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

1517/11/7/22

Salisbury Square House  
8 Salisbury Square  
London EC4Y 8AP

Monday 24 March – Friday 4 April 2025

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**

Matthew Cook KC, Sonia Tolaney KC & Owain Draper on behalf of Mastercard  
(Instructed by Jones Day and Freshfields  
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, Reuben Andrews, Flora Robertson & Oscar Schonfeld on behalf of  
the SSH Claimants

Monday, 24 March 2025

(10.19 am)

THE CHAIRMAN: Good morning, and welcome back.

MR BEAL: Good morning, sir. By way of representation --  
sorry.

THE CHAIRMAN: Before you start, I just need to --

MR BEAL: Of course.

THE CHAIRMAN: -- read the notice for the live stream.

Some of you are joining us live stream on our  
website, so I must start, therefore, with a 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.

Mr Beal.

MR BEAL: May it please the Tribunal. The representation  
before you this morning is I am leading Mr Woolfe KC and  
Ms Flora Robertson, Mr Oscar Schonfeld and  
Mr Reuben Andrews for the claimants.

My learned friends Matthew Cook KC and Owain Draper  
are for Mastercard, and my learned friends  
Daniel Jowell KC, Jessica Boyd KC, Isabel Buchanan,  
Ava Mayer and Aislinn Kelly-Lyth are for Visa.

1 THE CHAIRMAN: Familiar faces.

2 Opening submissions by MR BEAL

3 MR BEAL: I welcome Ms Robertson so she doesn't have to  
4 shout from the back of the court, which was her role  
5 last time.

6 In terms of what is open to me this hour that lies  
7 ahead of me, what I am proposing to do is to set out  
8 some initial observations and then deal with essentially  
9 what the issues are between the parties but looking,  
10 first, at some evidence from the merchants, then at some  
11 evidence from the acquirers, and, finally, at some  
12 previous regulatory and court decisions and then giving  
13 you perhaps a one-line answer for each of the different  
14 issues that have arisen.

15 As with Trial 2A, this part of the case necessarily  
16 proceeds on a series of assumptions. The first is that  
17 liability has been established in respect of each of  
18 the multilateral interchange fees or MIFs. Secondly,  
19 that none of the MIFs was lawfully set. Thirdly, that  
20 the unlawful level of the overcharge was the full extent  
21 of the MIF since the correct counterfactual is  
22 settlement at par and therefore zero MIFs. The fourth  
23 assumption is that the unlawful overcharge has been paid  
24 by the acquirer to the issuing bank.

25 We recognise that we have the burden of establishing

1           that the unlawful overcharge suffered by the acquirers  
2           has then been passed on to us, and in order to discharge  
3           that burden, we rely on a number of sources of evidence.

4           First, the evidence from the merchants themselves  
5           that was considered by this Tribunal in Trial 1 and also  
6           in Trial 2A.

7           Secondly, the available material from the acquirers,  
8           which consists principally of publicly available  
9           documents.

10          Thirdly, the previous regulatory and court decisions  
11          that have looked at this issue.

12          Finally, the expert evidence from Dr Trento in  
13          the form of Trento 3 and Trento 4.

14          Now, in terms of the expert evidence, it is possible  
15          to explain the various different ranges that the parties  
16          have landed upon. Firstly, as the Tribunal is well  
17          aware, everyone agrees that IC+ or IC++ contracts  
18          represent mechanical acquirer pass-on or APO in full.

19          I shall probably slip into saying IC+ rather than  
20          breaking into IC+ or IC++ but I hope you will forgive me  
21          that administrative ease. The claimants seek a finding  
22          to that effect, i.e. that there is full pass-on for IC+  
23          contracts and we say that the full practical  
24          consequences of that can be dealt with at Trial 3. We  
25          have some outline suggestions that I can no doubt go

1 through in closing if it would be appropriate to do so.  
2 One option we have noted is to have an exceptions  
3 process whereby the claimants have the option of  
4 electing to prove that they had IC+ pricing for all or  
5 a substantial period of the claim period. Another would  
6 simply be to apply a presumption of a particular rate of  
7 pass-on for claimants possibly within -- with  
8 segmentation for turnover if that is what the Tribunal  
9 considers to be appropriate. But it largely depends, in  
10 a sense, on how the evidence falls out and what  
11 the Tribunal's findings are. So whilst we can give some  
12 outline suggestions, we have not committed ourselves to  
13 any one at this stage. If you want further detail, we  
14 will of course provide it in closing.

15 Now, the second point is that Visa and the claimants  
16 are agreed that APO for merchants with turnover  
17 exceeding 100 million is 100%, albeit for different  
18 reasons. So we, for example, do not accept that it is  
19 appropriate to necessarily provide segmentation for this  
20 particular market. There is not a distinct market  
21 sub-sector as such based on turnover value. Firms with  
22 turnover both above and below the magic line of  
23 £100 million per annum are either on blended or IC+  
24 contracts, there is no rhyme or reason why they fall one  
25 side or the other, save that in practice one sees

1 a prevalence of IC+ pricing for larger merchants, other  
2 things equal.

3 Where the claimants and Visa part company is to  
4 suggest that for smaller merchants, i.e. those which  
5 Visa demarcates as being below the £100 million level  
6 per year, the APO should be 75% on the basis of  
7 Mr Holt's evidence.

8 Mastercard, in contrast to that position, disagrees  
9 with segmentation as well. Ms Webster advances a range  
10 of 60 to 80% for blended contracts in general, and  
11 within that level, Mastercard, as a defendant, has  
12 plucked 63% as the percentage to be applied and so  
13 therefore Mastercard's position is you have got full  
14 pass-on for IC+ contracts and 63% for everything else,  
15 as we understand it.

16 Now, it is important --

17 THE CHAIRMAN: You are saying that, in relation to Visa, it  
18 was turnover of more than 100 million was the dividing  
19 line.

20 MR BEAL: Yes.

21 THE CHAIRMAN: Was it not 50 million card usage?

22 MR BEAL: That is annual card --

23 THE CHAIRMAN: Card turnover.

24 MR BEAL: -- annual card turnover is 50 million.

25 THE CHAIRMAN: Right.

1 MR BEAL: Mr Holt has used a proxy that 50 million annual  
2 card turnover equates to roughly 100 million --

3 THE CHAIRMAN: Oh, I see.

4 MR BEAL: -- actual turnover per annum. That is the basis  
5 he has gone on. We are not necessarily seeking to go  
6 behind that as a proxy, we just do not think that there  
7 is this bright line division between those above and  
8 those below £100 million turnover.

9 Now, at the risk of stating the obvious and at  
10 the risk of this coming back in a jury point against me,  
11 it is obvious that the schemes are seeking to knock off  
12 hundreds of millions of pounds off the claim value, and  
13 indeed Mastercard openly acknowledges that at  
14 paragraph 8 of their skeleton argument {RC-A1/3/3}. We  
15 do say here that it is important to realise some of  
16 the practical consequences of the arguments that are put  
17 before the Tribunal. I hope I may be forgiven for  
18 borrowing a warning given by Lord Justice Sedley in  
19 the Court of Appeal in a VAT case involving *Royal and*  
20 *Sun Alliance v HMRC*. At paragraph 54 of his judgment in  
21 that case his Lordship stated:

22 "Beyond the everyday world, both counsel have  
23 explained to us, lies the world of VAT, a kind of fiscal  
24 theme park in which factual and legal realities are  
25 suspended or inverted". [As read]

1           The reason I give that warning is that we do end up,  
2           we say, in this case with, on our analysis, a relatively  
3           straightforward, traditional common law exercise of  
4           working out what the recoverable loss is, i.e. there has  
5           been an overcharge, it has been suffered by  
6           the acquirers, have they passed it on to us? We say  
7           the answer is yes, and that can be proven by qualitative  
8           and quantitative evidence.

9           In contrast, we say, the defendants' case leads to  
10          a position that is both counterintuitive and contrary to  
11          commercial and common sense.

12          So if we start with the proposition that  
13          a substantial proportion of the claim value is  
14          attributable to consumer debit MIFs and we then, for  
15          example, take as an estimate of what -- roughly what  
16          the value of the claim is that is attributable to  
17          domestic debit MIFs is around 50% for the SSH claimants,  
18          for example, then the combined claims in respect of  
19          consumer debit MIFs run, on any plausible valuation of  
20          the claims, to many hundreds of millions of pounds. Yet  
21          on the schemes' case, the acquirers of smaller merchants  
22          on blended contracts absorbed, on Mastercard's figures,  
23          up to 37% of all of the MIFs charged by issuing banks  
24          for consumer debit MIFs for the period from 2010 to  
25          2024. So in other words, you take something like



1 a consumer debit MIF, the plain vanilla MIF that is  
2 applied on a consumer debit card transaction, and  
3 Mastercard says 37% of that MIF has simply been  
4 swallowed by the acquirers rather than passed on in  
5 the form of elevated MSCs and that obviously triggers  
6 the hundreds of millions of pounds that they say and  
7 recognise is in issue, paragraph 8 of their skeleton  
8 argument.

9 But, of course, two implications follow from that.  
10 Firstly, debit card MIFs have actually remained largely  
11 the same over time. They have been hovering at or  
12 around 0.2% for the entirety of the period from  
13 essentially 2010/2011 through to 2024, in part because  
14 of the IFR introducing a 0.2% threshold for consumer  
15 debit card MIFs.

16 The second implication is that smaller merchants,  
17 all else being equal, will have lower bargaining power  
18 than larger merchants, and that seems to be, I will not  
19 say common ground because common ground rarely is, but  
20 it seems to be a general proposition that is echoed by  
21 each of the parties.

22 Now, in contrast, the acquirers are recognised to  
23 have passed on all of the MIF to larger merchants,  
24 despite their higher bargaining power, so we end up with  
25 this counterintuitive result whereby the party with

1 lower bargaining power, smaller merchants, is somehow  
2 able to force the acquirer to swallow up to 37% of  
3 the plain vanilla cost that has remained largely  
4 unchanged over the entire claim period, while  
5 larger merchants, seemingly who have the higher  
6 bargaining power, have nonetheless been forced to suffer  
7 the full extent of the MIF unlawful overcharge for  
8 consumer debit card transactions, and that in itself  
9 should give pause for thought.

10 Now, the only way we reach that counterintuitive  
11 result, we say, is because the schemes have, in  
12 practice, chosen to concentrate on the impact of price  
13 decreases in the MIF and downplay the response to price  
14 increases in the MIF. Mr Holt, for example, has  
15 acknowledged, in his 13th report at paragraph 346  
16 {RC-F1.4/2/128}, that acquirer pass-on will generally be  
17 complete for price increases, but he has then sought to  
18 rely on a series of much lower estimates of pass-on for  
19 price decreases in order to dilute downwards the overall  
20 figure.

21 Ms Webster has only considered, in terms of reliance  
22 on an estimate, she has only considered the PSR data  
23 relating to the IFR event, which, for the groups which  
24 the PSR analysed, related to a reduction in the consumer  
25 MIFs. She did not focus, as far as we can see, on any

1 of the price increases as an event study.

2 But we do say it is important to recognise that,  
3 conceptually, it is the response to a price increase  
4 which better reflects the analytical process that is  
5 required to determine whether an unlawful overcharge was  
6 passed on to a merchant, and that is because it is  
7 a price increase that better corresponds to what I have  
8 described as "the common or garden -- common lawyer  
9 approach" to establishing loss. There has been loss  
10 suffered; it has been suffered by the acquirer; we are  
11 an indirect purchaser; has that acquirer in fact, as an  
12 act of mitigation, passed that loss on to us? Obviously  
13 IC+ pricing, it is done mechanically; we say implicitly  
14 in the pricing mechanism that is adopted even for  
15 blended contracts, there is a full pass-on of that cost.

16 So the key issue to be determined, and I would like,  
17 briefly, to have a quick look, please, at the *Trucks*  
18 judgment in the Court of Appeal at paragraph 151, that  
19 is authorities bundle {AB-D/43/52}. We can there see  
20 how the Court of Appeal has framed the test.

21 Paragraph 151 --

22 THE CHAIRMAN: Which page is it?

23 MR BEAL: Page 52, not 22.

24 In 151, there we see the court says:

25 "In terms of factual causation, DAF could only

1           succeed in its argument on SPO if it could establish  
2           that the prices charged by Royal Mail and BT to their  
3           customers were higher because of the overcharge, in  
4           other words if it could establish ... that  
5           the overcharge had been passed on to those customers.  
6           The CAT was unanimous as to this requirement ... of its  
7           judgment where it said: 'we consider that DAF must prove  
8           that there was a direct and proximate causative link  
9           between the Overcharge and any increase in prices by  
10          the Claimants. That means that there must be something  
11          more than reliance on the usual planning and budgetary  
12          process ...'"

13                 So that is the way we have sought to characterise  
14          what we have to show. We are not seeking to rely on  
15          ordinary budgetary processes, we are seeking to identify  
16          a pricing mechanism, either explicit, IC+, or implicit,  
17          in blended, whereby what the acquirers have done in  
18          practice is to pass on the unlawful overcharge of  
19          the MIF that they have suffered and we say it is  
20          incumbent upon us to show the direct and proximate  
21          causative link in that process, which is what --

22       THE CHAIRMAN: You are accepting the burden.

23       MR BEAL: Yes.

24       THE CHAIRMAN: Yes.

25       MR BEAL: I am trying to describe what we are saying

1           the legal approach is.

2       THE CHAIRMAN:   Yes.

3       MR BEAL:   Simply because Mastercard in their skeleton said  
4           our legal approach was hopeless as a matter of law, what  
5           I have sought to do is to lock my submission in to  
6           the clear finding from the Court of Appeal in *Trucks*,  
7           which I would respectfully suggest is not hopeless, as  
8           a matter of law.

9           Now, here, what we do not need to have is  
10          a counterfactual analysis to determine the level of  
11          the MIF as an unlawful overcharge because it is clear  
12          from the finding of the Supreme Court in *Sainsbury's*  
13          that the correct counterfactual for assessing  
14          the unlawful overcharge is settlement at par with zero  
15          MIFs.   So that gives us the prima facie measure of loss.  
16          The prima facie measure of loss is necessarily the full  
17          extent of the MIF.   Where one is not dependent upon that  
18          counterfactual analysis for ascertaining the level of  
19          the overcharge, it is important that counterfactual  
20          analysis is then seen in its proper context.   Here, we  
21          say, importantly, the counterfactual cannot contain any  
22          illegality.   It is assumed for the purposes of Trial 2B  
23          that all permutations of the MIF were unlawful and arise  
24          as a result of a restriction of competition in setting  
25          the MIF.   It therefore follows that the counterfactual

1           analysis cannot envisage any lawful MIF being set, it  
2           must proceed, therefore, on the basis that the MIF never  
3           existed, and that is true, we say, regardless of  
4           the ambit of any claim brought by the CICC  
5           Class Representatives.

6       THE CHAIRMAN:   So it is no MIF?

7       MR BEAL:   No MIF at any stage, because it necessarily --

8       THE CHAIRMAN:   Because it is all unlawful?   We are assuming  
9           it is all unlawful --

10      MR BEAL:   The assumption is -- from liability issues in  
11           Trial 1, the assumption is that the schemes have lost on  
12           every point at Trial 1, therefore full liability for  
13           every MIF, because otherwise you get into exemption  
14           issues as well and the whole thing becomes redundant.  
15           The salami slicing that we have had for these trials has  
16           necessarily proceeded on the basis of assumptions,  
17           otherwise the assumptions become quickly undermined by  
18           the scheme saying: "Well, we have not established  
19           liability yet".   So for these purposes, it has been  
20           common ground, as I understand it -- well, at least  
21           I have not heard an objection, that the necessary  
22           precondition to the analysis for Trial 2A and Trial 2B  
23           is that liability is established, and liability is being  
24           established in Trial 1, in our submission, on the basis  
25           of each of the MIFs in question.

1           So what that means is it is not open, we say, to  
2           Mastercard to invite this Tribunal, when looking solely  
3           at the CICC claims, to say, well, it is only  
4           the commercial MIF that is unlawful, everything else is  
5           fine, because that necessarily builds into Mastercard's  
6           posited counterfactual analysis an illegal situation,  
7           because in fact the consumer debit and credit MIFs are  
8           not assumed for these purposes to be lawful  
9           transactions. Indeed, to build in an unlawful MIF into  
10          the counterfactual would be to fall foul of  
11          the requirement in the Court of Appeal's judgment in  
12          *Dune*, we do not need to turn it up, paragraph 39. For  
13          your note, {AB-D/35.2/18}, where I think it was  
14          Lord Justice Newey said:

15                 "The counterfactual must assume there is no  
16                 restriction of competition." [As read]

17          Of course, here, the restriction of competition is  
18          the scheme rules acting in conjunction with issuers and  
19          acquirers in setting the overall nature of a MIF  
20          regardless of whether it is a commercial MIF, a consumer  
21          debit MIF or a consumer credit MIF. It is the scheme  
22          rules implementing the combined collective agreement to  
23          price for a MIF that is the restriction of competition.

24          So Mastercard, but we note not Visa, also wants to  
25          assume that there was a lawful MIF until the start of

1 the claim period. That, of course, also necessarily  
2 posits that a lawful MIF can exist, which is again  
3 contrary to the assumptions made for Trial 2. We also  
4 note that it leads to highly impractical consequences  
5 with different claimants having different  
6 counterfactuals depending on when their claim period  
7 begins. Some claims only go back a few years, but for  
8 the purposes of Trial 1 on liability, some of the claims  
9 went back to 2007. For Trial 2A, of course, we know  
10 from the *Merricks* claim that matters covered all the way  
11 back to 1992. We also note, for the avoidance of any  
12 doubt, that Irish and non-UK based claimants in the SSH  
13 claim can go even further back in the light of  
14 the CJEU's ruling in *Heureka*. So (a) claims can go back  
15 beyond the 2016 start period, for example, for the CICC  
16 claim, (b) those claims have in fact gone back beyond  
17 those periods, and (c) the evidence at Trial 1 and  
18 Trial 2A has also encompassed a broader scope than  
19 simply the most recent period for, for example, the CICC  
20 claim.

21 We also respectfully suggest that Mastercard is  
22 wrong to suggest that our approach to the counterfactual  
23 analysis is new. For your note, we made the same point  
24 about the role of counterfactual analysis in Trial 2A in  
25 our skeleton at paragraphs 20 and 21. Again for your



1           note only, that is {RC-A/1/11}. At paragraph 30 of that  
2           opening skeleton, we stated that any counterfactual must  
3           be one in which it is assumed that there are no MIFs and  
4           a prohibition of ex-post pricing. So this is a redux of  
5           the line that we took for Trial 2A, in exactly the same  
6           way we cautioned against reliance exclusively on  
7           a counterfactual analysis, largely for the reasons given  
8           by the Competition Appeal Tribunal in *Trucks*, endorsed  
9           by the Court of Appeal in *Trucks*, namely that the proper  
10          test is to analyse has there in fact been a pass-on of  
11          this loss to another party so that the recoverable loss  
12          of that other party is the recoverable loss, not  
13          the loss of the acquirer.

14                 Our responsive case, it is true, for Trial 2B, at  
15          paragraph 20 {RC-A1/1/11} and 26 {RC-A1/1/14}, has  
16          addressed the limitation period arguments run by  
17          Mastercard, but that is because they raised it in their  
18          positive case in Trial 2B and we responded to it.

19                 So we do say that a crucial distinction between  
20          the parties is that the counterfactual here must be one  
21          in which the MIF never existed, or at the very least, if  
22          one wishes to have a more bounded view, did not exist  
23          after the Commission *Mastercard I* decision, because the  
24          Commission *Mastercard I* decision, in December 2007,  
25          ruled unlawful the intra-EEA MIF, and indeed Mastercard,

1 in response to that, had an 18-month period in which it  
2 reduced the intra-EEA MIF to zero. So we recognise that  
3 factually it might be said that that is at the very  
4 least the point at which one should go back. We would  
5 say you should imagine that no MIF has ever been lawful  
6 in any sense, but if one wishes to have a more practical  
7 application of that principle then  
8 the *Mastercard I* decision would be a reasonable cut off.  
9 What, of course, that means is you have got a prolonged  
10 period before 2011/2012, when the claims that are left  
11 start incepting, in which there has been a zero MIF  
12 landscape.

13 Now, can it plausibly be suggested if there is  
14 a zero MIF landscape that MSCs would still have  
15 reflected 60% of an overall cost of the MSC when it did  
16 not exist? The MIF, on average, one sees varies between  
17 45% and 85% of the value of the MSC, picking a rough  
18 mid-level in that, which is also the level chosen in  
19 the *Mastercard I* decision of 60% as a cost component, is  
20 to be expected on the schemes' case that pricing for  
21 MSCs necessarily contained this 60% cost component which  
22 was simply never there in the counterfactual. We say  
23 that is an implausibly high margin reflecting a cost  
24 which, in the counterfactual, has to be assumed simply  
25 not to be there.

1           Imagine then what the MSCs would have looked like if  
2           the MIF had never existed. Well, it does not take, with  
3           respect, a great deal of thought to think what  
4           the answer would be, because we know from the evidence  
5           that acquirers would have either carried out an explicit  
6           form of cost-plus pricing or an implicit form of  
7           cost-plus pricing, and so the merchants would have paid  
8           in the counterfactual scheme fees and they would have  
9           charged an acquirers' margin. For IC++ pricing, that  
10          would have been an express pricing mechanism, and for  
11          blended contracts, we say it would have been necessarily  
12          implicit because blended rates were set intentionally to  
13          recover MIFs and scheme fees. That is some of  
14          the evidence that we will be looking at from  
15          the acquirers. So with the MIFs gone, the acquirers  
16          would have looked to cover the scheme fee and obtain an  
17          appropriate acquirer margin. But we do say it is  
18          implausible that that acquirer margin would then have  
19          reflected a 60% value cost that simply was not there any  
20          more.

21          Reliance on a counterfactual in which the MIF would  
22          suddenly have been removed, which is the approach that  
23          only Mastercard suggests, is therefore inappropriate, we  
24          say, as a matter of law. The question is not how much  
25          would MSCs have fallen when MIFs were abolished in

1 the counterfactual, but how much did the schemes'  
2 unlawful MIFs increase MSCs? Indeed, we note that Visa,  
3 but not Mastercard, recognises that the Tribunal should  
4 not restrict its analysis to the impact of -- and  
5 I quote "a sudden dynamic reduction in MIFs", see  
6 paragraph 11 of their skeleton {RC-A1/2/1}, and for  
7 the reasons we have given, the cliff edge scenario, in  
8 which one posits a sudden reduction in  
9 the counterfactual from a given rate of MIF to zero,  
10 produces the counterintuitive results that I have  
11 suggested, whereby applying that to an increase in  
12 the costs leads to 37% of a main variable cost of doing  
13 business over a 14-year period simply being swallowed by  
14 acquirers. We say that is wholly at odds with  
15 the publicly available information from the acquirers  
16 themselves, some of which I will have a quick look at in  
17 a moment.

18 We also note that there is an air of unreality about  
19 the submission. Now, we of course recognise that there  
20 can be asymmetric reactions in pricing in response to  
21 cost increases as opposed to cost decreases. That is  
22 the well-recognised "rockets and feathers" approach that  
23 we looked at in Trial 2A. All of the experts have  
24 accepted in principle during the course of Trial 2 more  
25 generally that this feature should not persist in

1           the long run. Over time, the competitive forces of  
2           the market will bring about an equilibrium state.  
3           Mr Holt, in contrast to his position in Trial 2A, now  
4           says that out of the many markets he has reviewed in  
5           these proceedings, the acquiring market may be an  
6           exception, and that will have to be, we say, explored in  
7           cross-examination with Mr Holt.

8           Can I please note the consequences of a failure to  
9           pass on a decrease in the MIF. That consequence is  
10          commercially very different for an acquirer than  
11          a failure to pass on an increase. We have accepted, and  
12          I can understand why, commercially, an acquirer would be  
13          keen to pocket the benefit of a cost reduction in  
14          the short term if it can get away with it. But the  
15          recoverable loss suffered by a merchant still includes  
16          the reduced MIF, since that still represents a major  
17          component cost of the MIF -- sorry, of the MSC, which,  
18          as a matter of fact, has been passed on to the merchant.  
19          So the fact that there has been a reduction in the MIF  
20          which has not been passed on, does not mean that  
21          the reduced level of the MIF has not nonetheless formed  
22          a cost component of the MSC which has then been passed  
23          on because of an implicit or explicit form of pricing.

24          Now, it still represents a major component cost of  
25          the MSC which the acquirer has through the pricing

1 mechanism built into the prices that the acquirer is  
2 charging. In contrast, when there is an increase in  
3 the MIF which is passed on to a merchant, the level of  
4 overcharge does change. So if you have a price increase  
5 in the MIF which is reflected in an increase in the MSC,  
6 the overall level of the recoverable loss necessarily  
7 increases. When you have a reduction in the MIF,  
8 the recoverable loss is still the reduced level of  
9 the MIF, even if the full benefit of the reduction is  
10 not entirely passed on, because you are claiming only  
11 the MIF rate as applied by the acquirer to the issuing  
12 bank. That is always the recoverable loss. So the fact  
13 that it would only be in a sense if an element of that  
14 recoverable MIF, the reduced MIF rate, is somehow  
15 swallowed by the acquirer that you would not have  
16 the pass-on mechanism.

17 Now, this is not, we say, to fall into the trap of  
18 equating pass-on with cost recovery as the scheme sought  
19 to do in Trial 2A. In the event of a MIF decrease,  
20 the full extent of the reduced MIF is still passed  
21 through to the merchants in the MSCs because  
22 the acquirers have consciously set their pricing to  
23 recover all of the MIFs and all of the scheme fees when  
24 setting the MSC. So we are relying on the pricing  
25 mechanism and the evidence that the acquirers

1 deliberately set their pricing to recover scheme fees  
2 and MIFs and then a margin to establish the pass-on  
3 mechanism. That is not the same as budgetary process  
4 leading to cost recovery in the long run.

5 Our overall submission is that these common sense  
6 propositions should help analyse APO in Trial 2B. We  
7 have focused on establishing as a matter of fact that  
8 the unlawful overcharge was passed on to the claimants  
9 and that should be grounded in practical reality, not  
10 diverted into excessively theoretical mind games on  
11 a putative counterfactual. We say that the qualitative  
12 evidence in Trial 2B is therefore important and it is  
13 telling that the schemes have largely sought to downplay  
14 it, we say without good reason.

15 Just a word of warning, there are various factual  
16 assertions in the skeletons from the schemes which we  
17 were unable to identify a substantiated evidential basis  
18 for. They have levelled that charge at us and we will  
19 deal with it when it arises, but just simply a word of  
20 warning on that.

21 So, as with my roadmap, I will now move on, with  
22 your permission, to have a quick look at some of  
23 the evidence from the merchants. Please would  
24 the Tribunal look at in the bundle {RC-F1.1/1/17}. This  
25 is our positive case. If we could start, please, at

1 paragraph 38. We there summarise the witness evidence  
2 from Trial 1 with references from the Trial 1 bundle and  
3 then updated references in the margins for the Trial 2  
4 folders. Please would the Tribunal be kind enough to  
5 cast an eye over paragraphs 38 through to 44.

6 (Pause).

7 THE CHAIRMAN: Where are we going to?

8 MR BEAL: 44, please. Just to the end of 44 {RC-F1.1/1/19},  
9 where Mr Hirst says:

10 "... the MIF component ... was 'non-negotiable'."

11 THE CHAIRMAN: I should have asked at the beginning, we are  
12 okay being in open session through, what, the opening  
13 submissions?

14 MR BEAL: Confidentiality in this case is rather  
15 challenging.

16 THE CHAIRMAN: Yes.

17 MR BEAL: Because it is -- the designations happened quite  
18 late. There are some designations which do not make  
19 sense to us because they refer to figures that are in  
20 the public domain, principally through the PSR reports.

21 THE CHAIRMAN: Right.

22 MR BEAL: I am going to refer to the PSR reports in a moment  
23 where some of those figures come out. I do not,  
24 respectfully, suggest they are confidential. If my  
25 learned friends object to me reading out a public report



1           which gives figures that are in the public domain, no  
2           doubt they will leap up and try to persuade you that  
3           they are still confidential.

4       THE CHAIRMAN:   So that public report was not redacted in any  
5           way?

6       MR BEAL:   No, not for the figures I will be taking you to --

7       THE CHAIRMAN:   Right.

8       MR BEAL:   -- because I am going to take you to  
9           the non-confidential public report.

10      THE CHAIRMAN:   Well, I do not see there can be much  
11           objection to that.

12      MR BEAL:   We will see how that goes.

13                I mean, what the consequence is in due course for  
14           the redactions that are being claimed is a different  
15           point.

16      THE CHAIRMAN:   Yes.

17      MR BEAL:   Could we then, please, look at {RC-I4/52/1}, still  
18           on evidence from the merchants, so I am going to have  
19           a very quick canter through some documents.  This is an  
20           email from CMS Payments to an individual at one of  
21           the SSH claimants whose identity is confidential, and  
22           essentially, we see in the third paragraph down on that  
23           email that they have carried out a procurement exercise  
24           and they are delighted to have achieved a 37% saving of  
25           the costs above interchange.

1           If we then please look at {RC-I4/53/1}, we see that  
2           the procurement exercise has been set out in  
3           a PowerPoint presentation. Could we turn, please, to  
4           {RC-I4/53/4}. The "Executive Summary" shows what  
5           the benefits are of the proposed changes. See  
6           paragraph 1, they identified:

7           "... five figure annual savings from reduced  
8           merchant acquiring costs whilst retaining current  
9           suppliers, i.e. there was no need to switch ... to  
10          [obtain the benefit]."

11          Page 5 {RC-I4/53/5}, please, has a breakdown of  
12          the savings. If the Tribunal would be kind enough to  
13          look in the table at the third row down, one sees that  
14          the savings for interchange are constant throughout --  
15          or rather, sorry, the interchange fees are constant  
16          throughout, there is no saving from those. That is  
17          the bottom line payment that will be made for  
18          interchange fees, regardless of which of the acquirers  
19          is ultimately successful in this procurement exercise.

20       THE CHAIRMAN: So this is a document. Whose document is  
21       this?

22       MR BEAL: This is a merchant's document.

23       THE CHAIRMAN: A merchant document.

24       MR BEAL: Merchant is confidential. They have gone to

25       a company called CMPsi to conduct, essentially, a mini

1           procurement exercise, try and see if they can get  
2           a better rate for their --

3       THE CHAIRMAN:   From the acquirers.

4       MR BEAL:   -- card-acquiring services, and they were able to  
5           do so.

6       THE CHAIRMAN:   Okay.

7       MR BEAL:   But they were able to do so on the basis that it  
8           was -- the interchange was taken as fixed.

9       THE CHAIRMAN:   Right.

10      MR BEAL:   And we see, in the left-hand side, the descriptive  
11           element of this particular slide. The company that is  
12           being charged with trying to secure the savings is  
13           delighted to have achieved 37% savings, annual costs  
14           above interchange, so the interchange is simply being  
15           taken as the fixed, immovable object.

16           Could we then, please, have a look at some --  
17           briefly at some emails {RC-I4/12/2}. We have an email  
18           -- a charity was being consulted about savings offered  
19           by acquirer B, to use the terminology that the parties  
20           have adopted, through switching to IC+ pricing and also  
21           using a Dutch subsidiary. So if one looks at the email  
22           that begins:

23           "Hi Sarah"

24           There is then a reference to a conversation with  
25           acquirer B and various different options are put

1 forward, including switching to an interchange plus  
2 pricing structure and also switching to a cross-border  
3 programme using a subsidiary in a different country.

4 Could we then please look at {IC-4/9/2}. At  
5 the bottom of that page, there is a follow-up email  
6 relating to the proposal that has been put forward, and  
7 underneath the heading that begins:

8 "Interchange Plus (IC+) Proposal"

9 The acquirer B representative is agreeing:

10 "... that there are advantages in moving  
11 the acquiring cost model from a blended pricing across  
12 to IC+ pricing ..."

13 It would give the charity "increased transparency".

14 Then there is a line that begins:

15 "Fortunately the recent changes in Interchange have  
16 been positive for [the charity] and we have passed these  
17 savings across as they were applied. In the future no  
18 changes would be required by [acquirer B]."

19 So the two aspects of that evidence. Firstly,  
20 savings have been passed on to a charity even though it  
21 is on a blended contract, and secondly, that process is  
22 going to become more transparent if the charity moves to  
23 IC+ pricing.

24 That particular approach, we say, is consistent with  
25 the terms and conditions that are set by acquirers, even

1           for merchants that are not as large as some of the ones  
2           we have been looking at. Please could we look at  
3           {RC-I4/29/1}. This is a set of conditions from  
4           acquirer A to a company that is identified in the top  
5           left-hand side. We see under "Changes to your charges  
6           and fees", halfway down the page, that it says:

7                 "By way of partial derogation to [a numbered]  
8           condition ... of the merchant terms and conditions ...  
9           we may not introduce new charges and fees for  
10          the existing service and we may only change the rate or  
11          basis of the charges and fees for the existing services  
12          in the following circumstances:

13                "(i) if there is a change in the interchange fees  
14          and/or scheme fees levied on us by any of the card  
15          schemes or through a change to any of the scheme rules."

16                Now, that does not say, "If there is an increase we  
17          can pass it through", it says "if there is a change" and  
18          that change could be a price increase or a price  
19          decrease.

20       THE CHAIRMAN: That is obviously a partial derogation, it  
21          says, to the normal condition, is it?

22       MR BEAL: The normal condition would be that the pricing has  
23          been set and is not going to be renegotiated. So within  
24          a contract, you will have a set series of -- well, we  
25          can have a look at them. On {RC-I4/3} there is a series

1 of breakout charges. What we see under the "Card  
2 Payment Profile" is that there is an annual volume of  
3 transactions that is assumed for the pricing schedule  
4 that is set out and then an annual card turnover. Then  
5 we have the "Merchant Service Charges" that are broken  
6 out by reference to individual percentage rates for  
7 the MSC by reference to the various different types of  
8 card transaction, and then the refund figure of 0.6 is  
9 the same throughout.

10 Then if we turn over that page, please, to  
11 {RC-I4/29/4}, we see some "Additional Service Charges"  
12 in a further table which have all been negotiated.  
13 Those are not going to be changed, it would only be  
14 the MSC that would be changed because it would only be  
15 the MSC that was including the MIF or the scheme fees.  
16 So the way that a contractual change to the other prices  
17 would take effect would be either a different variation  
18 clause in the contract, the terms and conditions, or an  
19 acquirer and a merchant agreeing to the new terms of  
20 a new contract. But this is a unilateral variation  
21 provision that is open to acquirer A to change the MIF  
22 rates -- sorry, the MSC rates that one sees in the table  
23 above if there is an underlying change in the MIF, which  
24 would include both an increase or a decrease.

25 Now, we have seen here, for example, even though

1       this is a tiered blended contract, not an IC+ contract,  
2       that the individual components are still broken down for  
3       different types of transactions, so business cards, for  
4       example, are treated differently to premium cards, which  
5       are treated different to consumer credit and debit  
6       cards.

7               Now, the merchant service agreements adopted that  
8       sort of pricing approach even before the development of  
9       a more mechanical IC+ contract. If we look, please, at  
10      {RC-I4/35/2}, this is part of a contract from a very  
11      early date, 1 June 2005, between an acquirer and  
12      a merchant, and one sees that the relevant rates are  
13      broken out for credit cards, debit cards for  
14      the different schemes, and then separately for  
15      commercial cards, for example. So even in a very old  
16      contract, blended did not -- certainly for many clients,  
17      did not involve a single headline rate that was payable  
18      regardless of the transaction, it involved this tiered  
19      approach which therefore still enabled, for example,  
20      this specific MIF cost of a commercial card transaction  
21      to be reflected in the price that was charged for  
22      commercial card transactions, which helps explain why  
23      the commercial card rate is substantially higher, for  
24      example, than the credit card rate.

25             I could give other examples. I think probably time

1 does not permit me to do so. We can set those out in  
2 our closing submissions if we need to do so.

3 Can I move on, please, to evidence from  
4 the acquirers. Could we look, please, at {RC-I4/23/28}.  
5 This is a note to the financial statements, and we see,  
6 in the second paragraph down on that page, that this  
7 particular acquirer is classifying:

8 "Revenue ... based on the consideration which the  
9 Group expects to be entitled [to receive] in a contract  
10 with a customer ... The Group recognises revenue when it  
11 transfers control of a product or service to a customer.  
12 The revenue comprises."

13 Then they break it down into:

14 "Gross merchant service income ...

15 "Interchange fees ..."

16 Which are said to represent:

17 "... fees paid to the cardholder bank typically on a  
18 transaction basis. The cost is netted against gross  
19 merchant services income as Global Payments acts as an  
20 agent."

21 This is a publicly available document and therefore  
22 I have mentioned the acquirer.

23 This particular acquirer was not treating revenue  
24 that was derived from interchange fees as being revenue  
25 in the hands of the acquirer, it was separating it out



1           and treating it essentially as something that was going  
2           to be paid across to the cardholders' banks because  
3           Global Payments was essentially acting as an agent for  
4           the transfer of the money. So in accounting terms it  
5           was treating it as an agency transaction rather than as  
6           a full receipt of revenue, because otherwise you end up  
7           overstating your declared revenue in a statutory  
8           account, which accountants are loath to do.

9           Could we then please see {RC-I4/23/33}. That is  
10          reflected then in the classic breakdown of revenue and  
11          operating profit in the P&L account, and we see that  
12          "Gross merchant service income" is identified, then  
13          it -- or a deduction is made for "interchange fees" and  
14          a deduction is made for "scheme fees". It is then "Net  
15          merchant service income" which is considered against  
16          other income in the income section and the revenue  
17          section, and the "Operating profit" is then calculated  
18          on the basis of the net merchant service income or  
19          the net total income with deductions for the costs  
20          properly recognised under section 7.

21          In terms of another set of accounts for another  
22          acquirer, please could we look at {RC-I4/47/4}. Here,  
23          again, we see "Net revenue" is defined. "Financial  
24          highlights", this particular acquirer gives the "Net  
25          revenue" figure, and then in the note to the account, it

1           says:

2           "Net revenue is defined as revenue less interchange  
3           and scheme fees."

4           Could we then please look at page {RC-I4/47/51}. We  
5           see headline figures for "Revenue" are given. There is  
6           then a deduction from that revenue for "Interchange and  
7           scheme fees", which is a substantial chunk of  
8           the overall revenue, to produce the "Net revenue" figure  
9           that the trader then uses -- the acquirer then uses in  
10          order to present its financial welfare. It is, overall,  
11          how is this business doing? It is on the net revenue  
12          basis that it then calculates gross profit and EBITDA.

13       THE CHAIRMAN: Are you saying it is significant where this  
14          appears, the interchange fees?

15       MR BEAL: They are treating this as not money that is coming  
16          into their hands --

17       THE CHAIRMAN: Right.

18       MR BEAL: -- they are treating this as money that is going  
19          across to the issuing banks because it is -- they are  
20          acting in a quasi-agency capacity, and we can see --

21       THE CHAIRMAN: So it is taken off before calculating gross  
22          profit?

23       MR BEAL: Exactly.

24       THE CHAIRMAN: Yes.

25       MR BEAL: It is not treated as a cost simpliciter, it is

1 treated as revenue that never comes into the business.

2 We then see, please, at {RC-I4/47/51}, rather than  
3 just taking my word for it, we see how Worldpay, in this  
4 case, describes what it is doing. In the third  
5 paragraph up from the bottom, it says:

6 "Net revenue, defined as revenue less interchange  
7 and scheme fees ..."

8 And it:

9 "... is presented and discussed in this section as  
10 the Directors believe that this best reflects  
11 the relationship between revenue and profitability.  
12 Underlying EBITDA, being earnings before interest, tax,  
13 depreciation [etc.] ... excluding separately disclosed  
14 items, is considered by the Directors to give a fairer  
15 view of the year-on-year comparison of underlying  
16 trading performance."

17 So they have stripped it out, they have not treated  
18 it as a cost simpliciter, they have treated it as  
19 revenue that is simply not received into the hands of  
20 the business.

21 Then, please, later, at {RC-I4/47/68}, in the third  
22 row down, it says:

23 "Presentation of financial information. During  
24 the year, management proposed a number of changes to  
25 the presentation of financial information including

1 the introduction of 'net revenue' (being total revenue  
2 less interchange and scheme fees) on the face of  
3 the income statement."

4 The reason then given is:

5 "The Committee considered management's proposals and  
6 agreed to adopt them. Net revenue was introduced as it  
7 was felt that it enables a simpler discussion of  
8 the relationship between revenue and profitability  
9 following recent changes in regulation around  
10 interchange and scheme fees."

11 Now, for example, if we then look at page  
12 {RC-I4/47/100}, on the scheme fees case, up to 37% of  
13 that figure for interchange -- sorry, let me start  
14 again. If one strips out scheme fees and assume that  
15 they are not a significant proportion of interchange and  
16 scheme fees for this particular period, 2015, scheme  
17 fees have increased in time since the IFR, see the PSR's  
18 report, but interchange fees would have accounted for  
19 the lion's share of this particular revenue item at that  
20 time. On Mastercard's case, 37% of that figure has in  
21 fact simply been absorbed by Worldpay over the length of  
22 the claim. That is the natural consequence of them  
23 seeking to knock off hundreds of millions of pounds from  
24 the claim value.

25 MR TIDSWELL: You are obviously not suggesting that these

1           amounts, having been paid and then received, and with  
2           differential timing, I mean, they go through  
3           the accounts and so therefore, from a cash basis --

4       MR BEAL:   They do.

5       MR TIDSWELL:  -- they are properly recorded as income and  
6           expenditure.  But you are just -- the point you are  
7           making, I think, is that the way they have been  
8           presented is to identify them as being effectively  
9           a pass-through.

10      MR BEAL:   Yes.

11      MR TIDSWELL:  Yes.

12      MR BEAL:   Partly that, and also, what is the consequence of  
13           Mastercard's case for what that would show as a dent in  
14           the revenue, i.e. they are treating it as effectively  
15           a swallowed cost?

16      MR TIDSWELL:  Yes.

17      MR BEAL:   It has not been presented as a cost, that is my  
18           first point.  If it had been presented as a cost, these  
19           figures would have looked astonishingly different.  So  
20           how plausible is it, we say, that the sorts of figures  
21           that are being bandied around by Mastercard in  
22           particular are realistic for this sort of acquirer?

23           Could we then please look at {RC-I4/50/145}.  This  
24           is a prospectus that was issued by Worldpay.  Worldpay  
25           has been through various changes of ownership over

1 the years and this was a -- one of the prospectuses for  
2 a sale of the business. If you look, please, under 3.2,  
3 the second paragraph in that section, there is a section  
4 that begins:

5 "In an attempt to have its gross MSC reflect its  
6 costs ..."

7 Please would the Tribunal read that paragraph.

8 (Pause).

9 In the next sentence, it says:

10 "As a result of the Group's ability to set prices  
11 which correspond to the level of interchange and scheme  
12 fees paid, the Group has maintained a robust net revenue  
13 margin profile during the periods under review ..."

14 So they have factored in interchange and scheme fees  
15 into the gross MSC that gets set and they have still  
16 been able to obtain a robust net revenue margin profile  
17 on top.

18 Could we then please look at {RC-Q5/5/2}. In our  
19 responsive case we have pointed out that we have not  
20 heard back from Worldpay on various issues, one of which  
21 was how they dealt with increases in the MSC  
22 post-Brexit, which is dealt with on the previous page  
23 but I will deal with that either in cross-examination or  
24 in closing. This, however, is dealing with how it sets  
25 prices. Please would you read that first paragraph in

1 red, beginning "Worldpay" and ending with "transaction  
2 volumes".

3 (Pause).

4 The final paragraph then says:

5 "Finally, for merchants that contract under  
6 Worldpay's ..."

7 Then it refers to various different options:

8 "... detailed transaction breakdowns are made  
9 available to them, which contain information at  
10 the transaction level including the MSC, interchange  
11 fee, and relevant scheme fees."

12 So we have, even on the blended options offered by  
13 this particular acquirer, the customer still gets  
14 the breakdown of the interchange fee and the relevant  
15 scheme fees.

16 Finally, in terms of acquirer information, please  
17 could we look at {RC-I6/4.3/1}, and please would you  
18 read the second highlighted paragraph on that page  
19 beginning:

20 "For all merchants on ..."

21 (Pause).

22 I am now going to move on to look at some previous  
23 regulatory and court decisions. As the Tribunal will  
24 recall in the *Mastercard I* decision, at paragraph 458 to  
25 460, the Commission described the MIF as setting a floor

1 to the MSC. I do not think we need to turn that up,  
2 that will be very familiar news to the Tribunal, it is  
3 not news.

4 Could we have a quick look at the *Sainsbury's* CAT  
5 decision, that is {AB-D/13/125}. What we see in  
6 paragraph 201(3) is a reference to a column in a table  
7 that is over the page, dealing with:

8 "... the 'blended' MIF ... which is the rate of MIF  
9 actually paid by *Sainsbury's* ... expressed as  
10 a percentage of the value of sales ..."

11 If we could then turn over the page {AB-D/13/126} to  
12 202, you will see that the blended MIF is then  
13 identified all the way through the transactions with  
14 the various different acquirers. The Tribunal had no  
15 difficulty identifying those acquirers in a public  
16 document.

17 Page {AB-D/13/129}, please, paragraph 205, the --  
18 aggregating the position, we see that the total for all  
19 debit Mastercard transactions over the claim period led  
20 to a blended MIF of about 0.36%, the total from Maestro  
21 transactions was lower, that was 0.19%, and the total of  
22 all transactions over the claim period for debit card  
23 transactions was 0.2%. So given that the *Sainsbury's*  
24 claim went back to 2006, this is making good my  
25 proposition that the debit card MIF, on average, was at



1           0.2% well before the IFR came into effect in  
2           December 2015.

3           At paragraph 206, we see that some of the MSCs had  
4           a per unit rather than an ad valorem element to them and  
5           those were then identified. Footnote 128 at  
6           {AB-D/13/130} confirms that the IFR had no impact in  
7           this case for the simple reason that the transactions  
8           were taken as -- the transactions within the claim  
9           stopped in November 2015, so the entirety of the claim  
10          was pre-IFR in terms of its impact.

11          At paragraph 207, which I think is on this page, we  
12          see the figures that are then given for Visa are  
13          blended, and at page {AB-D/13/132}, paragraph 208, we  
14          have the overall blended rates for credit and debit  
15          cards for Visa. Admittedly, the ones for Visa, to be  
16          fair, are higher than 0.2, it is 0.26.

17          Could we then please look at {AB-D/13/261},  
18          paragraph 459, and halfway down that paragraph, there is  
19          a sentence that begins:

20          "*As Sainsbury's witnesses explained, and as we*  
21          *accept, Sainsbury's did not operate on a 'cost-plus'*  
22          *basis. In this, Sainsbury's business is readily to be*  
23          *distinguished from that of Acquiring Banks, who*  
24          *obviously did price on a 'cost-plus' basis: the MSC*  
25          *comprised essentially the MIF plus a little extra. But*

1           it was always possible for a Merchant to disaggregate  
2           the elements of the MSC."

3           Now, to similar effect, please could we see in  
4           {AB-D/15.2/27}, we see paragraph 103 of  
5           Mr Justice Phillips' decision in *Sainsbury's v Visa*,  
6           where he recognised that:

7           "... the MIF reduces competitive intensity as to the  
8           level of Interchange Fees to nil.

9           "Second, the MIF acts as a de facto floor ... that  
10          Merchants must pay."

11          Now, for your note, the Supreme Court decision  
12          endorsed this approach. That is {AB-D/21/5}. At (v)  
13          the Supreme Court said:

14          "The MSC is negotiated between the acquirer and  
15          the merchant. Typically, it is set at a level that  
16          reflects the size and bargaining power of the merchant,  
17          the level of the acquirer's cost (including scheme fees  
18          payable to Visa and Mastercard, and any interchange fees  
19          payable by the acquirer to the issuers), and  
20          the acquirer's margin."

21          If we could then please look at {AB-D/21/7} (x) in  
22          the same paragraph, we have recognition that:

23          "... the MIF typically accounted for some 90% of  
24          the MSC."

25          That is higher than the figure of 60% I gave you

1 earlier:

2 "Acquirers pass on all of the MIF, and the scheme  
3 fee, to the merchants through the MSC, with negotiation  
4 between acquirers and merchants in respect of the MSC  
5 being limited to the level of the acquirer's margin."

6 Could I just apologise for a clerical mix up in our  
7 positive case at paragraph 27.1. The reference -- no  
8 need to turn it up -- was {RC-F1.1/1/13}. We cited  
9 paragraph 7 of the Supreme Court's judgment in *Merricks*  
10 *v Mastercard*, not in *Sainsbury's*. That was a clerical  
11 error, it merged the two, but the side notes for  
12 the positive case do at least direct you to the right  
13 authority, unlike the text, so I apologise for that.

14 THE CHAIRMAN: We would have probably worked it out.

15 MR BEAL: I am sure.

16 Could I say a couple of brief things about some of  
17 the PSR reports. Firstly, the PSR report 2021 has  
18 obviously assumed a large significance in this case so  
19 I will need to go through it with the experts and also  
20 it will be the subject of closing submissions. But if  
21 I could just highlight one particular paragraph, that is  
22 {RC-J2.2/86/1}. That is the report itself. Then  
23 paragraph 5.66. I have not given myself the page  
24 number, which is not massively helpful. It will be  
25 somewhere around {RC-J2.2/86/85}. Please could you read

1 paragraph 5.66. It is dealing with scheme fees, not  
2 with interchange fees, I make that clear.

3 (Pause).

4 THE CHAIRMAN: Yes.

5 MR BEAL: Could we then please look at the PSR 2024 report  
6 and turn straight to {RC-J9/3/35}. At paragraph 4.12,  
7 there is a finding that most of the increase in outbound  
8 MIFs were passed on:

9 "... 95% of all the outbound ... increases were  
10 passed on to UK merchants either immediately (80%) or at  
11 some point (15%)."

12 It is talking about there the percentage points  
13 within the 95% figure:

14 "Only around 5% of these increases were 'absorbed'  
15 by a small number of UK acquirers and never passed on to  
16 merchants."

17 Could we then please look briefly at {RC-J9/3/72},  
18 paragraph 6.6 and 6.7, the headline figure is really in  
19 6.7. In terms of a split between IC+ pricing and  
20 everything else, at the time of this report it was  
21 roughly 80% of all transactions were IC+, 20% were on  
22 fixed or blended pricing contracts, and everyone is  
23 agreed that fixed can be largely ignored because they  
24 are so de minimis that it does not alter things and my  
25 understanding is the experts simply band fixed contracts

1 in with blended contracts.

2 Could we then please look at {RC-J9/3/122},  
3 paragraph 9.141, we have the -- the schemes in this --  
4 in responding to this report have said there is no point  
5 in imposing a cap on inter-regional fees because it will  
6 not be passed on by the acquirers to the merchants  
7 therefore it will not produce any benefit. 9.141 to  
8 9.143 are the PSR's response to that. They find that  
9 the benefit would be passed on to merchants, and please  
10 can I invite to you read those paragraphs, 9.141 to  
11 9.143.

12 (Pause).

13 Finally, in the trilogy of reports from the PSR, we  
14 have a report on scheme fees. I accept this is scheme  
15 fees, not interchange fees, but it is telling. The 2025  
16 report came out in March. Could we look, please,  
17 {RC-I4/41/63}, and could I please invite you to read  
18 paragraphs 4.150 to 4.151.

19 (Pause).

20 THE CHAIRMAN: Yes.

21 MR BEAL: I am now going to turn, if I may, to identify six  
22 core themes, some of them necessarily broad, that arise  
23 for this Trial 2B. They are: (1), the nature and impact  
24 of the counterfactual; (2), the impact of asymmetric  
25 pricing; (3), the question of time frame for

1           the analysis; (4), issues relating to the market for  
2           acquiring services; (5) is data issues, a broad bag; and  
3           (6) is methodological issues, again, a broad bag. Can I  
4           just give you --

5       THE CHAIRMAN: How long are you going to be?

6       MR BEAL: I am going to take less than a minute for each of  
7           those six.

8       THE CHAIRMAN: Okay. All right.

9       MR BEAL: I am going to give you a one-sentence answer to  
10          the extent I am able to do so.

11                So nature and impact of the counterfactual. You  
12          have had my submission on this in opening already.  
13          There is a difference between the parties as to whether  
14          counterfactual analysis should envisage no MIF at any  
15          stage, or a sudden cliff edge drop. We say no MIF at  
16          any stage.

17                Relatedly, the "rockets and feathers" effect.  
18          Because that feeds into is a decrease or a price  
19          increase the better comparator, we say, we recognise  
20          there is a "rockets and feathers" effect, but we also  
21          say one does not need to worry unduly about that,  
22          because, in the long run, we understand the parties  
23          ought to be accepting that it will not play  
24          a determinative role, certainly Ms Webster and Dr Trento  
25          agree on that, Mr Holt takes a different view for this

1 particular market.

2 Three, time frame for analysis. Again, on a related  
3 basis, there is a nuance. We have not in fact suggested  
4 a long run analysis for the econometric evidence. We  
5 recognise that a short to medium term focus is  
6 appropriate when evaluating the econometric evidence,  
7 and that is Dr Trento's position. We say that follows  
8 because, firstly, the question is: to what extent, after  
9 a MIF change, a new equilibrium level of MSCs reflects  
10 the MIF change? Secondly, there is a clear and direct  
11 mechanism for pass-on via cost-plus pricing or profit  
12 maximising pricing by acquirers. And thirdly, we would  
13 expect that mechanism to take effect to a large extent  
14 in the short to medium term so that new equilibrium MSC  
15 prices are reached fairly quickly. In practice, we have  
16 also expected that pass-on is likely to take place in  
17 the short to medium term, as our submissions in Trial 2A  
18 have emphasised. In the long run we are all dead, in  
19 the long run all costs will be recovered, but that is  
20 not the analysis.

21 Fourthly, as Dr Trento notes, reliance on a longer  
22 period for analysis can lead to confounding factors  
23 producing counterintuitive results such as, for example,  
24 where a pass-on rate is lower at the 12-month stage than  
25 it is at the three-month stage.

1           Fifthly, to the extent that the pricing mechanism  
2 sometimes takes longer to take full effect, in  
3 particular due to the feathers phenomenon, it is  
4 difficult for the econometric models to capture the full  
5 extent of pass-on via the new equilibrium price and that  
6 is because of increasing confounding effects over time.

7           We also say that the short to medium term analysis  
8 better fits the direct and proximate requirement set out  
9 in *Trucks*.

10           In terms of the market for acquiring services, it is  
11 the fourth theme, that covers a number of points.  
12 Firstly, the level of competitive intensity, and we say  
13 that this is a market in which there is sufficient  
14 competitive level of tension. Secondly, the role of  
15 payment facilitators. Visa suggests the role could be  
16 important, we say it is not. Thirdly, the role of  
17 contractual switching or acquirer switching, i.e. stay  
18 with the same acquirer but switch contract, or secondly,  
19 switch acquirers altogether. We say switching can be  
20 seen in the market and there are no barriers to  
21 switching. The schemes seem to take a different view.

22           Finally, the question of whether or not there are  
23 two separate markets for larger and smaller merchants.  
24 We do not understand anyone contending for a bifurcated  
25 market analysis, but it necessarily is implied perhaps



1 by treating smaller merchants differently from  
2 larger merchants for the purposes of pass-on.

3 Data issues. Different people seem to have had  
4 different problems with the data at different times.  
5 That will need to be explored in cross-examination.

6 Methodology issues. We have identified seven within  
7 this sixth theme. So -- I am sorry about this -- it  
8 does broadly correlate with the 12 issues I identified  
9 at some point, I think, in the responsive case.

10 One data aggregation issues: to what extent is it  
11 appropriate to use aggregated or disaggregated data?

12 Secondly, data cleaning issues: how is it  
13 appropriate to deal with outliers in the data?

14 Thirdly, general regression analysis versus event  
15 studies. Ms Webster adopts a general regression  
16 analysis, the other two experts plump for event studies.

17 Fourthly, models in logs versus model in levels. At  
18 Trial 2A, you will recall, pretty much everyone tried to  
19 do models in both. That seems now to be a bone of  
20 contention.

21 Fifthly, normalisation issues. There is a discrete  
22 issue as to the method by which account should be taken  
23 of the value of transactions. We say, ultimately,  
24 the issue goes nowhere, because Dr Trento used the same  
25 normalisation techniques as everyone else for his event

1 studies.

2 Sixthly -- and this is a very technical area --  
3 there is a difference between ordinary least squares and  
4 weighted least squares in the regression analysis that  
5 I need to understand properly before I put it in  
6 cross-examination. I am not yet there.

7 Finally, time trends. Do we need a time trend in  
8 the modelling, and if so, what impact does it have on  
9 the figures?

10 As I have indicated already, the consequences of  
11 the rates that are derived will need to be factored  
12 in in due course, and I am very happy, in closing, to  
13 address any concerns that the Tribunal might have, but  
14 it will perhaps become clearer as to how they slot in  
15 once we have been through the expert evidence.

16 Unless I can be of any further assistance, that is  
17 our opening.

18 THE CHAIRMAN: A whirlwind tour. Thank you very much.

19 Right, so I think we will take our break now,  
20 ten-minute break. Do we think we are going to finish by  
21 lunchtime with the opening submissions?

22 MR COOK: Absolutely, sir, I think.

23 THE CHAIRMAN: Yes? All right.

24 MR JOWELL: Mr Cook will be kicking off, with your  
25 permission.

1 THE CHAIRMAN: Okay, fine.

2 Ten minutes.

3 (11.32 am)

4 (A short break)

5 (11.45 am)

6 THE CHAIRMAN: Yes, Mr Cook.

7 Opening submissions by MR COOK

8 MR COOK: Sir, this trial is concerned with what should be  
9 a simple issue of causation. I mean, it may be  
10 factually complex, but the basic question, with respect,  
11 is a simple one, and it is the fundamental causation  
12 question in tort law, namely: was the alleged  
13 infringement the "but for" cause of the alleged loss,  
14 words missing from my learned friend's submissions this  
15 morning. The "but for" test involves comparing  
16 the factual world, which included the alleged unlawful  
17 conduct, with a counterfactual world without  
18 the infringement, and in the context of APO, that means  
19 that the Merchant Claimants have to show that  
20 the relevant alleged infringement, and as I will show  
21 you, that differs between the different proceedings, was  
22 the "but for" cause of higher MSCs, or in other words  
23 that the prices that merchants would have paid would  
24 have been lower in the absence of the relevant  
25 infringement and by how much.

1           On the facts of this case, since  
2           the Merchant Claimants have claims that are limited to  
3           specific periods, we say, with respect, it was common  
4           ground up until receipt of the Merchant Claimants'  
5           responsive case that this involved the relevant MIF or  
6           MIFs reducing to zero at the commencement of  
7           the relevant claim periods. We set out at our skeleton  
8           argument at paragraph 18 {RC-A1/3/5} the position  
9           the Merchant Claimants adopted in their positive case  
10          and which form the basis of Dr Trento's analysis, and  
11          I will just refer to them without a need to go to them  
12          particularly. The positive case stated in terms  
13          the relevant counterfactual is a drop in MIFs to zero  
14          and it noted that Dr Trento has sought to estimate  
15          the extent to which acquirers would have reduced MSCs  
16          had MIFs been reduced to zero. At that point we were  
17          all agreed it was a reduction to zero. Dr Trento's main  
18          APO report considered the effect on MSCs of a drop in  
19          MIF rates to the counterfactual level which he said he  
20          was instructed was zero, and then the same thing in his  
21          reply report.

22          That is also the counterfactual case which the  
23          claimants advanced throughout Trial 2A and we can see  
24          that from their written closing submissions, which  
25          refers to them putting exactly this proposition to

1           the witnesses. If we could have up on screen  
2           {RC-S/1/67}, and it is paragraph 139. It talks about --  
3           this is addressing Mr Holt's evidence, saying:

4                 "Mr Holt considered that the firms did not need to  
5           know about the change ... specifically ..."

6                 Goes down and says:

7                 "Ultimately, his contention appeared to be that  
8           increases in MIFs would be factored into ... overall  
9           [pricing]."

10                The starker position was then put to him as follows,  
11           about seven lines down:

12                "... if a firm had not taken notice of a fall in the  
13           MIF level to zero (as in the counterfactual) ..."

14                Then goes on to make some submissions from there.  
15           But that was repeating the proposition that leading  
16           counsel for the SSH claimants put to Mr Holt in  
17           cross-examination, a fall in MIF level to zero as in  
18           the counterfactual. That was the case.

19   THE CHAIRMAN: Right. On merchant pass-on?

20   MR COOK: On merchant pass-on.

21   THE CHAIRMAN: Right.

22   MR COOK: But ultimately we are dealing with, with respect,  
23           the same thing, which is, you know, are we dealing with  
24           a fall, but, I mean, the same point, it is the fall in  
25           the MIF level to zero. So, at that stage, we are

1           just -- we are dealing one stage removed further down  
2           the chain, but the starting point is a fall in the MIF  
3           level to zero.

4       THE CHAIRMAN:   Right.

5       MR COOK:   The Merchant Claimants, with respect, are now  
6           hunting around for an alternative case because  
7           the evidence indicates substantially incomplete pass-on  
8           in the correct "but for" scenario.  Now, their first  
9           attempt in their responsive case was to dispute the need  
10          for counterfactual analysis at all, where they argued  
11          that irrespective of any difference in MSCs between  
12          the actual and the counterfactual worlds, merchants are  
13          still paying an inflated MSC that reflects the MIF.  
14          That is paragraph 55 of their responsive case  
15          {RC-G1.1/1/26}.

16               Now, it did not figure in their skeleton argument.  
17       My learned friend returned to it in his oral submissions  
18       today.  I mean, that is simply trying to airbrush out of  
19       the law of causation the test of "but for".  There has  
20       to be a difference between the factual and  
21       the counterfactual.  I am afraid this is very basic, but  
22       it is a basic point that their case runs into and tries  
23       to hide from is, there has to be that difference between  
24       factual and counterfactual.  You cannot say a price had  
25       something reflected in it without trying to find out

1           what would have happened without that. Obviously, all  
2           businesses, to some extent, are alive to their costs,  
3           but that is, my learned friend was very eager to tell us  
4           during MPO, does not mean pass-on simply because  
5           businesses want to recover their costs.

6       MR TIDSWELL: Do you accept his point that we are trying to  
7           find out what has actually happened, this is an inquiry  
8           into something that has actually happened, as to whether  
9           or not the MIF has been passed on? I mean, that is  
10          a matter of history, is it not? The thought experiment  
11          helps us understand what might have happened, but  
12          whether or not it has happened is a matter of history,  
13          is it not?

14       MR COOK: No, with respect, that is not the case. I am  
15          saying all "but for" causation requires you to address  
16          the: what would happen without the wrong? Now, in many  
17          cases it might be really, really obvious. If I am in  
18          a road traffic accident and I get run over crossing  
19          the road, it might be fairly obvious that I have got  
20          a broken leg because I was hit by the vehicle and  
21          the counterfactual is the vehicle was not there and  
22          I did not get a broken leg. That, really simple, but  
23          nonetheless it is still factual and counterfactual. So  
24          you do have to look at both and see to what extent there  
25          is a difference between the two scenarios. Would there

1           have been a difference? That is the essence of all  
2           causation; sometimes it is really easy, sometimes it is  
3           more complicated, but it is always that comparison.

4           Now, the Merchant Claimants' responsive case also  
5           included a second attempt to advance an alternative  
6           case, which was the suggestion that the appropriate  
7           counterfactual -- it is now accepted there needs to be  
8           counterfactual analysis -- is not a sharp, sudden  
9           decrease in the MIFs at the start of the claim period,  
10          but rather a steady zero MIF from long before the start  
11          of the claim periods, and that is paragraph 87  
12          {RC-G1.1/1/37}. They seek to justify this in their  
13          skeleton argument on the basis that the counterfactual  
14          must be untainted by the illegality, a term which now  
15          appears to encompass absolutely anything they want to  
16          argue was unlawful, whether there is a pleaded case to  
17          that effect or not and regardless of the time periods  
18          covered by their claims. My learned friend tried to  
19          support that this morning by the suggestion that it was  
20          agreed that the assumption for this trial was that all  
21          MIFs were unlawful. With respect, that is simply wrong.  
22          The assumption for pass-on in relation to the Merchant  
23          Umbrella proceedings was that the allegations of  
24          infringement succeeded and they do cover all MIFs, but  
25          there has never been any assumptions about infringement



1 in relation to claims that are not and cannot be brought  
2 by the Merchant Claimants, so that is claims that relate  
3 to time-barred periods.

4 So the assumption is only about MIFs, and it is an  
5 assumption because we do not know the outcome of either  
6 Article 101 or Article 101(3), but it is just MIFs in  
7 relation to the claim periods. There has never been any  
8 assumption about the CICC claims, because they were not  
9 in Trial 1 or Trial 2A. As we will come to see, that is  
10 a much narrower claim and it needs to be looked at on  
11 its own facts, and with respect, that is, as we will  
12 see, their pleaded case is the counterfactual is just  
13 a change to commercial MIFs. So there has never been  
14 any assumption about all MIFs being unlawful in relation  
15 to that claim, because there is not even a pleading that  
16 other MIFs, other than commercial card MIFs, are  
17 unlawful. With respect, we say this is a transparent  
18 attempt on the timing point to try and evade limitation  
19 and on the wider point to try and advance a claim they  
20 have not brought.

21 Turning to the timing point first. With  
22 the exception of some minimal foreign claims there is no  
23 evidence about acquiring in any non-UK market,  
24 the Merchant Claimants are limited to claims going back  
25 six years prior to the commencement of their

1 proceedings. In the Merchant Umbrella proceedings, they  
2 have sought to extend that claim period, but that has  
3 been rejected by the Tribunal and more recently by  
4 the Court of Appeal. As I will show you shortly in  
5 relation to the CICC proceedings, the CICC  
6 Class Representatives expressly limit their claim so it  
7 only goes back six years prior to commencement, they  
8 have not even tried to extend the claim period, and they  
9 only advance a claim that the commercial card MIFs were  
10 unlawful.

11 The Merchant Claimants are therefore barred from  
12 advancing a claim that there was unlawful conduct  
13 pre-dating their claim periods and the CICC claimants  
14 are absolutely barred from advancing an unpleaded  
15 allegation of unlawfulness. The counterfactual must be  
16 based on the specific claims advanced by the relevant  
17 claimant, not some wider claim that is not -- longer  
18 claim that is not open to them in the case of  
19 the Umbrella Claimants and not some wider claim that has  
20 never been advanced at all in relation to the CICC  
21 Class Representatives.

22 THE CHAIRMAN: For the purposes of looking at  
23 the counterfactual, are you able -- are you bound by  
24 the limitation period, or do you, in order to test what  
25 has happened within the claim period, you can look at --

1           test it by reference to something that might have  
2           happened before?

3       MR COOK:  It is a different point whether one has a case  
4           which is evidentially you can say there is some --  
5           you know, if there was some evidence in relation to  
6           something that happened in Australia or New Zealand as  
7           there has been in other cases, that might be relevant  
8           evidence, but the question of whether one changes  
9           the counterfactual to assume -- to remove from  
10          a counterfactual historic conduct which there is no  
11          claim about, and that is what I am saying they simply  
12          cannot do.

13       THE CHAIRMAN:  But it is a counterfactual, it is not what  
14          actually happened.

15       MR COOK:  No, absolutely.  But the purpose of  
16          the counterfactual is to test what the effect of  
17          the impugned conduct is.

18       THE CHAIRMAN:  Yes.

19       MR COOK:  So one takes out just the impugned conduct from  
20          the counterfactual and then sees what would have  
21          happened in that counterfactual.

22       THE CHAIRMAN:  Right.

23       MR COOK:  So you cannot -- you know, so CICC, we say, is  
24          absolutely clear, and I will come on to show you what  
25          they have said and what they have pleaded, but they just

1           plead commercial card MIFs are unlawful.

2       THE CHAIRMAN: You say it has to be this sort of cliff edge  
3           thing so that at the start of a claim period, there is  
4           a sudden disappearance of a MIF?

5       MR COOK: Well, they cannot change history -- you know,  
6           history in relation to the time period that there can be  
7           no allegation of unlawful behaviour.

8       THE CHAIRMAN: Right.

9       MR COOK: So we say that is simply the case, and I will come  
10          on to deal with *Trucks*, which is a very different kind  
11          of case.

12           So, I mean, there is a very peculiar suggestion from  
13          the Merchant Claimants that it is not a problem to sort  
14          of advance time-barred infringement allegations on  
15          the basis that limitation extinguishes remedies and not  
16          rights. With respect, it is precisely because  
17          limitation means they cannot advance claims going back  
18          before the claim periods that they cannot ask this  
19          Tribunal to assess damages on the basis of time-barred  
20          allegations of wrongdoing by removing those from  
21          the counterfactual. So if you do that, you are not  
22          assessing the effect of the conduct that you are  
23          impugning, you are trying to assess the effect of some  
24          conduct you are impugning and other conduct which you  
25          cannot.

1           That is, we say, even more apparent from  
2 paragraph 11 of their skeleton argument {RC-A1/1/7}  
3 which suggests the counterfactual must be one in which  
4 the MSCs are not inflated at all, including by  
5 time-barred MIFs. Now, quite apart from the fact that  
6 whether an MSC is inflated or not begs the question, and  
7 at the moment we do not know if any MSCs were inflated  
8 because that is what you are doing the counterfactual  
9 analysis to test. I mean, the reality is, you know, we  
10 are acknowledging there is likely to be a certain degree  
11 of pass-on, so that is likely, but you cannot just  
12 assume the entire MSC is inflated, as they are doing  
13 there, that is begging the question. But their attempt  
14 to exclude what they say is the potential effect of  
15 time-bar MIFs reinforces the fact that they are seeking  
16 a remedy which depends in part on time-barred claims and  
17 that is what it means to say the remedy is barred by  
18 limitation.

19           Now, even if this new counterfactual argument was  
20 not legally flawed, with respect, we say it is far too  
21 late for them to advance an entirely new counterfactual  
22 case of this kind. There is no pleading by any other  
23 merchants that the relevant counterfactual is zero MIFs  
24 from any time before the respective claim periods.  
25 Trial 1 only considered Article 101 issues in relation

1 to market conditions during the claim periods. There  
2 was no evidence or argument in relation to prior  
3 periods. Mastercard, had there been Mastercard, would  
4 have had potential defences in relation to what was  
5 happening in market conditions at those times. Evidence  
6 on submissions for Trial 2B had focused on market  
7 conditions in the claim periods, not stretching back  
8 decades, and it is far too late to address how  
9 the payments market might have evolved over time if MIFs  
10 had not existed for an extended period prior to  
11 the claim periods.

12 Now, the Merchant Claimants' skeleton argument now  
13 includes a third and further reformulation of  
14 the counterfactual issue, which we see at paragraph 12  
15 {RC-A1/1/7}. Now they say the correct question is not  
16 how MSCs changed in response to a particular rise or  
17 fall in MIFs, though my learned friend, and I will come  
18 to, said something rather different this morning.  
19 The question is: what would the equilibrium level of  
20 MSCs have been, assuming that no MIFs were ever charged?  
21 This goes back even further than the responsive case and  
22 I now suggest the Tribunal should consider what would  
23 have happened if no MIFs had ever existed. Well, Visa  
24 notified its cross-border MIF to the European Commission  
25 in 1977. We will be going back a very long way if we

1           started trying to do what is now being suggested should  
2           be done.

3           But all of this gives rise to the same  
4           objections: it is time-barred and raises practical  
5           evidential issues that no one has dealt with because  
6           that was not the case that was being advanced. But more  
7           importantly, none of the experts have addressed what  
8           would have been the equilibrium level of MSCs if MIFs  
9           had never been charged, and this case, of course, comes  
10          with the responsive case at the point when evidence was  
11          essentially closed. The 2B experts have looked  
12          exclusively at changes in MIFs and analysed the extent  
13          to which those changes in MIFs were passed on and it is  
14          far too late to be saying, after the event, that all of  
15          that hugely time consuming and no doubt expensive work  
16          was looking at the wrong issue. With respect, it also  
17          contradicts the entire basis on which Trial 2A  
18          proceeded. Again, all the experts' analysis was looking  
19          at changes in costs to see what would have been  
20          the effect of a change in the MSC. It is far too late  
21          to say everyone was looking at the wrong question.

22          It is also worth seeing what the Merchant Claimants  
23          say in their closing submissions in Trial 2B -- sorry,  
24          Trial 2A, and that is {RC-S/1/67}.

25       THE CHAIRMAN: We are in the unusual position of being able

1           to rely on their closing submissions that have not yet  
2           been delivered.

3       MR COOK:   Well ... yes.

4       THE CHAIRMAN:   But yes, you are entitled.

5       MR COOK:   It is paragraph -- sorry, it is paragraph 103.2,  
6           which is probably going to be about {RC-S/1/57}. So if  
7           we could try page 57. If we could go back one page and  
8           it is probably going to be two or three then. Yes,  
9           103.2 {RC-S/1/51}, thank you. So this is saying and it  
10          is referring to Dr Trento's evidence, and it is 103.2:

11                "Dr Trento does not consider that it is possible  
12                simply to have resort to the 'long run' as do Mr Holt  
13                and Mr Coombs. In the real world, prices may never  
14                reach a supposed long-run equilibrium."

15                So they are now asking you to adopt an equilibrium  
16                case while they were arguing in Trial 2A that  
17                "a supposed long-run equilibrium" may never happen. So,  
18                again, it is just none of this makes, with respect, any  
19                sense at all.

20       THE CHAIRMAN:   I think Mr Beal talked about a short-term  
21           equilibrium price.

22       MR COOK:   Well, yes, I mean --

23       THE CHAIRMAN:   I do not know whether that makes  
24           a difference.

25       MR COOK:   Well, I mean, the problem with that is, you know,



1           you still have to start with equilibrium from what, and  
2           it comes back to, at a certain point in time, you are  
3           starting with either the factual world or a change to  
4           that factual world, so ...

5           There was then what I would say is a fourth new  
6           formulation in my learned friend's oral submissions,  
7           that the relevant question is what would happen for  
8           a price increase, and he referred in that context to  
9           the *Trucks* Court of Appeal judgment. But what is  
10          the increase in MIFs which my learned friend is  
11          suggesting happened in this case? He does not identify  
12          it, because there is no MIF increase he can point to  
13          during the claim period as being the problem. Now, in  
14          a cartel case like *Trucks*, of course the cartel  
15          generally will, and it will certainly be often assumed  
16          to, lead to an increase in certain prices, and it is  
17          then the pass-on of that increase which is then  
18          relevant, and that is what is being addressed in  
19          the *Trucks* Court of -- well, both *Trucks* judgments.

20          However, that simply is not the factual situation in  
21          this case. We are not starting with conduct which leads  
22          -- which is being suggested changed the price, the MIF  
23          upwards, it is simply saying at a certain point in time,  
24          now it is being said that that is unlawful behaviour.  
25          The reason is limitation, but that does not alter

1 the fact that the impugned conduct is conduct that is on  
2 a particular day and is not being said is an increase at  
3 that point in time. So, with respect, it is  
4 the critical bit of "but for" causation and by reference  
5 to a counterfactual which reflects the removal of  
6 the impugned conduct, not anything wider and not  
7 anything longer.

8 Then to make good my position in relation to  
9 the CICC claim, and we can best, very briefly, go  
10 through just a couple of paragraphs of the pleading  
11 which make absolutely clear what is being said here,  
12 that this is a commercial card MIF claim only. So there  
13 are two pleadings in the bundle, the opt-in and opt-out  
14 claims against Visa, there are material identical ones  
15 against Mastercard which are not there. I am going to  
16 go to the opt-in Visa claim, because  
17 the Merchant Claimants refer to a specific paragraph  
18 from that. All of the relevant paragraphs are in all  
19 four pleadings, the numbering is different unhelpfully,  
20 but because they are materially identical, we do not  
21 need to worry about the limited variations. So it is  
22 {RC-C/71/5}. Then if we turn over the page {RC-C/71/6}.  
23 So this is setting out the proposed claim:

24 "The claimants relate to one specific category of  
25 Merchant Interchange Fees ('MIF'), namely Commercial

1 Card MIF (of all types) on [the various cards] ..."

2 So that is a very clear plea, their claim is limited  
3 to commercial card MIFs. It is just worth noting,  
4 the amendments that were made, which is the history was  
5 that the original CICC claims posed claims in relation  
6 to commercial card MIFs and inter-regional MIFs, that  
7 permission was refused initially, and they modified  
8 their claim to drop the inter-regional claim, so it is  
9 now limited to commercial card claims. So not only are  
10 they not running a wider claim, when they did, they  
11 actually specifically dropped it.

12 If we then go to {RC-C/71/90} in this document,  
13 which sets out -- and it is paragraph 218 in particular  
14 which sets out the specific allegation of breach of  
15 statutory duty, in this case by Visa, and this is  
16 the paragraph my learned friend's skeleton argument  
17 particularly relies upon. It says:

18 "The decision and/or agreement and/or concerted  
19 practice to establish, maintain and/or abide by the Visa  
20 Scheme Rules whereby acquirers are to pay issuers  
21 the applicable Commercial Card MIF set by Visa in  
22 respect of all Commercial Card Transactions ..."

23 It goes on to explain the nature of the allegation.  
24 That is quite clearly an allegation limited to  
25 the commercial card MIF, not anything broader or wider.

1 The argument is put, at paragraph 16.1 of the claimant's  
2 opening {RC-A1/1/8}, that the infringing agreement is:

3 "... the Schemes' rules requiring the payment of  
4 the MIFs set by the Schemes from time to time."

5 So they are trying to widen this out from commercial  
6 card MIFs to MIFs generally, and with respect, that is  
7 just impossible on the language. They are not  
8 challenging all MIFs; they are making a specific and  
9 limited challenge to commercial card MIFs. Yes, they  
10 are challenging a combination of Visa's rules and  
11 the commercial card MIFs, but not against -- in relation  
12 to a wider category of MIFs.

13 Then if we can go to {RC-C/71/107}, so "Loss and  
14 Damages", they plead, at paragraph 262:

15 "The measure of the class members' damages is  
16 the pecuniary loss measured by the overcharge  
17 incorporated in the MSC, i.e. the difference between  
18 the MSCs that they have paid and continue to pay  
19 (with ..."

20 If we go over the page {RC-C/71/108}:

21 "... the unlawful Commercial ... MIF) and the lower  
22 MSCs that they would otherwise have paid (assuming  
23 a lawful level of Commercial Card MIF, if any)."

24 Paragraph 264, they claim damages from 1 June 2016.

25 In 265:

1           "The appropriate counterfactual in relation to which  
2           the class members quantify their losses is the level of  
3           MSC that would be set in the absence of any Commercial  
4           Card MIF ..."

5           So the claim is limited to commercial card MIFs, it  
6           is limited from the period 1 June 2016 onwards, and  
7           the pleaded counterfactual is the absence of commercial  
8           card MIFs, not anything broader and wider and not  
9           anything longer, going back further in time. So --

10       MR TIDSWELL: They do plead reliance, don't they, on  
11       the Commission's decision in *Mastercard I* and the Court  
12       of Justice decision and so on. That is all pleaded, is  
13       it not?

14       MR COOK: It is pleaded as being, you know, there are legal  
15       principles one gets from those cases.

16       MR TIDSWELL: Well, they plead it for more than that, do  
17       they not? They say they rely on them for their full  
18       effect, but in relation to liability as well as  
19       causation and loss is as I understand what they are  
20       saying at paragraph 8 of the claim form.

21       MR COOK: They do, and there are legal principles one gets  
22       from that and obviously the judgments and matters like  
23       that and, you know, the extent to which, as happened in  
24       *Sainsbury's* in the Court of Appeal, unless there was  
25       a material difference, whether the reasoning could be

1 read across, for example. That is very different from  
2 alleging that any form of MIF, other than commercial  
3 card MIFs, in the present world, are unlawful and they  
4 are just simply not doing that.

5 MR TIDSWELL: Well, but if they have put into their pleading  
6 reference to decisions which have determined that  
7 certain MIFs are unlawful, surely that has to be  
8 recognised in the counterfactual, does it not? You are  
9 not saying you can just ignore that, can you?

10 MR COOK: I mean, the only decision which established  
11 something unlawful was in relation to Mastercard's EEA  
12 MIF, which was then removed and then a new one was set  
13 at a level the Commission indicated it thought was  
14 exempt, and that was in 2008/2009, and other ones left  
15 issues like exemption open, for example.

16 MR TIDSWELL: To the extent they expressly rely on  
17 the outcome of Trial 1, which of course we do not have  
18 an outcome from, but if we did have an outcome of  
19 Trial 1, would you say the position was different? If,  
20 hypothetically, Trial 1 found that all of the current  
21 MIFs which are in issue in Trial 1 were unlawful, are  
22 you saying that they can then --

23 MR COOK: Well, firstly, Trial 1 will not find that on  
24 the basis that all it is doing 101(1).

25 MR TIDSWELL: Well, for that purpose, yes.

1 MR COOK: Yes. Well, it is only showing restriction, at  
2 most, so it is not -- and then there is 101(3), which is  
3 meant to be --

4 MR TIDSWELL: Yes, I understand. I understand.

5 MR COOK: But, no, just simply looking at the claim as  
6 pleaded, of course they could have pleaded a wider  
7 different claim and they would have needed to satisfy  
8 the CICC Tribunal, which obviously you are very familiar  
9 with, of, you know, the justification of bringing  
10 a wider claim. But the claim they have brought,  
11 the pleaded claim and the pleaded counterfactual case is  
12 -- I have just shown you -- it is narrow and limited and  
13 they cannot now advance a counterfactual case which is  
14 based on some unpleaded allegation of wrongdoing,  
15 whether it would have been open to them to do it or not.  
16 So with respect, we do say that it is simply not  
17 permissible to try and run a wider claim for damages  
18 which does not reflect the claim as pleaded and  
19 the counterfactual should be accordingly, you know,  
20 reflective of the case as advanced.

21 THE CHAIRMAN: Does that actually change things in the end  
22 if they are relying on something a bit broader than what  
23 they have pleaded? Does it actually affect the outcome?

24 MR COOK: Well, I mean, of course they are trying to do so  
25 because they think it does affect, because what they are

1           saying is you should think about what would have  
2           happened to commercial card MSCs if all MIFs entirely  
3           had disappeared. That is a completely different  
4           question from what would have happened if commercial  
5           card MIFs had disappeared on their own --

6       THE CHAIRMAN: And everything else had stayed the same.

7       MR COOK: Yes. So that is the difference between us, is,  
8           you know, if MIFs entirely had been swept away, what  
9           would have happened, versus what would have happened if  
10          just the allegation of wrongdoing is removed. So  
11          whether it turns out to make a difference --

12       THE CHAIRMAN: That is what Ms Webster did, did she?

13       MR COOK: Well, what we are doing in relation to that is  
14          identifying, you know, that there are arguments in  
15          relation to what happens in relation to narrower  
16          categories of MIFs, for example, which we will come to.

17       THE CHAIRMAN: Right.

18       MR COOK: But, you know, nonetheless that is -- whether it  
19          makes a difference at the end is another question, but  
20          what is legally the right test is the important point  
21          for the moment because we both are worried it does make  
22          a difference, which is the reason why we are making  
23          these submissions, or worried that it might make  
24          a difference.

25       MR TIDSWELL: But if you put aside that pleading point,



1 I understand the pleading point, but put it aside for  
2 a minute, are you inviting us to accept a counterfactual  
3 which has got unlawful elements in it on the hypothesis  
4 that Trial 1 is adverse to you, which is the way in  
5 which Mr Beal is putting it. He says we have to assume  
6 that for present purposes, otherwise we do not have  
7 a reference point. So if that were right, we would be  
8 putting an unlawful element of the counterfactual by  
9 assuming that all the other MIFs remained at the current  
10 levels, would we not?

11 MR COOK: Well, a couple of points to make in relation to  
12 that. One, Trial 1 will only find a breach of  
13 Article 101(1).

14 MR TIDSWELL: Yes.

15 MR COOK: That is a restriction. That is not a finding of  
16 a legality at all --

17 MR TIDSWELL: Yes, and I think Mr Beal recognised that. But  
18 I think the point he is making is you that can't -- you  
19 have got to go one way or the other on this. I mean,  
20 how do we decide this without having -- if this is an  
21 important point, how are we going to decide it without  
22 knowing what the answer is to Article 101(3)? Are you  
23 saying we just cannot actually decide this until we know  
24 the answer to that?

25 MR COOK: Well, no, I am saying when somebody has said this

1           conduct has caused -- you know, this is a conduct  
2           I impugn, this is a conduct I am saying has caused loss,  
3           you test that proposition.

4       MR TIDSWELL: But if the proposition involves putting an  
5           unlawful element -- potentially unlawful element into  
6           the counterfactual, are you saying if we do not know  
7           the answer to that -- I mean, Mr Beal is saying in those  
8           circumstances we should assume that it is unlawful  
9           because that is the premise on which he says Trial 2 has  
10          been conducted. Now, you disagree with that, obviously,  
11          but then what is the answer? Is the answer to  
12          the question we just have to wait see what happens after  
13          Trial 3 and only then will we know whether  
14          the counterfactual works or not?

15       MR COOK: No, I am saying it is perfectly fine to make  
16          the assumption in a similar way to what is being done  
17          with the Merchant Claimants, which is, assume  
18          the rightness of the allegation of infringement is made.  
19          You cannot -- but not going further than that --

20       MR TIDSWELL: Well, but you are asking --

21       MR COOK: -- because if they had wanted to advance that  
22          case, then they would have been free -- you know, they  
23          would have been free to do so.

24       MR TIDSWELL: Well, but that is a little bit unhelpful from  
25          our point of view. It is a pleading point, is it not?

1           And there is a point of substance here, which is: what  
2           are we supposed to treat as the counterfactual? If you  
3           are inviting us knowingly to accept a counterfactual  
4           which may turn out to have an unlawful element to it,  
5           that is a bit of a problem, is it not? So, logically,  
6           is your position not -- I mean, you could take  
7           the position that we should assume it is lawful, which  
8           is -- is that what you are saying?

9       MR COOK: That is what I am saying. If somebody has not  
10           suggested and pleaded a case and advanced a case that --  
11           I mean, the world may have all sorts of illegality and  
12           unlawfulness taking place, but if you are not pleading  
13           or advancing a case in relation to any of it, then you  
14           just assume everything is lawful unless it is  
15           specifically impugned. I mean, he who asserts must  
16           prove, would be the basic proposition there, so ...

17       MR TIDSWELL: Yes, but that is a slightly artificial  
18           position when we have just had a trial about liability  
19           and we know we are going to have a trial -- unless  
20           something else happens, we know we are going to have  
21           a trial about 101(3). I mean, this is a live piece of  
22           litigation in which all these issues are in play so I do  
23           not understand quite what you are inviting us to do on  
24           that basis. If we were to accept that everything's  
25           lawful and then we get to 101(3) and find against you,

1           then how does that work? We have ended up getting it  
2           wrong, have we not?

3       MR COOK: Well, because in fact, you would not be, you would  
4           be reflecting the case that has been put in front of you  
5           so ... In the same way if it was -- if it was  
6           a standalone piece of litigation, so, you know, if there  
7           was not Trial 1 and Trial 3 in the background, you would  
8           just be doing this and saying nobody has suggested there  
9           is anything unlawful more broadly; there may or may not  
10          be. You know, if we settle out with everybody that is  
11          left, as we are relatively close to doing in relation to  
12          the Merchant Umbrella proceedings, for example, that  
13          might not happen. So Trial 3 might not happen in that  
14          regard.

15                So, again, you know, you simply deal with the case  
16                as it is advanced.

17       THE CHAIRMAN: So are you saying we have to look at the CICC  
18           claimants differently to the Merchant Claimants because  
19           they have limited their counterfactual to commercial  
20           cards?

21       MR COOK: Yes.

22       THE CHAIRMAN: Whereas the Merchant Claimants, what is their  
23           counterfactual pleaded as?

24       MR COOK: I do not think it is pleaded in quite those clear  
25           terms, but their case -- their allegation is that all

1           MIFs and a variety of other rules are unlawful.

2       THE CHAIRMAN: Right.

3       MR COOK: So they have a --

4       THE CHAIRMAN: You say they cannot assert that properly as

5           their counterfactual?

6       MR COOK: Sorry, no, in relation to that, no. I accept, in

7           relation to where they have a claim within their claim

8           period, of course the Merchant Claimants have said

9           everything is unlawful and that is in relation to --

10      THE CHAIRMAN: Right, okay. All types of cards?

11      MR COOK: That is what they have said and they have pleaded

12          it, and so --

13      THE CHAIRMAN: Yes. Okay, so --

14      MR COOK: -- that is --

15      THE CHAIRMAN: Right.

16      MR COOK: -- you know, that is the claim advanced and

17          the way this has happened is we are --

18      THE CHAIRMAN: So your point against them is the timing one?

19      MR COOK: Yes, it is a timing point in relation to

20          the Merchant Claimants. They cannot go back in time --

21      THE CHAIRMAN: Right. Okay.

22      MR COOK: In relation to the --

23      THE CHAIRMAN: CICC.

24      MR COOK: CICC --

25      THE CHAIRMAN: It is then --

1 MR COOK: -- they cannot go back in time --

2 THE CHAIRMAN: Yes.

3 MR COOK: -- and they cannot broaden out their claim in  
4 the way that it does not reflect.

5 THE CHAIRMAN: Okay. All right.

6 MR COOK: So -- and I mean the reason to some extent why all  
7 of this potentially makes a difference, and we say one  
8 it is trial by ambush, which should just never be  
9 permitted, and trial without proper evidence, because  
10 this was not the position that was being advanced up  
11 until now, but there is a recognition there may be  
12 asymmetry of pass-on rates, whether it is just a timing  
13 point or in terms of level between MIF increases and MIF  
14 decreases, and that is why this is something that there  
15 is disagreement between us in relation to these issues.

16 So it is accepted by the Merchant Claimants in their  
17 responsive case that part of the benefit of a MIF  
18 reduction may be pocketed by acquirers in the short to  
19 medium term. So there is this recognition of  
20 a difference. My learned friend potentially sort of,  
21 this morning, suggested anything longer term might not  
22 meet the test of proximate cause, so he has to then, by  
23 the sound of things, focus his case on showing what  
24 would have happened in the short to medium term, in  
25 which case, you know, he is acknowledging that, if I am

1 right about the counterfactual, then I am -- you know,  
2 subject to the exact numbers -- right that there will  
3 potentially be some that is not being passed on because  
4 acquirers will take the benefit of any -- within  
5 the short to medium term of any MIF decrease. That --

6 THE CHAIRMAN: Do you say the same -- sorry. Is the same  
7 legal test as set out in *Sainsbury's* for acquirer  
8 pass-on as it is for merchant pass-on or you are saying  
9 it is just the straight "but for" causation test?

10 MR COOK: Sorry, I am not sure which particular test you are  
11 thinking of. Where we have got to now is having had  
12 the Tribunal resolve all the issues of legal causation  
13 already, what we are left with is the issue of factual  
14 causation.

15 THE CHAIRMAN: Okay.

16 MR COOK: Which is "but for" causation, simply. So we do  
17 say that is what is left, which must be --

18 THE CHAIRMAN: What about issues of proximity?

19 MR COOK: Well, that is what -- issues of proximity -- and  
20 obviously there are a lot of submissions you will hear  
21 on this, you know, in the next week on Trial 2A, but  
22 proximity is a question of legal causation.

23 THE CHAIRMAN: Right.

24 MR COOK: It is a legal bar that says: I have seen this  
25 happens in fact, but I have decided it is not

1           sufficiently proximate for legal policy reasons. So  
2           proximity is a legal causation test, we say, and that  
3           has been resolved --

4       THE CHAIRMAN: Whatever you say, we will have that debate  
5           next week --

6       MR COOK: We can have that debate --

7       THE CHAIRMAN: -- but for the purposes of acquirer pass-on,  
8           is that debate relevant at all?

9       MR COOK: Well, it becomes relevant because my learned  
10          friend essentially accepted, today, that in order to  
11          show direct and proximate cause, you know, he was going  
12          to -- he put it in terms of it needs to be short to  
13          medium term --

14       THE CHAIRMAN: Well, I imagine he was trying to be  
15          consistent as between the two.

16       MR COOK: Well, I suspect -- anyway, I have criticised him  
17          for not being ready this morning, but, yes. I mean,  
18          what we say in relation to his suggestion of sort of  
19          longer term causation is he does not have a case on it.  
20          So he has not advanced a case on when it will happen,  
21          you know, this longer term pass-on, because he does not  
22          say when. Even if there was a -- at some point after  
23          five years there will be full pass-on, he would need to  
24          then -- you know, in the meantime, you would have  
25          a lower level of pass-on and that would be relevant for



1 damages, and there is a question about when it would  
2 happen, if at all. So really the question of whether it  
3 happens in the longer term is not terribly relevant  
4 because he just does not have a case on it, he banks  
5 everything on either it happens short to medium term,  
6 which actually, in terms of Dr Trento, is about  
7 12 months, or he just does not have a case on it  
8 happening in greater terms, which is partly why he wants  
9 it to be increases, which there is certainly reason to  
10 think will happen faster.

11 MR TIDSWELL: But is there not an oddity in your case on  
12 decreases? Sorry, I am taking up your time, I am  
13 conscious of that, but just, is there not an oddity  
14 there that what you are really doing is, in  
15 circumstances where you are an infringer, so we are  
16 assuming you are an infringer here and you are getting  
17 and the benefit of an acquirer in a decrease, preserving  
18 its margin or taking longer to pass it on, so you are  
19 taking that as a benefit in circumstances where you have  
20 infringed? That is a bit odd, is it not --

21 MR COOK: Well, with respect, all pass-on is, at one level,  
22 about taking the benefit of events as happen. But it is  
23 not about taking the benefit, it is about establishing  
24 what loss was suffered and what loss is claimable, and  
25 indeed merchant pass-on was always, you know,

1           potentially that answered my learned friend's case,  
2           depending on levels of merchant pass-on, every bit of it  
3           knocks down the Merchant Claimant's case. We are not  
4           taking the benefit of that, that is just they have not  
5           in fact suffered the loss so they do not recover.

6       MR TIDSWELL: Well, as between decrease and increase, you  
7           are taking the benefit. I mean, clearly, there is  
8           a benefit to you in the decrease and that is why you  
9           have taken it. Certainly, as I understand, and  
10          I appreciate Ms Webster, I think, takes a slightly  
11          different position, she does not distinguish, does she,  
12          or have I got that wrong, between an increased and  
13          decreased rate?

14       MR COOK: So, yes, as a matter of economic theory -- I mean,  
15          the issue with that, to some extent, is what the case  
16          law says in terms of how particularly small costs will  
17          be affected or not is not entirely lined up with what  
18          economic theory said, and of course *Trucks* acknowledged  
19          that lawyers and economists think about pass-on perhaps  
20          somewhat differently. So there are some differences  
21          there where -- you know, about size and about timing,  
22          but, you know, the reality is there is a general  
23          acceptance that time certainly does make a difference  
24          and that is something that, you know, it is called  
25          the "feathers and rockets" phenomenon, but that is

1 relatively well established in economic theory, it is  
2 a question of -- or, you know, it could have been  
3 a question of how long would the feather have taken, but  
4 my learned friend has basically banked his case on it  
5 has to happen relatively short scale because he does not  
6 have a longer term case.

7 MR TIDSWELL: Well, I think that is a slightly different  
8 point. I was asking you about increases and decreases.  
9 As I understand it, Ms Webster does not embark on that  
10 distinction, the "rockets and feathers", she does not  
11 look at the difference, but I think quite a lot of  
12 the evidence we have in front of us suggests that where  
13 there is an increase, it is passed on at a much higher  
14 rate, for the reasons that Mr Beal suggested perhaps,  
15 that it is in the acquirer's interest to pass it on if  
16 it is an increase, but not necessarily if it is  
17 a decrease.

18 MR COOK: Yes, it becomes a factual point as to -- I mean,  
19 and it becomes very much a question of the competitive  
20 dynamics in that market, which is, yes, obviously anyone  
21 faced with a cost increase will have a temptation to  
22 want to raise prices; anyone faced with a cost decrease  
23 will, you know, potentially want to try and keep  
24 the extra profit. There may be reasons why they think  
25 if they reduce prices they will take business or matters

1           like that that go to it, but, simplistically, it is  
2           higher profit in the short term.

3       MR TIDSWELL: But I think you are saying to us we have to --  
4           because of the way you put the counterfactual analysis,  
5           we are effectively forced to take the decrease route.  
6           That is your submission, is it?

7       MR COOK: We say legally that is the right question you  
8           should be answering.

9       MR TIDSWELL: Yes.

10      MR COOK: You know, it is put against me that legally you  
11           should be answering the other question, you should be  
12           considering the increases.

13      MR TIDSWELL: Yes.

14      MR COOK: So we do say, in respect, that that is legally --  
15           that is the requirement of "but for".

16           I will try and speed through a couple of more things  
17           I planned to say and then hand over to Mr Jowell. We do  
18           say the -- what is very important to understand as well  
19           is the features of the acquiring market that exist here.  
20           There is a lot of material from the PSR report. We have  
21           set it out in our positive case and, you know, that is  
22           important to understand why you do not get this,  
23           you know, this is not a market with high speed pass-on  
24           of everything at the same kind of levels. So you are  
25           talking lack of price transparency and difficulty in

1 comparing prices, because prices are not published. You  
2 get price discrimination, or price differentiation, so  
3 that acquirers can offer better, keener prices to  
4 customers who are thinking of switching either to them  
5 or might be leaving them, so they can keep customers who  
6 are lazy, perhaps, or are not focused on this at higher  
7 rates; contracts automatically roll on for an indefinite  
8 duration, which, as the PSR, means there is no clear  
9 trigger to think about searching and switching. These  
10 are contracts ad valorem, which means in practical terms  
11 they are not -- it is not the classic thing where every  
12 year you try and increase prices and as a result that  
13 triggers people thinking about switching; you can just  
14 keep the same MSC for a very long time without ever  
15 needing to do so. There are costs of risk of switching  
16 providers, which discourages merchants from doing so and  
17 as a result, you have got what the PSR called  
18 the inertia problem with limited searching and  
19 switching. The reality is it is exactly what you get in  
20 quite a lot of consumer markets, which is bits like home  
21 insurance, you know, bank accounts, all these bits where  
22 consumers are classically just very bad at searching out  
23 better deals. Even when the information is readily  
24 available, it is just there is a certain inertia of just  
25 keeping doing what you have been doing, and a lot of

1 regulatory impetus over the last 10/20 years has been  
2 focused on trying to get consumers to do things that  
3 will actually benefit them.

4 PROFESSOR WATERSON: On this point, are you saying that this  
5 happens across all levels, that is small customers as  
6 well as -- small merchants as well as large merchants?

7 MR COOK: Well, what we get evidentially here is this split  
8 between blended and IC++ and --

9 PROFESSOR WATERSON: Yes, I mean within blended.

10 MR COOK: Within blended, I mean, to some extent, you know,  
11 evidentially, what will happen is all of the --  
12 certainly all of the super big merchants are -- super  
13 large merchants are on IC++. There may be some who  
14 were, you know, moderately large who are on that. There  
15 is a bit of uncertainty on the evidence about, you know,  
16 what sort of scale of merchant you get to and whether  
17 the difference between small, very small, medium, really  
18 makes a difference, and we are not saying there is  
19 sufficient evidence for the Tribunal to draw conclusions  
20 at that kind of level. What is important for CICC is,  
21 you know, for the opt-out claim, is businesses will have  
22 a turnover, not card turnover, below 100 million, which  
23 is largely going to be a lot of small or medium  
24 certainly, but there is a limit to how far the granular  
25 information on exactly, you go from 50 million to

1           100 million, does that make that much difference? It  
2           is -- the numbers probably are not quite there easily.

3       PROFESSOR WATERSON: But you are not saying anything about  
4           the relative bargaining position of small versus large  
5           merchants?

6       MR COOK: All of this is sort of averaging anyway, in  
7           the sense of, you know, there will be small merchants  
8           who are smart and clever and change car providers every  
9           six months and there will be large merchants who have  
10          had the same one for a very long time. So all we are  
11          looking at is sort of a generality of a blending impact  
12          on different people and what that shows in terms of  
13          the numbers, but ...

14                So what we do say is high merchant inertia, low  
15                switching, low price transparency leaves the limited  
16                price competition for sticky existing customers and that  
17                is very much what the evidence shows and it is just not  
18                contradicted by anything the Merchant Claimants have  
19                produced. My learned friend showed you various  
20                documents today. I mean, really they do not take  
21                the Tribunal anywhere, with respect, we say. A lot of  
22                this relates to interchange plus plus, it is accepted  
23                that is mechanical 100% pass-on, or it relates to  
24                isolated incidents where there are pass-on. Of course,  
25                we accept that. That is the reason why our case on

1 pass-on is not 0%. Our case for general MIF levels is  
2 63%. We accept, of course, pass-on happens sometimes at  
3 some levels for some merchants. So isolated examples of  
4 seeing it happen really do not take my learned friend  
5 anywhere.

6 The acquirer accounts take -- you know, those are  
7 matters of internal accounting. They tell the Tribunal  
8 absolutely nothing about how MSCs would change if MIFs  
9 were reduced. With respect, there was an exchange with  
10 the bench where my learned friend agreed that  
11 the accounts were an example of pass through. If so,  
12 that was the wrong way round. That is the interchange  
13 fee going to the issuer. Of course that happens.  
14 The interchange fee is payable to the issuer. But that  
15 is completely different from the question of: is there  
16 an impact upon MSCs paid by merchants? So, with  
17 respect, that does not take him very far.

18 The question about whether or not merchants get  
19 a breakdown of MIFs. My learned friend showed you  
20 the response from one of the -- I think -- I am not sure  
21 whether I can say it or not, but one of the banks  
22 certainly provided a response to that effect. That  
23 reflects the current regulatory landscape. There was  
24 a lot of material in CICC about that landscape had  
25 changed over the last few years and what information was



1           available at different times. We will put out that  
2           material for closing. The current position provides  
3           more material than was the case three years ago and  
4           certainly more material than was the case pre-IFR. But  
5           pre-IFR there was no requirement for anything, and under  
6           the IFR, the requirement was to make available, which  
7           was satisfied by simply allowing the information to be  
8           accessible online in some way, and there is a big  
9           difference between getting a statement each month that  
10          says, "By the way, you have paid the following",  
11          somebody still has to pay attention to it, and saying,  
12          "You could obtain this information from your acquirer if  
13          you were motivated to do so", and CICC concluded that  
14          for almost the entirety of the CICC claim, it was just  
15          that "make available" position.

16                Unless there are any further questions, sir, I will  
17          leave it there.

18   THE CHAIRMAN: Thank you, Mr Cook.

19                Mr Jowell.

20                   Opening submissions by MR JOWELL

21   MR JOWELL: Mr Chairman, members of the Tribunal, having  
22                said that we will finish by 1 o'clock, I think I have  
23                lost 10 or 15 minutes of my time, so I might need to  
24                trespass a little --

25   THE CHAIRMAN: Probably our fault.

1 MR JOWELL: With apologies.

2 We are all agreed in this case that acquirer pass-on  
3 is 100% for merchants on IC++ contracts. As regards  
4 the pass-on by acquirers to merchants on standard  
5 contracts, or blended contracts, there is a difference,  
6 but it is not a great difference at least as far as  
7 the experts are concerned. I am sure you will have read  
8 Mr Holt's 13th and 14th reports, which contain  
9 a characteristically comprehensive analysis of the data  
10 and the issues. They contain the same level of great  
11 detail, care and intellectual integrity that we say has  
12 characterised all of Mr Holt's reports in these  
13 proceedings. Of course, even Homer nods, and you will  
14 have seen that his team spotted a computer coding error,  
15 which he has corrected very quickly. The claimants make  
16 rather heavy weather of this in their written  
17 submissions at least, but the fact is that the error was  
18 spotted, has been corrected. It changes the numbers, of  
19 course, but not the whole approach or the analysis.

20 For a summary of Mr Holt's final results in relation  
21 to standard contracts, it may be helpful just to have  
22 a look at paragraph 197 of his 14th report, if we could  
23 have that up, please. It is in {RC-G1.3/2/67}. You  
24 will see he says there:

25 "Compared to the other experts, who generally place

1 more weight on General Pass-on Analysis and only analyse  
2 the impact of the IFR Decrease and the 2021/22 Brexit  
3 Increase, my analyses focus on analysing all of  
4 the changes in MIFs I was able to identify. Across my  
5 analyses of five MIF changes, I calculated an average  
6 Pass-on Rate of 78% (when weighting each estimate  
7 equally) or 73% (when weighting each MIF change event  
8 that I studied equally). The respective averages for  
9 small merchants were materially lower (64% and 59%  
10 respectively)."

11 Now, on the basis of that -- those outcomes, as it  
12 were, from the data, Mr Holt has rather conservatively  
13 ultimately opted for an estimated range of 50 to 100%  
14 with a midpoint of 75% for smaller merchants, those with  
15 a turnover of below 50 million for credit cards, and  
16 100% for larger merchants on standard contracts, which  
17 give him a combined economy-wide weighted average for  
18 standard contracts of 81%.

19 The other experts are not a million miles apart.  
20 Ms Webster's estimate is 60 to 80% for all merchants on  
21 standard contracts, and even Dr Trento's preferred range  
22 is 75% to 100% for all merchants on standard contracts.

23 Now, the claimants assert that Dr Trento's results  
24 are inconsistent with pass-on below 75% and they also  
25 seem to be arguing, despite their own expert saying that

1           the range is 75% to 100%, they seem to be saying, ah, it  
2           must be 100%, which does seem to us to be rather  
3           ambitious, to be bolder even than your own appointed  
4           expert.

5           In fact, when one looks at Dr Trento's calculations,  
6           his own estimates of pass-on do show figures for some  
7           numbers that are below 75%. In fact, in relation to two  
8           out of the four analysed events. If I could just show  
9           you that. One is -- this first one relates to  
10          the interchange fee regulation MIF change. If we could  
11          go to Mr Trento's third report at paragraph 6.26, which  
12          is in {RC-F1.1/2/54}, please.

13          You'll see he gives his -- in 6.26, at the bottom of  
14          the page, you see he gives his results when using  
15          the data for consumer transactions. If we could go over  
16          the page, please, {RC-F1.1/2/5} to 6.27, and if you  
17          could perhaps read to yourself paragraph 6.27, because  
18          it contains confidential information.

19          (Pause).

20       THE CHAIRMAN: So that is the MSCs?

21       MR JOWELL: Yes. What he is estimating, you will see,  
22          are -- you see he estimates acquirer pass-on rate.

23          Forgive me, I am told "MSA" stands for merchant  
24          service agreements, yes. Sorry, forgive me.

25       THE CHAIRMAN: Yes.

1 MR JOWELL: So that is the first of his results that is  
2 below 75%.

3 The second, if we go, please, to his fourth report,  
4 paragraph 7.10(a), which is in {RC-G1.1/2/59}, please,  
5 and if you see 7.10(a), he gives his estimates for  
6 card-present transactions and you can see the results.  
7 Now, he does not like those, he says they may not be  
8 reliable, and of course we will have to explore that in  
9 due course, but the fact is that one is seeing that  
10 the actual results of Dr Trento are really consistent  
11 with the other experts. He is also showing that in some  
12 instances his results come out below 75%.

13 So we say that when one reads the results in  
14 the reports as a whole, they all broadly agree that  
15 the level of pass-on by acquirers to merchants on  
16 blended or standard contracts is on the balance of  
17 probabilities materially incomplete, albeit also  
18 probably above 50%.

19 THE CHAIRMAN: You say that. I mean, you have pointed out  
20 that they are not very far apart, the experts, it seems,  
21 on the figures.

22 MR JOWELL: That is right.

23 THE CHAIRMAN: Are you able to give us some idea as to what  
24 that means in terms of value of claims?

25 MR JOWELL: Well --

1 THE CHAIRMAN: We cannot really get a handle on it, in terms  
2 of total value.

3 MR JOWELL: I think you are better off asking the experts  
4 this afternoon, if I might say so.

5 THE CHAIRMAN: All right --

6 MR JOWELL: Because what 1% --

7 THE CHAIRMAN: You must have --

8 MR JOWELL: -- or 10% --

9 THE CHAIRMAN: -- some idea as to how far --

10 MR JOWELL: -- but I think it is still --

11 THE CHAIRMAN: -- apart you are.

12 MR JOWELL: I think these -- there are large amounts still,  
13 I think, at stake as between the differences, albeit  
14 that, as you have seen, Mr Holt's rather conservative  
15 estimate is within Dr Trento's 75 to 100 range.

16 Now, there is one clear point of difference that  
17 does exist between Mr Holt and the other experts and  
18 that is Mr Holt distinguishes between different groups  
19 of merchants on blended contracts depending upon their  
20 size. Now, I should clarify, this was not an original  
21 observation of Mr Holt, it is one that the Payment  
22 System Regulator made as one of the central observations  
23 of its 2021 report. If I could take you to that, it is  
24 {RC-J6/172/1}. So you see this is the report, and if we  
25 could go, please, to {RC-J6/172/3} and you see there:

1 "Card-acquiring ..."

2 This is the "Executive summary":

3 "Card-acquiring services enable merchants ... to  
4 accept card payments.

5 "Our review considered whether the supply of these  
6 services was working well for merchants, and ultimately  
7 consumers.

8 "For the largest merchants with annual card turnover  
9 above £50 million, we did not find any evidence that  
10 the supply of these services does not work well.

11 "We find that the supply of card-acquiring services  
12 does not work well for small and medium-sized merchants,  
13 and large merchants with annual card turnover up to  
14 £50 million. These merchants could make savings by  
15 shopping around or negotiating with their current  
16 supplier -- but many don't."

17 If I can give you -- take you to a few other  
18 passages in this. If we could go, please, to  
19 {RC-J6/172/6}, and if you see 1.11, they:

20 "... investigated the extent to which the IFR  
21 savings were passed through to merchants, and used this  
22 as an indicator for how well the supply of  
23 card-acquiring services is working."

24 Paragraph 1.13, you see how they structured their  
25 analysis between the small and medium-sized merchants

1           and large merchants. In this case, they took a cut-off  
2           above 10 million, but they note that that is dominated  
3           by a very small number of the largest merchants.

4           If we go over the page, please, to {RC-J6/172/7},  
5           you see in paragraph 1.15 a summary of their findings,  
6           and I think we can skip over the first bullets, but if  
7           we go to the next page, please, to {RC-J6/172/8}, you  
8           see -- well, perhaps if I could invite you to read this  
9           page, page 8, and {RC-J6/172/9}.

10          (Pause)

11          If one goes to {RC-J6/172/10}, over the page, you  
12          see the conclusion for large merchants -- we are just at  
13          the very top bullet -- which they say -- where they say  
14          the market is working well, at least for those above  
15          50 million.

16          If you go forward -- if we can go forward, please,  
17          to {RC-J6/172/51}, and you see 4.54:

18          "We observe that large merchants -- irrespective of  
19          the pricing option they have -- pay lower prices than  
20          small and medium-sized merchants, as shown in  
21          Figure 10."

22          If we go over the page {RC-J6/172/52} we see  
23          the figure 10, and you can see the dramatically, really  
24          quite significantly different prices that are paid by  
25          merchants depending on their sizes with the yellow line



1           are those that are above 50 million, and the others, as  
2           you see, bunched above that.

3           If one goes to {RC-J6/172/65}, please, you see they  
4           go further. They say:

5           "The IFR ..."

6           This is the Interchange Fee Regulation:

7           "... capped interchange fees paid by acquirers to  
8           issuers on most card transactions, but did not cap  
9           the MSC paid by merchants. The IFR relied on  
10          competition between acquirers to ensure that acquirers'  
11          cost savings were passed through to merchants. We used  
12          the introduction of the IFR caps as an indicator for how  
13          well the supply of card-acquiring services is working by  
14          investigating the extent to which the IFR savings  
15          acquirers realised were passed through to merchants.

16          "As a group ..."

17          It says:

18          "... merchants on IC++ pricing, which are ...  
19          the largest [ones], received full pass-through of  
20          the IFR savings."

21          But then in the next paragraph we see:

22          "Merchants with annual card turnover up to  
23          £50 million received, on average, little or no  
24          pass-through of the IFR savings -- indicating that  
25          the supply of card-acquiring services is not working

1 well for these merchants."

2 Now, this conclusion has been, you know, scrutinised  
3 -- the data underlying it has been scrutinised by  
4 the experts in these proceedings and they do not agree  
5 necessarily that it is -- they think that it is somewhat  
6 overstating the position to say that it is little or no  
7 benefit, but certainly it is not, by no means, all of  
8 the benefit was passed on.

9 If one goes through the report -- and I am not going  
10 to -- in the time available, I am not going to take you  
11 through all of it -- you see the reasons for this are  
12 explained in the report and they go back to the ones  
13 that you have seen in the Executive Summary. So if  
14 I could give you for your note, so that you do not have  
15 to read it all now: page {RC-J6/172/74}, paragraph 5.33;  
16 and then within chapter 6 it might be helpful to look at  
17 page {RC-J6/172/94}, figure 12; page {RC-J6/172/96},  
18 paragraph 6.22; page {RC-J6/172/105}, paragraph 6.48;  
19 and page {RC-J6/172/134}, paragraph 6.145 through to  
20 6.147.

21 So this is really the basis of Mr Holt's view that  
22 there are differences -- likely to be differences in  
23 pass-on depending upon the sizes of merchants, and he  
24 refers to this evidence about the -- this factual  
25 evidence of how small merchants are in a different

1 position to the larger merchants in his 13th report at  
2 paragraphs 127 to 140 {RC-F1.4/2/47-50}.

3 THE CHAIRMAN: It largely comes down to poorer bargaining  
4 power, does it not?

5 MR JOWELL: Yes, that is one way of summarising it. It is,  
6 effectively, the margins are larger for the acquirers  
7 with the smaller merchants and the smaller merchants are  
8 partly -- are effectively locked into these indefinite  
9 contracts for a very long time, they are not shopping  
10 around for whatever reasons, and they are also somewhat  
11 linked to the -- they cannot -- there is a disincentive  
12 to swapping around because they have got these expensive  
13 point of sale equipment that costs a lot to change.

14 THE CHAIRMAN: Well, would you not expect there to be higher  
15 pass-through, therefore, for smaller merchants rather  
16 than higher?

17 MR JOWELL: No, not necessarily, because you would --  
18 precisely because of the slack in the margin, if you  
19 like, one would -- one sees that there is an ability --  
20 there is a likelihood that, in both directions, you will  
21 see some failure. Whether it is an increase or  
22 a decrease, you will see some failure to pass through to  
23 those smaller merchants.

24 If I can show you Mr Holt's brief conclusion in his  
25 third report, which is in {RC-F1.4/5/30} -- forgive me,

1 page {RC-F1.4/5/130}. You see at 348, he says:

2 "The difference in Pass-on Rates by merchant size is  
3 aligned [by] what economic theory predicts about the  
4 role of buyer power. As discussed in Section 3, larger  
5 merchants are likely to be more engaged and to negotiate  
6 harder with their acquirers, leading to relatively thin  
7 margins that leave little room for incomplete pass-on.  
8 Pass-on Rates for smaller merchants, on the other hand,  
9 can deviate much more materially from 100% because  
10 margins are relatively high and because (at least  
11 some) merchants fail to negotiate ... MIFs change[s]."

12 Mr Holt's view is -- yes.

13 MR TIDSWELL: But is that not the opposite of buyer power if  
14 you are suggesting that a price increase would not be  
15 passed on?

16 MR JOWELL: I think "buyer power" may not be a good word  
17 for it. It is effectively that there is -- the acquirer  
18 margins are larger for the smaller merchants, and  
19 therefore, in both directions, what you see is there is  
20 not an immediate renegotiation.

21 MR TIDSWELL: But they are larger, are they not, because  
22 the merchant has less buyer power --

23 MR JOWELL: Well --

24 MR TIDSWELL: -- and therefore the acquirer is able to  
25 extract more value, so why would it not keep doing that?

1           That is the bit I do not understand.

2       MR JOWELL: Well, because they also -- they cannot  
3           necessarily -- because if they have already got -- if  
4           they have already got a sizeable margin on the contract,  
5           they cannot necessarily then go along, indeed with these  
6           indefinite contracts, and suddenly say, "We are going to  
7           make it even higher". But this is --

8       MR TIDSWELL: Well, Mr Beal showed us a contract where they  
9           could do exactly that, and why would they not do it if  
10          they could?

11      MR JOWELL: Well, one cannot look at -- I mean, really it is  
12          hopeless to look at individual contracts. One is  
13          looking at -- in many cases they will, and indeed in  
14          most cases, perhaps, they will, but in some cases they  
15          will not.

16           If you look at -- if you look at the-- Mr Beal took  
17          you to the '24 report of the Payments Systems Regulator  
18          and they said -- in that report they said, "to a large  
19          extent", they say, "most" of the cost reduction would be  
20          passed on to smaller merchants. They do not say "all",  
21          and that is -- I mean, to say "most", or "to a large  
22          extent", is entirely consistent with the outcomes that  
23          the experts find from the data.

24           The data supports, in our respectful submission,  
25          this distinction between smaller and larger merchants.

1           So if we go to Mr Holt's 14th report and if I could show  
2           you that {RC-G1.3/2/1}, at page {RC-G1.3/2/126}, please.  
3           This is a -- this shows, one can see, the averages of  
4           his results at the bottom, and one sees a distinct  
5           difference between merchants on turnover below  
6           50 million and those above 50 million, and one sees --  
7           now, there are some discrepancies for certain acquirers,  
8           but there may be reasons for that which are based on  
9           the data specific to that acquirer, but one also sees  
10          a similar pattern that emerges also from Dr Trento's  
11          results, some of which are summarised in the second half  
12          of this column, but also Dr Trento's own results. If  
13          I could just show you that, it is {RC-F1.1/2/36}. If  
14          you see the note at the bottom of the table, one sees  
15          that the -- you see the various columns, 1 to 7 -- 1 to  
16          8, and those represent the different sizes of merchants.  
17          Broadly speaking, again, if you peruse those results,  
18          one sees a difference in the pass-on rates as between  
19          merchants of different sizes.

20                 One sees that also -- again, I will just give you  
21          the references -- in the PSR's regression --

22       PROFESSOR WATERSON: Which figures are you looking at here?

23       MR JOWELL: Forgive me. It is the -- if one looks at  
24          the figures at the top of the -- at the top,  
25          the "Interchange fee (%)", one sees a higher range --

1           a higher figure of pass-on for merchants in group 7 than  
2           in groups 1 through to 6.

3       PROFESSOR WATERSON: Yes, but they do not consistently rise.

4       MR JOWELL: They do not. It is not monotonic, and one has  
5           to accept that, but nonetheless we say there is  
6           a difference, and that is partly why -- I think Mr Holt  
7           will speak for himself, but why Mr Holt just bunches all  
8           of the smaller merchants together, but does -- draws  
9           a line with the larger ones above 50 million.

10      MR TIDSWELL: Where does 50 million cut in on this?

11      MR JOWELL: 7.

12      MR TIDSWELL: 7 is 50, right, I see.

13      MR JOWELL: One sees a similar pattern in Ms Webster's  
14           report {RC-F1.3/2/131}. Again, you see the same groups,  
15           and again, we see -- one sees group 7, a higher rate  
16           than the groups for the smaller merchants. Again, not  
17           monotonic, if that is the correct term, but it is  
18           nevertheless there.

19           Now, it is right to say that some of the experts,  
20           Ms Webster for example, take the view that the evidence  
21           is not strong enough to conclude that there are  
22           differences, but Mr Holt takes the view that there is  
23           and there is a reasonable basis for that.

24           Now, I am not going to address you on all of  
25           the detailed differences on methodology. There are --

1           there is -- I think in the time available I was going to  
2           hope to discuss two conceptual points, but I think  
3           I will restrict myself, and those two, just to be clear,  
4           the first is the question of the correct counterfactual,  
5           and the second is the question of whether you should go  
6           on to address an economy-wide rate and if so on whom is  
7           the burden of proof in that regard. I am content to  
8           address that second point in closing, unless you would  
9           prefer me to address it now.

10                 But let me briefly speak about the correct  
11           counterfactual. We say that, ultimately, the correct  
12           counterfactual is very clear. One considers the actual  
13           position of the MIF as it was in the claim period and  
14           one compares that with what would have happened if  
15           the MIF had been lower, at zero. We say that one does  
16           not actually need to determine -- you do not need to  
17           determine the question of what the MIF was in the period  
18           prior to the claim period in this particular case. But  
19           if you were to consider it necessary to determine that,  
20           we certainly reject the claimant's suggestion that it is  
21           appropriate to assume that the MIF has always been zero  
22           as part of the counterfactual in the period prior to  
23           the claim period, and that is because that is simply  
24           neither pleaded nor -- it is neither pleaded that it  
25           would have been zero, nor has it been established that



1       it would have been zero. In part, this is limitation,  
2       of course, but it is also important to note that, if it  
3       had been alleged, we would have said, well, there are  
4       relevant differences between that prior period and  
5       the claim period.

6               So my learned friend noted that Visa, for example,  
7       notified its MIFs in 1977 to the European Commission.  
8       Actually, it goes further than that. In 2002, Visa  
9       received an individual exemption from  
10      the European Commission for its MIFs, saying that they  
11      were lawful. So we say it is not appropriate for  
12      the Tribunal to make assumptions that there has been  
13      illegality in the prior period.

14             We do not -- we part company to a degree with  
15      Mastercard, because we say that one does not -- you do  
16      not necessarily have to assume that there has been  
17      a sudden, dramatic, precipitous, dynamic fall in the MIF  
18      at the start of the period. We say you do not  
19      necessarily have to assume that. But one is certainly  
20      not looking at a sort of sudden uplift, as I think  
21      Mr Beal sought to suggest, and we say that, actually, in  
22      practical terms, we say this is something of a storm in  
23      a teacup, because the approach of Mr Holt is ultimately  
24      to take -- to give equal weighting to the evidence of  
25      MIF increases and MIF decreases. He considers that they

1 are both valid in establishing the relevant pass-on  
2 rate. That is also the approach he took in relation to  
3 Trial 2A, and it is the approach that he takes also in  
4 relation to this Trial 2B. It is right that he  
5 considers in his evidence whether there may be an  
6 asymmetric position here, and he considers that this may  
7 be one of those markets where actually there might be,  
8 but, actually, in the end, he does not rely on that,  
9 what he does is to give equal weight to both  
10 the increases and the decreases.

11 One of the reasons why he does so is because he does  
12 not think that there is a very pronounced "rockets and  
13 feathers" issue in this case based on the data. He says  
14 that in fact the evidence shows that acquirer pass-on  
15 happens relatively quickly, and one sees that -- you  
16 will see that, I am sure, this afternoon in the graphs,  
17 where one sees that there is an adjustment and then you  
18 see the rates, whether they are margins or anything  
19 else, effectively flatlines. If I can take you to this,  
20 perhaps if we can go to his 14th report at  
21 paragraph 233, which is in {RC-G1.3/2/76}, please, you  
22 will see he says there:

23 "As set out in Holt 13, the evidence shows that  
24 acquirer pass-on happens relatively quickly. If this  
25 was not the case, after a decrease in MIFs, I would

1 expect to see an initial increase in MIF Margins.  
2 I would then expect to see MIF Margins fall and, in  
3 the case of full pass-on, converge back to their initial  
4 levels (in the case of a before and after analysis) or  
5 the levels of less affected merchants (in  
6 a [difference-in-difference] analysis). However, I did  
7 not see such a convergence in my consumer  
8 [difference-in-difference] Analysis of the IFR or  
9 Mastercard's commercial contactless MIF changes using  
10 PSR Data and Commitments Decrease analysis using T[rial]  
11 2B Acquirer Data."

12 He goes on then to give further details.

13 One can see some of this, to give you an example, if  
14 we go to figure 6.1 in Holt 13, which is {RC-F1.4/5}, at  
15 page {RC-F1.4/5/117}, and you can see how the graphs  
16 evolve, and as I say, you can see graphically there  
17 the flatlining -- the change and then the flatlining.

18 One can see it also in -- the same thing actually in  
19 Dr Trento's analysis if you go, please, to  
20 {RC-G1.1/2/57}, and you see there -- forgive me, it is  
21 green, but again, you can see -- in this figure 11, you  
22 see the evolution and then the flatlining. Actually,  
23 one can see very clearly in the graph below, one sees  
24 a very graphic -- clear graphic illustration also of how  
25 the pass-on is incomplete. You can see it visually.

1 THE CHAIRMAN: This is after a particular event, is it?

2 MR JOWELL: Yes, it is.

3 THE CHAIRMAN: The Brexit event or something?

4 MR JOWELL: Yes, exactly. It is the 2019 commitment, after  
5 the commitments were given. You see the top is the MIF  
6 -- is the MSC and the bottom is the MIF, and you see how  
7 the one falls and you can compare it to how the other  
8 falls, but you can see, visually, it is incomplete, and  
9 that is why -- essentially why all of the experts are  
10 agreed. Of course, they disagree with the claimants,  
11 but the experts at least are agreed that there is  
12 a substantial element of incompleteness, at least for  
13 the smaller merchants.

14 Unless you have anything further, those are my  
15 submissions.

16 THE CHAIRMAN: Well, that is very good. Thank you.

17 MR JOWELL: Thank you.

18 THE CHAIRMAN: You know we need to finish by 4.10, so to  
19 ensure we get through the hot tub this afternoon,  
20 I think we will have a slightly shortened lunch break,  
21 if that is okay, and we will resume at 1.50.

22 MR JOWELL: Thank you.

23 (1.06 pm)

24 (The short adjournment)

25 (1.52 pm)

1 THE CHAIRMAN: Good afternoon. Back in your familiar  
2 positions, although there are slightly fewer of you.

3 Right, are we going to swear? Yes, thank you.

4 RACHEL WEBSTER (affirmed)

5 DEREK HOLT (affirmed)

6 STEFANO TRENTA (affirmed)

7 THE CHAIRMAN: Thank you very much.

8 You have all got access to the documents on  
9 the screen, I assume? Good, all right.

10 Questions by THE TRIBUNAL

11 PROFESSOR WATERSON: Good. Okay, thanks very much.

12 So you have all made use of the PSR-provided data,  
13 but I think there are differences between you in how  
14 important or how relevant the PSR data are compared with  
15 the alternatives from the acquirers and so on. So this  
16 is by way of being a sort of general introduction to  
17 that issue. So we will go in the order, Ms Webster  
18 first, for this.

19 DR TRENTA: Can I only ask a question which is, for  
20 Trial 2A, we were allowed to have a few notes for  
21 the hot tub.

22 PROFESSOR WATERSON: Sorry?

23 DR TRENTA: Sorry, for Trial 2A, we, the experts, were  
24 allowed to have some notes for the hot-tubbing and I do  
25 not know whether that is also the case for this.

1 THE CHAIRMAN: Do you all have notes? Do you have some  
2 notes? Is there any objection to ...?

3 That is fine. Thank you.

4 MR COOK: (Off microphone) So the only point to raise is how  
5 far this can be in open court, because as soon as we --

6 THE CHAIRMAN: Yes.

7 MR COOK: -- (inaudible) the PSR data into saying anything  
8 about the acquiring data, I think any of the specific  
9 criticisms are going to be, you know, confusing and  
10 difficult, but ...

11 THE CHAIRMAN: You are going to want to go to confidential  
12 material, I assume, in some of your answers? Yes.

13 Well, would it be simpler if we went into closed session  
14 immediately then? I think so. All right. Can we do  
15 that?

16 (In private)

17 (4.10 pm)

18 (The hearing adjourned until 10.30 am on Tuesday,

19 25 March 2025)

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