

This Transcript has not been proof read or corrected. It is a working tool for the Tribunal for use in preparing its judgment. It will be placed on the Tribunal Website for readers to see how matters were conducted at the public hearing of these proceedings and is not to be relied on or cited in the context of any other proceedings. The Tribunal's judgment in this matter will be the final and definitive record.

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

1517/11/7/22

Salisbury Square House  
8 Salisbury Square  
London EC4Y 8AP

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

Before:

The Honourable Justice Michael Green  
Ben Tidswell  
Professor Michael Waterson

**Merchant Interchange Fee Umbrella Proceedings**

---

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

Ben Lask KC and Thomas Sebastian on Behalf of Allianz (Instructed by Pinsent Masons)

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

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

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

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

Tuesday, 19 November 2024

(10.30 am)

Housekeeping

THE CHAIRMAN: Good morning.

MS TOLANEY: Good morning. I have had a land grab.

THE CHAIRMAN: Yes, I can see. Getting closer, okay.

Just a little bit of housekeeping. For tomorrow, as Mr Jowell suggested, we think we should hear all the factual evidence in private, to avoid the complication of going in and out of private, and we have quite a few to get through.

The other matter was whether we want to start early tomorrow, whether that would help, or whether you think we are okay with the timings?

MR JOWELL: I think half an hour would be helpful, although it does appear that one or two witnesses may not be called, but that will be on Thursday, I think.

THE CHAIRMAN: Yes. What, that they will not be called? So we can review whether we start at 10.00 on Thursday but we will start tomorrow at 10.00 then.

MR JOWELL: I am grateful. Thank you.

THE CHAIRMAN: Okay.

Yes, Ms Tolaney.

Opening submissions by MS TOLANEY (continued)

MS TOLANEY: Thank you. I was on my third topic, which was

1           the importance of maintaining a clear distinction  
2           between the categorisation and the treatments of  
3           merchant service charges, and we address this at  
4           paragraphs 91 to 98 of our written opening submissions.

5           For present purposes, without repeating those  
6           submissions, it is enough to note, as we set out in our  
7           positive case at paragraph 33, that the categorisation  
8           chosen by merchants for their internal accounting  
9           purposes is plainly not determinative of the question of  
10          pass-on, and the claimants, we suggest, conflate the  
11          concepts of categorisation and treatment in their  
12          skeleton. For example, at paragraph 22.4 of their  
13          skeleton, they contend that the supposed mechanism by  
14          which prices are influenced by costs depends upon how  
15          those costs are characterised. Just for the note, you  
16          will note that is at {RC-A/1/12}.

17          Now, we suggest that that is wrong. It can't simply  
18          be question of how it is characterised by any individual  
19          merchant. How the costs are characterised or  
20          categorised may form part of the picture, because one  
21          has to look at and see how the categorisation may  
22          influence the role played by the charges in price  
23          setting, but it could only ever be part of the picture,  
24          and as we explain at paragraph 33 of our positive case,  
25          if merchant service charges as a common variable cost

1           were in fact taken into account in setting prices, just  
2           as economic theory suggests would be efficient, there is  
3           a necessary causal link between changes in the service  
4           charges and changes in prices, and that causal link  
5           can't be weakened or negated simply because a merchant  
6           has characterised the charges as an overhead cost for  
7           the purposes of its accounting.

8           The point is that if the charges flow into prices,  
9           whether as a constituent element in the calculation of  
10          the price, or being taken into account through a margin  
11          and profit of the business target, then there is  
12          a necessary causal link between the change in price and  
13          the change in overhead -- and change in charges.

14       MR TIDSWELL: The causal link, just so I am clear on that,  
15          the causal link might differ depending on how they are  
16          actually treated in fact, as opposed to what people  
17          think of them, is that ...

18       MS TOLANEY: Exactly.

19       MR TIDSWELL: So that distinction between, say, overheads  
20          and cost of goods sold, I think you are saying that your  
21          case, or you are accepting there might be a difference  
22          in the pass-on rate as a result of that categorisation,  
23          but that is not because people are thinking of them in a  
24          particular way, it is because that is just the  
25          consequence that flows from the treatment, is that the

1           distinction?

2       MS TOLANEY: It is, but it is not the way in which it has  
3       been put on the books, it is the actual how it is in  
4       fact flowing through. So even if it is labelled as one  
5       thing, as an overhead, if it is not in fact treated as  
6       an overhead, but rather does influence the price  
7       setting, then the fact that it has been given a label by  
8       a subjective analysis for different reasons does not  
9       determine the question.

10      MR TIDSWELL: Yes. So it is not the categorisation, it is  
11      actually really just simply a factual point as to what  
12      its connection is with pricing.

13      MS TOLANEY: Indeed. That is our case. Our case is you  
14      look at, as a matter of fact, what is the impact, and  
15      how you reach the conclusion of the assessment of fact,  
16      we say, comes from looking at all the evidence,  
17      qualitative and quantitative, because you cannot  
18      necessarily have a complete factual picture from one or  
19      the other, but you look at it in the round and you try  
20      and work out, as any court does, on the evidence, what  
21      the factual question is.

22      MR TIDSWELL: If you have so many million merchants in the  
23      UK, they might all -- there might be an infinite number,  
24      certainly a very large number of different ways in which  
25      they might both categorise that, but also the way in

1           which it might be connected?

2       MS TOLANEY:   Well, yes and no --

3       MR TIDSWELL:   How do we deal with that in this case?

4       MS TOLANEY:   Yes and no, because if you were dealing with  
5           any one claim by itself, that might be true.  But here  
6           obviously this is a sector-based industry-wide case, and  
7           so the court has to approach it on the basis of two  
8           things.  One is that you have data from public studies  
9           and empirical data that will inform the assessment  
10          across the industry.  The second is that, to the extent  
11          that it can be discerned, and that depends on the  
12          quality of the evidence that has been adduced, you also  
13          have a selection of willing claimants who are there not  
14          just as an individual but to give an insight into ways  
15          in which the costs are treated in practice.  But  
16          obviously there is a balancing exercise because one  
17          cannot look at one idiosyncratic methodology and say,  
18          well, that obviously helps that person but not this  
19          person.  One has to approach it on a realistic basis,  
20          given the situation we are in.

21                It is why there is a concern on this side of the  
22          court, as you know, as to the quality of the evidence  
23          that has been produced, but we are where we are, and  
24          this Tribunal will no doubt form its own assessments,  
25          but it will have to, we say, form its assessments in our

1           favour, if there is an ambiguity, given the burden that  
2           is on the claimants in this regard.

3           Now, just coming back to the point, I think, and  
4           putting the same point in a different way to  
5           Mr Tidswell's question. The fundamental question  
6           is: has the overcharge been passed on in higher prices  
7           or in another methodology and a lower service charge in  
8           the counterfactual world would have resulted in lower  
9           prices? That is what the Tribunal is trying to assess.

10          You will hear the witnesses, but I wanted to put  
11          that marker down, that simply because I say that  
12          something is blue does not mean it is blue if in fact  
13          you can see it is red, and that is to some extent the  
14          point over merchants saying they characterise in one  
15          way. It has to actually be blue for the Tribunal to  
16          find it is blue.

17       THE CHAIRMAN: Do you have to look at the purpose for which  
18          they are categorising it in a certain way?

19       MS TOLANEY: I am sorry?

20       THE CHAIRMAN: You have to look at the reason why it is  
21          being characterised in a certain way internally?

22       MS TOLANEY: Yes, so I accept that.

23       THE CHAIRMAN: Yes.

24       MS TOLANEY: If it is for accounting purposes, that may not  
25          be relevant, or for bookkeeping. If it is characterised

1 in a certain way because that is feeding in to price  
2 setting, that may be different. So you are absolutely  
3 right to say there is an inquiry involved in the  
4 process.

5 But just to use my rather bland example, no matter  
6 how it is treated for whatever purpose, if you can see  
7 that it is red rather than blue, that may be a shortcut,  
8 and that may depend on the relevant evidence you hear.

9 Can I then turn to my fourth topic, please, which is  
10 Mr Merricks' position. Now, Mr Merricks, as you know  
11 from our written opening, advances his case on pass-on  
12 based solely on a statistical correlation between  
13 general costs and prices, and what he then seeks to do  
14 is to extrapolate back from quantitative data applicable  
15 to a different time period, the merchant claim period,  
16 to the Merricks' claim period. Critically, he fails to  
17 adduce any qualitative or merchant-specific quantitative  
18 evidence of his own.

19 Now, just pausing there. That is quite a stark  
20 position that Mr Merricks has taken, and it is even more  
21 stark, notwithstanding the differences in card  
22 acceptance and usage and technology and business  
23 practices between 1992, when his claim period started,  
24 and now, 32 years later.

25 We suggest that, just standing back, that approach



1 is not consistent with the court's approach in *Trucks*  
2 and particularly given the tiny size of the alleged  
3 overcharge in the Merricks period, which we suggest  
4 calls for, as the Court of Appeal found in *Trucks*,  
5 evidence that is that much stronger in order to  
6 demonstrate the requisite causal link, and we suggest  
7 that, just starting there, we think that Mr Merricks'  
8 case faces an insuperable hurdle he cannot overcome.

9 But drilling down into the detail, I have seven  
10 points as to his case.

11 The first point is that this is an issue on which  
12 Mr Merricks, not Mastercard, bears the burden of proof,  
13 and it is for Mr Merricks to prove his case on pass-on  
14 from merchant to consumer in order to succeed in his  
15 case on causation. In that respect, the reason  
16 I highlight this is that he is in a different legal  
17 position to the merchants, because in the merchants'  
18 claims pass-on is a question, as I said yesterday, of  
19 mitigation on which Mastercard and Visa bear the burden,  
20 whereas here Mr Merricks has to discharge the burden on  
21 causation, and we suggest that if he has failed to  
22 adduce any qualitative evidence at all, then his case  
23 necessarily fails.

24 THE CHAIRMAN: The legal burden is on Merricks as it is on  
25 you against the merchants. What about the evidential

1           burden that the Supreme Court talked about?

2       MS TOLANEY:   Well --

3       THE CHAIRMAN:   Was that -- because the position in relation  
4           to Merricks is not they have the evidence, they are  
5           further removed.

6       MS TOLANEY:   But the evidential burden remains on him,  
7           because it is the causation burden on him.  On our case,  
8           it is a question of mitigation in which we have to show  
9           a causal link for mitigation, but he is actually having  
10          to demonstrate causation as a matter of law and fact.

11      THE CHAIRMAN:   But he is dependent on the claimants then.

12      MS TOLANEY:   But he is certainly not dependent on us.  So he  
13          is entitled to try and suggest that the claimants could  
14          have produced more, but it is a different time period.  
15          So he had to -- by seeking to join into these  
16          proceedings he has taken on a burden on himself, and he  
17          cannot rely on us to produce the material, because it is  
18          not necessarily in our gift, but the court has to look  
19          at what he could have done, and there are things, and we  
20          will develop this as time goes on, as to what  
21          Mr Merricks could have done.

22                But what he certainly should not have done, we  
23          suggest, is take the approach that Mr Coombs has done,  
24          which is to say: I am just going to look at it as  
25          a matter of extrapolation back from material that is not

1           actually correlative, and all the court can do is say,  
2           well, is that good enough? The answer to that, we  
3           suggest, is no.

4       MR TIDSWELL: You also say that he bears the burden as  
5           a matter of law and factual causation -- legal and  
6           factual causation. So are you suggesting that he is in  
7           a different position from --

8       MS TOLANEY: I am suggesting --

9       MR TIDSWELL: -- about legal causation?

10      MS TOLANEY: I am suggesting that to the extent -- I do not  
11           know that there is a distinction on his case. He simply  
12           has to prove the causation case that he is advancing.  
13           We are proving mitigation. So, as I said yesterday, we  
14           are trying to demonstrate that the loss that is claimed  
15           did not fall where it claimed and that there has been  
16           mitigation, and in order to demonstrate that, we have to  
17           show you, as a matter of fact, that the loss has  
18           necessarily fallen elsewhere by the mechanism we have  
19           identified.

20      MR TIDSWELL: I suppose there are all sorts of causation  
21           arguments that are going on quite separately from this  
22           in the Merricks proceedings.

23      MS TOLANEY: That is right.

24      MR TIDSWELL: So we do not want to get into any of that.

25      MS TOLANEY: No, you are not getting -- in fact, that has

1           been determined, subject to appeal.

2           Here we are saying that in order for Mr Merricks'  
3           case to get off the ground, he has to show, as a matter  
4           of causation; it is not mitigation, it is causation.

5       THE CHAIRMAN: Is it the same test of causation?

6       MS TOLANEY: Well, I think it is a but-for test, but I think  
7           that it is a slightly different test, yes. I would not  
8           say -- it is a different test, because it forms  
9           a crucial element of his cause of action.

10      THE CHAIRMAN: Yes. This causation of loss.

11      MS TOLANEY: Exactly, as opposed to mitigation of loss. It  
12           is different. We would say the burden is even more  
13           stringent, therefore.

14      THE CHAIRMAN: Right.

15      MS TOLANEY: Because it is a fundamental part of the cause  
16           of action, as opposed to a defence.

17      THE CHAIRMAN: Right. But when you say a more stringent  
18           burden, what does that actually mean?

19      MS TOLANEY: What I mean by that is that when the court is  
20           looking at the quality of the evidence, you cannot fill  
21           in the gaps for Mr Merricks. So there is a fair  
22           argument that is being advanced by Mastercard and Visa,  
23           which is where the claimants have not produced  
24           sufficient evidence in their -- from their witnesses,  
25           and if there is a gap, the court will have to do the

1           best it can to fill the gap, knowing that the claimants  
2           had the burden to produce the evidence, and therefore  
3           the gap is filled, if it needs to be, adversely to their  
4           interests.

5           There is a different test with Merricks because  
6           there is no suggestion that if he hasn't got the  
7           evidence, then the gap should be filled in his favour.

8       THE CHAIRMAN: But still the broad axe applies.

9       MS TOLANEY: The broad axe applies, but not to fill the gap  
10          for evidence he has failed to adduce. The broad axe  
11          would apply on the basis of the evidence he has adduced,  
12          can you reach a conclusion; but if the starting point is  
13          there just is not the relevant evidence there, the court  
14          cannot then fill the gap for him.

15       THE CHAIRMAN: Right.

16       MS TOLANEY: If I can put it another way, my Lord. If you  
17          take the situation where Mr Merricks is saying: I want  
18          to extrapolate back from a different -- from the  
19          historic ages, so let us take us an example. He says:  
20          in dinosaur times it was like this, and therefore  
21          I think it is like this now. You might say: well, it is  
22          clearly a very different time period, how can you  
23          extrapolate back? That would be the end of it. No  
24          broad axe question would then apply because you would be  
25          saying, well, it is completely not answering the

1 question.

2 If it is -- what you cannot do, I am saying, in  
3 terms of filling in the gaps, is you could not say,  
4 well, actually, I can see from the internet that this  
5 time period might have been more similar, so had  
6 Mr Merricks adduced this evidence, then we could reach  
7 this conclusion. That is not something that the court  
8 should or would do, and that is not an application of  
9 the broad axe. Whereas I think the broad axe is saying  
10 we can estimate more broadly on the basis of the  
11 evidence we have before us, which may not be perfect,  
12 but an estimation can be reached. What I am saying to  
13 you is that Mr Merricks does not even get there, because  
14 he does not have the material from which you could  
15 sensibly estimate.

16 THE CHAIRMAN: So he does not even get past first base --

17 MS TOLANEY: That is what we say.

18 THE CHAIRMAN: -- in terms of establishing a causation, some  
19 loss, and so it is only once he has done that you get on  
20 to broad axe.

21 MS TOLANEY: Exactly.

22 THE CHAIRMAN: Possibly.

23 MS TOLANEY: Exactly.

24 THE CHAIRMAN: Right.

25 MS TOLANEY: There are two reasons, and I am coming on to

1           them, but there are two reasons why we say that. One is  
2           because the evidence he has adduced just does not answer  
3           the question, and obviously that will be a matter for  
4           the cross-examination of Mr Coombs, but you have our  
5           submissions on that and I will develop it in a moment.

6           The second reason is the *Trucks* point, which is that  
7           Mr Merricks, we suggest, will not be able to show any  
8           movement on price given the tiny size of the overcharge  
9           in question. So there are two reasons and the broad axe  
10          does not help with either.

11       PROFESSOR WATERSON: I am a bit confused on this tiny charge  
12          point.

13       MS TOLANEY: Yes.

14       PROFESSOR WATERSON: Because Mr Merricks' claim is a very  
15          large claim. So how does it arise if it is a tiny  
16          charge?

17       MS TOLANEY: Well, that may be the additional -- the scale  
18          of the claimants, the volume of claimants, as opposed to  
19          the individual charge, and obviously Mr Merricks' claim  
20          has been reduced in size through the different legal  
21          routes, because, as you know, subject to appeals, part  
22          of the claim is now statute-barred, part of it has been  
23          knocked out on causation, so actually what we are left  
24          with may not be on anything like the scale that it  
25          started with, if that helps.

1 PROFESSOR WATERSON: Well, I seem to recall a figure of £300  
2 per person.

3 MS TOLANEY: That is where they ... I am being told reliably  
4 by the expert on Mr Merricks' claim that is where they  
5 started, but I do not think now -- we can certainly ask  
6 Mr Simpson. I do not think now that would be the  
7 recognised value of the claim.

8 MR SIMPSON: I do not have a value off the top of my head,  
9 sir, but the point you are looking at here is the  
10 aggregated value across all parts. The fact that things  
11 have been chalked out elsewhere is neither here nor  
12 there in the context in which you're determining the  
13 extent to which MSCs were, during the period, passed on  
14 to consumers. So it is the gross figure that is  
15 relevant for your purposes, but I could not give it to  
16 you off the top of my head, I am afraid.

17 MS TOLANEY: Also, there is obviously interest that will  
18 have, given the date of the claim, interest --

19 THE CHAIRMAN: But your point in relation to *Trucks* is that  
20 each individual amount each year, for each particular  
21 claimant --

22 MS TOLANEY: Can't have moved the dial.

23 THE CHAIRMAN: Yes.

24 MS TOLANEY: So it is a different point, and I am answering  
25 Professor Waterson's point that I think it is -- I would



1 not start now with the assumption that that value, which  
2 was once right, remains the value in any event.

3 So those are the two reasons, sir, why we say  
4 Mr Merricks' case does not get off the ground.

5 But just going back to my points more fully on his  
6 case. The first was obviously burden of proof. The  
7 second is, just to answer this, that he opens his case  
8 on pass-on in his skeleton with a bad point, which is at  
9 paragraph 3, where he says that, given that there are no  
10 merchant claims proceeding against Mastercard between  
11 1992 and 2010, this means that the outcome of this case  
12 will determine the apportionment of loss between  
13 merchants and consumers and whether Mastercard can avoid  
14 entirely the consequences of its unlawful conduct for  
15 the Merricks period.

16 So essentially he is saying that it is only because  
17 there are no merchant claims which are live over the  
18 relevant period that means that if Mr Merricks does not  
19 succeed on behalf of consumers, there will be no  
20 accounting for the conduct and, therefore, he says, for  
21 some reason, that should allow him to succeed.

22 Now, apart from being an obviously wrong basis on  
23 which he can suggest he establishes his case, it is  
24 important for me to highlight, in response to that, that  
25 the two sets of claims, merchant and consumer, as

1 the Tribunal will be all too aware, are very different  
2 in nature and scope and therefore cannot be aligned in  
3 that way or conflated.

4 His claim, Mr Merricks' claim, is a follow-on  
5 damages claim which follows on from, and only from, the  
6 European Commission's determination that Mastercard  
7 infringed Article 101 in relation to default  
8 cross-border EEA MIFs. It is important to have that in  
9 mind.

10 Now, having chosen to bring his case in that way, so  
11 following on from the decision in respect of only that  
12 category of MIFs, Mr Merricks' case is inevitably far  
13 more limited than the merchants' claims, and we address  
14 this more fully at paragraphs 209 to 217 of our written  
15 opening. If you have that, it is at {RC-A/5/71-73}.

16 Now, as we set out at paragraph 209, Mr Merricks'  
17 class action involves three distinct claims in relation  
18 to three different sources of potential overcharge and  
19 all are specific to Mastercard card transactions.  
20 Almost all are exclusively specific to consumer credit  
21 card transactions. So we already have a subset of  
22 a subset of card transactions which, in turn, formed  
23 a very small subset of all transactions during the  
24 Merricks' claim period. So it is already a very small  
25 proportion.

1           Three specific overcharges are in issue, as I said.  
2           The first, which is at paragraph 210 on screen, is the  
3           UK EEA MIF claim. Now, that relates to EEA MIFs on  
4           cross-border transactions by non-UK EEA Mastercard card  
5           holders at UK merchants, and Mr Merricks' claim is that  
6           they were passed on to UK merchants by acquirer pass-on  
7           and then, in turn, by those merchants to their customers  
8           in their general retail prices.

9           Now, you can see from that explanation that this is  
10          a very specific claim. The transactions in question  
11          comprise a tiny proportion of total transactions at UK  
12          merchants and, based on the best data available, they  
13          made up less than 0.1% of transactions by value at the  
14          start of the Merricks' claim period and less than 0.3%  
15          at the end. The calculations can be found in  
16          paragraphs -- in footnotes, sorry, 275 and 276 of our  
17          skeleton for your note.

18       THE CHAIRMAN: These are transactions by non-UK Mastercard  
19       holders?

20       MS TOLANEY: That is right, at UK merchants. Non-UK EEA  
21       Mastercard card holders at UK merchants.

22       THE CHAIRMAN: But Mr Merricks is only suing on behalf of  
23       UK.

24       MS TOLANEY: That is right, on the consumers, because he  
25       said --

1 THE CHAIRMAN: So it is reflected in prices.

2 MS TOLANEY: Exactly.

3 THE CHAIRMAN: Okay.

4 MS TOLANEY: But it is a tiny proportion.

5 THE CHAIRMAN: Yes.

6 MS TOLANEY: What it results in, sir, is a potential  
7 overcharge, if he establishes that, on average of around  
8 0.002% of transaction values. That is in footnote 277  
9 of our skeleton argument, for your note.

10 That calculation, just so you know, is taking  
11 a mid-point between the start of the Merricks' claim  
12 period and the end of it, so at times the potential  
13 overcharge would have been even less than the 0.002%,  
14 and even in competitive sectors where margins are  
15 squeezed, such tiny costs may simply never impact the  
16 prices charged.

17 Now the second of his three potential overcharges  
18 relates to the UK interchange fee claim. If we can go  
19 over the page, please on the skeleton. So that is at  
20 paragraph 212 on screen. Now, the assumed overcharge  
21 here is UK interchange fees on domestic transactions by  
22 UK Mastercard consumer card holders at UK merchants. So  
23 that is set out at paragraph 212 for your note. The  
24 argument that Mr Merricks is advancing in relation to  
25 this category is that although his pleaded claim is

1           limited to Mastercard's EEA MIFs that I have just shown  
2           you, the EEA MIFs, he says, had an indirect effect on  
3           interchange fees on UK domestic transactions between  
4           1992 and 2009.

5           Now, we say that that proposition does not in fact  
6           arise and for determination in these proceedings, and we  
7           set that out in paragraph 12.4 of our skeleton, and  
8           a large part of Mr Merricks' arguments, as I have just  
9           foreshadowed in my answer to Professor Waterson, have  
10          already been dismissed by the Tribunal earlier this  
11          year. That is the Merricks' causation decision. That  
12          is not subject to appeal, so it has been dismissed. But  
13          even in relation to this claim, the alleged MIF  
14          overcharge applied to a very small proportion of payment  
15          transactions, less than 1% by value at the start of the  
16          Merricks' claim period, rising to only 4% by value by  
17          the end of the claim period.

18          So, as a result, and you can see this in  
19          paragraph 214, even at its highest, the claimed  
20          overcharge amounts to around only 0.01% of transaction  
21          values in the earlier years of the claim, rising to  
22          a maximum of around 0.04% by the end of the claim  
23          period. The underlying calculations are set out, as you  
24          can see, in paragraph 214.

25          The third claim, if we can go over the page, please,

1 or go down -- sorry, back at the bottom of the page.

2 It is paragraph 216 of our skeleton and this is the  
3 non-UK EEA MIF claim which relates to EEA MIFs on remote  
4 cross-border transactions by UK Mastercard card holders  
5 at non-UK EEA merchants, so the other way round. As we  
6 say in paragraph 216 of our skeleton, this is  
7 a de minimis claim, because remote transactions by UK  
8 consumers will have represented only a very small  
9 fraction of transactions at non-UK EEA merchants in 1992  
10 to 2008, because that is an era well before the  
11 large-spread use of internet shopping.

12 The reference is at 285, footnote 285 of our  
13 skeleton:

14 "The first internet shopping sites opened in the UK  
15 in 1996 and the first ONS data (... for November 2006)  
16 reports only 2.8% of shopping taking place online."

17 So the overcharge here, even more so than the first  
18 of the three categories, is almost undetectably small  
19 and certainly it is a merchant by merchant level.

20 So when you stand back and look at that, you can see  
21 why we are emphasising the tiny amount points, because  
22 these are genuinely tiny amounts, comparable to the  
23 point that was made in *Trucks*. But it also means that  
24 the in terrorem argument made by Merricks in paragraph 3  
25 of his skeleton is fundamentally unsound, because there

1           is such a difference between a merchant claim and his  
2           consumer claim.

3       MR TIDSWELL: I am just trying to work out how this fits  
4           into the analysis. I understand obviously it is a broad  
5           point, but if -- so are you saying that -- I do not  
6           think you are saying that different types of MIFs are  
7           passed on at different rates, so this is not about  
8           whether or not Mr Coombs is wrong to be looking at an  
9           economy-wide rate. It is actually -- as I understand  
10          it, you are saying even if Mr Coombs does all that, all  
11          he has established is an economy-wide rate for all MIFs.

12       MS TOLANEY: That is right.

13       MR TIDSWELL: But if you are looking at causation and the  
14          likelihood of the effect, you have to come back to these  
15          very narrow sets of MIFs.

16       MS TOLANEY: Exactly. So the two points are the big point  
17          that I was just tackling, which is inappropriate  
18          methodology, inappropriate evidence. This is a separate  
19          and freestanding point, although you are right, there is  
20          a link between, which is to say that obviously their  
21          claim relates to these three specific categories. It is  
22          not in relation to everything. It is only against  
23          Mastercard, it is primarily consumer cards and credit  
24          cards. So what they have to establish is that the  
25          overcharges they can show the court they suggest

1           happened were impactive, or impacted upon, I should say,  
2           the prices.

3           This is the *Trucks* point: we suggest that even if  
4           they had all the evidence they needed to demonstrate  
5           this point, which we say they do not, even if they did,  
6           the amounts are so small that the idea that they would  
7           have moved the dial is unreal.

8       MR TIDSWELL: You are saying that they cannot just piggyback  
9           on whatever the general pass-on -- just assume, for  
10          argument's sake, the pass-on rate in this period is 50%,  
11          or whatever it is, you are saying for MIFs generally, as  
12          found by the evidence, I know it is not, but just assume  
13          you are saying --

14       MS TOLANEY: I understand.

15       MR TIDSWELL: You are saying that is no good to him, because  
16          he has to show a pass-on rate for the particular MIFs he  
17          relies on?

18       MS TOLANEY: Exactly, that is the point. His claim -- it is  
19          an essential part of his claim, as a matter of  
20          causation, that the overcharge caused the loss, i.e. the  
21          increased prices, etc, and that is how he is going to  
22          show it, and so he cannot just say it generally, he has  
23          to show it in respect of his claim. That is why trying  
24          to conflate it with the merchants' claim is wrong  
25          because this is a very different claim.



1           Now, yesterday my learned friend argued for the  
2           first time, as I highlighted, that there were four flaws  
3           in Ms Webster's evidence and Mastercard's approach, and  
4           the first of his four flaws I think is the point that  
5           you have anticipated, which is that Mastercard wrongly  
6           focuses on the aggregate side of merchant service  
7           charges and costs in arguing that the MSC over the  
8           Merricks' claim period was, as Mr Simpson put it,  
9           "*Trucks Tiny*".

10          In support of his submission, my learned friend  
11          relied on what was said by Dr Niels, you will remember  
12          this from yesterday, in the *AAM* and *Sainsbury's*  
13          proceedings concerning the pass-on rate for specific  
14          supermarkets on the facts of that case.

15          Now, that involved a highly competitive industry  
16          with tight margins, and that is why Dr Niels said in the  
17          passage that was cited to you yesterday:

18          "The differences in the size of the merchant service  
19          charge would not lead to different pass-on estimates in  
20          that case."

21          That was the quotation relied upon by my learned  
22          friend at {Day1/95:14} of the transcript, but the  
23          emphasis is on in the present case for Dr Niels'  
24          evidence.

25          That tells you nothing of the relevance of the size

1 of the merchant service charge to the facts of this  
2 case. It also provides no justification for my learned  
3 friend's rather extreme position, which he adopted at  
4 {Day1/93:1} that, contrary to *Trucks*, he said:

5 "Size does not matter."

6 My learned friend cannot avoid the consequence of  
7 the tiny size of the alleged overcharge by reference to  
8 a report that was addressing the position for entirely  
9 different litigation.

10 His second fundamental flaw he raised at {Day1/96}  
11 of the transcript, which is he says that Mastercard is  
12 wrong to have disaggregated Mastercard and Visa  
13 transactions and credit and debit card transactions by  
14 reference to the nature of the claims Mr Merricks has  
15 brought. This is the point that Mr Tidswell has just  
16 highlighted, I think.

17 Now, the purpose of doing so, however, is to  
18 identify the level, as I have just said, of the  
19 potential overcharge, recognising that depending on the  
20 final outcome of the causation issue, there are two  
21 potentially very different outcomes in relation to the  
22 overcharge, and my learned friend's argument here  
23 appeared to be that the Tribunal should be looking at  
24 the total merchant service charge costs incurred by  
25 merchants on all card transactions, rather than the

1 overcharge. That is what he was saying. So he was not  
2 even conflating the overcharge across everywhere, he was  
3 actually saying: look at the costs overall, rather than  
4 the relevant overcharge.

5 That is directly contrary to the authorities. The  
6 judgments in both the *Trucks* decisions emphasise the  
7 importance of looking at the size of the overcharge, and  
8 that must be right. Because the fundamental question,  
9 as I have shown you from the *Sainsbury's* Supreme Court  
10 decision, is whether the loss, which is the overcharge,  
11 has been passed on or not. That involves looking at  
12 whether prices were different in the factual from the  
13 counterfactual.

14 So the reality is that unless a business engages in  
15 mechanistic cost pricing and adopts granular pricing, it  
16 is unlikely that a tiny overcharge can have an effect on  
17 pricing, and my learned friend's argument just simply  
18 ignores the law and the causation question.

19 His third flaw, he said, was in relation to, you  
20 will remember, figure 2 of Ms Webster's expert report,  
21 which sets out in graph form the evolution of cash debit  
22 and credit cards in terms of the value of transactions  
23 for which they were used in the UK retail economy  
24 between 1995 and 2022.

25 Now, can I just make some preliminary points before

1           engaging with the criticisms.

2           Preliminary point 1 was that my learned friend was  
3           asked yesterday, but did not answer, that the balance of  
4           transactions would have been undertaken with cheques,  
5           a payment method which was heavily used in the 1990s,  
6           particularly for higher value transactions, but which  
7           has almost completely died out today.

8           My learned friend then, secondly, spent most of his  
9           time in his submissions attacking this one graph, but  
10          this was particularly surprising, because it really was  
11          the first time this criticism had been raised.

12          It was part of Ms Webster's report served with  
13          Mastercard's positive case, and instead of challenging  
14          the accuracy of the graph, Mr Merricks in fact included  
15          the graph in his responsive case and sought to make  
16          various points by reference to it.

17          Then two points made about Ms Webster's graph  
18          yesterday, orally, were new and they are wrong. First  
19          of all, at {Day1/98-110} of the transcript, my learned  
20          friend argued that the figures Ms Webster had used  
21          overstate the increase in card usage because they do not  
22          account for additional payment mechanisms such as direct  
23          debit and automated credit, and the reason that does not  
24          assist him is it misunderstands the proposition which  
25          figure 2 seeks to prove.

1           If we could go, please, to {RC-F/14/119}. If we  
2 could go back over, please, to paragraph 629. Yes,  
3 thank you very much.

4           So Ms Webster is looking at the size of the cost  
5 item to say whether it is relevant to whether a merchant  
6 is likely to treat it as akin to a variable or a fixed  
7 cost, and the final sentence says:

8           "Data on card usage over time is available and is  
9 relevant to that assessment."

10          The context to this, which you were not, I think,  
11 told yesterday, is that Ms Webster identified several  
12 reasons why merchant service charges might be treated by  
13 some merchants as fixed costs, which she sets out in her  
14 report at paragraph 3.25 onwards, and the role that card  
15 transactions play in the mix of retail transactions  
16 types is one of those reasons. We see that from 3.27 of  
17 her report, which is at page 39, if we can just look at  
18 that {RC-F/14/39}. Thank you very much.

19          Paragraph 3.27, over the page {RC-F/14/40}. So the  
20 focus is on the role played by card transactions in the  
21 mix of payment types faced by merchants.

22          If we go back, please, to page 119 {RC-F/14/119}, it  
23 is in that context that Ms Webster explains, at  
24 paragraph 630, that figure 2 demonstrates a nine-fold  
25 increase in the share of total transaction values that

1           were accounted for by credit card payments.

2           If we go over the page, please {RC-F/14/120}, at  
3 paragraph 6.32, which is over the page again, please  
4 {RC-F/14/121}, she concludes that given a much lower  
5 proportion of transactions by value, and given that they  
6 were undertaken by using cards in the Merricks period,  
7 this means, amongst other factors, it is more likely  
8 that merchants treated merchant service charges in their  
9 pricing decisions in the manner that economic theory  
10 would imply for fixed costs rather than variable costs.

11          So the proposition for which figure 2 is relevant is  
12 that there has been a substantial increase in card usage  
13 rates between the Merricks and merchant claim periods  
14 and that, relative to the other payment types that  
15 feature prominently in retail, card payments play a much  
16 larger role.

17          Now, Mr Merricks' argument, which was at  
18 {Day1/99:16}, was that the figure 2 was evidentially  
19 worthless, because the dataset Ms Webster uses excludes  
20 the value of payments made by two additional payment  
21 mechanisms, direct debit and automated credit. Now, my  
22 learned friend can put this in cross-examination, but it  
23 does not help him, because if the data pool of payment  
24 methods beyond cash, debit and credit cards is expanded,  
25 that will mean each percentage figure within figure 2

1 comes down. The denominator for each year will be  
2 larger, and each will necessarily comprise a smaller  
3 share of total transactions. So if you include more,  
4 there will be a smaller share.

5 That does not get my learned friend anywhere to  
6 showing that the comparison is worthless. What he has  
7 to show is that if the data pool is expanded in this  
8 way, card usage rates did not materially increase  
9 between the Merricks and the merchant claim period. The  
10 Tribunal will appreciate that what matters for the  
11 purposes of this proposition is simply the difference  
12 between card usage rates over time. The absolute  
13 figures, if the data pool is increased, is nothing to  
14 the point.

15 A simple example is if there was a four-fold  
16 increase in the usage rate of a payment card, that might  
17 be a four-fold increase from 2% to 8% or from 0.5% to  
18 2%, but it is still a four-fold increase, and that is  
19 the principle that we were relying on. It actually came  
20 very clearly out of my learned friend's own submissions  
21 at {Day1/104:9}, that if direct debits and automated  
22 credits are included, Ms Webster's figure for card usage  
23 of 18% in 2022 would drop to 8.4%. Now, if that is  
24 true, can we go back to {RC-F/14/120}. If you take  
25 Ms Webster's existing credit card figure for 1995, which

1 is 2.1%, that is still a four-fold increase against my  
2 learned friend's figure of 8.4%.

3 So the height of my learned friend's argument is  
4 that credit card usage rates quadrupled from the early  
5 part of the Merricks' claim period to recent years.  
6 That would obviously understate the position, because  
7 Ms Webster's existing credit card figure for 1995 would  
8 have to be decreased to reflect the overall dataset, so  
9 it would start from less than 2.1.

10 Now, I have gone through that to show you that  
11 nothing in that analysis demonstrates that this figure  
12 is evidentially worthless and has no underpinning, but  
13 the reason I have also done it is that if my learned  
14 friend is right about it, then it supports Mastercard's  
15 position on pass-on over the Merricks' claim period,  
16 because the effect of my learned friend's submissions  
17 was that the figures in Ms Webster's graph should all be  
18 lower, and, if that is right, it would mean credit card  
19 usage as a proportion of transaction values was even  
20 lower in the Merricks period than appears in this graph.

21 PROFESSOR WATERSON: Can I check, what is the denominator by  
22 which these shares in figure 2 are calculated?

23 MS TOLANEY: It includes all transactions but not cheques.

24 It does include cheques, sorry. It includes cheques as  
25 well.



1 PROFESSOR WATERSON: So I am puzzled by her argument on  
2 percentages, because obviously these figures are very  
3 low, they do not add up to nearly 100% at the beginning,  
4 so I am puzzled as to why they should be reduced  
5 further.

6 MR SIMPSON: Sir, I would like to correct something as well.  
7 They do not include direct debits, they are automated  
8 credits. That was my whole point yesterday. Ms Tolaney  
9 is simply wrong on that.

10 MS TOLANEY: No, I accepted that. My point is if they were  
11 included, the effect would be to widen the data pool and  
12 the figures would go lower as a result, which would make  
13 my point even more so, that credit card usage as  
14 a proportion of transaction values would be even lower  
15 if you included the extra methods that were included,  
16 and they were not included because they are not typical  
17 for consumers to be paying at merchants using direct  
18 debits. That is why they were not included. But if you  
19 did include extra payment methods, what it would show is  
20 that credit card usage as a proportion of transaction  
21 values was even less than this graph demonstrates, and  
22 then the alleged overcharges would become even smaller  
23 as a proportion of merchant revenues.

24 THE CHAIRMAN: To pick up Professor Waterson's point,  
25 I mean, if you are looking at 1995, that amounts to

1           about 15% of payments.

2           MS TOLANEY: Yes, the balance is cheques.

3           THE CHAIRMAN: It is all cheques?

4           MS TOLANEY: Because that was --

5           THE CHAIRMAN: 85% is cheques?

6           MS TOLANEY: In that time period, cheques were used

7           massively.

8           THE CHAIRMAN: Okay.

9           MS TOLANEY: This can be put to Ms Webster, but my point was

10          two things. One is that it has all been done orally

11          rather than previously, which is unhelpful, but I am

12          trying to demonstrate, first of all, there is good

13          reason for those methods not to have been included,

14          because how many consumers pay with a direct debit at

15          a merchant at that point, or at all. Secondly, if they

16          were included, it would just overall mean that card

17          usage was a lower proportion. Thirdly, that would then

18          mean the alleged overcharge was a lower proportion. So

19          it does not help Mr Merricks.

20          THE CHAIRMAN: There would be flatter sort of line, would

21          there not?

22          MS TOLANEY: Yes, exactly. So this --

23          THE CHAIRMAN: You say it does not matter because the

24          overall ratio remains the same?

25          MS TOLANEY: Exactly. So if we accept Mr Simpson's point,

1           it actually damages his case. But, to be clear, this  
2           figure was actually -- and that is the first point  
3           I made -- trying to support a different proposition than  
4           the one he presented as supporting, which is treatment  
5           as fixed or variable.

6       THE CHAIRMAN: Right.

7       MS TOLANEY: But if you take it on its terms as Mr Simpson  
8           has presented it, then it supports my case and it makes  
9           his case even harder.

10           The third point on this graph is that, despite all  
11           the criticisms made by Mr Simpson yesterday, neither  
12           Mr Merricks nor his expert team has put forward any  
13           alternative methodology for assessing the evolution of  
14           card usage rates between the Merricks and the merchant  
15           claim periods. Indeed yesterday, at {Day1/108:11-12},  
16           my learned friend said yesterday he wished to make it  
17           clear that he was not suggesting that 100% of direct  
18           debits and 100% of all automated credits are part of the  
19           retail economy.

20           Now, he could not make that claim because, as  
21           I said, payment methods like automated credit would very  
22           rarely be used by consumers to purchase goods and  
23           services. Direct debits may play more of a role in  
24           certain sectors. I think the example was given as to  
25           wine subscriptions, depending on how many people have

1           those. But Mr Merricks has made no attempt to put  
2           forward any data on what value of direct debits it is  
3           appropriate to include alongside cash and card payments,  
4           and he did not suggest at any stage of his submissions  
5           which proportion of those transactions Ms Webster should  
6           have included in her dataset, how she should have  
7           selected the right direct debits and automated credits,  
8           whatever those are, and what difference it would have  
9           made to the picture.

10           If there was an alternative set of data, which it  
11           now seems to be being suggested there is, it was  
12           incumbent on Mr Merricks to advance it in his responsive  
13           case. We should not be addressing new data sources  
14           arguments now. But perhaps it makes one of my other  
15           points, which is that Mr Merricks has not adduced the  
16           evidence which he needs to make his case, and he  
17           pointed -- he rather pointed that out himself in his own  
18           submissions yesterday.

19           Then my final point on his third alleged flaw is  
20           burden of proof, and I have already addressed you on the  
21           fact that Mr Merricks bears the burden of proof, but if  
22           he is going to say that he wants to advance a different  
23           case that card usage rates did not increase  
24           substantially between the 1990s and 2020s, he needs to  
25           have put that forward.

1           The flaw in his case yesterday was most vividly  
2           revealed by his submissions at {Day1/108:13-20} where he  
3           said:

4           "If Mastercard is going to argue that card usage  
5           rates were different between the two periods, then it is  
6           Mastercard who needs to prove what the retail economy is  
7           and what those percentages are for every year, and that  
8           means proving the size of the UK retail economy from  
9           1992 to 2024."

10          Now, we say that just shows the flaw in the  
11          approach, because it is for Mr Merricks to prove that  
12          merchants passed on the tiny overcharge in the claim  
13          period in which his claims arise, and in failing to  
14          advance any alternative analysis to date, he is unable  
15          to do that.

16          My learned friend's second argument under his  
17          fundamental flaw 3, I think this was, was he said  
18          Ms Webster's wrongly -- figures wrongly equate a rise in  
19          card usage with a rise in merchant service charge costs,  
20          because the MIF element of the MSC was capped by the  
21          Interchange Fee Regulations 2015 which came in on  
22          9 December 2015 and within the merchant claim period.  
23          That was the point made, for your note, at  
24          {Day1/110-120}. If you remember, his argument was that  
25          because MIFs were capped by the IFR, they decreased in

1 the merchant claim period, and so Ms Webster was wrong  
2 to suggest the aggregate cost of merchant service  
3 charges increased over time.

4 The short answer to this is that the IFR had very  
5 little impact in the United Kingdom, unlike some other  
6 European countries, on aggregate merchant service charge  
7 costs, and you can see this from Mr Holt's eighth  
8 report.

9 If we can go to that at {RC-K/21.5/44}, please. We  
10 are looking at paragraph 123, please. If I can just ask  
11 you to read that. (Pause)

12 So there Mr Holt is explaining that since the  
13 introduction of the IFR, all domestic and intra-EEA  
14 consumer credit card transactions are subject to a MIF  
15 of 0.3%.

16 If we can then go, please, to page 45 of that  
17 document {RC-K/21.5/45} -- sorry, go back a page to 44,  
18 and read 124 for debit cards well, please  
19 {RC-K/21.5/44}. (Pause)

20 Then if we go over the page, please, to 45  
21 {RC-K/21.5/4}, look at figure 2.3, this shows the  
22 changes in the average MIF rate for domestic and EEA  
23 consumer Visa card transactions between 2012 and 2022,  
24 and although it is specific to Visa, the trend is  
25 representative of the market. We can see that when the

1 IFR came into force, the 0.3% cap on credit cards did  
2 reduce credit card MIFs from around 0.8%, but the IFR  
3 had very little effect on UK debit card MIFs, which were  
4 already at roughly the level of the cap, and since debit  
5 cards have a much higher market share over the merchant  
6 claim period, as we saw within figure 2 of Ms Webster's  
7 report, the overall impact of MIFs for domestic EEA  
8 transactions as a whole was very limited. So my learned  
9 friend was wrong to say that MIFs "dropped radically"  
10 after the right introduction of the IFR, as he did at  
11 {Day1/111:1}.

12 THE CHAIRMAN: I think Mr Simpson's point was perhaps more  
13 of a jury point, that Ms Webster had not even dealt with  
14 it, really, in her reports, about the impact of the IFR,  
15 but no doubt he can take that up with her.

16 MS TOLANEY: He can take that up with her. But where it  
17 goes -- I mean, yesterday there were a lot of  
18 submissions about Ms Webster's figure 2, but it was not  
19 clear how they helped Mr Merricks' case, and I have just  
20 demonstrated the two reasons why most obviously they do  
21 not.

22 May I then just finish on my points, if I may, going  
23 back then to the points on Mr Merricks, because I want  
24 to just deal with the flaws. I think there is one more  
25 to come that was dealt with yesterday orally. But going

1           back to my seven points, as I said on the Merricks'  
2           case, the third point --

3       THE CHAIRMAN: I was wondering what happened to those.

4       MS TOLANEY: That was an intersection.

5       THE CHAIRMAN: Are we in number 2?

6       MS TOLANEY: Number 3.

7       THE CHAIRMAN: We are in number 3.

8       MS TOLANEY: Number 3, you will be pleased to hear. I think  
9           the first was burden of proof.

10      THE CHAIRMAN: Yes.

11      MS TOLANEY: The second point was his paragraph 3, the: it  
12           is all merchant claims.

13      THE CHAIRMAN: Yes, okay.

14      MS TOLANEY: The third point is that -- which you have  
15           already heard, but I just wanted to give you a little  
16           bit more detail on, is the failure to adduce evidence of  
17           how merchants in fact treated merchant service charges  
18           over the Merricks' claim period, whether on  
19           a representative basis, a sectoral basis or by  
20           qualitative or quantitative means.

21           Now, Mr Merricks summarises the approach taken by  
22           his expert, Mr Coombs, at paragraph 64 of his positive  
23           case, and I will leave that for cross-examination, but  
24           it is important to highlight paragraph 67 of the  
25           positive case, and that is at {RC-F/9/39}, please.



1           Mr Coombs has summarised here, he reaches an  
2           estimate of sector-specific pass-on rates for 12 sectors  
3           of the UK retail industry economy by relying on  
4           evidentiary sources which do not provide any factual  
5           evidence as to merchant prices. What you can see here  
6           is that, first of all, he relies on economic theory,  
7           (a); (b) is previous studies that estimate pass-on rates  
8           across the UK retail economy; (c) is public data on  
9           evolution of prices, wages, industry inputs, outputs,  
10          VAT rates, household expenditure, card expenditure; (d)  
11          an economic analysis of quantitative data adduced, and  
12          this is the important point, by the merchant claimants  
13          over the merchant claim period which are then -- he then  
14          extrapolates back from.

15           I am just being told that the transcript has said  
16          "merchant prices", when it should say "merchant pricing"  
17          at line 25 of page 38.

18           Now, it will be -- then if we go on to (e), please.  
19          This is the last one. He confirms at 67(e) of the  
20          positive case for Mr Merricks that Mr Coombs cannot  
21          directly rely on merchants' quantitative data because,  
22          amongst other things, the data does not overlap with the  
23          Merricks' claim period. You can see that on line 4. He  
24          does not rely directly.

25           So you can see from this list that Mr Coombs does

1 not rely on any qualitative data at all from merchants  
2 or consumer groups over the Merricks' claim period. So  
3 that then drives Mr Merricks to the extraordinary  
4 position at paragraph --

5 MR SIMPSON: Can you go to the next page, please,  
6 {RC-F/9/42}, and (f).

7 MS TOLANEY: I do not think that changes the point I was  
8 making.

9 If we could then go to paragraph 24 of his skeleton  
10 argument {RC-A/3/17}. This leads -- the analysis that  
11 Mr Coombs has undertaken, with or without (f), leads to  
12 the statement in Mr Merricks' written opening that, and  
13 it is the second part:

14 "... how [merchant service charges] are treated in  
15 price-setting decisions are, however, irrelevant both as  
16 a matter of economics and in law."

17 We suggest that that is impossible to sustain in  
18 light of the *Trucks* decision in the CAT in the Court of  
19 Appeal, and, in particular, the factors listed at  
20 paragraph 228 of the *Trucks* CAT decision, each of which  
21 requires a level of engagement with the qualitative  
22 evidence, and each of those requirements -- knowledge of  
23 the overcharge, relative size of the overcharge,  
24 relationship with the overcharge and prices, and  
25 identifiable claims -- requires Mr Merricks to adduce

1 evidence, even if on a representative or sampled basis,  
2 about the knowledge and practices of merchants in  
3 relation to charges between 1992 and 2008, and  
4 particularly where the level of the overcharge is very  
5 small.

6 So we will leave the cross-examination of Mr Coombs  
7 there and focus on that, but just highlighting that flaw  
8 in his approach.

9 Just so that you know how he tries to overcome it,  
10 at paragraph 2.87 of his thirteenth report he seeks to  
11 cure the evidentiary difficulties by saying that even if  
12 merchant service charges were not treated as a variable  
13 cost over the Merricks' claim period, and I am quoting:

14 "... it is a widely acknowledged maxim of economic  
15 theory that in the long-run all costs are variable."

16 Now, whether or not the Tribunal agrees with that  
17 proposition, the problem for Mr Merricks is that his  
18 claim is time-limited and he needs to show that the  
19 overcharge flowed through into prices immediately. If  
20 it took years, then his claim is reduced accordingly.  
21 You will hear from the experts that while changes in  
22 fixed costs are expected ultimately to affect prices,  
23 that is not via the same direct mechanism as variable  
24 costs, and only over a much longer timeframe through  
25 impacts on investment decisions, market entry, intensity

1           of competition, all of which are long-term mechanisms.

2           Mr Merricks' claim, as you know, relates only to  
3           consumer transactions between 1992 and 2008 with  
4           a two-year run-off to 2010. There is no claim in  
5           relation to higher prices in 2011. So any delayed  
6           effect beyond 2011 is not part of his claim.

7       THE CHAIRMAN: Ms Tolaney, how long are you going to be,  
8           because I think you had an hour yesterday?

9       MS TOLANEY: I had, I think, 50 minutes yesterday, and  
10           I have had now my two hours, I think.

11       THE CHAIRMAN: Mr Simpson finished early, and you started at  
12           about 20 to, and I think you did have about an hour.

13       MS TOLANEY: Oh, forgive me. I can take this quite quickly,  
14           if I may have a few more minutes? I am happy to take  
15           a break now or to try and finish in the five minutes.

16       THE CHAIRMAN: I think you should try and finish and then we  
17           will take a break.

18       MS TOLANEY: Thank you for the indulgence.

19           You will have -- the Tribunal will have realised,  
20           therefore, that what we are saying is that the  
21           statistical approach and/or the approach taken by  
22           Mr Coombs does not, therefore, we say, get over the  
23           hurdle.

24           The fourth flaw that was raised yesterday was it was  
25           suggested that Ms Webster had failed to account

1 sufficiently for differences within the pass-on rate  
2 within the merchant claim period itself, and that was at  
3 {Day1/121-127}. We have addressed this in our skeleton  
4 argument at paragraph 228, and the fact is that she does  
5 accept that there would be differences and the range she  
6 gives would encompass that.

7 The next point I had of my seven points for  
8 Mr Merricks' case is that the evidence that he has is  
9 deeply flawed. You have seen that he tries to  
10 extrapolate back from a different time period where we  
11 say the circumstances were different in card usage and  
12 acceptance, but his evidence also ignores the expert  
13 evidence on technological changes in pricing and the  
14 witness evidence that you will hear that shows the  
15 introduction of use of software after the Merricks' time  
16 period.

17 The fifth point is that Mr Merricks tries to suggest  
18 that we are demanding that every merchant in the UK  
19 retail economy should have given evidence over an  
20 18-year period, and therefore our case requires him to  
21 have produced evidence that is hopeless. We suggest  
22 that that is not right, there are ways of doing it, and  
23 my point is simply he has put forward no evidence at  
24 all. I have dealt with the broad axe point.

25 The sixth point on Mr Merricks' case is that he

1           criticises Ms Webster essentially for having "thrown her  
2           hands up in the air", is the expression, but, again,  
3           this misses the burden of proof point. Ms Webster has  
4           taken the evidence before her that Mr Merricks has  
5           adduced and then done the best she can, in accordance  
6           with the CAT Guide, and identified the limitations in  
7           the evidence before her.

8                     Finally, at paragraph 55 of his skeleton,  
9           Mr Merricks contends there is a flaw in Mastercard's  
10          instructions to its experts which leads them to conclude  
11          that pass-on rates are lower, and he says that  
12          Mastercard's experts have been instructed to consider  
13          the consequence of a change in cost in the  
14          counterfactual world, rather than the actual pass-on in  
15          the actual world.

16                    Now, we address this at paragraphs 236 to 237 of our  
17          skeleton argument, and the short answer is that, as we  
18          explain, pass-on requires that actual prices charged by  
19          the merchants were higher than would have been charged  
20          in the absence of the overcharge, that is counterfactual  
21          prices. If the actual prices were no higher than they  
22          would have been in the counterfactual, the merchant did  
23          not pass any of its loss to customers.

24                    So we do not understand what case Mr Merricks thinks  
25          he is trying to prove, but we think there is a clear

1 requirement that he needs to show prices were higher  
2 than they would have been in the absence of the  
3 overcharge or that prices would have been lower in the  
4 counterfactual. We have set out all the authorities at  
5 paragraph 46 of our skeleton.

6 So, sir, those are our submissions, unless I can  
7 help you further, and I did get through the seven  
8 points, so I hope I managed to convey which they were.

9 THE CHAIRMAN: You did. Thank you very much, Ms Tolaney.

10 MS TOLANEY: Thank you.

11 THE CHAIRMAN: So we will take a ten-minute break and then  
12 we are starting with Mr Beal.

13 (11.43 am)

14 (Short Break)

15 (11.57 am)

16 Opening submissions by MR BEAL

17 THE CHAIRMAN: Mr Beal.

18 MR BEAL: May it please the tribunal, in these opening  
19 submissions I will set out some introductory  
20 observations and a summary of our position. I will then  
21 outline the relevant test we say needs to be applied.  
22 I will identify some of the core issues for resolution  
23 and give you our thumbnail response, and then I will, if  
24 time permits, have some responsive points to the other  
25 side's written openings.

1           In this trial, unlike the first one, I am  
2           tag-teaming with a partner, and so Mr Lask will be  
3           saving me when I am on the ropes mid-afternoon by  
4           leaping into the ring.

5           In our submission, the core exercise for this  
6           Tribunal is the classic one recognised in the common law  
7           of damages regarding mitigation of loss. The Tribunal  
8           is asked to determine whether or not a defendant has  
9           discharged the burden of establishing mitigation of loss  
10          by a claimant, and we say it falls within the third of  
11          three rules identified in McGregor on Damages.

12          If I could ask, please for that to be put up  
13          {AB-D/21/72}. Sorry, that is the Mastercard endorsement  
14          of the McGregor on Damages approach. Could we go,  
15          please, to {AB-E/9/4}. Please can I invite the Tribunal  
16          to read paragraph 10-006. (Pause)

17       THE CHAIRMAN: Yes.

18       MR BEAL: That is the common law position. We respectfully  
19          suggest that the Supreme Court in *Sainsbury's* endorsed  
20          it, and I will come on to that shortly.

21          The upshot is the burden is on the defendants to  
22          plead and prove that all or part of the loss suffered by  
23          my clients, SSH Claimants, has as a matter of fact been  
24          avoided. The Supreme Court recognised, we acknowledge,  
25          that the search for scientific precision might well



1           prove elusive and that recourse to best estimates might  
2           be required, but that cannot dilute the legal  
3           requirements on the defendants to show that on the  
4           balance of probabilities, my clients have in fact passed  
5           on the loss they suffered, either to their customers or  
6           to their suppliers, using then best estimates of the  
7           value of the quantum of any pass-on. That includes  
8           demonstrating when, over a prolonged period, the avoided  
9           loss is said to have been passed on.

10           As this Tribunal concluded in *Trucks*, and please  
11           could we pull up -- I am actually going to come back to  
12           *Trucks*. As this Tribunal concluded in *Trucks*, and was  
13           endorsed by the Court of Appeal in the *Trucks* case, the  
14           relevant test is as follows, and please could we look at  
15           {AB-D/43/52}.

16           Here, in paragraph 151, we have the Court of Appeal  
17           setting out the test, and it says:

18           "In terms of factual causation, DAF could only  
19           succeed in its argument on SPO if it could establish  
20           that the prices charged by Royal Mail and BT to their  
21           customers were higher because of the overcharge; in  
22           other words, if it could establish (and the burden of  
23           proof is on DAF) that the overcharge has been passed on  
24           to those customers. The CAT was unanimous as to this  
25           requirement at [paragraph 223] of its judgment where it

1       said: 'we consider that DAF must prove that there was  
2       a direct and proximate causative link between the  
3       overcharge and any increase in prices by the claimants.  
4       That means there must be something more than reliance on  
5       the usual planning and budgetary process, into which the  
6       overcharge was input and at some point prices  
7       increased'. I agree with Mr Ward KC [in that case for  
8       the claimants] that the CAT was applying the correct  
9       legal test, as recently restated by this court in  
10      Stellantis ..."

11       So that, we respectfully suggest, is an endorsement  
12      of the correct legal test. It is in clear terms. It is  
13      for the defendants to show, the burden being on them,  
14      that the claimants -- that, rather, there has been  
15      a direct and proximate causative link between the  
16      overcharge and any increase in prices by my clients, the  
17      claimants.

18       Now, that issue of factual causation has led the  
19      experts to take a variety of different approaches. For  
20      Visa and Mr Merricks, their respective experts seek to  
21      establish a theoretical basis for pass-on which is  
22      grounded, at least initially, in economic theory. They  
23      rely on academic literature to support that, and to  
24      a lesser extent on studies conducted with public data,  
25      which are recognised by Mr Holt to be imprecise.

1           They then conduct regression analysis on some of the  
2           SSH Claimants' data, which they then seek to show  
3           establishes a correlation between increases in the price  
4           of a proxy cost and increases in prices for the  
5           claimants' products or services. That product -- proxy  
6           cost is either, on Mr Holt's analysis, the most  
7           significant component of variable cost, namely cost of  
8           goods sold, or COGS, or, on Mr Coombs' analysis, it is  
9           an even higher figure of total cost, full stop. That  
10          includes both COGS and all overhead costs.

11          In other words, each of Mr Holt and Mr Coombs seeks  
12          to establish a correlation between a very significant  
13          change in the cost of a business and a change in prices  
14          charged by that business as a proxy for the impact of  
15          the overcharge of the MIF, which, since 2015 at least,  
16          has been in the order of 0.2% or 0.3% of revenue on  
17          sales made using consumer cards. So that is the sort of  
18          ratio that one is looking at as an upper bound.  
19          Obviously, sales includes other methods, other than card  
20          payments, as we have heard from my learned friend,  
21          Mr Simpson. We have all sorts of methods of conducting  
22          transactions. So the visibility of the cost for  
23          a particular merchant in terms of payment costs will be  
24          a higher figure than the costs for, for example,  
25          consumer cards, let alone commercial cards.

1           Now, we know from Dr Trento's analysis, and this is  
2           Dr Trento at {RC-G/2/15}, that MIFs represent  
3           approximately 0.26% of the revenue of SSH Claimants  
4           which are earned from card payments. That is his  
5           evidence.

6           Towards the bottom of the page, under  
7           subparagraph (c), (i), Dr Trento says:

8           "However, the MIF paid by the SSH Claimants was on  
9           average 0.26% of revenues earned from card payments."

10          He qualifies that by saying it is based on the  
11          Stephenson Harwood claimants, rather than the  
12          Scott+Scott claimants, but he sees no reason for  
13          a difference in approach.

14          Of course, that is a percentage of revenues earned  
15          from card payments. It does not take into account total  
16          revenues from total sales.

17          That figure, we say, respectfully, is borne out by  
18          some of the analysis that has been conducted by the  
19          Payment Services Regulator. Please could we look at  
20          {RC-J2.2/86/69}. What that should show, once it pops  
21          up, is a graph that was prepared by the PSR,  
22          interestingly based on acquirer information, rather than  
23          merchant information, and this shows the average MSC as  
24          a percentage of card turnover split by interchange fees,  
25          scheme fees and acquirer net revenue. For the period in

1 question, 2014 to 2018, what this is looking at is the  
2 acquirers, the five largest acquirers, and the revenue  
3 they derive from card payments where they are charging  
4 for MSCs as that revenue, and that MSC is then broken  
5 down into acquirer net margin, scheme fees, which go to  
6 the schemes, and then interchange fees, which, as the  
7 Tribunal knows, get passed between the acquirer and the  
8 issuing bank.

9 So looking at those figures, MSC as a proportion of  
10 card turnover, again, not total sales turnover, is at or  
11 around 0.6% of the turnover that the acquirers derive,  
12 so that gives a percentage. Then within that, one sees  
13 that the corresponding contribution to the acquirers'  
14 revenue, over that period, is roughly in the order of  
15 two-thirds, down to just under two-thirds, is  
16 attributable to the MIF. So taking the stack at 0.6, as  
17 an example, and taking 2017, because it is perhaps the  
18 clearest example in terms of lines, one sees that of the  
19 0.6, 0.2 is attributable to scheme fees and acquirer net  
20 revenue, and the other bit of the 0.6 is attributable to  
21 the MIF. Doing basic maths, 0.4 over 0.6 is about 66%.  
22 So that gives you a rough figure: between 60 to 65%  
23 throughout that period is attributable to the MIF.

24 What that means, of course, is that is a lower  
25 figure for this period than the 90% figure for the MIF

1 as part of the MSC that was asserted by Mr Merricks on  
2 the basis of Mr Justice Popplewell's judgment in the *AAM*  
3 case.

4 More generally, given the way that the case against  
5 us has been put, i.e. selection of a proxy of a very  
6 significant cost and then saying, well, that can be  
7 rolled out with equal force to the MSC, which is a very  
8 small cost, two immediate and fundamental points arise.

9 First, cost recovery is not the same as establishing  
10 pass-on, and as the Tribunal established in the *Trucks*  
11 case and *Royal Mail*, please could we turn to  
12 {AB-D/37/245}, in paragraph 691 this Tribunal said:

13 "As we have said above, it is to distinguish between  
14 the economic concept of pass-on and the legal test for  
15 causation in relation to mitigation of loss. The  
16 formula is likely to be much broader than the latter,  
17 which requires there to be demonstrated a proximate  
18 causal connection between the overcharge and an increase  
19 in downstream prices. Mere recovery of costs is  
20 insufficient proof of such a connection. Something more  
21 is required and we are satisfied that DAF has not in the  
22 end provided us with anything more than that the  
23 increase in truck costs represented by the overcharge  
24 was taken into account in the price setting process  
25 whether by the respective regulators [for BT, Openreach]

1 or the claimants themselves. A number of other factors  
2 were also taken into account as well as costs and these  
3 were overlain with regulatory public interest and  
4 commercial judgments being made. It is not possible to  
5 say that an increase in truck costs, however small, was  
6 likely to have led to an increase in prices."

7 So that was the conclusion that was reached in that  
8 case, to similar effect at, for your note, page 249 in  
9 the otherwise dissenting judgment of Derek Ridyard.  
10 Paragraph 698 says much the same thing: costs recovery  
11 is not enough.

12 If one thinks about it -- otherwise the outcome  
13 would be extremely damaging for the concept of common  
14 law mitigation. If one thinks about it, if putting  
15 a particular cost in one's statutory accounts, as they  
16 are obliged to do, all of these companies are under  
17 obligations to ensure that the statutory accounts give  
18 a true and fair view of the profits and losses and costs  
19 of the business and revenue of the business, and indeed  
20 as prudent companies do, and all of my clients are  
21 well-established successful companies, they have  
22 management accounts that reflect the financial  
23 information as well. All of these accounts are going to  
24 contain all of the costs, because otherwise the business  
25 does not know what its costs exposure is and it has to

1 necessarily budget for its cost exposure. It is a trite  
2 point.

3 If simply putting a cost into a set of either  
4 management accounts or statutory accounts was enough,  
5 then there could never be a claim by a properly run  
6 company in the UK for damages for breach of a tort, and  
7 the reason for that would be the loss arising from the  
8 tort, if it was economic loss, would necessarily arise  
9 as a cost to the business. It would be put into the  
10 statutory accounts or the financial accounts that were  
11 held on a management basis, and any enterprising  
12 defendant would say: aha, it has gone into the accounts.  
13 Because you have recovered all of your costs in your  
14 accounts because you are still in business, you must  
15 have covered the costs.

16 On the defendants' case, at its most extreme, that  
17 is sufficient to get them home on an allegation of  
18 pass-on. We say that simply cannot be right. Nor does  
19 that approach, we respectfully suggest, show when the  
20 actual overcharge was said to have been recovered and so  
21 the loss avoided.

22 If one looks, please, within this document, at  
23 page 239 {AB-D/37/239}, paragraph 667, one sees that the  
24 CAT itself grappled with this issue of at what point in  
25 time did DAF say that the overcharge was in fact passed



1 on into prices. The learned Chairman will recall that  
2 in that case, one of the issues was the interval of  
3 regulatory control. The allegation was there came a  
4 tipping point, and over the course of nine or ten  
5 regulatory periods, there would be the jackpot period at  
6 which the overcharge was suddenly recovered.

7 The answer from the Tribunal was:

8 "It is impossible to identify which downstream  
9 customers may have ended up paying the overcharge or who  
10 may have a claim against DAF. It cannot be said that BT  
11 has recovered the overcharge from others and so factual  
12 causation has not been established. Even if BT might  
13 have hit the jackpot at some point, that cannot  
14 represent the recovery of the overcharge and we do not  
15 think that that could have been the intention of Ofcom  
16 as to the way it would work."

17 So Ofcom was obviously adopting a regulatory process  
18 to ensure that various regulatory costs were included  
19 into the price control mechanism, and that did not  
20 establish a method of pass-on.

21 The second point made, and I said there were two  
22 fundamental points in response, the second point is that  
23 regression analysis establishes correlation, which is  
24 not direct evidence of causation. I rely in support of  
25 that proposition on a decision of Mrs Justice Bacon in

1 the Qualcomm case.

2 Please could we look at {AB-D/33/21}. At  
3 paragraph 78, one sees the Tribunal recording:

4 "The Tribunal agrees that correlation does not  
5 necessarily imply causation. That does not, however,  
6 mean that a regression model - a technique [and it is  
7 described] can never be used as evidence of causation."

8 Of course, we accept that. We accept that  
9 regression analysis can be used as a part of a bundle of  
10 evidence to show something, but of course it depends  
11 what you are measuring. If what you are measuring is  
12 the most important cost that a business uses to  
13 determine its prices, such as COGS, then it is, with  
14 respect, perhaps unsurprising that a correlation can be  
15 established between the most important part of  
16 a business's costs and the prices it charged. Indeed,  
17 it would be odd if the position were necessarily any  
18 different. It would arguably only really be in  
19 a commodity market, where the price was set by an  
20 external market board, that you might contemplate the  
21 idea that costs were irrelevant to the price that was  
22 actually set, so if all of the merchants were price  
23 takers, by reference to a commodity market, for example.

24 But, of course, finding that a very significant cost  
25 element in the cost stack borne by one of my clients is

1 correlated to the prices they charge is not going to  
2 help us with the question the Tribunal needs to answer,  
3 which is: does that mean that the MIF, which is a very  
4 small cost, largely insignificant to most of my  
5 claimants, has been passed on? That is a different  
6 question.

7 Now, in contrast with that approach, the way we have  
8 approached this is to concentrate primarily on how  
9 pricing and the treatment of costs from our businesses  
10 work in the real world, and we say that the factual  
11 evidence will show that, with the possible exception of  
12 two analysed claimants, the vast majority of the SSH  
13 Claimants do not treat the MIF or the MSCs as a cost of  
14 goods sold. None of them purely adopts a cost-plus  
15 pricing model. Even the one which most directly factors  
16 in MSCs into its pricing engine, and I shall not mention  
17 it in open session, still prices on the basis of  
18 external factors, so it cannot simply be shown that it  
19 has passed on all of the overcharge into its downstream  
20 prices.

21 We have relied on the industry pricing expert,  
22 Mr Economides, to corroborate how businesses treat  
23 prices. He sought to establish a more appropriate proxy  
24 and to assist with the identifying sectoral evidence for  
25 those sectors covered by our claim.

1           Now, it is true that most of the appropriate proxy  
2 costs that Mr Economides identified unfortunately proved  
3 too small or lacked sufficient granularity for  
4 Dr Trento, our expert, to be able to model them properly  
5 for econometric regression. The regression analysis  
6 that was conducted by Dr Trento has proceeded on the  
7 basis of a real world analysis of how businesses treat  
8 their costs as a matter of fact, but also with an eye on  
9 what is achievable. He has therefore selected a proxy  
10 of total overhead costs in most cases, because the data  
11 on total overhead costs does enable a meaningful  
12 regression analysis to be conducted and, secondly,  
13 because most of the analysed claimants include MSCs in  
14 the stack of overhead costs, so that reflects the real  
15 world treatment of those costs.

16           The proxies which Mr Economides had selected for  
17 these claimants were within the category of overhead  
18 costs as well. It is just that they happened to be too  
19 small to permit the level of granular analysis that was  
20 necessary.

21           Of course, with the burden of proof being on the  
22 other side, what Dr Trento could have done is simply  
23 throw up his hands, in the way that has been suggested  
24 others have done, and said: well, I am not going to play  
25 this game. It is simply too small to model the impact

1 of this particular overcharge on any downstream price,  
2 therefore you cannot prove it.

3 That is, in effect, the position that could have  
4 been adopted. We did not do that. What we decided we  
5 would do was to come with a proxy that was a better  
6 proxy, which is necessarily going to be a more  
7 significant cost for our businesses than the MIF, or  
8 indeed the MSC which is higher. The level of that cost  
9 is so small and so insignificant you cannot sensibly say  
10 that it is the same as the figure for total overhead  
11 costs. What you can say is if the merchants put that  
12 very small cost in a stack of costs that is treated in  
13 the same way, with no individual disaggregation between  
14 the various different categories of costs in that  
15 bucket, then that is a better proxy than anything else.

16 What we respectfully suggest you cannot do is then  
17 say, aha, as a matter of economic theory, that bundle of  
18 overheads necessarily includes some fixed items, some  
19 semi-variable items and some variable items, and  
20 therefore it does not take into account like-for-like,  
21 the way that economic theory would treat the MSC as  
22 a variable cost.

23 But we suggest the answer has to be posed the other  
24 way round: how do these companies treat the cost? Then  
25 look at how you would work out the significance of that

1 cost vis-à-vis prices over time, because that is  
2 comparing like with like. Especially, for example, my  
3 clients, and we say they do not, do not have  
4 a meaningful distinction between a marginal or variable  
5 cost and a fixed cost. What they care about is COGS and  
6 overheads, and that is the buckets into which the costs  
7 go, and there are some COGS which are fixed and there  
8 are some overheads which are variable.

9 THE CHAIRMAN: Do you accept that they may be categorised as  
10 a certain type of cost for particular purposes, and it  
11 may be for different purposes it could be treated in  
12 a slightly different way so that, for accounting  
13 purposes, it has to be an overhead, say, but for the  
14 purposes of pricing you would regard it, or a claimant  
15 would regard it as somewhat different?

16 MR BEAL: The factual evidence, in my respectful submission,  
17 will show that the merchants concentrate primarily on  
18 cost of goods sold when they are working out their  
19 pricing policy. Some of them have very bespoke pricing  
20 policies which do not take into account costs at all.

21 In answer to your question, it is possible that  
22 a cost is included as an overhead and the firm chooses  
23 to price in order to recover its overheads. That is  
24 perfectly possible and I certainly cannot rule that out.  
25 What I do say is on the factual evidence of my

1 claimants, and all I can go on is the factual evidence  
2 of my claimants because it is representative of my  
3 claim, what I do say is that they have not in fact  
4 treated their pricing strategy as being one to recover  
5 the overheads as the key determinant of what they are  
6 seeking to do, and that is not the way that they have  
7 gone about pricing things.

8         So, I mean, actually, in the modern dynamic market,  
9 most of the merchants are far more concerned about the  
10 perception of value, demand-side factors, what their  
11 competitors are charging, than they are about recovering  
12 individual costs. Supermarkets, like M&S, for example,  
13 being a classic example, they will be worrying about  
14 what the impact on a consumer is at a basket level when  
15 the consumer leaves the supermarket. Ah, have we taken  
16 off a bit of cost here but covered it somewhere else in  
17 the basket of goods that we anticipate the customer will  
18 be walking out with? They are much more worried about  
19 the perception of value, brand value, how they are  
20 holding up against Tesco's or Sainsbury's than they are  
21 necessarily about: have we covered all the overheads  
22 that are in this particular management information  
23 bucket of costs called overhead operating expenses?

24         So we do say that we have to keep an eye on the real  
25 world, and economics needs to explain the real world,

1           rather than telling the real world what to do. It is  
2           there as a tool. It is not meant -- you know, Visa  
3           cannot criticise my clients because they have not priced  
4           according to the theory of marginal pricing, any more  
5           than they could say, well, you are not behaving as  
6           a competitor would do in a perfectly competitive model.  
7           They have to use economics to explain what we have been  
8           doing and what our response is.

9           There are some real world consequences, of course,  
10          of the fact that the MIF is so small. Firstly, having  
11          chosen the bucket of total overhead costs, that means  
12          you are picking a bigger cost to compare the  
13          significance for, and that bigger cost will be more  
14          visible in the accounts, it will be more significant for  
15          the business, and therefore, all other things being  
16          equal, it is likely to be more influential on pricing  
17          decisions than any change in the much smaller MSC.

18          So, in other words, the approach we have adopted  
19          already stacks the odds in the favour of pass-on, and we  
20          say it is not appropriate to go even further and choose  
21          the most significant marginal cost paid by a business,  
22          namely COGS, as the proxy for what the business actually  
23          recovers.

24          Now, in terms of Mastercard's approach, you will  
25          appreciate that they are, as we have said before,



1        adopting one -- at face value, one approach for us and  
2        one approach for Mr Merricks' claim. Just dealing with  
3        the way that they approach us for the moment, Ms Webster  
4        attempts to defend a broadbrush view that, for many  
5        businesses, pass-on rates would be generally what she  
6        calls her base range of 70 to 100%. She does not  
7        conduct any regression analysis, as far as I can see,  
8        and she simply bases that on the characteristics of my  
9        clients as re-sellers of goods or services.

10       Dr Harman, in contrast, has relied on implicit  
11       channels for pass-on of costs, and in many cases is not  
12       able to substantiate his view that a particular cost  
13       would, on the balance of probabilities, have been passed  
14       on.

15       Now, I do need to make clear that we are not seeking  
16       to establish an economy-wide pass-on rate. That is not  
17       an issue in our litigation. There was a joint expert  
18       statement that was prepared in December 2023, as the  
19       Tribunal will recall, and that was not one of the issues  
20       that was relevant for the SSH claim.

21       What we were tasked with doing was finding an  
22       approximation of relevant sectors or subsectors that  
23       reflected the total of our claims, and I make no bones  
24       about the fact that our claims do not cover the entire  
25       UK-wide economy. What our claims are representative of

1 is our claim, and the Tribunal will recall at the  
2 hearing in January 2024, Mr Moser was tasked with  
3 indicating roughly what the big ten or big five would  
4 be. I think it was suggested he might find big five, he  
5 came back with big ten, and we have the top ten by value  
6 and by claimant number that have become the so-called  
7 self-selected willing claimants.

8 The answer is they were not. They were the  
9 claimants who represented the biggest proportion of the  
10 claim, both by value and by number of claimants, and  
11 they were chosen on that basis, entirely divorced from  
12 any sense of selection, and the Tribunal was prepared to  
13 endorse the proposition that that was reflective at  
14 least of our claim, and the extent to which it was  
15 reflective of somebody else's claim was something the  
16 Tribunal would need to grapple with in due course.

17 I do not -- I am not so crass as to say we do not  
18 care about other people's claims, but naturally, even  
19 with the benefit of enlightened self-interest, my focus  
20 is going to be on my claim, and that is why we say we  
21 have not sought a UK-wide economy figure.

22 In contrast, Visa and Mr Holt have chosen to engage  
23 in that search for the Holy Grail of a single UK-wide  
24 economy figure for pass-on. Much like an econometric  
25 version of the deep thought computer in Hitchhikers'

1 Guide to the Galaxy, which produced the figure 42, his  
2 answer is 88.3%.

3 It is surprising, with respect, that Visa regards  
4 this as an economy-wide case, as Mr Jowell KC indicated  
5 yesterday. It is not, at least yet, facing any claim by  
6 consumers or businesses on a class action basis.

7 Mr Holt's justification for trespassing on to the  
8 issue of UK-wide economy rate is he says it will be  
9 relevant for Trial 3. I am afraid we have taken the  
10 old-fashioned view that it is issues for Trial 2A that  
11 are relevant at this stage and we will deal with Trial 3  
12 in due course. Obviously nothing that we say in this --  
13 in the course of this trial is intended to indicate  
14 what, if any, the position we will take in Trial 3 is.  
15 We recognise that the findings that are made Trial 2A  
16 are necessarily going to have an influence on the  
17 findings that need to be made in Trial 3, but the  
18 Trial 3 findings will have to be made in their own  
19 context in the light of such evidence as necessarily has  
20 been looked at in this case.

21 The short point is we are not proposing to engage  
22 with the UK economy-wide figure and nothing I say shall  
23 be indicated -- taken as indicating that we do.

24 Can I address then the elephant --

25 MR TIDSWELL: Just to interrupt you, I am sorry. Can

1 I understand just the implications of that. If and when  
2 we do get to Trial 3, are you saying that the question  
3 of net benefit to merchants, and therefore the question  
4 of pass-on across the whole economy, is open for  
5 re-litigation?

6 MR BEAL: Well, it is not an issue in our claim, so I would  
7 want to reserve my position to say that there were other  
8 factors that needed to be taken into account. If it  
9 is -- well, we have a legal position as to whether or  
10 not it is an appropriate way to categorise the criteria  
11 for exemption. That is a legal test. Then there is the  
12 factual and evidential issue of assuming it is relevant  
13 to the legal test, which probably will be against our  
14 submission, nonetheless, can you look at the findings  
15 that have been made previously? To which I am not in  
16 a position to say, no, of course you cannot, but I would  
17 want to reserve the position to at least consider those  
18 findings afresh in the light of such further evidence as  
19 we wanted to adduce, because my experts simply have not  
20 addressed this point.

21 MR TIDSWELL: But Mr Jowell -- it was not really Mr Jowell,  
22 because it was people before him -- but it has been made  
23 plain for some time that that was Mr Holt's approach and  
24 the reason for it, and it would be somewhat  
25 unsatisfactory if it has been set up very deliberately

1           and transparently by Visa against the possibility that  
2           they want to use it later, and you were to come along  
3           later and say I am not bound by that decision simply,  
4           because you chose not to engage with it.

5           I mean, that has all been very clear for some time,  
6           has it not?

7       MR BEAL: Mr Holt has said he wanted to look at this,  
8           because he said there was no point doing the work twice  
9           and it coming back into Trial 3. Because it is not an  
10          issue in Trial 2A, our experts have not looked at it.  
11          Mr Holt is aware of that as well. He was the only  
12          expert in our claim who said it was appropriate to look  
13          at the UK economy-wide point.

14          Now, he has chosen to do that of his volition. He  
15          cannot bind us as to whether or not that is an issue in  
16          our claim if everyone else says, no, it is not, we are  
17          not looking at that.

18       THE CHAIRMAN: So are you not challenging his evidence in  
19          that respect?

20       MR BEAL: I do not see how I am in a position to challenge  
21          him on an issue that is not before this Tribunal for  
22          this part of the trial, and I am trying to be pragmatic.

23       THE CHAIRMAN: Presumably they rely on it as part of their  
24          establishing what the pass-on rate would be --

25       MR BEAL: No, because they are not facing a UK economy-wide

1 claim. The only claim Visa faces from us, so it is  
2 a sectoral approach, but it is only for the SSH  
3 Claimants' sectors. Everything else is nothing to the  
4 point. They have the Allianz claim as well.

5 MR TIDSWELL: I have to say I do find that quite  
6 problematic, because we have had a history of this, and  
7 this may be before your time as well, but we have had  
8 long discussions about which bit of the case would go  
9 into which trial, and there was a discussion about  
10 whether 101(3) would come into this bit of the trial,  
11 and in the end it did not, simply because of the timing.  
12 I think there were perfectly good reasons why it could  
13 have done but it did not.

14 Now, it seems to me that that accident of history is  
15 really very unfortunate if you are going to then turn  
16 around and say this issue has to be re-litigated in  
17 Trial 3, because at that stage it will be a live issue  
18 for you, and it is not now, and Mr Holt has gone to the  
19 trouble, very transparently, making it plain that is  
20 what he has been doing for months and months and months.

21 Now, I am not sure I know what the answer to that  
22 is, but if that is your position, I think it is a very  
23 unsatisfactory one.

24 MR BEAL: Well, a couple of points, if I may, in response,  
25 sir. I completely understand that we are in a position

1           where we are. We in fact, spilt milk, but we had  
2           proposed having liability in its full form,  
3           i.e. liability under 101(1), and exemption under 101(3),  
4           dealt with in one hearing. That obviously did not work  
5           out.

6           We are then in the slightly unusual position of  
7           having pass-on dealt with before the full issue of  
8           liability has been determined. Again, that is where we  
9           are. I am not going to make any bones about that.

10          But with the greatest of respect, when the  
11          parameters for the experts are set by the issues in  
12          Trial 2A and nothing else, and the joint expert  
13          statement proceeds on that basis, save for a footnote,  
14          where Mr Holt says:

15                 "... and I am going to look at the UK-wide economy  
16                 point because I think it is relevant for Trial 3."

17          Then he, if your approach were correct, sir, he  
18          would be forcing our hand into having to determine that  
19          issue at this stage, even though it is not one of the  
20          listed issues for this part of the trial.

21          Now, that may or may not be unfortunate. I mean,  
22          obviously we have acquirer pass-on that is coming on at  
23          2B, even though arguably that should be coming before  
24          2A.

25         THE CHAIRMAN: Was that expressly stated in Mr Holt's

1           report, that he was only putting it forward for the  
2           purposes of Trial 3?

3       MR BEAL: Yes. Indeed, that is the effect of the footnote  
4           in the joint expert statement. But I will cross-examine  
5           Mr Holt on this in due course because I do not want to  
6           take up time with it now, I just wanted to put a marker  
7           down --

8       THE CHAIRMAN: So you will be cross-examining him on this?

9       MR BEAL: I will be cross-examining him on why he is  
10          addressing a Trial 3 issue.

11       THE CHAIRMAN: Well, is that --

12       MR BEAL: That may not be helpful.

13       THE CHAIRMAN: -- his expertise?

14       MR BEAL: I am going to ask him why he has engaged in this  
15          when nobody else has, but that may be a pointless  
16          question. In the light of your intervention --

17       THE CHAIRMAN: So he is not relying on that for the purposes  
18          of establishing pass-on, so that Visa can establish  
19          pass-on in relation to the specific claimants that are  
20          before the court?

21       MR BEAL: He is not relying on it for that purpose.

22       MR JOWELL: Forgive me, I think have to correct that.

23          Mr Holt -- there are ten sectors that are analysed by  
24          the claimants, by Mr Trento, but there are a number of  
25          claimants that do not fall within those sectors, and do



1 not fall within the Visa equivalent sectors that have  
2 other data in respect of them, and Mr Holt uses the  
3 economy-wide figures in order to assist with those  
4 sectors where there is no other data in these  
5 proceedings for this 2A Trial.

6 THE CHAIRMAN: So it is not only for Trial 3.

7 MR JOWELL: It is not only for Trial 3, and he makes that  
8 quite clear in his initial report and his second report.

9 MR BEAL: I will -- I am afraid I simply do not have time.

10 I have been squeezed on time already, I do not have time  
11 to chase this down and show you --

12 THE CHAIRMAN: It is a matter for you as to what you  
13 challenge and what you consider is relevant, but I can  
14 see that it may cause problems down the line.

15 MR BEAL: Can I deal with -- can I reflect on the panel's  
16 observations and work out how to put it in  
17 cross-examination --

18 THE CHAIRMAN: Yes, of course.

19 MR BEAL: -- so that we have not been hijacked with a point  
20 that is for Trial 3, I put it that way.

21 Can I then address an elephant in our room: can this  
22 Tribunal make a finding that Mr Merricks has established  
23 that consumers have suffered some loss in the UK on  
24 a UK-wide basis for a period before our claim, yet at  
25 the same time dismiss Visa and Mastercard's claim of

1 pass-on for our claims? We say that the answer to that  
2 question, which pragmatically lies at the heart of the  
3 extrapolation issue and many other points advanced in  
4 the Merricks' claim, is yes, if the evidence justifies  
5 that conclusion.

6 So there is a number of distinguishing factors  
7 between the Merricks' claim and our claim. Firstly,  
8 there is no overlap temporally between SSH Claimants'  
9 claims and the Merricks' claim. The ones that did exist  
10 have all been settled out.

11 Secondly, there is no overlap with the claim against  
12 Visa, because nobody, yet, has brought a claim against  
13 Visa on a class action basis.

14 Thirdly, as we have heard, it is only consumer UK  
15 MIFs which are in issue for the Merricks' claim, either  
16 because they are domestic MIFs, or they are intra-EEA  
17 MIFs that are borne as a result of transactions at UK  
18 merchants, or UK consumers having transactions with EEA  
19 merchants but with a causal connection to the UK.

20 So, given that our claim covers a wider variety of  
21 MIFs, commercial cards, inter-regionals, and so on,  
22 there is also -- the Merricks' claim but is a subset of  
23 the relevant MIFs that are in issue between the two  
24 claims.

25 More generally, the two claims are seeking to

1           achieve different levels of compensation for different  
2           people. The Merricks' claim seeks to achieve aggregate  
3           damages to be distributed among the class in due course,  
4           and the actual allocation of quantum in our case is  
5           going to have to await Trial 3, but there is no  
6           distributional stage at which the aggregate set of  
7           damages can be parcelled out between our various  
8           different claimants.

9           Furthermore, we have already established, at least  
10          ex hypothesi, that we have suffered loss through the  
11          overcharge, whereas it is a key part of Mr Merricks'  
12          case that he has that yet to do.

13          Now, to the extent that Mr Merricks also alleges  
14          that nothing has changed from 1992 to 2024 in terms of  
15          the treatment of the MIFs, whether or not that is right  
16          is a matter really for him and his claim. But to the  
17          extent that it is said that somehow the posited pass-on  
18          is the same in our case, because one can read forward  
19          from 1992 to 2010 and establish high pass-on, with the  
20          greatest of respect, that simply does not work. Because  
21          the fact that pass-on has been overestimated for an  
22          earlier period does not mean we should have the  
23          detriment of an overestimate of pass-on for my clients  
24          on their claims.

25          Conversely, the fact that we establish, as we hope

1 we will, that the pass-on rates for the SSH Claimants  
2 are negligible or substantially less than is being  
3 asserted against us, does not necessarily preclude an  
4 economy-wide approach for a much earlier period, because  
5 the two claims are tilting at different things.

6 So the next question is: is it unfair that  
7 Mastercard is somehow caught on the twin prongs of not  
8 establishing pass-on in their defence to our claim, and,  
9 on the other hand, being on the hook for a claim brought  
10 by Mr Merricks? Well, the short point is, as I have  
11 just said, they cover different periods with different  
12 issues, and therefore the answer, as a matter of theory,  
13 is no, that is not unfair. Then as a matter of the  
14 position in practice, we say, well, that is already  
15 where Mastercard is. They have already lost the  
16 allegation that the *Sainsbury's* overcharge was passed  
17 on. That has been found not to be established. So they  
18 have had to pay, albeit a sum I am not aware of the  
19 figure for, a sum to *Sainsbury's* in discharge of the  
20 claims successfully brought by *Sainsbury's* against them.

21 Of course, one solution would be to knock off any  
22 sums that have been paid out to individual merchants  
23 from the quantum of the Merricks' claim to the extent  
24 that there was an overlap. That would prevent double  
25 recovery.

1           The same approach can be adopted for any other  
2           claimants that have achieved any other settlements from  
3           Mastercard in the intervening period since the  
4           *Sainsbury's* litigation.

5           So we recognise that the burden of proof is rarely  
6           determinative, but of course the overall evidential  
7           picture for each claim is also substantially different,  
8           and the different parties are relying on different  
9           evidential pieces in order to drive the result that they  
10          seek from the Tribunal. We note, for example, that  
11          Mr Merricks was quite keen to join Trial 2A so that he  
12          could take advantage of the very detailed data that my  
13          clients have provided, albeit for a different period,  
14          a later period, in time, because it has enabled  
15          Mr Coombs to conduct some regression analysis where he  
16          would not have been able to otherwise. But that  
17          different evidential picture necessarily means that  
18          different conclusions can be drawn where appropriate.

19          Can I then, please, move on to the core legal  
20          principles to be applied, which is the second of my four  
21          sectors. I am going to take this relatively quickly,  
22          because I anticipate that the Tribunal is very familiar  
23          with the *Sainsbury's* litigation.

24          Could I pick it up, please, in the CAT judgment in  
25          *Sainsbury's* at {AB-D/13/261}, please.

1 Paragraph 459 contains the recognition that  
2 *Sainsbury's* would have been concerned to make a profit.  
3 This involved setting a price for the goods.  
4 Prima facie, it would have sought to pass on its UK MIF  
5 to its customers.

6 "Of course, given the range of products sold by  
7 *Sainsbury's* and the multitude of costs incurred, it  
8 would be impossible to say what part of the price of any  
9 given product was attributable to the UK MIF. As  
10 *Sainsbury's* witnesses explain and as we accept,  
11 *Sainsbury's* did not operate on a cost-plus basis."

12 Now, we then see, please, at page 262, paragraph 461  
13 {AB-D/13/262}, that any efforts taken by *Sainsbury's* to  
14 control its own spending or to reduce its costs by  
15 negotiating reductions in price would not have had the  
16 effect of passing on the MIF.

17 See just above paragraph 462 where it says:

18 "Once again, however, we consider that *Sainsbury's*  
19 efforts to reduce costs in spending decisions would not  
20 be capable of being related back to any given cost,  
21 whether that cost is a UK MIF or some other cost."

22 Please, then, at page 264 {AB-D/13/264},  
23 paragraph 468. The Tribunal makes what it describes as  
24 the "blindingly obvious" point that if *Sainsbury's* did  
25 not seek to recover the inevitable costs of its business

1 from its customers, it would rapidly lose more than it  
2 made and become an ex-business.

3 The submission from Mastercard in this case, as we  
4 see at the bottom of that page, 470, was not as extreme  
5 as simply saying: you put the cost into your accounts  
6 and therefore you have inevitably recovered it over the  
7 long-term; a more nuanced point was put, namely that the  
8 likelihood of pass-on in the abstract was sufficient to  
9 establish pass-on as a matter of factual causation.

10 The answer to that was essentially given at  
11 page 272, paragraph 478 and onwards. {AB-D/13/272}

12 So paragraph 478, subparagraph 4. The Tribunal  
13 found:

14 "Because we have concluded that the way in which the  
15 costs constituted in the UK MIF were dealt with by  
16 *Sainsbury's* is unknowable, in that it is impossible to  
17 say what proportion of the overcharge was passed on in  
18 higher prices or paid out as cost savings or paid for by  
19 reducing expenditure and so service levels, we also  
20 conclude that Mastercard's mitigation case should fail  
21 for this reason alone."

22 That was part of the reasoning.

23 Then at page 277 {AB-D/13/277}, 484, the Tribunal  
24 endorsed halfway down that page, where it begins:

25 "We are not impressed with the argument that sound

1           laws of economics require recognising the defence ..."

2           Then a quotation from the Hanover Shoe case.

3           Then, please, at page 484.

4       THE CHAIRMAN: 484?

5       MR BEAL: Sorry, page 277, paragraph 484.

6       THE CHAIRMAN: Yes.

7       MR BEAL: The Tribunal set out in a series of propositions  
8           the principles of English law that they were applying.

9           Please could I invite you to read paragraph 484,  
10          starting at page 278. (Pause) {AB-D/13/278}

11       THE CHAIRMAN: You need to go over the page, I think  
12          {AB-D/13/279}. (Pause)

13       MR BEAL: This was appealed to the Court of Appeal. Please  
14          could we turn up --

15       THE CHAIRMAN: They disagreed with that last paragraph 5,  
16          did they not?

17       MR BEAL: Yes. {AB-D/15/69}, please. We will see the  
18          analysis as it is framed. Paragraph 320.

19          We see pass-on is put in the context of the  
20          jurisprudence of the CJEU but also the common law.

21          We then see at 321 on that page the actual point in  
22          the appeal was a narrow one, namely whether essentially  
23          there were inconsistent findings between the interest  
24          finding and the finding that Mastercard had not  
25          established pass-on.



1 Paragraph 325, to the next page {AB-D/15/70}, having  
2 cited the CJEU case law on unjust enrichment, the Court  
3 of Appeal held:

4 "Damages which would reimburse the full amount of an  
5 unlawful charge will only amount to unjust enrichment  
6 for a claimant if there has been a direct passing on of  
7 the charge by the claimant to another person. The  
8 claimant will not be required to give credit for  
9 collateral advantages."

10 Building in the language of a direct connection  
11 between the loss that has been suffered and passing it  
12 on to another person, and that is grounded partially in  
13 the case law of the CJEU dealing with unlawfully levied  
14 tax.

15 Paragraph 327, further down that page, one sees the  
16 recognition that those principles of EU law are entirely  
17 consistent with common law principles of the assessment  
18 of damages and, in particular, mitigation.

19 At 328, there is a reference back to the classic  
20 British Westinghouse test:

21 "If a claimant has in fact taken steps which  
22 diminish its loss, that loss must be taken into  
23 account."

24 At page 71 {AB-D/15/71}, paragraph 330, is  
25 recognition that:

1            "Sums received which have diminished the loss are  
2            only to be taken into account if there is a sufficiently  
3            close causative link between them and the wrong  
4            committed by the defendant."

5            So that builds in the language of proximity.

6            At paragraph 332, on the next page, page 72  
7            {AB-D/15/72}:

8            "The court accepted submission from Mr Hoskins for  
9            Mastercard that in each case it is a matter for the  
10           judge to decide whether, on the evidence before him or  
11           her, the defendant can show that there is a sufficiently  
12           close causal connection between an overcharge and an  
13           increase in the direct purchaser's price. We see no  
14           reason why that increase should not be established by a  
15           combination of empirical facts and economic opinion  
16           evidence. It is not appropriate for us, in these  
17           appeals, to be more specific, but there has to be a  
18           sufficiently close causal connection."

19           Now, because the ground of appeal brought by  
20           Mastercard was necessarily a narrow one, the  
21           determination of the appeal turned on that, and  
22           essentially the Court of Appeal held, see page 73  
23           {AB-D/15/73}, paragraph 339 to paragraph 340, that the  
24           CAT had been entitled to take a different approach  
25           dealing with interest to dealing with the notion of

1 pass-on.

2 They endorsed, we would suggest, at 340, the  
3 suggestion that the notion of pass-on, whilst familiar  
4 to an economist, might be different from the legal  
5 definition of a passed on cost:

6 "First, whereas an economist might well define  
7 pass-on more widely to include cost savings and reduced  
8 expenditure, the pass-on defence is only concerned with  
9 identifiable increases in price paid by the claimants'  
10 customers."

11 It is that part which is then narrowed by the  
12 Supreme Court's decision.

13 "Secondly, the increase in price must be causally  
14 connected with the overcharge and demonstrably so."

15 That is the bit, with respect, that the  
16 Supreme Court analysis has not touched on.

17 The overall point is an economist may view things  
18 differently from a common lawyer as to what is involved  
19 in mitigation and avoided loss.

20 THE CHAIRMAN: I mean, it seems to me that "pass-on" itself  
21 is not a legal term. Because they use the common law  
22 cases on assessment of damages and mitigation, are we --  
23 we are having to work out whether it is arising out of  
24 the transaction, as it was said in British Westinghouse,  
25 but how does one get from that to the definition of

1 pass-on?

2 MR BEAL: That is why, with respect, I started with McGregor  
3 on Damages and took it back to basics, because the  
4 concept of avoided loss is what one is dealing with.

5 There are some very clear examples of pass-on. We  
6 have one here, which is the acquirers for IC+ and IC++  
7 contracts have contractually passed on the MIF,  
8 overcharge and all, to my clients. So that is a classic  
9 example.

10 Another classic example of a contractual pass-on is  
11 surcharging. As we all know, some companies,  
12 particularly airlines for a while, used to have  
13 a dropdown box, if you were paying by credit card, that  
14 you would have an additional sum that you had to pay  
15 when you booked a flight. That is a surcharging policy  
16 and, providing that the costs of the MIF was reflected  
17 in the surcharge, then that is full pass-on. We accept  
18 that. Again, that is another classic example of pass-on  
19 that works, both as a matter of economics and as  
20 a matter of law.

21 We also accept that if somebody has a very  
22 mechanistic cost-plus pricing policy, so that they  
23 simply take their stack of costs and say, right, we are  
24 going to have all of those costs recovered in our  
25 prices, and our prices are therefore going to be all of

1           those costs plus 5%, then that would represent economic  
2           and legal pass-on, because the costs that bear the loss  
3           are being directly passed on proximately into prices  
4           through the very pricing policy that has been adopted.

5           It may well be, and I am not going to go into detail  
6           in the Supreme Court, that the Supreme Court had in mind  
7           that sort of pricing policy as the paradigm. What the  
8           evidence in this case shows is that that is not right.  
9           That is not the paradigm. Pricing is dynamic, it is  
10          complex. It is based on all sorts of multi-factorial  
11          assessments of issues that feed into the price from  
12          a modern day business.

13          There is no example -- even, you know, the highlight  
14          of Visa's case, relying on one particular company, even  
15          that highlight -- that one outlier, as we say, even that  
16          one outlier does not simply do cost-plus pricing. It is  
17          more complex.

18          So I am not going to go into the Supreme Court  
19          judgment, partly because I do not have time and partly  
20          because it has already been covered very fully. The key  
21          take-away is at paragraph 215, in our submission, where  
22          they say that the relevant question is a factual  
23          question: has the claimant in the course of its business  
24          recovered from others the costs of the MSC? They were  
25          not dealing with legal causation. Legal causation is

1 a policy factor. Legal causation arises, as we will see  
2 from the judgment in *Trucks*, when you have already  
3 established factual causation and it operates as  
4 a retrenchment. Say you establish that there is avoided  
5 loss, legal causation comes in to say: well, even though  
6 it has been avoided, we are not going to hold you to  
7 that avoidance for public policy reasons. A classic  
8 example would be if I have a very expensive private  
9 health insurance cover for injury to me that means that  
10 if I have time off work because somebody drives into me,  
11 an irate client runs me over outside on Fleet Street as  
12 I walk out of here, if I have cover, insurance cover  
13 that covers me for my lost earnings on that, that will  
14 not necessarily be taken into account against a loss of  
15 earnings claim against the tortfeasor who has driven  
16 into me, and that is a policy point that is taken to  
17 encourage people to have protection in an appropriate  
18 case. That is legal causation.

19 Factual causation still requires an assessment of  
20 what is the test.

21 MR TIDSWELL: But is proximity not a legal causation test,  
22 at least in part?

23 MR BEAL: Direct and proximate link is the test that is set  
24 for factual causation. It is telling that is what you  
25 have to establish to show causation.

1 MR TIDSWELL: You showed us paragraph 150 in the *Trucks*  
2 Court of Appeal and I take the point you make about  
3 that, but it is quite difficult, is it not, to reconcile  
4 with the Supreme Court and the decision in *Sainsbury's*  
5 and the observation that is made about legal causation  
6 there?

7 MR BEAL: Well, you have my point that one of the great  
8 things about the common law is we have this concept of  
9 obiter dictum because when there are bits of a judgment  
10 that are difficult to explain, everyone does not wring  
11 their hands in horror, as they do with Court of Justice  
12 judgments. It is obiter. I would not like to say that  
13 the Supreme Court Justices were riffing, I think would  
14 be the term, but they were dealing with something that  
15 was not actually an issue before them and they were  
16 simply setting out some expansive thoughts, no doubt  
17 because they thought it was helpful context. They were  
18 not purporting to lay down the test.

19 Of course what we see in the Court of Appeal is the  
20 very argument I am facing now actually was being  
21 advanced by the defendants in that case. They were  
22 saying it is enough for us to show that this is a cost  
23 that has gone into the accounts, it is part of the  
24 budgetary process and therefore there is necessarily an  
25 inference of pass-on as a matter of fact. The response

1 to that was "no" because, yes, you can show it goes into  
2 the accounts, it goes into the budgets, every company  
3 has to do that; that is not enough. You have to have  
4 a direct and proximate link, see the tests that we have  
5 just been looking at.

6 MR TIDSWELL: You postulated that the Supreme Court might  
7 have had in mind the situation that was costs-plus and  
8 who knows what they had mind, but they might also have  
9 had in mind the four factors in *Trucks* CAT which I think  
10 are legal causation tests essentially. That is what  
11 those four factors are about. They are about trying to  
12 decide whether as a matter of policy you should allow  
13 for recovery.

14 MR BEAL: Well, if I may, I will come on to the factors from  
15 the CAT in *Trucks*. That is where I am going next after  
16 *Stellantis*.

17 MR TIDSWELL: Yes.

18 MR BEAL: My submission on that is that the CAT in *Trucks*  
19 was setting down the test for when you know whether or  
20 not factual causation has been established because it is  
21 impossible to square 150 in the Court of Appeal judgment  
22 in *Royal Mail* with 151. 150 deals with legal causation  
23 and says this is different from factual causation. 151  
24 then gives you the test for factual causation. So,  
25 regardless of what the Supreme Court may or may not have



1           been doing, this argument has been ventilated both  
2           before the CAT in *Trucks* and the Court of Appeal and the  
3           Court of Appeal has told us what the answer is and the  
4           way through it is. So to re-run this is essentially  
5           trying to undermine the Court of Appeal's judgment in  
6           *Trucks* by the back door.

7       THE CHAIRMAN: What you are really saying, I think, is that  
8           when we talk about legal causation, we are not talking  
9           about the legal test for factual causation, if you see  
10          what I mean, so that there may be certain elements that  
11          have to be established in order to prove on the facts  
12          that there has been causation?

13       MR BEAL: Yes.

14       THE CHAIRMAN: What you are saying legal causation means is  
15          there may be some policy reason why we are not going to  
16          allow this causation argument to work.

17       MR BEAL: Causation itself is a legal test. So you have the  
18          test in *Galoo* for contractual causation. You have the  
19          classic tort test for tortious causation. That is the  
20          easy bit because here we have assumed --

21       THE CHAIRMAN: I know, but this is causation of loss and now  
22          we are in mitigation.

23       MR BEAL: Precisely. So this is a subset of having already  
24          established we have suffered loss that has been caused  
25          by the tort. The next question is: should we not pay

1           you that because you have passed it on demonstrably to  
2           somebody else?

3       THE CHAIRMAN: We have transposed into that the test for  
4           causation of loss.

5       MR BEAL: Well, the test has been set by the Court of Appeal  
6           in *Trucks* where it says the way to establish that you  
7           have passed it on is to show a direct and proximate  
8           causal link between the overcharge, which is the  
9           equivalent of the transaction in *Westinghouse*, and then  
10          the loss that has been avoided, which is the pass-on in  
11          downstream pricing.

12       MR TIDSWELL: So when you talk about the policy reasons, are  
13          you saying that the words in *British Westinghouse* which  
14          say "arising out of the transaction" are not policy  
15          reasons? Are you saying that is a factual causation  
16          test?

17       MR BEAL: That is a factual causation test.

18       MR TIDSWELL: Well, that is not what *Sainsbury's* Court of  
19          Appeal says. It says it is a legal causation point,  
20          does it not?

21       MR BEAL: Well, it is looking --

22       MR TIDSWELL: "Here also a question of legal or proximate  
23          causation arises as the underlined words show."

24       MR BEAL: Well, it is talking about the test that you have  
25          to establish to show that there is a causal link. In

1           Westinghouse it was: you have achieved a benefit because  
2           the turbines work better than the ones you had bought  
3           and therefore do you set that benefit off against the  
4           loss you would have recovered? So it was saying does  
5           that benefit arise from the very transaction that you  
6           are saying has given rise to loss?

7       MR TIDSWELL: Well, is that not a legal policy point though  
8           as to whether it is the sort of thing that should be  
9           recovered? I am just struggling a little bit.  
10          I understand the point you make about *Trucks* and the  
11          Court of Appeal and there is obviously some difficulty  
12          to understand how that all fits together, frankly, with  
13          *Sainsbury's* and the Supreme Court. I do not think it is  
14          straightforward, but I do struggle a bit with the idea  
15          that this policy setting is only to do with things like  
16          recovery of insurance policy and it is not directly  
17          dealing with the causal -- the quality of the causal  
18          connection that is indicated in *British Westinghouse*.  
19          That really is what legal causation is about.

20       MR BEAL: With the greatest of respect, what is the test for  
21          factual causation -- I am not asking a hypothetical  
22          question of the bench, I am making a submission.

23       MR TIDSWELL: I do not mind if you do.

24       MR BEAL: What is the test for factual causation as a matter  
25          of law.

1 MR TIDSWELL: Well, it is but-for, is it not? It becomes  
2 but-for because I think the analysis goes -- certainly  
3 this is how I understand the case on this side, they say  
4 in the order in which you put it you, firstly, work out  
5 whether or not as a matter of fact one thing caused  
6 another and then you work out whether the law is  
7 prepared to recognise that that is a recoverable loss,  
8 but the first test is simply but-for. It has nothing to  
9 do with proximity; it is just can you show that one  
10 thing caused another.

11 MR BEAL: But-for causation is tempered by the Court of  
12 Appeal's judgment in both *Sainsbury's* and in *Stellantis*  
13 and in *Trucks* where they say you have to show  
14 a sufficiently close causal connection between the loss  
15 that you suffered and the avoided loss, namely the  
16 pass-on.

17 MR TIDSWELL: Well, that depends whether you read what they  
18 are saying in all those cases as being limited to  
19 factual causation or encompassing elements of legal  
20 causation, which I think is really the point the  
21 Chairman is making. We are back to that point.

22 MR BEAL: Well, when I define legal causation after the  
23 short adjournment by reference to the approach that was  
24 taken in *Royal Mail v Trucks* at paragraph 150, my  
25 submission will be that we accept that we do not have

1           any residual legal causation issues in the sense of is  
2           there a policy reason why, even if they establish  
3           factual causation between the overcharge and downstream  
4           pricing, we should nonetheless still get the full  
5           compensation regardless. That is not our case. What we  
6           do say that they need to establish is a sufficiently  
7           close causal connection between what they have  
8           overcharged us and an act of mitigation that we have  
9           taken that reflects in downstream prices increasing  
10          because that way we have avoided loss that we have  
11          otherwise suffered.

12       THE CHAIRMAN: I know you do not want to take us to the  
13                       Supreme Court but I seem to remember them saying in that  
14                       paragraph there is a question of legal or proximate  
15                       causation.

16       MR BEAL: They say "legal or" and when we come to look in  
17                       Stellantis, they say "legal and" and I will show you  
18                       what the Court of Appeal then landed on in Royal Mail,  
19                       but I fear I am trespassing on your goodwill and your  
20                       lunchtime.

21       THE CHAIRMAN: Right. Okay. Well, thank you. We will  
22                       resume at 2 o'clock.

23       (1.05 pm)

24                       (The luncheon adjournment)

25       (2.00 pm)

1 MR BEAL: With your permission, I am going to go to the  
2 Court of Appeal in *Stellantis*, briefly. That is  
3 {AB-D/29/7}, please, in the judgment of  
4 Lord Justice Green.

5 At paragraph 21, the learned Lord Justice explains  
6 how:

7 "The analysis of the Supreme Court was applied by  
8 the CAT in [the] Royal Mail [strike-out case]. The CAT  
9 addressed, and rejected, an argument by the defendant  
10 that the analysis in *Sainsbury's* proceeded upon the  
11 basis that causation was a "... subtle and imprecise  
12 question that can only be determined on the known facts  
13 of the case and must therefore be determined at trial'  
14 ... and that the judgment ..."

15 They rejected also the suggestion that:

16 "... the judgment properly understood, amounted to a  
17 'green light' to plead a defence of mitigation by  
18 off-setting in broad and theoretical terms [the loss  
19 that has been suffered]. The rejection of this 'green  
20 light' approach was followed by the CAT in the present  
21 case [i.e. *Stellantis*]."

22 If we then turn to page 9 {AB-D/29/9}, please,  
23 paragraph 27, one sees that one of the countervailing  
24 factors is that once you have established that there has  
25 been loss caused by a breach of a tort, an infringement,

1           there is a less onerous burden placed on a claimant as  
2           part of the duty to mitigate because, to paraphrase,  
3           a wrongdoing tortfeasor should not get away with it.

4           We then see, at paragraph 33, on page 11  
5           {AB-D/29/11}, having cited an extract from the CAT  
6           strike-out judgment in *Trucks*, cited at halfway down  
7           page 11, a summary of the test, and the learned  
8           Lord Justice says this:

9           "Pulling the strands together, the burden of proof  
10          when pleading causation is on the defendant to  
11          demonstrate (a) that there is a legal and proximate  
12          causal connection between the overcharge and the act of  
13          mitigation and (b) that this connection is 'realistic'  
14          or 'plausible' ..."

15          For the purposes of the strike-out test.

16          So that is the test that is identified as a matter  
17          of law for showing the requisite causal connection  
18          between the overcharge and the act of mitigation.

19          We then see, please, at page 21 {AB-D/29/21},  
20          paragraph 65:

21          "If the cost of the cartelised component is a small  
22          or modest portion of total costs, then there might in  
23          any event be little incentive or ability to seek an  
24          off-set. The cost of the component as a part of the  
25          total costs is not of course the relevant comparator; it

1 is the overcharge (i.e. the increment over the  
2 competitive price) as a percentage of total  
3 costs/expenditure that matters. If the cartel is very  
4 successful and pushes prices up by (say) 5% over the  
5 competitive level on a component that itself is (say) 5%  
6 of overall costs then the overcharge, which amounts to  
7 only 0.25% (i.e. 5% of 5%) of total costs, that might  
8 still not be such as to trigger any impetus for  
9 off-setting even in the most rigorous and challenging of  
10 cost control regimes."

11 We then see at paragraph 71, page 23 {AB-D/29/23}, a  
12 conclusion from the Tribunal at first instance, that:

13 "it was not sufficient for a defendant in the  
14 position of DAF to plead a defence of mitigation on the  
15 basis of broad economic theory and nothing more when the  
16 effect of that would be to place a heavy onus on  
17 a claimant to disclose and explain its financial  
18 procedures during the period of the operation of the  
19 cartel ... There must be some plausible basis in fact  
20 for alleging that the claimant would have reduced the  
21 amount of the overcharge loss in a manner which amounts  
22 to legal mitigation."

23 So, again, one of the, I acknowledge, complexities  
24 of the case law in this area is a repeated attachment to  
25 the word "legal" in circumstances where it is not



1 transparently clear what is meant by that epithet.

2 THE CHAIRMAN: They are principally dealing with that

3 category 3, are they not, of --

4 MR BEAL: Avoided loss.

5 THE CHAIRMAN: Supplier pass-on, is it not?

6 MR BEAL: This is a supplier pass-on case. I am going to  
7 come on to *Trucks*, which obviously was not. But both of  
8 them are avoided loss which is -- I thought you meant  
9 category 3 of the McGregor tripartite ...

10 THE CHAIRMAN: No, category 3 of the Supreme Court in  
11 *Sainsbury's*.

12 MR BEAL: Sorry, yes, quite right. It is supplier pass-on  
13 in this case.

14 Could we then please look at page 25, paragraphs 79  
15 to 80 {AB-D/29/25}, and:

16 "Mr O'Donoghue QC placed considerable reliance on  
17 the existence of targets, as part of the control system,  
18 as creating a mechanism which it was said created an  
19 inference that mitigation would necessarily flow."

20 There is a parallel there between the way in which  
21 the case is put against me by, in particular,  
22 Mastercard.

23 "He criticised the analysis of the CAT who addressed  
24 this argument ..."

25 If you would be kind enough to read the CAT's

1           response at 33 and 34, and then we will move on, please,  
2           to paragraph 80, which gives the answer. (Pause)

3       THE CHAIRMAN: Are we reading the whole of the quote?

4       MR BEAL: No. If we could skip, please, to page 26

5           {AB-D/29/26}, halfway down:

6           "In my view ..."

7       THE CHAIRMAN: Yes.

8       MR BEAL: "... the assessment of the CAT about what could  
9           reasonably be inferred from the existence of targets was  
10          one of specialist judgment and any criticisms of it are  
11          not, at base, points of law over which this court has  
12          jurisdiction."

13          So the learned Lord Justice was not saying this is  
14          a question of legal causation that gives rise to an  
15          error of law, therefore something has gone wrong, and  
16          I am going to intervene and either remit for further  
17          findings or conclude on the basis of the facts as  
18          alleged that this is a non-strikeable case.

19          He said:

20          "In any event, for the reasons already given, I see  
21          considerable force in the CAT's assessment."

22          Which is an endorsement, with respect, of both the  
23          legal test that he has already cited at paragraph 33,  
24          and then the analysis of the role that is played by, for  
25          example, target-setting as an implicit channel to

1           alleged pass-on.

2           Can I then please move on to this Tribunal's  
3           decision in *Trucks*, where the learned Chairman was also  
4           the learned Chairman in that case. It is {AB-D/37/82}.  
5           Hopefully one has paragraph 185 towards the bottom of  
6           the page. Please can I invite you to read  
7           paragraph 186. (Pause)

8           That then tips over on to the top of the next page  
9           {AB-D/37/83}.

10          Please could we turn to page 95 in this document,  
11          paragraph 219 {AB-D/37/95}. The point that is made here  
12          is that in a category (iv) case, i.e. merchant pass-on,  
13          it is a more recognisable case of pass-on:

14          "But as categories (iii) and (iv) were both dealt  
15          with together in the same way in *Sainsbury's* one would  
16          expect the same test to be applicable. Merely because a  
17          firm seeks to recover its costs and make a profit cannot  
18          be sufficient to prove that the overcharge has been  
19          transferred to its customers."

20          So there is no presumption, just because you seek to  
21          make a profit, that there is pass-on.

22          Then at paragraph 220, the Tribunal agreed with the  
23          Tribunal's strike-out judgment that there were two  
24          particular factors applicable to both category (iii) and  
25          category (iv) cases that are relevant, and it refers to,

1 at subparagraph (1) on the next page:

2 "The claimants' knowledge of the nature and amount  
3 of the overcharge, such that they would seek to address  
4 it; and

5 "(2) The size of the overcharge as a proportion of  
6 the claimants' relevant expenditure and/or price-cost  
7 margin.

8 "In 44 the CAT compared this case with *Sainsbury's*  
9 where there was both knowledge of the MIF and it was  
10 a significant cost ..."

11 Pausing there. The cost that is identified there,  
12 with the greatest of respect, is not the cost that is  
13 indicative of the standard position for merchant  
14 claimants, and it is some removed from the figure that  
15 I showed you earlier for Dr Trento. If there was a  
16 "0-point" before both figures it would be, with respect,  
17 a more accurate figure.

18 THE CHAIRMAN: I am not sure where those figures came from.

19 MR BEAL: It is not a criticism. You were not, I think, at  
20 that stage, as enmeshed in the joys of interchange  
21 litigation as you are now, but I am simply pointing out  
22 what I think is common ground to be a factual correction  
23 that might need making.

24 THE CHAIRMAN: Yes.

25 MR BEAL: Then it said:

1           "... and held that much more of a causative  
2           connection would need to be shown than merely the  
3           overcharge being taken into account in the claimants'  
4           business planning. Both factors were endorsed by the  
5           Court Of Appeal in Stellantis"

6           Which we just went to.

7           Could we then please turn at page 96 to 223  
8           {AB-D/37/96}, and please could I invite you to read 223.  
9           (Pause)

10          THE CHAIRMAN: Shall we go over the page.

11          MR BEAL: Top of the next page.

12                 Next, please, at page 98, 228, this is where we come  
13                 on to deal with the four factors that the learned panel  
14                 member Mr Tidswell referred me to before the short  
15                 adjournment. Please could I invite to you read 228  
16                 {AB-D/37/98}. (Pause)

17                 Those four factors, in our submission, are  
18                 quintessentially a valiative criteria which feed into  
19                 a multi-factorial assessment as a matter of fact of  
20                 whether or not an overcharge has led to the act of  
21                 mitigation, and they are primarily matters to be  
22                 resolved on the full suite of evidence before the  
23                 Tribunal.

24                 Now, in contrast, if we look, please, at  
25                 paragraph 230 {AB-D/37/99}.

1 PROFESSOR WATERSON: Can I just raise a question. Surely in  
2 order to be a claimant you must have knowledge of the  
3 overcharge?

4 MR BEAL: Not necessarily, because in a secret cartel, for  
5 example you, might --

6 PROFESSOR WATERSON: No. But in this case, or in *Trucks* --  
7 no, not in *Trucks*, but in this case?

8 THE CHAIRMAN: Not in *Trucks*, they were not ...

9 PROFESSOR WATERSON: No, but in this case.

10 MR BEAL: In this case to be a claimant you need to have  
11 paid the MSCs which bore an overcharge on the MIF.  
12 There are a whole suite of claimants who had no  
13 visibility of the MIF as part of the MSCs they were  
14 paying and they would not have known what proportion of  
15 the MSC they paid was attributable to the MIF, and they  
16 are mostly blended claimants.

17 If the point that is being put to me is an  
18 evidential one that most of my claimants for a  
19 significant period of time have been on IC++ pricing,  
20 you are absolutely right, sir, that that lists out the  
21 MIF as a component, and one would know what one has been  
22 billed for the MIF. One would not necessarily know it  
23 was an overcharge until such time as one had established  
24 liability, and so it is the liability process in Trial 1  
25 that gives rise to knowledge that is indeed an

1           overcharge because it has been wrongly charged and it is  
2           the prima facie measure of loss.

3           That is assumed for the purposes of this hearing,  
4           but it is the assumption that we all must work on.  
5           I hope that answers your question.

6           Could we then please go back to paragraph 230,  
7           page 99, and could I invite you, please, to read that  
8           paragraph {AB-D/37/99}. (Pause)

9           Could we then please move on to page 212,  
10          paragraph 564 {AB-D/37/212}. Two final paragraphs from  
11          this decision before I move on to the Court of Appeal.

12          564 says in terms that costs recovery is not  
13          sufficient by itself:

14          "All businesses seek to recover their costs and make  
15          a profit. But in itself, that tells you nothing about  
16          whether a price increase has been caused by an increase  
17          in costs."

18          Over the next page, please, paragraph 566, page 213  
19          {AB-D/37/213}:

20          "Mr Bezant also relied on various scatter plots  
21          which he said illustrated the relationship between costs  
22          and prices. However, a relationship does not mean that  
23          a very small increase in one particular cost input would  
24          inevitably lead to a price rise. The general  
25          proposition of a relationship cannot itself prove the

1           requisite causation."

2           So we say that those are valuable insights, with  
3           respect, from this Tribunal.

4           Let us see what the Court of Appeal made of it  
5           because a challenge was then brought by DAF --

6       MR TIDSWELL: Just before you do, Mr Beal, we had our  
7           attention drawn to the end of 573. Do you mind if we  
8           have a quick look at that?

9           So:

10          "While the four factors are not themselves decisive  
11          or necessary, we think that in a situation where none  
12          are present, the evidence of factual causation needs to  
13          be that much stronger so that the requisite proximity  
14          can be established."

15          It seems to be drawing a distinction between the  
16          four factors and the factor of causation.

17       MR BEAL: Well, in a sense this gets back to the nub of the  
18          issue, which is what does legal causation mean in and of  
19          itself. Does it have a bespoke meaning, and that is  
20          something that then bedevilled the analysis of this  
21          judgment on appeal, because DAF certainly said, well,  
22          the wrong test has been applied, all we have to show is  
23          but-for causation of the pass-on, and the direct and  
24          proximate link is not part of the legal test, and that  
25          was rejected.



1           If one looks at the top of 573, the learned Chairman  
2 then said, or the Tribunal said:

3           "... we do not think that DAF can satisfy the test  
4 for causation ..."

5           That is not the same thing as legal causation, which  
6 is a policy-driven -- it is a retrenchment on an  
7 established avoided loss in favour of the claimant, so  
8 it is rowing back from -- I mean, let us just break this  
9 down, if we may, for a moment.

10          A claimant against a tortfeasor establishes loss on  
11 the basis of establishing, but for the infringement,  
12 that loss would not have been suffered. So that is the  
13 but-for test. There is then a separate analysis where  
14 the onus shifts to the defendant to say, well, you have  
15 suffered that in principle, but in fact, looking at what  
16 has gone on here, you have managed to get that loss from  
17 another source, you have managed to avoid that loss by  
18 getting money from another source, and that stands in  
19 the stead of the compensation I am otherwise going to  
20 have to give you.

21          So it is the tortfeasor praying in aid a series of  
22 combinations to say: I do not have to pay you the  
23 compensation otherwise I would have to pay because, as  
24 luck would have it, you have got the money somewhere  
25 else.

1           There is then a policy issue as to whether or not  
2           certain forms of money that are going to set off against  
3           the compensation otherwise payable are to be taken to  
4           reduce the level of compensation payable.

5       MR TIDSWELL: There is a step in between, is there not,  
6           which is can you establish on a but-for basis that there  
7           has been an avoidable loss?

8       MR BEAL: There is a separate question then as to what is  
9           the legal test for establishing factual causation, and  
10          none of these authorities have ever said the legal test  
11          is simply but-for causation. They do not say that.  
12          They say you have to show a sufficiently close causal  
13          connection. That then gets translated into a direct and  
14          proximate link in *Stellantis*. It is applied in the  
15          *Trucks* strikeout, it is applied in *Stellantis*, it gets  
16          adopted by Lord Justice Green in *Stellantis*, and it is  
17          then followed by this Tribunal in *Royal Mail*, and it is  
18          endorsed by the Court of Appeal in *Royal Mail* as being  
19          the test.

20       THE CHAIRMAN: I mean, that last sentence does refer to  
21          establishing the requisite proximity.

22       MR BEAL: As a matter of factual causation.

23       THE CHAIRMAN: Yes, yes.

24       MR BEAL: I will show you in 150 at 151 of the Court of  
25          Appeal's judgment where they talk about legal causation,

1           and then at the top of 151 they say:

2                 "As regards factual causation ..."

3           They then go to endorse the test that the Tribunal  
4           has just said.

5           So I appreciate that the term "legal" has bedevilled  
6           this, and it was used, if I may say so, in a slightly  
7           odd way in certain circumstances in an obiter dictum  
8           comment in the Supreme Court, where it was not entirely  
9           clear what they meant by "legal causation". That is  
10          then unravelled in *Stellantis* and in *Trucks* Court of  
11          Appeal where Lord Justice Green, and subsequently the  
12          Chancellor, say what sort of things are legal causation?  
13          When does legal causation operate not to give effect to  
14          the otherwise outcome that would be produced by factual  
15          causation?

16          It is probably easiest to explain this by looking  
17          back at the bipartite approach in the Court of Appeal in  
18          *Trucks*. It is {AB-D/43/52}. Could we start, please, by  
19          turning to page 44 {AB-D/43/44}, paragraph 112, so that  
20          you can see the submission that was made by Mr Ward on  
21          behalf of Royal Mail. Could I invite you, please just  
22          to read 112. It is probably going to be quicker.

23       THE CHAIRMAN: Which paragraph?

24       MR BEAL: 112. (Pause)

25       MR BEAL: That submission is not saying do we need to show

1 on a counterfactual hypothetical basis whether or not,  
2 but for the overcharge, prices would have been lower in  
3 the counterfactual, it is saying: can it be shown that  
4 this tiny cost actually caused a price increase? That  
5 is the way that Mr Ward was putting his submissions to  
6 the Court of Appeal.

7 What we then see, at page 52, please, paragraph 149,  
8 the Court of Appeal endorses Mr Ward's description of  
9 DAF's case as "strikingly ambitious". They then endorse  
10 the suggestion that:

11 "The idea that this tiny amount could not only be  
12 traced to the price of the claimants' individuals  
13 products, but that it is then possible to establish that  
14 it caused a price increase, seems to me completely  
15 unreal. Even Mr Ridyard's dissenting opinion concluded  
16 that the specific downstream impact ... was too small to  
17 be measured."

18 So that is the same position we are in.

19 150:

20 In its argument ... DAF raises the somewhat elusive  
21 distinction between legal causation and factual  
22 causation in relation to mitigating conduct. In my  
23 judgment the distinction is clearly and usefully  
24 explained by the CAT in the MIF Umbrella Proceedings  
25 judgment quoted at [83] above. Factual causation

1 involves consideration of whether the effect of the  
2 mitigating conduct was in fact to reduce or eliminate  
3 the Claimant's loss, whereas legal causation concerns  
4 whether, even if the effect of the mitigating conduct  
5 was in fact to reduce or eliminate the claimant's loss,  
6 as a matter of legal policy, it should serve to reduce  
7 or eliminate the damages payable by the defendant to the  
8 claimant."

9         So what does that mean, unpacking it slightly, if we  
10 may? Once you have established factually that  
11 a claimant has in fact avoided its loss by passing it  
12 on, in fact, to another person, a third party, or  
13 recovering the money from some other means, there is  
14 then a legal policy issue: should the claimant  
15 nonetheless have to surrender part of its compensation  
16 on that basis?

17         We then see the classic example of that is an  
18 indemnity obtained under a contract of insurance, which  
19 is the example I gave earlier, if I had taken out  
20 a luxurious personal injury compensation insurance  
21 policy.

22         Other examples then identified by Lord Justice Green  
23 is the question of whether or not the loss itself is too  
24 remote. That does not concern us, because we have  
25 ex hypothesi overcharge, standards of loss, and the

1           simple factual question is: have we passed on that loss  
2           to anyone else? Then you have novus actus, which again  
3           does not concern us. So we are not in any of the  
4           categories of legal causation identified in this  
5           judgment.

6       MR TIDSWELL: Well, you could say that proximity is not that  
7           dissimilar to remoteness, could you not?

8       MR BEAL: Well, proximity is -- part of the test for  
9           remoteness in tort necessarily looks at whether or not  
10          the loss is -- well, whether or not it is reasonably  
11          foreseeable that the loss would have occurred, and the  
12          contractual test is obviously reasonable contemplation  
13          of the parties. That is part of the remoteness test.  
14          That is not the same as saying you have to have  
15          a sufficiently close causal connection, because  
16          remoteness comes in to say you have established  
17          causation, it is just that the particular head of loss  
18          that you are relying on is too distant to be recoverable  
19          as a matter of the scope of the duty of care. So it is  
20          a different ...

21       THE CHAIRMAN: That is Wagon Mound.

22       MR BEAL: Wagon Mound is -- Wagon Mound No 2 is the classic  
23          judgment for tort, and reasonable contemplation of the  
24          parties for contract. I am testing my university  
25          knowledge of the contractual principles. Victoria

1 Laundry, I am told by Mr Sebastian who has spared my  
2 blushes. He is not even that much closer to university  
3 than I am, but there we are. That is just my fading  
4 memory, sadly.

5 So that is the -- we say that is the analysis.  
6 Then, and this is the key point, in my respectful  
7 submission, we then see in paragraph 151:

8 "In terms of factual causation, DAF could only  
9 succeed in its argument ... if it could establish that  
10 the prices charged by Royal Mail and BT to their  
11 customers were higher because of the overcharge [or] in  
12 other words if [they] could establish ... that the  
13 overcharge had been passed on to those customers. The  
14 CAT was unanimous as to this requirement at 223 ..."

15 Then you have seen the test that I cited right at  
16 the start.

17 So unpacking the sequential case law, one sees how  
18 this has come to be where it is as a direct and  
19 proximate causative link as being part of the  
20 requirement of the terms of factual causation. Because  
21 the Court of Appeal have put it in the factual causation  
22 pigeonhole, that is the legal test they have set.  
23 Overconcentration on the phase "legal" is, with respect,  
24 unhelpful, not least because of the elusive distinction  
25 between so-called legal causation and factual causation.

1 THE CHAIRMAN: In the Supreme Court in *Sainsbury's*, did they  
2 go through a couple of cases concerned with novus actus  
3 and/or ... or was it sort of collateral advantage?

4 MR BEAL: It was collateral benefits, I think, yes, largely  
5 through the Westinghouse approach, which traditionally  
6 has been the more significant one in practice.

7 Then 154, please, page 53 {AB-D/43/52}, we see a  
8 summary of the overall approach, the four factors and  
9 the conclusion that is reached:

10 "In circumstances where none of the four factors  
11 which might establish the requisite degree of proximity  
12 to establish a direct causative link between the  
13 overcharge and the prices charged by the claimants is  
14 present, it is both logical and common sense to conclude  
15 that there would need to be some other evidence of  
16 factual causation."

17 So these factors are being treated as indicia of the  
18 legal test for factual causation to establish the  
19 requisite degree of proximity.

20 Of course that is a legal test, because it is part  
21 of the common law, but it is a legal test that goes to  
22 establish whether or not factor -- whether or not there  
23 is a factual causative link between an overcharge and  
24 a subsequent avoidance of that loss by an act of  
25 mitigation, and that is the test we say needs to be met.



1           Now, it has been said against me that somehow the  
2           tribunal has already ruled on legal causation, and  
3           therefore I am shut out from relying on the Court of  
4           Appeal telling us what the answer to the factual  
5           causation test is. With the greatest of respect, that  
6           is wrong.

7           Could I please pick it up at {RC-D/9/1}. In  
8           paragraph 4, we have the Chancellor refusing permission  
9           to the then umbrella claimants to appeal against  
10          a ruling on pass-on from July 2022, and in paragraph 4,  
11          one sees:

12          "Contrary to [the skeleton argument advanced by the  
13          claimants in that case] the CAT did not conclude that no  
14          factual enquiry was required. It recognised there was  
15          a factual enquiry involved but that is part of factual  
16          not legal causation: see for example [50(3)] of the  
17          judgment ... the CAT did not fail to appreciate the need  
18          for a causal connection between the overcharge and act  
19          of mitigation as recognised in Royal Mail and  
20          Stellantis."

21          So when an appeal was brought against the pass-on  
22          ruling from July 2022, the Chancellor rejected the  
23          permission to appeal application specifically on the  
24          basis that the CAT had treated factual causation  
25          differently from legal causation and still recognised

1 the need for a causal connection between the overcharge  
2 and the act of mitigation.

3 When one goes to the underlying paragraph,  
4 subparagraph 2 of the July '22 judgment, which I think  
5 you were taken to -- for your note {RC-D/7/24} -- that  
6 is the classic distinction between legal causation on  
7 policy grounds and factual causation as a matter of  
8 fact.

9 So one sees subparagraph (ii):

10 "Legal causation concerns the question of whether -  
11 even if the effect of the alleged mitigating conduct  
12 was, as a matter of fact, to reduce [the] loss - as  
13 a matter of legal policy it should serve to reduce or  
14 eliminate the amount of damages."

15 That is the same test that the Chancellor applied in  
16 *Royal Mail v Trucks*.

17 In the subsequent ruling on legal causation, that is  
18 {RC-D/26/4}, one sees, paragraph 7, the learned  
19 President endorsed -- sorry, recognised the comfort in  
20 the assessment that the CAT had given as to the  
21 appropriate approach by the endorsement given in the  
22 Court of Appeal, at paragraph 150:

23 "... which states the law as it has previously been  
24 stated by the Supreme Court and this Tribunal."

25 So the Tribunal did not think it was taking any

1 different approach to the issue of legal causation. It  
2 did not think that the Supreme Court's decision in  
3 *Sainsbury's* said anything different on legal causation  
4 to Royal Mail, but that does not change the fact that  
5 the test for factual causation is then clearly set out  
6 in paragraph 151 of the *Trucks* decision, endorsing the  
7 CAT's approach to the question of factual causation.

8 I understand that the defendants do not like it  
9 because they want to run the: it is sufficient that this  
10 has been accounted for in your accounts and, over the  
11 long-run, all costs are variable and everything will be  
12 recovered and it all comes out in the wash. I  
13 understand they want to run that point. But it is  
14 flatly inconsistent with the rejection of the parallel  
15 argument in *Trucks*, which did not find favour either  
16 with the CAT, and subsequently endorsed by the Court of  
17 Appeal.

18 The final point on this is simply to give you the  
19 statement of fact that the Supreme Court on 27 June this  
20 year rejected permission to appeal to DAF against the  
21 Court of Appeal's judgment. So if the Court of -- if  
22 the Supreme Court had thought that there was something  
23 odd between *Sainsbury's* and the Court of Appeal's  
24 adjustment in *Trucks*, they would have given permission,  
25 but they did not. Or one can infer that DAF is highly

1           likely to have said there is a conflict here between  
2           *Sainsbury's* and *Trucks* Court of Appeal, because that is  
3           how they had to run the argument, in the same way they  
4           did at first instance.

5       THE CHAIRMAN:   So when the Supreme Court said legal  
6           causation is straightforward in this case.

7       MR BEAL:   It is, because I am not raising any *novus actus*  
8           *interveniens* --

9       THE CHAIRMAN:   So do you say they were thinking of those  
10           policy reasons why causation might not -- or why it  
11           might not reduce the damages payable?

12      MR BEAL:   If we have suffered an overcharge and we have  
13           passed it on through a surcharge to a customer, what  
14           legal policy reason is there for us to be able to  
15           recover that loss?   There is not one, because it is not  
16           our loss.   It has gone to the customer.   We recognise  
17           that.   There is no *novus actus interveniens* in that  
18           case.   There is no remoteness issue.   It is very  
19           straightforward.

20           Similarly, if there is a cost pricing model where  
21           all of the costs are simply passed on to the customer  
22           with a margin -- that is not our case, but if that were  
23           our case, I do not think we would be here.   So no legal  
24           causation issue arises.

25           So the consequence of that, we respectfully suggest,

1 is that *Trucks* does set the test. There is no basis for  
2 distinguishing it, contrary to the submissions from  
3 Visa.

4 I need to say something briefly on counterfactual  
5 analysis. Counterfactual analysis is not the test  
6 per se, but we recognise that, certainly in the context  
7 of a competition case, one way of analysing how prices  
8 and costs may work would be to consider on  
9 a counterfactual basis what the counterfactual analysis  
10 might look like. But as the CAT said in *Trucks*, and  
11 I took you to it, that cannot dispense with the need to  
12 show a direct and proximate causal link between  
13 a particular overcharge and a downstream pass-on of the  
14 costs, or indeed an upstream pass-on of the costs to  
15 other suppliers.

16 So you still have to satisfy the test, it is just  
17 the counterfactual analysis may add some insight as to  
18 whether or not the test is in fact met. But ultimately,  
19 there is a real world issue of fact, as I think  
20 Ms Tolaney King's Counsel said for Mastercard. Look at  
21 paragraph 215 of the Supreme Court in *Sainsbury's*. What  
22 they make clear is that ultimately this is a factual  
23 question, and so when the Tribunal historically, in  
24 managing this particular case, has been focusing on what  
25 is the evidence, let us get the evidence in and then

1 worry about these niceties, with the greatest of  
2 respect, that is a perfectly sensible approach, because  
3 these things have a habit of coming out in the wash.

4 The reason why this has now come to the fore is  
5 because the defendants have chosen to say there are  
6 implicit channels of pass-on, because you have set a  
7 particular margin target on an EBITDA basis, and  
8 necessarily the costs are wrapped up in your analysis of  
9 what the margin should be, and therefore you have  
10 implicitly recovered the costs over time through the  
11 conventional management processing budgetary processes.

12 Mastercard in particular have not shied away from  
13 that, that is their case, and they say that is enough to  
14 satisfy the direct and proximate test, and with the  
15 greatest of respect, it simply is not.

16 Visa is more interesting because yesterday Mr Jowell  
17 King's Counsel said if there is a direct and proximate  
18 test, I cannot meet it, I cannot meet that test, and  
19 therefore we have all been following this fool's errand,  
20 trying to hunt down the Quark, or whatever the analogy  
21 ...

22 THE CHAIRMAN: I do not remember him saying that, actually.

23 MR JOWELL: What I believe I said was if that is the test,  
24 we are not in a position to be able fairly to meet it  
25 because the evidence has not been produced by the other

1 side, because there has not been disclosure, and there  
2 has not been disclosure even by these very select ...  
3 I think it is 13 out of 600 claimants.

4 So if this is the case, that we are now being asked  
5 for each claimant to produce evidence of direct and  
6 proximate causation, I am afraid we must adjourn the  
7 trial, start again, and get full disclosure from all the  
8 claimants.

9 MR BEAL: The key phrase there was "for each claimant". So  
10 the case management decisions taken by this Tribunal  
11 over the last year and a half have been to recognise  
12 that you cannot sensibly have 2,000 claimants parade  
13 their wares before this Tribunal over a two and a half  
14 year trial, nor do we seek that. The sensible and  
15 practical course was to -- initially this Tribunal  
16 suggested a sampling procedure, and we were fully in  
17 favour of that. Subsequently there was a U-turn on that  
18 particular position, it is what it is, and the sampling  
19 procedure was dropped, largely because I think there was  
20 an anticipation that the parties were never going to  
21 agree a sample. I think that is ultimately what was  
22 motivating the Tribunal's response, but it is not for me  
23 to speculate.

24 We are then in a position whereby, at a hearing  
25 in January, it is said to us, well, what is the best you

1 can do? We said, well, we can give you ten of our  
2 claimants who represent the vast majority of the value  
3 of the claim, or the majority of the value of the claim,  
4 and the vast majority of the numbers of claimants, by  
5 reference to the biggest groups for each of these  
6 particular sectors. We can offer up their data. It  
7 will be a blind selection, because it will simply be by  
8 value.

9 Mr Moser came back after the short adjournment on  
10 January 10, 2024 and said: here are the ten. There was  
11 then some horse-trading, and what happened was certain  
12 data from certain of the big ten was not as good as  
13 certain of the data from one of the ones in the 10 to 20  
14 range, and so there were some substitutions made, with  
15 the experts' consent. This particular approach was  
16 directed by the Tribunal and followed and has not been  
17 subject to any appeal from either of the defendants as  
18 to it being procedurally unfair.

19 If now what is being done is to suggest that if you  
20 find against them, it has all been procedurally unfair,  
21 then, with respect, that is extremely uncomfortable for  
22 this Tribunal to have that as a sword of Damocles over  
23 its head. If it is to be suggested, in the light of  
24 hearing my opening submissions, that this entire  
25 procedure is unfair, then it seems to me it is incumbent



1           upon the defendants to make out that case now so that  
2           something can be done about it, if it needs to be, and  
3           they can go on appeal if they do not like the answer.

4           What, with respect, one cannot do is keep an alleged  
5           procedural irregularity up their sleeve and save it for  
6           the appeal in due course if there is something they can  
7           do about it now.

8       THE CHAIRMAN: Do you say these issues of proximity and  
9           directness can be determined by reference to the willing  
10          claimants, those that have provided some evidence?

11       MR BEAL: I am saying that the issue of direct and proximate  
12          causation can be established on the basis of the  
13          totality of the evidence before the Tribunal, and you  
14          will weigh that evidence in the usual way. It will be  
15          a multi-factorial assessment, again, as to whether or  
16          not the defendants have established, on the balance of  
17          probabilities, that there is a direct and proximate link  
18          between the overcharge that has been suffered by not  
19          just my claimants, but a particular sector. But  
20          obviously my claimants need to -- are the forefront of  
21          my concern with my claim, because it is my claim. But  
22          it is open to the Tribunal to reach a different view,  
23          for example, on the sector where I have no claimants,  
24          than it would be for a sector where I have a claimant,  
25          because you have better evidence where there is

1 a tangible claim before you. That stands to reason.

2 But, no, I am not suggesting you cannot reach  
3 a conclusion -- I am not suggesting that the only  
4 conceivable conclusion you can reach is that there is no  
5 pass-on because they fail to establish the burden of  
6 proof. I am saying they need to satisfy you on the  
7 balance of probabilities that there is a direct and  
8 proximate causal link between the overcharge and the  
9 specific -- the passing on of that loss to a downstream  
10 set of purchasers.

11 I mean, I do say, actually, that the supplier  
12 pass-on point, I am afraid, is rather dead in the water  
13 because there is simply no evidence for it, but that is  
14 a separate submission on a separate point.

15 MR JOWELL: Would it be appropriate for me to respond  
16 briefly now?

17 THE CHAIRMAN: It depends whether you want to finish --

18 MR JOWELL: A gauntlet has been thrown down that we should  
19 be making a case now, but I am entirely in your hands if  
20 you want to hear me briefly on this.

21 THE CHAIRMAN: Are you going to be making a case for an  
22 adjournment or something like that?

23 MR JOWELL: No, but I wish to correct the  
24 mischaracterisation of the position that has just been  
25 put forward.

1 THE CHAIRMAN: Well, I do not think it is appropriate for  
2 you to do that now. I think we should carry on.

3 MR JOWELL: I am grateful.

4 THE CHAIRMAN: If there is time at the end of today, maybe  
5 you can have that.

6 MR BEAL: We heard about land grab earlier. We have had  
7 time grab, and I am right up against it, because it is  
8 not fair for me to take up Mr Lask's time.

9 THE CHAIRMAN: We do have fewer claimants now with Primark  
10 going, so the timing was to take account of them.

11 MR BEAL: I accept that, sir. Absolutely.

12 Can I come on to some themes. I am going to give  
13 you a number for each of the themes, but I do not have  
14 time, I am afraid, to go through each of them.

15 THE CHAIRMAN: Yes.

16 MR BEAL: I am just going to deal with the core themes. The  
17 first core theme is the role of economic theory and  
18 econometrics, and the relationship here between law and  
19 economics, it really lies at the centre of quite a lot  
20 of the demarcation of the issues, and we make the simple  
21 point that economic theory should explain the real  
22 world, not dictate what it should be.

23 In support of that, one has the view of RBB and  
24 Cuatrecasas in a report that was sent to the  
25 EU Commission. This is at {RC-J1.4/53/66}. The learned

1 authors of that study, at paragraphs 108 to 110, have  
2 observations to make about the real world approach to  
3 economic analysis. Please could I invite you to read  
4 108 to 110. (Pause)

5 THE CHAIRMAN: Yes.

6 MR BEAL: If we could then please move in this document --  
7 sorry, to a different document, {RC-J1.4/19/29}. So  
8 this is part of the EU Commission's Guidelines which  
9 followed on from the RBB and Cuatrecasas report. So the  
10 Cuatrecasas report was part and parcel of a study. The  
11 Commission then reflects those findings in its study.

12 Here, please could I invite you to read recitals 124  
13 to 127.

14 I should interject that the Supreme Court in a  
15 paragraph I did not take you to endorsed that these were  
16 useful guidelines for national courts in looking at  
17 pass-on issues. (Pause).

18 THE CHAIRMAN: 126, did you say?

19 MR BEAL: 127, please. Pause.

20 If we could then please go to {RC-J1.4/53/180}. We  
21 are back in the RBB report, but it moves on to deal with  
22 a specific aspect of the tension between real world  
23 analysis and econometrics. Please could you read 481  
24 and 482 about the role of regression analysis in  
25 particular. (Pause).

1 THE CHAIRMAN: I think we need to go down or over.

2 MR BEAL: There is one final sentence on the next page

3 {RC-J1.4/53/181}.

4 So we invite the Tribunal to recognise that  
5 regression analysis has a role to play, but it cannot be  
6 unfaithfully applied regardless of the factual  
7 circumstances. I do not think it was ever the hope of  
8 this Tribunal that we would be able to plug in the data  
9 to a spreadsheet or model and it would produce a figure.  
10 If that was the ambition, nobody now supports the  
11 suggestion that that is what in fact has been able to be  
12 produced.

13 So that is issue 1, the role of economics and  
14 econometrics.

15 The second issue is identifying the relevant factors  
16 for considering the MIF or merchant service charge as  
17 a cost.

18 Here, please could we back to the EU Commission 2019  
19 Guidelines. That is {RC-J1.4/19/14}. Please would you  
20 be kind enough to read paragraphs 51 through to 53. 53  
21 is just over the page {RC-J1.4/19/15}. (Pause)

22 Then scrolling down, please, to recital 56, the  
23 guidelines note that:

24 "Other elements may, under certain circumstances,  
25 play a crucial role. For instance, one element which

1           might be important is whether the input affected by the  
2           overcharge represents a large or small share of the  
3           direct purchaser's variable costs. A direct purchaser  
4           may face costs when changing its prices, so-called price  
5           adjustments costs. If the overcharge only represents  
6           a small share of the variable costs, the direct  
7           purchaser may not find it profitable to pass on."

8           Pausing there. That of course all relates to the  
9           direct purchaser, but the same analysis must apply to an  
10          indirect purchaser where there has, in this case, been  
11          ex hypothesi 100% pass-on from the direct purchaser to  
12          the indirect purchaser, because it is the same --

13       THE CHAIRMAN: From the acquirer to ...

14       MR BEAL: From the acquirer, yes. That is what lies behind  
15          this, because we are not dealing with acquirer pass-on.

16          That, I think, is all I need to say on issue 2,  
17          which is the treatment of the MIF/MSK as a cost.

18          The next point is really how the costs are treated  
19          in practice. In practice, these costs are not  
20          identified with any degree of granularity. In the  
21          majority of cases, I would say the vast majority of  
22          cases, they are swept up within a broader category of  
23          cost, namely payment charges or even bank charges, and  
24          with one or two exceptions they are treated as overhead  
25          costs rather than COGS.

1           That is all I need to say on theme 3 at this stage.

2           Theme 4 is marginal versus fixed costs comparison.

3           A great deal of ink has been spilt on this. It has been  
4           generally recognised that formally, as a matter of  
5           economic theory, we recognise that MSCs payable increase  
6           with the number of card payments made, and therefore  
7           they are not a fixed cost by reference to a given level  
8           of output. That is vouchsafed also, for your note, by  
9           recital 193 of the Commission Guidelines. But that does  
10          not mean, we say, it is appropriate to treat them as  
11          a short run marginal cost which is likely to be a key  
12          determinant of price, as a matter of economic theory, if  
13          that is not in fact how they are treated in the real  
14          world.

15          Now, a number of factors which deal with the real  
16          world treatment of costs. Mr Economides deals with them  
17          in his second report. For your note, that is  
18          {RC-G/3/29-31}. I am not going to turn them up, let me  
19          just give you some examples.

20          First, he says COGS are a direct cost of production,  
21          but they can also include fixed costs such as factory  
22          overheads, storage costs, and sometimes depreciation  
23          expense. Overheads are indirect costs. Overheads can  
24          be variable, semi-variable or fixed, and I can give you  
25          some everyday working examples of this. Labour, for

1       example, in a hotel, based on seasonality, or in  
2       a restaurant based on a busy period over Christmas or  
3       Easter bank holiday, etc, they may call in more staff  
4       for one or two days to cover demand. So that will be an  
5       example where staff costs generally are fixed, but there  
6       is a variable element to them on the facts.

7           Electricity. Everyone knows that the standing  
8       charge would be a fixed component but you have a  
9       variable component with use.

10          Insurance. I can give you the example that we are  
11       all familiar with the Bar, for example, or indeed  
12       a solicitors' firm, where you have the standard cover  
13       you need to have with Bar Mutual, then you have the  
14       top-up in the market, so there is a variable element to  
15       the top-up aspect.

16          Even something like property costs; again, I am  
17       afraid I am citing the Bar, having suffered the scars of  
18       being finance officer for a set of chambers. When you  
19       have a lot people suddenly join you, you sometimes have  
20       to get an extension, and you have to get an annex close  
21       to your chambers building, and that represents  
22       a short-term change in property costs.

23          So nothing is going to be treated invariably as  
24       fixed or variable, and businesses simply do not operate  
25       looking at costs and say, well, that is fixed and



1           therefore I am not going to include it in my prices.  
2           That is variable. I include everything. They have a  
3           much more strategic and dynamic view of pricing which  
4           Mr Economides covers.

5           So variable costs we say represent the total sum of  
6           marginal costs. Marginal costs is the additional level  
7           of costs measuring the additional level of output.  
8           Given the level of production, there is a relationship,  
9           obviously, with variable costs. I am sorry, I need to  
10          slow down because I am going too fast for the  
11          transcriber.

12          We recognise conventional economic wisdom is that  
13          firms base on marginal costs -- they base their pricing  
14          on marginal costs. If, however, a firm does not treat  
15          a particular cost as a marginal cost, because it does  
16          not factor into its pricing, then it is no good simply  
17          saying, well, it should do. This is not where economics  
18          can tell a business how to run its business.

19          In terms of MSCs themselves, it is not a standard  
20          component of marginal cost, because an MSC is not paid  
21          on all transactions. Indeed, for some claimants, such  
22          as Three, it is a charge for a small proportion of the  
23          overall payments received. Most customers of Three have  
24          a direct debit in place. Even within card payments, the  
25          size of the MIF, and therefore the MSC, can vary

1 substantially. One needs only think of a business that  
2 has a high proportion of commercial card transactions  
3 where the commercial card MIF has been substantially  
4 higher, or indeed a business that has lots of  
5 cross-border transactions where, certainly post-Brexit,  
6 there was suddenly a spike in the MIF that was payable  
7 for interregional transactions, something that the PSR  
8 then decided that they were going to investigate.

9 So when pricing at the margin, the merchant cannot  
10 know ex ante what the marginal costs will be. What the  
11 merchant can do is come up with a statistical likelihood  
12 of what the cost is likely to be, based on past costs,  
13 but it is not a classic marginal cost that goes into the  
14 COGS analysis and which is therefore determinative of  
15 pricing.

16 This is not to say, therefore, the MSC has to be  
17 treated as a fixed cost. That is a false analogy, in  
18 our respectful submission. What it has to be treated as  
19 is what it is. If it is predominantly treated as an  
20 overhead cost, then what one should be looking for is  
21 the treatment by that merchant of overhead costs in  
22 general. If that merchant is indicative of the SSH  
23 claim, so, say, for example, you will hear evidence from  
24 Hilton. If the way that Hilton deals with things is  
25 likely, on balance, to be similar to the way that IHG

1           and Marriott and other hotel chains deal with things,  
2           then one can reach the view that it is reasonably  
3           representative of that particular claim. Whether or not  
4           it is representative of the sector more broadly can be  
5           determined on that basis, to the extent that it is  
6           recognised that hotels is in a sector by itself.

7           There is then a separate issue of can you roll out  
8           the treatment of hotels to the treatment of online  
9           travel agencies, for example. We say you cannot. Visa  
10          says you can. Visa -- I will come on to sectorisation  
11          in a minute, but that is a dividing line.

12          But we do say it is very important to look at the  
13          way that costs are in fact treated by the merchants in  
14          the real world.

15          That moves me on to my fifth point. That means,  
16          therefore, that the qualitative evidence in this case  
17          and the factual and expert industry evidence is very  
18          important to show pricing strategies, the way things  
19          work on the ground. If pricing is not simply cost-plus,  
20          which we will be wiser about at the end of the five-week  
21          period, but is based on perceived value, dynamic  
22          algorithms and so on, anticipated economic forecasts, if  
23          that is how pricing works in the real world, then one  
24          needs to bear that in mind on the question of pass-on.

25          For your note, the Commission Guidelines which

1 I have referred to several times now, recital 38, that  
2 is {RC-J1.4/19/12} confirms the importance of  
3 qualitative evidence. I do not have time to turn it up.

4 Next theme, please, timeframe: short-term,  
5 medium-term, long-run. I have taken you to *Trucks* where  
6 this Tribunal recognised that the defendants in that  
7 case had failed to identify the particular juncture in  
8 a 13-year claim period -- sorry, particular juncture in  
9 the series of regulatory changes of price where the  
10 overcharge would have been passed on. We say that it is  
11 impossible in this case for the defendants to show over  
12 a 13-year claim period, if they cannot do it within the  
13 first couple of accounting periods, by which I mean  
14 accounting year annual periods, then the chances of them  
15 showing that the costs are nonetheless meaningfully  
16 recovered in a subsequent decade or so in terms of  
17 proximate and direct link, is, with respect, hopeful.

18 We have addressed this generally at paragraphs 102  
19 to 112 of our written opening so I am not going to dwell  
20 on it now. But one simply cannot have a theoretical  
21 construct where one says, in terms, the claim period is  
22 a long one. That is true. Over the long-run, all costs  
23 are variable. Therefore, over the long-run all of our  
24 costs have been recovered. Because that is effectively  
25 indirectly relying on the budgetary management processes

1           that the Court of Appeal -- this Tribunal has said are  
2           not sufficient and which the analysis of the Court of  
3           Appeal in *Trucks* has endorsed.

4           It would also give rise to a slightly odd process  
5           whereby, if the claimant had simply brought a claim for  
6           the last two years, for example, that argument could not  
7           be raised against them, but it could be raised against  
8           everyone else, even though the evidence in substance  
9           would be exactly the same, i.e. no evidence of actual  
10          pass-on but relying on an inference over time.

11          The seventh issue is the choice of proxy cost.  
12          Visa's analysis essentially says that the proxy must be  
13          a variable cost because MSCs are a variable cost as  
14          a matter of economic theory. A variable cost as  
15          a matter of economic theory can be equated with  
16          a marginal cost which is a major determinant of pricing.  
17          A major determinant of pricing for most merchants is  
18          also that marginal costs will be COGS, and COGS is  
19          therefore the right proxy. That is the extended  
20          syllogism.

21          Our outline response is as follows: firstly,  
22          merchant service charges are not treated by merchants as  
23          a marginal cost in practice and do not feature at all or  
24          as a major determinant in pricing decisions. That is  
25          the universal evidence from these merchants, including

1       the one that is what I have described as the outlier.  
2       Each of them say: we did not actually factor the MSCs  
3       into account in our pricing.

4             Now, secondly, while MSCs are variable in economic  
5       theory, they are not treated by merchants as a marginal  
6       cost determinant of pricing. They are aggregated with  
7       other costs in a bucket of overheads costs, and that  
8       bucket of overheads costs, we will hear, does not give  
9       rise to a merchant making a distinction between the  
10      costs in that bucket based on whether they are fixed or  
11      variable, because it is simply not a factor that they  
12      bothered to take into account on the ground.

13            But it follows that a proxy that treats them as  
14      a significant marginal cost, even though they are  
15      treated as an overhead by the business, gives an  
16      incorrect categorisation or attribution to that cost in  
17      terms of the significance it has, the visibility it has  
18      in businesses' pricing. In a nutshell, that means it  
19      overstates the significance, and therefore overstates  
20      the likelihood of the costs being passed on.

21            Now, let me be clear, we do not say that this does  
22      not -- that this means increases in overheads do not at  
23      some point affect prices. They can and they do over the  
24      longer run influence firms' decisions as to whether or  
25      not to invest in a given set of infrastructure or to

1 enter or exit the market, and that has an indirect  
2 effect on market prices.

3 Increases in overheads can also affect firms by  
4 causing them to review margin targets, even if the  
5 change in the MIF would not, but those are not the same  
6 mechanisms by which COGS influence prices. So when you  
7 have a direct, sizeable, marginal cost that goes  
8 directly into the pricing mix, that is going to produce  
9 a very different analysis of pass-on from something that  
10 is indirectly taken into account in a margin review in  
11 due course that we do respectfully suggest does not meet  
12 the test for direct and proximate link, see Stellantis  
13 where the point is made.

14 Issue number 8 is the implications of the choices of  
15 proxy costs. Well, it is the obvious one, and I can  
16 take this very shortly indeed. If you choose a very  
17 large marginal cost as the proxy, and it has, as a  
18 matter of both economic theory and practice, a  
19 significant impact on pricing, then you are going to  
20 give that cost a significance it does not have in the  
21 real world.

22 Conversely, if you choose a proxy based on total  
23 overheads, regardless of whether or not they are  
24 variable, semi-variable or fixed, given that the  
25 merchants do not draw a distinction between those

1 categories within that pot, what you will get is a proxy  
2 for the way that the business treats a particular cost  
3 in practice, and indeed, as you have heard me say in  
4 opening already, because total overhead cost is used  
5 rather than the individual cost, that is going to give  
6 a higher degree of significance to the visibility of  
7 that cost in the overall pricing decision. So we are  
8 already further down the path of making it easier for  
9 the defendants to establish pass-on than we would have  
10 done otherwise.

11 If we simply said: the MIF is tiny, it is  
12 a component of a tiny cost, which is the MSC, there is  
13 no way you can model for that, we need to throw up our  
14 hands in the air and give up and go home, they would  
15 have been left with the burden of proof not being  
16 discharged regardless.

17 Now, we have engaged with the process, we have tried  
18 to find a proxy that has some meaning, and you will hear  
19 from Dr Trento that total overheads best reflects, in  
20 practice, the way that the merchants treat these  
21 individual costs.

22 It also provides, we say, a better fit with the  
23 recognition by RBB that the small size of a given cost  
24 may simply mean it has no discernible impact on pricing  
25 level at all. So if we turn, please, to {RC-J1.4/53/8},



1 we have RBB at this stage giving an independent expert's  
2 opinion for the benefit of the EU Commission. No axe to  
3 grind, no case to make.

4 We see, under the subheading, "Relevant cost  
5 effects", it says:

6 "On the other hand, small cost changes may have no  
7 influence on prices - at least not immediately - if  
8 firms incur 'menu' costs in adjusting prices, if there  
9 are rigidities affecting output adjustment, or if  
10 relevant change in costs is not identified as such."

11 So basically, if it does not meet the visibility  
12 threshold, it may simply get lost, lost in the wash. It  
13 gets put in a bucket that is bigger than merchant  
14 service charges and businesses simply do not take any  
15 notice of it as an individual component of a cost  
16 bucket.

17 If we see, please, in the same report, page 11  
18 {RC-J1.4/53/11}, the second paragraph down:

19 "An important practical consideration is whether  
20 pass-on rates estimated in a different set of  
21 circumstances provide an appropriate measure of the  
22 pass-on rate in the case at hand. For example, pass-on  
23 rates might differ according to the scale of the cost  
24 changes concerned or according to the input that is  
25 affected. This may be a particular issue when such

1 pass-on rates are used to estimate the effects of a  
2 (small) overcharge that cannot be identified directly."

3 So we have already committed to a process that gives  
4 the defendants a substantial benefit of the doubt in  
5 terms of making it more likely than not that pass-on is  
6 going to be easier to establish. We still say they have  
7 not surmounted the threshold, but we have at least  
8 engaged with them to the extent that we are trying to  
9 establish what the true position is by doing the best we  
10 can with the appropriate proxy.

11 What we respectfully suggest that should not give  
12 them licence for is picking a proxy cost that stacks the  
13 odds so firmly in their favour that it is almost  
14 impossible to say, other than pass-on must be 88.3% or  
15 whatever the Hitchhikers' Guide to the Galaxy  
16 computation is.

17 Sectorisation. I can take this very shortly indeed,  
18 because I am hoping to sit down very shortly to give Mr  
19 Lask his due. Sectorisation is both sides accusing the  
20 other of not having proper sectors. Visa have given us  
21 the ipse dixit of their internal classification with no  
22 witness evidence to support it. We have produced  
23 Mr Economides who is going to be cross-examined on his  
24 choice and his selection of sectors, and that will have  
25 to be battled out on the evidence.

1           Academic studies. My short point is there is not  
2 one that deals with MIFs or indeed MSCs. I will let  
3 Visa explain why studies on the incidents of excise tax  
4 on alcohol in the United States in the 1990s is going to  
5 give us a meaningful proxy in this case.

6           The eleventh issue is public data. Visa acknowledge  
7 that the analysis of public data is imprecise. What it  
8 amounts to is essentially comparing a standard index of  
9 consumer pricing against a standard index of product  
10 pricing, and that, I am afraid, does not have the  
11 granularity that would be required, it tells you nothing  
12 meaningful about this particular cost, and it give rise  
13 to endogeneity issues as recognised by Dr Trento, as  
14 well as admitted variable bias and measurement error.

15           The twelfth issue is going to be the analysis of the  
16 merchant data. That is going to be battled out in  
17 cross-examination between the experts and I cannot say  
18 more about it now for time reasons.

19           Surcharging. We recognise surcharging can amount to  
20 mitigation of loss, and in our written opening we  
21 suggest a practical outcome to it.

22           Supplier pass-on, the fourteenth issue. I have  
23 ended up with 14 points, I am afraid. I know  
24 Georges Clemenceau criticised Woodrow Wilson for having  
25 14 points, on the basis that he said the good Lord only

1           had ten, but I have ended up with 14.

2           Supplier pass-on. We say, with respect, it is  
3           speculative and not made out on the evidence. It is an  
4           ambitious submission. The idea that a very large  
5           multinational company has deliberately held off from  
6           negotiating the best rate from a supplier in order to  
7           give itself, I do not know, some perceived ability to  
8           pass on an overcharge in due course through that route.  
9           Mr Ridyard had the best approach to it, with respect, in  
10          his dissenting opinion, when he said even as a matter of  
11          economic theory it does not work. So the fact that it  
12          does not work as a matter of fact and/or evidence here  
13          is hardly unsurprising. The only surprise for me is  
14          that it is still persisted with as a submission, but  
15          that is getting slightly churlish when I should be  
16          sitting down.

17          I do have quite a lot of responsive points to the  
18          other openings, but I have been slightly squeezed on  
19          time, and if I start, I will not be able to finish, so  
20          I will park that until closing, which is probably the  
21          more appropriate time to wrap all the points in anyway.

22          Unless I can be of further assistance, those are our  
23          submissions in opening.

24       THE CHAIRMAN: Thank you very much, Mr Beal.

25          Mr Lask, shall we take our ten-minute break now?

1 MR LASK: That seems sensible.

2 THE CHAIRMAN: Yes, okay.

3 (3.07 pm)

4 (Short Break)

5 (3.17 pm)

6 Opening submissions by MR LASK

7 THE CHAIRMAN: Yes, Mr Lask.

8 MR LASK: May it please the Tribunal. I propose to

9 structure my opening submissions under five headings.

10 First, I will briefly introduce the Allianz  
11 claimants and some of the key terms that you will hear  
12 in relation to their claim.

13 Second, I will make some very brief supplementary  
14 submissions on the applicable legal framework.

15 Third, I will address some key factual matters that  
16 we say render pass-on inherently implausible in  
17 Allianz's case.

18 Fourth, I will outline the approaches taken by the  
19 defendants' experts in respect of Allianz and highlight  
20 some of the key deficiencies in their analyses.

21 Finally, I will outline Mr Murgatroyd's holistic  
22 analytical approach on behalf of Allianz.

23 So turning first to the Allianz claims. The Allianz  
24 claims are for losses suffered by six entities. LVIC,  
25 Fairmead and Allianz plc are insurance underwriters.

1 ABSL, Home and Legacy, Pet Plan are, or were, insurance  
2 brokers. The Tribunal may recall that the claims of  
3 ABSL and Home and Legacy have been assigned to another  
4 Allianz company, Allianz Holdings plc, which has been  
5 substituted as a claimant in their place.

6 Since underwriting and brokering are different  
7 economic activities, the experts have generally assessed  
8 the issues separately for underwriters and brokers. It  
9 bears emphasis, however, that the Allianz underwriters  
10 account for the overwhelming majority of the claim  
11 value, some 97%, and LVIC, one of the underwriters,  
12 accounts for some 89% of the claim value on its own. So  
13 whilst evidence has been provided in these proceedings  
14 by LVIC, Fairmead and ABSL, much of the focus, both in  
15 the evidence you will hear and in my submissions, will  
16 be on the analysis and the issues as they apply to LVIC.

17 Now, Allianz are in a somewhat unique position at  
18 this trial because we are now the only party that is  
19 concerned with pass-on in relation to a single claimant  
20 or a single claimant group, so, in a sense, we are  
21 a microcosm of the issues ventilated by the other  
22 parties today and yesterday. I hope the Tribunal will  
23 forgive me for taking a more Allianz-centric approach  
24 than others have been taking.

25 Turning then to the key concepts. There are four

1 key terms that are unique to the Allianz claimants and  
2 which the Tribunal will be hearing lots about.

3 First, premiums. These are obviously the prices  
4 charged to customers by underwriters for insurance  
5 products. More specifically, when seeking to measure  
6 the impact of costs on prices, most of the experts in  
7 this case have used gross written premium as a relevant  
8 measure of price. This refers to the total premium  
9 across the lifetime of the policy, associated with  
10 policies sold in a given month.

11 The second key concept is claims costs. These are  
12 the payments that an underwriter is required to make in  
13 order to compensate for any loss or damage covered under  
14 one of its policies. Unlike MSCs, which are a function  
15 of the price paid by a customer and the method of  
16 payment, claims costs cannot be known at the time  
17 a policy is sold, so underwriters must predict possible  
18 future claims costs and use those predictions to help  
19 determine their premiums.

20 It will not surprise the Tribunal to hear that the  
21 modelling of possible future claims costs is a complex  
22 exercise, and it will not surprise the Tribunal to hear  
23 that claims costs are the largest and most important  
24 cost item incurred by underwriters and, as such, they  
25 play a central role in the price setting process.

1           Third key concept: non-claims costs. These are all  
2 remaining costs incurred by underwriters other than  
3 reinsurance costs. They include a wide variety of  
4 different costs which, according to the evidence, may be  
5 treated differently from each other for pricing  
6 purposes.

7           Some of the most important non-claims costs are  
8 management expenses and commissions paid to price  
9 comparison websites such as Compare the Market.

10          Fourthly, GI direct. This is the subcategory of  
11 management expenses in which MSCs, and therefore MIFs,  
12 sit. It is important for two reasons. Firstly, there  
13 is a measure of common ground between the experts that  
14 if LVIC's prices were going to change in response to  
15 a change in the MIF, it would most likely be via  
16 a change in a larger category of costs containing the  
17 MIF. Secondly, GI direct is the most granular larger  
18 cost category containing the MIF that is reported in  
19 documents that are made available to the LVIC pricing  
20 team when setting prices. It is for those reasons that  
21 Mr Murgatroyd identifies GI direct as his preferred  
22 proxy for econometric purposes, although, as I will show  
23 you, Mr Murgatroyd does not confine his analysis to  
24 GI direct.

25          So before leaving the first of my five headings,



1 I make this point: both Visa and Mastercard have made  
2 submissions criticising the disclosure provided by the  
3 claimants in this case. It is not clear whether those  
4 criticisms are directed at Allianz but, if they are,  
5 they are unfounded. Allianz has given extensive  
6 documentary and data disclosure, the parameters of which  
7 were set by the experts, and by way of illustration, it  
8 has disclosed over 2,000 documents, which is more than  
9 most of the other claimants put together, and one will  
10 see that in a table in Mastercard's skeleton at  
11 paragraph 85 which is {RC-A/5/31}.

12 Now, of course, the Tribunal ordered a Redfern  
13 process to deal with outstanding disclosure requests.  
14 As part of that process, Visa chose not to pursue any  
15 further requests against Allianz, having considered  
16 Allianz's responses. Mastercard did have two  
17 outstanding requests; the Tribunal decided that they did  
18 not require any further disclosure. That is all  
19 I wanted to say on that point.

20 Moving then to my second heading: the legal  
21 framework. You will be pleased to hear I can take this  
22 briefly because we agree with and gratefully adopt the  
23 submissions of Mr Beal on the legal framework. That  
24 said, for the purposes of these submissions, I am  
25 prepared to assume that the defendants are right in

1           their submission that they need only prove but-for  
2           causation. I am prepared to make that assumption  
3           because, on the evidence as it stands, we do not need to  
4           rely on concepts of directness and proximity to meet the  
5           defendants' cases.

6           But-for causation requires the defendants to prove  
7           on the balance of probabilities that the MIF caused  
8           Allianz's premiums to be higher than they would  
9           otherwise have been. To put it another way, did the MIF  
10          make a difference to Allianz's prices? For reasons  
11          I will outline, the defendants cannot prove that it did.

12          Now, when deciding whether but-for causation is  
13          established, even if that is all that the defendants are  
14          required to prove, size matters. It matters for the  
15          reasons given, or at least alluded to, by the Court of  
16          Appeal in *Trucks* at paragraph 149, which you have seen  
17          at least once, namely because in the real world, where  
18          prices are set by reference to a multitude of costs and  
19          commercial judgments, a very small cost is less likely  
20          to make a difference to price as a matter of fact.

21          I do not need to take you back to the Court of  
22          Appeal's judgment, but it is paragraph 149 {AB-D/43/52},  
23          and the relevance of size is also referred to in the  
24          Commission's pass-on guidelines at paragraphs 51, 56  
25          {AB-E/6/14} and 186 {AB-E/6/39}.

1           So that is all I need to say about the legal  
2           framework and I move now to my third heading, the  
3           inherent implausibility of pass-on in Allianz's case.

4           Now, the majority of the evidence that the Tribunal  
5           will hear will be expert economic evidence, and that  
6           evidence is going to cover matters such as economic  
7           theory, proxy selection and econometric modelling. It  
8           undoubtedly has a role to play in helping the Tribunal  
9           decide the case, but it is also important, in my  
10          submission, to stand back from the detailed expert  
11          evidence and consider the likelihood of pass-on in light  
12          of the facts, and indeed, the Commission Guidelines that  
13          I just referred to emphasise that the insight derived  
14          from economic theory must be assessed in light of the  
15          available factual evidence. That is paragraph 50 of  
16          those -- or recital 50 of those guidelines at  
17          {AB-E/6/14}.

18          When one does stand back and consider the basic  
19          facts, in my submission, they demonstrate that pass-on  
20          is inherently implausible in Allianz's case.

21          The starting point is size. If I may, can I show  
22          the Tribunal the first expert report of Mr Murgatroyd,  
23          please, which is {RC-F/6/33}. This is a confidential  
24          table in which -- this is figure 6 -- Mr Murgatroyd sets  
25          out the MIF expressed as a percentage of total costs

1           separately for LVIC and Fairmead. You will see the blue  
2           bars are LVIC and the orange bars are Fairmead.

3           In my submission, that speaks for itself. The MIF  
4           is an extremely small proportion of total costs.

5           Another way of looking at it is -- another way of  
6           looking at the size of the MIF is as a percentage of  
7           revenue, and we have indicated in our skeleton argument,  
8           paragraph 39, that the MIF accounts for approximately  
9           0.2% of gross written premiums. So, again, very small.

10          Ms Tolaney yesterday gave some examples from the  
11          witness evidence -- she did not name the witnesses  
12          because I think it was confidential information. It was  
13          not our witness evidence, but she drew attention to some  
14          examples where the MSCs were 2% of revenue or, in one  
15          case, between 15 and 20-something % of revenue, and one  
16          can see that it is a much smaller proportion of  
17          Allianz's revenue and costs.

18          Now, it is fair to say that it may not be as small  
19          as the overcharge was in *Trucks*, but the fact that  
20          it may not be a Quark does not mean that it is not still  
21          very small. A proton is not a Quark; it is still very  
22          small indeed.

23          Indeed, Mastercard's and Visa's experts have both  
24          stated that the MIF is too small for any impact on price  
25          to be measured, even when using finely tuned econometric

1 techniques.

2 Now, Mr Murgatroyd disagrees. But even if they are  
3 right, the implication is not simply, well, let us just  
4 use a proxy instead, but rather, if the MIF is so tiny  
5 that any impact on prices would be too small to detect  
6 even through these sophisticated econometric techniques,  
7 that must be relevant to the likelihood that it had any  
8 such impact as a matter of fact.

9 THE CHAIRMAN: Do you say that Mr Murgatroyd disagreed that  
10 it was too small to be measured?

11 MR LASK: He disagrees that there is no value in attempting  
12 to measure it through a regression analysis. He carries  
13 out several regression analyses, one of which looked at  
14 the MIF itself, and he finds no statistically  
15 significant pass-on. He acknowledges that there are  
16 signal to noise issues because of the size and because  
17 of the relative lack of variation, but he still says it  
18 is informative and that weight can be placed on it.

19 Just before leaving this point altogether,  
20 Ms Tolaney yesterday urged the Tribunal to consider the  
21 MIF as a proportion of margins, rather than costs or  
22 revenue, but, in my submission, that does not tell you  
23 very much in this case. Firstly, none of the experts  
24 have sought to calculate the MIF as a proportion of  
25 Allianz's margins. Mr Murgatroyd, as I have shown you,

1 presents it as a proportion of costs which reflects the  
2 approach set out in the Commission Guidelines. Mr Holt  
3 just says size is irrelevant, and Ms Webster does not  
4 rely on any empirical evidence for LVIC at all. So  
5 saying you need to look at it as a proportion of margins  
6 does not really get you very far.

7 It is not altogether surprising that the experts  
8 have not regarded this as helpful, because looking at  
9 the MIF as a proportion of margins may well make it look  
10 larger, because margins are obviously smaller than costs  
11 and revenue. But the impact is superficial, because if  
12 one is looking at the MIF as a proportion of margins,  
13 one also has to look at other costs as a proportion of  
14 margins, so all the costs are scaled up in percentage  
15 terms.

16 So the point is that comparing the MIF to margins  
17 does not change its size relative to other costs, and it  
18 does not change the likelihood of it being drowned out  
19 by other costs in a price-setting process.

20 Now, I do not rely on size in isolation. The small  
21 size of the MIF, in my submission, has to be considered  
22 along the evidence about Allianz's price-setting  
23 process. I would like to show you, briefly, the witness  
24 evidence that has been put in on that issue, please. It  
25 is in the first witness statement of Mr Bodman, which is

1           in -- I think there is a non-confidential version of it  
2           we can look at, actually, at {NC-H2/2/4}.

3           You will see there, halfway down the page, the  
4           heading, "Overview of insurance pricing".

5           Paragraph 15:

6           On a very basic level, insurance written premiums  
7           are calculated by deriving the manufactured cost for  
8           providing the insurance cover which is then adjusted to  
9           produce the retail price which a customer would pay for  
10          the insurance."

11          At 16, he says:

12          "The insurance premium paid by the customer can be  
13          expressed in the following formula: X plus Y plus Z  
14          where X equals claims burn or risk cost, Y equals  
15          expenses, Z equals demand overlay, and X plus Y equals  
16          the manufactured cost."

17          So, broadly speaking, premiums are set through  
18          a two-stage process. Firstly, the manufactured cost is  
19          calculated and, secondly, that manufactured cost is  
20          adjusted up or down to produce the retail price, and  
21          that second stage is referred to by Mr Bodman as the  
22          demand overlay.

23          If one looks at paragraph 18, Mr Bodman deals  
24          firstly with the manufactured cost:

25          "The manufactured cost is the burn/risk cost

1 (i.e. what the expected claims cost of a given customer  
2 is, including the expenses associated with servicing  
3 that claim and running the business. The risk cost is  
4 expressed as a pound amount) of the insured customer  
5 calculated by the insurer, overlayed with other expenses  
6 provided by the finance team. This is typically  
7 calculated using the insurer's experience of historic  
8 claims from the various data sets collated ... and also  
9 forward-looking factors such as inflation."

10 So the manufactured cost, the first stage of the  
11 price-setting process, comprises what is called the burn  
12 cost, that is expected claims costs, and then other  
13 expenses, and those other expenses include variable  
14 costs and fixed costs, not that there is any explicit  
15 distinction between variable and fixed, but they include  
16 all sorts of cost.

17 If the Tribunal could just cast its eyes over  
18 paragraphs 19 to 24, really just skim-read them, because  
19 they explain the work that goes into calculating the  
20 burn cost, so modelling expected claims costs. (Pause)

21 THE CHAIRMAN: Down to 26, did you say?

22 MR LASK: Just down to 24.

23 THE CHAIRMAN: Okay, fine.

24 MR LASK: Thank you.

25 PROFESSOR WATERSON: These forums, they are Allianz forums,



1           are they?

2           MR LASK: Yes, internal Allianz forums, teams.

3           One sees at 25:

4           "On top of that 'burn cost', the technical  
5           excellence [I think that should be 'team'] working with  
6           the portfolio pricing team will overlay and allocate the  
7           expenses given by the finance team [which are explained  
8           further below] to generate what is referred to as the  
9           manufactured cost."

10          As I said, the manufactured cost contains the burn  
11          cost, which is expected claims costs, and other  
12          expenses.

13          The reason I draw attention to these passages is  
14          because one can see from them that the business places  
15          considerable emphasis on modelling expected claims costs  
16          so that they can be reflected in pricing, and that is  
17          unsurprising, in my submission. As I will show you,  
18          claims costs are by far the largest cost incurred by  
19          LVIC, so even modest changes in claims costs or errors  
20          in the modelling will have a material impact on profits.

21          PROFESSOR WATERSON: To what extent are you able to rely on  
22          other companies' information, other insurers'  
23          information? Because when you fill out one of these  
24          forms, say for Go Compare or whoever, then you have to  
25          put in a lot of information about what has happened over

1           the last five years or so. Do you check that, or do  
2           they check that, or what happens?

3       MR LASK: Is this a question about to what extent LVIC  
4           considers information from other insurers when setting  
5           its premiums?

6       PROFESSOR WATERSON: Yes.

7       MR LASK: I will come on to show you that there is a passage  
8           or two in the witness statement that deals with the  
9           relevance of competitor pricing, but that does not come  
10          sort of in a bottom-up way through applicants for  
11          insurance; it comes through market intelligence in  
12          something called the Pearson Ham report. I will show  
13          you that in a moment, if I may.

14       PROFESSOR WATERSON: Okay.

15       THE CHAIRMAN: So by this stage, no overheads have gone in,  
16          is that right?

17       MR LASK: No. Overheads go into the manufactured cost. The  
18          manufactured cost has broadly two elements to it. One  
19          is the burn cost, which is the expected claims cost, and  
20          then it has a whole load of expenses.

21       THE CHAIRMAN: So it is within the expenses pot, the  
22          GI direct?

23       MR LASK: GI direct would be within the expenses pot that  
24          goes into the manufactured cost.

25       THE CHAIRMAN: The MIF is within that?

1 MR LASK: It is.

2 THE CHAIRMAN: Yes.

3 MR LASK: It is.

4 If we could then turn, please, to page 8 and  
5 paragraph 33 {NC-H2/2/8}. This is where Mr Bodman deals  
6 with the second stage.

7 So paragraph 33:

8 "The retail portfolio team receives the manufactured  
9 cost from the technical excellence team and uses other  
10 factors to determine the ultimate price that is charged  
11 to the customer. The manufactured cost is not set on an  
12 individual customer basis, rather it sets a price  
13 against various perils that are then called upon as  
14 relevant when running a quote for a customer, after  
15 which the price is generated for the individual  
16 customer. For instance, the retail portfolio team  
17 considers whether the market will accept additional  
18 margin on top of the manufactured cost, or indeed  
19 a reduction in price from the manufactured price is  
20 required to meet our volume targets. To help model the  
21 customer's price elasticity and inform how they want to  
22 price on the market, the retail portfolio team will use  
23 data to predict what will happen if they set their  
24 prices differently, for example 2% higher or lower, and  
25 model how this would affect sales."

1           So pausing there. What Mr Bodman is explaining is  
2           that at this second stage, there are various other  
3           factors that LVIC considers and applies to the  
4           manufactured cost to produce a final customer price, and  
5           that process can result in the final customer price  
6           being higher or even lower than the manufactured cost.

7           Over the following paragraphs he goes on to identify  
8           a series of other considerations that are factored in to  
9           this assessment. I will take it briefly, if I may.

10          In paragraph 34, he deals with inflation and  
11          emphasises how important that is, particularly when it  
12          might be higher than previously thought, and that can  
13          affect the price. It may mean that a change in  
14          inflation has to be absorbed or it may mean there has to  
15          be an increase in the retail price.

16          Paragraph 36:

17          "Customer impacts are also considered at this stage  
18          (i.e. how would a customer feel if the renewal price was  
19          increased) and other key individuals such as the  
20          operations director are involved to ensure the impact on  
21          our customers is understood and to ensure that there is  
22          minimum customer harm resulting from a price change  
23          while achieving our commercial objectives. If price  
24          increases are implemented, the various teams work  
25          together ..."

1           Paragraph 37, he refers to the General Insurance  
2 Pricing Practices rules.

3           Paragraph 38:

4           "The retail portfolio team also considers other  
5 factors when setting the retail price. Other factors  
6 include customers and regulatory considerations which  
7 can significantly influence some of the pricing  
8 decisions. For example, if a customer was getting  
9 divorced the ... model might say that they are a worse  
10 insurance risk than when they were married and so we  
11 would charge more, but that would be a hard conversation  
12 with the customer and we want to make sure we are  
13 considerate of changes and not just following  
14 statistical models."

15          Then at 39 he refers to something called tactical  
16 trading:

17          "Tactical trading can help to refine pricing  
18 decisions. An example of tactical trading would be  
19 where LVIC/AZP decided that it is selling too many of a  
20 certain type of risk on its books (for instance, young  
21 inexperienced drivers) and therefore may increase its  
22 prices for that type of risk with the aim being to  
23 reduce its exposure to that particular risk. The  
24 reverse may equally apply if we wish to underwrite more  
25 of a certain risk type in order to balance the overall

1 portfolio. In effect, the tactical trading actions are  
2 moving an insurer's price position away from the  
3 modelled manufactured cost, and towards a position that  
4 is more influenced by market conditions and risk  
5 appetite."

6 PROFESSOR WATERSON: It sounds like a booking -- balancing  
7 the books.

8 MR LASK: I am not sure if that is how the clients would see  
9 it, but that may be a fair and reasonable  
10 characterisation.

11 Then the next passage I would like to show you,  
12 please, is paragraph -- sorry, paragraph 50 may go some  
13 way to answering Professor Waterson's question.

14 Paragraph 50:

15 "There is also a weekly Trading Forum which is  
16 essentially in theory a weekly mini MPUF. The Trading  
17 Forum will seek to react to whatever is happening at a  
18 quicker pace than MPUF. It will, for example, review  
19 the Pearson Ham report [that is what I was referring to]  
20 which provides a proxy view of how competitors are  
21 adjusting their rates."

22 So it is looking at the market and what competitors  
23 are doing as part of this price-setting process.

24 Then on page 14, please, paragraph 65, this is  
25 significant {NC-H2/2/14}:

1            "If the business is aware that it is going through a  
2            cost cutting exercise in a given financial year, the  
3            Pricing team would be involved in those discussions to  
4            ensure that any cost benefit from the cuts is accounted  
5            for when setting prices for the next 12 months. It is  
6            critical that pricing would be aware of these decisions  
7            so that they can be factored in. However, it does depend  
8            on the scale of the cost cutting. For example, the  
9            closure of a call centre with 20 people is unlikely to  
10           make a significant difference to our thinking, whereas  
11           if a reasonable proportion of the workforce (e.g. 200  
12           people) was planning on being offshored then this would  
13           be enough to make a difference to pricing  
14           considerations."

15           So naturally the business will look at cost  
16           reductions, and no doubt cost increases and, where  
17           appropriate, take those into account. But as Mr Bodman  
18           says, it really does depend on the scale of the cost  
19           change in question.

20           Just finally on page 15, paragraph 70 {NC-H2/2/15},  
21           Mr Bodman deals with renewal customers, and he makes the  
22           point there at 70 and indeed 71 that there is discretion  
23           to offer renewing customers or potentially renewing  
24           customers discounts if it looks like they might  
25           otherwise take their business elsewhere.

1 PROFESSOR WATERSON: Are those the calls that are answered  
2 quickly?

3 MR LASK: Yes, it is when you say that that is it, you are  
4 going to go to a rival insurer, and then suddenly you  
5 get put through to someone who has the discretion to  
6 offer you a better discount.

7 Just to sum up, it is clear, in my submission -- you  
8 will be hearing from Mr Bodman on Thursday, but it is  
9 clear, in my submission, on the written evidence, that  
10 the relationship between costs and premiums is very far  
11 from being fixed or mechanical. On the contrary,  
12 premiums are set based on a multi-factorial assessment  
13 which involves a series of commercial and economic  
14 judgments.

15 One can see, empirically, just how fluid the  
16 relationship is between cost and prices from some charts  
17 that we have set out in our skeleton argument. This is  
18 at {RC-A/2/15}. Paragraph 42 -- sorry, paragraph 41  
19 makes the point that I have just made: no mechanical  
20 relationship.

21 Paragraph 42:

22 "This is starkly illustrated by figures 9, 10 and 11  
23 from Murgatroyd 1 reproduced below."

24 Then if we go to the next page, please {RC-A/2/16},  
25 the first figure, figure 1, shows LVIC's margins in both



1 home insurance and motor insurance from 2014 to 2023.  
2 It is confidential so I will not read out any of the  
3 detail, but one sees that the margins vary considerably  
4 in both motor and home.

5 Mr Murgatroyd's evidence is that he relies on this  
6 as one of many pieces of analysis, but he says, well,  
7 this suggests that LVIC is not necessarily pricing to  
8 maintain a particular margin, implying that it does not  
9 always pass on costs, at least not in full, and at least  
10 not in the short-term.

11 Then figures 2 and 3 plot the evolution of total  
12 costs and gross written premiums. They do it separately  
13 for home and motor. So in each one the blue line is  
14 average GWP per policy, and the orange line is average  
15 total costs per policy. One sees that there is  
16 considerable volatility in costs but relatively less  
17 volatility in premiums, which, again, suggests, in  
18 Mr Murgatroyd's opinion, that premiums are not  
19 especially responsive to changes in costs.

20 Now, Mr Murgatroyd does find that over the longer  
21 term LVIC appears to broadly cover its costs, perhaps  
22 unsurprisingly, but he explains why that is not  
23 informative to the question of pass-on, and Mr Beal  
24 showed you why from a legal perspective cost recovery is  
25 not sufficient to prove pass-on.

1           If I could just show you briefly how, as  
2           a complement to that, Mr Murgatroyd explains that it is  
3           not enough from an economic perspective either. This is  
4           in Murgatroyd 1 at {RC-F/6/35}. Perhaps I can ask the  
5           Tribunal just to cast its eye, please, over  
6           paragraphs 153 to 160, where Mr Murgatroyd explains why  
7           cost recovery and pass-on are conceptually distinct.  
8           (Pause)

9           So that, in my submission, is entirely consistent  
10          with the legal position as shown to you by Mr Beal,  
11          namely that cost recovery cannot necessarily be equated  
12          with pass-on.

13          So to sum up under this heading, my third heading,  
14          the idea that a tiny cost increment represented by the  
15          MIF will itself have made a difference to Allianz's  
16          premiums, despite the preponderance of vastly more  
17          important costs, and despite the interposition of  
18          various commercial and economic judgments, lacks  
19          reality, in my submission. The reality is that any  
20          discernible difference that the MIF may make to the  
21          manufactured cost is likely to be drowned out by the  
22          impact of the many factors and commercial judgments that  
23          actually drive prices.

24          Now, none of that is to say you need not look at the  
25          expert economic evidence. Of course you should. But if

1           you find, having looked at that evidence, that it does  
2           not establish pass-on, then in my submission one should  
3           not be surprised, for the reasons I have just given.

4           I turn now then to my fourth heading which is the  
5           defendants' experts approaches. What I propose to do is  
6           outline the evidence relied on against Allianz and  
7           highlight some of the key deficiencies that will need to  
8           be grappled with during these proceedings. I will  
9           address Mastercard first, followed by Visa.

10          So the principal economic analysis for Mastercard is  
11          carried out by Ms Webster who then draws on  
12          a qualitative assessment carried out by Mr Harman for  
13          certain of her conclusions. The starting point is that  
14          neither of Mastercard's experts rely on any econometric,  
15          or any other empirical analysis, in respect of LVIC.  
16          Ms Webster did carry out a regression analysis for LVIC  
17          in her first report, using total costs as a proxy for  
18          the MIF, but she concluded that the results were  
19          unreliable due to limitations that she says the data  
20          suffer from, and due, she says, to the time available to  
21          her. So that analysis that she carried out is not  
22          relied on by anyone in these proceedings.

23          Now, Mr Murgatroyd disagrees with Ms Webster's  
24          reasons for disregarding the available empirical  
25          evidence. He explains in Murgatroyd 2 how the supposed

1 difficulties raised by Ms Webster could readily have  
2 been addressed, and indeed were addressed, by the other  
3 experts. Just for your note, that is Murgatroyd 2,  
4 paragraphs 113 to 127. We do not need to bring it up,  
5 it is at {RC-G/5/23}.

6 But whatever the validity of Ms Webster's reasons  
7 for abandoning her empirical analysis, we are where we  
8 are. No such analysis is relied on against LVIC. In my  
9 submission, that is a striking omission in circumstances  
10 where extensive price and cost data have been disclosed,  
11 where all of the other experts have advanced empirical  
12 analysis, and where Ms Webster herself accepts that an  
13 analysis which takes no account of empirical evidence  
14 may fail to reflect how merchants act in reality.

15 Again, just for your note, that is Webster 1,  
16 paragraphs 3.8 to 3.10 at {RC-F/14/33}.

17 Earlier today, Ms Tolaney, on behalf of Mastercard,  
18 identified the lack of merchant-specific quantitative  
19 evidence in Mr Merricks' case as a fundamental weakness  
20 in his case, and, in my submission, that is ironic in  
21 circumstances where Ms Webster's analysis suffers from  
22 exactly the same problem.

23 So what we have, instead of any empirical analysis  
24 is Ms Webster's theoretical base case approach, which is  
25 relied on by Mastercard to contend that LVIC not only

1           passed on the MIF but did so at a very high rate.

2           There are three basic steps to Ms Webster's  
3           approach. The first step is to develop a base case  
4           pass-on scenario based on economic theory and, in  
5           particular, a theoretical benchmark that Ms Webster has  
6           constructed. Unsurprisingly, the benchmark relies on  
7           a series of assumptions and the base case scenario is  
8           pass-on at 70 to 100%.

9           The second step is to identify three situations  
10          where pass-on rates might differ from the base case  
11          scenario.

12          Ms Webster's third step is to consider for each  
13          merchant claimant whether it is most likely that the  
14          base case scenario applies or whether one of  
15          Ms Webster's alternative scenarios may be relevant, and  
16          it is only at the third step that any LVIC-specific  
17          evidence comes into play. In order to see why  
18          Ms Webster concludes, at step 3, that the base case  
19          scenario should apply to LVIC, can we go, please, to  
20          Webster 1 which is in {RC-F/14/104}.

21          So you will see there, under the heading "Insurance  
22          Providers", paragraph 5.58. Could I ask the Tribunal,  
23          please, just to read paragraphs 5.58 to 5.60. (Pause)

24          Now, that is the entirety of Ms Webster's reasons  
25          for concluding that the base case scenario should apply

1 to LVIC, a mere three paragraphs. The Tribunal will  
2 obviously have to decide, having heard the evidence,  
3 whether that is sufficient to discharge Mastercard's  
4 burden of proof, but three points bear emphasis.

5 First, even taken at its highest, Ms Webster's key  
6 conclusion, at paragraph 5.59, is very tentative indeed.  
7 She says:

8 "On balance, I consider that Mr Harman's conclusion  
9 is consistent with insurance providers treating MSCs and  
10 their pricing decisions in a manner that economic theory  
11 would imply for a variable cost although I note there is  
12 some uncertainty regarding this."

13 In my submission, that falls a long way short of  
14 a conclusion that LVIC in fact passed on the MIF, still  
15 less at a rate of 70 to 100%.

16 Second, the only factual basis for Ms Webster's key  
17 conclusion is Mr Harman's assessment.

18 Third, Mr Harman's assessment is purely qualitative  
19 and extremely limited in its own conclusions. Just to  
20 illustrate that, could I please show you Harman 1, which  
21 is in this bundle {RC-F/13/49}. Again, if I could ask  
22 you, please, to read 4.3.1 to 4.3.4. (Pause)

23 So, in other words, to summarise, because LVIC may  
24 adjust its prices in response to overhead costs, and  
25 because overhead costs include MSCs, MSCs are likely to

1 feed in to LVIC's pricing process on an implicit basis.  
2 In my submission, in substance, all that does is  
3 identify a mechanism through which the MIF could have  
4 affected prices. But the fact that there may be  
5 a mechanism by which the MIF could have affected prices  
6 does not tell you whether it did as a matter of fact or  
7 even whether it was likely to.

8 It would be surprising if there was not a mechanism  
9 for LVIC, or indeed any business, to take account of its  
10 costs, when setting prices, for its costs to feed in to  
11 the price-setting process. It is a starting point to  
12 identify a mechanism but it is little more than that.

13 So standing back, what we have from Mastercard's  
14 experts is a highly theoretical base case scenario and  
15 a very weak factual basis for applying it to LVIC.  
16 Mastercard's argument that that is sufficient to prove  
17 its case on pass-on is, in my submission, strikingly  
18 ambitious.

19 Just for your note, Mr Murgatroyd explains why  
20 Ms Webster's heavy reliance on economic theory is  
21 unsound in his view at Murgatroyd 2, 106 to 108, at  
22 {NC-G/5/22}.

23 As regards the assumptions underpinning Ms Webster's  
24 theoretical benchmark, Mr Murgatroyd has explained that  
25 these do not apply in Allianz's case, and that is

1 Murgatroyd 2, 143 to 168 {RC-G/5/29}.

2 I have been focusing on LVIC. I should acknowledge  
3 that in relation to ABSL, the broker, Ms Webster does  
4 rely on an econometric analysis. However, Mr Murgatroyd  
5 explains that the ABSL data are not suitable for an  
6 econometric analysis, and Mr Holt and Mr Coombs agree  
7 with him in that regard. That is no doubt something  
8 that will be explored in cross-examination.

9 So turning then to Mr Holt's analysis on behalf of  
10 Visa. Like Ms Webster, Mr Holt leans heavily on  
11 economic theory and takes a relatively narrow approach  
12 to the factual evidence. Unlike Ms Webster, Mr Holt  
13 relies on econometric evidence but disavows qualitative  
14 evidence, whereas Ms Webster takes the opposite  
15 approach.

16 The cornerstone of Mr Holt's assessment is an  
17 econometric analysis, and his essential position is that  
18 the qualitative evidence adduced by Allianz is simply  
19 incapable of altering the conclusions that he derives  
20 from his regression, and that qualitative evidence  
21 includes Mr Bodman's statement which I just showed you.

22 Mr Holt's conclusion is that LVIC and Fairmead, the  
23 other underwriter, passed on over 100% of the MIF.

24 There are three key deficiencies with Mr Holt's  
25 approach that will need to be explored at trial. The



1 first is his choice of proxy. Mr Holt uses claims costs  
2 as a proxy for the MIF, but the problem with that, in my  
3 submission, is obvious. Claims costs are the largest  
4 and most important cost incurred by underwriters, and it  
5 is common ground that they are the main cost driver of  
6 premiums and are considered very carefully during the  
7 price-setting process.

8 So the fact that claims costs makes a difference to  
9 premiums is wholly unsurprising. It tells you very  
10 little about whether the MIF makes a difference too.

11 Second, even if the MIF was passed on, the point of  
12 a proxy is to provide a reasonable approximation of the  
13 rate at which this is likely to have occurred. But in  
14 this case, there are fundamental differences between  
15 claims costs and the MIF which, as Mr Murgatroyd  
16 explains, undermine Mr Holt's position. To be clear,  
17 Mr Holt's position is that the MIF was passed on at  
18 exactly the same rate as claims costs. That is a very  
19 ambitious proposition, in my submission.

20 Third, even leaving aside those issues, Mr Holt's  
21 estimates of the rate at which claims costs were passed  
22 on is inflated by a series of significant modelling  
23 flaws. Mr Murgatroyd has shown in his second report  
24 that once those flaws are corrected, the rate of pass-on  
25 falls considerably.

1 I will elaborate a little on those points, if I may.  
2 Firstly, if we could look at Murgatroyd 1 again at  
3 {RC-F/6/15}. One sees table 1. So I have already shown  
4 you how small the MIF is. This shows you how large  
5 claims costs are by comparison. I will not read out the  
6 figures because they are confidential, but you will see  
7 the first row of the table deals with the claims costs,  
8 far and away the largest cost incurred by LVIC.

9 So unsurprisingly, given their size, claims costs  
10 play a very important role in price setting. We saw  
11 that from Mr Bodman's evidence, and it is also evident  
12 from the documents. I will not -- I am not taking you  
13 to any documents now, but for your note, as a useful  
14 summary of what they show, in Murgatroyd 1,  
15 paragraphs 131 to 134.

16 So it is wholly unsurprising that claims costs makes  
17 a difference to premiums.

18 Apart from the size and importance of claims costs  
19 compared to the MIF, there are also other important  
20 differences that are highly significant in this context,  
21 and Mr Murgatroyd has explained why, in light of those  
22 differences, claims costs are simply not a suitable  
23 proxy.

24 If I can show you in Murgatroyd 1 where he deals  
25 with this. It is at page 47 {RC-F/6/47}. You will see

1 section 4.3.3, "Potential proxies for the MIF".

2 What he does firstly, in paragraph 222, is set out  
3 the criteria that he thinks a good proxy should satisfy.  
4 Firstly, that it be taken into account by the business  
5 when determining prices in a similar way to the way the  
6 MIF is taken into account. Secondly, over the page,  
7 that it be larger than the MIF, but not so large that  
8 this affects how it is taken into account when setting  
9 prices. Thirdly, the third bullet point, that it have  
10 similar economic features to the MIF.

11 Then at 223 he applies those criteria to a number of  
12 potential proxies, and you will see he deals with claims  
13 costs first:

14 "In contrast to the MIF, claims costs are not an ad  
15 valorem cost. By the same token again unlike the MIF,  
16 at least some drivers of changes in claims costs are  
17 likely to be market-wide. For example, claims costs  
18 incurred from paying out damages related to material  
19 weather-related events ... which would likely be common  
20 across competing insurers ... In addition, unlike the  
21 MIF, there is considerable volatility in the magnitude  
22 of claims costs, and uncertainty over when they will be  
23 incurred as described in subsections 2.3.1 and 3.5.1 ...  
24 Claims costs are also by far the largest costs incurred  
25 by insurance providers, and as a consequence are taken

1           into account directly when setting prices. In contrast,  
2           the evidence suggests to me that the MIF accounts for a  
3           small proportion of total costs and is not directly  
4           taken into account when determining prices. These  
5           material differences between claims costs and the MIF,  
6           mean that claims costs are unlikely to be a good proxy  
7           for the MIF in terms of having a similar pass-on rate."

8           You will see, on the next page, page 49, that he  
9           explains why he thinks GI direct is a good proxy:

10           "I understand that GI Direct is the most granular  
11           cost category containing the MIF that is reported in  
12           documents available to the LVIC pricing team when  
13           setting prices. I therefore consider that GI Direct may  
14           be a suitable proxy for the MIF, since if pass-on of the  
15           MIF were to occur indirectly this would be via changes  
16           in this cost category."

17           Then he sets out some disadvantages of using  
18           GI direct as a proxy, and he weighs them up and he sees  
19           that it is a trade-off, he sees that there are  
20           limitations, and he explain that overall he thinks that  
21           is a better proxy than claims costs.

22           Just pausing there. You will have seen in the  
23           paragraph on claims costs he indicated that in his  
24           opinion, it was not right to view the MIF as  
25           a market-wide cost in relation to insurance -- insurers,

1           and the basis for that opinion is some analysis he  
2           carries out in this report at section 3.3. I will not  
3           take you to it, given the time. It is at {RC-F/6/22}.  
4           But he shows in that analysis that the relative  
5           incidence of card payments can differ significantly  
6           between insurers, and on that basis he says it is wrong  
7           to regard the MIF as a market-wide cost that affects all  
8           insurers to a similar extent.

9       PROFESSOR WATERSON: Can I just raise an issue?

10      MR LASK: Yes.

11      PROFESSOR WATERSON: You may or may not know the answer to  
12           this, but it strikes me some people pay by direct debit,  
13           you know, on a -- for their insurance.

14      MR LASK: Yes.

15      PROFESSOR WATERSON: Other people pay presumably by card,  
16           maybe credit card, maybe debit card, and there may be  
17           other means. So I was wondering whether the likelihood  
18           that a customer will pay in a particular way is taken  
19           into account in pricing?

20      MR LASK: I do not think the evidence addresses that. What  
21           the evidence does address, as I have just alluded to, is  
22           that there are different rates of card usage between  
23           different insurers, which suggests that some insurers  
24           tend to take more payments through other means, for  
25           example direct debit, or perhaps they sell more policies

1 through brokers, but I do not think the evidence  
2 addresses the particular point you identify. It may be  
3 something that can be explored with Mr Bodman when he  
4 gives evidence.

5 PROFESSOR WATERSON: Yes.

6 THE CHAIRMAN: Do some insurers surcharge for the use of a  
7 credit card?

8 MR LASK: There has been surcharging. There is evidence in  
9 this case that for a period -- ABSL, who of course are  
10 a broker, rather than an underwriter -- where they  
11 imposed a surcharge.

12 THE CHAIRMAN: Right.

13 MR LASK: But none of the other Allianz claimants did.

14 So I have shown you Mr Murgatroyd's view of the  
15 important differences between the MIF and claims costs.  
16 Now, there is a disagreement between Mr Murgatroyd and  
17 Mr Holt as to the relevance of those differences over  
18 the long-run, but Mr Murgatroyd explains in his second  
19 report that even if certain differences become less  
20 significant over the long-run, and even if the MIF was  
21 passed on, it does not follow that it would have been  
22 passed on at exactly the same rate as claims costs. As  
23 I say, that is a dispute between them that will have to  
24 be explored in evidence, but for your note it is  
25 Murgatroyd 2, 253 to 254, at {RC-G/5/50}.

1           Then, finally, but importantly, in relation to this  
2           issue, even if claims costs were a good proxy, as I have  
3           said, Mr Holt's estimates are overstated as a result of  
4           modelling flaws. Now, the merits of his modelling  
5           choices will be a matter for evidence, but I want to  
6           summarise the nature of the problems and show you what  
7           impact they have on the estimates. So, first, Mr Holt  
8           excludes ten months of data from the beginning of the  
9           sample period, not because of any suggested difficulty  
10          with those data or with that period, but it is simply  
11          a knock-on consequence of his particular approach to  
12          modelling expected claims costs. Both experts have to  
13          model expected claims costs, because the data relates to  
14          actual claims costs. But Mr Murgatroyd has shown that  
15          claims -- expected claims costs can be modelled without  
16          excluding those data, and his approach results in claims  
17          costs values that it is common ground coincide closely  
18          with Mr Holt's. So Mr Holt's exclusion of several  
19          months of data is not necessary.

20          Second, Mr Holt then excludes a further 21-months of  
21          data from his model on account of Covid, and  
22          Mr Murgatroyd has explained that there is no good  
23          reason for that omission either. For instance, even if  
24          the relationship between costs and prices differed  
25          during the Covid period, this can and should be taken

1       into account, because those 21 months are a significant  
2       portion of the claim period. So, in other words,  
3       whatever the relationship between costs and prices  
4       during that period, the pass-on rate matters.

5             Third, Mr Holt's model fails to control at all for  
6       other important explanatory variables that are likely to  
7       play a part in driving premiums, and the most notable  
8       example is non-claims costs. Mr Murgatroyd explains  
9       that the problem with that is it gives rise to omitted  
10      variable bias where changes in premiums which are  
11      actually due to the omitted factors are wrongly  
12      attributed to claims costs.

13            Now, significantly, each of those choices by Mr Holt  
14      results in a materially higher pass-on estimate, and  
15      Mr Murgatroyd explains that this is most likely because  
16      the relationship between claims costs and premiums was  
17      weaker during the excluded periods, and because the  
18      claims costs are variable in Mr Holt's model, it is  
19      likely to be picking up some of the effect of the  
20      omitted variables.

21            If I could just show you, please, what impact this  
22      has on the estimates. It is Murgatroyd 2, table 5,  
23      at -- there is a non-confidential version of this --  
24      {NC-G/5/65}.

25            So one sees table 5, "Estimated pass-on rates under



1 alternative Covid approaches". What Mr Murgatroyd does  
2 here is take Mr Holt's baseline model, which is the top  
3 line, and then adds in Mr Murgatroyd's claims costs  
4 instead of Mr Holt's. That is the second line. So that  
5 addresses the first flaw in Mr Holt's modelling where he  
6 excluded the ten months of data. You will see that  
7 first line, you will see how the estimates drop, the  
8 weighted average drops from 61% to 44%. The third  
9 line is where Mr Holt -- Mr Murgatroyd adds back in the  
10 Covid period, and you will see, again, quite  
11 a significant drop in the resulting pass-on estimate,  
12 weighted average 44% down to 38%.

13 The final line shows Mr Murgatroyd, for illustrative  
14 purposes, adding in Mr Coombs' Covid controls.  
15 Mr Coombs applied some dummy variables for Covid, and  
16 you will see that increases the pass-on rate slightly.

17 So that table illustrates the impact of -- the  
18 inflationary impact of Mr Holt's exclusion of many  
19 months of data.

20 If one then goes to paragraph 340, which is a couple  
21 of pages further on, I think we need to go back one,  
22 yes, 340, about two-thirds of the way down the page.

23 Here, Mr Murgatroyd makes a further adjustment where  
24 he includes, in Mr Holt's model, some of the explanatory  
25 variables that Mr Holt omitted, and you will see at the

1           end that brings the weighted average pass-on estimate  
2           down even further to 33%.

3       THE CHAIRMAN: No doubt we will go through all of this with  
4           Mr Holt in due course.

5       MR LASK: Yes. That is all I wanted to say on that. I just  
6           wanted to outline the problems but that is as far as  
7           I need to take it.

8       THE CHAIRMAN: Okay.

9       MR LASK: Just quickly, Mr Coombs, for Mr Merricks, takes  
10          a similar overall approach to Mr Holt but uses total  
11          costs as a proxy for the MIF. But the problem with  
12          total costs is it is liable to conflate the effects of  
13          many different types of costs that have different  
14          relationships with premiums, and it is also bound to  
15          overstate any pass-on of the MIF, because its biggest  
16          component is claims cost, which will overstate MIF  
17          pass-on for the reasons I have given. Mr Coombs'  
18          estimate is lower than Mr Holt's. It is 50.3%.

19          Then just finally, in the time I have left, I would  
20          like to turn to my fifth and final heading which is  
21          Mr Murgatroyd's holistic approach, and there are four  
22          points I wish to highlight.

23          First, Mr Murgatroyd does not simply adopt  
24          a destructive approach in which he critiques the  
25          analysis carried out by the other experts. As Mr Beal

1 submitted, as with Mr Trento, Mr Murgatroyd could have  
2 taken that approach given where the burden lies, but in  
3 order to assist the Tribunal, he has conducted his own  
4 positive analysis of whether and, if so, to what extent,  
5 the MIF was passed on.

6 Second, Mr Murgatroyd has taken a holistic and  
7 multi-faceted approach to the issue. He has conducted  
8 both econometric analysis and graphical analysis. He  
9 has considered the qualitative evidence contained in the  
10 witness statements and the documents, using it to inform  
11 his empirical analysis and interpret its results, and he  
12 has framed his assessment with insights drawn from  
13 economic theory while recognising its limitations. This  
14 has enabled him to triangulate information from various  
15 pieces of analysis and draw robust conclusions as to the  
16 existence and extent of any pass-on.

17 Third, Mr Murgatroyd has, as I mentioned earlier,  
18 tested a range of econometric models using different  
19 explanatory variables, rather than simply selecting his  
20 preferred proxy and confining himself to that. Most  
21 notably, he has tested models in which the MIF itself is  
22 used as an explanatory variable, and the variation is  
23 provided by two natural experiments in which LVIC's MIF  
24 costs fell substantially. He has also, as I have said,  
25 used GI direct as a proxy and examined the impact that

1           has on premiums.

2           Fourth, and most importantly, despite conducting  
3           these various forms of analysis, Mr Murgatroyd is unable  
4           to find evidence of any statistically significant  
5           pass-on of the MIF.

6           For the reasons I gave earlier when taking you  
7           through the facts, in my submission, that is  
8           a completely unsurprising outcome.

9           Unless I can assist the Tribunal, those are my  
10          opening submissions.

11         THE CHAIRMAN: Thank you.

12          Right. Anybody else?

13         MR JOWELL: I am in your hands as to to whether you hear me  
14          now in relation to this question of the adjournment that  
15          we should apparently be seeking, or whether we can put  
16          in a short note. I can either deal with it now or ...

17         THE CHAIRMAN: Are you seeking an adjournment?

18         MR JOWELL: No, we are not seeking an adjournment, and I  
19          wish to explain why we are not, and why we do not  
20          consider it is necessary for us to do so. I can do  
21          so -- it will take a little time but ...

22         THE CHAIRMAN: Will it? What, more than five minutes?

23         MR JOWELL: I would say about five minutes, maybe a little  
24          longer. Five or ten minutes.

25         THE CHAIRMAN: Yes. We will hear you then.

1 Further opening submissions by MR JOWELL

2 MR JOWELL: I am grateful.

3 So the basis upon which it is suggested that we  
4 should be seeking an adjournment, I think, is it is  
5 said, first of all, that the sample of willing claimants  
6 is a representative sample and determinative potentially  
7 of a proximity issue in these proceedings and that if we  
8 wished to submit that we do not have the sufficient  
9 material to interrogate that case, then we should be  
10 seeking an adjournment. That, as I understand it, is  
11 essentially the proposition that has been put forward.

12 To understand that, one does need to go back a bit  
13 into the procedural history of this case and also back  
14 to the key judgment on legal -- on causation and the  
15 meaning of that judgment to everybody at that time.

16 So, in terms of the procedural background, Mr Beal  
17 said, correctly, that it was decided whereas initially  
18 there was going to be a sampling process for certain  
19 claimants, that was abandoned subsequently by the  
20 Tribunal. You will find the ruling on that, if I may  
21 take you to it, in {RC-D/7/1} and if we can go, please,  
22 to paragraph 61, which I believe is on page {RC-D/7/30}.  
23 You will see that the tribunal made a ruling stating  
24 that they wanted to:

25 "... give a clear direction to the parties as to how

1 we intend to determine the pass on defence:

2 "(1) We note that Visa, in contrast to Mastercard,  
3 in substance proposes to demonstrate pass on by the use  
4 of econometric evidence and by relying on existing  
5 studies of pass on rates. We consider that approach to  
6 be, prima facie, the correct one to adopt. Mastercard,  
7 whilst not eschewing econometric evidence, also wishes  
8 to rely on disclosure from the Umbrella Interchange Fee  
9 Claimants. Given the sheer number of claimants, that  
10 will involve sampling.

11 "(2) Sampling is also the approach that the Umbrella  
12 Interchange Fee Claimants wish to adopt in demonstrating  
13 that the Overcharge was not passed on.

14 "(3) We propose to make an order refusing Mastercard  
15 permission to rely upon specific fact evidence to make  
16 good its pass on defence. Given the evidential  
17 difficulty we have described, we are entirely sceptical  
18 that the pass on defence can be established by claimant  
19 specific evidence adduced from a sample of many thousand  
20 claimants and we consider that such an approach would be  
21 a disproportionate and, frankly, hopeless way of  
22 deciding the question of pass on. That said, the  
23 Tribunal would be entirely sympathetic to some form of  
24 tightly controlled, expert-led disclosure, provided that  
25 it was focussed, cost-effective and proportionate. Such

1 an approach might include a survey or questionnaire  
2 directed to B or certain elements within the class that  
3 constitutes B. We make no further direction in this  
4 regard, because we are conscious that the parties are in  
5 the process of completing the list of issues described  
6 in the Ruling, and we wish only to provide clear  
7 guidance as to how this process is to be conducted. We  
8 do not propose to anticipate further how in light of  
9 this judgment, parties in the position of A might wish  
10 to make good their cases."

11 If we can go to the next page, please {RC-D/7/31}:

12 "(4) We are conscious that precluding a party from  
13 adducing evidence that it wishes to adduce is an extreme  
14 exercise of the Tribunal's case management powers.  
15 Nevertheless, given the view we have taken about the  
16 nature of pass on, we consider that to permit or oblige  
17 parties in the position of A to seek extensive and  
18 expensive factual disclosure is a cost we are not  
19 prepared to entertain.

20 "(5) However, we are not going to preclude the  
21 Umbrella Interchange Fee Claimants from adducing any  
22 evidence that they might wish to produce in support of  
23 their claim that the Overcharge was not passed on. We  
24 are as we have said, confident that claimant specific  
25 evidence will not take the resolution of the pass on

1           defence any further, but if we are wrong on this point,  
2           this will be demonstrated by the evidence that the  
3           Umbrella Interchange Fee Claimants adduce. The intention  
4           to adduce such evidence will be controlled by the  
5           Tribunal's case management powers and in the first  
6           instance the intention to adduce such evidence will need  
7           to be specifically referenced in the list of issues  
8           directed by the Tribunal in the Merchant Interchange Fee  
9           Proceedings. If we are wrong on the utility of this  
10          evidence, then we will of course re-visit the question  
11          of sampling and of Mastercard's (and Visa's) right to  
12          have disclosure of claimant specific evidence. For the  
13          present, however, sampling is not a process that we are  
14          prepared to entertain in order to resolve the pass on  
15          issue."

16                 So a very clear rejection of sampling. A very clear  
17          endorsement that it would not be resolved probably by  
18          claimant-specific evidence.

19                 Now --

20         THE CHAIRMAN: Were the claimants to be allowed to adduce  
21          whatever evidence they wished to?

22         MR JOWELL: Yes -- well, within the confines of a closely  
23          managed procedure.

24         THE CHAIRMAN: Yes.

25         MR JOWELL: What then happened is that in February of this



1           year there was this process of, and I am putting this in  
2           very broad summary, and no doubt we will have a debate  
3           over the precise rigmarole of this, but there was  
4           essentially a desire by the claimants to adduce and  
5           generally an interest in obtaining data from the  
6           claimants and it was in the context really of obtaining  
7           data from the claimants that this issue of further  
8           evidence from these willing claimants came forward and  
9           the willing claimants were those who were willing to  
10          provide data who happened --

11       THE CHAIRMAN: This was the data that the experts wanted.  
12          It was to be expert-led.

13       MR JOWELL: Yes, we suggested we didn't need it, but we were  
14          prepared to countenance if it was provided and we  
15          have -- our experts have taken it into account. Others  
16          said they wanted it very much. The data was then  
17          provided by a set of willing claimants who are not,  
18          incidentally, at the present time at least, the majority  
19          of -- they do not represent the majority of the  
20          claimants by value. I mean, on our calculation, based  
21          on the claimants that remain in the case, they are  
22          approximately 20% of the value of the claim, the data,  
23          and I think much less if you take out Sony, which is  
24          a claimant that has not provided any witness evidence.

25          Those claimants that provided data, then some of

1           them wished to also provide qualitative evidence, as  
2           they put it. Not all of them provided it. Three of  
3           them backed out and did not provide any disclosure or  
4           any witness statement. One of them, Sony, provided  
5           documents, but no witness statement, and the others  
6           provided limited disclosure and limited witness evidence  
7           that you have seen.

8           So they certainly were not a sample and they were  
9           certainly not a sample in order to determine some issue  
10          of proximate causation and that is absolutely clear.

11          Now, we were of course concerned by this,  
12          particularly because the claimants were also at the same  
13          time making submissions about legal causation and within  
14          that bucket they did not make this very refined  
15          distinction that they make now between issues of legal  
16          policy being those within legal causation; they included  
17          within legal causation this question of whether some  
18          additional proximity was required and that was the basis  
19          on which the legal causation -- the causation ruling  
20          that I showed you, and that I think Mr Beal did not go  
21          to or did not go to in detail, was then argued. We will  
22          provide you, if necessary, with the skeleton arguments  
23          and the transcript for that hearing.

24        THE CHAIRMAN: Is that the one earlier this year?

25        MR JOWELL: Yes. But if I could just show you --

1 THE CHAIRMAN: Right. I do not remember any reference to  
2 proximity in there, but maybe I am wrong.

3 MR JOWELL: If I can show you where the battle lines were  
4 drawn.

5 THE CHAIRMAN: Okay.

6 MR JOWELL: The battle lines were drawn as to whether this  
7 was going to be a trial only about but-for or about more  
8 than that. You can see that if you go to {RC-D/26/3}.  
9 If we could go please to page 3. You see in  
10 paragraph 3:

11 "The first three ..."

12 He is referring to Mr Rabinowitz's submissions, who  
13 was appearing for Visa:

14 "The first three paragraphs of these submissions  
15 appropriately set out the battle lines ..."

16 So this is the issue that is before the court.

17 Paragraph 2:

18 "The question for Trial 2 is fundamentally one of  
19 economic fact. That question is whether if the merchant  
20 service charges (MSCs) had been lower the claimants  
21 would have charged lower prices to their customers and,  
22 if not whether they would have agreed to pay higher  
23 prices to their customers. In other words, would the  
24 claimants have charged lower prices to their customers  
25 or paid higher prices to their suppliers but for the

1           overcharge."

2                 So it is a but-for test.

3                 "Contrary to the established position, the claimants  
4           now appear to suggest that at the substantive trial they  
5           will argue that something over and above factual  
6           causation is required; in other words, they want to be  
7           able to deny that a pass-on occurred even if the  
8           aforementioned question of economic fact is answered in  
9           the affirmative. They make two core arguments in  
10          support of that proposition. One, that the Tribunal has  
11          not excluded proximity as a relevant consideration in  
12          the test for causation in these proceedings ..."

13                I repeat:

14                "One, that the Tribunal has not excluded proximity  
15          as a relevant consideration in the test for causation in  
16          these proceedings or, two, that to the extent it has  
17          done so, the Tribunal's statements are not binding on  
18          the claimants or are not binding on all of them."

19                Then the Tribunal puts that issue emphatically to  
20          bed.

21                If one goes over to paragraph 8, please. {RC-D/26/5}

22                By reference to -- this was argued by reference to  
23          the *Trucks* judgment in the Court of Appeal, and the  
24          paragraphs that Mr Beal has taken you to, 151 and 150,  
25          and it stated here with reference to 151:

1            "We do not regard 151 as in any way assisting in the  
2            construction of 150 or what that paragraph lays down.  
3            Of course 151 is important; but it is only important in  
4            the context of the consideration the Court of Appeal was  
5            giving to the reasoning of the Tribunal at first  
6            instance in the decision under appeal in the DAF case.  
7            The paragraph is, therefore, an important paragraph in  
8            the specific context of the appeal in that case; but it  
9            says nothing about causation in the abstract. We  
10           consider that reference to or deployment of 151 in  
11           support of a general proposition to be quite simply  
12           erroneous and wrong."

13           Then it goes on to state that they asked  
14           Mr Rabinowitz:

15           "... whether a wholesale process of strike-out is  
16           required in order to bring clarity to this matter."

17           He indicated, and we regret this now, he indicated  
18           that we think that such a process is not required  
19           because we did not think that the claimants would be  
20           acting in this abusive manner, by now seeking to  
21           re-litigate a matter that has already been determined.

22           That is actually -- it is unarguable that this, in  
23           my respectful submission, this judgment, the intent of  
24           it, and particularly when you look at the skeleton  
25           arguments that were before the Tribunal at the time,

1           that this judgment was intended to dispose of this  
2           matter, and if they wished to appeal this judgment, they  
3           should have done so.

4           Now, to then say -- to then come along at the trial  
5           and say, well, actually, no, no, no, we construe this in  
6           this incredibly narrow way as only referring to some  
7           sort of question of legal policy, is not acceptable. It  
8           is not acceptable because, if that is the case, then we  
9           need to be in a position to have the material to  
10          properly interrogate that. We need to have a proper  
11          sample, we need to have proper disclosure, and we need  
12          to start again. But it is not, with respect, for me to  
13          apply for an adjournment; it was for them to appeal that  
14          judgment.

15          If that is not correct, then -- our interpretation  
16          of that is not correct, then we do reserve our right, of  
17          course, to say that we need to either rely upon  
18          procedural unfairness or to seek an adjournment.

19       THE CHAIRMAN: All right. Thank you.

20       MR JOWELL: Thank you.

21       MR COOK: Sorry, sir, I rise very briefly just to say only  
22          that Mastercard does echo its submissions with Visa.  
23          From our perspective, we do confirm, and our position  
24          is, that any sort of directness requirement that goes  
25          beyond but-for causation is being fully determined by

1           the Tribunal's (inaudible) causation ruling.

2       THE CHAIRMAN: Do I take it from that that you are not going  
3           to be cross-examining the factual witnesses on this  
4           point?

5       MR JOWELL: Well, to this extent, that we will be  
6           cross-examining the factual witnesses to an extent.  
7           Because we do accept that the factual witnesses are  
8           potentially relevant, not to the need for proximity as  
9           such, but, rather, for the need -- for the relevant --  
10          what is the relevant proxy, and the existence of  
11          mechanisms. But we are not proposing to cross-examine,  
12          if you like, on the basis that we need to establish some  
13          sort of -- something like cost-plus pricing, or  
14          something akin to cost-plus pricing, in order to succeed  
15          because, in our submission, that issue has been dealt  
16          with already. It is simply a question of the balance of  
17          probabilities.

18                If we were to be required to cross-examine on that  
19                basis, it would be cross-examining without the material  
20                that every cross-examiner needs, which are namely  
21                ordinary disclosure.

22       THE CHAIRMAN: Is it your case then that but-for -- if you  
23           establish but-for causation, that you have effectively  
24           dealt with proximity?

25       MR JOWELL: Yes.

1 THE CHAIRMAN: It is inherent in proving but-for causation  
2 that the parties -- or the transactions were  
3 sufficiently close together.

4 MR JOWELL: In the context of this case. To be clear --  
5 I mean, going back to *Trucks*. *Trucks*, both at first  
6 instance and in the Court of Appeal, is argued and  
7 decided really repeatedly by reference to a contrast  
8 with a MIF case, and almost all of those four factors  
9 that are identified in *Trucks* are contrasted with those  
10 that pertain in the MIF case. That is why both the  
11 Supreme Court in *Sainsbury's* gave a very clear steer  
12 that proximity was not an issue in the case of MIFs in  
13 the ordinary -- at least in the general case, and  
14 equally why this Tribunal took the same view, subject  
15 only to its exceptions procedure.

16 THE CHAIRMAN: Yes. Thank you very much.

17 MR JOWELL: Thank you.

18 THE CHAIRMAN: I have no doubt that is not where the debate  
19 will end.

20 MR JOWELL: I am sure.

21 THE CHAIRMAN: We will proceed from there.

22 So we are going to start at ten o'clock tomorrow  
23 with the first witness and see you then.

24 (4.42 pm)

25 (The hearing adjourned until 10.00 am)



on Wednesday, 20 November 2024)

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25