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 AN 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

Tuesday, 1 April 2025

MS TOLANEY: Good morning

THE CHAIRMAN: Right. We have apparently some problems with the audio, but we will make do without the live transcript for the time being.

MS TOLANEY: Thank you.

THE CHAIRMAN: All right.

Closing submissions by MS TOLANEY (continued)

MS TOLANEY: Sir, I propose briefly to touch upon the discussion we had yesterday afternoon in relation to budgeting and the key differences with *Royal Mail Group Limited v DAF Trucks Limited* and others for two reasons. First, I want to correct an error I made, and secondly, I want to identify why we say budgeting documents can form an evidential picture, an important part of that picture, for the pass-on of Merchant Service Charges. So, first of all, to correct the error, you were right, sir, yesterday to pull me up on my submission that paragraph 146 assisted me. As you said, that was, in fact, addressing the experts' regression analysis and concerned the figures for the overcharge in that case, not the figure for pass-on, and it was an error on my part. It does not assist me, as you said, but it does not hinder me either. It is just on a different point, so I wanted to correct that.

Can I then come on to why the comparison is nonetheless informative? I showed the Tribunal, and I do not intend to go back over that, paragraph 225 of the Supreme Court decision in *Sainsbury's Supermarket Ltd v Visa Europe Services LLC* on budgeting in the specific context of pass-on, and it is pass-on of Merchant Service Charges; and I just wanted to step back on that because, as I said yesterday, and I know it was late in the day so I just wanted to reiterate the point, the *Sainsbury's* case specifically focused on Merchant Service Charges and the ability to pass on or not pass on. *Trucks* is relevant but is obviously concerning something completely different.

What I am taking from the *Sainsbury's* case-- I will just show you a passage in *Granville v LG Display* in a moment, but what I am taking from that case is, first of all, that the Supreme Court considered that pass-on, both supplier and price pass-on, of Merchant Service Charges was possible. It was one of the options. They are both options put forward. Secondly, that it would be difficult to show the headline of the change in simply the Merchant Service Charge itself, because it was likely to be bundled up in costs; thirdly, that there would inevitably be a degree of estimation, imprecision in ascertaining pass-on and the

amount of pass-on, given that difficulty with the evidential picture, but nevertheless the Supreme Court thought that it was important to be realistic about assessing pass-on and obviously considered that it was likely to have occurred in some scenarios.

Now, one of the points the Chairman put to me yesterday was concerning a price being an input into the budget and establishing the margin, and that was at {Day3/189:10-11}. I wanted to just return to that because that is true in one sense, but not in another, and we were perhaps at cross purposes yesterday. We are not so much interested in a final budget, i.e. the locking down of costs and prices and expected profit. What we are interested in, and I think perhaps Professor Waterson highlighted this, was the process by which the budget is formed and how, in particular, cost changes feature in that process, and the budgeting process is not the only finalised document showing expected costs, plans, prices and outcomes in terms of gross profits in EBITDA.

The document itself is the output of the consideration of a small number of important questions, so if we assume for simplicity an annual budget cycle, the questions will go something like this: what are the projected costs for next year? If prices stay as they

are, what would that mean in terms of achieving our target level of profitability? If the picture does not look satisfactory, what levers can we pull to improve it? If you remember, one of the witnesses and statements used the word "lever" when talking about how the reaction was to cost changes. Now, if we assume that there has been an important change in costs, and I emphasise important, the business either reacts not at all or lets profitability fall where it will, or the business changes something it can.

That is where the four options in *Sainsbury's* come in. At a high level, the business does not have many levers it can pull. Price change is the most obvious, but not the only lever -- supplier pass-on could also play a role -- and I refer to the important change as I did because it is possible for a cost change to be so insignificant, "*Trucks* tiny", that it cannot be shown that it is even capable of affecting the decision on what levers to pull and how far to pull them. Now, that brings me to the comparison I was trying to make yesterday, and will make, to *Trucks* and the relevance of the size of the overcharge. At paragraph 147 of the written closing of the claimants, they contend that the small size of the Merchant Service Charge is highly relevant in determining the likelihood of pass-on in

this case, relying on *Trucks*.

But it is important, we say, to have in mind what size means in this context, and in the Tribunal's judgment in *Trucks* at paragraphs 220 to 222, the relevant factor was the size of the overcharge relevant to the merchants, relevant expenditure and/or price cost margin. So there are two important points. First, "*Trucks* tiny" is very tiny indeed. So, for *Royal Mail*, the overcharge on the facts never exceeded 0.05% of its revenue and was as low as 0.001%. That is paragraph 557 of the CAT judgment. For BT, the overcharge was just 0.003% of revenues, and that is 558 of the CAT judgment. In this case, the witness evidence for one of the Willing Claimants is that the Merchant Service Charges consumed 13% of its revenue in 2017, rising to 21 percent in 2023, and that is addressed at paragraph 154 of our written closing.

Depending on which of those overcharges in *Trucks* it is compared to, the scale of the assumed merchant service overcharge for that Willing Claimant is hundreds or many thousands of times larger as a proportion of revenues. The second example I can give you is less extreme but still stark. It is the evidence of another Willing Claimant that the Merchant Service Charge represents around 1.6% of its total revenues as an

average for the period 2017 to 2024, and that is addressed in paragraph 235 of our written closing {RC-S/2/79}. The second of the two points that I was going to make is that one has to compare the size of the overcharge against a firm's margins rather than only its revenues, and I mentioned the *Granville Technology* case to you. If I could just bring that briefly up on screen, {AB-D/40/79}, paragraph 207, at the very end, and here it was his Honour Judge Pelling sitting as a deputy of the Commercial Court:

> "At a high level of generality I accept the proposition that the lower the contribution made by the LCD panels to the cost of the packages being sold, the less likely it was that a cost increase would be passed on, particularly in a highly competitive market but the issue is acutely fact specific and in my judgment the potency of this point in relation to downstream pass on is that it erodes as the margin on sales tightens."

MR TIDSWELL: He is talking about gross margin there, is he not?

MS TOLANEY: It is, but the point is that it is not just revenue; it is margin that you look at. If we go, just while I am in this case, back to {AB-D/40/63], please, paragraph 180, this is an articulation of the point I made, obviously in the context of this case, but at the

start of my submissions today.

"It follows from this that although the defendants bear the legal burden of proving downstream pass on, I reject as wrong the notion advanced by the claimants that down stream pass on can only be evidenced by tracing the change in cost of the LCD panels from the claimants' purchases through to a change in sales price to the end consumer and any submission that I should conclude that the defendants have failed to discharge their burden because the material does not exist to enable such an exercise to be carried out. Where documentary evidence is limited, such an approach would effectively make it impossible to demonstrate pass-on. That would be contrary to the approach mandated by the Supreme Court in *Sainsbury's* ..."

Then if one drops down to 181, the judge took the approach that because the available documentary material was limited, it was in principle open to him to attempt to discharge the burden, or rather to the defendants to discharge the burden that rests upon them by resort to expert evidence. So, I just cite that, not because the facts are necessarily on point, but because it is making the sort of point I am making to you, which is that one has to look at - that is what I am in a way asking the Tribunal to keep in mind - what it is that one would

expect to see in the context of Merchant Service Charges in order to be satisfied that it had had an effect. Because it cannot be a headline in a budget relating to just Merchant Service Charges, we know that it would be bundled up in costs. Is it that it cannot be as limited as an email, perhaps internally - not that we have got those, and I will come on to that - saying, "We are going to put it up because we know that Merchant Service Charges remain stable more or less during the period that we are talking about?" So that sort of evidence will not really exist.

THE CHAIRMAN: Similarly, it cannot be sufficient just to point to a budget and say, "Well, MSCs are within payment costs category or" -- somewhere in there you have to show some sort of connection to the price-setting process, do you not?

MS TOLANEY: I accept that, and I will come on to show you in one moment. I have been threatening this, and I will do it. I am coming on to show you why we say it is not just sitting in the budget but it actually is relevant to price setting, and that is why we say we have discharged the burden.

MR TIDSWELL: Just before you do, I will ask you about -- at the moment, I think you are not putting to us any particular way in which the MIF might appear in this

budget, but there are two different arguments that have appeared along the way. One is the accumulation of costs, so you might have a smallish MIF cost, but other similar costs are added together and they provide a tipping point. That was one point. There is also, I think, a theme in your closings about a counterfactual assumption that it is a large drop in the MIF. So you have answered both those points as, if you like, scenarios in which we should be thinking that the costs are passed on.

MS TOLANEY: That is right.

MR TIDSWELL: Just in relation to the second of those, it does seem a slightly odd construct, because we are, as I understand it and I think you accepted yesterday, interested in whether the MSC was passed on. It does not really tell us anything to look at, if you like, a natural experiment or an event in which it drops very, very significantly at a particular point in time. Is that really the test of what is happening in the environment in which we are trying to assess?

MS TOLANEY: Well, I think yes, because the counterfactual is the way in which you test what would have in fact happened and the scenario that you are dealing with if the charges had been much lower, and that is the counterfactual that up until, I think, last week,

everybody agreed was the right counterfactual; and the point that we are making is the one that I started with at the outset of my submissions, that it demonstrates how unrealistic commercially the claimants' case is, because their costs are very tightly monitored because margins are so tight, and that is because they are in a very competitive market. They cannot charge -- that is what you heard from all the witnesses. They cannot charge any more than they absolutely have to in order to make quite low profits with some of them like [redacted] -- sorry, I should not say names -- like a travel agent that we heard, and if in fact their costs were significantly lower, then it is unrealistic to suggest they would have maintained prices at exactly the same level, making higher and higher and higher profits.

MR TIDSWELL: That is a slightly different submission, though, is it not, from assuming there is an event in which it drops by that amount and we are looking at the implication of that, because -- particularly on the way you are putting your case -- that clearly would be very noticeable and you say, "Gosh, that has dropped. Let us do something about it." I am testing really whether that is the right counterfactual test, if one can put it that way, because, as you say, this is just a thought experiment to test whether the economic theory that has

been put forward is validated by what happens in real life, and of course to reach some outcome as to the "but for", if you like, the outcome.

MS TOLANEY: I think where you are pressing me is on the idea that there is a significant drop.

MR TIDSWELL: Yes.

MS TOLANEY: Well, take that out. I do not need that, and you are right to pull me up on it. What I am saying to you is that the very premise of the business model that has been put forward is that the costs are covered and then there is a small margin. If the costs were much lower -- forget the drop -- then on the business model that has been put forward with very tight margins, not making a huge amount necessarily and certainly with lots of competitors, it is inconceivable that everybody would have just remained with a model that assumed a very high input of costs that just did not exist and remained at that level. That is not the model that has been put forward, and the reason why it is the second strand of my argument is as, you will see when we get onto the evidence, you see this very tight monitoring of costs, so the idea that the prices would have remained at a level that had been set to cover those costs even though the costs did not exist is contrary to the model.

PROFESSOR WATERSON: Can I just suggest something here? You

are saying, in this model that we are talking about, that there would be some change in the -- supposing that the MIF went down, there would be some change, but that does not say anything about the size of the change, does it? It does not say that if the MIF went down by, say, 1% then prices would go down by 1% or anything like that.

MS TOLANEY: Well, I think that may be an inference you draw when you see the granularity of the modelling.

PROFESSOR WATERSON: It may be an inference----

MS TOLANEY: So it may be that you will take that view. I accept if it was "*Trucks* tiny", you might say, "Well, it would not make a difference," but I have already made the point that we are not in that territory of "*Trucks* tiny". These can be quite significant in the context of the margins and revenue.

PROFESSOR WATERSON: So are you saying that it would be 100%?

MS TOLANEY: 100% of the MIF?

PROFESSOR WATERSON: Well, yes.

MS TOLANEY: I think that may be the claimants' new case. I am looking across. That is the claimants' new case. I am not quite sure whether that is our case, but -- no. Yes, we say 70 to 100.

UNKNOWN SPEAKER: (Inaudible)

MS TOLANEY: Yes, we say 70 to 100 is the pass-on rate, the rate on pass-on, yes.

PROFESSOR WATERSON: But the model does not -- your assumptions in the model, they suggest some change, but they -- where are you getting 70 to 100 from? From your experts?

MS TOLANEY: That is right, and that is a combination across the board, I think, of just economics and looking at the factual evidence. But maybe this is best -- we will debate this when we look at the evidence in May.

THE CHAIRMAN: If I can just, the counterfactual -- the experts are not modelling the counterfactual that has been put forward, namely an absence of MIF, do they?

MS TOLANEY: No.

THE CHAIRMAN: So what is the point of the counterfactual? What does it actually tell us?

MS TOLANEY: I think the two points are (1) that that is the, first of all, recognised way of testing --

THE CHAIRMAN: What is it testing?

MS TOLANEY: It is testing what would have happened in theory, what is the theoretical alternative in the scenario that has been posited, which is that the overcharge had not occurred. So----

THE CHAIRMAN: But, I mean, the experts are looking at various less dramatic changes in MIF or in their chosen

proxy and making an assessment of what the pass-on rate is from that.

MS TOLANEY: That is right.

THE CHAIRMAN: They are not looking at the counterfactual, and I just do not really understand, even if it is -- what is it actually testing?

MS TOLANEY: Well, the counterfactual is what -- I suppose, sir, it is the recognised way of assessing damages in a scenario where you are looking at if the breach had not occurred, what would the scenario have been? That is a way of testing it. In my respectful submission it is quite a good way of testing it here, because it demonstrates the unreality of the option 1, do nothing because it is not the same world. Now, you may get nothing more from it than that, but it is an important strand to the argument.

Sir, can I just then finish off on budgeting, which is just to say that a 0.5% cost shift might be a small cost to a firm which enjoys a 20% margin, but the same cost change would be very large to a firm which battles each year to achieve a 1 to 3% net margin, and that brings me back to budgeting. Even if the notional overcharge at issue in the merchant claims may be small relative to total costs or total revenues, the impact on margins may be more significant. The question is

whether a cost shock of the overcharge would move the dial sufficiently in the budgeting process to result in a change in prices.

Now, you asked yesterday, sir, about disclosure and I just wanted to cover that off and then we will move to the evidence. There is a long hinterland to the provision of what has been called qualitative evidence rather than disclosure in these proceedings and I do not have the time to go through the extensive background, but it is dealt with in our written closing and it is at paragraphs 91 to 112. Could I just ask you to have a look at that, I will bring it up on screen {RC-S/2/29}. If you, please, could read paragraphs 91 to 93.

(Pause).

There was then a process of requests for documents from *Mastercard*'s experts as addressed in paragraph 94 of our closing {RC-S/2/30}.

Then if I could ask you to have a look at paragraph 96, please.

(Pause).

Then cutting through the rest of the history, *Mastercard* was not satisfied that the claimants in fact made good on the disclosure they agreed to give. That then led to or fed into the Redfern process, which, as Mr Tidswell pointed out, was unfortunately delayed so

that no orders were in fact made until 23 October, which was very close to trial. We refer to that at paragraph 109, which is {RC-S/2/34} of our closing submissions.

THE CHAIRMAN: Oh, I see. (Overspeaking - inaudible).

MS TOLANEY: Yes, 34 is the reference -- internal 32, Opus 34.

Where the Tribunal determined the requests were well-founded, as was the case with most of them, the claimants were directed either to confirm that they had conducted a reasonable and proportionate search or to conduct such searches and provide responsive documents by 4 November, which was only two weeks from the date of determination. That was the first disclosure order for Trial 2A, and all we would say is what is reasonable and proportionate with only a few days to do it in is of course very different from what was possible back in March 2024 when *Mastercard* made its request and was one of the reasons why *Mastercard*, pragmatically, could not pursue some of its requests, mainly those relating to supplier pass-on.

THE CHAIRMAN: It is right to say, is it, that it was *Mastercard* that was -- you saw the relevance -- you saw the qualitative evidence was relevant to your case on pass-on?

MS TOLANEY: We did.
THE CHAIRMAN: Yes. By contrast with Visa's approach.
MS TOLANEY: That is right. We have taken a different approach.
THE CHAIRMAN: Yes.
MS TOLANEY: Can I just show you one of the requests that *Mastercard* made in March 2024, because it ties into --
MR JOWELL: (Off microphone - inaudible). Just to be clear, we also made a number of requests for documents which were -- many of which were -- most of which were refused. Just to be absolutely clear. Because we were of course also considering that we had to take a defensive posture in relation to pass-on and the choice of proxies, which is what we understood this documentation to --
THE CHAIRMAN: You were, at least initially, trying to avoid any sort of disclosure.
MR JOWELL: We -- yes, well --
THE CHAIRMAN: If we go down that route.
MR JOWELL: Well -- that is correct and that was endorsed by the Tribunal.
THE CHAIRMAN: Yes. But -- okay.
MS TOLANEY: Could I just show you one request that was made in 2024, because it goes back to the impact of cost changes in influencing budgets and price setting? We

made our request for documents based on a note from our expert team consistent with the Tribunal's expert-lead process. The cover letter is at {RC-M/43/6}. Thank you. It is paragraph 30, which is at the bottom of the page, refers to:

"... documentation recording a business' budgeting processes should give a picture of what cost shocks a business has faced in a particular period, and how it has attempted to manage those changes in costs."

So, two points. The document requests were not about seeing the final budget, they were about seeing how cost changes have influenced the budgeting process. Second, the focus is on the cost changes that had been experienced. Those cost changes are not going to be specific to Merchant Service Charges because those have in fact changed fairly little over the period covered by the claim. So the purpose of disclosure in relation to cost shocks was to see how important cost changes feature in the budgeting processing. We do not have a natural experiment to use, so we have to use changes other than changes to the Merchant Service Charges as proxies and say, as for that cost change, so it would be for Merchant Service Charges. It is getting the link between a change in costs and a change in prices. That is what we think the Supreme Court had in mind.

Now, with that, I am afraid, slightly lengthy introduction, may I turn then to the evidence, and please may we go into closed session for this?

THE CHAIRMAN: Yes, of course.

(In private)

(1.01 pm)

(The short adjournment)

(2.01 pm)

(In open court)

THE CHAIRMAN: Good afternoon.

Closing submissions by MR BEAL

MR BEAL: My oral submissions will broadly follow the structure of our written opening -- sorry, written closing interspersed with a few observations on the schemes' written closings along the way.

Please could I give my usual weasel words about not covering every point. We have not prepared a detailed, or even a short written rebuttal of any of the written closings from the schemes because we simply, I am afraid, have not had time and we did not necessarily think it was going to be welcome. What it does mean is that we simply cannot cover every single point in the 250 pages of material that have been deployed against us in the next five and a half hours or so, but therefore please do not accept any submission that

because we have not covered something, it is therefore accepted. The Tribunal is very familiar with where the battle lines are drawn in this case.

We do invite -- it is interesting what perspective the Trial 2B trial brings. We do invite the Tribunal to consider briefly, by way of an opening observation, quite what the different positions are between the two different trials. So Trial 2B, to state the obvious, is examining whether or not the full extent of the unlawful overcharge of the MIF has been passed on by acquirers to the Merchant Claimants or whether it is in some lesser sum and we accept that we bear the burden of establishing that.

If that is established, then the second issue is whether or not the Merchant Claimants as a distinct act of mitigation of their established loss have passed all or any part of it on to their own customers or own suppliers, and here, the burden lies on the defendant.

What we sought to establish in Trial 2B was that there was a direct and proximate causal link between the unlawful MIF, which the acquirers have been required by the scheme rules to pay to the issuing banks, and the level of the MSC which acquirers have charged to the claimants. Now, as the Tribunal is well aware, that arises explicitly and mechanistically in relation to IC+

contracts as everyone accepts; for blended or standard contracts, we say, the same conclusion can be drawn on the basis of the qualitative evidence supported by the econometric evidence of Dr Trento. It is also supported by some of the econometric evidence of Mr Holt.

Now, just pausing there. We have not actually had any direct input from any merchant acquirer in Trial 2B, so all of the material is coming from publicly available material, or from PSR studies, or from the experts themselves.

Now, we say that that intuitive response of recognising complete pass-on for both IC+ contracts and standard contracts from merchant acquirers is, in a sense, intuitively unsurprising, commercially unsurprising, because the MIF has always been recognised to be a major cost component of the MSC, we acknowledge that figures vary, I think Ms Webster's third report, paragraph 2.7 {RC-F1.3/2/7} indicates that the -- in the PSR dataset, the MIF represented somewhere between 40% and 85% of the value of the MSCs, and the figure that was given in *Mastercard* in the Supreme Court at paragraph 10(x) was 90% of the value of the MSC. But it has also been recognised that that is a variable marginal cost, it applies to all of the acquirers in

the acquiring services industry and it has been acknowledged that economic theory would predict a high level of acquirer pass-on.

Economic theory would also predict that businesses setting a profit-maximising price would either set prices or set their output levels so that marginal revenue equals the marginal cost of the next unit of production. It is the short-term profit-maximising pricing strategy that the Tribunal has heard much about over the course of Trial 2A and Trial 2B. Therefore, even where there is a market with non-perfect competition where businesses are price-setters rather than price-takers, an economically rational strategy still sees businesses setting prices at an equilibrium level where marginal revenue will match total marginal costs.

If one needed support for that, it can be found in the RBB/Cuatrecasas 2014 report, for your note that is {RC-J1.4/53/8}, and especially then at {RC-J1.4/67-71} and {RC-J1.4/74}. I went through that report at length with both Mr Holt and Mr Coombs in the course of Trial 2A and so it will be familiar to you.

More importantly, we say here what one would expect to see as a matter of commercial reality in the acquirer market would mirror that economic theory. So you have

commercial reality marching in step with what economic theory would predict. If one is a director of a large acquirer -- I shall not embarrass any by naming them -- and you are wondering what prices to set your Merchant Service Charge at, you will quite clearly take into account your major costs, your major variable costs that are marginal for you with every unit of production, every service/supply that you are making to your various merchants. So you would naturally and explicitly take into account the level of the MIF and the level of the scheme fee and that is mechanistically passed on in IC++, but it is no less going to be an express consideration when one is pricing for a standard or blended contract, and indeed Mr Holt, in the course of Trial 2B, accepted it would be factored into the pricing mechanism, that is, for your note, {Day21/18:3-8}.

Now, again, if one is sitting in the hypothetical world of being the chief executive officer of a large acquirer, you would obviously want to make a margin for your business, otherwise your investors and your shareholders are going to be unhappy, and you would also need to make sure that you can meet the costs of running your business, such as the information technology, the infrastructure for the platform that you are pricing on, commercial rent, staff costs and so on. That

intuition is supported by the qualitative evidence relating to acquirer pricing that was adduced in Trial 2B. It is supported, for example, by the terms of the Merchant Services Agreements and by the frequent communications by acquirers to the merchants notifying them of changes in the major underlying costs that merchants were facing. So we have seen repeatedly the letters that one of the -- some of the larger acquirers were sending to their clients saying, "Terribly sorry, scheme fees have gone up, terribly sorry, MIFs have gone up, we are going to have to change your pricing", and we saw some examples actually of acquirers writing to their merchants saying, "Lucky you, MIFs have come down, we are going to reflect that in the blended prices that we are giving you". All of that is what one would expect when acquirers are dealing with their valuable customers.

Now, of course, from the merchants' perspective, that communication does not bespeak an act of negotiation with the acquirer as to those elements of the fees. The common theme from the merchants in this case, both in Trial 1 and in Trial 2A and 2B, has been that the MIF element of the MSC was simply non-negotiable, and when I come on to close for Trial 2B, in short order, after closing for Trial 2A

tomorrow afternoon, I hope to take the Tribunal to some of the PSR 2024 and 2025 reports that, again, confirm that the PSR's view is that there is no sufficient competitive constraint on the schemes when they set their MIFs and their scheme fees and that that element of the MSC is indeed non-negotiable.

Now, in contrast to that picture, the overwhelming evidence that emerges from the merchants in Trial 2A, supported by the evidence that was given in Trial 1, was that they did not treat the MSCs as if they were a material marginal cost which factored directly into their pricing decisions. Their evidence has routinely been, "This is not a cost we can control, there is nothing we can do about it", and it has not been at the forefront of their vision for how they go about setting prices. That is not to say that our case is that all of these merchants are somehow in the dark. That expression has been taken forensically by the defendants from a passage of a cross-examination of Mr Harman when I was dealing with a separate point, as I will make good in due course. We, of course, recognise that MSCs are a cost of payment and any business will necessarily have, one would hope, a record of the costs it is incurring so that it can properly manage its business. That does not, however, answer

the question as to whether or not there has been a distinct act of mitigation whereby the unlawful element of the MSC, namely the MIF, has been distinctly, or, rather, directly and proximately, passed on through higher prices to the merchants' own customers.

The evidence has been that the MSC as a component of costs of payment has in every -- well, invariably, with two or three exceptions, been treated as an overhead rather than as a Cost Of Goods Sold on the basis of the evidence that is before the Tribunal. Even for a video game company which did recognise the MSC as a COGS, the MSC was irrelevant, we say, because the pricing mechanism for third-party video games was based on maintaining a markup on a wholesale price charged by game developers. So, as with platforms that are under scrutiny at the moment for app stores in various pieces of litigation, a platform that is supplying a game over that platform, the primary cost will be the cost paid to the developer for the software, that is the game, and there is then an arrangement reached as to how that game will be priced, a price will no doubt be selected on a revenue-maximising basis, and that revenue is then split between the developer and the platform operator. That is no different for a games company as it would be for, for example, one of

the large app store platforms either. So we say that the MSC was not factored into that product and that product made up over 96% of the merchant's sales.

The next example that is taken is a travel industry claimant which did expressly take the MSC into account as a COGS and it used it to construct a target price to be achieved in the market. That particular merchant was, however, ultimately at the whim of the market as to what price could be obtained and it frequently made losses. So that particular merchant did not simply operate a cost-plus pricing model, it had to factor in its COGS and then try and achieve a margin, but it could not always do so. It is noteworthy, we say, that in the *Sainsbury's* CAT decision, as I went to in opening in Trial 2B last week, at paragraph 459, which is {AB-D/13/261}, the CAT noted that *Sainsbury's* did not price on a cost-plus basis, but acquirers clearly did.

Now, this dichotomy between the position of the merchant and the position of the acquirer is also borne out by the relative value of the cost component compared to the revenue that the individual firm makes from its respective trading activity. So where, for example, the MSC -- sorry, the MIF as a component of the MSC is a majority variable cost of the acquirer, it is unsurprising that the acquirer has it well in mind

when it does in fact set its profit-maximising price.

Now, in contrast, where the relevant cost, the relevant overcharge in our case for a merchant in Trial 2A is the unlawful MIF, the unlawful MIF is admittedly a high -- relatively high percentage of the MSC, somewhere between 40% and 85%, according to Ms Webster, but of course as a percentage of the revenue, that MIF is very, very small for all of the merchants in question. We have given you, in our written closing, the proportion of the MIF to revenue for each of the analysed claimants and I will come on to deal, probably tomorrow morning in closed, with the details of that.

So given the relative size of this variable cost between the two players in the market that we are looking at, namely acquirer and merchant, we say it is ultimately unsurprising that merchants are passing on 100% of the very large variable cost to merchants and that merchants themselves --

THE CHAIRMAN: I think you meant acquirers.

MR BEAL: I am sorry, I did mean acquirers. Then merchants themselves are then passing on a much lower percentage, if any, of that underlying cost, just intuitively. Merchants are not going to pay heaps of very small expenses when there is a cost in trying to monitor

costs. I think the expression colloquially would be they are not going to "sweat the small stuff", but I think I put it to Mr Holt that "penny wise, pound foolish" was another way of capturing that concept. If, ultimately, it is too small to move the dial, which is the expression that some of the experts used, then one can understand why it does not then feature in the pricing processes, and the qualitative evidence from all of the merchants was that the MSC was not directly fed into the pricing practices. Mr Wilson, for one of them, obviously gave evidence as to the extent to which the MSC was put into a pricing mechanism that that particular company used, and I will come on to the detail of that, again, in closed tomorrow.

So where we end up, in our respectful submission, is that our twin approach to acquirer pass-on and merchant pass-on is essentially consistent with Marshall's third law, which was kindly drawn to our attention by Professor Waterson. So we say, happily, economic theory from the acquirer perspective marches hand in hand with our position and that Marshall's third law helps encapsulate the reason why what would otherwise intuitively be arguably an approach to these types of cost does not hold true when we look at the merchant pass-on perspective.

THE CHAIRMAN: It is the extraordinary thing about this trial, that the parties are arguing the polar opposite in each trial.

MR BEAL: Well, we are trying to be consistent, if I may say so.

THE CHAIRMAN: Yes, well, I see that is what you are suggesting.

MR BEAL: I am aiming for consistency and I am trying to apply the same test.

THE CHAIRMAN: Yes.

MR BEAL: I am trying to recognise at the acquirer stage of the investigation, I am setting myself the same test as I am expecting the defendants to meet, and I am doing so --

THE CHAIRMAN: You are saying you -- it is the same test, and the slightly perhaps higher test that you are setting for the schemes to prove on merchant pass-on applies also to you on acquirer pass-on, but it works.

MR BEAL: I am not seeking to suggest that we default to some sort of long-term analysis for acquirer pass-on in order to show that everything comes out in the wash and that one way or another, I think was the way that Mr Holt put it, you will end up with pass-on as a matter of economic fact. That is not our case at the APO stage. We recognise that the burden is on us to

show the profit-maximising decision acquirers are making for standard contracts in order to show how -- precisely how the question that Mr Tidswell has put to a number of witnesses: how do you say this is working? You have got the acquirer sitting there in the company suite looking at prices, looking at costs and working out how to price the month ahead and we say that that process will involve looking at your significant Cost Of Goods Sold, which is going to be primarily the MIF and the scheme fee.

THE CHAIRMAN: So you are saying it is appropriate to look at COGS in the context of APO?

MR BEAL: And in MPO.

We accept that as part of the short-term profit-maximising approach to pricing, if the MSC is a material element of COGS, it will feature in the pricing dynamic that the firm is seeking to set.

THE CHAIRMAN: Yes.

MR BEAL: The question is, is that what is happening with such a very small element of the costs that basically, to the extent that it is recognised to be a cost, and it will be recognised at some point to be a budgetary cost, it does not actually factor in the pricing precisely because it is treated by the majority of analysed claimants as an overhead and therefore that does not

feature into the short-term profit-maximising approach to dealing with pricing, and even those that treat it as a COGS, when you look at what they are doing with their pricing, [redacted] is probably -- sorry, that was my fault -- a firm -- let me wind back from that.

There is a gaming company that has taken into account Cost Of Goods Sold, but, for the reasons we have been through, it does not then feed into the pricing mechanism that is used in that case. We could have -- we do have, for example, merchants who are seeking to optimise their revenue rather than optimise their profits. A classic example of that occurs in the hotel industry, where the pricing mechanism is necessarily divorced from any analysis of the underlying costs full stop, because you are simply trying to maximise your revenue by reference to room occupation in that case.

So we do strive for consistency, and as and when there is an appropriate parallel on the facts, we recognise that. Now, we do, and not just for forensic reasons, seek to emphasise that the position of the schemes is indeed different, and so we end up in a position where, for Trial 2A, for example, the schemes are contending -- well, certainly Visa is contending for a merchant pass-on rate of 88% or so across the board, and that is driven by a very small cost which, even if

it is formally variable in nature, we would suggest it does not feature in the short-term profit-maximising approach to pricing, because it is not treated as a material Cost Of Goods Sold. Nonetheless, somehow that generates, on the schemes' cases, pass-on approaching 100%, and certainly on an economy-wide basis from Visa, it is pitched at 88%. But in contrast, when one considers acquirers who are indeed facing a market-wide industry marginal cost that is a very significant component of their revenue, that figure, certainly for smaller merchants, on Visa's case, drops to 75%, and on *Mastercard*'s case it goes lower still. I think they put it at 63%, even though that is not where Ms Webster ultimately came out.

Now, what we respectfully suggest is that is counterintuitive, given the respective sizes of the cost that is in issue, and of course when one is considering the MIF if it is between 0.2% and 0.3% of card revenue of a merchant for debit cards and credit cards in the consumer context, then that percentage of card revenue is an even smaller percentage of overall revenue when the pricing executives are looking at costs, to the extent that they do so.

We also suggest that the disparity in approach is not justified when considering the respective bargaining

power and the respective position of the counterparties to each transaction. So at the APO stage, for example, the acquirers have made it clear to merchants that there is no wriggle room with MIFs or scheme fees, that is something that is beyond their control to negotiate, they are set by the schemes and they are the immovable object. In contrast, there is no parallel exchange of information between Hilton Hotels and somebody turning up at the front desk of a Hilton Hotel in London saying, "Well, I see you are going to charge me implicitly for a scheme fee, or, sorry, a MIF in this case through your budgetary process, I am not happy about that, please can we knock it off". That is just not a realistic scenario. So there is no sense in which customers of my clients think of the cost that is allegedly being passed on to them as being negotiable or non-negotiable, because it simply does not arise in the consumer context, whereas it is a very visible price for the acquirer which the acquirer is seeking to pass on, and to the extent that merchants then try and do something about it, they are told there is nothing that they can do.

Now, in terms of where our overall conclusions come out, please could I invite you to look at our closing written submissions, paragraph 105, which is

{RC-S/1/53}. What we have sought to do here is set out a series of conclusions that we are contending for by reference to our primary case and then the fallback case. If I can just unpack, please, the primary case and the fallback case.

Our primary case is that the defendants have not discharged the burden of showing on the balance of probabilities that there is a direct and proximate link between the payment of the unlawful MIF and an increase in downstream prices to customers. In other words, they have not shown on the balance of probabilities that the unlawful MIF has been passed on by merchants, and that is for essentially three principal reasons.

Firstly, the schemes cannot establish a sufficient causal connection based on academic studies. Those academic studies principally deal with taxes, VAT and excise duty, they do not deal with the MIF and MSCs. Where we turn to look at a couple of studies that do deal with the MIF and MSCs, we find that the authors of those studies have concluded that there is no pass-on of interchange fees through an MSC into prices charged to consumers.

The second reason is that the imprecise studies of public data, comparing a price index -- a cost index with a consumer price index, are so imprecise that no

generic conclusion can be drawn which could sensibly be applied to establish a distinct act of mitigation by my clients which shows that they have avoided the loss that they otherwise suffer.

The third reason is that the regression of merchant data to identify the pass-on rate for the MIF has not proved possible. That is, as I think is now accepted, common ground. We have pointed to the fact that Mr Murgatroyd tried to find a link. He gave two reasons why he could not. One, he did not think there was any evidence of -- sufficient evidence of the pass-on, but, secondly, he recognised that it was a difficult job in any event. So we acknowledge that there has been no concrete econometric evidence showing the actual pass-on of the MIF itself into downstream prices, or indeed the MSC into downstream prices.

But, of course, what then becomes of crucial importance is, is it appropriate to select a proxy based on a much higher cost as a means of trying to find an answer? There may well come a point, as was reached in *Trucks* and, as we will see, has also been reached in *Autoliv*, where the conclusion is simply that the defendants cannot show that a small cost, a small overcharge leading to a small cost, has been translated into an increase in downstream prices, and if trying to

deal with regression analysis leads full stop to a selection of a proxy that is much higher, then all that the Tribunal is doing is giving the right answer to the wrong question, which is: does a much higher cost get passed on into downstream pricing? That is a much easier hurdle for the defendants to surmount. But is it an appropriate and fair way of working out whether or not they have in fact discharged the burden of proof? We say no and that is our primary case.

Our primary case is, put that way, notwithstanding that Dr Trento did not, as I have indicated, repeatedly throw up his hands in horror at the prospect of trying to model for such a small cost into much bigger downstream prices, he sought to be helpful, he picked a proxy that he thought was the most sustainable but at the same time could be modelled, but of course the consequence of that is that he has already selected a much more significant cost in terms of its -- (a) its absolute value, and (b) its visibility for the people who are taking the pricing decisions, including the management of my clients, that visibility is much higher, and therefore, to the extent that, for example, total overheads costs is going to be something that features more straightforwardly in the analysis of costs and pricing information for management at my clients,

that is ultimately going to be reflected in what would intuitively be thought to be a higher degree of pass-on into downstream prices just because it is a much more visible cost that you are going to think more closely about.

Now, Dr Trento, it is true, has said that you would take the average for the overhead pass-on rate and assume that even a small overhead would be captured by that, so -- but it is very important, we respectfully suggest, to recognise the degree of the concession that is already made towards trying to find an answer on what is, on any view, a very difficult question. If you step back and look at *Trucks* and *Sainsbury's* and *Autoliv*, the short point was that very small costs were not recognised to have an impact on pricing downstream, and that was so notwithstanding, as the learned President, as he was at the time, in *Sainsbury's* in the CAT recognised that it was blindingly obvious that nonetheless these costs were going to be in the budgeted accounts. If a firm is not keeping track of its underlying costs, then it is in trouble. But that does not mean that it therefore appears in the pricing calculus that a firm takes.

THE CHAIRMAN: Did Dr Trento think -- did he say that there is no appropriate proxy for such a small cost?

MR BEAL: The way he started was to say it would be very nice to model the MSC going into downstream prices.

THE CHAIRMAN: Yes.

MR BEAL: No good. That was option number one.

THE CHAIRMAN: Could not do that.

MR BEAL: Option number 2 is to say, well, let us have a look at some of the small technically variable costs, let us have a look at some of those that are being suggested by Mr Economides to try and find a technically variable cost that is essentially so small and it is bundled into an overhead, to which the answer was Mr Economides came up with a series of options none of which Dr Trento was able to model. So in answer, I think, to your question, sir, or it may have been my learned judge Mr Tidswell's question, where do you end up with total overheads, and we said it is the third best option.

THE CHAIRMAN: Yes, but does he say -- is it his expert view that this is actually inappropriate, it really cannot capture the pass-on of a much smaller cost?

MR BEAL: Well, his expert view is that -- is not capturing the pass-on of the MSC into downstream prices, save in a rough estimate way of concluding that if one takes the idea that this is an overhead, then total overheads is the third best option. So where it is put -- and his

conclusion throughout his reports, Trento 1 and Trento 2, is that there is no basis for concluding that pass-on has occurred. But if I am wrong on that and you want to use a proxy, then using the total overheads proxy produces the figures that are then set out in the table at paragraph 105 {RC-S/1/29}.

So in answer to your question, sir, giving you a direct answer, his primary case is you cannot actually show this, but he then recognises, in an effort to be helpful, that if you were to go down the total overheads route on a very broad axe estimation basis, then you would end up with the overheads rates that he is suggesting. Indeed, in some of them he says you cannot actually reach a final result on that because there is simply -- even using the overheads, there is no empirical basis on which to conclude that there is any pass-on. So, for example, looking at [redacted], at the bottom of that page --

THE CHAIRMAN: I do not think you should say the name.

MR BEAL: No, you are right, I am sorry.

THE CHAIRMAN: We can look at it.

MR BEAL: You can read what it says.

We do say, with the greatest of respect, there is no shame in reaching that result because it is a result that tribunals before you have reached and it is simply

a reflection of the fact that you would not expect ordinarily small costs to move the dial on downstream prices. Here, it is a very small cost.

MR TIDSWELL: Just thinking about the small cost point for a minute. I mean, the small cost point appears, I think, uncontroversially, to play a role in whether or not you might put it into your profit-maximisation exercise, because I think all the experts accepted that as a matter of practicality you might just choose, as you say, are not worth the sweat. When you get to the alternative case that somehow it is finding its way in through other mechanisms, the -- it is then said that it does not matter it is small, because as long as it is included in the bucket of costs that finds its way in, then a proportion of it will go in in the same way as a proportion of the other costs. Do you accept that, that the size of it may matter less when you are in the indirect mechanism world?

MR BEAL: Yes, to the extent that one is considering total movement of total costs, and this is part of the total costs, if that provides a means of estimating what the distinct act of mitigation was, then, yes, that cost would be within it, is the straightforward answer. The question as a matter of law is: does that budgetary process, whereby a firm will recover its total costs

over the long term in due course, provide a direct and proximate link between the unlawful overcharge that has been suffered and its avoided loss by an act of mitigation by transferring that loss to somebody else? That is, in a sense, my answer to that point as a legal submission. But in answer to your question, sir, on any view, these costs are going to feature in the budgeted costs of every firm, because they are a cost of the firm.

MR TIDSWELL: And if there was an exercise by which they did reflect in their prices changes in those costs outside profit-maximisation, then what follows follows, but you say there is no evidence that you get to that point?

MR BEAL: That is right. There may be a cost-plus pricing approach, surcharging, for example. My point about it being a small cost, it is a small cost -- it was a small cost for the airlines in the mid-2000s when they were surcharging for passenger flights depending on what sort of card you used. That did not stop them surcharging. We recognise that surcharging has the equivalent effect of an IC+ contract in the acquirer pass-on, so you can do it.

You could have -- I remember, not with fondness, my days as a finance director of chambers that shall remain nameless, where the aim was to recover all your costs,

because you were -- essentially, it was a cost allocation exercise between members of chambers and you would try and recover everything, regardless of whether it was a daily newspaper delivered to reception, or rent, which was typically the highest cost before staff costs.

But, yes, one could imagine a situation in which a firm takes a conscious decision to recover all of the costs in its budget and make a margin. The difficulty we face in this case is that does not appear to be a realistic model -- business model for the very large merchants that we are talking about in this case, and we are dealing here only with the SSH Claimants, of course, we are not dealing with -- well, this brings me on to my next point. It has not been part of our ambition to try and deal with an economy-wide point, an economy-wide rate of pass-on. Two reasons for that.

The first and most obvious one is that it is not an issue for this trial, it is an issue for Trial 3, and I do not wish to be unhelpful, it has been -- I have been reminded of the fact that it was perceived as unhelpful in the defendants' closing submissions. Let me just try and shoot that fox now. We recognise that any findings that are made by this Tribunal in this

trial, i.e. Trial 2 full stop, across both pieces, will be readily available to the tribunal hearing Trial 3, whether that is this Tribunal or a differently constituted tribunal. We recognise those findings will be available. That does not stop us making the submission that we are simply in a position here where the SSH Claimants do not cover the full economy, there is no suggestion that they do, and our ambition has been to prove, or rather, defend, a defence based on merchant pass-on for those claimants and no further.

Now, it was suggested, I think by Mr Jowell KC, in closing for Visa, that there is indeed a live claimant for every Visa sector. Could I just test that, please, by having a quick look at {RC-F/19/35}, table 2.1. You will see, halfway down that page, there is a section that is for "Health Care", and the number of claimants and then number of Willing Claimants so described is zero for health care.

Now, I make a broader point here, that we do not have any evidence about Visa's 14 sectors. Nor do we have any evidence about their alleged weighting, and nor have Visa, to my knowledge, identified which of the specific claimants other than the Analysed Claimants are within each of those 14 sectors. So it is a black box in the evidence from Visa which one cannot

interrogate.

Contrary to the submissions that are made in Visa's closing at paragraph 255 {RC-S/6/93} -- we do not need to turn it up -- I did cover this substantive issue with Mr Holt. Could we look, please, at {Day7/172}. I there put to him a series of points about how the classification was received -- sorry, derived. If we look down, please, at line 21, I said:

"Does Visa only have 14 sectors or is that just the ones you have selected?"

So, I am afraid I was, to use the theme that seems to be developing, I was in the dark about what those sectors were. He said:

"No, it has 14 sectors at that level, but then each of those sectors is divided into ... subsectors."

Turning over the page to {Day7/173}:

"Question: ... my point was a more basic one ..."

Does that group of sectors cover the entire economy?

His answer, at line 7, was:

"... I think that should capture the entire, at least, part of the economy where payment cards are relevant, yes. The 14 should cover all of that."

I then queried the caveat about where payment cards are relevant, and his answer at line 15 was:

"It would ... not cover it if the entire sector did

not accept cards."

I said then:

"We do not have any evidence from Visa explaining ... the underlying basis for the grouping ..."

He said:

"No, I do not think so."

We then see over the page {Day7/174:4}:

"Answer: Well, by definition, the level of aggregation goes down to 14 segments of the economy, albeit I also identify a few cases where you can disaggregate more and focus on the sub-sector level. So I have 18."

Now, what that means is that whilst we, of course, recognise that this Tribunal will make findings based on the evidence before it and extrapolate to the extent it is appropriate to do so, either on the basis of their sectorisation approach, or ours, or a mixture as the Tribunal sees fit, nonetheless we are not in a position where we can sensibly know enough, if the Visa sectorisation is accepted, to determine an economy-wide level and Mr Economides did not set out to try and achieve an economy-wide level. You will recall that in his responsive report, he gave some suggestions as to how it could be turned into that product in due course, but it does mean, in our respectful submission,

that we will have to come back to this in Trial 3.

THE CHAIRMAN: Is that a matter for Mr Economides?

MR BEAL: I suspect he was trying to be helpful as to how you would go about extrapolating from the extrapolation to a wider level. But he was simply saying what steps he would envisage taking if you needed to do that task. It may be that his involvement is not needed for that further task, it may be there is another way of doing it. But obviously if you find the Visa sectoral approach is the preferable one, his evidence on sectorisation at least becomes redundant because you have chosen instead to go with Visa's self-categorisation of where these businesses lie.

THE CHAIRMAN: Was there a list of issues for Trial 2A?

MR BEAL: Yes.

THE CHAIRMAN: Did it include an economy-wide pass-on rate?

MR BEAL: Well, this is the subject of debate. It is covered in our opening submissions.

THE CHAIRMAN: Right.

PROFESSOR WATERSON: Lawyers things are always the subject of debate, are they not?

MR BEAL: The answer is, to the extent there is --

THE CHAIRMAN: There is a list of issues. Was it on the list of issues?

MR BEAL: No, well ... no. No is the answer.

THE CHAIRMAN: Right.
MR BEAL: What happened was Mr Holt indicated that he thought it would be useful --
THE CHAIRMAN: Yes.
MR BEAL: -- for two reasons. The first reason he gave was this is relevant for exemption, which is a Trial 3 issue, and the subsidiary -- well, as a submission I am saying it is a subsidiary issue, he did not grade them which was primary and which was subsidiary, but looking at the development of the point, he repeated the exemption point more readily and more often than the subsidiary point, which was: it will also cover some gaps.

So the trouble with using an economy-wide point to cover gaps is you end up relying on evidence of other sectors to try and establish an economy-wide pass-on rate that then is seen as an appropriate way of analysing pass-on rates for sectors that you have not actually analysed, which does not, in my respectful submission, seem to me to comply with the burden of establishing pass-on for a given set of claimants.

THE CHAIRMAN: I do not really see why it is a matter for Mr Holt as to whether we should be dealing with it. It should be a matter for either the agreement of the parties or the Tribunal to decide whether that is an

issue before us or not.

MR BEAL: That was the line, I am afraid, we took, but we have met some resistance to that, and Visa's closing submissions have made a point of saying it is much more convenient to deal with it now. That means that we have not given evidence about it. I was told that we could give evidence about it if we wanted to, but it was not part of the issues, and so our experts simply have not turned their minds to it. There would be all sorts of things, we respectfully suggest, that would have to be looked at which are not within our gift at the moment for the simple reason that we have been focusing on our claims and our claims only, and it was only the determination of merchant pass-on for our claims that are within the scope of Trial 2A.

Acquirer pass-on for Trial 2B, Visa have maintained the common course of saying it would be very helpful for exemption. You obviously do not have the gap issue for Trial 2B, because you are essentially trying to find the acquirer pass-on rate for the acquiring industry and there were six main acquirers, so job done, principally. Where that does feed in is on burden of proof. So we say burden of proof for them on exemption is on them. Burden of proof for merchant pass-on is on them. But they therefore have to accept that, if they do want to

raise this, the acquirer pass-on issue, as part of this trial, essentially unilaterally shoehorning a Trial 3 issue into Trial 2, then they have to take the rough with the smooth, and the burden therefore lies on them to establish the specific rate of acquirer pass-on for the purposes of their exemption analysis in due course. We did not understand that to be a gauntlet that they had picked up, but you will hear more about that tomorrow afternoon.

MR TIDSWELL: If we were not going to be dealing with it, just how far -- if we go back to Mr Holt's table 2.1 {RC-F/19/35}, just how much of that is therefore redundant, or is any of it? Because I think you are saying that you would not need to do the health care line, because there are no claimants, but -- and you are saying, I think, there is some question about whether the allocation of one sector to another is in question, but you are still going to have to have that argument, are you not, in these proceedings?

MR BEAL: Well, these -- this is Visa's classification.

MR TIDSWELL: Yes.

MR BEAL: So to the extent that there is an argument about whether or not that classification is appropriate for a given cohort of claimants, that would potentially lead -- I mean, it is conceivable, for example, that we

simply do not have any claimants -- business-to-business, I am being told by Mr Woolfe, does not really work for the ones that are there identified. The trouble is we do not know who the 13 are that they have got in mind.

MR TIDSWELL: Yes, I see. But I suppose it is unavoidable, is it not, that we are going to have to grapple with those sort of issues? They have chosen one set of sectors in order to analyse your claimant base.

MR BEAL: Well, we have got a sectorisation process --

MR TIDSWELL: Yes.

MR BEAL: -- so I am not suggesting you will not do anything other than trying to find -- pin the tail on the donkey of that particular sector.

MR TIDSWELL: Yes. Because it seems the contentious bit, I mean, subject to the point about where the gaps are, the contentious point is then what do you do with, when you have got those on whichever sector turns out to be the one you like --

MR BEAL: Yes.

MR TIDSWELL: -- we like, and then there is some calculation that has to take place to deal with weighting and so on, and that is really the bit you say we do not need to deal with, is it?

MR BEAL: Yes. I am not urging that you do not make such

findings as are appropriate for whichever sectorisation method you land upon.

MR TIDSWELL: Yes, and the way that Visa presents it is, it is all very straightforward to do the last step and you are saying it might not be so straightforward.

MR BEAL: Yes, and not least because, if, for example, the 13 have been pigeonholed, and I do not know, I have not got a list of who they are, into business-to-business take strong objection to that, then they would invoke the exceptions process, I would have thought, and say, "Well, this is not appropriate for us, in fact, looking at our business, we should be in healthcare or retail goods", for example.

MR TIDSWELL: Yes.

MR BEAL: That is all I wanted to say really by way of setting the scene.

Can I move on to legal principles. I obviously covered an awful lot of this in opening and I did not expressly take you to paragraph 215 of the Supreme Court's decision in *Sainsbury's*. Let us bring it up. That is {AB-D/21/73}, please.

THE CHAIRMAN: Well, it is referred to in countless other places, is it not?

MR BEAL: Well, the only reason I am taking you here is because Visa, rather extraordinarily, at paragraph 30 to

34 of their closings {RC-S/6/15}, say I somehow dodged the bullet of not expressly addressing this. Well, it -- you have been taken there ad nauseam by the opening submissions of the other parties and I had no intention to waste your time by showing it again. But lest it be said in reply that yet again I somehow dodged a bullet, let us just see what it says.

So the Supreme Court is saying here:

"We are not concerned in these appeals with additional benefits resulting from a victim's response ..."

So that is dealing with one of the three different ways that mitigation can take place, what I have called the McGregor on Damages tripartite classification.

It then says:

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

Then it refers expressly to *Westinghouse* and says:

"'[W]hen in the course of his business [the claimant] has taken action arising out of the transaction, which action has diminished his loss, the effect in actual diminution of the loss he has suffered may be taken into account ...'."

There is then the reference, it has turned out to be

somewhat cursed, to legal or proximate causation, and the question of legal causation is said to be:

"... straightforward in the context of a retail business in which the merchant seeks to recover its costs ..."

Can I just say categorically now, we do not seek to take a point of legal causation here. In terms of recoverable loss, is it being suggested by us that if we have passed on in fact the unlawful overcharge to a given customer, for example through a surcharge, is it being suggested that that is too remote to be recoverable or that we should somehow nonetheless, notwithstanding that we have surcharged for it, still get the benefit of that loss? No, that is not our case. So we do not say there is an issue of legal causation for this Tribunal.

THE CHAIRMAN: You are saying -- you are reading that as meaning is there a question of legal policy that should deprive you of running that argument?

MR BEAL: Exactly, and that is the way it was cast in the Court of Appeal in *Trucks*.

THE CHAIRMAN: Yes.

MR BEAL: Paragraph 150 is legal causation, paragraph 151 is factual causation, and they endorse that very dichotomy that was given by this Tribunal in our case at the legal

causation -- sorry, the July 2022 judgment. So you have this weird and wonderful world where we have got a ruling from this Tribunal that says, in July 2022, this is what legal causation means and this is what factual causation necessarily means. We take that on appeal, and I will show you that in a moment; permission to appeal is rejected for reasons that I will show you. It then goes to the Court of Appeal in *Trucks* and the Court of Appeal in *Trucks* specifically endorses the bifurcation of the analysis that has been endorsed there, and then for some reason, in March this year, you have what I respectfully describe as submissions that pass each other like ships in the night from the parties, where the whole thing is dealt with again and the legal causation ruling that comes out of it is "No, I ..." -- the then President was saying, "I meant what I said back in July 2022 about the difference between legal causation and factual causation". If you want my three cents on what on earth was going on there, I think both parties were nervous that the other was about to try and argue something that was inconsistent with that bifurcated approach to legal and factual causation, and the President, as I will show you in a moment, was very clear that legal causation means what he had said it meant.

THE CHAIRMAN: I think what everyone has been trying to wrestle with is what did the Supreme Court mean by "legal causation" and "factual causation", because it is not really a concept that had been developed before then, and the way I sought to rationalise it in *Trucks* was that they are talking about legal causation and factual causation, but what that does not tell you is what is the legal test for causation.

MR BEAL: Can I please take you to *Fulton Shipping*, because it is the test for mitigation that is commonly cited and we can see how it has developed.

THE CHAIRMAN: Sorry, can I just say that in paragraph 215, there is no reference to "but for" causation, is there?

MR BEAL: No, and that is what I am about to show you through *Fulton*.

THE CHAIRMAN: Okay.

MR BEAL: Everyone seems to have had a conception of what concepts of mitigation involved and, as we will see, people have treated the question of proximity as either being a question of remoteness, which it can be, or somehow as dealing with the test for factual causation as a matter of law, and where you have people relying on proximity for the different parts of two different tests, that is what has led to confusion.

But if one looks at *Fulton Shipping*, one can see

perhaps some of the background to this very issue. This is {AB-D/13.1/1}, and could we start, please -- the facts of the case do not matter unduly, but essentially there was a breach of a charterparty, there was still time left to run on the charter, the innocent contractual party ended up selling the vessel at a price that was higher than it otherwise would have obtained had the contract run its course, and the question was: was that a benefit that it had to take into account?

If we could turn, please, in paragraph 16 of the judgment of the Supreme Court, there is a recital of the relevant legal principles from first instance. The judge at first instance was Mr Justice Popplewell, now Lord Justice Popplewell. Paragraph 16, please, is at {AB-D/13.1/7}. Please could I invite you to read the recital of the conclusions on legal principle that Mr Justice Popplewell developed in that paragraph.

THE CHAIRMAN: In paragraph ... 16?

MR BEAL: All of 16. It goes through over the page as well {AB-D/13.1/8}.

(Pause).

THE CHAIRMAN: We need to go to the end of this?

MR BEAL: Yes, please.

(Pause).

THE CHAIRMAN: Yes.

MR BEAL: So a number of points emerge there. Firstly, "but for" test is not going to be determinative, you have to find a sufficient causal connection, and breaking it up into two stages is not going to get you home either. The latter paragraphs, in my respectful submission, start trespassing onto the legal policy issues, and that is really what has then been considered.

Could we then please look at {AB-D/13.1/12}, paragraphs 29 and 30. The Supreme Court, having cited those principles, choose specifically to endorse the one that they were addressing, which was whether or not the relevant benefit had to be of the same kind as the relevant loss, because this was a benefit case. Answer: no. But what we do not see there is any indication that the principles developed by Mr Justice Popplewell were being anything other than tacitly approved.

If we then please look at paragraph 32 and 34 on {AB-D/13.1/13}, one can see that the principles are essentially applied to the facts of the case. There is a causation approach that is taken to whether or not the repudiation had resulted in -- had effectively caused the increase in value of the vessel such that it was appropriate to treat the sale of the vessel as an act of mitigation, and the conclusion then at 34 was:

"... the sale of the ship was not on the face of it an act of successful mitigation. If there had been an available charter market, the loss would have been the difference between the actual charterparty rate and the assumed substitute contract rate. The sale of the vessel would have been irrelevant."

So that is dealing specifically with the specifics of the charterparty market. But loss does not need to be of the same type, but it does need to be -- there needs to be a sufficient causal connection between them and "but for" therefore is not enough, is my submission.

Now, that essentially is captured in the *Trucks* judgment.

THE CHAIRMAN: I think that was referred to in *Sainsbury's*, was it not, *Fulton Shipping*?

MR BEAL: *Fulton Shipping* --

THE CHAIRMAN: I think it was, yes.

MR BEAL: Yes. I am trying to remember whether it was referred to in *Stellantis* but ... I think it was referred to in *Stellantis* as well. It was not referred to in *Trucks*, Court of Appeal.

THE CHAIRMAN: No.

MR BEAL: But it may well have been before you in the CAT in *Trucks*. I am afraid the transcript we have does not show what the authorities cited are. I am told it is

paragraph 213 of *Sainsbury's*, and it was categorised there as the first, I think, of the McGregor tripartite --

THE CHAIRMAN: Yes, the different type of mitigation.

MR BEAL: Exactly. But we have seen that the same principle should apply when one is talking about a benefit that you have obtained or whether you have been able to avoid your loss by making it somebody else's problem.

Could I briefly touch on the reasoning in your decision, sir, in the *Trucks* litigation in the CAT. That is {AB-D/37/96}. If we can look in particular, please, at paragraph 222 and 223, recognising in 221 you do not need to have a deliberate decision to pass-on, so there is no subjective intention requirement, but we will see what the Tribunal said at 222 and 223.

The conclusion was:

"... we consider that [the defendant] must prove that there was a direct and proximate causative link between the Overcharge and any increase in prices by the Claimants. That means that there must be something more than reliance on the usual planning and budgetary process, into which the Overcharge was input and at some point prices increased. We think that there is substance to the point made in CAT *Sainsbury's* as to the identification of persons to whom the Overcharge has

been passed as being a relevant factor in relation to the strength of the causal connection. The process is more properly one of identifying the persons who have suffered the loss by paying the Overcharge and therefore who should be compensated by the defendant."

I am told also that if one looks at page 87, there is a reference to *Fulton Shipping* at paragraph 197 {AB-D/37/87}. Not sure I personally marked that up, but, yes, there it is.

Could we then please look at {AB-D/37/98} in this transcript. 228, we have a consideration of the specific test and the Tribunal set out four relevant factors that were to be taken into account. If one looks in particular, for example, at factor (3):

"The relationship or association between what the Overcharge is incurred on and the product whose prices have been increased ..."

That obviously becomes pretty difficult when one is dealing with a general cost of payment, which is a very small sum which is paid across a suite of transactions, it is going to be quite difficult to establish a direct connection with any downstream product because it is essentially spread as a common cost between a variety of different suppliers to the extent that the supplier makes different supplies of goods or services which are

covered by a common payment mechanism.

There is then a reference at 230, please {AB-D/37/99}, the next page, to the counterfactual analysis, and the Tribunal makes the point that this theoretical thought experiment which is urged upon the Tribunal by the defendants in this case does not necessarily help with the actual question that the Tribunal has to answer, which is whether or not the loss has been passed on downstream to a customer rather than the recoverable loss therefore has been avoided by that distinct act of mitigation and the counterfactual can no doubt assist on some of the analysis, but it is not going to be determinative, because the question is:

"... whether there is a necessary proximate and direct causative link required by the legal test for causation, based on the above factors."

That is the legal test for factual causation, not a legal test for legal causation.

Now, on appeal, the Court of Appeal -- this is {AB-D/43/45} -- paragraph 120 dealt with the counterfactual issue, and we see that Mr Ward KC referred, over the page {AB-D/43/46}:

"... to the conclusion of the majority on [Supplier Pass-On] at [688] of the judgment, quoted at [62] above,

which he submitted was an unimpeachable formulation of the role of the counter-factual."

That conclusion was then endorsed by the Chancellor at paragraph 154, which is at {AB-D/43/53}, and at 154 to 156, the Court of Appeal concluded that no objection could be taken to the way that the CAT had dealt with the question of the counterfactual, or indeed with Mr Ridyard's dissenting opinion.

Now, you have well in mind, obviously, the dichotomy between paragraph 150 and 151 {AB-D/43/52}.

So we say, with respect, that the correct test has been set out there. We derive support for that proposition from a subsequent decision of this Tribunal in the *Autoliv* case. That is authorities bundle, please {AB-D/48/89}. Please could we look at paragraph 247 and please would you read 247 through to 253 {AB-D/48/91}.

(Pause).

At {AB-D/48/96}, 264 onwards -- paragraph 264 onwards, the CAT looks at some of the evidence that was given, some of the pricing evidence, by the witnesses in that case, how prices were set, what was taken into account in the price-setting and so on. Could we then turn to {AB-D/48/100}, please, paragraphs 277 to 279 set out the conclusion on the factual evidence, which, having understandably set out the key passages they seek

to take from the witness evidence and the documentary evidence, the conclusion then is contained in 277 through to 279. Please would you read those paragraphs. That does involve flipping across the boundary of the page divide at some point {AB-D/48/101}, or we could bring them both up -- oh, they are both up already, thank you.

(Pause).

THE CHAIRMAN: Yes.

MR BEAL: So we say, looking at the four different categories of merchant reaction identified by the Supreme Court in *Sainsbury's*, we can start seeing why there is a focus not on categories 1 and 2, which category 1 is do nothing and category 2 is change your marginal investment plans or take some other step to assess your profitability, those are not the relevant criteria. You are then looking for a specific act of mitigation through downstream pass-on of the price to a customer, that is category 4, or a distinct act of mediation through renegotiation of a contract with a supplier so that you pass the loss on to them, that is category 3. This fits within the framework for mitigation of loss precisely because pass-on is a form of mitigation of loss at common law.

Now, rather curiously, Visa suggests that we cannot

rely on *Trucks* in the Competition Appeal Tribunal or *Trucks* in the Court of Appeal. They suggest that either, seemingly, the proximity is a question for legal causation, which was also a submission that *Mastercard* makes at paragraph 19 of its closing {RC-S/2/6}, Visa at paragraph 33 {RC-S/3/16}, that, we say, simply misstates the test. Proximity as a matter of legal causation would go to remoteness. There is no question of remoteness here. What we are dealing with is the test to identify the sufficient causal connection between the act of mitigation and the step of avoiding the loss.

They also say that we were -- well, they say that the *Trucks* decision does not, seemingly, deal with channels for pass-on, but of course the channel for pass-on is not something that would meet the "direct and proximate" test. I referred you in opening to the *Stellantis* decision, which recognised that merely having budgetary targets would not, on the CAT's view, amount to mitigation and Lord Justice Green in the *Stellantis* case, paragraph 50, concluded that that was a perfectly sensible decision to come to.

THE CHAIRMAN: Rather than focusing on the word "proximity", which appears in various different guises, maybe we should focus on the word "direct".

MR BEAL: Direct and sufficiently causal.

THE CHAIRMAN: Yes.

MR BEAL: There has to be a sufficient causal connection to show a distinct act of mitigation, but not a "but for" test for causation, which you would use to establish recoverable loss in the first place, subject to principles of scope of duty of care and remoteness and so on.

So we do say, with respect, that this is a binding conclusion as to what the legal test is and it is not open to Visa to suggest otherwise. That is the test that was set for the form of mitigation known as pass-on in a competition case.

THE CHAIRMAN: So what was the Tribunal ruling out then in your various applications?

MR BEAL: It was ruling out our reliance on some policy reason why, if, as a matter of fact, we have passed on that loss to a merchant, for example through a surcharge, there was some policy reason why we should nonetheless maintain our claim in the face of what would ostensibly be a much better claim by the customer. That is what it was ruling out. It was essentially saying --

THE CHAIRMAN: But that is not what Visa understood you to be saying, as we saw from their skeleton argument.

MR BEAL: So I need to go through that skeleton argument to

show where the ships pass in the night.

Let us start, please, with the 2022 judgment.

I mean, the obvious point in response to this is, no matter what Visa may have thought they were getting from that exercise, what they actually got was a ruling from the Competition Appeal Tribunal, which stands by itself. If that is now wrong as a matter of law, it is wrong as a matter of law, and nothing that is said by the Tribunal on that point therefore --

THE CHAIRMAN: Well, it might be wrong as a matter of law, but it is binding on you as a party to it, is it not?

MR BEAL: Well, only if it is a determined issue.

THE CHAIRMAN: It depends what they were saying, but ...

MR BEAL: Well, I think that is what they are saying. They are saying somehow that there is a res judicata or an issue estoppel and, regardless of the subsequent movement in the case, or in fact it was not subsequent movement, it was prior movement in the case law, we have not appealed against it and therefore we are stuck. But it is therefore important to see what exactly the CAT has ruled upon.

THE CHAIRMAN: Yes.

MR BEAL: If we look, please, in the 2022 judgment --

THE CHAIRMAN: We ought to have a break at some point.

MR BEAL: Now is as good a time as any.

THE CHAIRMAN: Yes? All right.

(3.15 pm)

(A short break)

(3.27 pm)

MR BEAL: Please could we look at {RC-D/7/24}. This should hopefully bring up paragraph 50(2)(ii) of the July 2022 judgment, and we see (i) deals with factual causation:

"... whether the effect of the alleged mitigating conduct was, as a matter of fact, to reduce or eliminate B's loss."

Then legal causation, the Tribunal can see, is couched in now familiar terms, whether, regardless of the fact that there has been an act of mitigation, as a matter of fact, there is a legal policy reason why nonetheless B can still recover the loss even though it has been paid over to somebody else.

That, we say, was the distinction that was drawn. The subject matter went on appeal, largely because at that point, as I understand it, the claimants were arguing you needed to show specific pass-on and to specific identifiable transactions downstream. Could we look, please, at {RC-D/9/1}. This is the decision of the Chancellor refusing permission to appeal on various grounds that are identified. Could we pick it up, please, at paragraph 4. One of the concerns had been

that somehow there would be -- the issue of the factual enquiry would be shut out. The Chancellor said:

"Contrary to [41] ..."

Of the, no doubt, skeleton argument in support of permission to appeal:

"... the CAT did not conclude that no factual enquiry was required. It recognised that there is a factual enquiry involved but that is part of factual not legal causation, see for example [50(3)] of the judgment ... the CAT did not fail to appreciate the need for a causal connection between the overcharge and the act of mitigation as recognised in *Royal Mail* and *Stellantis*. Apart from anything else this is clear from the citation and highlighting of the passage from *British Westinghouse* ..."

So there was then a rejection of the suggestion that somehow factual causation was not going to be an issue and essentially it was being suggested that legal causation had been concluded against the claimants' case and that was the reasons then set out at 5 and 6 and so on.

On the specific point of whether or not you had to show a subjective intention of making a decision to pass on to identifiable customers downstream, paragraph 3 deals with that point and says:

"The CAT was correct in rejecting that additional requirement of subjective intention and [indeed] the applicants did not seek to argue the contrary on [the appeal]."

In terms of legal or proximate causation, that is dealt with in paragraph 2:

"'... the question of legal causation is straightforward in the context of a retail business in which the merchant seeks to recover its costs in its annual or ... other budgeting. The relevant question is a factual question: has the claimant in the course of its business recovered from others the costs of the MSC, including the overcharge contained therein?'"

So that is, we say, the effect of that.

Now, this did come back, because the vexed question of proximity arguably seems to have been understood in different ways by different people. Please could we look at {RC-E1/1/30}. This is part of the transcript that you were taken to from the legal causation ruling. I think I have given myself the wrong reference there. Could we go to {RC-E1/1/39}. It may be the wrong document entirely. Forgive me a moment.

(Pause).

THE CHAIRMAN: This is 23 May.

MR BEAL: Tab 7, yes, thank you. That is the transcript of

the legal causation hearing {RC-E1/7/30}. We see halfway down a submission -- sorry, a point made by the President:

"The reason Visa have made the application is because they don't want, by the back door, questions which we have determined being re-opened."

And Mr Rabinowitz said, "Precisely".

Then at line 18:

"Can I approach that in this way? The Tribunal has made certain decisions with a view to guiding what Trial 2 is going to be about. Those decisions, and I think this is what my Lord has said, has produced a situation in which what is going to be tried at Trial 2 is whether as a matter of fact the overcharge was passed on. We have cleared out of the way the possibility of legal causation, policy if you like, playing a role either in the production of evidence for Trial 2 or in submissions that you will get at the end of Trial 2 ..."

Then please could we turn to {RC-E1/7/39}.

MR JOWELL: If you could read on.

MR BEAL: How far would you like me to?

MR JOWELL: To the end of the page {RC-E1/7/30}.

MR BEAL: Would the Tribunal please read on to the end of the page. It is right that it says:

"... there is no evidence here sufficient to show sufficiency of link."

But we then see, on the next page {RC-E1/7/31}, Mr Rabinowitz seems to be having in mind proximity as a point --

THE CHAIRMAN: So that was Mr Rabinowitz saying {RC-E1/7/30}:

"... there is no evidence here sufficient to show sufficiency of link."

What link?

MR BEAL: 17 -- at number 2, he says at paragraph -- at line 15 on the next page {RC-E1/7/31}:

"... we don't want to land ourselves in a situation and the Tribunal in a situation where at the end of Trial 2 someone says, this is all very well but all you have established is factual causation. There is no evidence here sufficient to establish, whether you call it sufficiency, proximity, legal policy, they are all the same ..."

Well, with the greatest respect, they are not. The reality is that Mr Rabinowitz seems to have had in mind the test for remoteness or a legal policy reason, and the answer is that was not what was the correct legal test for factual causation.

We then see -- and I do not have time to go through

it in detail, but the point that is being made against that is, well, hold on, there is a legal test for factual causation and we do not want to be shut out from dealing with that, and I think it is fair to say that the President is concerned that he does not understand what the point dividing the parties is. So if we look, please, at {RC-E1/7/39}, he says:

"I speak entirely for myself ..."

At line 6:

"... and we will have a discussion in the course of the break, but going back to paragraph 50 of our 2022 decision ..."

Which is the one I just took you to:

"... and looking at the distinction we drew there between factual causation and legal causation, the more we discuss, the more it seems to me that 50(2)(ii) is exactly right and if we are going down the route of policy, well, we are not. That is, I think, absolutely clear.

"We are obviously going to have to deal with factual causation and the evidence that is required for that is something which we are managing going forward and is not a matter for debate today."

THE CHAIRMAN: So what evidence would have been relevant and was being resisted in relation to policy, legal policy?

MR BEAL: This is the point, actually, that Mr Schonfeld, my learned junior, here, makes when he says, well, we were having a rather arid discussion about the distinction between legal and factual causation, why can we not simply concentrate on what is the ambit of the evidence that needs to be disclosed here? It is fair to say that we were seeking to get in evidence of how pricing worked on the ground, because we thought it is all very well having academic studies from Visa and a series of econometric evidence based on data from the claimants, but if in fact the claimants are pricing in a certain way and that is relevant to the issue of pass-on, then the Tribunal should have access to that evidence as well.

THE CHAIRMAN: But that, you say, was an aspect of factual causation.

MR BEAL: Correct, and that is what we were seeking to preserve, the ability to call that evidence, because we said it went to the issue of factual causation.

THE CHAIRMAN: But I mean, in some way or other, they did find against you.

MR BEAL: Well, they found against me --

THE CHAIRMAN: -- on this, did they not?

MR BEAL: -- on the basis that it was not open to us to raise the question of legal causation again. So --

THE CHAIRMAN: What, you were keen to adduce evidence as to how claimants set their prices?

MR BEAL: Yes.

THE CHAIRMAN: That was why you were arguing that those points were still open to you?

MR BEAL: Yes, because we were saying --

THE CHAIRMAN: What, points on legal causation?

MR BEAL: We were saying it is a question of factual causation as to how we have gone about, if we have, passing on the unlawful overcharge into our downstream prices.

THE CHAIRMAN: Yes.

MR BEAL: There had been a suggestion from the Tribunal that there would be no need for -- I think you were taken to this by Mr Jowell -- there is no need to have evidence of the claimants themselves, that is not actually going to be meaningful or helpful, and I think maybe the aspiration at that stage was that you could have econometric evidence based on the data and it would produce, mathematically, an answer which would give you the answer for the entire case on pass-on. That, as we know, has proved impossible, and whilst this was going on, we were very keen to ensure that the Tribunal at least understood how we went about pricing our supplies of goods and services, because if in fact we are simply

setting to maximise revenue, as in the hotel example, then there is no space for an individual cost to be passed on, because the market, or the revenue-maximising price is determining what the price is and therefore the concept of passing on through price any particular cost becomes very difficult indeed, and that is the "hermetically sealed" point that I understand the defendants have recognised.

So one can look through this transcript -- I confess, if I am being brutally honest, I looked through it and was glad I was busy engaged on Trial 1 rather than being there, because it did seem there was a great deal of confusion in the submissions and how it was being presented. But the reality is that the ruling that we end up with is at {RC-D/26/4}, please. Yes, sorry, I am told I should -- Mr Schonfeld has reminded me that this was not a hearing necessarily arising directly from our effort to adduce evidence, it was a proactive application by Visa on what they presented as a point of principle. So, essentially, they were seeking to have determined what it was that was going to be in issue with a view to then determining what the evidence would be. But if you look at the submissions that were being made, it was all with an eye to: what can we actually get into evidence? That

was what was motivating our response to it.

MR TIDSWELL: It was taken as a pleading point, I think, was it not?

MR BEAL: It was taken as a pleading point. Then, of course, the Tribunal say, in terms, "How far are you pushing that, Mr Rabinowitz?" He says, "Well, it does not matter so long as I know what I am doing in terms of where we go with the evidence". The conclusion from that was that no particular direction was made, but a cost application was made in favour of Visa.

But the ruling is {RC-D/26/4}, paragraph 7, and the learned judge has set out his first subparagraph, which deals with factual causation at paragraph 6. He then says:

"Legal causation is the subject matter of the next ... sub-paragraph ... The intention of this paragraph -- and we consider the wording to be very clear -- was to state our conclusion that the questions of legal causation there articulated were not before the Tribunal because, as propositions, they were not arguable as a matter of law. That is the clear meaning of the last two sentences of [50(2)(ii)], where we referenced ... the Supreme Court's approach to questions of legal causation, going so far as to describe this ... as a 'no-brainer'. We are comforted in this assessment by

the endorsement of our statement by the Court of Appeal in *Royal Mail* ... at [150], which states the law as it has previously been stated ..."

He then goes on -- his Lordship then goes on to say at paragraph 8 {RC-D/26/5}:

"We do not regard [151] as in any way assisting in the construction of [150] ..."

That is because of the dichotomy between 150 and 151 that is identifiable in the Chancellor's judgment in *Trucks* and which has then been followed in *Autoliv* by this Tribunal again.

So the ruling that is against --

THE CHAIRMAN: Sorry, what is the dichotomy?

MR BEAL: Legal causation is dealt with in 150, factual causation is then dealt with in 151.

THE CHAIRMAN: Yes.

MR BEAL: The factual test, the test for factual causation is that of a direct or proximate link. That is the test that has been applied in *Autoliv* --

THE CHAIRMAN: Yes.

MR BEAL: -- and it is a test that one can track back through common law principles of mitigation going back to the summary of Mr Justice Popplewell in *Fulton*. So there is nothing particularly surprising about this.

What is surprising, with respect, is that

the schemes seem so keen to try and undermine the clear conclusions of the Court of Appeal in *Trucks* by the back door and we say that they cannot do so. The ruling that has been given against us here is: we, the CAT, have determined issues of legal causation and you cannot go behind that. They have recognised that the question of factual causation is to be determined, and they then make some suggestions about how paragraph 151 is to be read, but of course 151 was dealing with the test for legal -- for factual causation and that has been the subject matter of six weeks of evidence or so that we have --

THE CHAIRMAN: What is meant by the last sentence of 8?:

"We consider that the reference to or deployment of [151] in support of a general proposition ..."

What general proposition?

MR BEAL: Well, it appears to be suggesting that 151 does not establish a test for factual causation.

THE CHAIRMAN: But what, is that what --

MR BEAL: Well, I am not sure.

THE CHAIRMAN: -- was being said on behalf of the claimants then?

MR BEAL: No. I mean, we were saying paragraph 151 helps you understand the difference between legal causation and factual causation because paragraph 151 is not

dealing with legal causation.

THE CHAIRMAN: No.

MR BEAL: The conclusion from the judge is that 150 is dealing with legal causation, and I am afraid I simply do not quite understand what the judge thought paragraph 151 was all about.

THE CHAIRMAN: Well, he is saying, I think, that they were only concerned, on that application, with legal causation and therefore it is only 150 that was relevant on that question.

MR BEAL: Yes.

THE CHAIRMAN: 151 is dealing with a separate question of factual causation and so does not help in terms of defining legal causation and what is said to be straightforward.

MR BEAL: Well, that reasoning is unimpeachable. It is only if it is read more broadly as suggesting that 151 does not set out any legal analysis whatsoever that alarm bells might start being raised, because of course the Chancellor in the Court of Appeal does not usually devote paragraphs to unnecessary observations, he tends to characterise what is needed by way of a legal test, so --

THE CHAIRMAN: The legal test for factual causation.

MR BEAL: Correct.

THE CHAIRMAN: Yes.

MR BEAL: So to the extent that there is an ambiguity in the last sentence in paragraph 8, it needs to be read consistently with the judge having recognised that the Court of Appeal has actually endorsed his approach, at 150, as to what the test for legal causation is and that is all this does. It was not purporting to determine questions of factual causation which the judge had recognised in argument were fully to be debated and a matter of some difficulty, I think, was the way he put it.

Now, there is then a separate question about counterfactual analysis. *Mastercard*, for example, in paragraphs 11 to 15 of their closing {RC-S/2/5}, have sought to suggest that it is for us to show that prices we charge to customers downstream would have remained the same. There are two reasons why I am afraid that is wrong. Firstly, and quite obviously, the burden is not on us to do anything, the burden is on the schemes to show a distinct act of mitigation of passing on the unlawful overcharge we have suffered to a separate body of persons, be that suppliers or customers. Secondly, the counterfactual analysis, we respectfully suggest, is not terribly helpful here when actually what one is seeking to do is determine as a positive

matter: has the unlawful overcharge that is pregnant in the MSC as a matter of fact been passed on to a customer or, through supplier negotiation, to a supplier? That is the factual question that has to be determined, applying the legal test for factual causation that is set out in paragraph 151.

Therefore, the alleged commercial irregularity of the position here, that somehow we have been making profits that are said to be 15% above an equilibrium level for a decade, simply does not follow because we have, in the real world, in the actual world, been paying MIFs as they are incorporated into Merchant Service Charges, and that is a cost on my clients' businesses, and the question is: has that cost we have paid in the real world been passed on in the real world to somebody else such that it is avoided loss?
The suggestion that if, in the counterfactual, we have not paid that sum, whether or not prices would have been different is irrelevant to the question of whether or not we have in fact passed on that loss we have in fact suffered. So the counterfactual analysis comes at things the wrong way round.

The typical reason for looking at counterfactual analysis is if, for example, in an overcharge, you need to work out what the prices would have been but for

the infringement, and that is what it is typically used for. Here we do not have that issue, subject to acquirer pass-on, because it is recognised that the unlawful MIF is unlawful to its full extent and that has necessarily been factored into the MSC that has in fact been paid. So assuming for the sake of Trial 2A that there has been 100% acquirer pass-on, or I suppose one could countenance some proportion of that, but it is identifiable, then that establishes what the recoverable loss is. The question then is a distinct one: have we mitigated that loss by passing on, by way of avoided loss, an element, or all of it, to a customer?

THE CHAIRMAN: You say, for the purposes of mitigation as opposed to causation of loss, that the counterfactual is not a very useful tool?

MR BEAL: Well, one could no doubt use it and deploy it to get some sort of sense of: does this generally make sense? But we certainly say it is not determinative, and it can be positively misleading if it leads to absurd results. I mean, this is a point we make in Trial 2B as well, which is, if you have got a position where you are trying to work out whether or not the acquirer has passed on to us the unlawful overcharge inherent in the MIF or whether it has absorbed it as part of the cost of doing business and not bothered to

pass it on, then trying to work out what the position would have been on a given reduction of the MIF is not going to help you very much because, say for the sake of argument you are in a counterfactual where the MIFs never existed, then you necessarily have to posit the imposition of a MIF, which produces a cost, which then the question is: has that cost been passed on?

Where, with respect, I think the mischief comes is where, rather than trying to answer the question of has the loss been passed on and using the counterfactual for that purpose, i.e. you posit a situation in which the MIF never existed and therefore you have the imposition of the cost, you do it the other way round and you say, well, imagine you have a situation where there was a sudden cliff edge drop in the MIF and that cliff edge drop therefore led to a reduction, let us look at what you would have done to a reduction in the MIF, in terms of the costs that you then pass on or the prices you then set for your customers.

The difficulty with that is, in the real world, we are suffering the MIF all the way through. There is a 0.2% charge on debit card transactions throughout the entire claim period, as we have seen from Trial 2B, and, therefore, positing a cliff edge reduction for that particular cost is extremely difficult; it has always

been there. What you have to posit instead is: it was never there in the first place, it then gets imposed as a cost, and what does that mean for the acquirers pricing to the merchant and then the merchant pricing on to its own customers? That may conceivably be a sensible way of looking at it, but suggesting that there is a point immediately prior to the claim period where you have to assume a 0.5% MIF and then what would you do if that was no longer there on the next day, that is not helpful, it is looking at the wrong thing, because it does not take into account the fact that, in the actual world, we have been paying it throughout.

Can I turn then, please -- that is all I wish to say, I think, at this stage on the legal principles. Can I turn, please, to factual evidence. I do not need to go into closed, I think, at this stage. In terms of the factual evidence, this is addressed in our closing submissions at paragraphs 44 to 70 {RC-S/1/19-33}. We say that the factual evidence from each of the Analysed Claimants was to the effect that there was no explicit taking into account or pricing by reference to the MSC and that holds good even in relation to the travel sector claimant.

Now, I am simply dealing at this stage with some of the wider themes. You have reviewed very recently

a number of documents, such as Merchant Service Agreements, acquirer contracts with merchants, so that you have seen, for example, how various different transactions are broken out. They are dealt with on a tiered -- or even in a blended contract they are dealt with on a predominantly tiered basis, so you have separate charges, for example, for consumer credit, consumer debit and commercial cards, and we have seen recently in one of the acquirer contracts how, even in a blended contract, that necessarily drives the differential pricing that takes place within a blended contract. I can show you an invoice that makes this transparently clear. It is {RC-I4/56/1}. We went to this with one of the witnesses last week. This is an invoice, as you can see. On the left-hand side, there are various transaction charges that are derived by reference to a number of transactions and then the given rate, and you will see that the rate is broken out for various different types of cards that are being used by this particular entity. We see a different break out for, for example, commercial cards, business cards, which are a form of commercial cards, and then premium credit, debit, etc.

Now, all of that evidence, as we went through both in opening last week and also with the witnesses, shows

a number of things. Firstly, that the MIF is presented as a non-negotiable element of the MSC. It was frequently referred to by the witnesses as being a cost they could not control. Secondly, there is in fact no way to tie those MSCs into any particular transaction, they are aggregated at the cost level and the business cannot sensibly say, well, this relates to the supply of category A goods versus category B goods, it is a charge that is imposed on business activity across the board.

Save in relation to IC contracts, the merchant may have no particular visibility of the specific underlying MIF rates. The rates that are given, for example, here on this contract are the headline rates for each of the different types of card, it is not split out into MIF fees, scheme fees and then the acquirer margin, and whilst the merchant is able to compare and contrast that headline rate, obviously if the MIF element is said to be non-negotiable or the merchant experiences that the MIF rate is non-negotiable, then there is not much point trying to do anything other than negotiate the headline rate, to the extent possible. It is for that reason we say that the regulatory authorities have treated the MIF as setting a floor to the overall level of the MSC.

In terms of the factual evidence, I am going to deal

with this now because it is a recurrent theme from the schemes' submissions. They say, well, we have got the evidence from the witnesses, which they have not substantially engaged with, where the witnesses simply saying, "Well, we did not take this into account for pricing purposes". That is not something that they have addressed head on, save in the examples of the so-called COGS merchants. What they say is, "If you had given us proper disclosure, the facts would have been different". Now, I have not detected, but I may be wrong, any challenge to the credibility of the witnesses who have repeatedly said in a witness statement, sworn by a statement of truth, (a) -- those witnesses say two things. Firstly, (a), this is where the MIF and the MSC -- this is where the MSC is dealt with in our accounting and management information records, and, secondly, they then describe the pricing process and they say to what extent, if at all, the MSC is factored into the pricing for those particular goods or services.

It was suggested by my learned friends on several occasions -- well, sorry, let me qualify -- it was suggested by counsel for Visa on several occasions, my learned friend Mr Jowell, that these were carefully selected claimants. You will recall that, when opening back in November, I made it clear that the selection of

the claimants was largely a product of the January 2024 hearing, if I have it right, where Mr Moser went outside over a short adjournment and came back with a list of the ten biggest -- 11 biggest claimants and said, "Here's a list of the biggest ones; it may not be representative for the economy, or indeed even the entirety of the claim class, but it is representative of the biggest types of claimants that we have in this claim and so it is representative of the claim to that extent". I think the figures were something like 60% to 65% of claim value and 70% by reference to transaction number. Anyway, this is all set out in our opening. For your note, {RC-A/1/15-17}.

Now, that is the selection issue, and we went through it at some length, because there was then what I have described as some limited horse trading between the experts as to whose data was best. So if we had the biggest one for a particular individual sector, as perceived, if the data in fact was better from another one, then there was a substitution process to get a slightly smaller one in, but with better data, and there was a degree of chat between the experts to procure a sensible outcome on that.

THE CHAIRMAN: So these were the claimants who were providing the data that the experts could then use?

MR BEAL: Yes.
THE CHAIRMAN: Yes.
MR BEAL: There are a series of people who provided data and then the data was not very good, so they were passed over.
THE CHAIRMAN: Yes.
MR BEAL: There were also, I should say, a series of people whose data was made available, but Mr Holt said in terms, well, it might be useful to have it, but we do not necessarily need it. "It is useful, but not necessary", I think was the term he used.

In terms of the disclosure process, Mr Tidswell, having lived this more closely than I have, will remember the fortnightly CMC meetings where there was a recurrent suggestion that there would at some point be what was called "a car crash hearing" where Visa or *Mastercard* would make an application effectively to break the fixture for Trial 2 on the basis they could not sensibly go ahead with what they had. That was marching step by step with the disclosure process, the positive cases, the responsive cases and then the Redfern schedule process, and I was on standby for quite a while to attend this so-called "car crash hearing" and it never materialised. What happened was, we had the Redfern hearing where the learned judge

Mr Tidswell ruled on the Redfern requests that were outstanding -- some of them had been dropped by the schemes up until that point -- and there was a contested hearing, which I did not attend, and a ruling was made.

Now, all of this, or rather all of the steps in the disclosure process, are actually set out in detail in a letter from my instructing solicitors. This is {RC-M/330/1}. Please could we look at that. I am not going to go through all of this, but essentially what we see here is my instructing solicitor giving a summary of how the disclosure process had run. Then if we turn over the page {RC-M/330/2}, my instructing solicitors sought to set out a brief history of what the Tribunal and the Trial 2 active parties agreed the procedure would be. There is the mini-CMC on 26 January where there would be an expert-led process to help determine what data was going to be produced and where any gaps in the data would be. That was against the backdrop, see paragraph 6, of whether or not:

"... admitting qualitative evidence in addition to the quantitative data being relied on ... was discussed."

The Tribunal's initial concerns about the use of qualitative data revolved around the potential for

a disproportionate or, even worse, trial-derailing amount of evidence. So this goes into the common theme, which is that there is not going to be a widespread CPR-style disclosure process, it is a more targeted expert-led approach where the volume of qualitative evidence was to be kept under control.

We then see, next page {RC-M/330/3}, paragraph 7 and onwards, the approach to dealing with the requested documents. The involvement of our experts in working out which documents were going to be most useful, and, on the back of that expert-led guidance, proportionate searches being carried out for originally requested documents and so on.

We then see paragraph 10 {RC-M/330/4}:

"Each of the Selected [Stephenson Harwood] Claimants took a broadly similar approach to responding to the Redfern schedule requests in August/September 2024 ..."

There was then a process by which the requests that were being pursued were identified and there is then some comments on the documents that were in fact provided. So that sets out, we say, as at October 2024, I think shortly before the Redfern ruling, exactly what had taken place and why the suggestions that somehow the process had been inadequate to achieve its aim,

which was not full disclosure from 2,000 claimants but a targeted expert-led disclosure approach, why that had been complied with.

If we could look, please, at {RC-J1.3/14/1}, in the context that there is a note of an expert meeting from 22 April 2024, we see:

"On 22 April ... the expert teams ... [met] and discussed the prioritisation of Willing Claimants for data provision ...

"There is a list of 10 that are to be progressed ...

"There is then a list of five that are to be determined ..."

Including, for example, some names I will not read out.

The conclusion of the discussion can then be seen at {RC-J1.3/14/2} and views are reached as to which particular datasets would be preferable, who should be progressed, who should be held back, and we see in relation to some of those that the experts then instructed for both -- well, consistently instructed by Visa, but then instructed from *Mastercard* considered certain data to be "useful, though not essential" for implementing their methodologies. That point is also taken overleaf {RC-J1.3/14/3}, about one of the parties who we did not analyse, but who nonetheless is now

relied upon by the defendants in support of their contentions.

PROFESSOR WATERSON: Presumably Ms Webster was not involved at this stage?

MR BEAL: No. You may well recall the application that was made by Mr Simpson KC to try and make some points about the substitution of the experts. That was not a contention that we had anything to do with, but there was a change of expert by *Mastercard*. I am simply stating that as a matter of fact.

PROFESSOR WATERSON: Thank you.

MR BEAL: Now, this was something, actually, that was raised in opening, and you will recall that I had pointed out in opening -- please can we look at that, it is {Day2/119:19}, starting at line 19 -- and I was concerned that essentially the schemes were seeking to tee-up what might loosely be called an appeal point on the basis of an allegedly procedurally unfair process, and I said:

> "If now what is being done is to suggest that if you find against them, it has all been procedurally unfair, then, with respect, that is extremely uncomfortable for this Tribunal to have that as a sword of Damocles over its head. If it is to be suggested, in the light of hearing my opening submissions, that this entire

procedure is unfair, then it seems to me it is incumbent upon the defendants to make out that case now so that something can be done about it, if it needs to be, and they can go on appeal if they do not like the answer. What ... one cannot do is keep an alleged procedural irregularity up their sleeve and save it for the appeal in due course ..."

That coincides with my understanding of the general duty of the parties before a tribunal to try and cure alleged procedural irregularities rather than saving it up for an appeal point. I think that is a relatively uncontroversial proposition.

Therefore, what then happened, essentially, was that the learned Chairman pushed Visa to indicate whether or not they were in fact applying for an adjournment. Please can we look at {Day2/179:18-20} -- at line 17, the learned Chairman said:

"Are you seeking an adjournment?

"No, we are not seeking an adjournment, and I wish to explain why we are not, and why we do not consider it is necessary for us to do so."

He then proceeds to set out the reasons why he is not seeking an adjournment. It is therefore, with respect, regrettable, if we now look, please, in Visa's written closing at paragraph 37 {RC-S/6/17} --

MR JOWELL: Forgive me, but I then made submissions for about ten minutes precisely explaining why I was not seeking an adjournment and I made it abundantly clear that it was on the basis that the question of the sufficiency of the causal connection was not going to be an issue. You cannot just pretend that that is all I said.

MR BEAL: Well, I think it was pretty clear from my opening what I was saying the legal test was. My submission on that point has been the same in opening as it is now. My point is, if my learned friend was going to say, "Well, if that is still an open legal issue, and it clearly is, what the test is" -- well, I say it is not an open issue because it has been determined by *Trucks*, but if there is to be some debate about what the legal test is, then that was readily apparent from my opening submissions, and if my learned friend thought, "Well, I cannot possibly deal with that submission", then the appropriate course was not to allow the Tribunal to engage in five weeks of a hearing, calling the expert evidence and going through it all and then, when they get to a point where, having cross-examined all our witnesses and cross-examined our experts, they think they cannot discharge the burden, they then say, "Well, actually, this is all on the basis of a procedurally

unfair procedure".

MR JOWELL: Forgive me, but if you read on, that is precisely the point I made, was that if you go ahead with this trial on the basis of the disclosure that we have got and seek to determine whether there has been a sufficiency of causal connection, that cannot be adjudicated fairly, and that was a submission I made very clearly.

THE CHAIRMAN: You were asking us to rule on what basis we are going to determine the trial at that stage? I mean, we were not saying one way or the other what our legal conclusions were going --

MR JOWELL: No, I fully accept, but it cannot be taken -- it cannot be said that I sat on my hands and did not make our position clear.

THE CHAIRMAN: Right.

MR JOWELL: I made it abundantly clear and it is there on the transcript over many pages.

THE CHAIRMAN: Well, you can take us to that, if necessary, in reply.

MR BEAL: Can we see paragraph 37 of their closing. {RC-S/3/18}. Within that document, it is internal page 13. Please could I invite you to read that paragraph.

(Pause).

So that is a pretty unfortunate submission, with respect, because they should have put up or shut up in opening when the Tribunal pressed Mr Jowell to say, "Well, actually, are you now saying you cannot go ahead on this basis and therefore an adjournment should be sought". He said, "No, I am not asking for an adjournment". That is his decision. But it is no good having buyer's remorse, especially in circumstances where Visa set their stall categorically about the sampling exercise, some of my claimants had a ruling from Mr Justice Roth that a sampling exercise was appropriate, through a series of case management determinations there was a retrenchment from that position, partly because the parties could not agree what the sample should be, and Visa then said, "Well, we do not need to worry about any qualitative evidence or any merchant claimant evidence, we can prove this by looking at public studies, public data and doing some regression analysis on data from claimants". They said that was sufficient for their purposes and they, as we have heard -- unlike *Mastercard*, who of course were facing a claim from Mr Merricks at that stage and therefore evidence was going to be important, partly, no doubt, to show that Mr Merricks did not have any, to establish his recoverable loss, that was the way it was

being put at the time -- Visa set their stall by not having any of this evidence in, and through the CMC process from January 2024 onwards, there was a series of steps that were taken whereby merchants were permitted to bring forward their positive case, including witness evidence, including Mr Economides' expert report and including documentary evidence that they all filed. It is no good now, with respect, saying this has all been a chronic waste of time because we were never in a position where this was going to be procedurally fair.

THE CHAIRMAN: I am not really sure what disclosure they are saying they would need in order to deal with the proximity point.

MR BEAL: I have no idea.

THE CHAIRMAN: No.

MR BEAL: I have no idea. If what they are saying is, "We thought we could get away with simply saying that the 'but for' test applied", then they simply failed to read *Fulton* before they were taking that strategic decision, and it would have been apparent from this Tribunal's decision in *Trucks* what the test was, at the very least, to anyone reading it properly. When that test was endorsed by the Court of Appeal, may I suggest respectfully that there was no way round the terms of

paragraph 151, which are clear on their face as to what has to be shown. If the concern that is being raised is that we are somehow raising proximity as an element of legal causation, let me assuage the defendants on that front, we are not. We are simply requiring them to show a sufficiently close causal connection between the overcharge that we have suffered and the act of mitigation, be that pass-on to our customers or pass-on through a renegotiated contract with the supplier, and we require them to prove that. If they cannot prove that, they are in common company with *Mastercard* in *Sainsbury's* and the defendants in both *Trucks* and *Autoliv*.

THE CHAIRMAN: They have hung their hat on MSCs being part of COGS or being a variable industry-wide cost, as Mr Holt says, and if they are right on that, then proximity does not come into it, does it?

MR BEAL: Correct.

THE CHAIRMAN: So it is only if they are wrong on that and we are looking at overheads or some other cost pass-on that they might wish to say something about proximity.

MR BEAL: Well, we would need to establish that there was either the equivalent of cost-plus pricing or some form of pricing dynamic where the profit-maximising price in the short term recognised that the MSC was a COGS. If

they get home on that, then I recognise that they have established, factually, a form of causation that meets the *Fulton* test.

THE CHAIRMAN: Yes, exactly.

MR BEAL: I do not know really what they want more, other than --

THE CHAIRMAN: So we have that debate anyway in determining what is the appropriate proxy --

MR BEAL: Yes.

THE CHAIRMAN: -- do we not?

MR BEAL: Yes.

THE CHAIRMAN: I mean, that is really what we are arguing about and I am not sure whether it is helpful to actually get too hung up about proximity, to be honest.

MR BEAL: What we do say is that the pricing practices of merchants in the market was always going to be an issue and the surprising suggestion is that you can determine pass-on without actually looking at anything to do with pricing. It may be that you have got some very clever computer algorithm that produces an answer, but that seems, with respect, unlikely. You are always going to need to know quite how the market worked in terms of pricing in order to work out what you are comparing with what for the purposes of a regression analysis.

THE CHAIRMAN: Your witnesses all pretty much said on oath

that MSCs were not taken into account in their pricing.

MR BEAL: Yes. They were taken into account to varying degrees in management information, budgetary accounting.

THE CHAIRMAN: Yes, of course.

MR BEAL: All the things that you would imagine a business will look at, but there is a distinction between having a cost included as a business expense and working out how you set your prices. One needs only go to the hotel example, which is the most clear example, where, because you are looking to generate revenue, it is an entirely customer-facing process, how much can I get for this hotel room, costs do not come into it, full stop. It is simply a revenue exercise, it is a revenue determination exercise.

PROFESSOR WATERSON: But the variable costs are very small.

MR BEAL: They are, I accept that, and that will be a paradigm business model for only some of the merchants in -- well, in the sectors that we are dealing with. But it is a way of -- in my respectful submission, it is the best way of explaining video games or indeed app store platform pricing, which I know Mr Tidswell has been looking at with some care recently. It is the best way to explain that is it is all about generating revenue and then how do you split the revenue between the parties who are making the transaction possible.

PROFESSOR WATERSON: Yes.

MR BEAL: Now, on this disclosure point, it has been suggested adverse inferences should be drawn. Two things about that.

Firstly, that would be jolly unfair given that all we have sought to do is to comply with the procedural steps that have been taken and, I emphasise, case managed very closely by this Tribunal.

Secondly, of course, the process of selection of the claimants was adopted through expert negotiation and expert discussion, and, a bit like Groucho Marx principles, if they did not like them, then we have others. They could have said, "We do not like this particular claimant, we do not think their data is any good, we do not think they have given us sufficient disclosure", and they could have requested that another claimant step into breach, and, of course subject to the art of the possible, that would have been it.

We respectfully suggest here that there is an element of both schemes saying. Well, the evidence has not turned out the way we thought it would, therefore evidence must be missing, whereas in fact the proper approach is to say: what does the evidence show?

I emphasise that all of this led to a contested Redfern schedule hearing where certain disclosure was ordered,

certain disclosure was not ordered, and there has been no appeal against that final decision.

Now, could I please take you to the *Granville* case. It is authorities bundle {AB-D/40/72}. If we could look, please, at paragraph 188. You will see what the learned judge, His Honour Judge Pelling KC, in that case made of the suggestion that somehow adverse inferences should be drawn because of what was said to be a lack of evidence. In that case, of course, my understanding was that one of the companies had gone into insolvency and so there was a sort of an absence of evidence from that perspective. But the response was it is no good really moaning about the absence of witness evidence from those involved in the management of the claimants during the relevant period:

"... the asymmetry of the information problem that applies in relation to documentation relevant to pass on does not arise in the same way in relation to witnesses, whose identity is known or can be ascertained by defendants using conventional litigation techniques."

That is what we have had here. We have had witnesses who have come along and said, "This is how we do it". Given that that witness evidence is supported by a statement of truth, if those witnesses say, "We did not expressly take into account or factor in MSCs into

our pricing decision", then the fact that there is no document to say that they did is entirely unsurprising. A point, I think, was made by *Mastercard* today: well, there is no evidence of minutes of meetings, no evidence of emails. One only needs look at the folder list, the sub-folder list in folder I1 to show that there are plenty of examples of emails and some examples of minutes of meetings, but those have been disclosed when they are relevant to the pricing process. If what is being suggested is a hotel company, like Hilton, should have been approached group-wide to conduct a search of its email boxes from the pricing teams on a word search term of "price", then the consequence does not bear thinking about as to how many absolutely ridiculous results would have been generated from that. What we had was an expert-led process, whereby our experts fed into what was being asked of the clients, the clients had discussions, subject to privilege, of course, as to what was being required, they then produced those documents and those documents have then been supplied, save where they are irrelevant to the schemes.

While I have *Granville* open, please could I have a quick look en passant at {AB-D/40/77}, paragraphs 202 to 203. This is a case where pass-on was found, but of course it was a significant component of the downstream

product. Please could I invite you to read 202 and 203, the sorts of the evidence that the tribunal was considering in that case.

(Pause).

Now, that is the sort of email that we simply do not have on our case, because the same factual situation has not applied.

Can I then please come on, in the ten minutes or so remaining, to have a quick look at the expert evidence. We have made some submissions about expert evidence at paragraph 70 {RC-S/1/33} to 109 {RC-S/1/56}, and we do not repeat those here. *Mastercard*, we note, seemingly now rely on the evidence from Mr Coombs, because it is cited in their closing submissions at paragraphs 15 to 16 {RC-S/2/5-6}.

Could I please turn up {RC-F/10/36} and just observe that the average net margin by sector that is being relied upon there, the one that is landed upon by *Mastercard* for the purposes of comparing the size of the MIF with a long run average net margin is the lowest shown in that column.

THE CHAIRMAN: This is Mr Holt, rather than Mr Coombs, is it?

MR BEAL: No, I think that is Mr Coombs 13.

THE CHAIRMAN: Is it? Okay.

MR BEAL: Yes. At this stage we are dealing with Holt 11 and Holt 12, not Holt 13 and Holt 14. I think I have got that right. This is definitely Coombs, anyway, it is at the top.

The next point that is made by *Mastercard* at paragraph 113 of their closing {RC-S/2/35} is that somehow we had a fairly limited challenge to Mr Harman's analysis of documentary material. Again, with the greatest respect, the interjection from the learned Chairman was that why was Mr Harman dealing with these documents, which was the question I was teeing up which, if we look at {Day12/46:2}, the learned Chairman spared me having to ask the specific question I was teeing up:

"It is not your job as an expert to impugn the factual evidence?"

He said:

"I am not impugning whatsoever."

That may have been my question, I think. But in any event, it is the same point that is made by you, sir, in the course of the same passage of cross-examination.

In terms of Mr Economides, he was a management consultant with extensive experience of pricing. He was cross-examined very carefully by my learned friend Mr Jowell as to which particular sectors he was expert in and he revealed that he was relying on a wider team

to deal with sectors he did not feel he could comfortably call himself an expert in. It is therefore somewhat ironic to see in Visa's closing submissions that they try and set out effectively a potted history of business and financial concepts. Please could we look at {RC-S/6/26}. Given that this is an exercise that Mr Economides' responsive report went through with some care, what we see in paragraph 56 is a potted summary of that. If you would be kind enough to look at the footnote references, there are a number that refer to documents that are marked as "RC-J1.5" and then a tab number, and those are all documents that were exhibited to Mr Economides' evidence. So wherever J1.5 arises, effectively, we see that what is being relied upon is material that Mr Economides had chosen to put forward in support of the report that he prepared.

THE CHAIRMAN: This is just definitions. I mean, it is not --

MR BEAL: Well, if one looks at the underlying documents that are being relied on --

THE CHAIRMAN: They are not relying on his opinion of --

MR BEAL: No, they are not relying on his opinion, but they are relying on his work product, that is the point.

Mr Murgatroyd. Could I briefly take you to his evidence. It is {RC-F/6/1}, starting, please, at

{RC-F/6/23}, actually. I just want to bring out some salient observations that Mr Murgatroyd had, starting at paragraph 105, he observes that:

"... MIF costs are ... only incurred where customers pay by payment card. This means that, for any given change in the MIF, the costs of insurance providers ... [where] customer ... pays via payment card will be more significantly affected than ... those ... with a ... lower proportion ..."

I.e. there is a split in the industry between, for example, some forms of insurance are predominantly paid by direct debit and some are paid more predominantly by card payments.

Page {RC-F/6/32}, please, paragraph 143 to 146, Mr Murgatroyd takes into account the witness evidence that had been given for Allianz and notes that the factual evidence in support of the proposition:

"... underwriters do not specifically consider the MIF (or the MSC) when making pricing decisions."

Then he refers to Mr Bodman, those particular costs not having been on his radar:

"Taking this together with the broader discussion in Bodman 1 on the costs that are included in the expense ratio, I consider a likely reason for MIF not being taken into account directly in pricing decisions is

that, for costs to be directly taken into account, such costs need to be material."

At {RC-F/6/33}, paragraphs 147 and onwards, he deals with the relevant percentage of the GI direct sub-category of costs that is attributable to the MIF and he provides meaningful evidence at paragraphs 149 to 150 {RC-F/6/34} as to what the basic bottom line figures look like.

Finally, please, at page {RC-F/6/57}, he explores the extent to which the IFR event had led to a discernible impact on that category of cost, GI cost, general insurance direct costs, and you will see that his conclusion at 250 to 251 is that:

"... even large changes in the MIF rate [i.e. the IFR event] are not associated with any discernible impact in GI Direct and may have not led to sufficiently material changes ..."

Then he produces some scatter graph analysis, or chart analysis -- sorry, graph analysis, no doubt, based on scatter graph analysis to show what the relevant changes are.

That brings me to a natural pause. I am now going to move on to my 14 points. I am not going to labour some of them, because they have been extensively covered in detail. I will perhaps give you just some of

the headline points for each of those points and direct you to where -- the documents we have already seen, either through cross-examination or through my opening. Then what I propose to do for the latter half of my submissions tomorrow is to focus on some of the merchant-specific criticisms that have been made by my learned friends of the merchant evidence more generally.

THE CHAIRMAN: Right, so -- and you are going until just after lunch, did you say, tomorrow?

MR BEAL: I have I think left to me three and a half hours, if I have it right -- no, sorry, three hours.

THE CHAIRMAN: You started just this afternoon.

MR BEAL: I did. So it is -- I think that takes me until 2.30.

THE CHAIRMAN: You think you will go until then?

MR BEAL: Probably, I think is the fair answer. I can try and be quicker if I revise overnight some of the points.

THE CHAIRMAN: Are we likely to start with 2B then tomorrow?

MR BEAL: It depends on the scope of the replies. The time left through the waterbed effect to the defendants has to be split between replies and their submissions on Trial 2B.

THE CHAIRMAN: Right.

MR BEAL: It is up to them, really, how long they want to

take in reply and how long they want to take on Trial 2B, so I am in their hands rather.

THE CHAIRMAN: Shall we start at 10 again tomorrow?

MR BEAL: Yes.

THE CHAIRMAN: Yes.

MR JOWELL: I would be very grateful.

MR BEAL: I am asked, by the way, to give you simply a reference to our skeleton dealing with selection of claimants, which I am told has a better coverage, and this is dealt with at {RC-A/1/62-66}. So that is our skeleton argument paragraphs 132 [sic] to 146, has a much fuller coverage of the selection process than apparently the one I gave you a reference for.

THE CHAIRMAN: All right, so we will start at 10 o'clock tomorrow.

MR BEAL: Thank you.

THE CHAIRMAN: Thank you.

(4.32 pm)

(The hearing adjourned until 10.00 am on Wednesday, 2 April 2025)