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IN THE COMPETITION
APPEAL TRIBUNAL

1517/11/7/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Monday 24 March – Friday 4 April 2025

Before:

The Honourable Justice Michael Green
Ben Tidswell
Professor Michael Waterson

Merchant Interchange Fee Umbrella Proceedings

A P P E A R A N C E S

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

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

Kieron Beal KC, Philip Woolfe KC, Reuben Andrews, Flora Robertson & Oscar Schonfeld on behalf of
the SSH Claimants

Monday, 31 March 2025

(10.30 am)

THE CHAIRMAN: Just give us a moment.

(Pause).

Good morning, Mr Jowell.

MR JOWELL: Good morning.

May it please the Tribunal. I do not know if the Tribunal has received the copy of an amended timetable.

THE CHAIRMAN: Yes.

MR JOWELL: I hope that the Tribunal is content with that.

According to that, we would -- Ms Boyd and I would intend to sit down at around about 2.45, I think, today.

THE CHAIRMAN: Okay.

MR JOWELL: The -- there is a possibility that we may need to go over, and if we do, we hope you will indulge us on the basis that that would come out of our Trial 2B submissions, if necessary. Hopefully that will not be necessary, but if we do go a little over --

THE CHAIRMAN: Right.

MR JOWELL: -- then that may be ...

THE CHAIRMAN: Okay.

Closing submissions by MR JOWELL

MR JOWELL: The Tribunal has received no shortage of written submissions --

1 THE CHAIRMAN: Yes.

2 MR JOWELL: -- and evidence in this Trial 2A and I am sure
3 you will be relieved to hear that I do not intend to
4 repeat everything in our written closing, nor could I,
5 and I will make my remarks, as far as possible,
6 responsive to points in the claimants' closing
7 submissions.

8 But I would like to start, if I may, by pointing to
9 two rare, but nonetheless important points of agreement
10 on approach between all of the remaining parties.

11 The first point of agreement which one sees reflected in
12 the claimants' written closing submissions and ours is
13 that all of the parties agree that in these proceedings
14 one has to adopt a sectoral approach. One cannot
15 practicably assess each claimant individually. As
16 the claimants put it in paragraph 217 of their closing
17 submissions {RC-S/1/106}:

18 "In the absence of a formal sampling process,
19 a consensus emerged between the experts that the only
20 way to reach pass-on estimates in respect of all of
21 the SSH Claimants is to adopt a sectoral approach. This
22 is because the number of claimants makes it impractical
23 to assess pass-on individually."

24 Now, although the parties agree on a sectoral
25 approach, they disagree on the precise delineations of

1 the sectors. This delineation issue does not, in our
2 submission, matter very much. We all appreciate that
3 sectoral division is to some degree subjective or
4 arbitrary, but it is possible broadly to match up
5 the various parties' different sectors, as Mr Holt has
6 sought to do, and there should be, we consider, little
7 impact on the ultimate outcome. I therefore do not plan
8 to address you on the differences between the parties on
9 the delineation of the sectors, but what I will do in
10 due course is take you through the sectors as defined by
11 Visa and point out where they match to the sectors of
12 the other -- of -- which the claimants prefer and to go
13 through the sectors in that way. The point I just wish
14 to emphasise for present purposes is that we are all
15 agreed in seeking to derive sectoral pass-on rates, not
16 individual pass-on rates.

17 The second point of agreement between the parties is
18 that in order to assess pass-on rates, one cannot use
19 econometric regression analysis of MIFs or MSCs
20 themselves as against prices, instead what is required
21 is an alternative proxy for the MIF or for the MSC.
22 Again, if I can quote the claimants in paragraph 205 of
23 their closing submissions {RC-S/1/99}, they say this:

24 "... because meaningful direct econometric analysis
25 of the MSC is not feasible, the only realistic approach

1 to assessing the rate of pass-on of the MSC is to
2 analyse a proxy cost instead. That proxy cost must be
3 a cost which is expected to be passed on at a rate
4 similar to the MSC, otherwise it would not be safe to
5 treat the rate of pass-on of that cost as a proxy for
6 the rate of pass-on of the MSC."

7 We agree: one does have to use a proxy cost. One of
8 the major -- probably the major dispute in these
9 proceedings is what is the appropriate proxy cost to use
10 for each of the sectors.

11 Now, with those two points of agreement in mind,
12 I would like, with the Tribunal's permission, to
13 structure my remarks into two main sections. In
14 the first section, I want to make some general points
15 regarding the proper approach to proxy selection and
16 the evaluation of the different types of evidence. In
17 the second part, I then ask you to go into closed
18 session so that we can freely discuss some of
19 the confidential factual evidence for the Willing
20 Claimants and to go through all of the various sectors
21 in a sort of whirlwind tour of the 14 Visa sectors.
22 Then, finally, I will hand over to Ms Boyd to deal with
23 some certain discrete evidential points.

24 Before I go into those two main sections, I would
25 like to dispose of two specific points that my learned

1 friend makes in his written submissions. Both are, I am
2 afraid, clearly bad points and we suspect that they are
3 put in for the purposes of prejudice or distraction
4 rather than anything else, but I should say a few words
5 about them.

6 The first of these two points relates to
7 the significance of the *Merricks* settlement. Now, at
8 paragraph 12 of my learned friend's closing submission
9 {RC-S/1/6}, he refers to the joint -- to
10 paragraph 36(f)(ii) of the joint application of
11 Mastercard and *Merricks* for their settlement, and it is
12 noted that the settlement was for 200 million in respect
13 of an initial claim worth 10 billion, and it asserts
14 that {RC-S/1/7}:

15 "Mastercard ... failed to establish why the merchant
16 pass-on rate would be significantly lower in
17 the *Merricks*' claim period ..."

18 It then asserts that:

19 "... neither Mastercard nor *Merricks* have succeeded
20 in showing any material pass-on by merchants in either
21 period."

22 And tells us that:

23 "This no doubt explains, at least in part, why
24 a substantial reduction in the claim figure advanced by
25 Mr *Merricks* has been agreed between those parties."

Now, with respect, this suggestion that a large part of the reduction in the claim figure is due to a supposed failure to establish pass-on in these proceedings is not only an impermissible inference from the settlement, but it is also not even a remotely plausible inference. It is not permissible because this Tribunal is obviously not in a position to draw any conclusions from the terms of settlement as to what the parties did or did not conclude about the underlying strength of their case on particular issues. Parties settle for all sorts of reasons, so this is obviously just a rather childish attempt to inject some prejudice. But I am conscious that one should never underestimate the power of prejudice and I therefore feel bound to point out that if one scrutinises the settlement documents, there is nothing to suggest that they were based upon anything but an assumption of a rather high level of pass-on, even for the *Merricks* period. The reduction from 10 billion to 200 million is clearly overwhelmingly due to the series of wins that Mastercard had in other aspects of the litigation. Now, it is a matter of public record that at the second certification hearing, 5 billion was lost from the headline claim value to reflect the exclusion of deceased persons and compound interest, the Tribunal's

1 limitation judgment of June 2024 knocked off another
2 billion in value, and above all, the Tribunal's
3 causation judgment of February 2024 found that
4 the central tenet of Mr *Merricks*' case, that
5 Mastercard's unlawful European interchange fees caused
6 its UK domestic interchange fees to be higher, failed
7 for the entire claim period, which lost around 95% of
8 the value of Mr *Merricks*' claim and the Court of Appeal
9 refused Mr *Merricks*' permission to appeal the judgment.

10 If one wants to see this made good -- and I do not
11 intend to take you through --

12 THE CHAIRMAN: I do not see how we can really possibly read
13 anything into the settlement.

14 MR JOWELL: No, indeed. But I -- and if -- just for your
15 note, however, all what I have said is very clear from
16 the joint application, which you will see, for your
17 note, is in {RC-N1/1/1} and if you look in particular at
18 paragraphs 16 {RC-N1/1/7} and following.

19 THE CHAIRMAN: We will obviously have the Tribunal's
20 judgment before we deliver judgment --

21 MR JOWELL: Yes.

22 THE CHAIRMAN: -- and we will be able to see what it says.
23 I cannot imagine it will say anything about --

24 MR JOWELL: No.

25 THE CHAIRMAN: -- assumptions like that.

1 MR JOWELL: Well, no, but one can see -- I mean, this is in
2 the public domain, so I should -- if I could show you
3 one, just one document, which is an annex to it, which
4 is, if we could call it up, {RC-N1/7/45}. Now, as you
5 would expect, the parties were considering a range of
6 possible outcomes for things like interest rates,
7 merchant pass-on, acquirer pass-on, and you can see from
8 this page, if you look at the third column,
9 the assumptions that were being considered for merchant
10 pass-on by the experts that were advising, and you can
11 see that they are all between 50% and 85%. So
12 the insinuation that Mr *Merricks*' reduction from an
13 initial figure of 14 billion was largely or even
14 significantly because of concern over how the pass-on
15 trial went is simply contradicted by this. It is very
16 clear.

17 Now, the second point that I should dispose of is
18 rather more involved is the suggestion that we have not
19 established a sufficiently proximate causal connection
20 to establish pass-on. This is a motif that runs through
21 the claimant's written closing submission repeatedly
22 invoking paragraph 151 of the *Trucks* judgment, to
23 the effect that we consider -- the lines there that
24 {AB-D/37/96}:

25 "... we consider that *DAF* must prove that there was

1 a direct and proximate causative link between
2 the Overcharge and any increase in prices ... That means
3 that there must be something more than [the] reliance on
4 the usual planning and budgetary process, into which
5 the Overcharge was input and at some point prices
6 increased."

7 That phrase from paragraph 151 is quoted many times.

8 On that basis, it is suggested that even if we could
9 establish as a matter of economic fact on the balance of
10 probabilities that merchant prices in a sector would
11 have been lower in the counterfactual without the MIF,
12 it is said that would not suffice. Even if we -- it
13 would not matter that we established that using the most
14 appropriate proxy cost there is an econometric effect on
15 prices on the balance of probabilities and
16 the suggestion is that we have to prove something more
17 by way of factual causation than a "but for" test. It
18 is not entirely clear what it is said that we
19 additionally and specifically have to show to show
20 a proximate and direct cause. There are -- at times, it
21 looks as though it is being suggested that we have to
22 show something like cost-plus pricing or something very
23 close to cost-plus pricing if we are to establish
24 proximate causation. There are several sectors where,
25 even where their own expert finds on their preferred

1 proxy that there is likely to have been an overcharge,
2 it is said we have not -- still we have not passed this
3 proximate causation bar.

4 Now, I have already made submissions to you on
5 the law in relation to this point and what we have
6 submitted is that there is already a short and complete
7 answer and that short answer is that this issue was
8 determined on a binding basis by this Tribunal, not
9 once, but twice already, first in its rulings in
10 July 2022 and again in its ruling in March 2024, and
11 that second ruling was clearly all about the issue of
12 whether at this trial we had to establish something more
13 than factual causation on the balance of -- on
14 the balance of -- "but-for" balance of probabilities
15 basis, or whether we needed to show something further,
16 whether you call that legal causation or proximate
17 causal link.

18 THE CHAIRMAN: But do you accept that whether something is
19 proximate or not is a question of fact?

20 MR JOWELL: I think that --

21 THE CHAIRMAN: Or it involves findings of fact?

22 MR JOWELL: It can involve findings of fact, but in this
23 particular case, that issue of whether there was --
24 whether the -- whether there was sufficient proximity on
25 the facts of this case has already been decided.

1 THE CHAIRMAN: But how could it have been decided before
2 the evidence was adduced?

3 MR JOWELL: Because it was decided on the basis of the fact
4 that you had a -- that on the facts of this case, you
5 had already had a -- established facts about the MIF,
6 that it was industry-wide, that it was transparent, that
7 it -- that it -- and that it was a cost that was
8 material, and on that basis the Tribunal clearly found
9 that there was no requirement in this case to
10 investigate across the whole economy whether that
11 additional proximity standard was met, and that was what
12 was -- that was what was determined at these -- on those
13 occasions.

14 Now --

15 THE CHAIRMAN: So are you saying we cannot examine whether
16 pass-on was effected through a direct channel or an
17 indirect channel, that that is not even open to us to
18 consider because that only goes to proximity?

19 MR JOWELL: Yes, in a sense. I mean, other than -- save
20 insofar as that may be relevant to the selection of
21 the appropriate proxy. But what you cannot do is say,
22 "Well, we find in this case that you have only
23 established an indirect cause and that is insufficient,
24 that is too indirect to amount to proximity as a matter
25 of fact or law", because that is -- that issue was taken

1 off the table.

2 THE CHAIRMAN: But was that point addressed in the Tribunal
3 before, namely that we are not able to consider whether
4 the pass-on was effected through an indirect mechanism
5 rather than a direct mechanism? That was ruled out, you
6 say, by the ruling?

7 MR JOWELL: I say that the indirectness of the mechanism as
8 a basis to say that there is not pass-on was ruled out,
9 yes. You are entitled to look at that issue,
10 absolutely, as it goes to proxy selection, but not --
11 but what was clearly established, particularly in
12 the second ruling, was that this trial would be
13 determined on a "but for" causation basis, that there
14 would be no additional requirement for us to establish
15 proximity, and I wish to take you through
16 the submissions that ran up to that --

17 THE CHAIRMAN: Okay.

18 MR JOWELL: -- if I may, to show you that. Before I --

19 MR TIDSWELL: Just before you do.

20 MR JOWELL: Yes, yes.

21 MR TIDSWELL: So you are using proximity and directness
22 almost interchangeably. Are you saying they are
23 the same thing?

24 MR JOWELL: Yes, I think -- well, they are very closely
25 related. I mean, they are not -- I mean, I think that

1 you can have an indirect -- I think, in my submission,
2 an indirect -- an indirect effect can also be
3 a proximate one for these purposes. I do not think that
4 you can -- one can say that they are synonymous, in
5 fact, absolutely. I mean, I think you -- in my
6 submission, for the -- when one is considering pass-on,
7 indirect effects often are sufficiently proximate.

8 MR TIDSWELL: So indirect effects might be relevant, not
9 just -- if you are thinking about a division between
10 legal and factual causation, which actually I think
11 increasingly looks like quite a difficult line to draw,
12 but just assuming that there is a clear, bright line
13 between them, you could have directness as being
14 something which went to a factual causation question as
15 well, could you not, because it goes to the quality of
16 the evidence on causation?

17 MR JOWELL: I think my point is -- I think that it could go
18 to the -- it could go to the choice of appropriate
19 proxy, that --

20 MR TIDSWELL: That is what you are acknowledging with that.

21 MR JOWELL: -- that I acknowledge.

22 MR TIDSWELL: But just explain to me why you make that
23 exception. Why do you say that that is different from
24 your general argument?

25 MR JOWELL: That -- well, that -- I say that it is -- I say

1 that you are entitled to look at that evidence of --
2 well, I think it -- what -- it comes out of what was
3 effectively ruled would not be in dispute in these -- in
4 these proceedings, in these -- in the two rulings --

5 MR TIDSWELL: Well, I am sure you are going to come to that.

6 But I think, just before we get to it, it is quite
7 helpful, I think, just to understand, logically and
8 conceptually, what the structure is and where you draw
9 the line and what falls on what side of whichever line
10 you are going to draw.

11 MR JOWELL: Yes.

12 MR TIDSWELL: Because it may well be that we go into this
13 and it is helpful or it is not helpful for the point,
14 but conceptually, understanding how it works
15 conceptually is quite important, is it not?

16 MR JOWELL: It is, except for -- well, let me say this. To
17 some degree, whether you call proximity legal causation
18 or factual causation is a matter of choice, it is not --
19 one could say -- or let me put it this way: it is
20 a question of terminology. What is -- and whether one
21 calls it -- and if -- whether one calls it a requirement
22 of legal causation or an aspect of factual causation, it
23 is clearly a distinct issue, and what is clear from
24 the judgments is that, whichever category you put it in
25 terminologically, it was ruled out, this -- or it was

1 determined -- it was -- it was -- it was ruled that this
2 -- this hearing would be on the basis of a "but for"
3 causation test and that is the basis on which all of
4 the disclosure was ordered and that the trial was
5 curated and, as I will come on to, it was actually -- it
6 is a perfectly defensible approach because it is the --
7 it was the only practicable approach when you are
8 talking about all the sectors in the economy.

9 The alternative would have been to have gone down
10 a completely different route, which would have been
11 effectively to say: well, we need to do a deep dive into
12 each sector and we have to have very extensive
13 disclosure to see whether there is proximate causation
14 say by reference to multiple different claimants. But
15 that is simply not the route that the tribunal went
16 down --

17 MR TIDSWELL: Well, I think -- I think --

18 MR JOWELL: -- and reasonably so, in my submission.

19 MR TIDSWELL: Well, I think I am making a slightly different
20 point, which is --

21 MR JOWELL: Yes, forgive me.

22 MR TIDSWELL: No, let me try and be clearer. It is that if
23 you have a set of facts about, for example, the way in
24 which merchants treat the MSC --

25 MR JOWELL: Yes.

1 MR TIDSWELL: -- that might inform your analysis of
2 causation, both from a legal and a factual perspective,
3 and I think you are acknowledging that it does help you
4 understand the proxy, which seems to me to be an
5 acknowledgement, rightly so --

6 MR JOWELL: Well --

7 MR TIDSWELL: -- that there is a factual causation element
8 of that which is proper and relevant for us to consider.

9 MR JOWELL: I do not think it is a factual causation issue,
10 I think it is an issue of going to what is
11 the appropriate proxy which is a slightly different
12 question, which is how you assess --

13 MR TIDSWELL: But the proxy is there to tell us whether
14 something has happened or not. When you talk about "but
15 for" causation what we are really interested in is
16 whether something has happened or not, "but for" is
17 a test to assess that. We want to know whether there
18 has been pass-on or not and so -- and we want to know
19 whether something has caused something else to happen.

20 MR JOWELL: Yes.

21 MR TIDSWELL: Now, that is obviously a matter of factual
22 causation. There is a separate question which arises if
23 one wants to distinguish the two as to legal causation,
24 which is the nexus with the original transaction if you
25 like, as put in *Westinghouse*.

1 MR JOWELL: Mm.

2 MR TIDSWELL: But just simply the question of whether
3 something has happened or not, that is what we are
4 interested in, is it not, and a proxy tells us --
5 the proxy is designed to find a way to estimate whether
6 something has happened or not.

7 MR JOWELL: Yes, it is, but one is talking in this case
8 about a particular type of challenge, which is
9 a challenge to find what is -- what is the extent of
10 pass-on throughout an entire -- throughout an entire --
11 all sectors of the economy, effectively, and that is
12 something that has to be done in a -- in a manner that
13 is proportionate and it -- it cannot be -- it cannot, in
14 our submission, be sensibly assessed by reference to
15 self-selected evidence that a handful of claimants have
16 put forward --

17 MR TIDSWELL: It is about the quality of the evidence
18 rather --

19 MR JOWELL: Yes.

20 MR TIDSWELL: -- rather -- I mean, that is a different
21 point, is it not? I mean, I think --

22 MR JOWELL: Yes.

23 MR TIDSWELL: Let me just test it a different way with you,
24 which is, if all the merchants had turned up and said
25 that, "We used the MIF in our marginal cost pricing

1 exercises for profit maximisation, we do that obviously
2 and deliberately", you would be saying that was a fact
3 that went to factual causation and demonstrated that
4 the charge had been passed on, would you not?

5 MR JOWELL: Well, if -- if they had come forward, then that
6 would be an a fortiori case, but they have not come
7 forward and that -- it is --

8 MR TIDSWELL: That is not really answering my question --

9 THE CHAIRMAN: They have not come forward with the evidence
10 you would have liked them to have come forward with.

11 MR JOWELL: Well, they have not been required to come
12 forward with any evidence that was -- on that sort of
13 basis, because there has not been a conventional
14 disclosure process in these proceedings or a process of
15 sampling in these proceedings. So I think I need -- if
16 I may, I think I need just to remind the Tribunal how we
17 got to where we are --

18 THE CHAIRMAN: Okay.

19 MR JOWELL: -- and then I think it becomes clear, because we
20 say that actually, on the evidence, the evidence is so
21 inadequate in these proceedings that you cannot -- one
22 cannot possibly -- the qualitative evidence, that one
23 cannot possibly determine these sorts of issues on
24 the basis of that evidence. One has to consider this
25 from an economic perspective and look at the proxies

1 from an economic perspective and very -- and one gets
2 very little, actually, from the qualitative evidence, as
3 I will come on to, and that is -- and if this -- if one
4 had wished to go down this different route, the whole
5 curation of the whole proceedings would have had to have
6 been completely different, but what one cannot do is now
7 say, well, we have got self-selected claimants giving
8 self-selected disclosure, a-ha, therefore we do not see
9 -- we infer this or that from that. One simply cannot
10 do it that way in a reliable way. What is clear is that
11 this -- is that this whole issue of proximate causation
12 was ruled out.

13 If I could show you, first, the -- if I may, take
14 you to the first of the Tribunal's rulings. If we go to
15 -- this is the July 2022 ruling. It is {RC-D/7/23}.
16 You see here it quotes from the Supreme Court, you will
17 recall this, this is -- it quotes from
18 the Supreme Court's judgment in *Sainsbury's v Visa* and
19 it divides it between different propositions, and you
20 see in Proposition [b] it is quoting from
21 the Supreme Court, having mentioned *British*
22 *Westinghouse*, it says:

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

25 So the Supreme Court is effectively using proximate

1 causation and legal causation as a single category
2 there, which is why I say this is just a question of, in
3 a sense, just of terminology.

4 THE CHAIRMAN: Well, was the notion, the separation between
5 legal and factual causation, did that only appear for
6 the first time in the authorities in *Sainsbury's*?
7 I mean, was it -- is it normally -- before then, was it
8 sort of separated out as though it was a separate
9 question?

10 MR JOWELL: Yes, I am not sure -- I am not sure it was, in
11 fact.

12 THE CHAIRMAN: No.

13 MR JOWELL: I think that is fair, yes --

14 THE CHAIRMAN: So legal -- this whole separation between
15 legal and factual causation --

16 MR JOWELL: Yes.

17 THE CHAIRMAN: -- possibly stems from *Sainsbury's* and I am
18 not sure, frankly, how helpful it is.

19 MR JOWELL: Well, it is -- well, I respectfully agree, but
20 the only point I would make is that the requirement --
21 as we will come on to, is that whichever -- whatever
22 the terminology you use, proximity was excluded and if
23 I can come on to show you that.

24 THE CHAIRMAN: Well, I know they say legal or proximate
25 causation --

1 MR JOWELL: Yes.

2 THE CHAIRMAN: -- but that does not sort of follow through
3 in the later cases, I do not think.

4 MR JOWELL: Well, if we go to {RC-D/7/28}, please, and we
5 see then paragraphs -- if I could read to you 55 and --
6 to 58:

7 "Whilst we have no doubt that a deliberate decision
8 to increase prices in the face of the Overcharge
9 constitutes pass on, we do not agree that pass on is so
10 limited. Any increase in price, occurring as a result
11 of the Overcharge, is sufficient to constitute pass on.
12 The intention of B to increase prices in response to
13 the Overcharge, whilst it constitutes evidence that may
14 be helpful, is not a necessary part of the defence...

15 The Umbrella Interchange Fee Claimants identify no
16 authority in support of their proposition that intention
17 is an aspect of the pass on defence which therefore
18 needs to be pleaded, and the assertion is flatly
19 contradicted by Lord Haldane LC's statement in *British*
20 *Westinghouse*. Moreover, there are cogent reasons of
21 policy why the Umbrella Interchange Fee Claimants'
22 proposition cannot be right. The Court of Appeal, in
23 *Sainsbury's*, made clear that the Tribunal's approach to
24 pass on was wrong, and that the *Hanover Shoe* approach to
25 pass on (namely to close it out) did not reflect the law

1 of this jurisdiction. The Supreme Court has made it
2 clear that it would be wrong to place insurmountable
3 burdens on a claimant seeking to vindicate a claim, and
4 that such burdens would probably offend the principle of
5 effectiveness. If pass on only exists where there has
6 been a decision to pass on, the prospects of C ever
7 being able to make good a claim against A would be
8 vanishingly small."

9 Then he goes on to quote the Supreme Court
10 addressing the evidential difficulty:

11 "'The loss caused by the overcharge included in
12 the MSC was an increased cost which the merchants would
13 in all probability not address as an individual cost but
14 would take into account along with a multiplicity of
15 other costs when developing their annual budgets.
16 The extent to which a merchant utilised each of the four
17 options, which the CAT identified and we described ...
18 above, can only be a matter of estimation. In
19 accordance with the compensatory principle and
20 the principle of proportionality, the law does not
21 require unreasonable precision in the proof of
22 the amount of the prima facie loss which the merchants
23 have passed on to suppliers and customers.'"

24 Then, over the page {RC-D/7/29}:

25 "Again, this makes clear that a decision to pass on

1 is unnecessary, and that the sort of counterfactual and
2 econometric analysis advanced by Visa (and, to an
3 extent, by Mastercard) is a proper way to plead
4 the defence of pass on. We find that there is nothing
5 objectionable in the way in which Visa and Mastercard
6 have pleaded the pass on defence, and that the Umbrella
7 Interchange Fee Claimants' objections to the pleadings
8 are unfounded in law and wrong."

9 So the way the proximity point was then put was --

10 MR TIDSWELL: Just before you -- I mean, that was not about
11 proximity, was it, that was about the argument from
12 the claimants that you have to prove intention?

13 MR JOWELL: Well --

14 MR TIDSWELL: There is nothing in there about proximity at
15 all, is there?

16 MR JOWELL: I do not agree. That was the way that
17 the proximity point was then being put was that it was
18 being put by reference to a need for a conscious
19 awareness of the cost and the decision to pass it on.
20 That was how they put the proximity point --

21 MR TIDSWELL: Well, I think it is fair to say it was being
22 put as a requirement of the *British Westinghouse* test
23 that it was being said that it would not arise out of
24 the transaction unless it was apparent to the merchant
25 and they decided to do something about it. That was

1 the way it was being put, so I understand that. But
2 there is no -- that is not about proximity, that is
3 about --

4 MR JOWELL: Well, I respectfully disagree. I think that is
5 a way of formulating the proximity test and it is a way
6 of formulating it quite high --

7 MR TIDSWELL: You are now using proximity to equate to
8 the legal causation test and I do not think that is
9 right. I think proximity is just an element of legal
10 causation, is it not? That is not the only way in which
11 you could look at it.

12 MR JOWELL: Well, this was how they -- this was how they
13 were putting their case, in my respectful submission, on
14 the need for a particular type of connection and
15 the tribunal rules it out and determines --

16 THE CHAIRMAN: Can we just go back, sorry, to paragraph 56
17 {RC-D/7/28}.

18 MR JOWELL: Yes.

19 THE CHAIRMAN: I am just trying to understand, where they
20 are saying:

21 "The Supreme Court has made clear that it would be
22 wrong to place insurmountable burdens on a claimant
23 seeking to vindicate a claim ... that would ... offend
24 the principle of effectiveness ..."

25 MR JOWELL: Yes, they are, I think, bearing in mind indirect

1 claimants. There is a discussion earlier in this
2 judgment -- the judgment bears reading in full, but
3 there is a discussion earlier in the judgment regarding
4 the fact that you have indirect claimants who, like
5 Mr *Merricks* and his class, require pass-on effectively
6 to be established.

7 THE CHAIRMAN: Okay.

8 MR JOWELL: Then you have indirect claimants where, in
9 respect of which the defendants -- forgive me, you have
10 direct claimants who -- in respect of whom the pass-on
11 is invoked as a defence by the defendants and the -- as
12 Visa and Mastercard do to the remaining claimants. But
13 the point that the tribunal makes, rightly, is that you
14 cannot treat those two situations differently. Judicial
15 integrity requires that you have the same approach,
16 whether you are talking about pass-on as a defence or
17 pass-on as a sword from an indirect claimant point of
18 view. This is a -- the principle of effectiveness in
19 European law has established that it is important that
20 indirect claimants, who bear the economic -- the real
21 loss, have -- are able to claim and it --

22 THE CHAIRMAN: So when they refer to a claimant being --
23 "prospects", they are talking about a Mr *Merricks*
24 claimant.

25 MR JOWELL: Indirect. Yes, indeed, indeed.

1 THE CHAIRMAN: Okay.

2 MR JOWELL: But the test has to be the same, that is
3 the point. One cannot just turn -- apply different
4 tests depending on whether it is being considered as
5 a defence or as a -- or as a sword.

6 If one then goes to {RC-D/7/30}, please, one sees
7 paragraphs -- if I could read the paragraph 61(1),
8 (2) and (3). It says:

9 "As we made clear in the Ruling, these are complex
10 claims, not least because of the sheer number of
11 claimants. Given the nature of the ... Interchange Fee
12 Proceedings and the pass on defence, it is appropriate
13 that we give a clear direction to the parties as to how
14 we intend to determine the pass on defence.

15 "(1) We note that Visa, in contrast to Mastercard,
16 in substance proposes to demonstrate pass on by the use
17 of econometric evidence and by relying on existing
18 studies of pass on rates. We consider that approach to
19 be, prima facie, the correct one to adopt. Mastercard,
20 whilst not eschewing econometric evidence, also wishes
21 to rely on disclosure from the Umbrella Interchange Fee
22 Claimants. Given the sheer number of claimants, that
23 will involve sampling.

24 "(2) Sampling is also the approach that the Umbrella
25 Interchange Fee Claimants wish to adopt in demonstrating

1 that the Overcharge was not passed on.

2 "(3) We propose to make an order refusing Mastercard
3 permission to rely upon specific fact evidence to make
4 good its pass on defence. Given the evidential
5 difficulty we have described, we are entirely sceptical
6 that the pass on defence can be established by claimant
7 specific evidence adduced from a sample of many thousand
8 claimants and we consider that such an approach would be
9 a disproportionate and, frankly, hopeless way of
10 deciding the question of pass. That said, the Tribunal
11 would be entirely sympathetic to some form of tightly
12 controlled, expert-lead disclosure, provided that it was
13 focused, cost effective, and proportionate. Such an
14 approach might include a survey or questionnaire
15 directed to B or certain elements within the class that
16 constitutes B. We make no further direction in this
17 regard, because we are conscious that the parties are in
18 the process of completing the list of issues ..."

19 So --

20 THE CHAIRMAN: This is an entirely pragmatic decision based
21 -- I mean, it is not making any decision about proximity
22 and whether that can be relied upon as part of
23 the defence to a pass-on claim.

24 MR JOWELL: Well, my Lord, what it is is it is clearly
25 indicating that, in our submission, the Tribunal's view

1 that pass-on can be demonstrated by econometric evidence
2 and by relying on existing studies of the pass-on rate.

3 That is what it says in the subparagraph. Secondly --

4 THE CHAIRMAN: Not ruling out --

5 MR JOWELL: Well, it is --

6 THE CHAIRMAN: -- some disclosure. What is that to go to?

7 MR JOWELL: Well, some very focused expert-lead disclosure

8 to go to potentially the question of the appropriate
9 proxy, for example. But they are denying Mastercard's
10 attempt to obtain claimant specific evidence. I have
11 been asked also to read subparagraph (5), which says
12 {RC-D/7/31}:

13 "... we are not going to preclude the Umbrella
14 Interchange Fee Claimants from adducing any evidence
15 that they might wish to produce in support of their
16 claim that the Overcharge was not passed on. We are, as
17 we have said, confident that claimant specific evidence
18 will not take the resolution of the pass on defence any
19 further, but if we are wrong on this point, this will be
20 demonstrated by the evidence that the Umbrella ... Fee
21 Claimants adduce. The intention to adduce [the]
22 evidence will be controlled by the Tribunal's case
23 management powers, and ... [the] evidence will need to
24 be specifically referenced to the list of issues ..."

25 THE CHAIRMAN: Why did Mastercard want that disclosure from

1 the claimants?

2 MR JOWELL: Because Mastercard took the position -- well,
3 Mastercard will speak for themselves --

4 THE CHAIRMAN: Yes.

5 MR JOWELL: -- but they took the position that they thought
6 that it would be relevant to the issues in dispute, but
7 we -- but they did not -- they did not obtain it. You
8 see they say:

9 "If we are wrong on the utility of this evidence
10 [they say] we will ... course revisit the question of
11 sampling and of Mastercard's (and Visa's) right to have
12 disclosure of claimant specific evidence."

13 But they did not -- they never went -- we never had
14 sampling and we never had disclosure on the basis of
15 sampling of claimant specific evidence. So this is --
16 this is -- the problem is that they -- that the whole
17 proceedings had been curated in a way that is not --
18 this issue is not -- this is not an issue, and that is
19 then -- that was then the background -- against that
20 background of this and the curation of the evidence on
21 this basis, the proximity issue then surfaced again in
22 various submissions by the claimants and that is what
23 then led to Visa's application in March of last year in
24 relation to causation, because we saw them still
25 invoking proximity, but, as you see, the evidence is

1 being curated in such a way that it is impossible for
2 that issue to be separately determined.

3 So if we go to our -- and our understanding of this
4 -- of this ruling was that we were simply proceeding --
5 and of all of the rulings that followed in which
6 sampling was -- there was no sampling, there was no
7 detailed disclosure by selected claimants and so on, on
8 the basis of sampling was that we were going to
9 a hearing on the basis of "but for" causation.

10 If you go to {RC-O/6/1} you see this is our skeleton
11 argument for the causation hearing, Mr Rabinowitz'
12 skeleton argument, and you see the way we put it in
13 paragraph 2:

14 "The question for Trial 2 is fundamentally one of
15 (economic) fact. [The] question is whether, if [the]
16 ('MSCs') had been lower, the Claimants would have
17 charged lower prices to their customers; and if not,
18 whether they would have agreed to pay higher prices to
19 their suppliers. In other words, would the Claimants
20 have charged lower prices to their customers -- or paid
21 higher prices to suppliers -- but for the overcharge?"

22 So a very clear statement of how we see the issue
23 for the upcoming trial.

24 Then over the page {RC-O/6/2}, you see, paragraph 3,
25 we summarised the claimants' position:

1 "Contrary to that established position,
2 the Claimants now appear to suggest that at
3 the substantive trial they will argue that something
4 over and above factual causation is required. In other
5 words, they want to be able to deny that pass-on
6 occurred even if the aforementioned question of economic
7 fact is answered in the affirmative. They make two core
8 arguments in support of that proposition: (i) that
9 the Tribunal has not excluded 'proximity' as a relevant
10 consideration in the test for causation in these
11 proceedings; or (ii) that to the extent that it has done
12 so, the Tribunal's statements are not binding on
13 the Claimants, or are not binding on all of them."

14 So it could not be clearer and this is quoted in
15 the March 2024 judgment and it is referred to in
16 paragraph 3 as these are the battle lines. The debate
17 was not about legal causation in some narrow sense, it
18 is precisely, precisely, about whether proximity was
19 excluded as a relevant consideration in the test for
20 causation in these proceedings.

21 THE CHAIRMAN: Legal or factual proximity?

22 MR JOWELL: It means -- it comes to the same thing, with
23 respect. It does, because we have said in the previous
24 paragraph what we say the test is. It is a "but for"
25 test.

1 MR TIDSWELL: One of the ways this has been put from time to
2 time is to ask the question if you were able to
3 demonstrate very obviously as a matter of fact that
4 the MSC had been passed on, the MIF had been passed
5 on --

6 MR JOWELL: Yes.

7 MR TIDSWELL: -- then it was quite difficult to see why you
8 would then get into questions of proximity, so -- or
9 indeed the question of intent. So that -- you know,
10 that was -- I think that was one of the points that was
11 raised at that hearing in July 2022. Once you have got
12 evidence that it has been passed on as a matter of
13 fact --

14 MR JOWELL: Yes.

15 MR TIDSWELL: -- then it is quite hard to see, with that
16 evidence, why you would not reach the conclusion that it
17 was arising out of the transaction in terms of
18 *British Westinghouse*. That seems to be, as far as I can
19 tell, what the Supreme Court is saying when it talks
20 about this, but it does presuppose that you have got
21 there with what is described here as an economic fact,
22 but really it is just a question of fact, is it not, as
23 to whether it was passed on?

24 Now, I wonder whether your focus on proximity is
25 really missing the point. I mean, it may be unhelpful

1 that the words used by the Merchant Claimants and it may
2 be it opens up all this debate, but the real question,
3 which is one I think we toyed with a little bit before,
4 is whether it is open to us to consider the evidence we
5 have from merchants talking about the different ways in
6 which the MSC might be treated and therefore to draw
7 conclusions as a matter of fact from that as to whether
8 or not it was passed on and that may be through
9 the choice of the proxy or through some other means.

10 MR JOWELL: The --

11 MR TIDSWELL: In other words, does any of this really matter
12 if what we are really talking about is we have got some
13 evidence, it is what it is, it has been tested, you can
14 make submissions about the adequacy of it and the extent
15 to which it is universal for all claimants, but is there
16 any reason why it should not be taken into account for
17 determining the question of what is plainly factual
18 causation because it goes to your point about economic
19 fact?

20 MR JOWELL: In our submission, the evidence is not -- is
21 simply not -- is simply not informative, and we will
22 come on to --

23 MR TIDSWELL: No, but I -- I know you are going to say that,
24 but I am asking --

25 MR JOWELL: Yes, but --

1 MR TIDSWELL: -- I just want to know whether you think there
2 is anything wrong with looking at it.

3 MR JOWELL: I think that if what you are saying is that if
4 we can demonstrate that on the balance of probabilities
5 the -- there was pass-on by the claimants in
6 the particular sector, then there is no further issue,
7 if you see what I -- or it is very difficult to see how
8 there would be any further issue, then we respectfully
9 agree with that. But I have to address this point,
10 because my learned friend is saying it does not matter
11 that you show that yours is econometrically the better
12 proxy if you have not somehow connected all the dots and
13 shown some form of -- it is not clear exactly how we
14 have to connect the dots, but if we do not connect
15 the dots in some very specific way to show that in that
16 sector the cost is passed on proximately.

17 MR TIDSWELL: Well, I am not sure that is what he is saying.
18 I do not think he is saying that. I think he is saying
19 that your proxy is not the right proxy because of
20 the evidence he has produced and as a result, you then
21 get into an analysis of indirect pass-on, which is not
22 sufficiently clear. I will not use the word proximate.
23 There is not a sufficient causal connection between --
24 that can be shown between the MIF and the output of what
25 all those indirect mechanisms are. So that is the sense

1 in which I understand he is using the word "proximate",
2 and it may be it is unhelpful to use it that way, but
3 actually, if used that way, it is just about the facts,
4 is it not, about whether something has happened or not,
5 it is not really about any of this?

6 MR JOWELL: Well, I respectfully disagree, because if that
7 had been -- if that had been effectively an issue, that
8 we have to show these mechanisms operating in practice
9 in a direct manner, then the whole of the disclosure
10 process in this -- in these proceedings would have to
11 have been done differently, and this was simply -- this
12 was -- as we will see, if one looks at the next
13 paragraph in this -- in this judgment -- in this
14 skeleton argument, we say:

15 "Visa respectfully submits that these arguments are
16 not now open to the Claimants, as the Tribunal has
17 previously considered and determined them."

18 That --

19 MR TIDSWELL: But you are not saying -- surely you are not
20 saying that that means they could not argue that your
21 indirect mechanisms were the right ones to be looking at
22 and that they did not deliver evidence of causation.

23 I mean, surely there is a factual question open to them.

24 MR JOWELL: But how, on the evidence as it stands, are we
25 supposed to be able to prove our case?

1 MR TIDSWELL: Well, but that is a different question, is it
2 not? That is not about proximity and it is not about
3 legal causation, it is about whether we have got
4 the right evidence in front of us to determine what
5 the economic fact is, and I think -- and I cannot
6 remember -- I do not know whether you are able to tell
7 us when it first became apparent to all of us, certainly
8 to the Tribunal, that the merchants' position was that
9 this was not treated as a marginal cost or for marginal
10 cost purposes, but that is the point, is it not, that is
11 really the point about whether the evidence was
12 sufficiently focused on that argued treatment of it? It
13 has got nothing to do with legal causation, has it?

14 MR JOWELL: It has to do with proximity, as they -- as they
15 -- and that is how they put it, and this is how -- and
16 this was the issue at this time as well, in March,
17 because as you see in this paragraph 4, we then go on to
18 say:

19 "In particular, the Tribunal has already held that
20 legal causation is a 'no-brainer' ..."

21 That is quoting from the previous judgment:

22 "... on the facts of the present proceedings,
23 a finding subsequently upheld and endorsed by the Court
24 of Appeal."

25 Because the March finding was they did not --

1 the Court of Appeal did not give permission to -- for --
2 did not give permission to appeal:

3 "The case management directions that have followed
4 that determination, and the blueprint laid down by
5 the Tribunal leading to Trial 2, have all been
6 predicated on the basis that all that remains to be
7 tried with regard to pass-on is a question of factual
8 causation -- the issue of legal causation
9 and 'proximity' being clear."

10 So it is abundantly clear that we were not concerned
11 with legal causation in a narrow sense, but with whether
12 proximity still needed to be established.

13 We then go on to make the point that I -- that --
14 about the unsuitability of the evidence base if one were
15 seeking to determine proximate causation, because we say
16 in paragraph 5:

17 "It is ... not simply a question -- important though
18 this is -- of the issue of legal causation having
19 already been decided in these proceedings. There is
20 also a serious practical consequence that would arise
21 from the attempt by the Claimants to revive the legal
22 causation issues. That is because the reopening of
23 these issues at this stage -- if permitted -- would have
24 fundamental evidentiary implications and would
25 ultimately mean that Trial 2 could not take place in its

1 present form ... as umbrella proceedings with host
2 claims."

3 We then -- Mr Rabinowitz then addresses
4 the July 2022 judgment, and if we go, please, to
5 {RC-O/6/6}, you see in paragraph 14, the *Trucks* judgment
6 in the Court of Appeal is mentioned and it is -- we
7 explain how the court distinguished the position in that
8 case from the position in the present interchange
9 litigation. We then go through the further hearings on
10 pass-on in May 2023 and January 2024, and if we go,
11 please, to {RC-O/6/8}, you will see that we quote from
12 the Allianz skeleton argument at the January '24
13 hearing, suggesting:

14 "... that it might wish to challenge whether
15 'the requisite direct and proximate causative link
16 exists' ..."

17 That is what they are saying there.

18 If you go to page 20 -- forgive me {RC-O/6/9}, over
19 the page, paragraph 20, we see how, at the January 2024
20 hearing, counsel for Visa, Mr Rabinowitz, warned
21 the Tribunal of:

22 "... the need to avoid a '"gotcha' moment at trial'
23 whereby one of the Claimants argues that factual
24 pass-on 'doesn't qualify as legal pass-on'."

25 You see the President's response to that.

1 One then sees the present application, and if
2 I could read you paragraphs 22 and following -- perhaps
3 if -- yes:

4 "As above, the Claimants appear to disagree that
5 the only relevant question is one of fact ... whether
6 prices would have been lower but for the overcharge. In
7 particular, they seek to add to the test for causation
8 by making repeated references to an additional need for
9 a 'sufficiently close causal link' or a 'direct and
10 proximate link' between the overcharge and ... higher
11 downstream prices. This of course precisely raises
12 the legal causation issue already determined by
13 the July 2022 Judgment.

14 "The starting point is that, as above, the proposed
15 insertion of an additional hurdle is entirely at odds
16 with the July 2022 Judgment. For example, Allianz
17 criticises Visa's position as being that 'following
18 the ... 2022 Judgment, any causal link between the MIF
19 and any of the Claimants' prices is sufficient', and
20 goes on to argue that the 'sufficiency of any causal
21 link' must additionally be inspected. But the July 2022
22 Judgment expressly and specifically found that in
23 the context of the present proceedings, '[a]ny increase
24 in price, occurring as a result of the Overcharge, is
25 sufficient to constitute pass on' ..."

1 You have seen that, that is in paragraph 55:

2 "In other words, Visa's position -- with which
3 the Claimants take issue -- is the very position set out
4 in the July 2022 Judgment.

5 "Moreover, the Claimants have remarkably avoided
6 saying what exactly they consider 'proximity' should add
7 to the test -- or indeed whether they accept that this
8 is simply posing the already-decided legal causation
9 issue. In 2022, the Claimants suggested
10 that 'proximity' in this context required conscious
11 decision-making. That was rejected by the Tribunal.
12 Now the Claimants provide only limited indications of
13 what they might intend to argue in the future."

14 You see:

15 "First, they argue that causation will not be
16 established merely because a business seeks to recover
17 its costs. As above (at [paragraph] 15), this was the
18 point made in *Trucks* ...: 'something more than reliance
19 on the usual planning and budgetary process' is required
20 in order to show proximity where certain other factors
21 are absent ... But as already noted, the Court of Appeal
22 repeatedly and explicitly distinguished *Trucks CA* from
23 the interchange fees proceedings, and endorsed
24 the approach taken by the Tribunal in the July ...
25 Judgment on the facts of this case."

1 We then go through the law on res judicata and abuse
2 of process.

3 Then if you could go, please, to {RC-O/6/15}, and
4 you see paragraph 36:

5 "Visa's position is that: (i) the July 2022 Judgment
6 created an issue estoppel in relation to the relevance
7 of legal or proximate causation to these proceedings,
8 alternatively; (ii) to the extent that for any reason
9 any party considered itself not bound by the ...
10 Judgment, the issue of 'proximity' could and should have
11 been raised by that party at an earlier stage ..."

12 That is the abuse of process argument:

13 "... and; (iii) in any event, it would be an abuse
14 of process and/or vexatious for a party to now argue
15 that the question for Trial 2 is anything other than one
16 of (economic) fact. The short point is that
17 the 'gotcha' approach of questioning a decided point at
18 a late stage -- which some Claimants appeared to be
19 contemplating prior to this hearing ... is not
20 permitted."

21 Then, on page {RC-O/6/17}, at the top of -- we see
22 paragraph 38:

23 "... the point that the test for causation does ...
24 on the facts of this case, entail any additional 'legal
25 causation' or 'proximity' hurdle was necessarily

1 determined by the July 2022 Judgment. The finding
2 that 'proximity' is not in issue here was a fundamental
3 step in the Tribunal's reasoning, and led it to conclude
4 that there was no need for the Claimants to have made
5 a decision to pass on ... An issue estoppel was
6 therefore created ..." --

7 THE CHAIRMAN: That is defining what the proximity issue
8 was.

9 MR JOWELL: With respect, it -- no. As we made very clear,
10 Mr Rabinowitz made very clear that that was simply how
11 they were expressing the proximity point at that
12 stage --

13 THE CHAIRMAN: Okay.

14 MR JOWELL: -- and that there is a wider proximity point
15 that is now being raised that is in some way different
16 from the decision point, and that we say that if they
17 wanted to argue there was something else, they could and
18 should have done so at that hearing.

19 MR TIDSWELL: So what is your understanding of the wider
20 proximity point that is being raised now? I mean,
21 obviously the word has been used and, as I said earlier,
22 I am not sure it is entirely helpful, but what is your
23 understanding of what they are actually asking us to
24 take into account?

25 MR JOWELL: I -- my understanding is that they are saying

1 that "but for" causation, simple "but for" causation on
2 an economic fact basis on the balance of probabilities,
3 there is something over and above that that requires to
4 be proven, such that if -- even if you establish that
5 but for the overcharge the prices would have been
6 higher, nevertheless, because of the nature of
7 the indirectness of the method of -- in which that has
8 come about, there is insufficient proximity, whether
9 that is, for example, through a budgetary process that
10 is indirect or through competitors putting it into their
11 prices and you following the competitors, whatever
12 the precise methods are, they say some of those methods
13 they say are too indirect, even if you can establish
14 that on the balance of probability, absent the MIF,
15 their prices would have been lower. That is what they
16 are clearly seeking to do in various forms and they put
17 their case in various different ways, sometimes it
18 appears to be they are saying it has to be almost
19 cost-plus pricing, in other words they put it in a more
20 restrictive way. But what we were saying on this
21 occasion was the only issue on the table for this trial
22 is "but for" causation.

23 MR TIDSWELL: So it is something to do with the quality of
24 the causative link then; is that the understanding?
25 Because you are not suggesting -- you are not suggesting

1 that you do not have to find a causative link. I mean,
2 there does have to be a causative link, does there not?
3 You cannot just say because prices have gone up and
4 the MIF was charged therefore you can infer from that?
5 That is not your case, is it?

6 MR JOWELL: There has to be a causal link, but that causal
7 link can be inferred from econometric evidence based on
8 proxies --

9 MR TIDSWELL: Yes, of course.

10 MR JOWELL: -- and that is how -- that is how -- on
11 the appropriate proxy. We can have a -- we can have
12 a debate about what is the appropriate proxy. What we
13 cannot have in these proceedings is a debate about
14 whether a particular type of causal mechanism is too
15 indirect because -- and the reason you cannot have that
16 debate is because then you put in play the question of,
17 well, how did businesses in this sector actually carry
18 out that pricing on a very, very granular, detailed
19 method -- (overspeaking) -- you cannot determine that.

20 THE CHAIRMAN: I realise we are slowing you down
21 considerably.

22 MR JOWELL: Yes.

23 THE CHAIRMAN: We will try and move on --

24 MR JOWELL: Yes.

25 THE CHAIRMAN: -- but it is obviously an important point.

1 MR JOWELL: Yes.

2 THE CHAIRMAN: What I was just thinking is that, in a sense,
3 "but for" causation, which you say is the only issue
4 before us --

5 MR JOWELL: Yes.

6 THE CHAIRMAN: -- is a rather sort of "all or nothing"
7 issue, is it not? Either there is causation or there is
8 not on a "but for", whereas the issue in our case is,
9 well, what is the rate, the rate of pass-on? Because it
10 is not either 100% or 0%, it is -- and is "but for"
11 causation really suited to determining that issue, which
12 is -- which depends on a whole number of factors as to
13 the rate -- as to how the MSCs were passed on and if so
14 in what amount?

15 MR JOWELL: Well, that question of the rate, I accept that
16 if you decide on a particular proxy and that proxy shows
17 0% pass-on, I think that is a very unlikely scenario, in
18 my submission, in any sector, given the nature of this
19 cost, but if you were to decide that, then that would --
20 then "but for" causation would not be established. But
21 I agree with you that once you -- in a sense, once one
22 is into the question of estimation, it is really just
23 a question of seeking to do the best you can with
24 the material before you as -- really as Lord Briggs
25 explained in *Merricks* on the basis of the methodology

1 that was proposed by *Merricks*, and he said precisely
2 this sort of -- they envisage this -- precisely this
3 sort of sectoral econometric evidence and he said,
4 indeed, and tribunals must simply do -- and courts must
5 do the best they can with that material to arrive at
6 their best estimate.

7 THE CHAIRMAN: If, for example, the only way it could be
8 passed on was through some sort of indirect mechanism,
9 could it not be said that that would not satisfy
10 the "but for" test? Alternatively, if you have got
11 pass-on might be achieved through -- partly through
12 a direct mechanism and partly through an indirect
13 mechanism, what then happens to causation in that?

14 MR JOWELL: In my submission, the nature of the mechanism
15 does not matter from the point of view of the "but for".
16 I mean, if you are -- it may be an indirect mechanism,
17 but if it has happened -- if, on the balance of
18 probabilities, it happened, then that is sufficient for
19 the "but for" test. Provided there are mechanisms there
20 by which it can occur, then that is sufficient. Then
21 you are simply into a question of estimation.

22 If I -- one sees -- you see, if I may, because --

23 THE CHAIRMAN: Yes.

24 MR JOWELL: -- I have got quite a lot to get through.

25 THE CHAIRMAN: Okay.

1 MR JOWELL: This is an important point, but there is more to
2 see. But we say what you see is that this would -- what
3 our skeleton argument is all about is whether there was
4 any additional proximity requirement in addition to "but
5 for" causation. If you go to page {RC-O/6/18}, please,
6 over the page, you see in paragraph 41 we explain
7 the practical consequences of proximity issues being
8 reopened and we note the lack of clarity as to what is
9 the evidence that would be required to determine
10 proximity.

11 At paragraph 44, over the page {RC-O/6/19}, we note
12 that:

13 "... the concept of 'proximity' [is] inherently
14 entity-specific, despite the Tribunal having been clear
15 that these proceedings are not progressing on a 'case by
16 case [basis'] but rather on [the basis of] '...
17 the statistics'."

18 In paragraph 46, we note that this would mean, if
19 proximity is back in play, then this would mean that
20 Trial 2 could not take place in its current form.

21 At paragraph 47, on {RC-O/6/20}, it is noted:

22 "... that there was already a flavour of 'déjà vu'
23 in that the hearing had been a third attempt to 'achieve
24 a degree of confidence in the approach to the gathering
25 of the evidence to be adduced at Trial ...'"

1 I respectfully say, well, if there was déjà vu then,
2 in the words of Yogi Bear, today, this is déjà vu all
3 over again.

4 Then we conclude in paragraph 48 that:

5 "If there is an argument that certain evidence needs
6 to be adduced in order for there to be a fair trial,
7 then the Tribunal will of course resolve it, but the key
8 point which Visa intends to establish at this hearing is
9 that such applications will have to be made on the basis
10 that the proposed evidence is necessary to assess
11 whether prices would have been lower but for
12 the overcharge: in other words, whether pass-on occurred
13 as a matter of economic fact. Spurious arguments about
14 the need to prove 'proximity' or 'causal nexus' at
15 a Claimant-specific level should not be permitted -- and
16 nor should arguments that the evidence, as ultimately
17 adduced, is insufficient to establish these additional
18 requirements."

19 It is not just us that is framing the argument in
20 this way. If you go to the response of Allianz, who
21 I think led on this point, if you go to {RC-O/13/1}.

22 THE CHAIRMAN: I think it is RC-O, is it not?

23 MR JOWELL: Sorry, RC-O, and if we could go, please, to
24 {RC-O/13/2}, we see:

25 "It seems clear, therefore ..."

1 Paragraph 6:

2 "... that the Defendants' applications are driven by
3 the proposition that they need not prove a direct and
4 proximate causal link between the MIF and the Claimants'
5 prices in order to succeed on pass-on. That proposition
6 is plainly wrong."

7 They say.

8 You will see at paragraph -- on {RC-O/13/3},
9 paragraph 9, we see they then say:

10 "... the legal test for causation requires
11 a fact-sensitive assessment. In *Trucks* ... the Tribunal
12 identified a non-exhaustive list of factors that may be
13 relevant when applying the legal test ..."

14 Then it goes through them.

15 Then if you read over the page, please, {RC-O/13/4}
16 paragraphs -- if you could read, please, to yourselves
17 paragraphs 10 to 14.

18 (Pause).

19 THE CHAIRMAN: Go to 14, did you say?

20 MR JOWELL: Yes, to 14.

21 THE CHAIRMAN: Yes.

22 MR JOWELL: If I could show you next the submissions of
23 Ocado, which you will see in {RC-O/14/1} at page 2
24 {RC-O/14/2}, and if I could ask you to read paragraphs 3
25 to 7.

1 (Pause).

2 I am going to have to speed up a bit, but for your
3 note, if you read also page {RC-O/14/7}, paragraphs 17
4 to 19, and page {RC-O/14/9}, paragraph 24, and you will
5 see similar submissions were also filed by Primark.

6 If I could just show you {RC-O/16/1}, this is
7 the position of the SSH Claimants, and you see they say
8 they adopt the submissions of Primark and Ocado and
9 Allianz, and they say:

10 "... the SSH Claimants agree that there remains live
11 in the claims a requirement for the Defendants to show
12 a close causal connection between the overcharge and any
13 higher downstream prices. This applies equally for all
14 of the SSH Claimants."

15 So, squarely and indisputably, the precise issue for
16 that hearing was whether proximity, causal connection,
17 indirectness of causal connection, however you wish to
18 put it, was that excluded or included, or did the only
19 issue remain one of "but for" causation on the basis of
20 economic fact.

21 One then comes to the oral hearing, and if you go to
22 {RC-E1/7/1}, please, and if we go to {RC-E1/7/3}, you
23 see at line 8 -- line 7, Mr Brealey:

24 "... what I would like to do is make some headline
25 points on how the Tribunal looked at proximate cause in

1 the May hearing. Because we say when one looks at
2 the pages, and we can't get into the Tribunal's mind of
3 course, but when one looks at the pages and the
4 background we say that Visa is not excused from having
5 to prove a sufficiently close causal link."

6 If you look at then the President makes a comment at
7 line 20:

8 "Yes. This is exactly it. As the Tribunal will
9 have seen, we gave three reasons in our skeleton as to
10 why Visa is not exempt from having to prove
11 a sufficiently close causal link."

12 So on.

13 If you go to {RC-E1/7/26}, you see in the middle, at
14 line 9, you will see:

15 "These are concerns that you are using the wordings
16 in the pleadings as a back door to re-opening a question
17 that I think we have already decided. We have not
18 decided matters on the basis of what the law of
19 causation is, we have decided on the basis of what
20 evidence in broad shape we would need to hear in order
21 to resolve Trial 2. So we are proceeding down one track
22 which I regard as wholly irrelevant to the question that
23 is actually before us. We have lots of interesting
24 academic questions and we have the practical question of
25 how we resolve the factual issues before us. It is

1 the latter that we are trying to control, not
2 the former. I mean, bearing in mind where we came from,
3 right at the beginning, we had a long list of issues
4 which we said we wanted to have populated so we would
5 know what evidence was being adduced. The claimants
6 were remarkably coy about what they wanted to produce in
7 terms of evidence, because what they wanted to maintain
8 was the notion of: we will produce a series of
9 individual matters from individual claimants and that is
10 how we are going to discuss pricing. We are going to
11 have, essentially, a subjective approach. Now, we have
12 shot that hare. We then had a debate about sampling and
13 the representations of that and we have shot that hare.
14 We are now going down an econometric assessment across
15 a pool of claimants, whose shape we are trying to
16 control, and my question, again, is how is this debate
17 assisting us in controlling the evidential question that
18 we are going there?"

19 He says {RC-E1/7/27}:

20 "So I quite understand why Visa are here. They want
21 a degree of confidence that there is not going to be
22 a further rabbit pulled out of a hat saying: oh, yes,
23 you have been dealing with one aspect of causation.
24 That is great. We have the evidence under control but
25 we are going to have a whole raft of extra stuff which

1 is apparently open on the pleadings, which no one has
2 articulated yet, which we are going to be shoehorning
3 into a trial which means we are going to be adjourning
4 it. That is not going to happen."

5 You see -- I cannot take you through all of
6 the transcript, but if you see, for example, Mr -- you
7 will see Mr Draper's submissions on {RC-E1/7/28} where
8 he again says -- you will see he mentions, you will see,
9 at 2 to 15, he says:

10 "What we have said is for there to be witness[es],
11 they should come sooner and be accompanied by documents
12 ...

13 "That isn't affected by the debate today, because at
14 that hearing, when we make the application, what we will
15 have to persuade you, as the Tribunal, is that the
16 material we want is relevant to factual causation. That
17 it will go to whether pass-on occurred, aiming at a 'but
18 for' standard. So we are quite happy to have this
19 question of legal causation clearly squared away."

20 If you go to Mr Lask's submissions, page 42
21 {RC-E1/7/42}, you will see he, expanding on his skeleton
22 argument -- perhaps if you could just read lines 7 to
23 26.

24 (Pause).

25 THE CHAIRMAN: Yes.

1 MR JOWELL: If you go to {RC-E1/7/61}, please, if you see
2 line 24, Mr Rabinowitz says:

3 "I am not going to press the Tribunal to take out
4 any colour pencil at all, but can I just say this to
5 the Tribunal. The more I have sat here and listened to
6 my learned friends, in particular Mr Brealey and
7 Mr Lask, the more in my respectful submission it is
8 important for the Tribunal to make clear what you have
9 said in paragraph 50(2) is binding on these parties.

10 "The reason I say that is, with respect to my
11 learned friends, we had submissions which slid from
12 talking about the legal test for causation to legal
13 causation to remoteness being something separate from
14 legal causation, to the suggestion that when you talk
15 about policy at paragraph 50(2) -- and, indeed, as
16 endorsed by the Court of Appeal in paragraph 150 -- that
17 leaves something to the side in relation to legal
18 causation, be it remoteness, sufficient connection.

19 "My learned friends were not there at the hearing we
20 had in March ... and they probably don't know -- but
21 they could have if they had looked at the transcript --
22 we went through all of this."

23 So on.

24 You will see, if you go to {RC-E1/7/65}, that
25 following the ruling, the costs were awarded to Visa and

1 Mastercard. Now, the ruling is a short one. I have
2 taken you to it already, it is at {RC-D/26/1}. If we
3 could go to that, please, and if we go to {RC-D/26/3}
4 you will see in paragraph 3 --

5 THE CHAIRMAN: So the ruling was given there and then?

6 MR JOWELL: There and then, indeed.

7 THE CHAIRMAN: Fair enough.

8 MR JOWELL: You will see paragraph 3 describes -- it quotes
9 Visa's -- the first three paragraphs of Visa's skeleton
10 argument and it describes those as setting out
11 the battle lines.

12 Then if one goes forward to -- over the page to
13 {RC-D/26/4} paragraph 7 -- 5:

14 "We refer to our Judgment on Pass-on, reported under
15 neutral citation number ... at [50]. We do not set that
16 paragraph out in this Ruling (it is not a short
17 paragraph), but it should be regarded as incorporated by
18 reference into this Ruling, for we endorse exactly what
19 was said there. In particular, we refer to [50(2)],
20 which draws a distinction between factual causation and
21 legal causation."

22 Then it then goes into the *Trucks* judgment, and we
23 see legal causation, in paragraph 7, they say that:

24 "The intention of this paragraph -- and we consider
25 the wording to be very clear -- was to state our

1 conclusion that the questions of legal causation there
2 articulated were not before the Tribunal because, as
3 propositions, they were not arguable as a matter of law.
4 That is the clear meaning of the last two sentences ...
5 where we referenced and adopted the Supreme Court's
6 approach to questions of legal causation, going so far
7 as to describe this approach as a 'no brainer'. We are
8 comforted in this assessment by the endorsement of our
9 statement in the Court of Appeal in *Royal Mail* ... which
10 states the law as it has previously been stated by
11 the Supreme Court and this Tribunal."

12 Then over the page {RC-D/26/5}:

13 "Considerable emphasis was placed by the Claimants
14 on the next paragraph in the Court of Appeal's decision
15 at [151]. We do not regard [151] as in any way
16 assisting in the construction of [150] or what that
17 paragraph lays down. Of course, [151] is important: but
18 it is only important in the context of the consideration
19 the Court of Appeal was giving to the reasoning of
20 the Tribunal at first instance in the decision under
21 appeal in the *DAF* case. The paragraph is, therefore, an
22 important paragraph in the specific context of
23 the appeal in that case; but it says nothing about
24 causation in the abstract. We consider that reference
25 to or deployment of [151] in support of a general

1 proposition to be quite simply erroneous and wrong."

2 Yet we see in the claimants' written submissions
3 they seek to deploy that paragraph 151 over and over and
4 over again. Now, if the claimants disagree with
5 the Tribunal's evaluation in that paragraph 8 and in
6 their response to our application, they ought to have
7 appealed that ruling, and they did not. So it is --
8 whether it was an abuse of process to re-litigate
9 the issue of proximate causation the first time round,
10 it is certainly an abuse of process to do so now.

11 THE CHAIRMAN: What are you saying they should have
12 appealed? The finding that 151 --

13 MR JOWELL: Yes.

14 THE CHAIRMAN: -- is not relevant --

15 MR JOWELL: Yes.

16 THE CHAIRMAN: -- to what was being considered by
17 the Tribunal then?

18 MR JOWELL: Yes, and the overall --

19 THE CHAIRMAN: I mean, 151 is binding on us insofar as it
20 finds anything or sets out anything in relation to
21 the law on pass-on, is it not?

22 MR JOWELL: Well, in my submission, the Tribunal has ruled
23 that 151 is irrelevant, is not -- is irrelevant as
24 a general proposition in the context of this case -- of
25 this hearing. They have ruled -- I am afraid there is

1 no getting around it, but they have ruled that
2 the factual -- in the factual circumstances of
3 the interchange proceedings, proximate causation is
4 already taken as established, save only for
5 the exceptions procedure that they go on to mention in
6 the judgment. There is no additional requirement at
7 this trial for us to establish some further individuated
8 facts to meet the requirement of factual causation other
9 than the "but for" test. That was precisely the issue
10 that was firmly put to bed at the March 2024 hearing.

11 Now, if -- I do wish to make some further points by
12 way of summary.

13 THE CHAIRMAN: We need to have a break at some point. Do
14 you want --

15 MR JOWELL: This is a good enough place. Thank you.

16 THE CHAIRMAN: Yes?

17 All right, a ten-minute break.

18 (11.55 am)

19 (A short break)

20 (12.08 pm)

21 THE CHAIRMAN: Yes, Mr Jowell.

22 MR JOWELL: Thank you.

23 Sir, I wish to address you briefly on the question
24 of: was the Tribunal entitled to do what it did?
25 Because we say it clearly set aside for this trial any

1 proximity issues and said that for this trial that
2 the only issue was that of "but for" causation as
3 a matter of economic fact. But I can see that
4 the Tribunal is somewhat troubled by that and so I want
5 to address you as to why we say actually the Tribunal
6 was entitled to do that.

7 The first reason is that one does need to and cannot
8 ignore the sheer scope and scale of these proceedings
9 and the need to ensure proportionality, and this is --
10 and proportionality is actually an aspect of
11 the application of the compensatory principle. If I can
12 show you the Supreme Court's judgment in *Visa v*
13 *Sainsbury's*, it is {RC-J5.1/46/74}, please. You see in
14 paragraph 217, it says:

15 "The court in applying the compensatory principle is
16 charged with avoiding under-compensation and also
17 over-compensation. Justice is not achieved if
18 a claimant receives less or more than its actual loss.
19 But in applying the principle the court must also have
20 regard to another principle, enshrined in the overriding
21 objective of the [CPR], that legal disputes should be
22 dealt with at a proportional cost. The court and
23 the parties may have to forgo precision, even where it
24 is possible, if the cost of achieving that precision is
25 disproportionate, and rely on estimates. The common law

1 takes a pragmatic view of the degree of certainty with
2 which damages must be pleaded and proved."

3 Of course, that pragmatic view was again underlined
4 in the *Merricks* judgment of the Supreme Court in which
5 Lord Briggs highlighted the importance of the Tribunal
6 doing what it can on the basis of the evidence before
7 it, if necessary by, as he put it, "informed guesswork",
8 and it had in mind, of course, a methodology that was
9 proposed by *Merricks* which is precisely sectoral
10 estimates of pass-on based on econometric evidence.

11 One of the -- the second aspect here is one I have
12 already mentioned, which is that the pass-on has two
13 implications. One is that it is a defence to
14 defendants, but, just as importantly, it is also a way
15 in which indirect claimants, who may well be consumers
16 -- normally are consumers, who in economic substance are
17 often the real victims of an alleged infringement,
18 the real losers in economic terms who bear the cost, and
19 it allows them to be able to claim and obtain their
20 compensation rather than being retained by
21 the intermediaries, the direct claimants, who do not, in
22 reality, suffer the loss, or did not suffer all of it.
23 Neither this jurisdiction -- that is why I know, neither
24 this jurisdiction, nor the EU has taken the more
25 stringent approach that you see in the United States at

1 the federal level, where in cases like *Hanover Shoe*,
2 they say, other than in cost-plus cases, pass-on cannot
3 be invoked as a defence, and logically, following on
4 from that, in their subsequent case of *Illinois Brick*,
5 the federal courts in the United States have said
6 therefore, of course, it must follow, to avoid double
7 compensation, multiple compensation, that indirect
8 claimants cannot claim. But we do not have that
9 approach. We permit indirect claimants to claim and
10 the tighter you tighten the -- the more you tighten
11 the screws on pass-on as a defence, the more you tighten
12 it for those indirect claimants as well, and that is
13 really also what lies behind the judgment in *Merricks*.

14 If one steps back and comes back to the practical
15 point, well, how in practice could you square an
16 approach where you are seeking to take a sectoral
17 approach based on econometric estimates, but also try to
18 establish a further distinct proximity requirement for
19 each sector? How would you do that -- how would you
20 even do that? It would be an enormous challenge, and
21 the only way you could do it really is if you, as
22 I said, potentially, is if you, in each sector you went
23 through a sampling exercise, you got a range of
24 claimants in every sector and then you got really deep
25 dive, detailed disclosure from each of those claimants.

1 THE CHAIRMAN: What would that evidence be going to?

2 MR JOWELL: It would be going to -- it would enable you to
3 assess potentially -- I am not suggesting this is
4 a sensible approach, but it would enable you to assess
5 how, within the sector, the cost is treated by a range
6 of claimants on a really proper, detailed level and see
7 how it tracks through in their internal budgetary
8 processes and so on.

9 THE CHAIRMAN: Right.

10 MR JOWELL: Yes. Then you would also be able to see, if you
11 had a range of claimants, potentially the competitive
12 interaction. It would be a tremendously difficult,
13 challenging process and the trial would not last
14 four weeks, it would last six months, and probably even
15 there, you would have to limit it just to some sectors.
16 But that is the sort of process, if you were seeking to
17 establish proximate causation, that is what would be
18 required.

19 MR TIDSWELL: You could take the view that that was
20 necessary to establish factual causation, because all
21 those things just establish whether or not it was passed
22 on. So I am not sure that it depends on -- it was case
23 management for a broader purpose, not because of
24 proximate or legal causation.

25 MR JOWELL: Well, in my submission, the two things are

1 linked, and the point -- the difficulty that we find
2 ourselves in is that, as I said in opening, we do not
3 have the evidence before the Tribunal fairly to resolve
4 that issue. If -- my point in opening was of course my
5 learned friend quotes me in opening, suggesting, well,
6 we cannot prove proximity. That is not what I said.
7 What I said was that if the burden falls on
8 the defendants to prove proximity by reference to
9 individual claimant evidence and demonstrate a direct
10 causal link, then we do not have the evidence before us
11 fairly to permit us to do so. Indeed, that is just
12 obviously so when you take, for example, the number of
13 -- now, there are a number of sectors, a whole slew of
14 sectors where we just have got no claimant evidence at
15 all. We have got no witness statements, no disclosure,
16 and that comprises 30% of the claim value.

17 THE CHAIRMAN: But there were directions for evidence given
18 in this case from the claimants.

19 MR JOWELL: The claimants -- well --

20 THE CHAIRMAN: They were allowed to put in witness
21 statements and they disclosed certain documents.
22 I mean, to what issue was that evidence therefore
23 directed?

24 MR JOWELL: Well, they -- that evidence -- it was not
25 entirely clear what that evidence was directed to, but

1 it certainly could not have properly been directed to
2 the question of establishing proximate causal link,
3 because that was excluded.

4 THE CHAIRMAN: But surely, at least in the first instance,
5 what it was primarily directed to was how did those
6 particular claimants treat MSCs?

7 MR JOWELL: No.

8 THE CHAIRMAN: No?

9 MR JOWELL: What it was initially directed -- the way that
10 the evidence from the claimants emerged was they wanted
11 to put in lots of evidence at various times, as did
12 Mastercard, and their requests were declined -- the --
13 the -- Mastercard, rather, sought claimant evidence --

14 THE CHAIRMAN: Yes.

15 MR JOWELL: -- and their requests were declined. What then
16 happened was, very late in the process, the claimants
17 wanted to -- essentially, they were producing data,
18 claimant data, and then, in support of that, they were
19 producing these witness statements to show -- which they
20 said was relevant to the treatment of the data. But it
21 was never understood by us or, in our understanding, by
22 the Tribunal, to be going to this question of proximate
23 -- the establishment of a proximate causal link.

24 The Tribunal ordered at an early stage that there
25 would be no sampling of claimants, so these are not

1 representative claimants, they are not claimants that
2 cover all the sectors, they are not also claimants who
3 provided meaningful disclosure, in our submission,
4 because the disclosure process that they adopted was,
5 for the most part, one in which solicitors were not
6 involved, they were not involved in selecting
7 the relevant documents. If I may just remind you of
8 that, of the requirement for that, if we go to
9 {AB-D/19/1}, this is a judgment of Mr Turner sitting as
10 a Deputy High Court judge, and if you go to
11 {AB-D/19/53}, at paragraph 200, he quotes -- he reminds
12 us that the CPR requirement is not the -- the extent of
13 the solicitor's relevant disclosure duties in civil
14 litigation, and he says:

15 "It is fundamental that the client must not make
16 the selection of which documents are relevant ..."

17 He then quotes Matthews and Malek on Disclosure:

18 "'A solicitor's duty is to investigate the position
19 carefully and to ensure so far as is possible that full
20 and proper disclosure of all relevant documents is made.
21 This duty owed to the court, is ...

22 "'one on which the administration of justice very
23 greatly [depends], and ..."

24 "'The solicitor has an overall responsibility of
25 careful investigation and supervision in the disclosure

1 process and he cannot simply leave this task to his
2 client. The best way for the solicitor to fulfil his
3 own duty and to ensure that his client's duty is
4 fulfilled too is to take possession of all the original
5 documents as early as possible. The client should not
6 be allowed to decide relevance -- or even potential
7 relevance -- for himself, so either the client must send
8 all the files to the solicitor, or the solicitor must
9 visit the client to review the files and take
10 the relevant documents into his possession. It is then
11 for the solicitor to decide which documents are relevant
12 and disclosable'."

13 Now, most of these claimants who gave their
14 disclosure, they were left to run it unsupervised.
15 There were insufficient custodians, in many cases there
16 were no board members or key -- key members of
17 the finance teams were even asked for documents, there
18 were no proper searches, in many cases no hard-copy
19 documents, no proper word searches and so on. So if
20 the burden lies on us as defendants to establish
21 a further proximity requirement, a further level of
22 causal connection, then we are just at the kind of --
23 this is the "gotcha" moment that we sought to avoid. We
24 have been lured along essentially on one basis, assuming
25 that proximity has been disposed of, with the Tribunal

1 structuring the evidence on that basis, only then for us
2 to find that at trial, it is said, "Ah, but you have to
3 establish an additional requirement", a sort of
4 juridical catch-22. We feel a bit like we have been
5 invited to play cricket and we have come along with all
6 our pads -- in our pads and then we turn up and we are
7 told, "No, no, you have to play football and you have
8 also got to score a penalty without -- but there is no
9 football for you to shoot the penalty". It is -- that
10 is not a fair process if that is what was required.

11 THE CHAIRMAN: What proximity are you -- do you think
12 the claimants are requiring you to prove?

13 MR JOWELL: They seem to be saying that we have to show --
14 well, they put it in various different ways, but they
15 seem to say that certain types of -- even if in fact,
16 economically, the burden of the MIF has not fallen on
17 them but has been reflected in higher prices to their
18 customers on the balance of probabilities, that does not
19 matter, that should not be taken into account, because
20 we have not -- because we have not established for
21 certain of the sectors that the method, the causal
22 method by which that was -- that happened is
23 sufficiently close.

24 THE CHAIRMAN: But is not your answer to that what Mr Holt
25 has chosen as his proxy? So he has decided to go down

1 that route and this is really a battle on the choice of
2 proxy, is it not --

3 MR JOWELL: It is --

4 THE CHAIRMAN: -- because --

5 MR JOWELL: -- yes.

6 THE CHAIRMAN: -- once he has decided to do that, then there
7 is a direct mechanism for passing on variable costs.

8 MR JOWELL: Well, absolutely. We say there are various --
9 we say that there are various different possible
10 mechanisms which one sees, none are excluded in any of
11 the sectors based on the paltry evidence that we have
12 seen from the claimants, and therefore he establishes
13 "but for" causation --

14 THE CHAIRMAN: This debate about proximity, does it really
15 just come down to what is the appropriate proxy then?

16 MR JOWELL: Yes. In our submission, yes.

17 THE CHAIRMAN: So we have that debate anyway, so do we --

18 MR JOWELL: Yes, as long as that is the (inaudible). Yes,
19 we are content with that approach, absolutely.
20 Absolutely.

21 THE CHAIRMAN: All right.

22 MR JOWELL: On that basis, if I can --

23 MR TIDSWELL: I hate to puncture the bubble, but is that,
24 right, because is not this part of your defensive
25 position if Mr Holt's proxy turns out to be wrong? Are

1 you not advancing this because then you get into
2 the other mechanisms which are not about Cost Of Goods
3 Sold, they are about other -- about overheads?

4 MR JOWELL: Ah, well, I think one can -- we would say that
5 -- well, I think --

6 MR TIDSWELL: Or, put another way, I do not understand
7 the claimants to be saying that there is a proximity
8 requirement if Mr Holt is right about Cost Of Goods
9 Sold. I do not think that is their case. I think they
10 are saying that if that is the case, they accept that
11 you have ticked the boxes. It is only if Mr Holt is
12 wrong about the proxy, you then get into the other
13 mechanisms, let us not call them indirect, the other
14 mechanisms you rely on, but they all presuppose that
15 the right proxy is some form of overhead costs or
16 possibly total costs, but not total Cost Of Goods Sold.

17 MR JOWELL: Well, I think if, for any particular sector, you
18 are not convinced that Cost Of Goods Sold is not
19 the appropriate proxy, then we would say, well, then you
20 must go to the next best proxy and that may be
21 overheads. But if -- it may be -- but using overheads,
22 you then use the overheads, the relevant overheads
23 estimates and you do not at that stage say --

24 MR TIDSWELL: Dr Trento's overhead estimates, because
25 Mr Holt has not done any, has he?

1 MR JOWELL: Well, or Mr Holt's adjustment of Dr Trento's
2 overheads.

3 MR TIDSWELL: Yes.

4 MR JOWELL: Because there are some sectors where -- but what
5 you do not say is, oh, well, it is only -- because it is
6 overheads therefore there is no proximate causation.

7 MR TIDSWELL: Well, but, hang on, are you saying there is no
8 factual causation point once you get into that scenario?
9 Are you saying that if you can show some correlation
10 between overhead costs and prices, are you saying that
11 disposes of the factual causation point?

12 MR JOWELL: Yes.

13 MR TIDSWELL: That deals with "but for" causation?

14 MR JOWELL: Yes.

15 MR TIDSWELL: In circumstances where we know the overhead
16 pass-on rates are lower, let us say at least lower than
17 Cost Of Goods Sold, and therefore necessarily, in
18 a mixture of a whole lot of costs which may have been
19 treated in different ways, some of which are variable,
20 some of which are semi-variable, some of which are
21 fixed, you are saying you have got over the "but for"
22 causation?

23 MR JOWELL: Yes, absolutely. Yes. Yes, I do say that, yes,
24 absolutely.

25 MR TIDSWELL: Well, that is what the nub of the argument is

1 because I think that they are saying that as a matter of
2 factual causation, you have not done that. They may use
3 the word "proximate" to describe that, but I think that
4 they are saying it is a factual causation point.

5 MR JOWELL: Yes, well, I think they are wrong about that and
6 I think that it is not really open to them to say that,
7 as I have said.

8 MR TIDSWELL: Well, if they -- they must be entitled to say
9 that you have not produced any evidence which links
10 the MIF to the prices as opposed to some other costs.

11 MR JOWELL: Well, no, because that is --

12 MR TIDSWELL: They do not accept overheads is the right
13 proxy either. I mean, that is not -- Dr Trento's
14 evidence was not that that was the correct proxy, he
15 said that was just the best he could do.

16 MR JOWELL: Well, I think it was his evidence that that was
17 his preferred proxy.

18 MR TIDSWELL: No, I do not think it was.

19 MR JOWELL: In my submission, the whole nature of having
20 a proxy is that that proxy does not link to
21 the particular -- it does not link in that -- in
22 a direct way to the -- it cannot, because it is a proxy.
23 It cannot link to the specific cost. It is a different
24 cost, but you are trying to use it in order to assess,
25 to get the best evidence of what your cost would -- how

1 your cost would be treated by the entire sector, and
2 that -- and one does need -- it does come back a lot to
3 this question, we are talking about sector -- entire
4 sectors of the economy and trying to figure that out.
5 This is why it is, I think, challenging for us common
6 lawyers often to -- you know, to try to translate our
7 concepts onto that, but Lord Briggs has said, you know,
8 we must do the best we can, even if it is by informed
9 guesswork. But always with a proxy you are never saying
10 that proxy is exactly the thing you are -- the actual
11 cost, because that, in the nature of a proxy, it is
12 different.

13 This is, as I said, this is the key question which
14 is: which is the better proxy for each sector?

15 MR TIDSWELL: Yes.

16 MR JOWELL: Now, in the hot tub for the Trial 2B, Dr Trento
17 said something quite interesting and I just quote it to
18 you. It was on {Day19/140:19}, he said:

19 "I agree with Mr Holt and Ms Webster ... that
20 acquirer pass-on is more of an empirical question ...
21 than a question that can be resolved as a matter of
22 economic theory. I think what you can do with economic
23 theory is you derive a framework that then you use to
24 design the empirical analysis or you use in order to
25 assess whether your empirical analysis or the results of

1 your empirical analysis make sense."

2 Now, obviously I am not going to discuss whether
3 that is a good description of Dr Trento's approach to
4 acquirer pass-on, but it is a good description of
5 Mr Holt's approach to merchant pass-on, because what he
6 does, Mr Holt, is to use economic theory to derive
7 a framework that he then uses to design the empirical
8 analysis, but ultimately his answer is not determined by
9 economic theory but by the empirical results that he
10 finds. In accordance with this, Mr Holt approaches
11 the selection of the appropriate proxy for each sector
12 on the basis of criteria that economic theory tells us
13 are likely to be salient to the pass-on rate of the cost
14 in question. So it was first necessary to consider:
15 well, what are the critical economic features of
16 the cost in question -- here, the MSC -- and also
17 the key economic features of the nature of the cost
18 change envisaged? Mr Holt observed, of course, it is
19 a variable cost, and he also observed it is an
20 industry-wide or a market-wide cost. It is well
21 established in economic theory, as in all of
22 the guidance and studies that you have seen, including
23 those of the European Commission and others, that
24 whether a cost is fixed or variable, whether it is
25 market-wide or firm-specific, are two very important

1 factors in determining both whether the cost in question
2 is passed on, and if so the rate of pass-on. So it is
3 essential to Mr Holt's approach that the proxies that he
4 uses share those two key economic characteristics. He
5 based his selection of proxies on whether the proxies
6 were also variable and also largely industry-wide. That
7 is why, in many sectors, he uses the Cost Of Goods Sold,
8 or the part of Cost Of Goods Sold, and in other sectors
9 he uses labour costs, which are -- and in still other
10 sectors, he uses a combination of labour costs and
11 the Cost Of Goods Sold.

12 Now, there are other features -- other relevant
13 features of the costs which Mr Holt also considered
14 the relevance of and I will come on to them. One is
15 that it is a transparent cost, it is not a secret
16 overcharge. Another is that it is a relatively small
17 cost, not a tiny, minuscule cost, but somewhat less than
18 a per cent of the cost base. I will come on to those
19 features shortly and why Mr Holt did not consider them
20 to be significant in this case.

21 But just to be clear, Mr Holt's approach is not
22 a theoretical one, ultimately, it is an empirical one,
23 because he does not just assume that variable and
24 market-wide costs are passed on at a particular rate in
25 any particular sector. Rather, he obtains as much

1 reliable empirical data as he can from as many reliable
2 sources as he can and he then tests and estimates
3 the actual empirical average rates of pass-on of
4 the variable and market-wide cost proxies for each
5 sector. So the ultimate choice for this Tribunal is,
6 really, was Mr Holt's choice of proxies a reasonable one
7 or should it prefer Dr Trento's choice of total
8 overheads, or perhaps Mr Coombs' approach of total
9 costs, or Ms Webster's combined approach. The starting
10 point is that economists are in agreement that in theory
11 at least, whether a cost is variable or fixed is liable
12 to matter to the existence and rate of pass-on. They
13 all agree that variable costs are likely to be passed on
14 more than fixed costs, and you will see the reference to
15 that in paragraph 62.1 of our written closing
16 {RC-S/3/29}.

17 So the first question is: well, are we right that
18 MSCs are variable costs? A common sense answer is,
19 well, obviously so, they clock up regularly on pretty
20 much every card transaction. It is actually quite hard
21 to think of a better example of a variable cost, and
22 indeed a variable cost that is very visible and
23 front-of-house to most merchants. Now, the claimants,
24 or at least Dr Trento, concede that MSCs are variable,
25 but then they wriggle by trying to say, drawing a rather

1 fine distinction between variable costs and marginal
2 costs and the main basis for that distinction is
3 the observation that MSCs are not paid on every single
4 transaction, but only on those transactions where cards
5 are used. You will recall the discussion of this in
6 cross-examination with Dr Trento, where I used
7 the example of the milk, the price of milk that goes
8 into an Americano coffee. The Americano can be white or
9 black, but it is still treated as the same product and
10 priced the same, and the milk for the white Americano,
11 as I suggested, is a variable cost of those Americanos,
12 even though it is not charged on every single
13 transaction. What matters for the purposes of economic
14 classification is that the merchant can reliably predict
15 that the cost will vary with output and will vary
16 reliably with the number of units sold, and Dr Trento
17 ultimately accepted in cross-examination that MSCs would
18 vary predictably with output. Just for your note, that
19 is {Day17/43:22} to {Day17/45:16}. So we say that
20 the theoretical distinction between marginal and
21 variable costs is not a relevant distinction for present
22 purposes. It might arise because the marginal cost is
23 the cost of producing one more unit, whereas variable
24 costs are the sum of all marginal costs, and
25 the distinction might become relevant if marginal cost

1 changes depended on the volume of sales, for example.
2 But this is not the case for the MIF; it does not go up
3 and down with the total volume, it is effectively
4 the same on every single transaction.

5 So we say, yes, the MSC is indeed a variable cost,
6 and yes, it is de facto equivalent to a marginal cost.

7 Now, it is also argued by the claimants in their
8 closing submissions that MSCs are in some sense not
9 variable because they are paid on each transaction
10 rather than on each item purchased, and they say,
11 you know, well, when you go into a supermarket, you pay
12 once for the whole -- all of the things you get rather
13 than buying just one item. Well, that may be true in
14 a supermarket. Of course, if you are buying
15 a television or a mobile phone, it will just be one
16 item. But, again, the point goes nowhere, because
17 essentially, similar reasons, that if you as merchant
18 can -- you can assume the product mix of the average
19 transaction will remain broadly constant and so MSCs
20 will still change reliably -- vary reliably with output.

21 The final point the claimants rely on is that, even
22 if it is a variable cost, they say the MSC is in
23 significant part an ad valorem cost and they observe
24 that the theoretical predictions of economic theory of
25 variable costs is somewhat muted in the case of

1 ad valorem costs. Well, it is true that for the claim
2 period that postdates the Interchange Fee Regulation
3 coming into force, which is about mid-2015, the MSC has
4 largely been, but not exclusively been, ad valorem. But
5 it is also worth noting that actually, before
6 the Interchange Fee Regulation in mid-2015, MIFs for
7 debit cards were set on a per unit or per transaction
8 basis, and of course for Visa, debit cards are a very
9 large share of the claim, so it is actually only
10 partially ad valorem when you take the whole claim
11 period into account.

12 MR TIDSWELL: Where do you -- sorry.

13 MR JOWELL: Yes.

14 MR TIDSWELL: Are you still on ad valorem? I thought you
15 were finished.

16 MR JOWELL: Yes, I am, yes.

17 MR TIDSWELL: Keep going. Sorry.

18 MR JOWELL: Okay.

19 In that case, we accept that the ad valorem point is
20 a slightly better point than the other two, because it
21 has at least got some -- it has got some basis in
22 economic theory, but -- in that ad valorem costs may in
23 some cases be expected to be passed on at a lower rate
24 than per unit costs. But, as Mr Holt observed, this is
25 largely expected only to be significant in cases where

1 you have particularly low marginal costs, or where there
2 are high gross margins. You will see that in Mr Holt's
3 evidence at -- in his 12th report {RC-G/17/80}, at
4 paragraph 223. He also notes that actually there is
5 quite a lot of -- in the next paragraph, in 224, he
6 notes that in fact there is also quite a bit of
7 empirical evidence that supports the view that
8 the pass-on changes in ad valorem costs are actually
9 high and unaffected by their ad valorem nature.

10 Now, the claimants -- and one sees that with, for
11 example, VAT and so on.

12 MR TIDSWELL: I was going to ask you --

13 MR JOWELL: Yes.

14 MR TIDSWELL: -- a different question about where in this --
15 maybe you are going to come to it, but where does
16 the claimants' argument that, as a matter of fact,
17 the MIF does not find its way into the profit-maximising
18 discussion? Does that -- how does that fit into
19 the framework you have just given us about variable and
20 marginal costs, because in a way, the categorisation
21 does not matter from an economic theory point of view,
22 so say the claimants, if in the real world no one
23 actually looks at it because it is just not worth
24 putting it into that calculation?

25 MR JOWELL: Well, we say that the -- it does feature in

1 the real world and would feature in the real world, and
2 it is -- well, we will come to the qualitative evidence
3 in due course, but we say that it is -- that when you
4 have an industry-wide, indeed an economy-wide variable
5 charge like this, it will inevitably feed its way
6 through by a number of -- the number of mechanisms that
7 Mr Holt posits, whether that is through the budgetary
8 process, or through competitors --

9 MR TIDSWELL: Well, but on the point about -- sorry, but if
10 we are just on the point about the choice of proxy,
11 which I thought we were --

12 MR JOWELL: Yes.

13 MR TIDSWELL: -- so, in other words, if you are making
14 a decision about whether you are going to choose Cost Of
15 Goods Sold because it was the right proxy --

16 MR JOWELL: Yes.

17 MR TIDSWELL: -- and the point of departure for
18 the claimants at that stage is they say, well, maybe you
19 can characterise it as variable, even marginal from an
20 economic theory point of view --

21 MR JOWELL: Yes.

22 MR TIDSWELL: -- but in the real world economic theory does
23 not hold because that is not what people do with this,
24 they do not treat it like Cost Of Goods Sold.

25 MR JOWELL: Well, we will look at the evidence that they

1 cite for that. We say there is no reliable evidence to
2 show that.

3 MR TIDSWELL: So you say there is no factual evidence that
4 that is the case?

5 MR JOWELL: No, there is no -- there is no evidence to show
6 that that is in any sense convincing.

7 MR TIDSWELL: If that was the case, would you accept that
8 the proxy was the wrong proxy?

9 MR JOWELL: Well --

10 MR TIDSWELL: Does it not undermine the variable and
11 marginal costs point?

12 MR JOWELL: Well, you have to establish that across
13 the whole sector, because there is a competitive
14 interaction between --

15 MR TIDSWELL: Well, no, I understand the point about the
16 other mechanisms.

17 MR JOWELL: If you could show that all -- that, if you like,
18 all companies, all businesses across a sector were
19 somehow priced in a way that hermetically sealed
20 themselves from taking into account the --

21 MR TIDSWELL: Well, that is not really the question I am
22 asking you, though, because that is back into your other
23 mechanisms. The question I am asking, let us put aside
24 the sector for a moment and just take a merchant who has
25 turned up and been cross-examined on the way in which

1 they treat the MIFs, and if their evidence -- if we were
2 to accept their evidence, and you have no doubt lots of
3 reasons why you say we should not, but if we accepted
4 their evidence that they just had the MIFs tucked down
5 in bank payments somewhere in their overheads and that
6 when they did their profit maximisation pricing exercise
7 they looked at other Cost Of Goods Sold and all sorts of
8 things, but not the MIF, in those circumstances, would
9 you accept that COGS would not be a good proxy for
10 pass-on for that merchant?

11 MR JOWELL: No, because they also have to take into account
12 their competitive interaction with other merchants
13 and --

14 MR TIDSWELL: But that is not about the proxy. That is not
15 about the proxy, is it, because the proxy has got
16 nothing to do with that, that is just about other ways
17 that it can be passed on?

18 MR JOWELL: No, it is still about -- the proxy is about
19 seeking to determine on a sectoral basis what is
20 the likely effect of the -- of the -- of effectively --
21 what will best proxy the effect -- the extent of
22 pass-on, and that -- you cannot look at -- it is not
23 informative to look at an individual merchant.

24 MR TIDSWELL: Oh, because you say other merchants will be
25 treating it as a Cost Of Goods Sold and therefore it

1 will find its way through, I see. So you are saying
2 that -- so you are really saying that anybody who does
3 that is an aberration and the aberration is cured by
4 other ways of looking at it but that we should not draw
5 a conclusion from that about the whole sector. That is
6 the point you are making.

7 MR JOWELL: I certainly say that you cannot draw
8 a conclusion -- you cannot draw reliable conclusions
9 from self-selected claimants, who have come forward
10 without proper disclosure, about how the costs are
11 treated by the whole sector. I absolutely say that.
12 I also say that what one will find is, even in relation
13 to this -- the claimants have created this sort of
14 dichotomy between Cost Of Goods Sold and overheads that
15 does not exist in that way, and they say: Cost Of Goods
16 Sold, these all go into pricing; overheads, they go into
17 pricing in some other way.

18 MR TIDSWELL: Well, that is the economic theory, is it not?

19 I thought the experts all agreed that is the economic
20 theory?

21 MR JOWELL: No.

22 MR TIDSWELL: Okay.

23 MR JOWELL: No, that is not the economic theory.

24 The economic theory is that you seek to find a cost that
25 is -- that shares similar characteristics, from an

1 economic perspective, to the cost that is in question.

2 So if we take, for example, labour costs. Now, in
3 many industries, labour costs do not go into Cost Of
4 Goods Sold from -- either from an accounting
5 classification point of view or in any other sense, they
6 are often categorised as overheads, and there is --
7 indeed there is evidence in this case to show that that
8 is the case in some cases. Labour costs are one of
9 the costs that Mr Holt uses to -- as a proxy.

10 MR TIDSWELL: Yes, but --

11 MR JOWELL: He does so because they, like these Cost Of
12 Goods Sold, these -- effectively these -- are -- share
13 the economic characteristics of the MIF, that they are
14 variable and industry-wide.

15 MR TIDSWELL: Yes, but I think, generally, the experts
16 agreed, did they not, that you have a set of costs which
17 you treat as Cost Of Goods Sold, generally, and that you
18 use as being your proxy, if you like, a different sort
19 of proxy, but the basis on which you set your pricing,
20 and so you undergo your profit maximisation analysis on
21 that basis, that would be the economic theory, and you
22 have a bunch of costs that you do not do, therefore,
23 which would generally be your fixed or semi-fixed costs.
24 That much was agreed by the experts, was it not? There
25 is a -- there are two buckets of costs which operate in

1 different ways.

2 MR JOWELL: Well, I am not sure the -- I think the experts
3 say that, economically, you would expect those -- there
4 to be a different rate of pass-on, but matching that to
5 how merchants do things in practice is a hazardous
6 business, because there are all sorts of ways and all
7 sorts of mechanisms by which these costs can find their
8 way through, and I think we have seen some of that
9 indeed in the qualitative evidence. So I think that
10 Mr Holt's approach, in a sense, is just more high level
11 than that. He says, well, what type of a cost, from an
12 economic point of view, is this cost, and he says it is
13 a variable cost and it is a market wide cost.

14 Now, again, when it comes to the fact that it is
15 a market-wide cost, the experts are all agreed that such
16 costs are likely to be passed on at a greater rate. You
17 may recall that in cross-examination he sought to
18 suggest that this theoretical insight only applied to
19 conditions of perfect competition, but I think you may
20 remember that in cross-examination he accepted that, at
21 least intuitively, he agreed that an industry-wide cost
22 would likely be passed on at a higher rate. You will
23 see that on {Day17/37:15} to {Day17/38:17}, and you also
24 see it at {Day17/48:11-25}. That is not surprising,
25 given the obvious significance of the point for

1 the selection of an appropriate proxy, and one can see
2 that there is a hint of a suggestion in the claimant's
3 written closing that, well, because some customers may
4 have more -- some businesses may have more customers
5 that pay with credit cards than others in the sector,
6 therefore it will not be, if you like, perfectly
7 industry-wide, perfectly market-wide, but they do not
8 actually really refer to any expert evidence to support
9 that view, and in fact what is clear is that, when you
10 look at a particular market, it is highly likely that
11 businesses in the same market will have broadly similar
12 amounts of MSC costs.

13 It is also important to bear in mind that
14 the question is not whether MSCs are perfectly common
15 across competitors, the question that matters is: are
16 they similarly common across competitors to the same
17 extent that the proxies are? So if you take, for
18 example, COGS and labour rates, which are the two types
19 of proxies used by Mr Holt, as I have said, they also
20 will not be perfectly common across competitors, but
21 they will be similarly common and similarly variable to
22 MSCs and that is what makes them a good proxy, that they
23 share those similar economic characteristics.

24 Now, the problem with the use of overheads is,
25 fundamentally -- which is what the claimants invite you

1 to use, is that they fundamentally do not share those
2 two economic characteristics. It is true that some
3 overheads may have a degree of commonality across
4 a sector and some may be variable, but for the vast bulk
5 of those costs, they are not going to be either variable
6 or industry-wide and that is what makes them, in our
7 submission, an inappropriate proxy.

8 Now, I should mention the other features of
9 the cost. One is the transparency of the cost, which is
10 a factor that is mentioned by the courts as making
11 a cost more likely to be passed on, and it is referred
12 to in the *Trucks* case, for example, where --
13 the invisibility of the overcharge. Well, the MSC
14 clearly is a highly visible cost. You will see that in
15 section VIII of our closing submissions {RC-S/3/90}. We
16 establish that it was highly visible to all of the -- or
17 most of the claimants in this -- in these proceedings.
18 But Mr Holt is not in fact impressed by that factor as
19 being economically relevant. You will see that in his
20 11th report at paragraph 152 {RC-F/19/67}. He says,
21 from an economic perspective, the visibility of the cost
22 does not -- is not a factor, but of course, if it is
23 a factor, it only can be supportive of greater pass-on,
24 or a selection of proxies that are similarly
25 transparent, such as the Cost Of Goods Sold and labour

1 rates.

2 There is then the factor of the size of the cost, or
3 the size of the cost change. Now, all of
4 the economists, including Dr Trento, accepted that,
5 according to economic theory, the size of a marginal
6 cost should not affect the degree of pass-on for that
7 cost, and you will see that on {Day17/38:19} to
8 {Day17/39:4}. Now, Mr Holt's approach is that -- which
9 is conventional, again, for the economists, is that
10 the size of the cost might be relevant when it comes to
11 the extent of pass-on in the short run, but that size
12 should not affect pass-on in the long run, and he
13 acknowledges that you have things like price adjustment
14 costs, or menu costs, that can delay a pass-on in
15 the short term, but in the case where you are
16 considering a very long claim period, like the present
17 case, 14 years, and you are considering an industry-wide
18 variable cost that is operating on an ongoing basis, his
19 view is that the size of the cost is not a relevant
20 factor, and that is supported by economic --

21 THE CHAIRMAN: It is not a relevant factor in the choice of
22 proxy?

23 MR JOWELL: In the choice of proxy, or in the -- yes,
24 indeed, in the choice of proxy.

25 THE CHAIRMAN: Is that right, though? I mean -- go on.

1 PROFESSOR WATERSON: You are appealing to economic theory
2 there rather than empirical evidence, as I understand
3 it.

4 MR JOWELL: Well, there is also -- no, there is also --
5 there is also economic evidence of it. One sees some of
6 it in the European Commission, for example. In
7 the European Commission study, they refer to
8 a relatively small cost that was passed on at the same
9 rate as larger costs, and there is -- it is -- I would
10 say I am appealing to economic learning on that point.

11 But there is a bit of a -- there is a problem,
12 empirically, which is that the reason one is using
13 the -- these proxies in the first place is precisely
14 because of the signal-to-noise issue. So it is
15 something of a catch-22, that you cannot -- precisely
16 because the noise gets in the way of the signal for
17 small costs, that you cannot actually necessarily prove.
18 But rather like you cannot prove the existence of atomic
19 structure from the naked eye, that does not mean that it
20 is not happening, it just means you cannot necessarily
21 prove it.

22 THE CHAIRMAN: Size is the reason why we need a proxy.

23 MR JOWELL: Yes, indeed, it is.

24 THE CHAIRMAN: But it is not -- what you are saying is it is
25 not determinative of what that proxy should be.

1 MR JOWELL: It is not, particularly -- well, at least in
2 a case like this one where one has a 14-year period that
3 one is considering. I think I said in opening, if you
4 had a cost that was sort of a flash in the pan, that
5 came and went, and there were many adjustment costs,
6 that might not feed its way through. But if you have
7 got a cost that is ticking up on every single credit
8 card transaction over 14 years, it is inconceivable that
9 it is not going to get passed through, largely.

10 PROFESSOR WATERSON: Would VAT, for example, meet Mr Holt's
11 criteria?

12 MR JOWELL: Yes. Yes, it would. I think, if one thinks
13 about it intuitively, it seems, if you had, say -- if
14 you had VAT goes up by 15%, as it has on certain
15 services recently, then you expect that to be passed on
16 to a large degree, and --

17 PROFESSOR WATERSON: Well, but --

18 MR JOWELL: -- but -- and if the VAT rate instead went up by
19 1%, one would not, in the long run, expect there to be
20 any proportionate difference to the extent of its
21 pass-on, otherwise you would be in a world where fifteen
22 1% VAT increases would be passed on at a lesser rate
23 overall than one 15%, which is -- which may be plausible
24 in the short term but is not plausible, in my respectful
25 submission, in the long term. Intuitively, it seems

1 right.

2 PROFESSOR WATERSON: My point really is, did Mr Holt try
3 VAT?

4 MR JOWELL: Yes, VAT is one of the -- is absolutely one of
5 his proxies, indeed.

6 PROFESSOR WATERSON: That he used?

7 MR JOWELL: Yes. Well, forgive me, I will be corrected, but
8 I believe it was, yes. VAT is also ad valorem as well.

9 PROFESSOR WATERSON: Yes.

10 MR JOWELL: So really, we say, the significance -- now,
11 the significance of the long run, as it is sometimes
12 said that Mr Holt uses the long run because all costs
13 are variable in the long run, that is not
14 the significance of the long run to Mr Holt. Rather it
15 is essentially that the relatively small size of a cost
16 will not be a significant factor in relation to
17 the pass-on rate once one is considering a long-run
18 perspective. It also, therefore, means that it is much
19 less informative to look at evidence of the short run
20 cost treatment, particularly by one claimant in
21 isolation, when seeking to assess pass-on rates.

22 So the claimants put great reliance on a number of
23 other factors that they say that Mr Holt has either got
24 wrong or left out of account. He says: well, what about
25 the intensity of competition, the shape of the demand

1 curve, the shape of the supply curve, the structure of
2 the market, and so on? They say: well, all of those
3 things can affect the extent of pass-on as well.
4 Mr Holt, his response is: well, I accept that entirely,
5 they can, but they are extremely difficult to observe
6 what the shape is of the supply curve, for example, or
7 the shape of the demand curve, and it does not actually
8 matter, because I am not taking a theoretical approach,
9 what I am doing is I am looking at how the proxies -- to
10 what extent the proxies are actually passed on in each
11 sector, I look at -- so therefore all of these other
12 factors will be reflected in the empirical evidence as
13 to the extent of pass-on of a proxy cost sharing
14 the same key economic characteristics as the MSC within
15 each sector. That is why, in Mr Holt's view, it is not
16 necessary to take a view on exactly how competition
17 works in each sector, or how these various factors,
18 because effectively it will come out in the wash of what
19 the pass-on rates actually are empirically.

20 Similarly, the references to different models of
21 competition, Cournot and Bertrand. Mr Holt does not, in
22 any sense, assume certain particular models of
23 competition. On the contrary, he simply takes what --
24 he considers what the evidence shows from his -- from
25 the empirical rates that emerge at the end of the -- at

1 the end.

2 It is equally wrong to say that the case advanced by
3 Visa and *Merricks* is premised on a theory of perfect
4 competition. Mr Holt does not say that. He does not
5 say that prices -- that firms set prices at marginal
6 costs, because they generally do not, and perfect
7 competition is just one of three examples of general
8 structures of competition that Mr Holt identifies in his
9 report.

10 So that is, in a nutshell, Mr Holt's approach. He
11 uses proxies that mimic the key economic characteristics
12 of the variable and industry-wide MSCs.

13 Now, the claimants took a different approach and
14 they did not go to their economist to select
15 the appropriate proxies, in the first instance at least.
16 Instead what they did was they went to Mr Economides,
17 a strategic management consultant. I will come on in
18 a moment to the limitations of his expertise and of his
19 approach, but before I do, it is important to recall
20 that Mr Economides' initial selection of proxy costs was
21 rather different than the proxy costs that the claimants
22 ended up using. The initial selection was essentially
23 multifactorial. They sought to select costs -- proxies
24 based in part on their accounting classification. But
25 that was not -- to be fair to Mr Economides, that was

1 not the only factor that he used in his first report; he
2 also sought to select costs that were variable, costs
3 that varied with output, and indeed he sought to select
4 costs -- cost proxies that were industry-wide and not
5 firm-specific. He discarded those, for example, that
6 included things like depreciation, or other fixed or
7 firm-specific costs, and you will see some examples of
8 that in paragraph 113 of our written submissions
9 {RC-S/3/48} and you may recall that I put some of those
10 examples to Dr Trento in cross-examination.

11 So my point is this, that even Mr Economides,
12 originally at least, recognised that the variable and
13 market-wide nature of the MSC was relevant in
14 the selection of the appropriate proxy, albeit that he
15 did not put all of the weight on that. The problem was
16 that, as it transpired, and as Dr Trento accepted,
17 the proxies that Mr Economides initially selected were
18 not statistically usable for essentially the same reason
19 that the MSCs could not be used, because
20 the signal-to-noise ratio was too great. So that then
21 prompted Mr Economides and Dr Trento to rethink their
22 approach and select a different proxy, and their new
23 approach was to say: well, we are going to use total
24 overheads. There are really so many fundamental
25 problems with that choice of total overheads that it is

1 hard to know where to start or stop, but the -- we have
2 identified a number of false assumptions underlying
3 the approach in our written submissions at
4 paragraphs 121 to 158 {RC-S/3/52-66}, and what I would
5 like to do is just to take you through a few of the main
6 points.

7 The first problem --

8 THE CHAIRMAN: Would that be -- is that a convenient time?

9 MR JOWELL: That is a convenient time.

10 THE CHAIRMAN: Do you want to make the headline points now
11 or ...?

12 MR JOWELL: No, that is a convenient time. I would say,
13 I am running -- very much behind time, so if it is
14 possible to start a little earlier, but I do not want to
15 -- that would be very helpful.

16 THE CHAIRMAN: All right. Shall we start at quarter to 2?

17 MR JOWELL: I am grateful.

18 THE CHAIRMAN: All right.

19 MR JOWELL: Thank you very much.

20 (1.01 pm)

21 (The short adjournment)

22 (1.45 pm)

23 THE CHAIRMAN: Yes, Mr Jowell.

24 MR JOWELL: The -- I was going through the problems with
25 Dr Trento's selection of proxy and I will try to go as

1 fast as I can. I do not think, realistically, I am
2 going to be done by 2.45, in which case we will have to
3 eat in, with your permission, to our time for Trial 2B.

4 THE CHAIRMAN: Right.

5 MR JOWELL: But I think it is important that we go through
6 a lot of this material, because it is important.

7 Now, the first and most fundamental problem with
8 the choice of proxy is that -- of total overheads is
9 that they are likely to contain a preponderance of costs
10 that are largely fixed or semi-variable and costs that
11 are largely firm-specific rather than industry-wide. So
12 if you include within overhead costs things like
13 relocation costs of the firm in question, or corporate
14 governance costs of the firm in question, or even
15 things, as Dr Trento does in some cases, amortisation
16 and depreciation costs, then we say that you cannot
17 reasonably expect it to operate as a reliable proxy for
18 a cost like the MSC that is incurred market-wide and
19 whose size varies reliably with output and with sales.
20 In other words, it will be systematically downward
21 biased. Mr Holt illustrates this point about how it
22 will skew the true pass-on rate downward by his
23 Monte Carlo experiment, which you will see and we refer
24 to in our written submissions at paragraph 116 to 119
25 {RC-S/3/50-51}.

1 There is -- another problem, a fundamental problem
2 with the approach is that the claimants want to give
3 primacy to the accounting classification of the costs:
4 are they put into overheads or do they feature in Cost
5 Of Goods Sold? The first difficulty is, well, how do we
6 know how the businesses will in each sector classify
7 their costs for accounting purposes, and more
8 fundamentally, even if we were to know how they classify
9 them for accounting purposes, how do we know how
10 the businesses actually treat those costs? It assumes
11 that we have got the evidence to determine how, for each
12 sector, businesses categorise their costs and how they
13 treat them for pricing purposes.

14 Now, the claimants' initial approach was to rely on
15 the evidence of Mr Economides' views on the basis of his
16 presumed knowledge of the accounting classification of
17 costs and the pricing methodology in each of
18 the sectors. But what emerged in cross-examination --
19 and you will see it all referred to in paragraph 125 of
20 our closing submissions {RC-S/3/53} -- is that
21 Mr Economides simply did not have the experience to
22 opine on the classification or categorisation of MSCs in
23 most sectors, still less how they would be treated for
24 pricing purposes. It transpired that out of the 30
25 sectors he considered and in respect of all of which he

1 had confidently offered his views in his report,
2 Mr Economides had experience, significant experience in
3 only 18 of them, and you will see that in the document
4 that is at {RC-M/414/1}. Now, his assistance he said he
5 relied on, Mr Ward and Mr Robertson, did not improve
6 the position because, regardless of the fact that they
7 had worked in some of those sectors, as Mr Economides
8 acknowledged, neither of them had any significant
9 pricing experience. You will see that in his
10 cross-examination {Day13/42:2-22}.

11 Mr Economides also relied in his reports on supposed
12 accounting requirements as to why MSCs supposedly had to
13 be classified in particular ways in certain companies'
14 accounts. You will see that, for example, at
15 paragraph 2.54 of his responsive report, which is
16 {RC-G/3/40}. But it transpired that Mr Economides had
17 no accounting qualifications, and Mr Harman, who does
18 have accounting qualifications, disagreed with
19 Mr Economides' approach, and nor did either of his
20 assistants have any accounting qualifications.

21 Mr Economides also -- important to bear in mind that
22 even in relation to the sectors where he said he had
23 experience, he had never actually worked in a business
24 in the finance department in any of the relevant
25 sectors, and indeed, there were a number of instances in

1 which the limited evidence we do have contradicted his
2 assertions as to how costs were supposedly accounted for
3 or dealt with. You see those -- a number of those
4 discrepancies mentioned in paragraph 130 of our closing
5 submissions {RC-S/3/56}.

6 So, not surprising, the claimants now in their
7 written closing put a bit less weight on Mr Economides'
8 evidence and they try instead to turn to
9 the claimant-specific evidence. The difficulty is that
10 the claimant-specific evidence simply does not stretch
11 to support what the claimants wish to assert. So to
12 give one striking example of overreach, the claimants
13 say in paragraph 8 of their closing submissions
14 {RC-S/1/5}, they say:

15 "The factual evidence has shown that with
16 the possible exception of two Analysed Claimants,
17 the vast majority of SSH Claimants do not treat the MIF
18 or the MSC as a COGS."

19 Well, with the greatest respect, the factual
20 evidence shows nothing of the sort. What we have is,
21 out of 2,000 claimants, or 600 or so -- a bit more --
22 claimant groups, we have 13 that came forward to give
23 evidence, and out of those 13, three classified the MSC
24 as part of COGS for accounting purposes and ten
25 classified them as part of overheads or operating costs.

1 That is not, in our submission, informative or
2 representative. We simply do not know how the vast
3 majority of the remaining SSH Claimants categorise
4 the MSC for accounting purposes, still less do we know
5 how they address them internally for pricing purposes.

6 As Mr Holt observed in his report, even in
7 Dr Trento's narrowly defined sectors, there are
8 considerable differences in business models: in
9 the restaurant sector, you have got claimants range from
10 casual dining to very high end; in hotels, you have got
11 global hotel chains next to caravan parks. It is
12 interesting, if you look at the European Commission
13 study, that suggests that many merchants classify MSCs
14 as variable costs. You will see that at
15 {RC-J1.6/114/189}.

16 So the reality is that, other than the 13 that came
17 forward, we do not have reliable evidence as to how
18 the remaining SSH Claimants classify their MSCs even for
19 accounting purposes, and the sleight of hand really that
20 is going on here is to seek to pretend that these 13
21 Willing Claimants are somehow representative of their
22 respective sectors, and there is no reason to suppose
23 they are. Sampling was rejected by the Tribunal and one
24 simply cannot treat a self-selected sample as though it
25 were a representative one.

1 But even beyond that, one should not lose sight of
2 the fact that for claimants that represent 30% of
3 the claim value, there are no Willing Claimants at all,
4 hence no claimant-specific -- and hence no
5 claimant-specific evidence for those sectors. These are
6 what Mr Economides called the "unanalysed sectors".
7 Now, indeed, if you count Sony, where there is no actual
8 witness evidence proffered, then I think the proportion
9 goes up to about 40% of the claim value. So what do you
10 do there? Well, Mr Economides had his extrapolations,
11 where he tries to seek to extrapolate the treatment that
12 he knows from one sector to another sector. Well,
13 the method was always highly unreliable, but it became
14 positively preposterous once it became clear in
15 the course of his evidence that neither Mr Economides,
16 nor those assisting him had any significant pricing
17 experience in many of the relevant sectors they sought
18 to extrapolate from or to. To extrapolate results from
19 the university sector to the autoparts sector is, to say
20 the least, deeply implausible. When you have got no
21 experience in either sector, as Mr Economides did not,
22 it is actually absurd.

23 Now, the other problem with this approach is that --
24 again, another fundamental problem, is that it assumes
25 that if a cost is categorised for accounting purposes in

1 a particular way, then it will also be treated that way
2 for pricing purposes. We say the factual evidence that
3 you have seen before the Tribunal does not support that
4 proposition. Rather, the preponderance of the evidence
5 suggests, if anything, that it is the substantive nature
6 of the cost that matters when it comes to pricing, not
7 its accounting treatment. We will come to -- I will
8 come to that when we go through some of the sectors.
9 There is not a clear relationship between the accounting
10 classification and how the costs are then used
11 internally when it comes to pricing.

12 Now, that complexity is why Mastercard's experts,
13 Ms Webster and Mr Harman, are not focused ultimately on
14 the accounting classification of a cost; they are
15 interested in its de facto treatment, and they say --
16 they ask themselves in substance: well, regardless of
17 its accounting classification and leaving aside for
18 the moment its economic nature, is the cost treated as
19 a variable industry cost or is it treated as
20 a firm-specific cost that is fixed? That approach
21 certainly has more to commend it than a focus on
22 the accounting classification, but it also has got
23 difficulties in this case, because to apply it properly,
24 one would really need a deep dive into how businesses
25 across each of these sectors treat their costs for

1 pricing purposes, and the limited number of claimants
2 that have given disclosure, and the limited scope of
3 the disclosure that they have given, is not always
4 capable of revealing that in a comprehensive or reliable
5 way.

6 Now, Mr Holt explained in his evidence that
7 companies in the real world use a variety of short-term
8 pricing methods. He recognises that those involved in
9 pricing in many businesses will initially set their
10 prices day-to-day in the short term on the basis of
11 a rule of thumb that is often connected to a limited set
12 of costs and they do so, no doubt, for reasons of
13 practicability. But as Mr Holt observed, it is also
14 very likely that in almost all cases a much wider set of
15 costs will come to inform and influence prices over
16 the medium term and certainly over the long term, and
17 Mr Holt identifies these various channels in his report.
18 You will see it, for example, in section 4.2 of his 12th
19 report, which is in {RC-G/17/64}. In particular, one
20 way that it might happen that is very common, and one
21 sees in the evidence, is there are changes to target
22 margins that then affect prices, and those sorts of
23 changes, although they do not always take effect
24 immediately, are nevertheless in substance prices
25 reacting to changes in variable market-wide costs.

1 Now, I want to say a word about the evidence from
2 the claimants generally. You will have seen that they
3 submitted, rather carefully -- their carefully selected
4 witnesses and they have certainly got carefully drafted
5 witness statements, and all of them seek to emphasise
6 the fact that in their respective businesses, prices in
7 the immediate term are set exclusively by reference,
8 they say, typically to some limited set of costs,
9 typically COGS or some part of COGS. But what emerged,
10 in our submission, is that, when you look at
11 the documents more carefully and under
12 cross-examination, that the evidence is -- that picture
13 is either incorrect or, at very best, a partial and
14 materially incomplete picture of their overall price
15 setting process. We respectfully suggest that Mr Holt's
16 positive mechanisms were ultimately borne out by that
17 qualitative evidence, notwithstanding its serious
18 limitations. The analysis of the disclosed documents
19 conducted by Mr Harman and by Mr Holt, and
20 the cross-examination of the claimants' witnesses,
21 revealed that there was this wider picture, wider than
22 that portrayed in the witness statements, and
23 essentially what one sees is prices are set by reference
24 to budgetary goals, or margin goals, set by the finance
25 department, that take into account a wider set of cost

1 inflation or deflation and that they are also set by
2 reference to disaggregated categories of costs, and
3 those disaggregated categories of costs included --
4 almost certainly included MSCs.

5 You will recall, I think, in the evidence that there
6 were a number of those EBITDA walks that appeared, where
7 you see how costs -- particular costs had changed from
8 one financial year to the next. Now, those EBITDA walks
9 are not by some just total costs, total overhead costs,
10 as the claimants would have it, they are disaggregated,
11 they are broken down, and that -- those -- that -- those
12 disaggregated costs are then considered when it comes to
13 the margins and the prices that are to be adjusted in
14 due course.

15 Now, it is notable that, in many cases, the relevant
16 witnesses that were called did not include the board
17 level individuals responsible for that critical top down
18 margin setting based on the scrutiny of cost categories
19 and their inflation or deflation. There was one notable
20 exception to that, but in many cases the board level and
21 finance level people were not called. What that means
22 is that we are not in a position always to demonstrate
23 incontrovertibly that MSCs for that particular claimant
24 would have been scrutinised at a disaggregated basis.
25 But what one does see from the documents is that board

1 and finance departments had the documents there to
2 scrutinise a disaggregated breakdown of costs and looked
3 at their movements and their origins. Now,
4 the claimants assert in their written closing at
5 paragraph 158 {RC-S/1/77}, they say:

6 "... there is no suggestion in any of the evidence
7 that any of the Claimants who account for MSCs as
8 overhead costs nevertheless identify MSCs as distinct
9 from other overhead costs when it comes to making
10 pricing decisions."

11 Well, we respectfully disagree. There were plenty
12 of instances within the qualitative evidence that MSCs
13 feature as significant components within specific line
14 items that are individually monitored by the companies
15 and there is strong circumstantial evidence at least to
16 suppose that those categories of card payment costs or
17 similar would, and were, directly and individually
18 considered when it comes to pricing, and you can see
19 that in some of the instances, even within the limited
20 disclosure provided. It is true that in other cases
21 the limited disclosure and the limited seniority of
22 the witnesses called meant that the pricing process was
23 essentially a black box, but there are powerful reasons
24 to suppose that in all cases a change to a market-wide,
25 variable and visible cost like the MSC would not be

1 ignored merely because it was classified as part of
2 overheads, or still less be ignored by competitors
3 across the market and across the sector. One cannot
4 ignore, when one has a sectoral approach, that one has
5 to consider the wider market, and particularly where you
6 have got firms of a diverse range of sizes and natures
7 competing in the same market. As we point out in our
8 closing submissions at paragraph 260 {RC-S/3/95}, two
9 things emerge from the evidence with near universality
10 about competitors. First of all, the Willing Claimants
11 priced, in significant part, by reference to their
12 competitors' pricing, and secondly, equally strikingly,
13 was that none of them knew the internal methodology by
14 which their competitors arrived at those prices.

15 Now, there may be some markets or sub-sectors where
16 it is supposed that if you have got an insight into how
17 one company prices, you have got an insight into how
18 they all price. But that is not a reasonable basis to
19 suppose that, for example, Holland & Barrett will price
20 by the same methodology as -- or take into account
21 the same costs as Amazon, or even a Tesco, or that
22 a mid-range hotel group will price its goods in the same
23 way as the Aman Hotel or an individual bed and
24 breakfast. It is that interaction between competitors
25 that really gives Mr Holt confidence to a large degree

1 that a market-wide variable cost is liable to be passed
2 on at least when one is considering an entire sector and
3 the long run, as one is in this case.

4 This is not, as the claimants put it in their
5 submissions, a process of "economic osmosis"
6 {RC-S/1/67}. This is a familiar process of competitive
7 interaction whereby, if one significant competitor does
8 take into account a particular variable and
9 industry-wide cost, like MSCs, particularly if that
10 competitor is a price leader in the particular market,
11 then it is likely that other competitors will follow
12 that lead, and they will do so because, if the price
13 changes upward, they will want to maximise their prices,
14 and if the leader's prices go down, they will want to
15 make sure that they maintain market share. That is why
16 it is really treacherous, in our submission, to look at
17 a single, particularly self-selected examples of
18 internal price setting processes of just one competitor
19 in an industry to seek to work out what is happening in
20 the sector as a whole. It is just not likely to be
21 informative, certainly not in the long run, and it is
22 certainly likely to be uninformative when the disclosure
23 is incomplete and the witnesses are incomplete, even for
24 the one example that you have before you.

25 THE CHAIRMAN: So are you saying that, in terms of looking

1 at the evidence that we have got, if you cannot see that
2 that particular company was setting its prices by
3 reference to an MSC, you can say, or you can infer that
4 other competitors in the same industry were, and that
5 that would then be influential on --

6 MR JOWELL: Yes, there is one proviso to that. I do accept
7 that you could say, well, we have actually got -- and
8 I think this is almost said in one of the cases, they
9 say: we have almost got a methodology that is, if you
10 like, hermetically sealed from those costs, it just does
11 not go into it, and if you could say, well, it is
12 hermetically sealed from the cost and also from
13 competitors' pricing, then you could -- if you like,
14 that would be a good counter-example to our approach.
15 But if you are looking at a sectoral basis, as we are,
16 it is not, in our -- and you only have claimants that do
17 not even cover or only cover two-thirds of the sector,
18 you have to base yourself on -- effectively,
19 on reasonable assumptions and estimates, which is
20 exactly what Lord Briggs had in mind in *Merricks*.

21 Now, I want to move on briefly to the -- shortly to
22 the various industry sectors because I want to go
23 through the evidence on them on a whistle-stop tour, as
24 I said. I want to just mention one point, which is that
25 one of the virtues of Mr Holt's approach is that he

1 considers all three sources of evidence available to
2 the Tribunal: the public studies, the public data and
3 the claimant-specific data. Now, the same is true,
4 perhaps to a slightly lesser extent, of Mr Coombs and
5 Ms Webster, and it is notable that Dr Trento stands out
6 as placing almost no reliance on that wider set of
7 information and evidence.

8 Now, it is said by the claimants that Dr Trento
9 places no reliance on the studies. That is actually not
10 quite fair to him. He acknowledged that there are
11 empirical analyses in the economic literature and he
12 said these are usually sound -- you will see that on
13 {Day17/105:11-15} -- and he also made clear in
14 the course of his cross-examination that his preferred
15 pass-on estimate for the supermarket sector was to rely
16 on one existing study that dealt with the pass-on of
17 minimum wages in the supermarket sector -- you will see
18 that on {Day17/104:22} to {Day17/105:5}. He said he did
19 so cautiously, but still that was the basis of his best
20 estimate. But for the rest, he preferred exclusively to
21 use the claimant data alone, and we respectfully say
22 that his reasons for ruling out all of the other public
23 studies and all of the public data are simply not
24 adequate. Insofar as he points to econometric issues,
25 particularly in relation to the public data, they are no

1 doubt there, but they are no greater certainly than
2 compared to the econometric problems of Dr Trento's
3 regressions on overheads, which suffer from severe
4 problems also arising from the short-term nature of some
5 of the data, the highly aggregated nature of the data,
6 and its lumpiness and the mix effects, a number of which
7 tend to bias -- further bias, I should say, his overhead
8 estimate systematically downwards.

9 Now, it is also important to mention, and I think
10 I have already done so, that the cost indices that
11 the claimants use are not just based on COGS, they are
12 also based on pass-on of wages. If I could show you
13 a document which I believe I put to Dr Trento, it is
14 {RC-I6/4/1}, and you will see here we have created
15 a summary of the existing studies on the pass-on of
16 labour costs by Mr Holt. You see the various
17 pass-on rates. If one goes over the page {RC-I6/4/2},
18 there are certain others. These labour costs, as
19 the evidence showed, are often a part of overhead costs,
20 not classified necessarily as COGS in many sectors. We
21 see that these figures also show the similar high
22 pass-on rate.

23 So those are the general points I wanted to make as
24 to the selection of different proxies.

25 If I could then quickly turn to the various sectors.

1 You will see in our written closing at just below
2 paragraph 2 {RC-S/3/5}, we have set out a table that
3 summarises Mr Holt's final results for each sector,
4 including his estimates for all three of his data
5 sources that he uses, and you will see in Appendix II
6 {RC-S/3/133}, we have set out the estimates of the other
7 experts for the same sectors, those at least that are
8 based on COGS. We analyse each sector in section VII of
9 our written closing {RC-S/3/62}.

10 Now, I should say at the outset that we understand
11 for each of the 14 Visa sectors that we have identified,
12 we understand there is at least one still unsettled or
13 live claimant, and therefore it will be necessary, in
14 our submission, for the Tribunal to consider what is
15 the appropriate pass-on rate for all of those 14
16 sectors. So if I can whizz through them.

17 The first is the Automotive Sector, which we address
18 in paragraphs 162 to 167 of our closing submission
19 {RC-S/3/67}. This corresponds to two of the claimant
20 sectors, vehicle and accessory sales, and vehicle
21 maintenance and repair. For this sector, Mr Holt was
22 able to use data from all three of his data sources. He
23 uses four reliable public studies, he uses public data,
24 he uses his and Mr Coombs' estimates calculating
25 a rather lower average pass-on rate of 54%, and he also

1 uses data from [redacted], which is a claimant that did
2 not serve any witness evidence, but -- and I believe did
3 not serve any disclosure either but did provide its
4 data. From those three sources Mr Holt arrives at an
5 overall estimate of 82%.

6 Now -- oh, forgive me, I am so sorry, we should go
7 into closed session at this point.

8 THE CHAIRMAN: Right.

9 MR JOWELL: Forgive me. Yes, I am so sorry.

10 THE CHAIRMAN: Right, can we go into closed session, please.

11 (The hearing continued in private)

12 (In open court)

13 MS TOLANEY: Thank you.

14 The first point, just standing back, is that
15 the Tribunal should observe that the case advanced by
16 the merchants is simply unrealistic. The merchants say,
17 in a nutshell, that even if they and their competitors
18 had paid lower Merchant Service Charges, they would not
19 have reduced their prices at all. So, essentially,
20 their case is that they would have ignored their own
21 lower costs and continued to put up prices each year to
22 the same extent as if those prices had been covering
23 higher costs and that seems very unlikely in
24 a competitive margin -- competitive market where margins
25 are tight.

1 Now, we suggest that, applying commercial and common
2 sense and having regard to the evidence before
3 the Tribunal, this is plainly not what would have
4 occurred, but rather the merchants would have reduced
5 their prices to reflect the lower charges, or would have
6 reduced the efficiency savings which they needed to hit
7 their profit targets. Now, as the Tribunal is aware,
8 each side has tried to ground their case in the options
9 put forward by the Supreme Court in the *Sainsbury's*
10 litigation, and as we say in paragraph 8 of our written
11 closing, the claimants' case is essentially option 1,
12 which is: do nothing in response. Our case is that
13 either supplier pass-on or price pass-on applied, and
14 that is options 3 and 4.

15 Just to ground the claimants' arguments so that
16 the Tribunal has it firmly in mind before I start my
17 closing submissions in earnest, those are described at
18 paragraphs 14 to 15 {RC-S/2/5}, the two strands of
19 the claimants' argument, of our written closing, we
20 describe them, and each is unsustainable. First of all,
21 the claimants contend that sophisticated retailers would
22 not have known that their Merchant Service Charges had
23 reduced at all, and you will recollect, through
24 cross-examination, the case that was advanced was that
25 merchants could find themselves in the dark about what

1 had caused a change in their total costs. So it is on
2 that basis they say they would have done nothing,
3 because they did not know what was happening.

4 The second strand is that the claimants say that
5 even if retailers were to identify that their costs had
6 fallen this would have had no effect whatsoever on any
7 relevant business decision, and except for in relation
8 to a travel agency, they deny any degree of pass-on
9 ruling out that any of the benefit of lower costs would
10 have been shared with consumers.

11 My second overarching point is that despite the very
12 limited evidence produced by the claimants, the evidence
13 available to the Tribunal shows two things, which we
14 identify at paragraph 24 of our written closing
15 {RC-S/2/7}. First, that merchants engage in detailed
16 and careful monitoring of their costs, and I will show
17 you the evidence to that effect. So just pausing there,
18 that undermines the first strand of the claimants' case
19 based on the evidence that is before you, that they were
20 in the dark, because what we can see is that there was
21 indeed a detailed and careful monitoring of costs.

22 Secondly -- and this attacks the second strand of
23 the claimants' case -- the Merchant Service Charges feed
24 into the merchants' price-setting processes, and
25 the evidence before you will show that either through

1 Merchant Service Charges being treated as COGS, and that
2 is true of a fair proportion of the merchants for whom
3 there is evidence, or it feeds in through other
4 mechanisms, such as margin or profit targets, for
5 instance, EBITDA targets which are calculated after
6 taking account of a number of constituent elements,
7 including the Merchant Service Charges. In summary, 13
8 merchants provided qualitative evidence for Trial 2A.
9 Not all gave oral evidence or even produced witness
10 statements, but those are the merchants from whom we
11 have data. Of these, three categorise Merchant Service
12 Charges as COGS, and it is common ground between
13 the experts that COGS are likely to be passed on to
14 a higher degree than other costs.

15 So pausing there, that is three out of the 13
16 Willing Claimants, which is 23% or almost a quarter of
17 the merchants before the Tribunal, categorise Merchant
18 Service Charges as COGS, and we suggest the true number
19 is likely to be higher. In the case of one of
20 the merchants, an insurer, it was accepted by its
21 counsel, as I will show you, in opening submissions that
22 Merchant Service Charges form part of its manufactured
23 costs, which is treated analogously to COGS in
24 price-setting. Just so you have it for your note, it is
25 {Day2/153:15-25} and also {Day2/154:1-3}. So that is

1 four of the 13 Willing Claimants.

2 I said to you it is probably higher, in fact. As we
3 say in paragraph 26 of our written closing {RC-S/2/8},
4 we draw there attention to a small study conducted by
5 EY and Copenhagen Economics which demonstrated that, for
6 nine out of the ten merchants who were participants in
7 this survey, payment costs were an explicit variable
8 cost category in line with many other variable costs,
9 with only one merchant treating payment costs as a fixed
10 cost which was not controlled at store level. Now, that
11 is a small survey, but quite a striking result. Where
12 the Willing Claimants then categorise the charges as
13 overheads for accounting purposes, which is the other of
14 the 13, to the extent that there is available evidence
15 it strongly indicates that Merchant Service Charges are
16 part of the costs that are taken into account in setting
17 profit or margin targets and which influence
18 negotiations with suppliers or price setting, and
19 the strongest example of that for a Willing Claimant is
20 a restaurant chain, which I will come on to, but it is
21 far from alone.

22 So that is the summary of the evidence that you
23 have, the factual evidence.

24 The third point I have by way of introduction is
25 that although the merchants have failed to provide

1 the evidence we would have expected to see in relation
2 to supplier pass-on, the evidence they have provided in
3 fact shows that supplier pass-on played an important
4 role and we make that point at paragraph 29 of our
5 written closing {RC-S/2/9}. In essence, the likelihood
6 is that to the extent that reductions in charges were
7 not passed on in the form of lower prices the pass-on
8 would have occurred by supplier pass-on, because
9 reductions in the service charges would have reduced
10 the efficiency savings needed for merchants to hit their
11 profit targets. Again, I will develop that.

12 The fourth point is that economic theory, existing
13 studies and the results of analysis of public data all
14 indicate that there is likely to be high price pass-on,
15 70% to 100%, for industry-wide variable costs for most
16 retailers, and we make that point at paragraph 23 of our
17 written closing {RC-S/2/7}. So economic theory,
18 existing studies and public data are all consistent with
19 the factual evidence before the Tribunal in this case.
20 Visa has already addressed the Tribunal on economic
21 theory and I will not repeat their submissions. For
22 the Tribunal's note, we address economic theory at
23 paragraph 75 to 80 of our written closing
24 {RC-S/2/24-26}. I am going to concentrate in my
25 submissions on the factual evidence before the Tribunal

1 which we say is consistent with the studies and data in
2 the public domain.

3 Then my fifth and final overarching point relates to
4 burden of proof, and these are the points we make at
5 paragraphs 30 to 35 of our written closing
6 {RC-S/2/9-10}. You will recollect, because it has been
7 mentioned many times, that the Supreme Court held in
8 *Sainsbury's*, at paragraph 216 {AB-D/21/73}, that once
9 a defendant has raised the issue of mitigation in
10 the form of pass-on, there is a heavy evidential burden
11 on the merchants to provide evidence as to how they have
12 dealt with recovery of their costs in their business and
13 it is for the merchants to produce that evidence to
14 forestall adverse inferences being taken against it by
15 the court.

16 THE CHAIRMAN: It does not change the burden of proof,
17 though.

18 MS TOLANEY: It does not, but what it is very clear about is
19 that the burden of proof starts on the defendant who is
20 seeking to prove mitigation, but it is recognised,
21 inevitably, that it will be the merchants who have all
22 the information, and if they do not produce information
23 that the court would expect to see, then an inference
24 will be drawn against them when they are making
25 assertions as to their practice. The only reason for

1 making that point is the recent case law has very much
2 gone against the idea of drawing adverse inferences from
3 witnesses not being called and so on, but this is very
4 different. This is in relation to the proof of pass-on,
5 and you will remember that the Supreme Court said
6 essentially, and I think it was followed in *Granville* as
7 well, that one needs to not overstate the burden, given
8 where the information is likely to be held.

9 The Supreme Court also went on to talk about
10 the fact that establishing pass-on of the Merchant
11 Service Charge is necessarily a matter of estimation,
12 and the law does not require unreasonable precision, and
13 that the merchants would in all probability address it
14 not as an individual cost but by taking it into account
15 along with a multiplicity of other costs when developing
16 their annual budgets. That is paragraph 225
17 {AB-D/21/76}.

18 Now, we suggest that the merchants have not produced
19 appropriately fulsome disclosure in this case, and what
20 they have tried to do instead to avoid their disclosure
21 obligations is to suggest that Mastercard has to meet
22 what they contend is an extremely high evidential burden
23 and undertake a granular exercise of tracing actual cost
24 changes into specific price decisions. That is clearly
25 not the test, looking at the paragraph I have referenced

1 in the Supreme Court decision, and just for your note,
2 it is {AB-D/21/76}, and it is also the case that that
3 was rejected in *Granville Technology Group* at
4 paragraph 180, and that is {AB-D/40/68}.

5 THE CHAIRMAN: The trouble is that in the run-up to this
6 trial, as we have just heard, Visa were objecting to any
7 disclosure, they did not want the claimants to provide
8 any disclosure, so you cannot sort of say that they were
9 required to produce this stuff when it seems as though
10 there was --

11 MS TOLANEY: Well, sir, I --

12 THE CHAIRMAN: -- as part of the case management decision --

13 MS TOLANEY: I absolutely can, sir, because Visa's case was
14 rejected. So the reason why you have disclosure is
15 because it was ordered to be produced and Mastercard
16 wanted that disclosure.

17 THE CHAIRMAN: Well, what was ordered to be produced and
18 have they not complied with that order?

19 MS TOLANEY: Well, the Tribunal, in previous case management
20 decisions, warned the parties that the onus was on each
21 of them to take -- and I quote -- "a warts and all
22 approach", that is {RC-E1/8/6}, and they said that
23 a party who advanced a cherry-picked or untestable case
24 put squarely on risk that it would be in the bin, or
25 "down the drain". So the Tribunal made it clear that

1 there was "a warts and all approach", and that was
2 debated, and indeed what was ordered was disclosure.
3 Now, the idea of that was, sir, so that it could be
4 assessed whether the relevant merchants in fact passed
5 on the charges, and there may be debate about what has
6 to be shown, but the evidence as to what merchants did
7 was supposed to be there.

8 Now, can I just, in contrast, show you what was in
9 fact disclosed, and you can see a summary of this in
10 Mr Harman's reply report at table 2-1, which is
11 {RC-G/11/8}. I will not read this out because we are in
12 closed session.

13 THE CHAIRMAN: Yes. Well, we are in open session.

14 MS TOLANEY: We are in open session, I beg your pardon.

15 But you can see that the table sets out for each
16 Willing Claimant the period of time that their evidence
17 covers, the number of statements, number of documents
18 and so on, both originally and later provided in late
19 2024. You see that in the fifth row, the restaurant
20 had, less than three months before the start of trial,
21 disclosed just ten documents, and then in total it
22 disclosed only 126. Next line down, you see a total of
23 64 from the relevant claimant, and in the eighth row,
24 you see 66 from a telecommunications provider.

25 Then if we go, please, to figure 3-2, which is at

1 {RC-F/13/34}, and it is Mr Harman's report still. Thank
2 you. It should be, yes, figure 3-2. That shows
3 the quantity of documents produced by the Willing
4 Claimants against each year of the claim period. So
5 the merchants have disclosed almost no documents in
6 relation to the early years of their claims.

7 MR TIDSWELL: I may have my recollection wrong, but
8 I thought that it was slightly different from what you
9 just said. I thought that there was an indication of
10 intent from the claimants to put in evidence with their
11 positive cases and that is what the expression about
12 the "warts and all approach" applied to. So there was
13 not a full disclosure process, but that was their
14 decision as to what they wanted to put in and they were
15 being told, well, if you are selective about it, it is
16 going to cause a problem in the process, so please do
17 not be selective about it. But in advance of that,
18 Mastercard did seek disclosure, and actually some --
19 I do not know how much of this related to that, but my
20 recollection was that Mastercard was actually seeking
21 disclosure as early as March -- February and March and
22 was getting that, but then, as I think you acknowledge
23 in your closings, you did not get as much as you
24 wanted --

25 MS TOLANEY: That is right.

1 MR TIDSWELL: -- and the process, for one reason or another,
2 did not deliver to you orders that allowed you to get
3 more documents, if one can put it that way.

4 MS TOLANEY: That is right. I think there were time
5 constraints and pragmatic reasons informing that, but at
6 no point was the suggestion that disclosure was not
7 needed accepted.

8 MR TIDSWELL: Well, I think that the messaging from
9 the Tribunal was always, we do not want to have
10 a wide-ranging disclosure exercise because (a) it is
11 unlikely to be helpful, and (b) the trial timetable did
12 not allow for that, but that if you wanted things, you
13 should ask for them, and if they were obviously things
14 you needed, then the Tribunal would help you get them.
15 Now, you know, it may be that last bit has not worked as
16 much as we would all have liked, but I do not think --
17 there was not disclosure in a CPR 31 sense at any stage,
18 as I recall.

19 MS TOLANEY: I accept there is no CPR disclosure, but in
20 a sense, the position has to be one thing or the other.
21 If there was no disclosure, then in a sense the whole
22 factual inquiry is unnecessary and Visa's position, that
23 it is all about the economic assessment on public data
24 and other matters, is where the Tribunal has to land.

25 If it is that disclosure is relevant because it is

1 necessary to look at or have in mind what the merchants
2 did in order to assess the "but for" causation test,
3 then the only point I am making is that to the extent
4 the claimants seek to rely on an absence of evidence
5 and/or a suggestion that what we have put forward is not
6 sufficiently granular, the Tribunal has to have in mind
7 that the absence of evidence is a matter that rests
8 entirely in the claimants' hands, given that they have
9 put forward the material and a "warts and all approach"
10 was suggested, and if they now suggest that there is
11 insufficient evidence before the Tribunal, then an
12 inference needs to be drawn against them, rather than it
13 being suggested that my clients cannot prove pass-on
14 with essentially their hands tied behind their back.

15 MR TIDSWELL: Well, Visa's position was slightly different,
16 was it not, because Visa's position was, "We do not need
17 it, we do not think it is useful", but then when it
18 became apparent that evidence was going to go in,
19 I think from the moment that it was flagged there would
20 be some evidence coming in, Visa started saying, "Well,
21 if that is going to be the case, we need to deal
22 with it, so we may need disclosure", and that led to
23 a number of discussions and hearings and so on, from
24 about I think probably starting in June in terms of
25 correspondence and then ending up in September, so very

1 tight. But Mastercard's position was different.

2 I think Mastercard was always saying, "We would like to
3 see more material in from claimants".

4 MS TOLANEY: That is right. I do not shy away from that.

5 We always said, because we were always concerned, and
6 with respect, it may be different approaches from
7 different tribunals, but we were always concerned that
8 part of the causation test may require an assessment of
9 a causal connection looking at what merchants were
10 doing, and that is why we were concerned about it. Now
11 what we say is, on the basis of the material we have, we
12 can make good that test, but insofar as my learned
13 friend Mr Beal wishes to say that something more
14 granular was required and/or we do not have sufficient
15 evidence, then the Tribunal has to look at that through
16 the prism of them holding the keys, if you like.

17 THE CHAIRMAN: But are you saying that there was stuff that
18 you asked for and they did not provide?

19 MS TOLANEY: I will need to take instructions on that, so if
20 you give me a moment. (Pause).

21 I am being told yes, but I would have to give you
22 chapter and verse on that --

23 MR TIDSWELL: I think, certainly my understanding, if it is
24 helpful, is that there were requests made.

25 MS TOLANEY: Yes.

1 MR TIDSWELL: You were not satisfied with the responses to
2 quite a lot of them, it then ended up in the Redfern
3 process. Actually, when the Redfern process reached its
4 culmination or supposed culmination in September,
5 the hearing was vacated because the parties wanted to
6 continue to discuss the matter, and it was not, I think,
7 until October that it came back before me to deal with
8 quite a limited number of matters which were still in
9 dispute, and I made some orders, including, I think, in
10 favour of Mastercard, for the production of documents at
11 that stage.

12 So I think the position may well have been that
13 there were -- there was a long period of dialogue, but
14 actually the only time that it really came to an
15 application was October.

16 MS TOLANEY: That may explain why there are so many
17 documents provided at that point. I will have to --

18 THE CHAIRMAN: Were those orders not complied with in the
19 end? I mean, it ultimately came to an order having to
20 be made and are you saying there was non-compliance?

21 MS TOLANEY: I am sorry, I was not at the hearing so I am
22 just asking Mr Cook, who was. As I understand
23 the position, in a sense, it almost became
24 a fait accompli, given the timing, that there was
25 a limit to what could be done.

1 THE CHAIRMAN: Right.

2 MS TOLANEY: So, I can get you chapter and verse on it --

3 THE CHAIRMAN: So, you left it there, effectively?

4 MS TOLANEY: -- but, if I put it this way, we thought more

5 should have been provided, but by the time we had --

6 there was a limit to what could be done.

7 THE CHAIRMAN: Okay.

8 MS TOLANEY: I will see if there is any good examples

9 overnight, I can assist on you that.

10 THE CHAIRMAN: Thank you.

11 MS TOLANEY: With those introductory points and I do not

12 want to overstate, I should say hastily, I do not want

13 to overstate the adverse inference point, but I do want

14 to make that point clear because it is one of the limbs

15 of my learned friend's case, I think, that there is

16 insufficient material to deduce pass-on and that is why

17 I just thought it was important to have in mind

18 the Supreme Court's approach to that question.

19 Can I then just outline the structure of my

20 submissions. First of all, I wanted to, I think this

21 afternoon, pick up the questions asked about

22 the distinction between legal and factual causation just

23 briefly and some other small points on the law.

24 I then propose, secondly, to address the evidence of

25 the merchants who categorise the Merchant Service

1 Charges as COGS, and from that point, we will need to go
2 into closed session. I am not sure whether I will reach
3 that today or not.

4 Thirdly, I will address the evidence of
5 the merchants who treat the service charge in a manner
6 that is analogous to COGS.

7 Fourthly, I will address the evidence of merchants
8 who categorise the Merchant Service Charge as overheads.

9 Fifthly, I will address supplier pass-on.

10 Then, sixthly, I will address the criticisms of our
11 experts briefly and also the findings we submit should
12 be made.

13 So turning then to the first topic on the legal
14 framework. We have explained, at paragraph 40 of our
15 closing {RC-S/2/11}, that the allegation of pass-on
16 raises issues of factual and legal causation, as we have
17 been debating this morning, and a very good explanation
18 of the distinction comes from the *Trucks* litigation in
19 the Court of Appeal, and that is at {AB-D/43/1}. If we
20 could go, please, to {AB-D/43/52}, paragraph 150.
21 The Chancellor says within this paragraph that -- refers
22 to the "elusive distinction between legal ... and
23 factual causation", and he, I think, cites the CAT's
24 judgment below in holding on line 4:

25 "Factual causation involves consideration of whether

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

8 THE CHAIRMAN: There is no reference in there to proximity,
9 is there?

10 MS TOLANEY: There is not. But in answer to your question,
11 the issue of where proximity lies in the factual or
12 legal causation split is in fact clear from
13 the Supreme Court *Sainsbury's* decision. If we can just
14 go to that, it is at {AB-D/21/73}, and essentially, sir,
15 what you see in paragraph 215, under the quote, is
16 the reference to proximate being equated, we would say,
17 with legal. So it is:

18 "Here also a question of legal or proximate
19 causation arises ... But the question of legal causation
20 is straightforward in the context of a retail
21 business ..."

22 So what we would suggest is that "proximate" here is
23 part of legal causation and that is the way in which
24 the test is used, and the reason why factual causation
25 can be insufficient is remoteness, intervening act,

1 proximity, but they are all covered within the umbrella
2 term "legal causation".

3 MR TIDSWELL: Is there a point, do you think, that
4 the statement in *Trucks*, in 150 of *Trucks*, is very
5 general and really I think is aimed as a statement of
6 the general law in relation to legal causation, because
7 it talks, for example, about the position of an insurer
8 insurance policy, which I do not think you would
9 characterise as being a proximity point, but when you
10 come and apply it in this context of mitigation, you are
11 then back to this expression "arising out of
12 the transaction", and it may be that that is actually
13 a lot closer to a test of proximity. In other words,
14 this is -- I am not suggesting that there is a different
15 approach to mitigation than there is to general
16 causation, because I think that *Trucks* is telling us
17 that is not the case, but actually, when you look
18 specifically at mitigation and you apply
19 *British Westinghouse*, then those words "arising out of
20 the transaction" do lend themselves more to a concept of
21 proximity.

22 MS TOLANEY: I think the difference -- and I do not think we
23 need the word "proximity" there -- is just simply
24 between "but for" causation, which is factual. So
25 I think I said to the Chairman in my oral opening

1 the essential question the Tribunal needs to ask
2 is: were prices in fact different as a result of
3 the overcharge? That is the factual question. That is
4 distinct from legal principles which would restrict
5 the recoverability of damages, even where the damage
6 would otherwise have satisfied the "but for" test, and
7 the principal example of that is remoteness or breaking
8 the chain of causation, or a proximity from a policy
9 issue. That is the question, if you like: even if
10 the prices were different, is there a reason why we
11 should not allow it as a matter of policy? That would
12 be the legal causation test.

13 I think what we are suggesting the Tribunal has
14 already determined, as Mr Jowell explained, is that that
15 question of the, even if you find there has been an
16 overcharge that is passed on, is there a policy reason
17 why we cannot allow recovery, that second limb, legal
18 causation, is not part of this trial. The only question
19 for this Tribunal is the factual question: were
20 the prices -- the overcharge in the prices passed on?

21 PROFESSOR WATERSON: Can I try and put it in terms that

22 I understand it?

23 MS TOLANEY: Of course.

24 PROFESSOR WATERSON: Rather than a lawyer. So what I think
25 you are saying, from my point of view, is that factual

1 causation is necessary, but not sufficient to
2 demonstrate that you win, if you like.

3 MS TOLANEY: I am saying the opposite, I am afraid. I am
4 saying factual causation is sufficient, because
5 the question of any policy reasons does not arise,
6 because that is what the Tribunal has already taken off
7 the table, if you like.

8 PROFESSOR WATERSON: I was talking more generally.

9 MS TOLANEY: Oh, I see.

10 Typically, you are right that there is two
11 questions. The first is: can you get over the factual
12 link between the overcharge and the loss? Then
13 the second question is: as a matter of policy, for all
14 the various reasons, should it be recoverable?

15 THE CHAIRMAN: You are including proximity as an aspect of
16 that sort of policy reason?

17 MS TOLANEY: I am in the sense that it is being used here,
18 where you see it being used in that way, a proximate.
19 That is how the Supreme Court have used
20 the word "proximate", and --

21 THE CHAIRMAN: The trouble is that "proximate" also comes
22 in, in, for instance, the *Trucks* in the Court of Appeal,
23 paragraph 151, by linking it as part of factual
24 causation --

25 MS TOLANEY: That is right, but --

1 THE CHAIRMAN: -- where you have to prove direct and
2 proximate causative link.

3 MS TOLANEY: I see that, but in a sense you do not
4 need "proximate", if you just -- because I think --

5 THE CHAIRMAN: Similarly, you could say the same, you do not
6 need "proximate" in the Supreme Court judgment.

7 MS TOLANEY: I agree. I am just trying to say that I think
8 proximity in the legal sense of -- like remoteness, in
9 that way, as an extra -- if I can just stand back and
10 put it this way. We do not challenge the idea that
11 there has to be a connection between the cost and
12 a price change, and the more indirect it is, the more
13 difficult it may be to establish "but for" causation.
14 That is just the reality. How we go about establishing
15 it I can come on to, because there is a difference
16 between us as to the granularity and what one would
17 show, and I think the claimants are wrong in their
18 approach, because what we say is, it is a common sense
19 approach to "but for" causation in the context of
20 the available evidence and appropriate inference. We
21 say that is all part of the factual process.

22 Insofar as my learned friend is trying to say that
23 there is some extra add-on of a concept of proximity
24 even if we satisfied "but for" causation, then we would
25 not agree with that, and that appeared to be what they

1 were saying in opening. In closing, I am not so sure
2 that they are, because they seem to be suggesting it is
3 part of factual -- they are talking only about factual
4 causation. So --

5 THE CHAIRMAN: Are you saying that to prove "but for"
6 factual causation, you are accepting that there is an
7 element of proximity that will need to be established
8 there --

9 MS TOLANEY: Well, I am accepting --

10 THE CHAIRMAN: -- you are saying there has to be a direct
11 and proximate causative link?

12 MS TOLANEY: I am not accepting proximity because I think it
13 is adding a concept from legal causation. I am
14 accepting that, in order to satisfy a "but for" test,
15 you have to show a link between -- because you have to
16 show --

17 THE CHAIRMAN: Well, yes, clearly.

18 MS TOLANEY: Exactly. I think -- I think -- I am not sure
19 that adding concepts of direct/indirect, proximate/not
20 proximate help that debate, because it is simply whether
21 you are satisfied that there is a sufficient link, and
22 the reason I do not think in this context
23 the words "direct" and "proximate" help --

24 THE CHAIRMAN: You have to establish a link, clearly.

25 MS TOLANEY: We do.

1 THE CHAIRMAN: The question is: how close a link?

2 MS TOLANEY: That is right. But, as the Supreme Court said
3 -- and I mention this, I think we have got it up on
4 screen -- let me just find the relevant passage -- where
5 you have got by definition this type of cost that would
6 be not necessarily isolated but merged into other costs,
7 you have to factor in the reality of being able to show
8 the nature of the link. So the court cannot approach
9 things on the basis that it is insufficient to show that
10 the Merchant Service Charge was in a pool of costs that
11 were affected by price change. You do not have to show,
12 for example, because -- and we could not because of
13 the signal-to-noise point, that the isolated MSC has
14 moved, and if that is what my learned friend is trying
15 to get at with "direct" and "proximate", we say that
16 runs into things like -- if we go to paragraph 225
17 which, is I think at {AB-D/21/76}.

18 THE CHAIRMAN: Of *Sainsbury's*?

19 MS TOLANEY: Of *Sainsbury's*. So here, the point is that
20 this is all about compensation, and:

21 "The loss caused by the overcharge included in
22 the MSC was an increased cost which the merchants would
23 in all probability not address as an individual cost but
24 would take into account along with a multiplicity of
25 other costs when developing their annual budgets."

1 We see:

2 "The extent to which a merchant utilised each of
3 the four options ... can only be a matter of estimation.
4 In accordance with the compensatory principle and
5 the principle of proportionality, the law does not
6 require unreasonable precision in the ... amount of
7 the prima facie loss which the merchants have passed on
8 to suppliers and customers."

9 THE CHAIRMAN: The thing is they are not really dealing with
10 price setting, are they, and pass-on through price?

11 MS TOLANEY: Well, I think they are, because they are
12 talking about the options, one of which was price pass
13 on --

14 THE CHAIRMAN: Yes, it was one of the options.

15 MS TOLANEY: It is 4, and supplier pass-on is the other, and
16 they are talking about the -- take into account when
17 "developing their annual budgets". So I think they are
18 talking about price setting.

19 THE CHAIRMAN: Then we know from the Court of Appeal in
20 *Trucks* that merely the setting of budgets is not
21 sufficient --

22 MS TOLANEY: Well, I am going to come on to address that
23 because I know I need to persuade you on that point.

24 But what I would say is this case concerned, bang on
25 point, the Merchant Service Charge. I appreciate *Trucks*

1 concerned something different and both the CAT and
2 the Court of Appeal were very keen to distinguish that,
3 whereas, here, we are talking about price setting and
4 here we do see the Supreme Court saying -- essentially,
5 just standing back here, what is happening here is that
6 the merchants are saying they have suffered loss and
7 what the court does not want to do is give the merchants
8 a windfall if in fact they have not suffered a loss
9 because they have passed it on. The reality here is
10 that if the merchants say, "Oh, well, come on and prove
11 it that we have actually passed it on", because then
12 the court might say, "Well, you have got
13 the information, but from what you have disclosed, we
14 can see that the Merchant Service Charge has been put
15 into your budget, going up or down depending on its
16 level and the price you need to set", and our submission
17 in essence is, if you look at the evidence, having in
18 mind paragraph 225 of the Supreme Court judgment in
19 *Sainsbury's*, you will see, in the case of all of
20 the Willing Claimants, either that they treated Merchant
21 Service Charges as COGS, which it is accepted would be
22 variable with price, or, insofar as it was classified as
23 overheads, in fact it fed into price setting. We
24 suggest that having in mind that we cannot -- we would
25 not be able to show you an absolute link as showing that

1 the Merchant Service Charge pushed the price up by this
2 amount, that is not something we could do and we have
3 not been given the evidence to be able to do that. What
4 we can show you is that it does feed in, exactly in
5 the way it is addressed here:

6 "... into account ... with a multiplicity of other
7 costs when developing ... annual budgets."

8 THE CHAIRMAN: But they are saying that the merchant might
9 use any of the four options.

10 MS TOLANEY: That is right.

11 THE CHAIRMAN: So it is not necessarily saying, well, you
12 can assume that it went into price setting.

13 MS TOLANEY: No, but if -- what they are saying is,
14 the extent to which can only be:

15 "The extent to which a merchant utilised each of
16 the four options ... can only be a matter of
17 estimation."

18 So I think when they are talking about the four
19 options, it is actually on a separate point.

20 I understand it has got to be -- I would have to show
21 that they -- if you had a merchant who did not factor in
22 Merchant Service Charges to their budget, then I might
23 be on more difficult ground. Or if there was evidence
24 showing that, for example, and it may be the case when
25 we come on to it that one does fall into this category,

1 a merchant just absolutely had no regard to Merchant
2 Service Charges at all, then the claimants' case is that
3 is option 1. If we see it being fed into a budget which
4 sets prices, then we are saying it is option 3, or it
5 may be, if it did not factor into the price, option 4.

6 So the point is, if you look at --

7 THE CHAIRMAN: I think it might be the other way round,
8 actually.

9 MS TOLANEY: Hm?

10 THE CHAIRMAN: I think it might be the other way round
11 actually.

12 MS TOLANEY: 225, if I may, just the first sentence, is
13 talking about the fact that you will not see the MSC as
14 an individual cost factored in.

15 MR TIDSWELL: So when you talk about -- you talk about it
16 feeding into the budget, but I think you accept that is
17 not enough, you have to then show that the budget has an
18 effect on price?

19 MS TOLANEY: Yes.

20 MR TIDSWELL: Are you saying you just infer that, or how do
21 we get that, the impact on price? I mean, is that done
22 in an empirical way or a qualitative way? Budgets do
23 not set prices, prices determine what budgets look like
24 because the price is an input into the budget, is it
25 not?

1 MS TOLANEY: Well, when I show you the evidence that might
2 be easier to answer.

3 MR TIDSWELL: No, I am just -- so you are going to rely on,
4 no doubt, lots of things, but do you say there is
5 a bunch of evidence that will demonstrate that there is
6 a connection between overhead costs in aggregate and
7 price? Is that the --

8 MS TOLANEY: Yes, so what -- what you see for different
9 merchants will be that the budgets are set having regard
10 to their -- the costs they are likely to incur having
11 regard to the margin or profit they would like to make,
12 and what factors into the costs which then relates to
13 the profit, amongst other things, will be the Merchant
14 Service Charge.

15 MR TIDSWELL: But that does not show an impact on price.

16 MS TOLANEY: I think it will if it shows they are trying to
17 set -- if they are trying to set their budget so that
18 they get a margin, a profit of a certain amount, then
19 they have to set their price having regard to their
20 cost.

21 THE CHAIRMAN: But the prices are an input into that budget.
22 That is how they establish the margin.

23 MS TOLANEY: Well, let us --

24 MR TIDSWELL: That is how the experts tell us that this is
25 done. It is that --

1 MS TOLANEY: Well, let us -- we will have a look at in
2 practice and then you will see what I am saying in
3 relation to each one, rather than me trying to give an
4 overarching point.

5 But can I deal with the law on budgetary processes,
6 just to deal with that before we stop, because if I can
7 just -- I have shown you paragraph 215 now of the -- if
8 we just go back and just remind you of it, the relevant
9 question at {AB-D/21/73} on the screen. So the core
10 factual question is:

11 "... has the claimant in the course of its business
12 recovered from others the costs of the [Merchant Service
13 Charge], including the overcharge contained therein [and
14 thereby has the claimant] transferred all or part of its
15 loss to others ..."

16 So it is the transfer of all or part of its loss.

17 I have shown you 225, about the estimation and they
18 are joined together.

19 Now, the estimation point, we say, is inconsistent
20 with a granular tracing exercise, and we would say that
21 the determination of pass-on rates can only be made by
22 approximate estimates. The fact is that
23 the Supreme Court formulated a simple question,
24 the answer to which could turn on whether Merchant
25 Service Charges were passed on as part of a wider group

1 of costs in a merchant's budgetary process with some
2 wielding of the broad axe. Just to remind you, in
3 the Supreme Court in *Merricks*, at paragraphs 47 to 48,
4 Lord Briggs explained that sometimes the court has to do
5 the best it can when calculating damages with informed
6 guesswork. Now, the CAT judgment in *Trucks*, we say, is
7 entirely consistent with the two Supreme Court
8 decisions, and if I could just show you the Tribunal
9 decision at {AB-D/37/1}. If we go, please, to page
10 {AB-D/37/98}. So at paragraph 228 -- we looked at these
11 in oral opening -- we see the identifying features that
12 in general terms can be said to make it easier to show
13 pass-on or result in higher rates of pass-on.
14 The fourth is the size of the overcharge that is
15 relevant to the merchant's expenditure or price cost
16 margin, and that goes back to paragraph 220(2). If we
17 can go back to that, please, on {AB-D/37/96}.

18 MR TIDSWELL: Did you say the fourth?

19 MS TOLANEY: Yes, 228(4). Oh, no, 228(2), I beg your pardon
20 {AB-D/37/98}. 228(2).

21 MR TIDSWELL: But against the overall costs and revenue,
22 yes.

23 MS TOLANEY: That is right.

24 If we go to 220(2), which is at the top of the page
25 {AB-D/37/96}, that is where it comes from. Just below:

1 "... the CAT compared this case with *Sainsbury's*
2 where there was both knowledge of the MIF and it was
3 a significant cost ... and held that ... more of
4 a causative connection would need to be shown than
5 merely the Overcharge being taken into account in ...
6 business planning."

7 The Tribunal then summarised the position on
8 the facts, if we go back to {AB-D/37/98}, please, and it
9 is paragraph 228, where it said that it was not enough
10 for the defendant in the *Trucks* litigation to argue,
11 this is line 4:

12 "... that all costs, including increases in costs,
13 are fed into the Claimants' or their regulators'
14 business planning and budgetary processes ... something
15 more specific than that ... [was needed]."

16 Now, what we would suggest is that, here, it would
17 suggest that it was not enough just to demonstrate that
18 on the facts of this case, but it cannot be a blanket
19 rule, because that would be inconsistent with what
20 the Supreme Court had said in relation to pass-on at
21 paragraph 225, as I have shown you, and here we would
22 suggest the Tribunal was influenced by the tiny amount
23 of the overcharge and the particular circumstances
24 relevant to the setting of the prices on the case before
25 it. You can see that very clearly from the Court of

1 Appeal decision, which is at {AB-D/43/51}, at
2 paragraph 146 of the Court of Appeal decision, the Court
3 of Appeal acknowledged that the evidential problems
4 the Tribunal had had in relation to "the imprecision of
5 the experts' regression models", and at 149, if we can
6 go down, please {AB-D/43/52} you can see the level of
7 the relevant overcharge was no more than about 0.025% of
8 *Royal Mail's* revenues and 0.0015% of Openreach's
9 revenues, which was characterised, rightly, as "a tiny
10 amount". It was for that reason that it was said that:

11 "The idea that this tiny amount could not only be
12 traced to the price of the Claimants' individual
13 products, but that it is then possible to establish that
14 it caused a price increase, seems to me completely
15 unreal."

16 Now --

17 THE CHAIRMAN: Sorry, you referred to 146 before there.

18 That was dealing with the overcharge, the evidence --
19 the regressions on the overcharge, not on pass-on.

20 MS TOLANEY: That is right.

21 THE CHAIRMAN: Anyway, I just wanted to point that out.

22 MS TOLANEY: That is right, but I think that there is no --

23 I think that is the same for the point I need for it,
24 that the quality of the evidence was not good enough,
25 and then the fact is that you could not trace the tiny

1 amount into the budget given the quality of the evidence
2 and the size of the overcharge. Properly understood, we
3 would suggest that there is a distinction to be drawn in
4 this case between the facts of the present case, where
5 the overcharge is of a much more significant amount, and
6 that the budgets are -- you know, that some of
7 the budgets are relevant in evidence. If what is being
8 said is that the *Trucks* litigation is now authority for
9 the idea that simply relying on budgets and costs
10 collectively will never be enough to establish pass-on,
11 then there is an inconsistency with the approach taken
12 by both the Supreme Court and the Commercial Court in
13 *Granville*, and also it would likely mean that in
14 a Merchant Service Charge case you could never establish
15 pass-on, because, as you have heard, the experts cannot
16 isolate that charge, or the MIF.

17 MR TIDSWELL: If you had a budgeting process where
18 a particular -- where all of the costs or a particular
19 group of costs were set as a basis for price, then
20 obviously there would not be an argument about that,
21 like a cost-plus situation, I mean, in a way that is
22 the test of a proposition. So I do not really think
23 that is what this is about. This is about the --
24 I think this is about the difficulty that is apparent
25 from paragraph 225 of the Supreme Court decision, which

1 is that when you -- if you do not have anything as clear
2 as that, you are left with a huge amount of uncertainty
3 as to what has actually happened as prices have
4 increased, which of the options has been followed and
5 how do you actually prove that. The challenge here is
6 about providing the linkage between that budgeting
7 process and some outcome which gives you some confidence
8 that actually you have created a linkage between
9 the increase and the price, is it not? That is really
10 what this is about.

11 MS TOLANEY: Well, that is certainly what we say. I think
12 my learned friends do rely on the *Trucks* case as
13 demonstrating that we cannot rely on a linkage that
14 arises from budgets.

15 MR TIDSWELL: Well, I think --

16 MS TOLANEY: That is part of their written closing.

17 MR TIDSWELL: Well, I think they certainly -- well, I do not
18 know, I have to see if they say that. I thought they
19 were saying it is no good just taking a budget and
20 saying therefore the price has to be affected, you have
21 got to do better than that, and actually it is not
22 entirely clear how you do better than that given that it
23 may well be that there are no records and the claimant
24 does not even know how they have done it because
25 the budget process is pretty fluid, but -- and at the

1 end of the day, if someone said, well, we can knock
2 these costs down a bit, we can stop doing this, we
3 decide not to pay, we are going to let this premises go
4 and not pay rent on it, all those things happen in
5 a fairly uncoordinated way in a budget process and then
6 you have not got any evidence of any linkage between
7 the decision that might have been taken to change prices
8 which may have been based on six different other things.
9 That is the problem, is it not? That is where you do
10 get into the directness, put aside proximity for
11 a moment, that is where directness becomes a difficulty,
12 because, as you say, you have got so many other things
13 happening there that it is quite hard to work out that
14 there is a linkage between the cost and the price.

15 MS TOLANEY: Well, I think there are two points to be said
16 in relation to that.

17 First of all, I had in mind the claimants' closing,
18 for example at paragraph 3 {RC-S/1/3}.

19 MR TIDSWELL: Yes. I may be wrong --

20 MS TOLANEY: No, I think you are right, in the sense that
21 they say "the usual budgetary and planning process"
22 {RC-S/1/4}, but they are seeking to exclude, I think,
23 some of the evidence we rely on through the sweep of
24 the *Trucks* litigation, and we do not think it is quite
25 right to say that that prohibits in all cases reliance

1 on budgets.

2 The second point -- and I am sorry to -- I feel like
3 I am labouring the same point, but in a pass-on trial
4 about the Merchant Service Charges, one has to start
5 from really the Supreme Court's approach, which is
6 merchants are not likely to identify it individually, so
7 you are always going to see it, if at all, within
8 a group of costs and it will be in -- presented in
9 a certain way. Now, the Supreme Court clearly thought
10 that, with that evidential piece in mind and with
11 the evidential point that they made, which is that
12 the merchants have to provide the information, it is not
13 in the defendants' hands and adverse inferences will be
14 drawn. In my respectful submission, what they were
15 saying -- seeking to say is -- there are always going to
16 be these four options and one of the four is going to
17 apply. In working out which one, you have got to be
18 realistic that although the defendants have got
19 the burden of proof, ascertaining which one is going to
20 lie in the hands of the merchants and they have got to
21 provide the information, that it is not going to be
22 packaged necessarily in a way that you can say, "Ha-ha,
23 there is the direct increase", because it will be, as
24 a matter of real life, factored in with a number of
25 other costs in a budget, for example, and all you are

1 trying to do is to stand back and say, when
2 the claimants are claiming compensation, because we do
3 have to start from the premise that they are the ones
4 who are seeking payment and will get a windfall if in
5 fact they have passed on.

6 Now, what we have said is, if you look at
7 the evidence, which I will come to now I think tomorrow,
8 you can see the way in which pass-on has occurred, and
9 that is entirely consistent with the evidence in
10 the public data, studies and expert evidence saying that
11 you would have these costs passed on as a matter of
12 economic theory. It is also entirely a matter of common
13 and commercial sense that if you are trying to cover as
14 a merchant a set of costs that are very high, if those
15 costs do not exist, then your prices do not need to be
16 high, and one of the things that you heard in
17 the evidence was that this is an area where margins are
18 tight. So if competitors reduce, everybody would reduce
19 their prices. So some of it is going to be common and
20 commercial sense.

21 But I think what the Supreme Court was saying is you
22 have got to have a fairly broad approach to this, it is
23 going to be a matter of estimation because of the way
24 this cost will have been handled, and that is really all
25 I am saying. If my learned friends and sir take

1 a different approach based on *Trucks*, our answer is,
2 well, *Trucks* was not dealing with a Merchant Service
3 Charge, it was dealing with something very different,
4 presented differently in evidence and a tiny overcharge
5 which had a lot of distinguishing features to the case
6 before you.

7 THE CHAIRMAN: Well, it certainly was very different, but
8 actually, in *Trucks*, there was a hell of a lot of
9 evidence about price setting, because they had to go
10 through all the regulatory processes, and one can see
11 the way prices were capped for *Royal Mail*, etc, and so
12 we actually had a lot of it. It was not because of
13 a lack of evidence that we came to the conclusions that
14 we did, it was because, in the end, we thought that
15 there was not sufficient linkage proved.

16 MS TOLANEY: But one very distinguishing feature on that was
17 the size.

18 THE CHAIRMAN: Yes.

19 MS TOLANEY: I think that has been the "tiny *Trucks*" point.

20 But also, there were a number of other features that
21 were not met in that case, for example the knowledge of
22 the overcharge and things like that.

23 THE CHAIRMAN: Yes.

24 MS TOLANEY: So but what we would say is, I do not think

25 *Trucks* -- and I am trying to limit it to this point --

1 is the authority to say you cannot rely on a budget,
2 relying on budgetary processes is insufficient to show
3 a link, which is the way it has been characterised.

4 PROFESSOR WATERSON: Can I raise a point. I am thinking
5 about the difference between 2A and 2B, and in 2B,
6 people have -- not all experts, but several experts have
7 taken the approach of looking at particular sort of
8 events and seeing what has happened. Now, there is
9 the same issue of correlation versus causation here,
10 although, you know, you might want to look at other
11 costs which are in the same bucket as MIFs to see
12 whether there is this causation rather than just simply
13 a correlation, because, you know, if you take a very big
14 chunk of costs and you see that prices have gone up,
15 well, you know, any member of the public could tell you
16 that that is likely to happen, you know, if costs
17 constitute 95% of what determines price. But that is --
18 there is no very direct linkage there, is there,
19 necessarily? (Pause).

20 Luckily, Mr Cook has got the answer.

21 MS TOLANEY: I am afraid I was not involved in Trial 2B, so
22 I am at a disadvantage I think to others. But Mr Cook
23 tells me that we asked for cost shock disclosure.

24 PROFESSOR WATERSON: Right.

25 MS TOLANEY: So it is difficult to say more than that,

1 I think.

2 PROFESSOR WATERSON: Thank you, yes. I look forward to

3 that.

4 THE CHAIRMAN: All right. Well, we have probably slowed you

5 down a little bit.

6 MS TOLANEY: Not to worry at all.

7 THE CHAIRMAN: The question is, how are you doing?

8 MS TOLANEY: I have got to cover the factual evidence.

9 I think I have got another couple of hours or a bit more

10 to go.

11 THE CHAIRMAN: Right. Do we think it is sensible to start

12 a bit earlier tomorrow?

13 MS TOLANEY: I think so. I think that would be helpful.

14 THE CHAIRMAN: I mean, presumably that can be taken account

15 of so that Visa are not prejudiced by you having more

16 time, or whatever. We can work out the adjusted

17 timings.

18 MR JOWELL: (Off microphone - inaudible).

19 MR BEAL: I usually get squeezed in these things

20 and I suspect this trial is going to be no exception.

21 I am very happy with my existing allocation; I am not

22 looking for more, if that helps. But, you know, we

23 obviously do need to get through 2A and then do 2B, and

24 I am not asking for any more time at this stage.

25 THE CHAIRMAN: Yes. You are not asking for more time.

1 Well, I do not want to set a precedent for the rest of
2 the week, but I think we should probably, to be safe,
3 start at 10 o'clock tomorrow.

4 MS TOLANEY: Thank you.

5 (4.36 pm)

6 (The hearing adjourned until 10.00 am on Tuesday,
7 1 April 2025)

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