

9 The first step is they say we divide the claimants  
10 into ten main sectors, and where he can, which is in  
11 nine out of the ten sectors, Mr Trento then finds  
12 a willing claimant for each such sector and focuses in  
13 exclusively on the evidence of that so-called willing  
14 claimant for each sector, so -- and he disregards for  
15 each sector entirely the studies and the public data.

16 The next step is to then say: well, let us find  
17 a proxy set of costs to stand in for the MSCs to use for  
18 each willing claimant. Now, the initial approach was to  
19 rely on Mr Economides, not an economist but  
20 a consultant, who they stylise as a pricing expert, and  
21 Mr Economides' task in his first report was to seek to  
22 identify other costs that shared common features with  
23 MSCs that could be used as proxies for the econometric  
24 analysis and in identifying the relevant features for  
25 a proxy cost and applying them to each case,

1 Mr Economides took into account a number of factors that  
2 the economists, such as Mr Holt and Mr Coombs and  
3 others, would regard as really quite irrelevant, but, to  
4 be fair, he also identified as factors some valid  
5 features of the costs from an economic perspective, like  
6 whether the cost was fixed or variable, but, in any  
7 event, unfortunately when Mr Trento sought to use the  
8 proxies selected by Mr Economides, he found that -- in  
9 all but one of them he found them to be unworkable for  
10 an econometric analysis. The results that came out were  
11 not stable or meaningful.

12 That part of Mr Trento's analysis is not -- is  
13 agreed. Mr Holt in fact goes further and he says that  
14 even in the one case where Mr Trento continues to use  
15 Mr Economides' proxy, even that one is unreliable  
16 because -- but the short point is that overwhelmingly it  
17 is common ground that the cost proxies selected by  
18 Mr Economides just do not exhibit sufficient variation  
19 to permit reliable statistical analysis.

20 So what then does Mr Trento do? Well, one might  
21 think that as an economist he would then have focused on  
22 proxies that share the key economic characteristics of  
23 MSCs, the ones focused on by Mr Holt, that they are what  
24 are the proxies that are industry-wide, that are  
25 variable, that are permanent, but instead he goes in

1 a quite opposite direction and he considers exclusively  
2 how the willing claimants categorise their MSCs from an  
3 accounting perspective and to an extent, where he finds  
4 where it is available, he also invokes the qualitative  
5 evidence as to the claimants' averred day-to-day  
6 price-setting process.

7 As it so happens, maybe coincidence or not, but ten  
8 out of 13, it seems, categorise MSCs as overheads or  
9 operating costs for accounting purposes and, on that  
10 basis, he then selects, in almost all cases, total  
11 overhead costs as the proxy and then concludes that, in  
12 light of the regressions run on those overheads or  
13 operating costs, there is either no pass-on at all is  
14 established or a very low or a low rate of pass-on for  
15 each of the willing claimants.

16 To be fair to Mr Trento, in his second report, he  
17 does at least resile from the suggestion that his  
18 estimates are on the low side. He accepts that they  
19 are, if you like, mid-points, he claims, based on the  
20 proxies.

21 There are then two more steps to Mr Trento's  
22 analysis which is it important not to lose sight of.  
23 Once he has the willing claimant regression results, he  
24 then makes two very bold extrapolations. The first  
25 extrapolation is to apply the results of the regressions

1       for each willing claimant in this sector to all other  
2       claimants within the same relevant sector and that  
3       seems -- that extrapolation seems to be based almost  
4       entirely on Mr Economides' assurance that competitors in  
5       the same sector all categorise or are all likely to  
6       categorise costs for accounting purposes in the same way  
7       and also that their pricing is then driven by that  
8       accounting characterisation. Of course that is an  
9       assumption that we will need to explore in evidence.

10       Then the fourth and final step is to make a yet more  
11       ambitious extrapolation because not all of the sectors  
12       that Mr Economides selects cover the whole -- all the  
13       sectors in which the claimants are in. There is about  
14       a third of people who are -- claimants who are outside  
15       of those sectors and, again, what he does is to say --  
16       he takes the basis of Mr Economides' alleged expertise  
17       as to which sectors are likely to price most similarly  
18       to other sectors. He then bolts on those other sectors  
19       to his estimates for each of the ten main sectors.

20       Now, this approach is, in our submission, flawed at  
21       really every stage of the analysis and obviously so.  
22       First of all, when conducting a sectoral and  
23       economy-wide estimate, it is surely wrong to ignore  
24       entirely the large corpus of knowledge that can be  
25       gained from previous studies and from public data,

1 particularly when the alternative -- the only  
2 alternative is to rely entirely on a very small,  
3 unrepresentative sample of claimant volunteers.

4 Secondly, by using only total overheads, one is  
5 giving priority to the accounting classification of  
6 costs over their fundamental economic nature and, in our  
7 submission, it is the economic characteristics of the  
8 costs, not its accounting categorisation, that is far  
9 more likely to determine how it affects pricing,  
10 certainly in the medium to long-run, and one does not  
11 really need an economist to see this. As I said, the  
12 Supreme Court itself noted that in *Sainsbury's* case it  
13 must be important that the cost is borne not just by the  
14 firm in question but by all competitors.

15 The key problem when using total overhead costs as  
16 a proxy is that there is what Mr Holt calls an  
17 aggregation effect. That is because the evidence shows  
18 that most overhead costs will largely be firm-specific.  
19 Now, most overhead costs will also largely be fixed or  
20 semi-fixed, not variable, costs. In both respects,  
21 therefore, they are unlike MSCs and that is true of the  
22 willing claimants' overhead costs.

23 Now, if I could show you a diagram to represent  
24 that. Some of this is confidential information so  
25 I will not read it out, but could we go to {RC-G/17/95},



1       please. You see here two graphs that show -- the top  
2       one shows the breakdown of overhead costs as between  
3       fixed and variable, and then the bottom graph, you see,  
4       an illustrative claimants' breakdown of their overhead  
5       costs by firm-wide and specific.

6       The upshot of this, and it illustrates the point  
7       that I just mentioned, that those costs are largely  
8       either fixed or semi-fixed or not variable and that the  
9       costs in overheads are also, in large part,  
10      firm-specific, rather than industry-wide.

11      If we can go, please, to page 113 {RC-G/17/113}. We  
12      see the upshot of this point, as pointed out by Mr Holt  
13      at 6.2 at the bottom. What he says is that he says that  
14      the effect of this is that what -- when you regress  
15      against total overheads, what you are creating is  
16      a weighted average of pass-on of fixed and variable  
17      overheads and a weighted average of firm-specific and  
18      industry-wide overheads and that is likely to understate  
19      pass-on.

20      If one looks at 332:

21      "It is useful to illustrate this issue with a simple  
22      example. Imagine a change in total overhead costs, half  
23      of which was due to changes in fixed overheads and half  
24      of which was due to changes in [turn over the page,  
25      please] {RC-G/17/114} in variable overheads. Assume

1 further that fixed overheads are not passed on at all,  
2 but variable overheads are fully passed on.

3 "333. In a best-case scenario when none of the  
4 issues regarding the adequacy of the available data ...  
5 applied, the estimated pass-on of total overheads would  
6 be the average of the pass-on of variable overheads and  
7 the pass-on of fixed overheads ... Thus, the estimated  
8 Pass-on Rate based on total overheads ... would  
9 significantly underestimate the pass-on of variable  
10 overheads ...

11 "334. An alternative way of thinking about this is  
12 through the lens of measurement error. We are interested  
13 in pass-on of variable overheads. Adding fixed overheads  
14 to variable overheads in effect introduces measurement  
15 error in our measure of variable overheads. Because  
16 fixed overheads are less correlated with prices than  
17 variable overheads, this type of measurement error  
18 biases estimated pass-on towards the Pass-on Rate of  
19 fixed costs, similar to the way classical measurement  
20 error would bias pass-on to zero."

21 Now, he goes on to perform in his second report, at  
22 later paragraphs, to perform a Monte Carlo experiment to  
23 test this and confirm. Now, in fact, I respectfully  
24 suggest that you do not need an elaborate experiment  
25 where variable costs are such a small proportion of the

1 total of overhead costs. The point is actually rather  
2 obvious.

3 Now, the claimants' response to all of this is to  
4 say: well, none of these theoretical points matter, if,  
5 as a matter of fact, the cost was treated as an overhead  
6 for pricing purposes, but even in the limited  
7 self-selected snapshot that the Tribunal has in the  
8 qualitative evidence before it, one can see that is most  
9 unlikely to have been the case because what one sees  
10 from that evidence is that certain types of overheads  
11 did apparently influence prices directly, while others  
12 ostensibly did not.

13 I refer you, again, if you want to see examples of  
14 that, some of them are referred to in paragraphs 386 to  
15 387 of Mr Holt's twelfth report at page 119  
16 {RC-G/17/119}.

17 More generally --

18 THE CHAIRMAN: I do not know how much time you were going to  
19 give Ms --

20 MR JOWELL: Yes, Ms Boyd is not going to deal with Allianz  
21 because we are going to --

22 THE CHAIRMAN: Oh, okay.

23 MR JOWELL: I think we are going to prioritise. I think  
24 I stated at the outset if time permits and it does not  
25 permit.

1 THE CHAIRMAN: All right.

2 MR JOWELL: She will deal with it in closing.

3 THE CHAIRMAN: Okay.

4 MR JOWELL: But the evidence before the court, even prior to  
5 any cross-examination, is already sufficient to show  
6 that there are channels or mechanisms by which MSCs  
7 could, and in all probability would, have affected  
8 prices and, again, he sets these out in his twelfth  
9 report succinctly in paragraph 354 {RC-G/17/120}, which  
10 again I invite you to read, but, in summary, there are  
11 a number of mechanisms by which -- more indirect  
12 mechanisms by which costs go into prices, for example  
13 competitor price monitoring. If the competitor's price  
14 takes into account MSCs, then if you are monitoring your  
15 competitor's prices and you are adjusting your prices in  
16 that way, then that will come in.

17 Margin targets, if you have an overarching financial  
18 metric, like EBITDA, and that then is -- that then  
19 affects the more day-to-day targets, like the simple  
20 gross margin targets that people apply, buyers and  
21 sellers apply on a day-to-day basis, then, again,  
22 through that targeting of EBITDA and then adjusting  
23 gross margin targets, that is another mechanism.

24 One has executive compensation being set potentially  
25 by reference to EBITDA which, again, drives that whole

1 process and all of those are set out in Mr Holt's --  
2 explained in Mr Holt's evidence. They are also  
3 apparent, even on the basis of the witness statements,  
4 these very, very self-selected witness statements, and  
5 we hope to elicit more that you will see in the course  
6 of cross-examination to make all of that good.

7 Now, so, for all of those reasons and many others  
8 that you will see in the detailed critique of  
9 Mr Trento's approach that you see in Mr Holt's second  
10 report, really particularly in the second part of  
11 Mr Holt's second report, which I invite you to -- it can  
12 be confusing because it is in two parts and it is  
13 important not to miss the second part -- the analysis of  
14 Mr Trento is flawed on that fundamental basis, but it is  
15 also important to realise that there are also a number  
16 of more detailed critiques of his analysis made by  
17 Mr Holt, in particular that the time frame taken by  
18 Mr Trento is inadequate. He looks at a very short time  
19 frame for the pass-on of these overhead costs which is  
20 not going to be sufficient in many cases to capture the  
21 full extent of the pass-on and there are substantial  
22 econometric problems with all of the analyses that you  
23 will see from page 72 onward of Mr Holt's second report  
24 with Mr Trento's analysis of each specific willing  
25 claimant.

1           But our main point is he simply selects the wrong  
2           proxy and, on any reasonable view, such an approach is  
3           going to lead to a very significantly downwardly biased  
4           estimate because of what we call the aggregation issue  
5           and the inadequate time period.

6           I should just say, if I may have two minutes, and  
7           I appreciate I am asking for indulgence, just to briefly  
8           talk about the two extrapolations.

9           We say that in considering whether the claimants are  
10          representative of their sector, one cannot ignore the  
11          process by which those claimants came to be selected or,  
12          rather, self-selected. They are willing claimants.  
13          They are not representative claimants. Mr Economides  
14          says they are representative of the sectors he puts them  
15          into, in the sense that how they categorise costs will  
16          be a good basis for how all companies in the sector also  
17          categorise those costs and the extent of how much they  
18          pass on those costs, and we will need to explore in  
19          cross-examination with Mr Economides, in each of the  
20          relevant sectors, to see whether he has the experience  
21          that allows him to make that assertion.

22          Incidentally, Visa's expert, based on consideration  
23          of the public materials, does not agree. Again, I refer  
24          you to Mr Holt's second volume of Holt 12, paragraph 487  
25          {RC-G/17/154}, where he explains why for each sector

1           there is no good basis for supposing that the willing  
2           claimant is representative of the sector more generally.

3           Then one gets to the truly heroic final  
4           extrapolation in which they then extrapolate from the  
5           ten main sectors to the other third of sectors where we  
6           see, for example, hotels are said to be similar to  
7           airlines or entertainment fixed assets and fashion is  
8           said to be similar to charities and it is supposed that  
9           pass-on rates based on the same overhead proxies apply  
10          and, again, Mr Holt analyses that in his second volume  
11          of his twelfth report from paragraphs 535 to 543 and he  
12          finds these extraordinary extrapolations to be  
13          unsupported by documentary evidence and contradicted by  
14          information in the public domain.

15          So the Tribunal will need to consider the  
16          reliability of Mr Trento's approach to the sectors where  
17          there are no willing claimants at all, his experience  
18          and expertise for making those extrapolations,  
19          particularly the propriety of doing that whilst, at the  
20          same time, studiously avoiding all of the wider public  
21          data and the published studies.

22          So we respectfully submit that it can be already  
23          seen that the SSH's approach is deeply unsound at every  
24          stage of the analysis.

25          Thank you for giving me some indulgence and those

1           are my submissions.

2       THE CHAIRMAN: Thank you, Mr Jowell.

3           Mr Simpson next.

4       MR SIMPSON: Yes, sir. Would it be possible to break now,  
5           ten minutes early, and then set up and then have a clean  
6           start?

7       THE CHAIRMAN: It probably makes sense.

8       MR SIMPSON: I am grateful.

9       THE CHAIRMAN: We will start at 1.50.

10       (12.50 pm)

11                       (The luncheon adjournment)

12       (1.50 pm)

13                       Opening submissions by MR SIMPSON

14       THE CHAIRMAN: Yes, Mr Simpson.

15       MR SIMPSON: Sir, members of the Tribunal, good afternoon.

16           I want to start briefly by mentioning some broad  
17           principles before focusing on a few key points as  
18           Mr Jowell did. They are only a starting point but they  
19           are an important one, we say.

20           Mr *Merricks*' claim is a follow-on claim based on  
21           a decision of the Commission in 2007. At the heart of  
22           the Commission's theory of harm was the concern that  
23           consumers ultimately pay higher prices as a result of  
24           interchange fees.

25           Can we bring up the first document, please -- the



1 second document {RC-K/2/166}. I am quoting, and I will  
2 bring it up from Dr Niels' 2015 *Sainsbury's* report. It  
3 is 8.11 that I am looking for.

4 "At the heart of this theory of harm is very much  
5 the concern that consumers ultimately pay higher prices  
6 as a result of interchange fees. The concern was not  
7 that merchants made lower profits as a result. In other  
8 words, the European Commission concluded and acted on  
9 the basis that merchants pass on interchange fees to  
10 consumers."

11 Now, that was Mastercard's own expert, Dr Niels, in  
12 the *Sainsbury's* case in 2015.

13 In the next document, which is {RC-Q4/17/1}, we have  
14 collated 77 publicly available statements, I think, by  
15 regulators, retailers, retailer association, academics  
16 and courts in relation to pass-on of MIFs and MSCs,  
17 obviously MIFs are part of MSCs, from merchants to  
18 consumers over the period 1997 to 2024. They all  
19 demonstrate a concern that it is likely to be consumers  
20 that are ultimately harmed by inflated interchange fees.  
21 That is that there was, in fact, merchant pass-on.

22 Now, just looking briefly at -- I am not going to  
23 read the whole extracts, but looking briefly at those  
24 tables, they have a universal theme but I want to  
25 emphasise a couple of quick points.

1           First, as you see, starting on page 1{RC-Q4/17/1} --  
2           the internal pages is the same on Opus as on the  
3           handout -- there are statements from government and  
4           competition authorities on passing on of MIFs. That  
5           runs through to page 18 {RC-Q4/17/18} where we have  
6           a large number on the following pages, and on that page,  
7           of comments from retail associations, that there was in  
8           fact a pass-on of interchange fees to consumers, and we  
9           have comments from some retailers, including at item 8  
10          Dixons, and at item 26, and Tesco at item 9.

11          Then from page 29 on {RC-Q4/17/29} on, we have  
12          comments by academics and researchers, and then at  
13          page 32 {RC-Q4/17/32} some from the courts. We have not  
14          included all the domestic ones, because we are going to  
15          be canvassing this in the course of this trial, and  
16          I just want to look at first one. This was the General  
17          Court's response to the appeal from Mastercard against  
18          the very decision which is the basis of Mr *Merricks*'  
19          follow-on claim in these proceedings. The General Court  
20          says, and I quote:

21          "... the Court must also reject the applicants'  
22          arguments concerning the Commission's failure clearly to  
23          establish the effect of the MIF on the prices paid by  
24          the end user. First, it is reasonable to conclude that  
25          merchants passed the increase in the amount of the MSC,

1 at least in part, on to final consumers."

2 So the decision itself found an infringement in the  
3 *Merricks* period and at least some pass-on.

4 Mastercard positively aver, in our case, that there  
5 was high merchant pass-on for 68% of the economy --  
6 I will come back to that in a moment -- in the merchant  
7 claim period. That period overlaps, as Mr Jowell said,  
8 with the *Merricks* claim period, and the real question  
9 therefore is the extent of that pass-on.

10 Now, all of this accords with both economic theory  
11 and common sense. Ultimately, it is also a matter of  
12 common sense that businesses have to pass on all their  
13 costs in the long-run or they will go out of business.

14 So I want to turn next to where Mr *Merricks*, Visa  
15 and Mastercard have ended up on pass-on for the merchant  
16 claim period.

17 Now, Mr Coombs, Mr Holt and Ms Webster all broadly  
18 agree that pass-on during the merchant claim period was  
19 high or very high. Mr Coombs says 91% across the whole  
20 economy. Mr Holt says 88% across the whole economy,  
21 retail economy. Ms Webster says 70 to 100% for her base  
22 case group which she says will apply to at least 68% of  
23 the UK retail economy.

24 Now, the mid-point of Ms Webster's range is  
25 therefore 85% for at least 68% of the economy. So far

1           so good. But the crucial difference between Ms Webster  
2           and Mr Coombs and Mr Holt is that Ms Webster says that  
3           the situation in the *Merricks* claim period was  
4           completely different such that pass-on would have been  
5           very much lower, and Mastercard picked that up on  
6           a causation argument and say it is what I will call, for  
7           these purposes, Trucks tiny; in other words, it is too  
8           low for there to be provable causation.

9           Now, Ms Webster's two main pillars for this argument  
10          are that both card acceptance by merchants and card  
11          usage by consumers were very significantly lower in the  
12          *Merricks* claim period than in the merchant claim period.

13          Now, for conceptually different reasons, which  
14          I will come to, she says that each of these points,  
15          lower card acceptance and lower card usage, mean that  
16          pass-on in the *Merricks* period was much lower than in  
17          the merchant claim period, and Mastercard then base what  
18          I have just referred to as the further legal argument on  
19          Ms Webster's views as to card usage. They say,  
20          Mastercard say, that aggregate MSC costs for merchants  
21          were so small in the *Merricks* claim period that  
22          Mr *Merricks* cannot prove causation in the *Merricks* claim  
23          period. They were, in effect, Trucks tiny.

24          This is in contrast to the merchant claim period,  
25          the overlapping merchant claim period, in which they

1 enthusiastically aver that causation of pass-on is fully  
2 made out as to 70 to 100% for 68% of -- at least 68% of  
3 the retail economy.

4 Now, Mastercard's first significant problem with  
5 this is that, as Mr Jowell has already noted, the  
6 merchant and *Merricks* claim periods overlap. The  
7 *Merricks* claim period ends at the end of 2010, but the  
8 merchant claim period begins in December 2007. So  
9 Ms Webster and Mastercard do not have the bright-line  
10 they need between the two periods to make the point that  
11 Ms Webster is making and on which Mastercard relies.

12 Now, Mastercard seek to achieve that bright-line in  
13 their opening, at footnote 2, I need not go to it, by  
14 saying that the only merchant claim starting before  
15 November 2010 are Fortnum & Mason and Heals.

16 Now, there are three problems with this. First, it  
17 is factually incorrect. It ignores those merchants in  
18 these proceedings who have settled, for example, M&S,  
19 whose claim started in December 2007, Primark, whose  
20 claim started in December 2007, and Ocado, whose claim  
21 started in December 2008. We do not know, as *Merricks*,  
22 how many of the stayed claims started in 2007 because we  
23 do not have the pleadings, but those are sufficient for  
24 these purposes.

25 Second on this point, it ignores other interchange

1       proceedings, for example *Sainsbury's*, and Asda, Argos  
2       and Morrisons, the *AAM litigation*, where the claim  
3       periods all started in 2006. Now, just for reference,  
4       we need not go to it, we have listed for convenience all  
5       those claims on a one-pager at {RC-Q4/22/1}. If the  
6       operator has time to bring it up, that is fine, but I am  
7       not going to go to it.

8       THE CHAIRMAN: Are these the documents that you submitted  
9       over the weekend?

10      MR SIMPSON: Yes, they are all based on existing material,  
11      other than the Niels new reports, 7 and 8, in the *AAM*  
12      litigation, which we received on Saturday evening, and  
13      I put in a single-pager showing an inflation between  
14      1992 and 2024, which is a single-page from the Bank of  
15      England web page, which shows that the value of the  
16      pound in 1992 is 2.4 -- it is 2.4 times now what it was  
17      in 1992. So that is -- that is, to my knowledge, the  
18      new document, but I think I could have done that with  
19      a little bit of common sense.

20             Just to take that point now, sir, seeing as I have  
21      gone to it, Ms Webster says with a flourish that -- and  
22      Mastercard say: well, the value of the card payments in  
23      the entertainment sector is now 95 times what it was in  
24      1992.

25             Well, I mean, first of all, that is an irrelevant

1 point, but if you are going to make it you should get it  
2 right, and take into account the change in value of  
3 money. That is the only reason I uploaded that.

4 So we listed the claims on that page and of the  
5 Mastercard -- we have in the *AAM* case the Asda defence  
6 and we are told that that is, and we accept, materially  
7 identical to the other two defences.

8 In relation to -- so Mastercard's pleaded defence in  
9 those merchant claims is a primary case of 100% pass-on  
10 to consumers, with various fall-back cases after that.  
11 We have set out the pleadings references in our positive  
12 case wrapper at table 1, and that is at {RC-F/9/17}.

13 We did not have at that time the *AAM* pleadings but  
14 we do now, and the relevant paragraphs of the Asda  
15 defence are 145(f) and 145(f) (a) and they are at  
16 {RC-C/55} and {RC-C/57}.

17 You also have the *Sainsbury's* case in which, as you  
18 know, and as we set out in extenso in our positive case  
19 wrapper, Mastercard's defence was that there was very  
20 high pass-on.

21 So even -- just reminding myself of the point I am  
22 actually making here, which is the bright-line --

23 THE CHAIRMAN: It is the overlap.

24 MR SIMPSON: You have the problem of the overlap, yes.

25 THE CHAIRMAN: *Sainsbury's* went back to 2006.

1 MR SIMPSON: *Sainsbury's* went back to 2006, yes.

2 THE CHAIRMAN: Okay.

3 MR SIMPSON: So third on the overlap problem, the evidence  
4 served on behalf of Mastercard in the *Sainsbury's* and  
5 *AAM litigation* entirely supports a case for high  
6 pass-on.

7 On Saturday evening we received redacted copies of  
8 Dr Niels' seventh and eighth reports in the *AAM*  
9 proceedings. Now, members of the panel, some of the  
10 redactions are slightly enthusiastic, in the sense that  
11 there are redactions where obviously it would say  
12 Dr Niels' view on an abstract point, but it has been  
13 redacted, but at the moment we can take that up with  
14 Stewarts Law who are acting for *AAM*. But for present  
15 purposes, there is enough unredacted to support in  
16 spades the fact that Mastercard argued for a very high  
17 degree of pass-on.

18 So, since Saturday evening, another document -- the  
19 document that you referred to, sir, I think -- we have  
20 prepared, on a most enjoyable weekend, a document which  
21 is now available at {RC-Q4/21} which extracts all the  
22 relevant quotations from Dr Niels, Mr Harman and  
23 Mr Carroll's expert reports in *Sainsbury's* and in *AAM*  
24 and puts them into thematic order.

25 Now, sir, the caveat to that, we have had very



1       little time to prepare it, but we would be very happy to  
2       prepare an amended version if any other party thinks  
3       there are any errors in it or it is overselective in any  
4       way, so it, in effect, could be an agreed document as to  
5       what is said there, but if there is any overselection  
6       due to speed, that is the only reason. If anyone wants  
7       to criticise that, then we are very happy to amend and  
8       upload another version.

9               Now, I am going to go to one or two points in that  
10       in a moment when we come to particularly the issue of  
11       size of MSCs and how important it is.

12              Now, again, I will not go to it due to time  
13       constraints, but even a skim of this material puts to  
14       bed the idea that there was no causation of loss for  
15       consumers in the *Merricks* claim period, and also that  
16       the loss was only very low because of low pass-on.

17              Mastercard's own experts in other cases do not think  
18       that, and, of course, we know that Ms Webster herself  
19       does not think that for the *Merricks* -- for the merchant  
20       claim period.

21              Now, the key thing to note is the dates of these  
22       claims. As you have already mentioned, sir, the claim  
23       periods run from 2006. AAM runs through to 2017, and  
24       I will take you a bit later to an extract from  
25       Mr Justice Popplewell's judgment in that; certainly as

1 I understand it.

2 None of Mastercard's experts suggest in any of these  
3 reports that the factors they are talking about only  
4 arose in 2006. They are not dealing with earlier  
5 periods, but at no point do they say: well, this is  
6 a new factor, or do they suggest that it changed at all  
7 during those claim periods, which were nine years in the  
8 *Sainsbury's* case and 11 in the -- 12 in the *AAM* case.

9 Now, in fact, the experts relied on a significant  
10 amount of evidence from before 2006 and, for instance,  
11 Dr Niels in his *Sainsbury's* report annexes various  
12 decisions and various papers in the appendix to that  
13 report which go back as far -- I am doing this from  
14 memory -- as the late '90s. I think the primary run of  
15 documents he relies on starts in the early 2000s.

16 I am told they are all in here, by someone more  
17 efficient than I am.

18 So with all that in mind, what I would now like to  
19 do is go to -- turn to some building blocks of all the  
20 experts' reasoning on pass-on, and then to Mastercard's  
21 case in relation to *Merricks*.

22 Now, at the risk of being trite, everyone in this  
23 case knows that the MSC comprises three elements: the  
24 MIF, or the interchange fee in its UK context; a scheme  
25 fee; and an acquirer fee. The way that the MIF

1       overcharge is passed on to consumers is as part of the  
2       MSC.

3       Now, the question in this trial is the question that  
4       has been ordered to be tried. You all know this, it is  
5       in the UPO order, but I will give the reference for the  
6       transcript. It is {RC-D/29/3}. The question in the  
7       trial is the extent to which elevated MSCs were  
8       reflected in higher retail prices paid by customers of  
9       the merchants. So that is what you are trying. It is  
10      about MSCs and their pass-on, and everybody assumes --  
11      the Tribunal has assumed rightly, with respect -- that  
12      if you work out the pass-on of MSCs, you can then work  
13      out the pass-on of the MIF within those MSCs. You are  
14      ipso facto passing on an MSC whatever the percentage of  
15      that MSC may be, and I will come back to that issue in  
16      a moment.

17      Now, a key plank of Mastercard's case against  
18      Mr *Merricks* -- in fact, really Mastercard's case against  
19      Mr *Merricks* is all about extrapolation; because of the  
20      embracing of high pass-on and causation for most of the  
21      economy in the merchant period, they have to distinguish  
22      that in some way from the *Merricks* period, and the key  
23      way in which they do that is that they look at what they  
24      call MSC costs to merchants, by which they mean the  
25      aggregate cost to merchants of card transactions. So

1           there is a difference between your MSC percentage and  
2           your MSC costs. If you are a merchant and you have very  
3           few transactions -- it is so obvious but it is worth  
4           repeating -- but you have a constant MSC cost, then your  
5           overall MSC costs will be an aggregate lower. That is  
6           the fundamental point that Mastercard are making  
7           throughout.

8           So when they talk about MSC costs, they are talking  
9           about aggregate MSC costs for a merchant. A flat MSC  
10          cost but with lower transactions means lower MSC costs.  
11          So that is the fundamental building block of their  
12          argument.

13          Now, they say that two very important consequences  
14          flow from this. The first one I have already mentioned,  
15          but I come back to it because it is the fundamental  
16          basis of their case. Mastercard say that in the  
17          *Merricks* claim period, aggregate MSC costs were so small  
18          that they fell within the causation reasoning in *Trucks*.  
19          So Mr *Merricks* cannot prove factual causation at all.  
20          They do not make this point about the merchant claim  
21          period, they positively contend factual causation is  
22          made out in the merchant claim period.

23          The second point they make, based on MSC costs in  
24          the aggregate, is if they are wrong on that, they say,  
25          well, pass-on rates would have been much lower in the

1        *Merricks* claim period, because aggregate MSC costs were  
2        lower in the *Merricks* claim period, and therefore the  
3        ultimate key piece of their reasoning -- Ms Webster's  
4        reasoning -- is that those smaller MSC costs were more  
5        likely to be treated by merchants in their price setting  
6        decisions as fixed costs, rather than variable,  
7        therefore they were less likely to be passed on. That  
8        is Ms Webster's fundamentally important reasoning on  
9        this point.

10        Now, for the merchant claim period -- this is the  
11        facing two ways point -- Mastercard say that MSC costs  
12        were very much higher. Therefore, neither point  
13        applies. So what they say is: there is no causation in  
14        the *Merricks* period, but there is causation in the  
15        overlapping merchant period. Alternatively, if  
16        causation is made out in the *Merricks* period, there is  
17        low pass-on in that period but high pass-on in the  
18        overlapping merchant period. That is problematic  
19        position to start with, but we are going to look at the  
20        ways in which Mastercard seek to justify it and, in our  
21        submission, there are four fundamental flaws which  
22        I will just summarise and then I will go through each  
23        flaw.

24        First, they focus on what they say is the very small  
25        size of aggregate MSC costs. But so far as pass-on in

1 the specific factual circumstances of this case is  
2 concerned, size does not matter, we say. I will come  
3 back to all of these.

4 Second, and inconsistently with that approach, they  
5 seek to disaggregate both MSCs and aggregate MSC costs  
6 into much smaller parts in the *Merricks* period to make  
7 them look Trucks tiny, but they do not disaggregate them  
8 in the merchant period.

9 Third, they base their calculations of aggregate MSC  
10 costs in the merchant claim period on what we say is  
11 both flawed -- fundamentally and fatally flawed  
12 evidence, and fundamentally and fatally flawed  
13 reasoning.

14 Finally, and even if their evidence can be relied on  
15 in its terms, they take inconsistent approaches to that  
16 evidence in the *Merricks* and merchant claim periods.

17 So I want to start then -- it seems rather otiose to  
18 say one wants to start with the first flaw, but the  
19 first flaw is the wrong focus on the aggregate size of  
20 MSC costs.

21 Now, I can be very short on this for these purposes.  
22 We know that Ms Webster broadly agrees with Dr Niels on  
23 economic principles, and so, on this topic, I just want  
24 to point briefly to what Dr Niels says, it is said, in  
25 his 2022 *AAM* reports and his *Sainsbury's* report.

1           So for this, we can go to the hand-up at  
2           {RC-Q4/21/5}. Again, if anyone ever feels I am  
3           misquoting or selectively quoting, I would be very happy  
4           to be taken to the broader quote in the main report.  
5           This has been done at speed, this aggregation of  
6           material.

7           So we need to go to page 5 {RC-Q4/21/5}. I want to  
8           turn first to passage 1 at 5.21 of Dr Niels' 2022 AAM  
9           report:

10          "The economic logic for why a profit-seeking firm  
11          would want to increase its prices in response to an  
12          increase in per-unit costs holds, irrespective of the  
13          size of the cost increase in question."

14          Number 4, 4.40:

15          "In my seventh report I concluded that even though  
16          MSCs represent a share of overall turnover ... these  
17          charges are like to be passed on to final consumers, for  
18          the following reasons."

19          First:

20          "During the Claim Period the MSCs did not vary  
21          substantially ..."

22          Now, that is the claim period in AAM, so that is  
23          a lengthy period of over ten years.

24          "... and thus no frequent price adjustments were  
25          required ... I would expect that the MSCs were taken

1           into account together with other costs changes when  
2           prices were periodically reassessed."

3           If we turn over then to two extracts from his  
4           *Sainsbury's* reports {RC-Q4/21/6}.

5           8.43:

6           "In the present case, the MSC/MIF is a highly  
7           visible cost to merchants and [redacted]. Awareness of  
8           the MIF would also have been heightened by the various  
9           interchange fee investigations themselves. Pass-on is  
10          also more likely here because it concerns retail prices  
11          to end-consumers, as opposed to prices to strong  
12          downstream buyers, where buyer power may affect the  
13          degree of pass-on."

14          Finally, 5.17:

15          "I do not agree that, in the present case,  
16          differences in the size of the underlying costs leads to  
17          systematically different pass-on estimates. As set out  
18          in section 8C.5 of my first report due to the high  
19          visibility of the MSC, the pass-on rate of the MSC is  
20          likely to be high despite its small relative size. This  
21          is in line with economic theory, which suggests that the  
22          pass-on rate of small cost items tends to be in line  
23          with larger cost items, provided that suppliers  
24          periodically look at their total marginal cost base and  
25          adjust prices accordingly."



1           So the first flaw, we say, and obviously this is  
2           a matter for trial, but that is our case, is that  
3           Mastercard wrongly focuses on the aggregate size of MSC  
4           costs.

5           The second flaw is disaggregation. Now, if, as  
6           Mastercard contends, size does matter, it begs the  
7           question: size of what? Now, there are three ways --  
8           two ways, I am sorry, in which Mastercard seek in their  
9           opening to disaggregate MSC costs and the underlying MIF  
10          costs in the *Merricks* claim period to get to a smaller  
11          size, to make it Trucks tiny.

12          First, they disaggregate both Mastercard and Visa  
13          transactions and credit card and debit card transactions  
14          for the *Merricks* period. We have no need to go to it,  
15          but the reference for that is paragraph 35.1 of their  
16          opening.

17          Second, they seek to disaggregate types of  
18          transactions and purchaser on the basis of what or who  
19          is, in their view, properly within the *Merricks* claim  
20          and class. So they have a section in their opening in  
21          relation to the three different types of MIF, the UK MIF  
22          and two types of EEA MIF, depending on whether it is  
23          incoming or outgoing transactions, and they seek to  
24          disaggregate on that basis as well.

25          The reality, though, from the perspective of

1 a merchant, is that MSCs on all transactions will form  
2 a lump of costs in a merchant's bottom line they  
3 consider. That is entirely consistent with all the  
4 evidence that is in front of you. There is no  
5 suggestion that the merchant will treat an MSC on a Visa  
6 debit card separately from an MSC on a Mastercard credit  
7 card.

8 Merchants will not know in advance whether they will  
9 incur an MSC on a transaction, or, for each transaction,  
10 whether it will incur an MSC for Mastercard or an MSC  
11 for Visa, they do not know how the purchaser is going to  
12 pay, and it will not know, therefore, whether the  
13 purchaser using the card, which they do not know about,  
14 is going to be incurring an EEA MIF or a domestic MIF.

15 So everything has proceeded in this litigation on  
16 the basis that merchants set their prices in the round  
17 by reference to all the MSCs they face, with the MIF,  
18 and I will come back to this point -- I need to make it  
19 good -- comprising approximately 90% of the MSC.

20 Now, when it comes to calculating quantum, of course  
21 it will be relevant to consider whether Mr *Merricks*'  
22 claim is against Mastercard or against Visa, to use  
23 a disaggregation example. Clearly, Mr *Merricks* cannot  
24 claim against Mastercard MSC costs which are  
25 attributable to transactions on Visa cards.

1           So, yes, you disaggregate when you are looking at  
2           quantum, but you do not disaggregate when you are  
3           looking at causation and pass-on. So there is  
4           a fundamental flaw in Mastercard's approach on that.

5           But that is also, separately, why, when we come to  
6           consider Ms Webster's views on change in card usage, we  
7           need to focus on change in card usage as a whole and not  
8           on credit card usage or debit card usage.

9           So in Mastercard's opening, and I should have given  
10          you a reference to the second disaggregation -- that is  
11          {RC-A/5/17} -- in our submission, all these  
12          disaggregations: Mastercard, cards from Visa cards,  
13          credit cards from debit cards, UK MIFs, cross-border  
14          MIFs, these are highly artificial attempts by Mastercard  
15          to disaggregate both MSC costs and MIF costs, underlying  
16          MIF costs, to show how tiny those costs were, and that  
17          approach, we say, is obviously flawed.

18          Now, coming then to the third flaw in Mastercard's  
19          argument, that is their flawed calculations of aggregate  
20          MSC costs which are the building block of their  
21          argument.

22          Now, just to recap, the starting point of  
23          Ms Webster's reasoning is that when card usage is lower,  
24          as in the *Merricks* claim period, then aggregate MSC  
25          costs for all merchants are lower. I have said this

1 before but it is worth -- this building block at the  
2 beginning of this section. Thus, she says merchants  
3 were more likely to treat what she calls MSC costs, that  
4 is aggregate MSC costs, as fixed rather than variable,  
5 and/or are less likely to consider them in their pricing  
6 decisions, and therefore, she says, pass-on will be  
7 lower, which Mastercard glosses in its argument into  
8 much lower.

9 Now, the starting point of her reasoning is her  
10 graph on card usage rates over time. This graph and the  
11 figures underlying it are so important in her reasoning  
12 that we reproduced it at paragraph 81 of our responsive  
13 case wrapper, and -- next document, please -- Mastercard  
14 reproduced it at paragraph 33 of their opening.

15 But there are two fatal flaws in this graph, with  
16 this graph -- it is the bottom graph on the screen  
17 now -- which we submit make it evidentially worthless  
18 for the purpose that Mastercard want to deploy it.

19 First, if you look at footnote 3 -- no, we have  
20 moved on a document. Could we go back to the opening at  
21 {A/5/16}.

22 If you look at footnote 39, they say:

23 "The available data did not include payments by  
24 direct debit or standing order and therefore the figures  
25 given will overstate card usage."

1           Because what we are looking at here is obviously the  
2           retail economy; what is the percentage of card usage in  
3           the retail economy?

4           So the first fatal flaw, which I will develop in  
5           a moment, is that Mastercard acknowledge that this  
6           graph, and Ms Webster's figures, overstate card usage  
7           but they cannot and do not say by how much.

8           The second fatal flaw is that Ms Webster's whole  
9           point about rising card usage rates is they lead to  
10          higher aggregate MSCs -- MSC costs, I should say, which  
11          are more likely to be passed on. But all other things  
12          being equal, that only applies if the MIFs which  
13          underlie those MSCs -- I will make good the fact that  
14          they are 90% of them in a moment -- stay constant. But  
15          they did not in the merchant claim period, they came  
16          down.

17          I am going to go to some evidence in a moment from  
18          Trial 1, which I know will be extremely familiar to the  
19          two members of the panel who were on -- in Trial 1, but  
20          to refresh your memories, as well as for the new member  
21          of the panel, I am going to go to one or two extracts.

22          One of the things that was central to Trial 1 was  
23          the fact that the Interchange Fee Regulations came in,  
24          in 2015, and they took compulsorily debit card -- credit  
25          card MIFs down to 0.3% and debit card down to 0.2.

1           I will come back to that point. So that is point 2  
2 of the fatal flaws.

3           I will go back now to fatal flaw number 1, which is  
4 that the card usage graph here overstates card usage.

5           Now, if you look at footnote 39, there are several  
6 problems with this footnote and with this statement, but  
7 the most fundamental one is it means that Mastercard's  
8 whole argument based on card usage has absolutely no  
9 evidential underpinning. Mastercard acknowledge the  
10 figure is overstated, but neither Mastercard nor  
11 Ms Webster state the margin of error. Without a margin  
12 of error, then all the figures are meaningless. If the  
13 margin of error/overstatement is 1%, that is one thing,  
14 if it is 10,000%, that is another, but Mastercard do not  
15 have a case on that. Those figures just illustrate the  
16 point that if you say a figure is overstated or  
17 understated, but cannot and do not say by how much, that  
18 figure is just meaningless and evidentially worthless.

19 THE CHAIRMAN: Is it overstated throughout the whole period?

20 MR SIMPSON: Yes. I will come to how in a moment, sir.

21           I will show how that comes about. But, yes, it is  
22 acknowledged by Mastercard that they are overstated  
23 throughout the whole period.

24           Now, in a sense, that proposition that I have just  
25 advanced is the beginning of the end of it, and this

1 graph can be just ignored for the rest of the trial as  
2 a matter of principle. But it is worth unpacking it  
3 further to see exactly how flawed Mastercard and  
4 Ms Webster's approach is.

5 At footnote 39, Mastercard explain the overstatement  
6 on the basis that the available data do not include  
7 payments by direct debit or standing order. This is the  
8 reason which Mastercard appear to be giving for not  
9 being able to state the margin of error because they  
10 cannot state what the retail economy is. But in fact  
11 this is in error; the available data do include  
12 payments -- I am going to go to it in a moment -- by  
13 direct debit and also automated payments which included,  
14 automated payments, standing orders. Ms Webster just  
15 excludes them from her calculation. She says she is  
16 excluding them but she does not explain why, and nor do  
17 Mastercard.

18 Now, the graph is taken from paragraph 6.30 of  
19 Webster 1 {RC-F/14/120}. On the previous page, if we go  
20 back one page, please, and bring up the lower half of  
21 the page {RC-F/14/119}, now, 6.30:

22 "Figure 2 [that is the graph] shows that the share  
23 of total transaction values (excluding direct debit and  
24 automated credit) that were accounted for by credit card  
25 payments amount to the only 2.1% in the first year for

1       which data is available ... and then increased almost  
2       nine-fold to 18% by 2022. The combined share of all  
3       payment cards increased from 3.5% in 1995 to over 80% in  
4       2022 (a 23-fold increase)."

5       Now, the first flaw in that is obviously you should  
6       be looking at percentage point increases. It does not  
7       matter how many multiples it is, so it is quite  
8       artificial to say 23-fold.

9       The next page, please {RC-F/14/120}:

10       "On the other hand, the share of cash payments fell  
11       from around 11% to 6.5% over the same period."

12       Now, we then look, if we could bring up the graph  
13       and the notes under it, please, just to quite a big  
14       size, the italicised bit.

15       So at the bottom, the source is the APACS UK Payment  
16       Statistics 2006, 2016 and 2023, and the references are  
17       there.

18       The note says:

19       "Payments refer to transactions made in the UK by UK  
20       resident individuals and businesses. Card payments  
21       include debit card and credit card. Credit cards  
22       include credit, charge, purchasing and stock cards. The  
23       shares are calculated over a base that only includes  
24       cash, cheques and cards (ie excludes direct debit and  
25       automated credit)."



1           So her UK economy is limited to the ones that she  
2           states, which is the base of cash, cheques and cards.  
3           So that is what the percentages are based on.

4   THE CHAIRMAN:   What is the other -- in 1995, what is the  
5           other 85% of payments?

6   MR SIMPSON:   I am going to go to exactly that, sir, because  
7           we have the numbers.   We have the numbers.

8   THE CHAIRMAN:   How were we paying for things in those days?

9   MR SIMPSON:   Barter, probably, but ...

10           So we then go to the figures underlying that.   Can  
11           I just have one moment, sir.   (Pause)

12           Yes, just for reference, you have direct debit and  
13           automated credit.   Now, automated credits include  
14           standing orders, which is why Mastercard refers to  
15           standing orders.   They are Bacs payments, credits and  
16           debits, but standing orders are within them.

17           Now, one thing and an absolutely crucial thing that  
18           is absolutely clear is Ms Webster has not included --  
19           has not excluded direct debits and automated credits on  
20           the basis that they are unavailable, she has made  
21           a positive choice not to include them and therefore have  
22           a smaller UK retail economy.

23           Now, that is clear from the data she gives the  
24           sources under "Source", just before note 2.   It is only  
25           necessary to go to one sample of the tables Ms Webster

1       has drawn her data from because the data categories are  
2       the same in each.

3               So I am going to go to -- it is a spreadsheet. It  
4       is at {RC-J5.2/9/1}. This is the APACS payment  
5       statistics report for 2023. Can we go, please, to table  
6       27.2. You need to scroll across quite a bit. It is  
7       rather slow, I can tell you from experience. 27.2,  
8       nearly there. 27.1 and .2, and down to the second  
9       table, please, on this.

10              So here we have the figures from 2012 but it is the  
11       same categories in each of APACS reports.

12              Now, you will see that the columns here are cash,  
13       cheque, debit card, credit card, direct debit and  
14       automated credits. So the figures are available.  
15       I will come back to the figures in a minute, because we  
16       can go to another source of exactly the same figures  
17       because Ms Webster herself collated those figures. They  
18       are not only available, they are actually included in  
19       the spreadsheet on the basis of which this graph is  
20       drawn.

21              Now, what she does -- I will just say what I am  
22       setting up here -- what Ms Webster does, as I found out  
23       on Thursday when we got the data pack from Compass,  
24       which had accompanied the Webster report, which did not  
25       go to the lawyers, it went between the economists, what

1 we are going to see is not only are the figures  
2 available, but Ms Webster sets them out in toto in her  
3 spreadsheet, all the columns. So she includes them in  
4 the spreadsheet which is the basis of the graph, but  
5 when she draws the graph she excludes them, without any  
6 explanation or rationale for what she is doing.

7 Now, the way we track this down is that -- this  
8 proves how one spends one's evenings and weekends --  
9 footnote 827 of Mr Coombs' fourteenth report refers to  
10 the spreadsheet and says it was exchanged as part of the  
11 data pack that went between experts. The spreadsheet  
12 has now been uploaded to the trial bundle at  
13 {RC-Q4/16/1}. That is the graph.

14 So the data source, if you scroll down, please,  
15 operator, is here, and what this material is, if you  
16 just scroll across, it lifts all the information, it  
17 collates all the information from the APACS reports into  
18 one place, but it does not then use it all. It only  
19 uses cash, cheques and cards.

20 So if you scroll up again, please, operator, to the  
21 graph, this graph is the product of calling the UK  
22 retail economy only cash, cheques and cards.

23 If you go to 2022 as a sample, can we go down again,  
24 please. If you go to -- could we just make that  
25 slightly smaller so that we can get it on one page. I

1 know that may strain the eyesight, particularly mine,  
2 but can we just ... Go across then, in that case, if you  
3 could, to -- that is right. That gets everything there,  
4 we can see it.

5 Now, if you go to 2022, which is the final line, you  
6 will see at the bottom, these are billions. So the  
7 figures that are thousands are trillions. So direct  
8 debits were a total of 1,332 billion in 2022. Now, what  
9 you realise when you get these numbers is that figure is  
10 higher in itself than the cash, cheque and debit and  
11 credit card figures combined. I have done the maths,  
12 I have even had someone check it, and that is  
13 1,164 billion. So the total retail economy that Ms  
14 Webster is relying on and selecting is 1,164 billion,  
15 but the total of direct debits, which she has just  
16 excluded like that, is higher than her total retail  
17 economy, it is 1,332 billion, and -- and -- it gets  
18 worse. If we go to the right, automated credits of  
19 8,022 billion are more than twice all the other figures  
20 combined. Now, I am not suggesting that all automated  
21 credits should be in the retail economy, I will come  
22 back to this point in a moment, but I want to do  
23 a couple of sums.

24 According to my maths, which I am sure everyone will  
25 now check, if you add direct debits into the retail

1 economy, you get a total figure of 2,496 billion. Now,  
2 what, then, are debit and credit cards as a percentage  
3 of that? Well, debit cards fall from Ms Webster's 63%  
4 to 29.4%, and credit cards fall from Ms Webster's 18% to  
5 8.4%, so the graph figures you have seen above are just  
6 completely wrong.

7 Now, let us say, and please do not take me as saying  
8 that automated credits all go in, but if we add in  
9 automated credits, then you get a total figure of  
10 10.518 billion. On that basis, debit cards fall from  
11 Ms Webster's 63% to 6.97%, and credit cards fall from  
12 Ms Webster's 18% to 2%.

13 Now, I want to be clear. We are not suggesting that  
14 100% of all direct debits and 100% of all automated  
15 credits are part of the retail economy. We are simply  
16 saying that it is obvious that if Mastercard are going  
17 to base their entire case on temporal extrapolation on  
18 card usage as a percentage of the UK retail economy,  
19 they need to prove what that economy is and what those  
20 percentages are for every year from 1992 to 2024. That  
21 means proving the size of the UK retail economy from  
22 1992 to 2024.

23 Now, crucially, Ms Webster has not even attempted to  
24 do that. She has simply taken 100% of cash, cheque,  
25 debit card and other credit card transaction values,

1 aggregated them, and called it the whole UK retail  
2 economy, eliminating without any reasoning, or any  
3 explanation at all, the entire figures for direct debits  
4 and automated credits.

5 Now, we do not have to go too far in our own lives  
6 for evidence that direct debits and standing orders  
7 within automated credits are used for numerous things in  
8 the retail economy. They are used for gym memberships,  
9 wine subscriptions, Sky TV, phone airtime contracts.  
10 All of these are just ignored by Ms Webster as if they  
11 do not exist.

12 This card usage graph is therefore evidentially  
13 worthless and none of the reasoning --

14 PROFESSOR WATERSON: Not everyone has a wine subscription!

15 MR SIMPSON: Yes, I came up with some other examples!

16 But they are just ignored as if they do not exist in  
17 Ms Webster's figures.

18 So the graph is evidentially useless and worthless  
19 and none of the reasoning based on it has any  
20 underpinning, and it is too late for Ms Webster and  
21 Mastercard to try to remedy that, even if they could, in  
22 theory, because in order to make her card usage point  
23 good, Ms Webster would need a volume of expert evidence  
24 which would be close to the volume we have got already,  
25 which would be further volume, which would be to carry

1 out a detailed analysis of what constitutes the UK  
2 retail economy for every year from 1992 to 2024.

3 Now, to be of any evidential value, that would be  
4 a very heavy and detailed report which Mr *Merricks* would  
5 then need the opportunity to answer, and it is far too  
6 late for that, we say, in the context of this trial.

7 So that is a convenient moment, if the transcriber  
8 needs a break, but I can carry on if they do not. I do  
9 not know when they need their break, before I move on to  
10 the second flaw in Ms Webster's graph.

11 THE CHAIRMAN: How long is your next section, roughly?

12 MR SIMPSON: I will carry on.

13 THE CHAIRMAN: Yes, because if we have a break now, we will  
14 then have too long a section afterwards.

15 MR SIMPSON: I will carry on, in that case.

16 THE CHAIRMAN: Yes, sure.

17 MR SIMPSON: Now, the second fatal flaw -- that is the end  
18 of that graph, but we might as well have a go at the  
19 rest of it, because Ms Webster wrongly equates rise in  
20 card usage with rise in MSC costs.

21 Now, that is a fundamentally flawed premise which we  
22 know to be false because -- I am only going to refer,  
23 for these purposes, to the Interchange Fee Regulations,  
24 but you will be aware that the EEA MIFs came down  
25 earlier, but it is big enough, and it is a principal

1 point, to just refer to the 2015 regs.

2 So her premise is flawed for two reasons. 1, MIFs  
3 which constitute 90% of MSC costs dropped radically with  
4 the Interchange Fee Regulations in 2015, and, 2, the  
5 rise of merchants on IC++ contracts, which I will unpack  
6 just a little in a moment, and, as you know, the bigger  
7 merchants went on to IC++ contracts, and a very large  
8 part of the economy was therefore concerned by merchants  
9 who were on IC++ contracts.

10 By way of example, it was agreed in Trial 1, as  
11 I understand it now, and I only found out some of this  
12 late last week, that by 2018, I am looking particularly,  
13 because I know that two members of the panel were there,  
14 by 2018, 77% of transactions by value were by merchants  
15 on IC++ contracts, and IC++ contracts, as you will  
16 recall, is where the interchange fee is passed on at  
17 cost, and an IC+ contract is where ... I think it is  
18 a scheme fee, I cannot remember which. But in IC+ and  
19 IC++, the IC is the interchange fee, and that is passed  
20 on at cost.

21 Now, I just want to pull those threads together  
22 slightly, and a nice way of doing that, in relation to  
23 the effect of the 90% and the IC++ contracts, is the  
24 judgment of Mr Justice Popplewell in AAM 2017, and that  
25 is at authorities bundle D, tab 14, page 7. It is



1 paragraph 15 we are going to look at {AB-D/14/7}.

2 While that is coming up, I will just say what I am  
3 seeking to make good. It has been common ground in the  
4 previous cases in which the issue of pass-on has arisen  
5 that the MIF typically comprised over 90% of the MSC,  
6 and Ms Webster does not suggest any different figure.  
7 Indeed, she does not suggest any figure at all, because  
8 she does not go into this calculation at all.

9 So if we look at -- can I ask you to read  
10 paragraph 15. If you can bring up 15 a bit larger,  
11 please. Thank you.

12 If I could ask you to read 15. (Pause)

13 So in the final sentence -- so we have the 90%  
14 figure, and that was also the figure relied upon by the  
15 Supreme Court in *Sainsbury's* at paragraph 10.10, and  
16 that is at {AB-D/21/7}.

17 Now, in the final sentence of the *AAM* case,  
18 Mr Justice Popplewell is talking about IC+ and IC++  
19 where, for any given transaction, the acquirer -- I am  
20 using this wording because it is taken from a PSR  
21 report:

22 "... automatically passes through at cost the  
23 interchange fee and scheme fees applicable to that  
24 transaction."

25 The reference for that PSR report is

1 {RC-J4.4/21/31}. We need not go to it, but I am pretty  
2 sure that will be common ground, but just to make it  
3 good.

4 There are -- so that was IC++. There are two other  
5 categories which are relevant: IC+ I have dealt with,  
6 and blended contracts, where a lot of small merchants  
7 are on blended contracts, but the volume of transactions  
8 on blended contracts is relatively low. It has changed  
9 over time, it has got -- because there has been a growth  
10 of IC++ contracts and IC+ contracts overtime. There are  
11 a lot of merchants on those contracts, but they tend to  
12 be the smaller merchants. The big merchants with buying  
13 power are on IC+ or IC++ where you get the interchange  
14 fee and then the scheme fee and the acquirer margin.

15 Now, Ms Webster's card usage rates are the basis of  
16 her point that MSC costs, by which she means all MSCs in  
17 the aggregate for all transactions, were much higher for  
18 merchants in the merchant claim period. In other words,  
19 she says, with higher card usage, the total  
20 transaction -- I am being slightly repetitive to start  
21 the building blocks again. She says with higher card  
22 usage, the total transaction values on which MSCs were  
23 payable were higher, and therefore MSC costs, the  
24 aggregate, were higher.

25 So she treats a rise in card usage as meaning

1 ipso facto a rise in MSC costs. But if the MIFs, which  
2 constitute 90% of MSC costs, drop, and if acquirers pass  
3 on all or part of that drop to merchants, that point  
4 does not work, and that is exactly what happened in the  
5 merchant claim period. So we know, or I now know, that  
6 UK MIFs dropped very significantly in 2015 as a result  
7 of the IFR, down to 0.2% for debit cards and 0.3% for  
8 credit.

9 We also know that acquirers passed on a very  
10 significant part of that drop to merchants through IC++  
11 and IC+ contracts in which they passed the interchange  
12 fee through at par, as it were.

13 Now, neither of these fundamentally important points  
14 is even mentioned in Ms Webster's report. She simply  
15 equates rising card usage with a rise in MSC costs.

16 Now, the basic issue for Ms Webster emerges  
17 particularly clearly, with respect, from paragraph 36 of  
18 the SSH Claimants' opening, and that is at {RC-A/1/21}.  
19 So I just want to look there at -- yes, paragraph 36:

20 "As already noted above, MSCs, and any overcharge on  
21 MSCs arising from anti-competitive MIFs, represent only  
22 a very small percentage of the Merchant Claimants' costs  
23 and revenues: See Trento ... Dr Trento has calculated  
24 that the MIF paid by the SH Claimants was on average  
25 0.26% of the revenues earned from the transactions paid

1           for by card."

2           Now, actually I did not know about the IFR, and  
3           I did not know about IC++ contracts and how they worked,  
4           so this really puzzled me because I thought: how can  
5           that work? I looked at table 2 of the Mastercard  
6           pleading and I thought, well, they are 1% MIFs, or 0.2%  
7           from the very latter end of it for debit cards, how on  
8           earth do you get to 0.26%?

9           So the answer or most of the answer is in the next  
10          paragraph:

11          "On 8 June 2015 the IFR came into force. Articles 3  
12          and 4 of the IFR set a maximum weighted average rate cap  
13          of 0.2% on domestic and cross-border consumer debit  
14          MIFs, and a maximum ad valorem rate cap of 0.3% on  
15          domestic and cross-border consumer credit MIFs with  
16          effect from 9 December 2015."

17          I believe, but I am not sure, that there was some  
18          earlier implementation of that, but for these purposes  
19          I do not need to worry about it.

20          I say most of the answer is in that paragraph.  
21          Before we go on, it might be worth just going to the  
22          footnote which makes good the point in paragraph 36. If  
23          we go down to footnote 49, if I could go just ask the  
24          panel to read that. (Pause)

25          THE CHAIRMAN: Yes.

1 MR SIMPSON: So I say most of the answer is in the  
2 Interchange Fee Regulations, because it is implicit in  
3 the 0.26% figure that 100% or nearly 100% of the drop  
4 was passed on to these merchants, because you get to  
5 a sort of figure between 0.2 and 0.3. That would have  
6 to mean, one inferred, that all or nearly all of them  
7 were on IC++ contracts, which I now know they were,  
8 because that emerged in Trial 1.

9 Now, Mr *Merricks* was not involved in Trial 1,  
10 neither was I, so Mr *Merricks* does not have access to  
11 the Trial 1 Opus platform, but it was sensibly agreed in  
12 the summer that he could have documents from that  
13 platform on request. So having read the SSH Claimants'  
14 opening, we wondered whether the expert evidence from  
15 Trial 1 would throw any light on the 0.26% figure, and  
16 then we realised we did not have all the expert reports  
17 from Trial 1, including, in particular, Dr Niels' two  
18 reports on behalf of Mastercard.

19 So last week we requested them. They do throw light  
20 on the 0.26% figure, and in fact they completely explain  
21 it, and they have been uploaded to the platform and we  
22 will go to one in a moment.

23 Now, as the Tribunal knows, one of the issues in  
24 Trial 1, maybe the main issue, was whether MIFs were  
25 still anticompetitive after the IFR when they dropped

1 radically. Mastercard and Visa argue, and had  
2 previously argued in the June case, that that drop was  
3 a game-changer, they called it, and that you find in the  
4 judgment of Mr Justice Roth in the June case at  
5 {AB-D/27/17}. So they argued: we have much lower MIFs  
6 here, they are no longer anticompetitive, that is the  
7 game-changer.

8 As I understand it, that was the big issue in  
9 Trial 1, but I have not read all the Trial 1 materials.

10 So all the experts in Trial 1 therefore considered  
11 the impact of the IFR and also the impact of IC++  
12 contracts.

13 Mastercard's expert was Dr Niels, and the next bit  
14 is confidential. We are going to go to a confidential  
15 section of his report, which I am not going to read out,  
16 but I am going to ask you to read. It is quite short  
17 and it is at {RC-K/19.1/32}.

18 THE CHAIRMAN: What do you want us to read, which  
19 paragraphs?

20 MR SIMPSON: I am sorry, yes. So we are looking at  
21 a proportion of IC+, IC++ contracts, and could I ask you  
22 to read -- I have my own copy, I can tell you exactly  
23 where to read to. If you start reading, I will read  
24 through the next section when you get to it.

25 THE CHAIRMAN: Yes, I have it now.

1 MR SIMPSON: Yes, I am going to ask, just for the operator's  
2 benefit, the panel to read through to paragraph 4.7,  
3 when they ask you to turn the page. (Pause)

4 THE CHAIRMAN: Yes, okay, can you go down.

5 MR SIMPSON: So summarising very briefly --

6 THE CHAIRMAN: One minute, I think we are reading the next  
7 page.

8 MR SIMPSON: Sorry.

9 THE CHAIRMAN: You wanted us to go to 4.7.

10 MR SIMPSON: I wanted you to read right through to 4.7.

11 THE CHAIRMAN: Yes {RC-K/19.1/33}. (Pause)

12 Shall we go down again {RC-K/19.1/34}. (Pause)

13 MR SIMPSON: So the broad theme of that I need not mention  
14 in open court, and you have the information on MIFs and  
15 IC++ contracts and the effect of them at that point.

16 I would like also then to go to a footnote in which  
17 I think one tiny bit is confidential, so I will not read  
18 it out. The bottom of that page, please. Footnote 55.  
19 (Pause)

20 THE CHAIRMAN: Okay.

21 MR SIMPSON: So that appears to have been common ground,  
22 that point, in that footnote.

23 So the crucial point here is that Ms Webster does  
24 not mention any of this, which is all necessary in order  
25 to calculate aggregate MSC costs in the merchant claim

1 period and therefore to ascertain whether those  
2 aggregate MSC costs were higher, and, if so, by how much  
3 than in the *Merricks* claim period.

4 Can we go to {RC-F/14/39}.

5 THE CHAIRMAN: Let me know when would be a convenient time.

6 MR SIMPSON: Yes. I have five minutes on this one.

7 THE CHAIRMAN: Fine.

8 MR SIMPSON: Could I ask you to read that paragraph 3.25.

9 (Pause)

10 I am being over-wary here. It is now no longer  
11 confidential. This is the only mention of the IFR in  
12 Ms Webster's reports. (Pause)

13 THE CHAIRMAN: Yes.

14 MR SIMPSON: So Ms Webster does not mention any of the  
15 following crucial points in her reports: first, that  
16 interchange fee were reduced by the IFR from 2015;  
17 second, that those reductions were passed on in full to  
18 merchants who were on IC++ contracts; third, that a very  
19 significant proportion of retail transactions by value  
20 during the merchant period were with merchants on IC++  
21 contracts, and nearly all the merchants in this merchant  
22 claim are on IC++ contracts; fourth, she did not mention  
23 the proportion of MSC which is comprised of the MIF.  
24 That is the 90% point. She also does not mention any of  
25 the expert evidence from Trial 1 in relation to the



1 effect of the IFR and of IC++ contracts. To be fair to  
2 her, it looks as though she has not been given it,  
3 because she does not list it in the material she has  
4 reviewed or relied upon. So we just do not know why it  
5 is it not mentioned, whether she thought it was  
6 irrelevant or has not been given it, we do not know.

7 So, in our submission, Ms Webster therefore has no  
8 basis, leaving aside the first fatal flaw, no basis  
9 whatsoever for saying that what she calls MSC costs, by  
10 which she means aggregated MSC costs for all  
11 transactions, in the merchant claim period, were  
12 significantly higher than in the *Merricks* claim period,  
13 that is what she is asserting here, but she cannot prove  
14 it. She is in no position to say whether they were  
15 higher or lower, or much higher or much lower, because  
16 she has not looked at the evidence which it would be  
17 critical to look at in order to come to a conclusion on  
18 that point, and, therefore, for this further and  
19 separate reason, none of Mastercard's arguments based on  
20 card usage rates even begin to get off the ground.

21 Is that a convenient moment?

22 THE CHAIRMAN: Yes. Ten minutes.

23 (3.06 pm)

24 (Short Break)

25 (3.16 pm)

1 THE CHAIRMAN: Mr Simpson.

2 MR SIMPSON: So I was going to move then to the fourth flaw  
3 in Ms Webster's approach, which is an inconsistent  
4 approach in the merchant and *Merricks'* claim periods  
5 between them.

6 Now, even if you could take Ms Webster's card usage  
7 graph at face value, she still has an inconsistency  
8 problem. If you look at her graph, that is at  
9 {RC-F/14/120}, taking the graph on its own terms, it  
10 shows card usage growing significantly more in the  
11 merchant claim period than in the *Merricks'* claim  
12 period. But Mastercard's case is, or we believed it was  
13 until the point they served their opening, that there  
14 was no change in pass-on rates during the merchant claim  
15 period, and so you see the inconsistency: big change,  
16 *Merricks*, but lower change rate, bigger change rate in  
17 the merchants, flat.

18 Now, as you will recall, in section 4 of his third  
19 report Mr Economides says there was no change in pass-on  
20 rates over time across the *Merricks* and merchant claim  
21 periods, and Mastercard objected to the admission of  
22 section 4, and Mr Cook KC described the starting point  
23 of that objection as being that, and I am quoting,  
24 {RC-E1/26/39} line 18.

25 So Mr Tidswell questions:

1            "... if Ms Webster is making observations about what  
2            drivers might have been different, doesn't that open up  
3            the question as to the weight one puts on those drivers  
4            and the important of them ... putting aside the question  
5            of expertise, but just in relation to the cleanliness of  
6            the cut between the first period and the second period,  
7            doesn't it blur that?

8            "MR COOK: The starting point is Ms Webster does not  
9            say anything about there are any factors which changed  
10           significantly during the course of the Merchant claim  
11           period which impacts on it. If it was the case this was  
12           a response to a suggestion you should assume half  
13           pass-on in 2010, 2015, one could see why the claimants  
14           would have an interest in responding to it.  
15           Mr Economides would have done. So what I am saying is  
16           he is addressing something which is only a live issue in  
17           relation to a claim period which is nothing to do with  
18           this client."

19           The "something" is the change of pass-on rates over  
20           time in section 4 of his report.

21           So this could not be clearer, and it is completely  
22           consistent with both Mr Cook's (inaudible) with  
23           Ms Webster's reports in which she does not suggest at  
24           any point that pass-on rates change at all during the  
25           merchant claim period. The fundamental inconsistency

1           between her approach in the merchant period and the  
2           *Merricks* period is unexplained, but in their opening it  
3           seems as though Mastercard may have realised they have  
4           a problem here and they have changed tack.

5           If we go to {RC-A/5/77}, the first -- for the first  
6           time, at 228(2) -- it is worth reading from the  
7           beginning:

8           "Mr Coombs criticises Ms Webster for not  
9           acknowledging that card acceptance and card usage rates  
10          also differed within the Merchant Claim period such that  
11          her argument, if correct, would imply lower pass-on  
12          rates earlier in that period, relative to the most  
13          recent years. The criticism is wholly misplaced."

14          Could I ask you to read those two subparagraphs.

15          (Pause)

16       THE CHAIRMAN: Yes.

17       MR SIMPSON: So in the first paragraph, all that happens is  
18          she is observing that the impact of the change is likely  
19          to have been greatest between the early part and the  
20          late part, but that tells us absolutely nothing, of  
21          course, comparing the beginning and the end. What you  
22          are looking at is the trend line, and the inconsistency  
23          allegation is not about the comparison between two  
24          points, it is about the fact that the graph is like this  
25          in the first period, and this is in the second. No,

1 change in the second, change in the first. So that does  
2 not face up to that at all.

3 But then at (2), we see this:

4 "... prefers ranges to point estimates ... and her  
5 estimates are broad enough to allow for changes in  
6 pass-on within the Merchant Claim period."

7 Now, they must be referring there to her estimates  
8 of 70 to 100%, because that is the only estimate she  
9 gives, the only global estimate she gives that would be  
10 relevant to *Merricks*. But what does this mean: "her  
11 estimates are broad enough to allow for changes". Well,  
12 yes, yes, that is all very well, but is your case that  
13 they do actually allow for changes, that there were  
14 actually changes which are covered by those ranges? The  
15 first we have heard of it, and it is not said. So it is  
16 a meaningless statement.

17 So Mastercard do not yet seem to have a case that  
18 they do cover changes within the period in the rate of  
19 pass-on.

20 THE CHAIRMAN: Were the experts examining that within the  
21 merchant claim period, whether there were changes in  
22 rates over the whole period during --

23 MR SIMPSON: What Ms Webster is doing -- sorry, sir, I am  
24 saying that Ms Webster's premise is flawed, because what  
25 she is doing, if we look back at her -- if we look back

1 at her graph where she is -- what she is doing is she  
2 takes card usage rates and, as I said in the earlier  
3 part, she is saying that MSC costs rose with those.  
4 I have done my bit on that. But I am saying that the  
5 reasoning in relation to change in pass-on in the two  
6 periods is -- must be incorrect, because she says that  
7 there is no change in the merchant period, even though  
8 there are greater changes in card usage during the  
9 merchant period than there are in the *Merricks* period.

10 So what appears to be happening here is that,  
11 contrary to what they said at the PTR where Mr Cook  
12 said, "We do not want Economides in because his evidence  
13 is irrelevant on changes, because it only applies to the  
14 *Merricks* claim period, because Ms Webster says -- does  
15 not suggest there are any changes in the merchant claim  
16 period", so it is the first seeds of a retreat from that  
17 into, "Well, her ranges do allow for those sorts of  
18 changes, so there is not an inconsistency".

19 But first of all, they do not actually say that that  
20 is her evidence, and it is not her evidence. Her  
21 evidence makes no suggestion that there is any change on  
22 pass-on rate during the merchant period. Secondly, it  
23 is contrary to the basis on which they opposed the  
24 admission of Mr Economides' evidence, which is it is  
25 flat during the merchant period, therefore we should not

1       be seeing anything from Economides on this topic in the  
2       merchant period, and you have the *Merricks* period, well,  
3       that is a change issue, but *Merricks* has not asked for  
4       that, so that is the basis on which they went for the  
5       exclusion.

6               But there is a more -- there is an absolutely  
7       compelling reason why Ms Webster did not suggest that  
8       changes in card usage rates are actually allowed for  
9       within her range, and it is an obvious mathematical  
10      reason.

11             The whole basis of her argument on card usage rates  
12      is that where card usage is lower, MSC costs for  
13      merchants are lower, and, thus, they are more likely to  
14      treat them as fixed costs, rather than variable. They  
15      are more likely to fall within her -- to fall outside  
16      her base case range, which applies to variable costs.  
17      The fundamental basis of her base case range is the  
18      variable costs.

19             So if, in fact, what Ms Webster is doing here is  
20      saying in her range, is accommodating in her range the  
21      fact that card usage rates change during the period,  
22      that would be completely irrational, because, in fact,  
23      the change in card usage rates takes them out of her  
24      base case completely. It makes it more likely that you  
25      are going to treat them rather than fixed -- as fixed,

1           rather than variable.

2           So if Ms Webster's view was that card usage affected  
3           pass-on during the merchant claim period, then we would  
4           expect the percentage of merchants falling within her  
5           base case to change, because the way it affects it is it  
6           means they are going to treat them as fixed, rather than  
7           variable, is her case. So you would see her 68% figure  
8           coming down. You would not see any effect on the range,  
9           you would see merchants coming out of that, and you  
10          would see a lower proportion in her base case, if there  
11          were card usage rate changes over time.

12          But it does not do that. Ms Webster finds that for  
13          the entire 17-year merchant claim period, 68% of the  
14          economy is covered by her base case, is covered by  
15          merchants who treated them as variable. So it simply  
16          does not make sense to say that her range accommodates  
17          that kind of change. The range does not accommodate it;  
18          what would have changed is the percentage of merchants  
19          who fall within that range.

20          Now, I perhaps got slightly too enthusiastic earlier  
21          in saying that the entire case in relation to lower  
22          pass-on in the *Merricks* period turns on card usage.  
23          That is not correct. Ms Webster also mentions card  
24          acceptance and it is that topic I want to turn to next.

25          Now, the second thread to her reasoning that pass-on



1 was low in the *Merricks* claim period but high in the  
2 merchant claim period is that card acceptance by  
3 merchants was lower in the *Merricks* period. Now, it is  
4 really important, before going any further, to  
5 appreciate at the outset that her reasoning as to why  
6 lower rates of card acceptance by merchants would lead  
7 to lower pass-on is completely conceptually different  
8 from her reasoning as to why lower rates of card usage  
9 would lead to lower pass-on. That is not a criticism,  
10 it is just an observation of the building blocks of her  
11 reasoning.

12 On Ms Webster's evidence, lower card usage, starting  
13 with that, affects the size of the MSC costs in  
14 aggregate and potentially leads to a re-categorisation  
15 of MSCs by merchants as fixed rather than variable. It  
16 is a discrete argument, but recategorisation is not the  
17 basis of her card acceptance argument. Her reasoning is  
18 that where card acceptance is lower, the MSC costs which  
19 are treated as variable are less likely to be passed on  
20 because they are not a market-wide cost. There is no  
21 commonality -- there is less commonality, and as we know  
22 from economic theory, market-wide costs are more likely  
23 to be passed on.

24 Now, can we go to -- this is confidential,  
25 I believe -- {RC-F/14/123}. Could I just ask you to

1           read paragraph 6.36. I think there is something  
2           confidential in it.

3       THE CHAIRMAN: 6-point ...

4       MR SIMPSON: 6.36. (Pause)

5       THE CHAIRMAN: Yes.

6       MR SIMPSON: So this is a point about competition and it is  
7           a point about whether a cost is market-wide or not, and  
8           the more market-wide it is, the more likely that it is  
9           going to be passed on, so conceptually completely  
10          different from card usage.

11           Now, I need not turn you to it, but ... In fact, it  
12          may be worth going to it {RC-A/3/51}.

13           The first problem with this is that Ms Webster  
14          cannot really tell us anything about the level of  
15          competition. Could I just ask you to refresh your  
16          memories from 88, just that paragraph, please.

17       THE CHAIRMAN: This is your opening?

18       MR SIMPSON: This is our opening, yes. (Pause)

19           Similar points were made, I need not turn you to  
20          them, at paragraph 80 and paragraph 71.

21           Now, again, if we turn back to 228 at {RC-A/5/77},  
22          Mastercard appear to be suggesting that -- they have an  
23          inconsistency problem because, again, the graph of card  
24          acceptance shows similar changes in card acceptance  
25          rates in the *Merricks* and the merchant claim period,

1 but, again, no change in pass-on in the merchant period,  
2 but change in pass-on in the *Merricks* period. So  
3 exactly the same issue.

4 Now, at 228, Mastercard, again, seem to be saying,  
5 in relation to this issue, that it too is potentially  
6 covered by the breadth of her range. So you could say,  
7 well, in fact maybe she is saying they do change in the  
8 merchant period because she has a very wide range, is  
9 basically the point that is being put.

10 Now, that is a mathematically not -- it is a flawed  
11 statement, because her reasoning on card acceptance  
12 rates is that where card acceptance rates are lower,  
13 then variable costs are less likely to be passed on  
14 because they are not market-wide. She does not suggest  
15 anywhere in her report that her base case estimate of 70  
16 to 100% pass-on for variable costs for the merchant  
17 claim period takes any account of changes in card  
18 acceptance rates during the merchant claim period. That  
19 is suggested for the first time here.

20 She cannot suggest that because it is obviously  
21 mathematically incorrect. If she had taken account of  
22 lower card acceptance rates at the beginning of the  
23 merchant claim period than at the end, then, on the  
24 basis of her whole -- her reasoning, it would move the  
25 whole range down. If card acceptance rates were lower

1           at the beginning of the merchant than the end, merchants  
2           would not have been able to pass on, on her reasoning,  
3           the variable costs at the same rate at the beginning as  
4           at the end, because those costs would not have been as  
5           market-wide as they were at the end.

6           So if Ms Webster were applying the logic she applies  
7           to the *Merricks* period to the merchant claim period, she  
8           would have started the merchant claim period with  
9           a range of -- I am plucking it from the air -- 50 to  
10          80%, and then as card acceptance went up, the whole  
11          range would have gone up. It is mathematically  
12          nonsensical to suggest that you could potentially be  
13          accommodating a change in card acceptance within your  
14          range of 70 to 100% and indeed Ms Webster does not  
15          suggest that.

16       THE CHAIRMAN: Can you just remind me. Does she say, in  
17          relation to the *Merricks* claim period, that pass-on  
18          rates went up as there was increased card acceptance and  
19          card usage?

20       MR SIMPSON: It is implicit that she does accept that they  
21          went up during that period.

22       THE CHAIRMAN: But does she give a range?

23       MR SIMPSON: No.

24       THE CHAIRMAN: Right.

25       MR SIMPSON: Unless I can assist you further, those are

1           Mr *Merricks*' opening submissions.

2           THE CHAIRMAN: Excellent. All in good time.

3           MR SIMPSON: You look so surprised.

4           THE CHAIRMAN: I was expecting at least another half an  
5           hour. Thank you very much, Mr Simpson.

6           MR SIMPSON: I am grateful.

7           THE CHAIRMAN: So it is over to Mastercard. Ms Tolaney.

8                       Opening submissions by MS TOLANEY

9           MS TOLANEY: Sir, there are four overarching points which we  
10           suggest should guide the Tribunal's consideration of the  
11           factual and expert evidence that you will hear over the  
12           next five weeks. The first, which we have made the  
13           point in our opening, is it is important, as you will  
14           know, to apply a consistent and principled analytical  
15           framework to the question of pass-on, and Mastercard's  
16           fundamental submission is that, applying that framework,  
17           it is logically and sensibly possible, and in fact we  
18           submit inevitable, that different outcomes will be  
19           reached in the two different claims before the Tribunal.

20                    The outcome in each claim depends on the nature of  
21           the relevant businesses, the time period of the claims  
22           and the size of the overcharge.

23                    Just pausing there. Tackling head-on the refrain  
24           that you have heard from Mr *Merricks*, and no doubt the  
25           merchant claimants, that Mastercard's position in the

1 two claims is somehow inconsistent or uncomfortable or  
2 facing both ways, we do not accept that. On the  
3 contrary, Mastercard's position is entirely comfortable  
4 because it comes from the consistent application,  
5 rigorously, of legal principle to the different facts.

6 In a nutshell, what we submit is that when the  
7 evidence, which you will hear, is properly analysed, it  
8 is apparent that pass-on rates from the merchant service  
9 charges from 2010 are likely to have been significantly  
10 higher than pass-on in the two prior decades.

11 That is unsurprising, contrary to Mr *Merricks'*  
12 submissions, when one considers the significant  
13 increases in card usage, charges and pricing  
14 technologies. We address those points in paragraph 1 to  
15 10 of our skeleton argument.

16 The second of my four points is that the Mastercard  
17 approach properly applies relevant and binding  
18 authority, and it applies both the Tribunal and Court of  
19 Appeal's finding in *Trucks* and the Supreme Court's  
20 approach in *Sainsbury's*, which can be reconciled and are  
21 consistent, contrary to the claimants' submissions at  
22 paragraph 57.1 of their written opening submissions,  
23 because the essence of the ratio in those cases was that  
24 a fact-sensitive approach should be taken to the  
25 question of pass-on, and that is precisely what

1 Mastercard is inviting the Tribunal to do.

2 We address the correct legal approach, in light of  
3 Trucks, in particular, in paragraphs 25 to 30 of our  
4 positive case and paragraphs 56 to 59 of our skeleton  
5 argument, our written opening.

6 Thirdly, in relation to the factual evidence, the  
7 crucial distinction is to be maintained on the one hand  
8 between the categorisation of the merchant service  
9 charges, and that is whether as a matter of economic  
10 theory or by the merchants for their internal accounting  
11 purposes. That is on the one hand. On the other hand,  
12 the merchants' actual treatment of merchant service  
13 charges in practice. Recognising and applying that  
14 distinction appropriately is critical to selecting an  
15 appropriate proxy cost.

16 Now, the merchant claimants, in particular,  
17 frequently blur that distinction between categorisation  
18 and treatment, and we address this at paragraphs 97 to  
19 109 of our written opening submissions.

20 Fourthly, and finally, Mr *Merricks* advances his case  
21 on the sole and, we suggest, inadequate basis of  
22 generalised and high level statistical inferences which  
23 he draws from costs and prices in public data, and he  
24 then seeks to extrapolate back from quantitative data  
25 applicable only to the merchant claim period. Now, you

1 have heard submissions from Mr Simpson King's Counsel  
2 today, and, interestingly, they were all about  
3 Ms Webster's graph at paragraph 630 of her first expert  
4 report. I will come back to the detail of that. But it  
5 is interesting, because Mr *Merricks*' own responsive  
6 case, at one stage, relied on that very graph, so the  
7 points that you heard today are completely new and they  
8 are a new attack and criticism.

9 What you did not hear was any justification for the  
10 approach, other than the sort of sleight of hand  
11 alignment between the data that is before the Tribunal  
12 in the merchant period and the attempt to extrapolate,  
13 without any real explanation of the approach taken in  
14 the absence of any data in the *Merricks* period. The  
15 reason that is fatal to Mr *Merricks*' claim is threefold.

16 First of all, he bears the evidential burden to  
17 establish causation in his case in the form of pass-on  
18 from merchants to consumers. That is common ground.  
19 Secondly, he cannot simply extrapolate from a different  
20 period in time where card usage acceptance and so on was  
21 different, irrespective of the percentages that he might  
22 now say should be applied, without engaging on the  
23 important differences, because if he is going to  
24 extrapolate, he has to tackle the differences.

25 Thirdly -- and this is the second problem for him --



1 is that he has failed to engage with the scale of the  
2 overcharge at issue. What he glibly said was: oh,  
3 Mastercard is trying to create a tiny Trucks overcharge.

4 Well, that is simply not right. That is a matter of  
5 fact, and he has to engage with that, and engage with  
6 the requirement to show that in the *Merricks* period  
7 there was an actual effect on prices. His case involves  
8 simply asking the Tribunal to assume that, and to assume  
9 it on the basis of inadequate evidence and material at  
10 best.

11 With that introduction, may I turn then to the first  
12 of the four topics. The first topic is the need to  
13 apply a consistent analytical framework to both the  
14 merchant claims and Mr *Merricks*' claim with the  
15 recognition that applying that framework to different  
16 facts may well result in different outcomes.

17 The analytical framework that Mastercard applies can  
18 be summarised as follows: first of all, as a matter of  
19 economic theory and applying insights from existing  
20 studies and analysis of public data, one would expect  
21 there generally to be a high level of pass-on in respect  
22 of a common variable cost. Now, just stepping back and  
23 breaking that down, a cost is variable where it is  
24 incurred for each additional unit that is supplied by  
25 a particular business. The most obvious example of

1 a variable cost is the cost of purchasing raw materials  
2 for the manufacturer of particular goods. By contrast,  
3 as is obvious, a cost is fixed if it is one which is  
4 incurred irrespective of the number of units that are  
5 supplied, and an obvious example is the cost of building  
6 or maintaining a factory. A cost is common where all or  
7 at least most firms within a relevant sector are  
8 similarly affected by the cost change, and so  
9 a business's competitors are similarly affected by it,  
10 and the Tribunal will hear evidence from the economic  
11 experts on pass-on on expectations for common variable  
12 costs.

13 But the obvious point is that a cost change that is  
14 common to a set of competitors will more likely result  
15 in changes to prices. So it follows that if there ought  
16 generally to be a high level of pass-on in respect of  
17 a common variable cost, then applying the same logic,  
18 pass-on is likely to be lower and slower where the cost  
19 is not common amongst competitors, or tiny compared to  
20 merchants' margins, or there are practical complexities  
21 associated with reflecting the cost in pricing.

22 Now, that is the approach that Mastercard suggests  
23 is the appropriate analysis, and I believe that Visa  
24 takes the same approach in its analysis.

25 The position of the other parties, by contrast, that

1       it Mr *Merricks* and the claimants, in a nutshell, is  
2       essentially that there is a single, one-size-fits-all  
3       answer to pass-on that applies across all sectors and  
4       all industries at all times over a 30-year period  
5       between 1992 and 2024. We suggest that, as a matter of  
6       common sense, that seems very unlikely, and  
7       unsurprisingly our expert has concluded that it is not  
8       the case. Pass-on rates in some sectors for some period  
9       will be high and in other sectors in other periods will  
10      be low, and there will be critical differences in levels  
11      of pass-on within different sectors in different decades  
12      as card usage, card acceptance and pricing technologies  
13      evolved.

14             That is why we suggest our position has an intuitive  
15      logic that there is not a single answer to pass-on of  
16      merchant service charges that stretches across all  
17      sectors and all decades, and that is not a weakness of  
18      our analysis.

19             Now, the Tribunal will be aware, and just tackling  
20      Mr Simpson's recent submissions, that the *Merricks* claim  
21      period, as he said, is from 1992 to 2007, with  
22      a two-year run-off -- 2008, sorry, with a two-year  
23      run-off to 2010. It is a follow-on damages claim, so it  
24      is limited essentially to consumer credit transactions.  
25      The merchant claim period starts essentially in

1 November 2010 with some exceptions, limited exceptions,  
2 the two exceptions from 2007, and there is an attempt to  
3 broaden those exceptions, which are only Fortnum &  
4 Mason, and one other, Heals, there is an attempt to  
5 broaden it by bringing into play other claims that have  
6 been settled, which is hopeless, there are only two  
7 before this Tribunal, and the vast bulk of the claim is  
8 from November 2010, relating to all Mastercard and Visa  
9 transactions, including credit cards, debit cards,  
10 commercial cards, and interregional transactions.

11 Now, Ms Webster's graph shows, and this was at 6.30  
12 {RC-F/14/119}, and you will remember it, so I am going  
13 to come back to it in more detail tomorrow. But  
14 broadly, what it is showing is the increase -- if we go  
15 over the page, please -- as a matter of ratio between  
16 '95 and 2022, and what we see is a nine-fold increase  
17 over 27 years with card payments comprised as a share of  
18 total transaction values, and a 23-fold increase over  
19 27 years where credit and debit cards combined as  
20 a share of all payment cards.

21 Now, for the first time on his feet, Mr Simpson  
22 tried to suggest that in some way the graph was  
23 defective, because it did not include a pool of data  
24 that has never been identified by Mr Merricks in any of  
25 the material before the Tribunal, or his submissions, as

1       having been necessary to be included. Even more  
2       starkly, today, on his feet, Mr Simpson could not  
3       actually identify precisely which other direct debits  
4       and so on should be included, or standing orders,  
5       because he was saying in his submissions that not all of  
6       them should be and have been included in the pool. So  
7       you are presented with quite a vague submission.

8             But it would not matter, because the graph sets out  
9       differences in credit card usage over time, comparing it  
10      against a pool, and the point is that it is the ratio of  
11      the use in one period to the ratio of the use in the  
12      next, and it would not make a difference to what  
13      question the Tribunal has to answer because the ratio  
14      remains the same.

15            I will develop some more of the detail on this as I  
16      talk about, in more detail, Mr *Merricks*' claim, but just  
17      to put that in front of the Tribunal now, the point  
18      having been raised, that nothing Mr Simpson said today  
19      on his feet for the first time changes the point that  
20      whatever you put into the pool, the ratio is showing an  
21      increase from '95 to current date, or 2022, that is very  
22      significant. The reason is, as the Tribunal will  
23      remember, during the 1990s, credit cards were far from  
24      universally accepted, even by major high street  
25      retailers. John Lewis did not accept credit cards until

1           October 1999. M&S did not do so until 2000. Even where  
2           cards were accepted, they were often subject to  
3           restrictions on use, such as minimum spend limits, and,  
4           as a result, it is obvious that merchant service charge  
5           costs are far larger, far more industry-wide and more  
6           commercially significant within the subsequent merchant  
7           claim period than they were in the *Merricks* claim  
8           period, and that is coupled with important advances in  
9           technology with increasingly sophisticated pricing  
10          practices, and that has permitted more frequent and  
11          granular price changes which are likely to have  
12          substantially increased merchants' ability to reflect  
13          small cost changes, such as increases or decreases in  
14          the merchant service charge in prices.

15                 So the key point, and I can return to the detail of  
16          this later in my submissions, but the key point is in  
17          the time period of the merchants' claim, the overcharge  
18          for which the merchants are claiming, which is said to  
19          apply to all Visa and Mastercard payments, was a common  
20          variable cost that represented a significant proportion  
21          of merchants' margins in the merchant claim period, and  
22          so a high level of pass-on is to be expected for most  
23          businesses.

24                 By contrast, in the *Merricks* claim, the overcharge  
25          that he is claiming, which is just on Mastercard credit

1 cards, was not a common variable cost that represented  
2 a significant proportion of merchant margins in the  
3 *Merricks* claim period, and so one would expect a lower  
4 level of pass-on, or even for there to be no effect on  
5 prices, because prices were not granular enough.

6 Now, that is the expectation, but what we suggest is  
7 that the right approach is for the Tribunal to apply  
8 a fact-sensitive, hybrid approach to estimating pass-on  
9 that takes account of both top-down evidence, which is  
10 economic theory, studies, analysis of public data, and  
11 bottom-up evidence from the merchant claimants, their  
12 data on costs and prices and qualitative evidence as to  
13 pricing; a hybrid approach because it recognises the  
14 limitations in the sources of evidence available in  
15 these proceedings and looks to triangulate them as far  
16 as possible. The problem for Mr *Merricks* is he has not  
17 produced appropriate bottom-up evidence for the time  
18 period of his claim which is why he is forced into  
19 extrapolation.

20 Now, applying the hybrid approach, Ms Webster  
21 concludes that in the merchant claim period, pass-on  
22 rates in many sectors are likely to be high,  
23 specifically around 70 to 100%, and she describes this  
24 as her base case pass-on scenario which applies where  
25 merchants treat merchant service charges in the manner

1 of a variable cost for price setting purposes.

2 But she fairly sets out three exceptions to her base  
3 case pass-on scenario, and for your note that is in her  
4 first expert report at paragraph 2.64. What she says is  
5 that, first of all, a fixed cost pass-on scenario  
6 applies if, in practice, merchants treat merchant  
7 service charges in their pricing decisions in a manner  
8 that economic theory would imply the fixed rather than  
9 variable costs, and the circumstances for a fixed cost  
10 pass-on scenario to apply arises far more squarely in  
11 the *Merricks* claim period but less in the merchants for  
12 the reasons I will come on to develop.

13 Secondly, she refers to an ad valorem pass-on  
14 scenario, which applies where a merchant incurs merchant  
15 service charges on an ad valorem basis and reflects this  
16 in its treatment of service charges in price setting.  
17 One of the willing claimants was advanced by the SSH  
18 Claimants as an example of this, but the evidence does  
19 not stack up, and you will hear that when we are in  
20 confidence. I will not identify them at the moment.

21 The third is a non-profit maximising scenario, which  
22 applies when a merchant is subject to price regulation  
23 and/or incentives, other than maximising profits, and,  
24 again, one of the willing claimants has been identified  
25 as a potential candidate for this, but whether actually



1 in practice that is true we will see from the evidence.

2 Now, it will be for the Tribunal to determine  
3 whether Mastercard's hybrid approach is the right one.  
4 It may not be the magic bullet, as my learned friends  
5 characterise it, but it does have the merit of being  
6 aimed at the target established by the case law, which  
7 brings me to my second topic, which is the Tribunal's  
8 and the Court of Appeal's judgments in Trucks.

9 The Tribunal will hear from factual witnesses on  
10 Wednesday and Thursday this week, and their evidence is  
11 relevant to whether budgetary and performance monitoring  
12 mechanisms, or similar channels, as they are called,  
13 exist, through which changes to costs, such as the  
14 merchant service charge, are in fact passed on by  
15 merchants, and those channels can be to consumers  
16 through the price setting process or to suppliers  
17 through the negotiation in other areas of the business.

18 In Mr Harman's two expert reports, he refers to  
19 these mechanisms and channels as an implicit route  
20 through which charges are passed on to the merchants and  
21 their loss is thereby mitigated. The reference for your  
22 note is paragraph 2.3.1(ii) of Mr Harman's first expert  
23 report.

24 Now, he refers to this as implicit, in  
25 contradistinction to prices being set explicitly, based

1       on a cost stack that includes merchant service charges,  
2       which is what we see for one of the willing claimants  
3       that you are going to hear evidence from, and that  
4       claimant has a pricing model determining the price on  
5       the basis of an accumulation of a series of costs,  
6       including merchant service charges.

7       The others, we suggest, may have more implicit  
8       channels, rather than it being expressly included in the  
9       stack. Both are equally valid. They are the mechanisms  
10      for passing on.

11      The claimants make two points about Trucks in their  
12      written opening submissions. First of all, they say  
13      that Mastercard and Visa have failed to apply the proper  
14      legal test under Trucks because their evidence does not  
15      establish a direct and proximate link between high MIFs  
16      and "an identifiable direct and proximate increase in  
17      the downstream prices paid by the claimants' customers".  
18      That is paragraphs 5.2 and 23 of their written opening.

19      Secondly, they say that in seeking to establish this  
20      direct and proximate link, there must be something more  
21      than reliance on the usual planning and budgetary  
22      process, and they cite Trucks at paragraph 57.2 of their  
23      skeleton.

24      Now, the target of those two submissions appears to  
25      be Mastercard's assessment of the limited qualitative

1 evidence adduced by the merchants, which we suggest  
2 demonstrates the mechanisms and channels through which  
3 increases in the service charge have been passed on.

4 But the starting point on answering the claimants'  
5 point is that, in citing Trucks as they do, they in fact  
6 mischaracterise the approach to proving pass-on  
7 explained by the Tribunal and the Court of Appeal in  
8 that case. We address this at paragraphs 56 to 59 of  
9 our written opening submissions.

10 I appreciate that, sir, you will be very familiar  
11 with the case, but there are five key points which we  
12 suggest are necessary in order properly to understand  
13 the relevance of the judgments in Trucks to these  
14 proceedings.

15 So, first, in this case, the question of pass-on is  
16 a question of factual causation, and you had the same  
17 point made by Mr Jowell KC, that no issue of legal  
18 causation arises, both on the face of Trucks and  
19 pursuant to the previous judgments in these proceedings.

20 Now, just stepping back, what does that mean? What  
21 it means is, in this case, the sole issue is whether  
22 prices, whether those charged to customers or paid to  
23 suppliers, were in fact different as a result of the  
24 overcharge. It is a but-for test. No questions of  
25 remoteness or policy then get superimposed, you are

1 simply applying a but-for test. It does not matter that  
2 some of the mechanisms or channels may be hard to show,  
3 the question is: are they shown and, but for them, would  
4 the overcharge have been different?

5 As we put it in paragraph 20 of our positive case,  
6 another way of putting it is whether there is the  
7 required causal connection, causal relationship, between  
8 the overcharge and higher prices or supplier pass-on  
9 through which the overcharge is alleged to have been  
10 passed on. That is the first point.

11 The second point is that the Supreme Court has  
12 already established the proper approach to factual  
13 causation in interchange fee litigation. If we could go  
14 to the *Sainsbury's* Supreme Court decision again, please,  
15 which is at {AB-D/21/1}. The relevant page, please, is  
16 page 66, paragraph 189 {AB-D/21/66}.

17 You will see:

18 "It is therefore a question of fact in each case,  
19 which the national court must resolve on the evidence  
20 adduced before it, whether an overcharge resulting from  
21 a breach of competition law has caused the claimant to  
22 suffer loss or whether all or part of the overcharge has  
23 been passed on by the claimant to its customers or  
24 otherwise mitigated."

25 If we could then go, please, to page 73 {AB-D/21/73,

1 and it is paragraph 215. The question that must be  
2 determined is formulated in clear and straightforward  
3 terms:

4 "The relevant question is a factual question: has  
5 the claimant in the course of its business recovered  
6 from others the costs of the [merchant service charge],  
7 including the overcharge contained therein?"

8 Thereby has the claimant:

9 "... transferred all or part of its loss to others  
10 ..."

11 We suggest that is the core factual issue the  
12 Tribunal must determine in these proceedings. In that  
13 context, and as the Supreme Court found in the same case  
14 at paragraph 225, which is on page 76 {AB-D/21/76}. You  
15 may well see the charge having an effect on prices as  
16 part of a number of costs dealt with together, because:

17 "The loss caused by the overcharge included within  
18 the [merchant service charge] was an increase cost which  
19 the merchants would in all probability not address as an  
20 individual cost but would take into account along with  
21 a multiplicity of other costs when developing their  
22 annual budgets."

23 The court went on to say that it is then a matter of  
24 estimation whether and to what extent the merchant  
25 passed on loss to consumers and suppliers, and the law

1 does not then require unreasonable precision in proving  
2 the amount so estimated.

3 So the approach of the Supreme Court was to  
4 formulate a clear and simple question for factual  
5 causation, the answer to which could turn on, for  
6 example, whether the charges were passed on as a wider  
7 group of costs in the merchant's budgeting process.  
8 Whether or not that process results in pass-on in any  
9 given case is a matter for the evidence and necessarily  
10 of some estimation in wielding a broad axe.

11 THE CHAIRMAN: Are they implicitly saying that the CAT, in  
12 *Sainsbury's*, got it wrong on pass-on?

13 MS TOLANEY: I do not know whether I need to go that far,  
14 but they appear to have been providing a simpler test of  
15 factual causation.

16 But what I would say, sir, is that properly  
17 understood, the Trucks case is perfectly consistent, and  
18 so what you, sir, have before you is a consistent  
19 approach in the case law before you.

20 You will be familiar with the facts of Trucks which  
21 comprised a follow-on damages claim by the *Royal Mail*  
22 and *BT* in relation to an EC decision concerning a group  
23 of cartelised truck manufacturers.

24 If we could please go to the Tribunal's judgment,  
25 which is {AB-D/37/1}, the Tribunal, at page 98

1 {AB-D/37/98}, paragraph 228, set out a number of  
2 identifying features that in general terms can be  
3 expected to make it easier to show pass-on or result in  
4 higher rates of pass-on, before giving a summary of the  
5 relevant factors that arose on the facts of that  
6 particular case.

7 There are four factors which come out of the  
8 judgment and if we could pick up the discussion going  
9 back to paragraph 188, which is at page 83, please  
10 {AB-D/37/83}. The first factor set out there is whether  
11 the defendant is able to identify the class of persons  
12 to whom the overcharge may have been passed on to. That  
13 factor is established in the present case before the  
14 Tribunal. The class of persons is either the merchants'  
15 customers, in the case of pass-on through prices, or its  
16 suppliers, in the case of supplier pass-on.

17 If we could then go, please, to page 94  
18 {AB-D/37/94}, paragraph 214. This is that the  
19 overcharge is experienced by all competing firms, rather  
20 than being specific to the merchant or some subset of  
21 competitors, and, as the Tribunal held here:

22 "In a competitive market, where all competing firms  
23 face a similar cost increase, it is likely that each  
24 firm would pass through a high proportion of that cost  
25 increase because it is well established that an increase

1 in the marginal cost of supplying a product is likely to  
2 lead to an adjustment to the profit-maximising price of  
3 the output in question which will tend to exert upward  
4 pressure on the downstream selling price in this  
5 scenario. That is probably the situation in the MIF  
6 cases."

7 Now, that factor is established in the present case  
8 as regards merchants in the merchant claim period  
9 because, as the Tribunal noted in this paragraph, the  
10 merchant service charge in these days is plainly  
11 a competitive and common cost amongst competing firms.  
12 The position, we suggest, was different in the *Merricks*  
13 claim period, particularly the 1990s, and I will develop  
14 that later in my submissions.

15 The third factor is at page 96, please,  
16 paragraph 220, subparagraph (1) {AB-D/37/96}, and this  
17 is knowledge of the nature and amount of the overcharge  
18 and by this the Tribunal clearly meant, we suggest,  
19 knowledge that a higher cost exists that may in  
20 principle be passed on. There is a clear distinction  
21 here between a cost, such as the merchant service  
22 charge, which is a known clear and transparent charge,  
23 and a hidden cost, such as that concealed within pricing  
24 set by a secret cartel.

25 The point was made by the Court of Appeal in the



1        *Stellantis* case, and that is, just for your reference,  
2        and {AB-D/29/18} -- we do not need to go to it -- but at  
3        paragraph 48, where the Court of Appeal held there was  
4        nothing secret about the imposition of a MIF. It was  
5        a transparent known charge and it was a recognised  
6        industry practice that acquiring banks pass it on to  
7        retailers in the merchant service charge.

8        The court went on to say:

9        "All of this was clearly relevant to the burden  
10        facing a defendant in this sector seeking to raise  
11        a realistic case of mitigation. The MIF was a systemic  
12        and troublesome cost that any major retailer would,  
13        inevitably, have had to confront."

14        Now, Mastercard, and I am sure Visa, would object to  
15        the merchant service charge being described as  
16        "troublesome", given the value of card acceptance to  
17        a merchant, but it is clearly in the merchant claim  
18        period a systemic cost.

19        The fourth factor we see at paragraph 220,  
20        subparagraph (2), which is the size of the overcharge  
21        which is relevant to the merchants' expenditure and/or  
22        price cost margin.

23        Now, here, at paragraph 220, the Tribunal noted that  
24        the merchant service charge was a significant cost in  
25        the *Sainsbury's* Supreme Court proceedings, between 2-3%

1 of the majority of retail sales -- I do not know if we  
2 need to go up to show that -- and that in Trucks  
3 a previous Tribunal had held that much more of  
4 a causative connection -- sorry, could the operator just  
5 go up a bit so we can see this on the page, 220, thank  
6 you -- much more of a causative connection would need to  
7 be shown than merely the overcharge being taken into  
8 account in the claimants' business planning in light of  
9 the far smaller overcharge on the specific facts of  
10 Trucks.

11 So one can see here that size of the overcharge is  
12 important, contrary to what Mr Simpson said in his  
13 submissions. Size is one factor to be borne in mind and  
14 we say there is an important difference, on the one  
15 hand, between a cost that is small relative to revenues,  
16 but substantial relative to retailers' margins, such as  
17 the merchant service charge in the merchant claim  
18 period, and, on the other hand, a cost that is minuscule  
19 compared to the revenues and small even relative to  
20 margins, such as the overcharges at issue in the  
21 *Merricks* claim.

22 If we could then please go back to page 98 to  
23 paragraph 228, which is where I started {AB-D/37/98}.  
24 The Tribunal then summarised the position stating that:

25 "It was not enough for [the defendant in that case,

1       which was *DAF*] to say that all costs, including  
2       increases in costs, are fed into the Claimants' or their  
3       regulators' business planning and budgetary processes."

4       Rather something more specific than that was needed  
5       on the facts of that case.

6       Now, it is this aspect on which the claimants rely,  
7       but this was not being laid down by the Tribunal as  
8       a hard and fast rule against reliance on budgetary  
9       planning and budgetary processes, which is the way it is  
10      presented in my learned friend Mr Beal's skeleton. That  
11      would be inconsistent with the Supreme Court's remarks  
12      in relation to the relevance of annual budgeting  
13      exercises to pass-on rates in the *Sainsbury's* decision  
14      which I showed you at paragraph 225.

15      What the Tribunal, we suggest, was saying here was  
16      that on the facts of the case before it, *DAF* needed to  
17      do more than simply rely on all costs being fed into  
18      a budgetary process. That was not a legal rule but  
19      a comment on the facts at issue. It appears that the  
20      Tribunal was influenced in reaching that conclusion, in  
21      particular, by the tiny amount of the overcharge and the  
22      particular circumstances relevant to the setting of  
23      prices in the case before it. We see the summary then  
24      of the relevant factors that *DAF* could rely upon in the  
25      case follow in subparagraphs (1) to (4), which are:

1           "Knowledge of the Overcharge or the specific  
2           increase in the cost in question;

3           "(2) The relative size of the Overcharge against the  
4           Claimants' overall costs and revenue;

5           "(3) The relationship or association between what  
6           the Overcharge is incurred on and the product whose  
7           prices have been increased;

8           " (3) Whether there are identifiable claims by  
9           identifiable purchasers from the Claimants in respect of  
10          losses caused by the overcharge."

11          Now, the Tribunal then revisited the question of  
12          size at paragraph 556, which is at page 210  
13          {AB-D/37/210}, and there we can see that size matters  
14          and, on the facts of Trucks, was a highly significant  
15          factor.

16          Now, in the case of *Royal Mail*, the overcharge of  
17          the facts never exceeded 0.05% of its revenue and was as  
18          low as 0.001%. That is paragraph 557. In the case of  
19          *BT*, the overcharge was just 0.0003% of revenues. That  
20          is paragraph 558. It is worth keeping those figures in  
21          mind because they are the orders of magnitude, smaller  
22          than the figures -- massively smaller than the figures  
23          in the merchant claim period, but they are strikingly  
24          similar to the figures in the *Merricks* claim period.

25          If we go then, please, to paragraph 564, page 212

1 {AB-D/37/212}, we see that the fact that all businesses  
2 seek to recover their cost and make a profit tells you  
3 nothing about whether a price increase has been caused  
4 by an increase in cost.

5 At paragraph 566, please, over the page  
6 {AB-D/37/213}, the fact that there is a general  
7 statistical relationship between costs and prices does  
8 not mean that a very small increase in one particular  
9 cost input would inevitably lead to a price rise because  
10 the general proposition of a relationship cannot itself  
11 prove the requisite causation, rather, as we see at  
12 paragraph 567, there is a broad range of factors that  
13 are taken into account in setting prices.

14 Where none of the four factors the Tribunal had  
15 identified, back at paragraph 228, are present, if we  
16 can go, please, to paragraph 573 at page 214  
17 {AB-D/37/214}, you see the evidence of factual causation  
18 needs to be that much stronger so that the requisite  
19 proximity can be established. We rely on that in  
20 particular in the *Merricks* case to demonstrate why we  
21 are making the submissions that we are.

22 Now, none of this is controversial and it was not  
23 overturned on appeal. So if we could look at the Court  
24 of Appeal decision, please at {AB-D/43/51}. If we could  
25 please go to paragraph 146.

1           So this is the Court of Appeal decision, and at  
2           paragraph 146 the Court of Appeal acknowledged the  
3           evidential problems the Tribunal had faced in relation  
4           to the impression of the experts' regression models to  
5           which a balanced approach had been taken with which the  
6           Court of Appeal would not interfere.

7           Then if we go on, please, to paragraph 149 at  
8           page 52 {AB-D/43/52}, the Court of Appeal noted that the  
9           level of the relevant overcharge was no more than about  
10          0.025% of *Royal Mail's* revenues and 0.0015% of  
11          Openreach's revenues and said that this was a "tiny  
12          amount".

13          If you read that paragraph, you will see within it  
14          the idea that this tiny amount could not only be traced  
15          to the price of the claimants' individual products, but  
16          that it is then possible to establish it caused a price  
17          increase seems to me completely unreal.

18          That is what we say holds true for the overcharges  
19          at issue in the *Merricks* claim period that are based  
20          just on Mastercard consumer credit card transactions  
21          which formed a tiny minority of all sales, and the idea  
22          that a small overcharge on a tiny proportion of sales  
23          resulted in a change to merchant prices for all  
24          transactions across the whole economy is completely  
25          unreal.

1           The position, however, is different for an  
2           overcharge said to arise on all Mastercard and Visa  
3           transactions, both credit and debit, in the later  
4           period, the merchant claim period. Without going into  
5           confidential material, there are two examples in the  
6           witness evidence that you will hear. One of the willing  
7           claimants demonstrates that merchant service charges  
8           consumed a double figures percentage of its revenue. So  
9           far from the figures that you see here, they were  
10          between something like 15% and 20-something % in the  
11          period from 2017 to 2023. The scale of that overcharge  
12          is many thousands of times larger.

13          The second example is still stark, which is from  
14          another willing claimant, that it represented just under  
15          2% of the total revenues as an average over the period  
16          between 2017 to 2024, but you will hear that is still  
17          very substantial.

18          So one can see, and you will hear this evidence, the  
19          merchant claim period is different and the revenue  
20          percentage of these charges is very different from  
21          Trucks.

22          Now, it was in the context of that extremely small  
23          size of overcharge in Trucks that we see, at  
24          paragraph 151, which is on the screen, the Court of  
25          Appeal endorsed the Tribunal's remark that there must be

1 something more than reliance on the usual planning and  
2 budgetary process in order to establish the requisite  
3 causative link for pass-on on the facts of that case.

4 Then if we could please go over the page to -- or  
5 just bring it down to paragraph 152. The Court of  
6 Appeal then focused upon the claimants' knowledge of the  
7 existence of the overcharge and said, in terms, by  
8 contrast to the case in front of them:

9 "In the cases involving MIFs, the overcharge in the  
10 form of the MIF is transparent and known to the  
11 merchant, so that it can seek to address that  
12 overcharge, for example bypassing it on to customers.  
13 In contrast, the overcharge as a consequence of the  
14 secret cartel was, by definition, not known to the  
15 Claimants, so they were not in a position to address  
16 it."

17 That is an important factual distinction between the  
18 Trucks litigation and the interchange fee litigation in  
19 terms of the likelihood of pass-on, namely knowledge of  
20 the MIF as forming part of the merchant service charge  
21 cost.

22 If we could then go to paragraph 153, the Court of  
23 Appeal noted there that there are also no identifiable  
24 claims by identifiable purchasers from the relevant  
25 merchants on the fact of Trucks.



1           Then the conclusion is at paragraph 154, where the  
2           Tribunal's finding -- it was recorded that the Tribunal  
3           had concluded that none of the four factors identified  
4           in the first instance judgment at paragraph 228 was  
5           present on the facts of the case and that had not been  
6           challenged on the appeal. The facts of Trucks were  
7           therefore a situation where none of the four factors are  
8           present and so the evidence of factual causation needs  
9           to be that much stronger so that the requisite proximity  
10          can be established.

11          The Court of Appeal then concluded that the  
12          Tribunal's approach had disclosed no error of law.

13          We suggest, properly understood, the Tribunal's and  
14          the Court of Appeal's approach in Trucks is consistent  
15          with the position adopted by Mastercard in these  
16          proceedings and the framework for pass-on in interchange  
17          fee cases set out by the Supreme Court in *Sainsbury's*.

18          Mastercard does not rely solely on qualitative  
19          evidence, but considers that the qualitative evidence in  
20          these proceedings, which largely relates to the last few  
21          years, demonstrates clear mechanisms and channels for  
22          pass-on of the merchant service charge in the merchant  
23          claim period which are explicable in light of its  
24          greater size and significance compared with the sums at  
25          issue in Trucks, and in so doing, Mastercard is drawing

1 a direct and proximate link between changes in the  
2 merchant service charge and changes in prices for the  
3 merchant claimants.

4 In relying on budgetary and performance monitoring  
5 mechanisms for that purpose, Mastercard's approach is  
6 closely aligned to that endorsed in the interchange fee  
7 litigation by the Supreme Court in *Sainsbury's*, and it  
8 is a world away from the wide propositions the claimants  
9 in this case seek to derive from Trucks, namely, you  
10 simply just cannot rely on budgetary processes.

11 That takes me then to my fourth point, which is the  
12 unreliability of the claimants' submissions on Trucks.  
13 If we could just look at {RC-A/1/31}, please. That is  
14 the opening submissions of the claimants,  
15 paragraph 57.2. Thank you.

16 So the claimants there cite the Trucks CAT decision  
17 under the heading "Proximate causation", for the  
18 proposition there must be something more than reliance  
19 on the usual planning and budgetary process.

20 Now, on the facts of Trucks, it is correct that  
21 given the extremely small size of the overcharge and the  
22 regulatory framework, normal planning and budgetary  
23 processes would not necessarily mean a tiny cost would  
24 result in a tiny increase in price correspondingly.  
25 That does not mean that normal planning and budget

1 processes may not be sufficient to show that a cost did  
2 result in a price increase, and if Mastercard is able to  
3 show that changes in the merchant service charge were  
4 passed on to customers through different prices, or to  
5 suppliers through renegotiations in other parts of the  
6 business, that will satisfy the test for factual  
7 causation.

8 The fact that Mastercard may do so through  
9 interrogating a merchant's planning and budgetary  
10 processes, we suggest, is neither here nor there. What  
11 matters is the answer to the straightforward question  
12 posed by the Supreme Court in *Sainsbury's* at  
13 paragraph 215, which is: has the claimant, in the course  
14 of its business, recovered from others the costs of the  
15 merchant service charge, including the overcharge  
16 contained therein?

17 If we could go back, please, to page 13 of this  
18 document {RC-A/1/13}, at paragraph 23 of their skeleton  
19 the claimants cite Trucks without giving a reference to  
20 any paragraph in either judgment in support of an  
21 argument that Mastercard's identification of mechanisms  
22 and channels within the qualitative evidence are  
23 impermissibly "indirect".

24 Now, it is not entirely clear what is meant by that,  
25 and it is challenging to respond to an allegation when

1       there is no citation, but we suggest that it is wrong,  
2       because in none of the decisions, the three decisions we  
3       have looked at, did any of the Tribunal, the Court of  
4       Appeal or the Supreme Court conclude that reliance on  
5       pass-on through performance monitoring and budgeting  
6       processes is impermissibly indirect, such that this is  
7       incapable of itself in establishing the causal link to  
8       prove pass-on.

9             Just to put that point to bed, those decisions are  
10       in fact contrary, we suggest, to the proposition here,  
11       because the *Sainsbury's* Supreme Court decision at  
12       paragraph 225 is flatly inconsistent with it, and  
13       neither of the courts in the Trucks decisions express  
14       themselves in those terms either. All that can be  
15       taken, we would suggest, on this point, is that the  
16       Trucks judgments conclude on the facts of that case, and  
17       in particular, given the small size of the overcharge,  
18       something more was needed than a basic assertion that  
19       all costs are eventually swept up through budgets and  
20       targets into prices.

21            Mastercard accepts that point, pass-on cannot simply  
22       be proved by relying on a truism that an increase in  
23       costs must exert upwards pressure on prices, and we say  
24       it is necessary to identify the mechanisms by which the  
25       overcharge likely resulted in higher prices in any given

1           time period. Therefore, if we can demonstrate that  
2           a merchant took account of the charges in their  
3           budgeting and targeting setting processes, and  
4           established causal connection between those processes  
5           and prices, then we have discharged our burden to  
6           demonstrate pass-on for the relevant merchant or sector  
7           in the merchant claim period. But in any case, we do  
8           rely on more than the usual planning and budgetary  
9           process, because in addition to the qualitative  
10          evidence, we also rely on quantitative data.

11       MR TIDSWELL: Can I ask you a question. A moment ago you  
12           said that Mastercard was drawing a direct and proximate  
13           link between the changes in the merchant service charge  
14           and changes in prices. I was not sure whether you  
15           were -- I think that was different from what you were  
16           saying earlier about proximity, and I was not sure  
17           whether that was my misunderstanding of what you were  
18           saying.

19           Are you meaning to say something different from  
20           but-for causation there?

21       MS TOLANEY: I am not. I was using that as but-for  
22           causation.

23       MR TIDSWELL: Yes, because I think -- well, it seems to me  
24           that where you -- in this slightly strange world where  
25           we have factual causation and not legal causation, it

1 does then become quite difficult to apply things like  
2 Trucks, and to apply everything that is said, without  
3 quite a lot of critical analysis, which I think is what  
4 you have just been showing us, as I understand it.

5 But I think what you are -- as I understand what you  
6 are saying to us, is that the discussion that took place  
7 in Trucks at the CAT was that almost a combined  
8 conversation about legal and factual causation in which  
9 factual causation plays a part, where other -- where  
10 other indicia of legal causation were weak or not  
11 present. Is that broadly right?

12 MS TOLANEY: Well, I think Trucks can be analysed in that  
13 way, but the proposition that comes out of Trucks for  
14 the Tribunal's purposes is to look at the method by  
15 which it has been established that there is a causal  
16 connection but-for.

17 The questions of remoteness and other things do not  
18 come into it, but the fundamental factual question was  
19 part of -- well, I would say at the heart of the ratio  
20 of the Trucks CAT decision, and it was broken down in  
21 different ways, I accept that, but with indicia of what  
22 would demonstrate the causal connection and not just  
23 sweeping in the costs in one way. We would say that  
24 that is consistent with the approach taken by the  
25 Supreme Court to the question of factual causation.

1           The relevant point that comes out of Trucks is  
2           twofold. One is that the size of the overcharge does  
3           matter, and that is on the factual side, because it is  
4           unlikely that a small overcharge would have the causal  
5           connection to show and shift the increase in prices, or  
6           any effect on prices. So that is one of the key points  
7           that comes out of Trucks that is consistent with what  
8           was said in *Sainsbury's*.

9           The other point that is consistent is that you can  
10          look at budgetary and other proposals if you can meet  
11          the causal test through it, but what you cannot do is  
12          just simply say it must have been caught up in the  
13          budgeting and the processes.

14          I have gone through it at length because that --  
15          I think the point that is taken against me is that  
16          relying on a budget is impermissible. Well, that is not  
17          right, and it would be inconsistent with the  
18          Supreme Court in *Sainsbury's*, and indeed my learned  
19          friend Mr Beal tries to present the two decisions as  
20          inconsistent, whereas I do not think they are, and  
21          certainly not for this Tribunal's purposes.

22       MR TIDSWELL: Can I ask you a slightly different question  
23          then about the channel that represents competitor  
24          pricing. So if you had a channel in which the merchant  
25          is looking at what competitors are pricing, I think

1           Ms Webster and other experts say, well, that may well  
2           result in harm.

3       MS TOLANEY: That is right.

4       MR TIDSWELL: I think Mr Harman actually, and then Ms  
5           Webster, say that may result in effectively the MSC  
6           being passed on.

7       MS TOLANEY: Yes.

8       MR TIDSWELL: There is an element of indirectness there.

9       MS TOLANEY: Yes.

10      MR TIDSWELL: But you say that does not matter?

11      MS TOLANEY: It does not matter if the fundamental question  
12           is: have you shown through a channel or other whether  
13           a direct increase on price, or an indirect through  
14           competitive adjustment, if I can put it that way, that  
15           there has been an effect on prices, and that is the  
16           point because -- and in a sense, again, that is  
17           consistent with the *Sainsbury's* approach, which is you  
18           might assume that a number of costs are wrapped up  
19           together. You cannot be entirely breaking it down  
20           precisely to show that this pound was increased on the  
21           charge, therefore this pound was increased on the price.  
22           That may be what you would like to do, but it is  
23           impossible in this context.

24           So there is going to be an element of estimation,  
25           and within that it is going to be more sophisticated, we



1           would suggest, than simply the route of £1 for £1, there  
2           will be other routes, because these are sophisticated  
3           businesses and sophisticated sectors that are  
4           competitors.

5       MR TIDSWELL:  When we are thinking about that, I mean, there  
6           are principles in relation to this in the law of  
7           causation generally, which are similar to what you have  
8           just said.  Are they things we should be looking at and  
9           applying here as well, those more general principles,  
10          where you have competing -- not competing,  
11          multiple causes, or you have a chain of causation.  
12          Obviously remoteness then applies as a policy setting,  
13          and you would say that is a --

14       MS TOLANEY:  That is out.

15       MR TIDSWELL:  That is out.  But putting that aside, because  
16          there are just -- putting aside the policy points, there  
17          are these practical points, which is if you have three  
18          things that might have caused a price to go up, do you  
19          have to show that one of them was the reason, or is it  
20          enough that it was a reason?

21       MS TOLANEY:  Well, I think the answer to that is, as  
22          a matter of general law, we would have to persuade the  
23          Tribunal that we had discharged our burden, or  
24          Mr *Merricks* has to persuade the Tribunal he has  
25          discharged his, in showing that where we say the causes

1       are, whatever they are, whichever channel it has, has  
2       caused the change in the price, so it has been a loss,  
3       because ultimately this is about showing that the loss  
4       has not fallen where it is being said it has fallen.

5       So we do have to discharge the burden, and to the  
6       extent that general principles come into that, yes. But  
7       what is not in play here is the matters of legal policy,  
8       legal causation, because the Tribunal has already  
9       ordered they do not form part of it, and, in a sense, it  
10      is quite hard to see how they would apply to a MIF case  
11      anyway, because questions ... So, for example, I think  
12      one of the discussions in the cases, maybe the  
13      *Sainsbury's* case. It was about a ship that had been  
14      chartered, and the chartering had occurred six months  
15      prior, and did you take into account the benefit or  
16      burden of that factor when -- and it was analysed as  
17      a break in the chain rather than forming part of the  
18      causation.

19      Here, it is hard to see that there is a similar  
20      circumstance, because the case is that the loss was  
21      passed on through one or more channels, and that is not  
22      the same as having to show that it was this channel or  
23      that channel; as long as you are satisfied it was passed  
24      on through one of those channels, one or more, then the  
25      loss was not suffered whether it has been claimed.

1 THE CHAIRMAN: I do still find it difficult to separate out  
2 legal and factual causation. I know we seem to have  
3 gone down that route, probably because that is what the  
4 Supreme Court did in *Sainsbury's*, but, as you rightly  
5 say, in *Trucks* we were considering both really.

6 We are now in the situation where we cannot consider  
7 legal causation but we have to work out whether there  
8 has been factual causation, and it is, I think, a little  
9 difficult to see -- to understand exactly what that  
10 means. I mean, how much causation does there have to  
11 have been from the MIF itself? How much influence did  
12 it have to exert on the prices? I mean, is there  
13 a level above which it needs to go to have an effect, or  
14 is it any effect counts?

15 MS TOLANEY: Well, I think the question is, this is if  
16 analysed through the prism of mitigation and loss. The  
17 purpose of this argument is to make sure that there is  
18 not, what we would say, overcompensation. So to the  
19 extent that that there is any overcompensation, then  
20 that would be the answer, I think, sir, to your  
21 question. Because you are not looking at -- when you  
22 are looking at causation, you are looking it through the  
23 prism of making sure that there is not overcompensation  
24 to the claimants if they have in fact not suffered the  
25 loss for which they are claiming, even if it is only

1 a very small amount.

2 There is, however, the practical different question  
3 on causation which is: if you have a tiny overcharge,  
4 has it actually caused any increase in prices? Which is  
5 where the size point comes in. Has it actually caused  
6 the increase? Because that is a causal question. Has  
7 it in fact been passed on? It is an element of that  
8 question. But when you look at it through the prism of  
9 loss and compensation, I think it seems less troublesome  
10 to be focusing on causation.

11 I understand that it is a split that is not very  
12 natural, in a way one might say that causation is always  
13 a question of law, and the distinction between legal and  
14 factual is slightly blurry. But I think what is meant  
15 is -- the factual question, as I say, is: did the  
16 prices -- were they in fact different as a result of the  
17 overcharge? That is the factual question. I think the  
18 legal causation element the Supreme Court had in mind  
19 was simply the policy issues of: even if the prices were  
20 different, is there a reason we should not allow  
21 recovery?

22 We are saying that does not come into play, and one  
23 cannot really see why it would come into play in a MIF  
24 case, because either there has been loss or there has  
25 not. So that is why legal causation may be sensibly put

1 to one side.

2 THE CHAIRMAN: All right.

3 MS TOLANEY: I do not know if that answers your question?

4 THE CHAIRMAN: I will think about it overnight.

5 MS TOLANEY: May I finish, I am sorry, I am going on, but

6 may I finish my fifth and final point on Trucks, or

7 would you like me to carry on tomorrow with that?

8 THE CHAIRMAN: How long are you going to be on that?

9 MS TOLANEY: I think I can take it briefly, because it is

10 simply on disclosure which you have heard a lot on, sir.

11 So if you give me two minutes, I will be done.

12 THE CHAIRMAN: Yes.

13 MS TOLANEY: The fifth point was disclosure, which is -- you

14 have heard the background to the disclosure given by the

15 claimants and the complaints made by Mastercard and Visa

16 about this, and I will not rehearse all of that. They

17 are very real points, but now is not the time to

18 rehearse them.

19 There are three brief observations that I might just

20 make because they are relevant to you hearing the

21 evidence.

22 First, as we say, it is clear that even though we

23 bear the legal burden, there is a heavy evidential

24 burden on the merchants because they have the material

25 to provide evidence of how they dealt with, in the

1 recovery of the costs of their business.

2 Secondly, their approach to disclosure has been so  
3 inadequate that further new documents were still being  
4 provided just days ago. So three months after positive  
5 cases were submitted, one month after responsive cases,  
6 and days before the trial skeletons, two weeks before  
7 these submissions. So that has not been very helpful.  
8 It may be, and this is an unusual case, but it may be,  
9 sir, that you will listen to the evidence, and the panel  
10 will listen, and think: where are the documents?  
11 Certainly we have thought that in relation to some of  
12 the witnesses.

13 Thirdly, it follows that if inferences are necessary  
14 to bridge any gap in the available documents, in  
15 particular between performance monitoring and budgetary  
16 procedures and price setting processes, we will be  
17 inviting the Tribunal to draw those inferences. This is  
18 not a case where we are in the territory of adverse  
19 inferences in the normal run; it is a particular area  
20 where the Supreme Court has already anticipated the  
21 drawing of inferences because of the one-sided nature of  
22 the information holding.

23 I just flag that because it is important, before we  
24 cross-examine, that that marker is firmly put down in  
25 open court so that it has been heard.

1 THE CHAIRMAN: All right.

2 MS TOLANEY: That was it on Trucks, unless you have further  
3 questions tomorrow morning.

4 THE CHAIRMAN: Apart from saying obviously the Court of  
5 Appeal judgment is the finest judgment there.

6 MS TOLANEY: Indeed, and it said the same about yours, sir.

7 THE CHAIRMAN: All right. So 10.30 tomorrow. Thank you.

8 (4.43 pm)

9 (The hearing adjourned until 10.30 am  
10 on Tuesday, 19 November 2024)

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