**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)

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Wednesday, 2 April 2025

(10.00 am)

THE CHAIRMAN: Good morning.

Closing submissions by MR BEAL (continued)

MR BEAL: Good morning.

Please can I give you some headline points on my so-called 14 points, number 12 of which is an analysis of the merchant material where I will need to go into closed. If I need to go into closed before then, I will shout.

THE CHAIRMAN: Yes.

MR BEAL: Number one is the role of economic theory. The Tribunal will have seen that one of the issues for this Tribunal to resolve is this concept of channels, are there more than the two viable channels recognised in the *Sainsbury's* Supreme Court decision for pass-on, and those what I have called the two viable channels are where a defendant establishes that there is a direct and proximate causal link between the sufferance of the unlawful overcharge and either reduced prices paid to its customer, or the unlawful overcharge is effectively borne by, and therefore paid by, the customer, or has been borne by the renegotiation of a contract price with a third party supplier. Those are categories 3 and 4 in the *Sainsbury's* four-fold categorisation process.

Now, we have discussed cost-plus pricing. That is an obvious example of a direct and proximate link between suffering an overcharge and then passing it on downstream. Outside the realm of that mechanical merchant pass-on, you can also have a firm that is taking a decision, or pricing in accordance with its profit maximising price in circumstances where the marginal cost has been suffered as an overcharge is directly passed on through the profit maximisation process of setting a price into the downstream prices. As a matter of economic theory, changes in variable costs can be expected to directly affect the profit maximising price for a firm, so that would be another way of looking at it, and that is how we categorise the process for the purposes of acquirer pass-on on standard contracts in Trial 2B.

Now, in contrast to that short-term profit maximisation mechanism, changes in fixed costs in the long run do not feed into that short-term profit maximisation calculus, they feed into market entry and exit decisions and to changes in investment decisions. We will come on to look at later the responses that a business may have to changes in fixed costs, or indeed, we would say, changes in overhead costs, which is how Mr Economides viewed it. For your note, confirmation that is the right approach can be seen at {Day10/140}.

Now, a change in costs other than marginal costs may mean that the undertaking suffers a reduction in its profitability, but of course the response of a firm to a reduction in its profitability may be simply to leave things where they are, and that is for the obvious reason that that particular, "We won't do anything about it", approach, "We will live with the change in our underlying profitability", is one of the Supreme Court's options, namely option 1. They might, alternatively, re-evaluate their strategy in the light of the reduced profitability, for example they might refrain from making investments, they might change the number of store openings or reduce their discretionary expenditure and so on, and that is category 2.

Mr Coombs accepted Professor Waterson's suggestion that it might be rational for a firm facing a decline in profitability to shrink its market presence, that is {Day10/200-201}. I note in passing that interviewees on the Radio 4 Today programme this week have been talking about the anticipated impact of various external price changes, in particular tax changes, and what that means as a knock on for both their staff recruitment decisions and their general approaches to investment in the UK, and that is a classic example of an industry-wide cost being factored into changes in discretionary expenditure.

Now, what that sets is therefore the conceptual difference between an increase in a direct marginal cost that affects the profit maximising price and a change in other costs which are not directly factored into the profit maximising short-term price but which have an impact over the longer run and in due course and which can be dealt with in different ways. We say that distinction is important to then consider how we go about assessing how these merchants treat overheads. So that is point number one.

Point number two are relevant factors for considering the nature of the cost, and this breaks down into a series of subheadings. All of these relevant factors are derived essentially from either the 2019 Commission Guidelines or the RBB paper. I took the experts through them. There are references in our written closing and in our opening case and responsive cases.

The first factor that is generally considered to be relevant is the intensity of competition. Now, on that point, there is a divergence between the parties as to how intense or not intense these particular markets are. My short point here, rather than labouring it, is to say that all of the firms, with the arguable exception of, well, two, firstly, universities have a regulated price, for example, for domestic tuition fees, and secondly, in the travel sector, one has seen evidence that there is a market price set for certain -- because of the way that flights and hotels are sold over websites, there is a generated market price through essentially an exchange -- an online exchange, and those are examples where the relevant merchant has to be a price-taker, either because of regulation or because of the market. But we have seen that for pretty much every other merchant there is an ability to set prices.

One of the hares that has been set running here is the nature of margins. Could I ask you please to have a quick look at {RC-G/2/61}, and we should be looking to see, at paragraph 4.58 and onwards, Dr Trento deals with low margins. Could we scroll over to the next page, please. I am sorry, it has not come up on my laptop yet {RC-G/2/62}. So the next page would be 62.

THE EPE OFFICER: The system has frozen.

MR BEAL: I am sorry?

THE EPE OFFICER: It has frozen.

THE CHAIRMAN: It has frozen, I think.

MR BEAL: Ah, I see. Your hearing is better than mine, sir.

Then it is going to be the next page after that {RC-G/2/63}. If we go through. That is it. There is a figure 3 there with the average gross margins by segment, and you can see for retail, non-retail and the median figure what the gross margins look like. The schemes have been concentrating on figures that are net margins, and you will have seen the evidence that it is generally the gross margin analysis that feeds into pricing decisions precisely because the EBITDA analysis, which is net of -- on net margin basis, is factored into profitability for the most part rather than pricing. When I say "for the most part", I am not aware of any evidence of a merchant saying in terms, "We price on the basis of EBITDA", and it is contrary to the evidence that Mr Economides has given.

Now, dealing with the evidence from Mr Economides,

THE CHAIRMAN: Sorry, this graph, what is it showing?

MR BEAL: This shows average gross margins by segment for a variety of different segments over -- different retail segments are categorised by different gross margins and the period is 2017 to 2022, and it is based on Compass Lexecon's analysis of the Damodaran data. The difference between the parties is, we have looked at gross margins here and they have concentrated on the net margins, which are necessarily small.

If we could look briefly, please, at Mr Economides 2, which is {RC-G/3/68}. He sets out here an example of Aldi and Lidl deciding to have a low price strategy and what they were deciding to do was to essentially have a low price entry into a market to gain market share, and that involved the sacrifice of gross profit and gross profit margins in order to achieve an aim. But of course, that is not indicative of competition, because that is an example of intense competition leading to lower margins, not necessarily stable margins in the long term.

The next point is demand and supply. I think the short point on demand and supply is that nobody actually has worked out what the demand and supply curves would look like here and so it is of limited assistance. The general points that can be made are that most demand for most merchants is likely to be relatively elastic because they are not supplying essential goods for the most part, and not much can be said about the supply curve, save that it is unlikely to be flat.

PROFESSOR WATERSON: Can I just pick you up on terminology?

MR BEAL: Yes.

PROFESSOR WATERSON: Because it is only in the case of perfect competition that there is a supply curve.

MR BEAL: Yes, so it would be the average cost curve -- the average marginal cost curve is unlikely to be flat for any given merchant.

PROFESSOR WATERSON: Yes.

MR BEAL: Aggregated, that would give us the supply curve.

PROFESSOR WATERSON: Well, only under perfect competition.

MR BEAL: Let me quit while I am ahead and move on to the next point!

So the next point is the industry-wide cost argument, and Visa and *Merricks* here contend that the MSC represents an industry-wide cost. We respectfully disagree because there are some merchants, for example, who do not accept commercial cards. Now, this point only goes so far, because of course, by definition, all of the merchants have accepted cards and necessarily paid MSCs, otherwise they would not be in the cohort of claimants, but it is important, we say to, recognise that the individual burden of the MSC varies quite considerably between claimant and that is most visible in the Allianz case, where we have ABSL, which is an insurance broker, and then the insurance writing side or insurance offering side of the business, which I think was LVIC, and those two claimants have two very different types of business and very different types of card payment usage. So one of them typically receives their money by direct debit, the other has a much higher instance of card payments. If we look please, briefly, at Mr Murgatroyd's first report, this is {RC-F/6/19}, paragraph 86, he explains at the bottom of the page there how the IFR led to changes in the MIF rates. Then if we turn over the page, please, {RC-F/6/20}, we see analysis of LVIC and ABSL respectively, and they are clearly impacted in different ways, we say, as shown by that table, by the relevant MIF rate paid by those different claimants.

Now, the response from Mastercard, too, is, at paragraph 119 of their closing {RC-S/2/37}, to say, well, merchants can have very different business models. But, in a sense, that is our point. You do not see the same business model in the travel sector, or indeed the digital games sector as you do in the retail sector, or indeed in a claimant like Allianz.

More importantly, we say, even if it is right that all of the claimants, by virtue of being in the claim, will necessarily be impacted by a change in MIFs and therefore a change in the MSCs, nonetheless it does not necessarily mean that each claimant will respond in the same way. If a firm considers that it is setting prices at a profit maximising level, then we say it would be imprudent to respond to a known change in its EBITDA margin by raising prices in circumstances where it does not actually think its marginal costs have changed. So, even if it is an industry-wide cost and even if it is technically a variable cost, if in fact the firms, when they are doing their pricing analysis and they are sitting down in their rooms thinking, "What are we going to charge next month", if they are looking at their EBITDA walkthrough, as we have seen is in the documents for some of the companies, and even if, assuming against the evidence, that that EBITDA walkthrough is somehow factored into the pricing process, then simply knowing that your overall level of profitability has been affected is not going to assist you unless you know that there has been a specific change in a marginal cost, and the reason for that is because of the marginal cost pricing process.

It is in this context that I was referring with the witness to it being a "shot in the dark" with Mr Harman as to whether or not a firm should change its costs. It is not because they do not know that the MSC is a cost and that it is factored into their costs in some way, it is because they do not treat it as a marginal cost, it gets swept into a bundle of overheads. They may or may not have individual visibility of the individual overhead, they may simply know about the bucket. But even if though know that the MSC has increased as an overhead, if they are not treating that as a trigger for changing the profit maximising price by reference to the Cost Of Goods Sold because they do not put it in that bucket, then why would they change their price, because they are already pricing at what they consider is the profit maximising price, because they are covering their Cost Of Goods Sold and any price increase is likely to change the volume dynamic. So if they increase the price in response to that, they do not know how they are going to respond to the volume of sales that they are going to get. On a purely profit maximising analysis of marginal costs, which is what theory says they should be doing, they do not think marginal costs have changed and therefore they are not going to change their price.

THE CHAIRMAN: Is that just saying that however an economist might define that particular cost as a marginal cost, you have got to look at whether the firm actually treated it as a marginal cost --

MR BEAL: Exactly.

THE CHAIRMAN: -- and therefore factored it in to their profit maximising price setting?

MR BEAL: Yes. We have got an empirical response to this, which is, actually, when you look at what they are doing, they use EBITDA for profitability studies and setting budgets and so on. When it comes to cold, hard pricing, most of them are looking at things like what are our competitors pricing, what do we think the market will bear, have we covered our Cost Of Goods Sold? These are the three principle drivers, just empirically. But what I am trying to do is to acknowledge that there is this profit maximising explanation, short-term profit maximisation process which could be a way in which one could say, well, the -- a marginal cost has been priced into the downstream price. But even assuming that, you still have to have the firm recognising that it is the sort of cost that goes into that short-term pricing mechanism. It is no good to say, well, it is within a bucket of overheads and in the long term all overheads will be covered, because that --

THE CHAIRMAN: That is the firm's choice as to whether --

MR BEAL: It is the firms' choice where they put it --

THE CHAIRMAN: -- whether to rely on that particular cost as part of its price-setting process.

MR BEAL: That is right. But what we are looking to see is has the firm, as a distinct act of mitigation, passed the individual cost on to somebody else. Is there a direct and proximate link between it suffering that unlawful overcharge and charging a price downstream, and I am recognising that this mechanic may be an explanation, but you only get to the short-term mechanic if you are in fact treating it as a COGS and putting it into the COGS analysis, if I can use that shorthand. If that is not what they do, then you do not even get there, and when I come on to explain, looking at the other channels, all of the other channels are essentially a way of trying to circumvent the very clear ruling from this Tribunal in *Trucks* that simply being part of the usual budgetary process is not enough. That is foreshadowing the point I will make in a moment about the different mechanisms.

Now, the evidence from Mr Holt -- this is {Day6/186-188} -- was that it would be through competitive pressures over time that the change in an industry-wide cost, which was not identified as a marginal cost such as COGS, would feed into the determination of prices, and our short submission is that that is not a direct and proximate incidence of mitigation of loss.

There is then a slightly arid debate as to whether or not overhead costs can be industry-wide or not. In my respectful submission, they can be, but of course the problem comes that overhead costs are not typically factored into the pricing process. There are some outliers, but typically, you have a very clear indication in the evidence before you as to where, exceptionally, a firm will treat an overhead cost as being directly related to pricing, and that applies in particular in the restaurant sector that we will look at when we go into closed.

The next issue is ad valorem versus per unit. Could I please bring up {RC-J1.3/29/75}. This is the PSR market review 2021 and we see here that there is a reference to, at 5.35:

"... merchants on IC++ pricing that received full pass-through are very few in number but represent 77% of transaction value."

Then the figure in 2024 -- this is {RC-J9/3/72} paragraph 6.6, we see that that has -- 6.7, otherwise we are dealing solely, I think, with UK-EEA figures, but 6.7:

"We found that:

"... 80% of transactions, by value, relate to contracts on IC++ and IC+ pricing.

"Around 20% of transactions relate to contracts on fixed or standard pricing ..."

That is in fact still looking at CNP transactions, but of course we know that most Merchant Service Agreements will cater for these MIFs, as well as every other MIF. So when the agreement is either on an IC+ or not, it is going to cover debit, credit, consumer, corporate business, premium, EEA, inter-regional.

Now, that gives us an indication, we say, of the number of merchants who are facing ad valorem basis MSCs, and the relevance of this is that there is a general acceptance, as I understand it, as a matter of principle, that all other things equal, the pass-on of ad valorem costs will be expected to be lower than the pass-on of per unit costs because of the endogeneity issue in trying to account for a cost. The way it is put in Dr Trento's evidence, contrary to Visa's closing submissions at 65 {RC-S/6/30}, is dealt with in Trento 1 at paragraph 720. This is at {RC-F/2/55}, please. At paragraph 7.20 to 7.22 -- 7.21 gives us the setting, so there is a distinction being drawn between ad valorem and per unit costs. Then at 7.22, it says:

"... an important prediction of economic theory is that -- if a company pays no unit marginal costs, such that all marginal costs are ad valorem -- any overcharge on these ad valorem costs would not be passed on."

Now, just pausing there. The caveat is that there cannot be any per unit costs, marginal costs, at all.

Now, obviously that is highly unlikely to apply in practice, so all you actually get is a general sense of which direction this is going in, but it does have some resonance, and therefore it is being, I am afraid, mischaracterised in Visa's submissions at 65 {RC-S/6/30}, where they refer to marginal costs generally rather than per unit marginal costs, which is the caveat. But putting that to one side, where does this have resonance? Well, it is those platform transactions where the per unit marginal cost is going to be very small and, I mean, digital gains would be an example where essentially the impact of the MSC is likely to be predominantly ad valorem and economic theory suggests that, in those circumstances, the expectation of pass-on is lower.

Now, one ad valorem -- it is not a cost, it is a tax, is VAT, and that is being prayed in aid by Mr Holt as a relevant factor to take into account. Could I just make some short points on VAT. Firstly, obviously there is a built-in mechanism for pass-on because there is a statutory obligation to charge VAT on top of the transaction price. That is derived from the VAT Act 1994. Secondly, it is a charge that is 100 times larger than the MIF overcharge for debit cards. Thirdly, customers expect to pay it, and they know that the supplier is bound by law to charge it. Suppliers necessarily know that if their competitors, like them, are VAT registered, they will also have to pay it. Next, VAT is not treated as either revenue or cost in the accounts, it is simply a tax, and of course EBITDA is earnings before tax, amongst other things. The next point is that the impact, commercially, is softened by input tax recovery. Finally, the very nature of the tax is that you pass it on through the chain as part of the principle of fiscal neutrality that applies between VAT transactions.

So all of those things suggest, in my respectful submission, that it is a very poor comparison to the MSC, which is a much smaller charge and which does not have any of those other features.

THE CHAIRMAN: But firms are not actually, by law, passing on the VAT. I mean, it is a different VAT on input and output, is it not?

MR BEAL: Well, it gets swept through the transaction chain.

THE CHAIRMAN: Yes, I know it gets set off. Right.

MR BEAL: Save for when one makes an intra-EU, as was, or inter-regional now --

THE CHAIRMAN: Right.

MR BEAL: But it is meant to be a tax that is a sticking tax in the hands of the final consumer.

THE CHAIRMAN: Yes.

MR BEAL: Price adjustment issues is the next heading. With respect, that gets relatively little air time in the schemes' closings. The only one line point I want to make about it is that we have a ready-made example from a witness at {RC-H1/18/5}, paragraph 23 of the evidence of Mr Barnett. It is confidentially marked, so I will simply invite the Tribunal, please, to read paragraph 23.

(Pause).

The next item is recurrent cost. Visa has made the suggestion that the MSC is an industry-wide cost that has been highly visible and an ever-present feature of the payments landscape. We recognise, of course, that domestic debit card MIFs have been present for many years and are largely unchanged. We do respectfully suggest that the setting of MIFs was pretty opaque until the bundling -- unbundling requirement introduced by the IFR, Article 9. We do say that MSCs have varied over time, more generally, particularly for IC+ and IC++ contracts precisely because of the events that we have seen in the event studies in Trial 2B, such as the IFR caps, the Brexit commitments -- sorry, the 2019 commitments, and then the Brexit reversal of some of those commitments for inter-regional transaction.

The result is that merchants with different profiles and different payment mixes have very different exposure to and reactions to MSCs. For example, a mobile phone company, where customers are on primarily direct debit payments, will be different from a travel agency which is exclusively online and which can therefore only accept -- which does only accept card payments for purchases. We say that differentiation is magnified when it is taken across the entire economy.

It is a very small point, but Mastercard, at paragraph 125 {RC-S/2/41}, have attributed to me a submission that in fact was made by Mr Simpson KC for *Merricks*. I do not want to own his submission.

In any event, we respectfully suggest it is not right that IC+ contracts have been stable over time because increases or decreases in the MIF about which we know have necessarily been passed on mechanically to the merchants.

The next item is the smallness of the MIF. Could I please invite you to have a quick look at {RC-J1.4/53/66}, and the point we are essentially making is really set out here in the RBB report at paragraphs 108 to 111. Please can I invite you to cast an eye over those paragraphs again.

(Pause).

THE CHAIRMAN: Yes.

MR BEAL: Mastercard, at paragraph 128 of their closing {RC-S/2/42}, and Visa, at paragraph 78 of its closing {RC-S/6/36}, seek to compare the size of the MIF with the size of a retailer's net operating margin. We have a number of points we would like to make about that.

Firstly, as I have indicated, retailers generally focus on gross operating margins, not net operating margins. Secondly, the size of the proxy chosen by their respective experts, or at least by Mr Holt, was a size of magnitude higher than the net operating margin. So, a travel agency, for example, if the proxy that has been selected is the cost of the flight, that is going to massively exceed the net operating margin and therefore one is not comparing like with like. Generally, of course, the cost of goods of a business would materially dwarf the levels of net operating margin, because it is a margin once you have accounted for the costs of the business.

What that means is that reliance on the size of the cost relative to low net operating margins leads to statistically misleading conclusions. So imagine, for example, a merchant with exceptionally low net operating margins of 1%. Any cost which represents 0.1% of revenue will represent 10% of that operating margin. So if that firm had two major costs which accounted for 80% of its revenue, say, for example, Cost Of Goods Sold is 40%, staff costs are 40%, and then it has 190 sets of costs, each of which are 0.1% of revenue, then according to their approach, each of those individual 190 sets of costs representing 0.1% of revenue would be treated as being vitally important, because 0.1% is 10% of the 1% net operating margin and therefore has, according to the schemes, significance. Can I suggest that, in the real world, the ones I would be worrying about would be Cost Of Goods Sold and staff costs, and that is where I would spend my energy.

We also had some analysis from AlixPartners on EBITDA margins, and Dr Trento prepared a response to that. Please could we look at {RC-Q1/F/4} [sic].

(Pause).

I do not think that is the right reference. This should be Dr Trento's responsive note. Maybe it is Q5, tab 5, is it? No. Sorry, I misstated.

THE CHAIRMAN: You said Q1, F. Is it Q1, 5?

MR BEAL: I am sorry. It is {RC-Q1/5/4} and then {RC-Q1/5/5}, it should be. Q1, tab 5. There we are.

So we see, at paragraph 3.3 {RC-Q1/5/4}, Dr Trento sets out some reasons why the figures that have been reported may be subject to error, because:

"... the unweighted average EBITDA margin over all 930 companies with ... margin information in the ... raw data amounts to -2,505% ..."

A number of negative EBITDA margins are seemingly reported in the raw data.

If in fact we look at the corrected figures then dealt with on 3.5 on the next page {RC-Q1/5/5}, the proportion of MSCs to EBITDA margin comes down rather considerably. But in any event, this is, we say, a somewhat misleading exercise, because it is not comparing the right factors that are going to be at the forefront of the price-setter's mind in any business.

Right, that deals with the second point from the 14 points.

The third point is the treatment of the MIF and MSC as a cost. Ms Webster has accepted that it is -- or rather Ms Webster has opined that it is important to take into account how the MSC is recognised by a firm, and we respectfully agree. But she then -- Mastercard then go on to look at purely theoretical considerations at paragraph 78 of their closing {RC-S/2/25}, rather than looking at what is happening in the real world. We respectfully suggest that all of the evidence confirms for the Analysed Claimants that, save for two, namely [redacted] -- I apologise. Save for two -- in fact, I think that was ... anyway. Save for two, which are well known, the MSCs were treated as part of COGS -- sorry, not as part of COGS, as part of overheads.

Now, the salient features involve looking at whether or not an MSC cost is incurred and how much that cost is, and that depends on which card a customer uses for a particular transaction, which a merchant may not know in advance. Secondly, MSCs are typically invoiced by acquirers to merchants on a total transaction basis. You will recall that we saw the invoice from a sample acquirer to a sample merchant in which the various different transactions were broken out by number and then a rate for each different card was applied to them. MSCs are frequently incurred in relation to transactions as a whole, aggregated over a monthly period, rather than based on individual product lines and there are, obviously, supermarkets where even an individual transaction with an individual card on a given day will cover a multitude of different products. The MIF is not a cost that merchants can negotiate, and we say for all of those reasons, it is perfectly understandable that merchants choose to categorise this particular cost as an overhead rather than as a marginal cost of doing business.

The response to that from the schemes is to say, well, they can predict it. They may or may not be able to predict it, but that involves a level of energy and a level of cost, internal cost, which many merchants think, on the basis of the evidence they have given, is simply not worth a candle because there is nothing they can do about it. So they treat it as something that they cannot change, save on a procurement basis from time to time when they negotiate with the acquirer to try and get a better deal, and we know that the acquirers say, "There is nothing we can do about the MIF, let us talk about the acquirer margin". But given that is the position for the merchants, they tend to lump it into a category commonly referenced as "costs of payments". That is treated as an overhead, it is not then factored in as a marginal Cost Of Goods Sold or services sold. Why would you -- if you are receiving the sort of aggregated invoice that we looked for a particular merchant, why would you try and allocate that to any of the particular lines of business that you have as a wholesaler? It would be futile.

Now, Mastercard, at paragraph 26 of its closing {RC-S/2/8}, has relied on the EY/Copenhagen Economics study to try and establish that a larger proportion of claimants than we are suggesting treat the MSC as COGS.

Could we look at that study, please. It is {RC-J4.2/141/168}. We see, second paragraph down, the authors note that:

"... the pass-through the interchange fee ... savings is very difficult to measure directly ..."

Therefore what they are looking at for this study is the extent to which savings have been made by the IFR change. So that their brief, if that is the right word, is to consider: has the IFR led to tangible savings for consumers in the Member States of the EU?

For that assessment, see the next paragraph, what they rely on is:

"... pass-through literature to conduct a meta-study and estimate the pass-through rate of cost changes in the countries of interest. The analysis does not allow to assess whether there was in fact a pass-through of cost savings stemming from the IFR. Rather, it allows to estimate consumer savings assuming that cost pass-through rates are consistent with historical average pass-through rates in the empirical literature.

"We find that merchants in the food retail sectors of five [Member States] in the long run pass-through up to 66% of cost savings to consumers. This is close to the average pass-through rate in the food retail sectors of all EU, where up to 72% of cost savings are passed through from merchants to consumers."

Then says:

"Assuming full pass-through of acquirers' cost savings to merchants and based on the estimated pass-through rates ..."

They then give a figure for the perceived total benefit of the IFR as a policy measure.

If we then look at {RC-J4.2/141/170}. This analysis is necessarily being conducted not by reference to the MIF, because we see at the top:

"Interchange fees constitute very small costs of payment which are difficult to measure directly without extensive and granular cost and price data ..."

They then refer to two attempts to do so, but said that it was:

"... difficult because the cost changes from the IF capping were very small ... this chapter [instead] seeks to measure the pass-through of cost savings resulting from the IFR indirectly by conducting a meta-study, first, pass-through rates and their determinants are collected from the literature and then used to predict the missing ... rates of interest."

Now, in the light of this, the estimates were then applied but had to be applied with caution. If we see {RC-J4.2/141/175}, please, top of that page:

"The estimation results confirm that cost changes are, to a large extent, passed-through to consumers, see Table 44. Moreover, the results for the food retail sector show that cost increases are consistently passed through on a larger scale than cost decreases. On average, cost increases in the [Member State] of interest are nearly fully passed-through to consumers, at 90%, whereas only 66% of cost decreases are passed-through. This is in line with the literature on cost pass-through."

They refer to Bergman and Hansen.

That has been conducted essentially on the basis of empirical studies that look at retail pass-through, as I understand it, in the food sector.

At the bottom of the page, it says:

"The reported pass-through rates for the five [Member States] cover direct cost changes in the food retail sector that we use to approximate the pass-through of cost changes resulting from the IFR."

Now, when they say "cover direct cost changes in the food retail sector", I infer from that that they have been looking at changes in the Cost Of Goods Sold:

"The change in interchange fee, however, is an indirect cost of change, that is a change in cost of payment, rather than of production. Since the pass-through of indirect cost changes could differ from the pass-through of direct cost changes, the estimated pass-through rates should be applied with caution."

That was a caveat to be applied to it.

There was then a separate element at {RC-J4.2/141/189}, where the authors conducted some qualitative research. This was based on interviews with -- conducted over the phone:

"... merchants typically participated with 2-3 pricing managers in each interview who were interviewed by two consultants based on an interview guide.

"All merchants emphasised that pricing was determined as part of an interaction between competition and market factors ... and cost factors ... The actual distribution of weights given to the two sides differed significantly between markets and sectors and varied over time, both in the short run and the longer run.

"A majority of merchants operated a price calculation model to help them determine optimal pricing from the cost side."

Now, that is not actually saying that they operated a Cost Of Goods Sold model, it is simply saying that they used a price calculation model to help them determine optimal pricing, but we have seen from the previous paragraph that actual pricing was determined both on interaction between competition and market factors on the demand side and then cost factors, so it is not a recognition, in our submission, that this is cost-plus pricing. It then says:

"In most calculation models, payment costs were an explicit variable cost category in line with many other variable costs within a main category ... and under control of the local store. In a single case, it appeared as though payment costs were treated as a fixed cost that was not controlled at local store level."

Now, it is difficult to glean from that whether or not that is a recognition that the costs are variable but they have gone into an overhead bucket or whether or not the costs are variable and treated as a Cost Of Goods Sold. It is -- that information is simply not available, and of course this is a firm of economists that are preparing a report along with EY and therefore one suspects that they have adopted a variable versus fixed costs analysis rather than a marginal and overhead costs analysis, which is the one that we are looking at.

Page {RC-J4.2/141/190}, please, second paragraph down:

"All merchants stressed that pricing was often influenced by competition and market factors rather than cost factors, in particularly in the short run."

So if they were even recognising as a variable cost the payment costs including MSCs, then in any event, the pricing that was derived for their particular industry was often led by competition and market factors rather than cost factors:

"Their industry was very competitive, and all market participants were to a large extent a price taker."

Now, we just do not know who they spoke to, or it is not obvious from this who they spoke to:

"As such changes in payment costs are not directly influencing the prices, it could create situations where cost increases, as for example the removal of the right to surcharge ... are taken by the merchant instead of being converted into general price increases. It was often stated that pricing is mostly driven by local competition but there is an interaction as variable costs (not including fixed costs) form a floor for pricing that cannot be under-priced by the local merchant ..."

So that again suggests that it is dealing with variable costs, it implies perhaps that it is Cost Of Goods Sold, but it is far from clear because of the earlier sentences.

Then says, next paragraph:

"No merchant could mention an example of a specific price change that was driven explicitly by a change in payment costs. The merchants agreed that this is no surprise as changes in payment costs typically are small and would not be sufficiently large to release price adjustment by themselves. This was a key feature that was shared with many other cost categories."

So, even if, this particular merchant is classifying it as variable and treating it as a Cost Of Goods Sold, then they are not behaving in accordance with standard theory which would suggest that no matter how small a change in Cost Of Goods Sold is, it would still feature directly into the profit maximising price, and one can infer from this that the evidence from these merchants was actually no different from the evidence from our merchants, which is, yes, they are variable in a technical economic sense, but they are put into a basket of costs because they are so small which does not directly factor into the pricing calculus.

THE CHAIRMAN: Do they mention marginal costs?

MR BEAL: No, they do not mention marginal costs at all, so ... -- well, not in this section. They do draw a distinction between variable and marginal costs I think somewhere else in the report. No, I am sorry, it is not this report, it is the RBB report that draws a distinction between marginal and variable and I will come on to that in a moment.

Now, this was also a point that was dealt with by Mr Holt in cross-examination. Please could we look at {Day7/76}. At the top of the page there, I am putting to the witness that you are assuming:

"... that the firm is aware that its marginal costs have risen by the 10% headroom that you are positing ...?"

He says:

"... yes, in the sense that if it is reacting in a direct way to its own ... profit-maximising incentives ... it would apply it in that way.

"My point though is that profit-maximisation is not something I am saying is applied at each instant individually by the firm, but that there is a range of channels [through] which [that] can be achieved ..."

I said:

"But the implicit channel will not trigger the marginal cost analysis that you are otherwise relying on. They are different processes, are they not? Marginal cost analysis is a direct pricing approach --

"Answer: Yes and what you are implying through your implicit channels is ... even if they do not have that direct approach, there are still other ways in which the MIF can be factored in to the overall cost analysis?"

He says:

"Correct. Some of them are ... triggered by the change in the cost because those changes in cost are taken into account in other information that is monitored."

That, in a nutshell, is our distinction, with respect, between a direct mechanism for establishing pass-on and an indirect mechanism for establishing pass-on, and the indirect mechanism is the various channels that Mr Holt has alighted upon as an explanation of why, in his view, over the long run, the cost of the MSCs will find its way into the prices charged to downstream customers.

THE CHAIRMAN: Was Mr Holt relying on that if his main sort of thesis was not correct? I mean, his main thesis is that these were treated as COGS.

MR BEAL: His main thesis is not to that these are treated as COGS --

THE CHAIRMAN: Or they should be.

MR BEAL: -- it is that they have the economic characteristics --

THE CHAIRMAN: Yes.

MR BEAL: -- of being an industry-wide marginal cost that ought to be --

THE CHAIRMAN: If so, it would have been --

MR BEAL: Economically.

THE CHAIRMAN: -- filtered into the direct price-setting mechanism?

MR BEAL: Yes.

THE CHAIRMAN: So if that is wrong, is he saying, well, in any event, it will then -- over the long term, it will feature in price-setting because of the indirect mechanisms?

MR BEAL: Yes, and that is his choice of proxy. My criticism of his choice of proxy is you have chosen a proxy which is highly visible, it is going to motivate the short-term profit maximisation calculus, it will inevitably feature very significantly in a pricing decision from a firm, see what the acquirers do in the acquiring services market, and the MSC is simply not comparable with that sort of cost at the ground level. So regardless of what economic theory may tell you, because it is variable, it is not treated as a marginal cost going into a marginal cost calculus. That is essentially the point I was trying to tease out with Mr Holt here, and he said, well, if you are right that the MSC is not going to be factored in as a marginal cost, then I have other ways in which I can explain why, in the long run, it is still going to be passed on to the downstream customer. That is what I took his evidence to be.

THE CHAIRMAN: That will be an explanation for his pass-on rates in some way or other?

MR BEAL: No, I think an explanation for his pass-on rates is simply that he has modelled for a COGS which, in every case, is an order of magnitude higher than the MSC as a proportion of overall costs, and he says, looking at how a firm has in fact dealt with that sort of cost, you can infer that it has passed on a much smaller cost to the same extent. Our response is: well, how do you get there if in fact it is treated as an overhead, it does not feature in the short-term profit maximisation calculus? He says, well, if it is an overhead and if it is dealt with in that way, then in any event, I would expect it to be dealt with through an indirect channel over the long run. That is essentially where the battle lines are drawn, as I see it. None, of course, of which has anything to do with the specific evidence of specific merchants because Visa have chosen to take an in-principle approach to the question of pass-on, it does not actually matter, they say, what the merchant does with it, it is enough that the economic characteristics are as such that it should be treated as a marginal cost, which is why I started off my early cross-examination with Mr Holt by saying, "Should not economic theory reflect what business does rather than tell a business what to do"?

THE CHAIRMAN: But his modelling assumes a direct channel of pass-on.

MR BEAL: It does, because he has selected in each case a marginal cost that is typically industry-wide --

THE CHAIRMAN: Exactly.

MR BEAL: -- and variable and marginal and goes into the COGS. So he is already assuming, in a sense, what needs to be proved, and the prescient, if I may say so, question you asked him, sir, was, "Well, when did you land upon this theory", and he said either Holt 5 or Holt 8, both of which I think were 2022 or 2023. So this was an approach to dealing with pass-on that the Visa expert had already landed on before the witness evidence from the numerous witnesses you heard was even a twinkle in their eye, and that is the approach they took, which is why, with respect, this attempt to suggest there is procedural unfairness and disclosure has not been given and so on, I mean, that --

THE CHAIRMAN: But then he did not adjust his theory in the light of that witness evidence?

MR BEAL: No. No, that was a criticism I have made of him, for which I have been told off, but there it is.

Now, that, we say, is the marginal cost approach.

Now, an analysis of overall profitability might of course, because businesses are businesses and they want to stay profitable, lead in due course to a change in pricing. But what the defendants cannot do when dealing with profitability analysis is show at which point any particular cost is factored in and becomes determinative of a change in the downstream pricing, and that is the tipping point that comes across very clearly from the *Trucks* CAT judgment. It is all very well saying that in due course, you, as a business, will recover all of your costs and budget for them accordingly, but how does that help you if you need to show a direct and proximate link between a particular cost and a downstream increase in prices.

Mastercard have suggested, at paragraph 28 of their closing {RC-S/2/8}, that costs which are treated as an overhead would still be factored into profit or margin targets and so therefore would impact pricing in the counterfactual that it relies upon. But our short point is that that is another way of running the ordinary budgetary process. It is very similar, with respect, to the argument counsel ran in the *Stellantis* case for the defendants in that case, where it was very much, "This is a cost that goes into our budget, therefore it will be recovered in due course, otherwise we will go bust". The answer in *Stellantis* was that that was not a satisfactory way of dealing with it. Then the same argument, I think, was tendered with slightly lower enthusiasm by Mr Beard KC in the *Trucks* case. These are all piles up essentially the same mountain. They are all seeking to invoke the usual budgetary or planning processes which necessarily go to look at profitability in order to try and skirt round the fact that there is no direct and proximate link between a cost if it in fact is not factored into the short-term pricing calculus.

Could we look, please, at Mr Economides' second report. This is {RC-G/3/78}. At paragraph 2.132, we see Mr Economides giving his opinion that:

"... firms are more likely to seek to increase prices when faced (a) with a decline in Gross Profit margins, when circumstances allow, than when faced (b) with a decline in Operating Profit margin for reasons other than a decline in Gross Profit margins, in other words by an increase in Overheads."

He goes on to set out the reasons for that. If we look, please, at {RC-G/3/81}, he deals with some practical examples of businesses looking at levers to address gross profit margin issues. Then at page {RC-G/3/86}, he notes, at paragraph 2.139:

"The inability of a business to achieve its targets in terms of Operating Profit margin (i.e. Gross Profit minus Overhead costs) may be the result of a decline in Gross Profit or increase in Overhead costs."

The consequence of that is then dealt with at {RC-G/3/86}, paragraph 2.142, where he describes practical steps a business can deal with when a significant issue related to overhead costs is identified and they include:

"Cancelling planned increases in personnel costs ..."

Then going over the page {RC-G/3/87}, he gives another example of Apple making an effort to cut costs. 2.142.2:

"Reducing commercial costs or marketing expenditure."

Over the next page {RC-G/3/88} 2.142.3:

"Implementing a temporary freeze on non-essential business costs ..."

2.142.4:

"Rationalising the external overhead spend ..."

Next one {RC-G/3/89}, 2.142.5:

"Reviewing the structure or headcount of overhead functions, in particular of expensive middle-management or senior roles."

2.142.6:

"Postponing capital expenditure or other investments that support the future growth of the business."

I could go on, but these are all what the Supreme Court would categorise as discretionary decisions to deal with investment and general expenditure which do not amount to pass-on, it is a category 2 type expense, and it is only, in my submission, where he deals with negotiating down prices from external suppliers that one might consider -- which I think is one I did not quite reach, but which he does refer to it --

THE CHAIRMAN: Why is category 2 not pass-on?

MR BEAL: It is not pass-on because there is no direct and proximate link between the steps that are taken and the particular sufferance of the unlawful cost. It is an impact on the overall costs of the business to which there is a generalised response by the business to try and improve its profitability status. So category 1 is do nothing. Category 2 is take steps to try and make sure that you have covered off elements of your costs generally, or your pricing generally -- sorry, your costs generally, discretionary expenditure generally, to try and redress the profitability issues that arise. But of course that does not -- there is not then the direct and proximate causal link between suffering the overcharge and taking a specific step either in prices or supplies, and the Supreme Court chose to recognise that you would need the necessary causal connection.

THE CHAIRMAN: But if you are cutting expenditure on a particular item, I find it difficult to see why that is different to cutting the amount you are paying to suppliers, but anyway ...

MR BEAL: Well --

THE CHAIRMAN: Is that the distinction that the Supreme Court made, that -- as between 2 and 3, that 2 did not have a direct and proximate cause, causal link, whereas 3 did?

MR BEAL: The Supreme Court simply says, in terms, 1 and 2 are not pass-on and 3 and 4 are.

THE CHAIRMAN: Yes. I know.

MR BEAL: The rationale, in my respectful submission, must necessarily lie in what is going on with the underlying categories, and if one views this as: you have suffered a loss of funds by virtue of the unlawful overcharge, so you have less money because you have paid out something you should not have paid out, so that loss of funds has arisen, is that loss of funds then dealt with through a mechanism of avoided loss by getting somebody else to bear the burden of it? You do not have that necessary connection when what you are doing is responding to the overall profitability status of the company by, for example, reducing staff payments to reflect the overall conduct of the firm. You do not have the necessary causal connection between not having the funds for that specific instance and then responding generally to the profitability of the firm across the piece by changing the staff structure, getting rid of middle management and so on. I infer that that is the basis for the distinction.

I accept that the Supreme Court has not said in terms what the basis they think for the distinction is, but the reason I am inferring that is because, when you track back to the Court of Appeal, the Court of Appeal is very much saying you need to be able to show a sufficient causal connection between the loss that you have suffered and the steps that you are then taking in mitigation to pass it on.

MR TIDSWELL: There is also arguably no benefit, is there, in category 2, because we are talking about giving credit for a benefit, are we not, and category 2, there is no benefit to the firm, because one assumes that cutting its costs is damaging to its business rather than beneficial?

MR BEAL: I am sorry, I was being passed a note and --

MR TIDSWELL: So, category 2, there is no benefit --

MR BEAL: There is no benefit --

MR TIDSWELL: -- to the firm that cuts the costs, because one assumes that that is a bad thing for the firm rather than a good thing. Whereas in category 3 and 4, there is some benefit because it is reducing its losses and mitigation is all about giving credit for the benefit.

MR BEAL: Mitigation is either received as a benefit that has arisen out of the transaction which you need to put on the credit side of the equation, otherwise you are over-recovering --

THE CHAIRMAN: That is the *Fulton Shipping*.

MR BEAL: Yes, that is the *Fulton Shipping*. Or -- and this is the tripartite structure in McGregor, there is another middle one, which I am not going to go to, or you have got the third one, which is avoided loss.

MR TIDSWELL: Perhaps I am wrong to use the word "benefit", but avoiding the loss is improving their position, is it not?

MR BEAL: It is.

MR TIDSWELL: Yes, and there is no improvement of the firm's position in category 2 because it is in a worse position because it has --

MR BEAL: Exactly.

MR TIDSWELL: -- cut costs which it no doubt was incurring because it thought they were beneficial for its business.

MR BEAL: The note my -- Mr Woolfe KC -- I cannot call him my learned junior any more, my learned senior -- passed me is to paragraph 205 in *Sainsbury's* in the Supreme Court, where they use the expression:

"... because it would have been deprived of those funds for its use ..."

That is {AB-D/21/70}, and when I said this is all about analysing it through loss of funds, that must have stuck in my brain as a result of that expression being used in paragraph 205. That is the only explanation that is given for the distinction between them within that paragraph. We can infer, as Mr Tidswell has, with respect, quite properly, to say, well, what are we -- how do we fit -- how do we fit this into the classic mitigation structure, which is the one I am urging upon the Tribunal, and it is an avoided loss because you have managed to pass on that loss to somebody else in a tangible and direct way.

Let me turn, if I may, to the three types of indirect channel. The schemes have relied variously on the setting of an EBITDA margin. Now, here, we respectfully suggest there is no difference between a general profitability analysis and an EBITDA margin. EBITDA margins are there, as we have seen from Mr Economides' evidence and from some of the witness evidence, to budget for and establish that the firm will be profitable over the longer term, and we say that that is part of the general budgetary and usual planning processes of the firm, and I will come back to look at the specific EBITDA walkthrough that you have been referred to on several occasions.

As for competitor pricing, we essentially make two points about this. Firstly, it is circular. Without establishing evidence of what a specific competitor does, i.e. does the specific competitor, on a cost-plus basis or other acceptably direct basis, factor the MSC increase, the charge to the MSC, does it factor it directly into its pricing, without having that as a necessary evidential basis, simply saying, "Well, you followed a competitor's pricing", does not tell you anything.

The second reason is that, if it is right that one competitor is simply following another competitor's actions, then even if competitor number 1, who is not making the claim, has indeed directly fed in an unlawful overcharge into its pricing, then it is that loss, that competitor's loss which is going to be in issue and not the company that has simply followed the price. So there is no necessarily causal connection between one competitor and another competitor in terms of the loss -- the underlying loss. If the underlying loss is that of the competitor, then it is not, therefore, going to be that loss which is being avoided by another competitor simply following that other competitor's price.

The next mechanism is executive pay incentives, which we respectfully suggest is simply speculative and even less direct than each of the other posited channels. There is evidence that MSCs were considered by some merchants, but no evidence that it was factored into pricing decisions, save for the evaluation of a proposed or target price by one particular merchant in one particular industry, who nonetheless then had to take a market price for the individual product. I will come on to deal with that in closed session.

The next, fourth factor is marginal costs versus fixed costs. Quite of lot of this has been gone through in cross-examination. I did say I would pick up briefly on where we see the distinction being drawn. Could we look, please, in the Commission 2019 Guidelines

{RC-J1.4/19/14}, paragraph 52.  We see the distinction is being given:

"When the overcharge impacts the direct purchaser's costs which do not vary according to the input quantity ... it is less likely to be passed on because such costs typically do not affect the direct purchaser's price setting, at least not in the short run ... fixed costs may vary in the long run ... By contrast, when the overcharge impacts the direct purchaser's costs which actually vary according to the input quantity (i.e. variable costs), it will generally be more likely to be passed on, at least to some extent.  This is because marginal costs (a subcategory of variable costs that can be defined as the cost increment incurred ...) typically affect the direct purchaser's price-setting decisions."

So it is recognising you can have a category of variable costs, in my submission, that is broader, that do not necessarily feed into the price-setting decision, whereas conventional theory is that marginal costs would.

Lest that be considered to be somehow a misreading of that, could we look, please, at {RC-J1.4/53/232}. This is the RBB report rather than the Commission Guidelines.  We have separate definitions within page 232 for [Marginal cost], which, at the bottom of the page, is:

"The additional cost associated with supplying an additional unit of output."

Then {RC-J1.4/53/235} there is a separate definition is given for "Variable costs", which are said to be:

"Costs that vary with the level of output."

So RBB have themselves given different definitions to those concepts. Let us see how that matters {RC-J1.4/53/66}. Rather than the annex, this is in the main body of the report, and at paragraphs 110 to 111, we have:

"Basic economic reasoning predicts that a firm's 'marginal' costs ... have a critical influence on its pricing decisions ...

"... an increase in an input cost caused by a competition law infringement ... may be expected to have some impact on the price that the purchaser in question charges its customers if it affects the purchaser's marginal cost."

That bears the definition that we have described.

So whilst we recognise that MSCs are formally variable, if they are not in fact factored into the pricing decision, then they should not be treated as being equivalent to a marginal cost, and it necessarily follows, we say, that they do not share the economic characteristics of a marginal cost for the purposes of Mr Holt's analysis.

THE CHAIRMAN: It is all a bit circular, though, is it not? I mean, you are saying, if it features in the price-setting, then it is probably a marginal cost.

MR BEAL: Well, I am recognising simply that RBB and the Commission Guidelines acknowledge that you can have a subset of variable costs which do affect pricing, but a broader, therefore, category of costs that do not necessarily, because otherwise everything would be variable and you would not need to draw the distinction. So the fact that the cost is variable does not give you everything you need for the analysis that Mr Holt wants to bring to bear. That is, I think, probably as far as the point goes.

THE CHAIRMAN: Well, Mr Holt always referred to variable costs, I seem to remember.

MR BEAL: He has.

THE CHAIRMAN: But did he mean marginal costs?

MR BEAL: I did have this debate with him.

THE CHAIRMAN: I do not know whether that -- but you asked him that?

MR BEAL: I did ask him that. I cannot remember what the answer was, I am afraid, off the top of my head.

THE CHAIRMAN: Okay.

MR BEAL: What I can show you is that Mr Holt recognises that changes in fixed costs do not affect the profit maximising price, that is {RC-F/19/48}, paragraph 82. He says:

"Fixed costs are costs that do not vary with the level of output (e.g. the cost of R&D or store rent). Changes in fixed costs do not affect the trade-off faced by a firm because they are incurred regardless of the level of output. As a result, changes in fixed costs do not affect the profit-maximising price and will not generally be passed on."

Now, there was a line of questioning from the Tribunal, from Mr Tidswell, on {Day8/93-106}. It is a very long section so I am not going to go through it, but it is simply to point out that Mr Tidswell was trying to capture how, if it was an overhead cost, which you could not necessarily predict would be variable, semi-variable or fixed, what the mechanism would be for actually passing that price on -- that cost on, sorry, if you could not work out how it is featuring into the pricing mechanism on a short-term marginal cost basis, and it was the "how" question that, I am afraid, went rather unanswered.

Just for your note, Mr Holt did not even try to model a regression based on overhead costs, that is {Day7/92}.

THE CHAIRMAN: Was semi-variable, was that his categorisation?

MR BEAL: I think it came from Mr Economides --

THE CHAIRMAN: Yes.

MR BEAL: -- but was recognised -- electricity, I think, has a fixed component and a variable component and therefore people were suggesting it was semi-variable when it was lumped together in one bill. That would be a classic example. If you remember, I had a discussion at some point with some witnesses about steel smelting versus a bakery versus various other businesses which would have high variable electricity costs, but it would be treating the electricity bill as an overhead.

THE CHAIRMAN: But you are accepting that MSCs are variable?

MR BEAL: They are formally variable because they change with output.

THE CHAIRMAN: Output, yes.

MR BEAL: Now, can I then move on to factor 5.5: the role of qualitative evidence. The short point I make here is that the RBB report and the Commission Guidelines and the references that you have been given at various points recognise that it is helpful to look at qualitative evidence and you have had a variety of qualitative evidence given to you. For your note, the references in question, the RBB report, paragraph 485 {RC-J1.4/53/1082}; Commission Guidelines 2019, paragraph 162, that is {RC-J1.4/19/35}; and in particular in the Commission Guidelines {RC-J1.4/19/29}, recitals 123 to 127. It might be worth turning that one up so that I can make the point good. That is {RC-J1.4/19/29} and it is recitals 123 to 127, there is some guidance about using qualitative information, and also deals with the smallness of the MIF point.

THE CHAIRMAN: Can you make it a bit bigger? Thank you.

(Pause).

MR BEAL: So that is looking at internal pricing data, internal pricing documents, seeing how the cost has been dealt with in the real world and recognising that if it is very small, it may simply not get picked up.

In terms of the experts' responses to that qualitative evidence, Mr Holt did not, in my respectful submission, take into account the oral evidence that had been given by the witnesses. I take the point that if a responsive witness evidence from Holland & Barrett was only given the day of his responsive report, it will not appear in his responsive report. The difficulty is that he did not then change his evidence orally to factor in the evidence that -- the factual evidence that had in fact been given.

Mr Harman essentially tried to recast the evidence through his eyes, as to what it meant and what it said. Ms Webster did not conduct an independent analysis of that factual evidence which, with respect, I find strange, because, ordinarily, an expert would be told what the factual evidence is and would opine on the basis of it. One does not need an expert to be imposed interstitially in that process.

Mr Coombs accepted in principle that qualitative evidence was important, but acknowledged he had not paid any attention to the oral evidence given by merchants, that was {Day11/56-57}. We say that the evidence from the merchant claimants is important. It sets out the pricing policy they have adopted and how the MIFs were accounted for. It has been suggested that evidence is unsatisfactory and does not deal with the things it should deal with. It dealt with the very issue that is in issue in this case: how does the firm approach MSCs as a cost, and how does it price its downstream goods or services? So it gave evidence about exactly the issue that is before this Tribunal and I will not repeat the submissions I made yesterday about the disclosure exercise and so on.

THE CHAIRMAN: I mean, it is not -- I think the complaint is

that it is feeding into your case on direct and
proximate, but actually it is important for choosing
the appropriate proxy, is it not?

MR BEAL: Yes. Well, it is doing two things. Firstly, it is relevant -- if, contrary to Mr Holt's opinion, these costs are not treated in the way that they would be according to micro-economic theory -- and it is important for the Tribunal to know that, that is the qualitative evidence overlay that we have seen from the guidance, and secondly, it does therefore direct what the choice of proxy should be, and Mr Holt's position has been throughout, this is a matter of economic theory, I can simply look at what economic objective characteristics exist for this type of cost and predict that every merchant, if it is acting rationally, will follow economic theory, and he set out his stall, as I have said, very early, and that was a point he wanted to take. When, in fact, the merchants have turned round and said, "Well, that is not how we do things", he has an issue. He can either stick with his theory or he can come up with an alternative theory in the light of the facts as they are, and the alternative theory that he then advanced is the indirect channels, which then raises a legal issue because that is not the direct mechanism that he was positing with his

original theory of COGS as the proxy.
MR TIDSWELL: But you are not running a positive case about the indirect channels, are you?
MR BEAL: No, we are facing responsive -- that responsively, because it is not our burden of proof. We have developed a response to it because it has been articulated as a fallback case by Visa.
MR TIDSWELL: So the purpose of the evidence that you put in your positive case was to deal with the question of proxy -- proper proxy.
MR BEAL: Yes, and essentially what Visa have done with that evidence is said "Ha-ha, here is a whole bunch of documents that show you looking at profitability studies for EBITDA and everything else and we can infer that therefore you have monitored costs and prices and therefore, in the long run, they have been taken into account". The question then, legally, is: is that enough to satisfy the *Trucks* test?
Now, the next point, factor 6, is time frame. That is probably an appropriate moment to pause for ten minutes.
THE CHAIRMAN: All right.
MR BEAL: But I am making decent progress. I will need to go into --
THE CHAIRMAN: You are going into closed --

MR BEAL: I do need to go into closed relatively soon.

THE CHAIRMAN: Surely, yes.

All right, but we will have a ten-minute break.

(11.22 am)

(A short break)

(11.36 am)

THE CHAIRMAN: Yes, Mr Beal.

MR BEAL: The short term versus long run -- short run versus long run distinction. One of the points that we had thought Visa was making was that all costs become variable over the long run, therefore it is a variable cost, and that has been decried, both, as we understood it, by Mr Holt and then in the further note handed up by Ms Boyd KC, at paragraph 10.

If that is the case and that is not part of Visa's case and it is not part of Mr Holt's evidence, it is difficult to understand why, if we look, please, at {RC-S/6/33}, paragraph 71.2 of Visa's closing, Visa is asserting that:

"Costs that are fixed in the short term may become variable in the long term ..."

So that seems to be a vestige of the argument I thought was being run. But, look, let us not get bogged down in precisely what their case is --

THE CHAIRMAN: It is not even part of your case that these are fixed costs, though.

MR BEAL: No. No.

THE CHAIRMAN: As I understand it.

MR BEAL: Anyway, I was trying to deal with that argument that it is no good simply saying that all variable -- all fixed costs become variable in the long run.

THE CHAIRMAN: Yes.

MR BEAL: That -- we say that is not the right way of looking at it. But anyway, it matters not, for the reason, sir, you have just given.

What does matter is how the mechanism for the price -- for the cost being suffered and being translated into prices downstream, how that mechanism works. What we respectfully suggest is that Visa is essentially seeking to apply a short-term marginal cost pricing framework to a period which, on their case, extends over a decade or more, and we say that you do not get the same trade off -- that is the wording used in the RBB report, the same trade off between price and sales -- volume of sales on the basis of a long-run analysis, because in the long run, the focus is on the profitability of the firms and exit and entry decisions, investment decisions and so on, not on the short-term trade off between price and volume of sales.

This point comes out, we respectfully suggest, very clearly when Mr Tidswell pressed Mr Holt to explain how you could go from economic incentives in the long run to find out how the price -- the loss pass-on mechanism is working. Please could we look at {Day8/99-102}, and the Tribunal will be able to recall quite how that exchange unfolded. Please would you just cast an eye over 99 through to 102.

(Pause).

If we could then, please, turn to {Day8/110}, we see the position that Mr Holt ended up with, at lines 7 to 16, where:

"My point is that we can bypass [the analysis of the mechanism] because the underlying incentives are so clear, and the general economic principles so clear, and that while I recognise that there are some real-world short-term considerations, that in the longer term all of these channels exist, and which ones will be adopted in any particular set of circumstances is almost impossible to say. Therefore, in my view, on a balance of probabilities, or what is likely to happen, it is better to look at the economic principles."

That would, of course -- it is difficult to see how pass-on would not apply to every merchant in every circumstance regardless of what the factual position is.

The only other point to draw out in relation to long-term analysis is we respectfully suggest that the length of the claim period cannot help with this issue for a couple of obvious points. Firstly, claim periods can vary. We do have some claimants who have only started their claims recently. Secondly, where you have a long-running, ongoing infringement, as in this case, it would lead to potentially different considerations applying to different claimants depending on when they joined the claim without an underlying substantiation of why that should be should. Thirdly is the triggering point, the tipping point at which, over that period, the loss actually becomes avoided loss by being transferred to another person. I should add, in Holt 12, at paragraph 287, which for your note is {RC-G/17/98}, Mr Holt recognises that it becomes more and more difficult to control for confounding factors in regression analysis over the long run, so he does recognise that point.

Right, could I then please move on to the choice of proxy cost, and the terrain is pretty well marked here. We have obviously opted in our alternative case -- our primary case, as you know, is that it is not appropriate to pick a sizeable proxy because it ends up misstating the impact or significance of the small price that is suffered here. But even if that were not right, we say total overheads should be the proxy, because it is the third best option is the way Dr Trento put it.

The alternative proxies suggested by Visa certainly all lead to very high costs being compared with downstream prices. So the first is obviously COGS, which we have discussed at length, both yesterday and today. The next one was labour costs. We do respectfully suggest that they will be substantially higher. The evidence seems to be that most businesses treat that as a variable cost and obviously, for most businesses, the number of staff you have will vary with the output of your business, but we have seen that certain businesses do in fact treat labour as an overhead cost rather than a variable cost.

VAT is not a cost, and I have already discussed it. Excise taxes is even less suitable than VAT. It is not necessarily ad valorem in nature, but it is unlikely to be industry-wide, save within a very narrow band of industries, alcohol and cigarettes supplies being predominantly the excise taxes in this country, oil, I suppose. But it becomes very, very bespoke, and in any event, the analysis of the reaction to excise taxes is by no means uniform, for reasons I will come on to give you two references for. Different academic studies have reached polar opposite views on the treatment of excise duties.

THE CHAIRMAN: Is that the same as tariffs?

MR BEAL: I am not going to go into tariffs until I have to, which will be tomorrow.

Next, implications of the choice of proxy cost. I do not think I need to do more on this than point out the obvious, which is, if you are selecting as a proxy something that is very significant and is likely to factor directly into the firm's gross profit analysis so that it is frequently taken into account in pricing decisions, you will get a more obviously significant correlation than you would do if you are looking at a very small cost which is packaged as an overhead amongst other overhead costs by the business. Therefore, two immediate consequences. First, the regression analysis is likely to overstate the material importance of the MSCs, and that is important because regression allows you to -- it is not a proxy for causation, it allows you to infer causation in certain circumstances; it is correlation, not causation.

Secondly, whilst it is harder to perform a regression analysis on total overheads because of the structure of the data, that does not necessarily mean that the STP(?) pass-on will be less precise than for COGS. You have got our point that there is no point asking the wrong question with more specific data, if, in fact, you have got enough data on the right question to still give a reliable estimate of what is likely to be the treatment of a particular cost, which is subject to our primary case not being accepted.

Now, the criticisms by Visa of our overheads analysis are, we say, with respect, inaccurate. The role played by fixed, semi-variable and variable costs was considered with our cross-examination of Mr Holt {Day7/33-34}. That is where we looked at the various different components. One of his responses was to refer to the Monte Carlo experiment. That is dealt with at {Day7/93-98}. In essence, the Monte Carlo experiment he alighted upon essentially weighed into the thought experiment, a necessary finding that the component of fixed costs would vary more than the component of variable costs and therefore the analysis was skewed. We suggest there is no basis within the evidence to consider that an individual component within a stack of overheads is going to be passed on at a different level from any other. So the fact that a bucket of overhead costs will have both fixed, semi-variable and variable elements does not mean that the treatment of that bucket of costs is going to necessarily change depending on the preponderance of the underlying component, or there is no evidence to suggest that it would.

Next point, sectorisation. So this is issue 9. We have not suggested that we are representative over every sector in the economy. What we are representative of, as far as we can be, is the claimant groups within the SSH claim. What was conducted -- the exercise that was conducted by Dr Trento with Mr Economides essentially looked at: who are the claimants; what are their business sectors; how can we group those business sectors to bring order to what would otherwise be chaos? They did a bottom-up approach to that, they looked at the characteristics of the different claimants, or rather Mr Economides did and then Dr Trento relied upon his analysis, and so it was bespoke for the claimant groups.

Now, the opposite way of doing that is to take Visa's 14 sectors and to consider what that tells us. The answer is that does not tell us very much, because we do not actually know how those 14 sectors have been constructed by Visa. We have not had any witness evidence from Visa, we do not know to what extent that they actually cover the entire economy. I think I touched on this yesterday, when looking at the economy-wide issue. We are simply not in a position to be able to do anything other than say a plague on both your houses, to the extent you can point to some odd examples of us bunching things together, we can throw the same criticism back at you. There is ultimately -- as I think, Mr Holt accepted in cross-examination, there is going to be no perfect allocation process for sectorisation, you have to make an evaluative judgment.

What we have done is to set out our evidence which enables Visa to critique it. What Visa have not done is set out the evidence that enables us to have any idea as to how they have gone about doing it, save that particular merchants are categorised internally for reasons we do not understand by Visa in that way, so it is taken as a fait accompli. That is all I wish to say on that.

Academic studies is factor 10. Two short points here. Firstly, Mr Coombs did not in fact use academic studies to do anything other than provide a cross-check for his analysis based on regression of public data. That is {Day10/154:19-24}. Ms Webster considers that no meaningful conclusions can be drawn from academic studies due to a number of limitations but that they might help inform an in-the-round assessment. That is

Ms Webster's first report, volume 3, paragraph A.11 {RC-F/16/7}. That is what two of the witnesses say.

Now, the third expert witness is Mr Holt and he has relied heavily on academic studies to produce a figure which he then triangulates essentially as being one-third of his overall assessment. Now, the difficulty with that is, when we come to look at two specific studies that deal with MIFs and MSCs, they suggest that there is no pass-on to merchants and those are two studies that Mr Holt did not consider to be reliable. Every other study -- I say, "every other study". A lot of the other studies relate to alcohol taxes and cigarette taxes or VAT, or they relate to minimum wage legislation and how that is factored into labour costs. They do not speak with one voice. For example, Bergman and Lynggård, this is {RC-J6/31/1}, found excise duty led to overshifting for prices of beer, but undershifting for spirits. In contrast, Ali et al {RC-J6/10/1} found undershifting for beer and overshifting for spirits, or what they term "liquor". So it is quite difficult to make sense of that.

You have then got, in any event, the publication bias point, which is Ioannidis et al 2017, that is {RC-J1.6/91/1}. Then you have the two studies that actually address MIFs in the context of price changes in

Australia, the first of which is Chang et al, that is {RC-J8/8/1}. I went through that with Mr Holt in cross-examination so I am not going to go back to that. In short, this was a study that was sponsored by Visa that found that there had been no ostensible or no detectable pass-on of decreases in the MIF and into the MSC into merchant prices downstream to customers.

The second paper that deals with this was not cited by Mr Holt, I put it to him last week in Trial 2B. I would like to just pick this up, please. It is the CRA International paper 2008, co-authored by, amongst others, Professor Bishop. It is {RC-I4/7.1/1} is where it starts. That is just to show you what the report is. It is a study into the "Regulatory intervention in the payment card industry by the Reserve Bank of Australia, Analysis of the evidence". If we go to {RC-I4/7.1/6}, please, what we see there is an "Executive summary". It explains the nature of the policy intervention was to:

"... [reduce] the interchange fee on four-party credit cards by approximately 50% and prohibited no-surcharge rules. Prior to [this] ... interchange fees ... averaged approximately 0.95% and ... merchants that accepted Mastercard and Visa ... were allowed to offer cash discounts and to suggest that customers use other methods of payment ..."

We then see in the last substantive paragraph up from the bottom, there is a section that begins:

"Further, the RBA's regulations have clearly harmed consumers by causing higher cardholder fees and less valuable reward programmes and by reducing the incentives of issuers of four-party cards ... At the same time, there is no evidence that these losses to consumers have been offset by reductions in retail prices or improvements in the quality of retailer service. The empirical evidence thus provides no support for the view that consumers have derived any net benefits from the intervention."

At page {RC-I4/7.1/8}, please, in the bottom half of that section, there is a paragraph that begins:

"One of the RBA's key expectations was that reductions in interchange fees would lead to reductions in merchant service charges, and that those reductions ... would be passed on to final consumers ...

"As expected, the reductions in interchange fees have led to reductions in merchant service charges. Merchants however have not presented any empirical evidence documenting the extent to which reductions ... have been passed through to consumer ...

"Instead we see merchants lobbying aggressively for further reductions ..."

It is suggested:

"... merchants have retained a significant share of the reductions ... rather than passing them on ..."

{RC-I4/7.1/17}, please. That, in a sense, is some qualitative analysis, but the paper does go on to look at the evidence of the actual effects of the RBA's regulations, and in the third bullet down, it says:

"On the acquiring side, merchant service charges for four-party schemes have declined in line with the reduction in interchange fees."

Obviously that was the APO point I was putting to Mr Holt last week. Then page {RC-I4/7.1/36} -- sorry {RC-I4/7.1/28}, first. At page 28, we see, under paragraph 4.3:

"As expected, merchant service charges for Visa and MasterCard have declined considerably ... Interchange fees fell by an average of ... 40 basis points ... from ... 0.95% to 0.55% ... merchant service charges for four-party credit cards fell by approximately the same amount. The average merchant service charge ... declined over this period by 44 basis points ..."

So it is indicating a correlation between the drop in a Merchant Service Charge and a drop in the MIF.

At page {RC-I4/7.1/36}, they acknowledge that the calculation of merchant pass-on as opposed to acquirer pass-on was more difficult and they then set out three reasons on that page why they were not able to detect any particular movement in downstream prices. Please can I invite you to read those.

(Pause).

THE CHAIRMAN: Yes.

MR BEAL: We then see over the page at {RC-I4/7.1/37} there is a critique of the theoretical -- even the theoretical position, if firms are not in fact price-takers the analysis becomes more complex, and:

"Economists who have considered pass-through rates in market where markets are oligopolists offering differentiated products find that the rate of pass-through depends on the nature of consumer demand for the different firms' offerings."

Finally, please, at the top of {RC-I4/7.1/38}, there is a reference to another study that simply found that:

"'Retailers have adapted to the new interchange levels by broadly speaking 'pocketing' the reduction in MSCs ... and using the new transparent MSCs ... to force down the MSC's they pay to all of the card schemes."

That was the conclusion that was reached.

The final conclusion at page {RC-I4/7.1/63} was that we had therefore had differential rates of APO and

MPO for this -- as a result of this particular policy intervention. That is the fourth paragraph on that page under "Summary ..." -- it is the second paragraph under "Summary ...", outlining the overall conclusion.

So the consequence of that is that two of the studies where we have direct analysis of a comparable reduction to the IFR in Australia through regulatory intervention have led to a finding of, at least in this study, complete acquirer pass-on but of no detectable merchant pass-on in downstream prices.

THE CHAIRMAN: This study was not considered by any of the experts?

MR BEAL: It is footnoted, I think, by Ms Webster --

THE CHAIRMAN: Right.

MR BEAL: -- in her fourth(?) report, but she says, well, it essentially follows Chang, therefore I am not going to treat it any differently from Chang. Mr Holt has not referred to this report, full stop, and I cross-examined him last week on why not, because he has partnered up with Charles Russell --

THE CHAIRMAN: You said that before.

MR BEAL: I did. CRA. Charles Rivers Associates, perhaps, in preparing his report, and I asked him whether or not they had drawn this to his attention.

Visa have suggested in closing that Dr Trento relied on a study of supermarkets which found a pass-on rate of between 52% and 97% and he had agreed that this could be used for Marks & Spencer. Could I actually please take you to his evidence, that is Trento 2, 15.23(d), that is {RC-G/2/260}. Subparagraph (d) there says:

"A previous existing study finds evidence of [those rates] ..."

I will not read out the next bit:

"I consider that this study could be informative of the pass-on of other overhead costs, at least for the geography and period covered by the analysis, although -- in the absence of additional evidence on the comparability of the affected market with the market analysed by the article -- the relevance of the article's pass-on estimate to the current case is less clear."

He then says in 15.24 that his view is:

"... the range of estimates is ... wide ... In the light of this range of results, I am not able to provide a reliable pass-on estimate for the pass-on of overhead costs in the Supermarkets sector."

So that is his overall conclusion.

What actually was put to him in cross-examination was this is the only -- because he does not have any regression, because he could not regress the data sufficiently for various reasons that he has gone through, it was put to him that this is the only evidence, therefore, going on your case for the supermarket sector, and he said, "Well, that is all there is, yes". What we respectfully suggest is it is a stretch to suggest that he has endorsed those ranges, given that his conclusion at 15.24 is he cannot provide a reliable estimate. The overall conclusion that is then given at 15.38 {RC-G/2/262}, is, having --:

"I instead consider that the total overhead costs are a better proxy. Using a modified version of Mr Holt's model (where the modifications are necessary to estimate the pass-on of total overhead costs), I estimate non-statistically significant (and slightly negative) pass-on of total overhead cost, i.e. I find no evidence of pass-on of those costs."

So there is in fact an approach to remodelling of Mr Holt's model where he finds that the results are not consistent with a finding of MPO.

As for the paper in question, could I please take you to that. It is {RC-J6/186/1}. This is the one that Dr Trento recognised could be potentially relevant. We see from the abstract that it:

"... estimates the pass-through of minimum wage increases into the prices of US grocery and drug stores

... between 2001 and 2012 ...

"We find that a ... minimum wage hike translates into a 0.36% increase in the prices of grocery products."

It says:

"This magnitude is consistent with a full pass-through of cost increases into consumer prices."

I will show you exactly what their findings were.

In the right-hand side of that column, they set out the relevant parameters for the study, what was being looked at and minimum wage increases and how 2,500 distinct grocery and drug stores and their pricing and so on.  It also says there, if we then go, please, to {RC-J6/186/2}, on the right-hand side, the second paragraph down, there is a paragraph that begins:

"Most closely related to our work are the contemporary papers by Leung (2021) and [then two other academics in] (2017) ... These papers focus on a different period ... based on another dataset ... and use different identification strategies.  Ganapati and Weaver ... find a zero pass-through of minimum wage increases into prices and Leung ... more than a full pass-through."

So it appears that the academic studies are not speaking with one voice either.

If we then please go to page 902, internal page, 13 within the Opus folder {RC-J6/186/13}, we see on the left-hand side, under B:

"One striking result from our baseline regressions ... is that grocery stores appear to anticipate future cost increases by increasing their prices as soon as the minimum wage hike is announced (i.e. before the hike is implemented)."

So they have jumped the gun.

Then, on the right-hand side, they say:

"Time-dependent models with a low probability of price change can feature a substantial degree of anticipation."

They do, however, find that, after that, in the next paragraph down, they say:

"To further illustrate these anticipation effects ..."

They look at some figures. They say:

"The figure provides evidence that prices respond at legislation when implementation happens shortly after legislation, but not when implementation is at least a year out."

So they are recognising that the impact on pass-through is going to be happening relatively quickly.

At {RC-J6/186/15}, please, right-hand side, just in terms of the overall cost figures that we are talking about, under "Empirical Calibration", the authors:

"... estimate that the labor cost share of grocery stores is 16% ..."

So it was a cost that was a high percentage of cost and it was that cost which was going up.

The reason why Dr Trento acknowledged it was potentially informative was it was not looking at the Cost Of Goods Sold, which, for a grocery store, would be obviously the cost of buying in the product.

MR TIDSWELL: Presumably, if you are right about the proxy, then you would say any of the public studies that deal with Cost Of Goods Sold or approach it as profit maximisation are not useful?

MR BEAL: Yes.

MR TIDSWELL: If you are wrong about the proxy, then you still say that these are not reliable for the reasons you advance?

MR BEAL: Well, insofar as they are providing evidence of, empirically, in certain industries over certain periods of time, how Cost Of Goods Sold would be reflected in downstream pricing, then they offer a range of estimates and they stand or fall with the quality of the work. I do not seeking to behind those, but they are just not

-- we say they are not asking and answering the right question. But, yes, if I am wrong on Cost Of Goods Sold and it is -- the MSC is a significant marginal cost that feeds into the short-term pricing maximisation, then I do not think, on my case, you need to go to the academic studies, because the intuition and the practice would suggest, if that is right, there is pass-on of a higher level than is estimated by Dr Trento. One example of that is in the acquirer sector with acquiring services and the pass-on rates we suggest for APO.

THE CHAIRMAN: Yes. But in this study, we are talking about labour costs.

MR BEAL: We are talking about a minimum wage increase.

THE CHAIRMAN: But that was not part of COGS, it was -- was it treated --

MR BEAL: Well, it then says:

"Variable costs include labor costs, costs of goods sold and some smaller items ..."

On this page.

THE CHAIRMAN: Variable costs.

MR BEAL: Well, they seem to be distinguishing between labour costs as a variable cost and the Cost Of Goods Sold, because they are treating them as two different things.

THE CHAIRMAN: Yes.

MR BEAL: To be fair to Mr Holt, he also treats labour costs as a separate proxy from COGS. The question is are they variable or are they an overhead, and some businesses treat them as an overhead. My understanding is most businesses treat them as variable costs, but ...

MR TIDSWELL: I thought that Dr Trento thought it was interesting because [redacted] -- sorry, I am not going to say that. I thought it was interesting for the reason set out in that subparagraph (d) you showed us and I think we have had some evidence that some retailers treat that labour costs as overheads and some treat them as Cost Of Goods Sold.

MR BEAL: Yes. That is certainly true.

MR TIDSWELL: Some of them who treat them as overheads still sometimes consider them when they are thinking about --

MR BEAL: For pricing purposes.

MR TIDSWELL: -- pricing purposes.

MR BEAL: We will come to look at a restaurant that does that.

MR TIDSWELL: Yes.

MR BEAL: Can we then please go to {RC-J6/186/16}. On the right-hand side:

"... the pass-through rates in panel A do not take into account that minimum wages increases may also increase the cost of goods sold ... in grocery stores."

Also, sir, it is recognising an endogeneity problem:

"Wholesale prices, in turn, may increase if minimum wage workers are employed in the production of grocery products."

The bottom line, ultimately, looking at page 17 {RC-J6/186/17}, internal page 906, there is a table at the top, "Implied cost pass-through" on baseline 1 is in the order of 96%, but once you have a chain-time fixed effect, it drops to 51%. So even on this -- it is that that therefore explains the range between 51% and 52% and 97% that is attributed to Dr Trento by Visa's closing submissions.

That is all I propose to say on academic studies.

Public sector -- sorry, public data involves the comparison of cost indices with price industry -- consumer price indices. It suffers from a number of problems, none of which I propose to develop in detail. One is simultaneity bias which is a form of endogeneity. Secondly, measurement error problem, and third omitted variable bias. All of these were looked at in great deal with Mr Coombs and with Mr Holt.

A further major issue concerns the way in which elasticity is derived from public data and converted into pass-on rates. That is dealt with, for your note, in Trento 2 at paragraph 6.60 to 6.64 {RC-G/2/104-105}, and it was also a point raised by Professor Waterson in the hot tub {Day6/18-39}. Mr Holt acknowledges there are imprecisions in the public data, see {Day8/1}, and he still continues to rely on public data and he still, as I understand it, factors it in as a third of his average of averages approach.

It is at this point I would ask to go into closed so that I can make some points about the merchant evidence.

THE CHAIRMAN: Yes.

(In private)

(In open court)

Reply submissions by MR JOWELL

MR JOWELL: So we say that that consideration, and one can see it in the Supreme Court's judgment in *Sainsbury's*, that that consideration of the need to allow claims by indirect claimants is a very important factor which colours the Supreme Court's approach to the proper application of the "proximate and direct" requirement in that case, and more generally in trying to set out the proper approach in other competition cases.

Now, the Supreme Court held in that case that, contrary to the Court of Appeal's view and that of the Tribunal below, the broad axe, the power to estimate on a rough and ready basis, applied not just to the calculation of initial loss, but also to the extent of mitigation of loss, and it also made clear with the Court of Appeal that there is no absolute requirement for there to be an indirect claimant. More broadly, the Supreme Court made it clear, in our submission, in its reasoning that both the Tribunal below and to an extent the Court of Appeal had adopted too stringent an approach to the pass-on defence. So when my learned friend invokes *Sainsbury's* at first instance and says, "Well, look at the approach of *Sainsbury's* at first instance", we respectfully say that that approach has in effect been overruled, or at the very least has been ruled to be incorrect by the Supreme Court, if not --

THE CHAIRMAN: I do not recall them referring to that.

MR JOWELL: Well, by implication they say -- well, the Court of Appeal do say that the Tribunal below got it wrong in relation to the requirement for there to be an indirect claimant class and the Supreme Court say that the Court of Appeal went too far in saying there could be no use of the broad axe.

THE CHAIRMAN: But I do not think the CAT finding that there was no pass-on --

MR JOWELL: No, that --

THE CHAIRMAN: -- that was not overruled.

MR JOWELL: It was not overruled because it was not appealed.

THE CHAIRMAN: Yes.

MR JOWELL: But -- when it was appealed to the Court of Appeal, they effectively reformulated what the Tribunal had said about pass-on and the -- but then it was not appealed to the Supreme Court, no doubt because it would not have been -- that finding would not have been considered to be in itself a matter of public importance. But in my submission, the effect of the reasoning of the Supreme Court is inconsistent with the approach of the Tribunal in *Sainsbury's* at first instance.

We suggest that, in that case, the Supreme Court made it clear that in the circumstances of an MSC, which is an industry-wide visible cost that features in the budgeting and pricing decisions of the merchants, there was, in principle at least, sufficient proximity for there to be pass-on recognised, and it did so notwithstanding that, in paragraph 225 of its judgment, the Supreme Court expressly recognised that the MSC would in all probability not be addressed as an individual cost, but rather might just be taken into account along with a multiplicity of costs when developing annual budgets. In our submission, that paragraph is just not consistent with the narrow approach that my learned friend urges on you. If the MSC was taken into account along with multiple other costs when developing the annual budget and that annual budget then influenced prices, then that is sufficient -- we say the Supreme Court was saying that that is sufficient to be taken into account in calculating pass-on in the circumstances of an MSC.

MR TIDSWELL: But that is not a submission that the annual budget process is sufficient, is it? You are not arguing that, are you?

MR JOWELL: It is not sufficient, I accept that, but in the context of an MSC, it is sufficient provided, in our submission, you then have -- you would have econometric evidence to fill that gap. That is our submission.

MR TIDSWELL: But the econometric evidence is not evidence of causation, though, is it?

MR JOWELL: In our submission, it is evidence of causation --

MR TIDSWELL: You are saying it is evidence --

MR JOWELL: Yes, yes.

MR TIDSWELL: Right. So when it is said that econometrics is evidence of correlation not causation, you are disagreeing with that?

MR JOWELL: It is evidence for causation. I mean, that is how --

MR TIDSWELL: So you are saying it is an item of evidence from which we could infer causation?

MR JOWELL: From which one could infer, exactly. Precisely.

MR TIDSWELL: Yes.

MR JOWELL: So we say that it is simply wrong then, in light of that, for my learned friend to take the stance he takes in which he says, no, you are only looking at cost-plus pricing or very, very direct inputs directly into pricing. We say that is simply inconsistent with the approach of the Supreme Court in paragraph 225.

We also say that such an approach must be wrong when you look at what happened in the *Merricks* judgment in the Supreme Court, because in that case the Supreme Court had before it a proposal, a proposed methodology for a sectoral approach to pass-on advanced by the class representative, it was a very high level econometric sectoral approach to be based on studies and econometrics. Now, if my learned friend is correct that pass-on of an MSC can only be established by cost-plus or closely analogous direct COGS-based pricing, the Supreme Court in *Merricks*, in my submission, would have said, "Wait a moment, this methodology is hopeless, because you, Mr *Merricks*, cannot possibly establish a test for proximate causation, that would require you to establish that the MSC features in prices on a cost-plus basis, or as part of immediate COGS, how are you going to do that"?

MR TIDSWELL: Is that not because it was a claim for aggregate damages? Does that not change the situation?

MR JOWELL: Absolutely does not change the position at all and that is what the Supreme Court makes absolutely clear in *Sainsbury's*. It is exactly the same. The burden of proof to prove pass-on is on the claimant, the indirect claimant, and there is no difference between how pass-on is used as a sword and how it is used as a shield, and if you do start introducing differences, you immediately get into multiple compensation, because the defendant then becomes liable, potentially, twice for the same economic loss.

This is fundamentally why one cannot -- you cannot, in our submission, rightly, in law, accept the submission that things like the EBITDA route of -- that we discussed and which target EBITDAs are set and gross margins are set as a result and those target gross margins then feed into pricing, that cannot be excluded as a method of -- as a price on -- as a pass-on mechanism, and nor, in our submission, can pricing via competitors. I mean --

THE CHAIRMAN: But --

MR JOWELL: If you just consider an example. Suppose you have a market in which you have got a price leader and the price leader takes into account costs in exactly the way that my learned friend says one has to, so they -- the price leader takes the cost in question and feeds it into the price of their goods directly, but everybody else in the market, they follow the prices of the price leader. Now, on my learned friend's logic, everybody who is a customer of the price leader has a claim. Say there is an upstream cartel. Let us imagine, say it is a soap factory. There is a -- the soap factory buys glycerin, right, and there is a cartel in glycerin, okay? The price leader feeds that price of glycerin directly into the price of soap that it charges consumers. All the other soap factories, they just price their soap on the basis of the price leaders, which is 5% below, lever brothers prices, if you like. Now, if you follow my learned friend's logic in which you exclude pricing barrier (inaudible) competition as pass-on, the implication of that is that the customers of the price leader, they have a claim against the glycerin cartellist to be compensated, because the price is fed directly through to them. But everybody who buys from everybody -- all the other soap manufacturers in the market, even though they suffered exactly the same loss de facto, they do not have a claim.

Now, that, in my submission, will drive a coach and horses through the compensation -- the fair compensation to indirect claimants, and one has to bear that in mind, and that is what the Supreme Court was bearing in mind where it adopts in the context of competition law the somewhat looser test for proximity than you might expect in, say, a contractual context.

THE CHAIRMAN: What do you say the Supreme Court was applying as its test for factual causation?

MR JOWELL: I accept -- well, it was saying that in the context of -- as I said, the words "direct" --

THE CHAIRMAN: What was the test?

MR JOWELL: It was requiring a direct proximate cause, but what constitutes a direct proximate cause is not an absolute standard, it is not --

THE CHAIRMAN: So it is not an aspect of legal causation, you are accepting that "direct and proximate cause" is the relevant test to apply to the facts?

MR JOWELL: I accept that that is -- as I said, I started with the proposition that as a matter of the general law, I accept that that is the proper approach for mitigation.

THE CHAIRMAN: So where the Supreme Court says "legal or proximate causation is straightforward", we are not -- that is not what we are talking about?

MR JOWELL: No, forgive me, I disagree. I think -- sorry, no, I -- on the terminology, I think that -- I think that this is a total red herring, is the terminology, which I think, Mr Chairman, you agree with me.

THE CHAIRMAN: Yes, I am veering towards that as well.

MR JOWELL: Because I think that -- look, there are different ways of looking at this. There is no -- these are not terms of art, legal and factual causation, as you rightly pointed out, Mr Chairman, these are not sort of terms that feature in the case law.

THE CHAIRMAN: No.

MR JOWELL: Some people use the term "factual causation", and this is, I think, if you look in Hart and Honoré on Causation in the Law you will see this, some people use the term "factual causation" simply to refer to sine qua non, to refer to "but for" causation, yes? If -- it would not have happened but for the -- and anything over and above that is regarded as legal causation effectively in that element of policy.

In my submission, the -- the -- that is a perfectly acceptable use of the two terms, but there is no standard definition. But in my -- in my submission, what the -- what one can glean from the Supreme Court judgment in *Sainsbury's* is that they were saying that they were using the terms "legal" and "proximate" causation actually as effectively one and the same. I do not think it matters whether they do or do not. But in substance, also what they were saying was that, in the context of competition law, where you have got direct -- indirect claimants and direct claimants, you do not actually have a very stringent application of that requirement of proximate cause in that particular context, and the reason for that is not to deprive those indirect claimants and to respect, as I said, the symmetry of the approach. That is why they say, "We accept that an MSC can be passed on, even if it is accumulated with other costs and passed on via a budgetary process".

Now, *Trucks*. Now, I accept entirely that, as the Tribunal and the Court of Appeal found in *Trucks*, the fact that a cost is included in an annual budget along with other costs does not in each and every case mean that it is a sufficient basis on which to find that there is a sufficient causal connection. In other words, going into the annual budget and affecting the price through margin setting was not enough on its own in all cases, something more was required to establish that.

But what that something more is identified as being in *Trucks*, both in your own judgment and in the Court of Appeal, is effectively a set of features of the cost. So, what are identified? The factors that are identified are the transparency of the cost, the size of the cost, how it features in the product and also the existence of indirect claimants. The Court of Appeal agreed that those were relevant factors. But it also did so and said that the Tribunal was entitled to take those into account to find that there was not sufficient causal proximity in *Trucks* in a -- in its reasoning in contradistinction to the MIF case. So you see that it says -- it draws that distinction, for example, in paragraph 152 of its judgment.

So the way we read the Court of Appeal in *Trucks* is it is making clear that proximate causation did exist in the circumstances of *Sainsbury's* even if it did not exist in *Trucks*, because those four factors pointed in different directions in those two cases. In other words, the MSC is transparent, the MSC is larger, the MSC -- there were indirect claimants, look at Mr *Merricks*, and so on. All of them pointed in the other direction in *Trucks*.

MR TIDSWELL: It is a bit odd, is it not, that you are saying it is actually making a finding or giving a strong indication on that which is contrary to the finding the Tribunal actually made in that case?

MR JOWELL: I do not follow you, I am sorry.

MR TIDSWELL: Well, are you not suggesting that there would be pass-on as a result of that? It is more likely there is pass-on and in fact in *Sainsbury's* there was not any?

MR JOWELL: No, I am talking about *Sainsbury's* in the Supreme Court, where, in my submission, they made clear that there was a situation of pass-on.

The Supreme Court, in my submission, in those paragraphs you see, in paragraph 225, is saying the Tribunal's approach was in error in that and the MSC did count -- ought to have counted towards mitigation.

THE CHAIRMAN: I thought what you were saying was that in *Trucks* in the Court of Appeal they were distinguishing *Trucks* from MIFs.

MR JOWELL: Yes, that is what I was saying, yes.

THE CHAIRMAN: Because MIFs have one or two of the factors that were set out and that is a distinction.

MR JOWELL: Yes, indeed, that is right.

THE CHAIRMAN: Yes.

MR JOWELL: That is why I say that the Supreme -- that is how they square the -- that is how they square the two cases.

MR TIDSWELL: But are you saying -- sorry, maybe it is my

fault and I have not understood you properly.
I understood you to say that the Supreme Court in *Sainsbury's* relaxed -- was less -- indicating a less stringent test, but are you saying they relaxed it so much that they gave an indication of what the answer to the test was in its entirety?

MR JOWELL: On the facts of MSCs, yes.

MR TIDSWELL: Well, in that case, what are we doing here if that is the case, if that was decided by the Supreme Court in *Sainsbury's*, why on earth are we trying this case?

MR JOWELL: Well, that is exactly right. The question is -- and I think that was the approach of the previous Chairman, was that, in our submission, and you will see, it was that it was a no-brainer to establish proximity. But, of course, proximity does not get you to -- does not get you all the way, you still have to establish "but for" causation and you still have to estimate the amount. That, in my submission, is where --

MR TIDSWELL: I see -- sorry, I -- I am not sure, you misunderstood me, but --

MR JOWELL: -- so that -- that --

MR TIDSWELL: So you are not saying the Supreme Court dealt with the full question, you are saying there still was something left which was --

MR JOWELL: "But for" causation.
MR TIDSWELL: -- "but for" causation.
MR JOWELL: Yes.
MR TIDSWELL: Right, okay.
MR JOWELL: That, in our submission, is how the --
THE CHAIRMAN: To my mind, "but for" causation is the first question. I mean, you only get into -- I mean, it is a necessary condition of causation.
MR JOWELL: Yes, I think that is --
THE CHAIRMAN: But not necessarily sufficient in itself.
MR JOWELL: I think --
THE CHAIRMAN: You may need to go on and show sufficient proximity.
MR JOWELL: Yes, but I think that the approach that the -- I will come on to it, but the approach that the tribunal took previously was effectively to say, given the scale of these proceedings, we are talking about 2,000 claimants, how are we going to deal with proximity on an individual basis? We cannot. Look at what the Supreme Court says in *Sainsbury's*. It is saying it is effectively clear in the case of MSCs that there is sufficient proximity, so we are just going to look at this on a "but for" basis.
THE CHAIRMAN: Can I just understand why you are so concerned about this, in a sense, because is this for

some alternative case that you are making to the one that is set out by Mr Holt, which is that these were, or should be considered as COGS --

MR JOWELL: No, I am --

THE CHAIRMAN: -- and therefore passed on as part of the usual price maximising -- profit maximising price?

MR JOWELL: Well, first of all, let me be clear about Mr Holt's position. Mr Holt was not saying that, factually, all of the merchants necessarily priced directly by reference to the MSC. He was not making a factual assertion. He was making an economic assumption that because you are dealing with entire sectors of the economy and because the MSC has got certain economic -- key economic characteristics, that it is variable, that it is industry-wide, that in the long run it will be treated as if it is any other COGS, if one likes.

THE CHAIRMAN: But COGS are not dealt with in the long run, they are dealt with -- that is the whole point, I thought, about COGS is that they will be dealt with --

MR JOWELL: I think there is a bit of mythology about this, in our submission.

THE CHAIRMAN: Okay.

MR JOWELL: I do not think there is anything in economics that tells one that. It is not that the profit maximising moment, you know, comes at a moment and then there is some totally different thing. We are talking -- particularly when you are talking about a cost like the MSC, which is a recurrent cost, it is not as though this was a flash in the pan, this is a cost that ticks over on every single transaction, year after year after year after year, and his point is simply that through various mechanisms which he identifies, some may be directly through COGS, some may be through the budgetary processing, some may be through competitor pricing and influencing it that way, these variable, industry-wide, visible costs will find their way into prices across entire sectors and will do so to a proximate extent as the same as COGS will.

MR TIDSWELL: I am not sure that is entirely an accurate representation of Holt 13 and your positive case. I mean, there is very little in Holt 13 and practically nothing in your positive case about indirect mechanisms, it is all really about the price maximisation process. I had -- not how I understand --

MR JOWELL: I will provide you with -- he goes through --

MR TIDSWELL: Well, there is a paragraph and a half on it.

MR JOWELL: No, forgive me, but that is simply -- I think perhaps -- Holt 13 I think comes in two parts.

MR TIDSWELL: No, Holt 11. Holt 11.

MR JOWELL: There are long passages where he analyses also the claimants' evidence and looks at the opportunities -- the opportunities that exist for these indirect mechanisms. We will -- I will -- I am sure my juniors will find you the passages.

MR TIDSWELL: But if you are right about how you say -- the way you have put it and you are right about that and the claimants are wrong, then does any of this about proximity and directness matter? I think that is the question that the Chairman is asking.

MR JOWELL: We say not only does it not matter, but it is actually not on the table for these proceedings because the Tribunal has already ruled it out, but I have to deal with it because this is the way -- this is the central way my learned friend puts his case.

MR TIDSWELL: Well, I am not sure it is, actually. I mean, it is what you said at the start, but actually I think the way he puts his case is you have got the burden, you have come along and you have said it is done this way, which you say goes into the price-setting process, because largely we should think about these as being variable costs and therefore treated like COGS, and Mr Beal accepts, I think, that if you are right about that, then that is the end of it. But he says you are not right about that because he produces some evidence saying you are looking at the wrong proxy, and that is as far as he goes, he just says you are looking at the wrong proxy. It is only at that stage that you then turn around and say, "Well, if that is right, we need to rely more on the indirect mechanisms", and that is where this always comes from, is it not? It is your argument, not his.

MR JOWELL: With respect, no, that is not correct. Mr Holt -- I need to take you through the chronology and what Mr Holt has said, but it is -- Mr Holt has always made clear that his argument is one that is based on looking at economic proxies for how a variable industry-wide cost, like the MSC, would be treated, and his position has always been -- he has never said they will price in this particular method, he appreciates that merchants price with all sorts of methods. His point is that, from an economic perspective, it is likely that, over the long term, these prices will feed their way through, because of their economic nature, to an extent that COGS do.

Let me, if I may -- there is quite a bit I need to show you, because I think that the Tribunal is under a bit of a misconception about how we have got where we have got to as well. So if I may, the application of the proximate causal link test, as I have said, depends upon the circumstance, and that depends here -- those circumstances here depend on the nature of the cost, the compensatory principle in the context of competition law that I have discussed, and they also include the nature of the proceedings and the need to deal with the proceedings -- the dispute proportionately. Now, these are proceedings on an incredibly grand scale. We have got 2,000 claimants and over 600 merchant groups. The Willing Claimants that have come forward are the self-selected tip of the iceberg and it is important, as I will come on to, to understand that they are indeed self-selected and not in any sense representative.

The challenge that the Tribunal had is how did it resolve these proceedings on this scale proportionately, and that brings me to the rulings that the Tribunal made in July 2022 and in particular in March 2024, which we say bind the claimants and make it an abuse of process for them now to say that we are obliged to prove anything more than "but for" causation.

THE CHAIRMAN: Do we need to go back to those again?

MR JOWELL: I am not going to take you back to those again, because I think you have my submissions on them.

THE CHAIRMAN: Right. Yes.

MR JOWELL: We say -- but I do want to -- we say that the fundamental point is that -- we say, is that the Tribunal took the view that, as I have said, that in proceedings which concern MIFs, proximity was, as they put it, a "no-brainer", that there was no need to hear further evidence on sufficiency of the causal link, and what is more, that could not proportionately be done given the size and scope of the proceedings. We submit that the Tribunal was entitled to rule that the only issue was a "but for" cause given what the -- what was said in *Sainsbury's* by the Supreme Court and given what is known about the features of MIFs and the nature and scope of these proceedings. But the fundamental point is not whether it was -- the Tribunal was right so to rule, it was not whether it was right to rule out factual proximity, the point is that it did, and, more fundamentally, the disclosure and the evidence in this case has been provided on that basis, that proximity is not a remaining issue, the only remaining issue is "but for" causation.

If we are wrong on that and the issue was not ruled out, then the inevitable implication is that the procedure that has been adopted of self-selected claimants giving self-selected disclosure would be manifestly unfair and there would need to be a retrial.

Now, I showed you the skeleton arguments already in relation to the March hearing, I am not going to go back to that, but in our submission, Mr Rabinowitz made it abundantly clear in his written and oral submissions for the March hearing that the issue as he saw it was, whether all one needed to prove that the trial was "but for" causation or whether something more, whether one calls it proximity, legal proximity, factual proximity, causal connection, sufficient closeness of causal link, directness, whatever one calls it, anything above "but for" causation, was that going to be required to be established at trial? In our submission, the -- that was ruled out.

Now, how did one get to that point where it was ruled out? Well, we have put in a detailed and careful description of the procedural chronology. I myself only came into the picture at a relatively late date, but it is, I think, a meticulous description. It is in paragraphs 29 to 49 of our responsive case, which is in {RC-G/16/17-26}. I do not have time to go through it all, I do very much encourage the Tribunal to read it carefully.

Now, the starting point, of course, was you have got these -- the starting point is actually -- is that the initial chairman, Mr Justice Roth, was the initial chairman of these proceedings, immensely challenging, how do you case manage thousands of claimants and how do you do so proportionately given all the demands on the Tribunal's time? Well, one potential way would be select a representative sample of claimants in the hope that they then provide a proxy for a particular sector or sectors. That indeed was the route that the original chairman, Mr Justice Roth, was heading towards, and I will just give you a reference to his order, {RC-D/1/2} and you will see it in paragraphs 3 to 4.

Various proposals were around for selecting lead claimants, or sampling, including from Visa. Visa's proposal at that time was that the defendants would complete a survey and then the claimants and the defendants could pick an equal number of claimants from the cohort. A hearing was scheduled in which the Tribunal was to seek to resolve differences as to the appropriate representatives, and no doubt, had the Tribunal gone down that route, one would have then had something akin to the procedure that one had in the *Trucks* litigation with multiple requests for full disclosure -- well, not full, but multiple tranches of disclosure and a detailed dive into a number of representative or quasi representative claimants.

The chairmanship of the tribunal then changed and under the new chairman, Mr Justice Marcus Smith, an indication was given, in March 2022, that he thought that sampling was not going to work, although he did not definitively rule it out. Again, for your note, you can see that in his ruling, which is in {RC-D/3/23} and I invite you to read in that ruling -- forgive me, you can see at paragraphs 7 to 11 and paragraph 20 and paragraph 37. Instead, the tribunal's stated inclination was for a sectoral approach based upon economic studies and econometric modelling.

Now, Visa, for its part, was in principle content with that high-level approach as a proportionate means of resolving the pass-on issue, but it also caveatted that approach. So if I can just show you that in Mr Holt's fifth statement, it is {RC-K/7/24}. If you see paragraph 57, he says -- he talks about the various -- he talks about the assessment of the factual evidence for the claimants. He says, in 57:

"In light of the above, from an economic perspective, I believe that witness statements and an extensive documentary disclosure exercise would not be as useful as data-driven analysis in quantifying the link between costs of a similar type to MSCs and prices. Moreover, the possible increase in the degree of precision of pass-on estimates that might be obtained by using this approach together with a data-driven analysis may not justify the additional costs."

Now, here comes the important caveat:

"That said, I understand that at least some of the claimants contend that, as a matter of law, pass-on can only be established by demonstrating the causal nexus between MSCs and prices based on internal documents, rather than inferring that nexus from the data. If that were the position, then disclosure of documents from individual claimants would be required. In those circumstances, I cannot see how the issue of Merchant pass-on could be dealt with as a common issue across the claimants."

So -- and if we -- if you go -- if you go forward, please, to paragraphs -- to page {RC-K/7/25}, you see in paragraph 61, at the top, where he sets out his proposed analysis, he caveats it in bold:

"Indeed, if the legal framework permits one to make economic inferences and extrapolations as to the likely pass-on of MSCs based on the pass-on of other similar cost categories then I would propose an analysis along the following lines."

So the -- very clear that he was not going to analyse the impact of changes in MSCs on prices using a -- directly, he was going to use extrapolation based on cost proxies, and that -- and he made it clear that

that was required because of the signal-to-noise ratio, and you can see that, for your note, it is paragraphs 48 to 50 of this same statement. So he was always very clear about his approach and caveatted, as you have seen, by saying, well, if you need a proximate nexus, then we have to go down a different route.

THE CHAIRMAN: Did he foresee the need for factual evidence in order to decide what is the appropriate proxy?

MR JOWELL: He did not think it was necessary. He did not --

THE CHAIRMAN: You just base it on economic theory?

MR JOWELL: Effectively, yes. Yes.

THE CHAIRMAN: Right.

MR JOWELL: He did not think it was going to be of assistance, but we will come on to that.

Now, the pass-on judgment from July '22 followed that hearing, and at paragraph 61, the tribunal refused to order disclosure and instead prima facie ruled that Visa's approach was correct, and I think you have already seen that judgment, it is in {RC-D/7/1}, and if I could just show you -- maybe I will just quickly remind you, if I may, of {RC-D/7/28} --

THE CHAIRMAN: They had become umbrella proceedings by then.

MR JOWELL: Yes, they had.

THE CHAIRMAN: I mean, what is the effect, if any, that that had?

MR JOWELL: Well, the effect is effectively to mean that common issues, and, you know, one sees -- one has to then decide if they are going to be common issues that bind everyone, all of the parties.

THE CHAIRMAN: Right.

MR JOWELL: You see in particular the statement that we understood meant that he was just looking at "but for" pass-on in paragraph 55:

"Whilst we have no doubt that a deliberate decision to increase prices in the face of the Overcharge constitutes pass on, we do not agree that pass on is so limited. Any increase in price, occurring as a result of the Overcharge, is sufficient to constitute pass on."

MR TIDSWELL: But that is in the context of the argument that was being run which was whether intention was necessary, as you can see from the next sentence, is it not? I do not think it is -- it is not discarding any other causal point, it is just making the point that intention is not necessary.

MR JOWELL: Well, that, I think -- that is the ambiguity, if you like. I accept that there is an ambiguity in the judgment. You have to -- one has to read the whole of the judgment, the arguments that were being put and so on. The point is that there were then numerous statements by the claimants that notwithstanding what was said in this judgment and notwithstanding what was said in *Sainsbury's* in the Supreme Court, they wanted to rely on the additional requirements in the case law that you see in the *Fulton Shipping* line of cases to show proximity or sufficiency of causal connection.

THE CHAIRMAN: You said 55 was just dealing with "but for" causation. It does not refer to that, though, does it?

MR JOWELL: No, it does not put it in those terms. So I accept -- I am not saying that it is crystal clear in this judgment what the position is; it is ambiguous. But those representing Visa at that time understood in its full context that that was the approach that was being taken. You have to also appreciate that this is not just -- it is not just what is said in the judgment, it is what is being done on a case management basis, because what is being done or not done on a case management basis -- because what is not being done on a case management basis is, at this stage, any qualitative evidence.

THE CHAIRMAN: But this is essentially deciding a pleading point, is it not, if you go back to paragraph 54 {RC-D/7/27}, it is talking about whether you were required to plead that the claimants decided to pass on the overcharge? Was that not the issue?

MR JOWELL: Well, that was -- that was how the causal proximity point was put --

THE CHAIRMAN: Yes --

MR JOWELL: -- at that time.

THE CHAIRMAN: -- exactly.

MR JOWELL: The argument that was made at the subsequent hearing was that actually it was either res judicata or an abuse of process to say that anything other than "but for" causation was ruled out.

Now, the fact is, as I said, it does not matter, in a sense, whether it was right for the Tribunal to do it, the point is they did it in the next hearing, and the -- what -- the problem that Visa faced at this stage was you have, on the one hand, an approach where you have no qualitative evidence, on the other hand, you have an approach where you have got claimants who are saying, "Ah, but you must show proximity, sufficiency of causal connection". So the essential problem for Visa was, well, if that is still an issue that is still in play, how do we address that without any factual evidence or disclosure? Bear in mind, we are in early 2024 by this point and we have a trial listed for November 2024, and what Visa did not want to find itself in was what it -- what Mr Rabinowitz labelled, I think picking up one -- one of the chairman's expressions in a different case, was a so-called "gotcha" moment, in which these had got to trial relying on econometric studies and data and understanding that the tribunal -- that the case would be tried on one basis, and then only to be told, "Ah, well, that is all very well, you have shown correlation, but you have not shown proximate causation", and, hey presto, there is no evidence on which you can do so.

MR TIDSWELL: But you did not -- I think you confirmed, yesterday or the day before, whenever it was, that you had no objection to evidence -- qualitative evidence being put in that went to the choice of proxy; that is right, is it not?

MR JOWELL: Well, yes, up to a point, although we do say that -- we do make many points about the inadequacy of that evidence and its lack of --

MR TIDSWELL: But in terms of the sort of the landscape.

MR JOWELL: Yes.

MR TIDSWELL: What I think Visa was very keen to do, as you say, was to keep out qualitative evidence that went to an issue which you did not think was relevant, which was what the claimants might have thought, or what the individual circumstances might have been of individual claimants, because you were dealing with it on a top-down basis, but I think because this whole question of the appropriate proxy was in play, you accepted that evidence about that was going to be relevant properly in front of the Tribunal; is that right?

MR JOWELL: I -- that is -- well, I accept that the subsequent evidence that came in for that issue of proxy is properly in front of the Tribunal --

MR TIDSWELL: So you are not complaining about any unfairness in relation to that?

MR JOWELL: We do complain about -- we do say that you must do adverse inferences and I will come on to that.

MR TIDSWELL: But not about the fact that evidence of that sort has found its way in, because I think you were going to tell us that it is unfair that there is, if you like, an argument about evidence that has not found its way in.

MR JOWELL: I do say -- I do make a number of points about the probative value of that evidence.

MR TIDSWELL: Of course, I understand that.

MR JOWELL: But I do not object to its admissibility, if you like, no. But for a particular issue, which is namely the choice of proxy --

MR TIDSWELL: Yes, exactly --

MR JOWELL: -- but not for the point that my learned friend tells you repeatedly, which is that we have not established proximate causation because that is a much more fundamental point, because you are not then talking about, oh, well, do we use overheads or do we use COGS, you are, saying, well, you are saying, if you do not, there is no proxy at all, because effectively you have not established any proximate causation.

MR TIDSWELL: No, he is not saying that. He is saying --

THE CHAIRMAN: The questions you were asking in the Redfern schedule and all, that was not just related to proxy, was it?

MR JOWELL: It was entirely related to proxy, as far as we saw it, yes. I can show you how we were approaching it.

If I could show you -- go back to Mr Rabinowitz's skeleton {RC-O/6/18}. (Off microphone) If I could read you just some paragraphs of this skeleton argument:

"The Claimants' arguments have significant practical complications for Trial 2. The starting point ... is that the Claimants have remarkably avoided saying how exactly they consider that 'proximity' might be made out. Instead, they provide vague references to potentially relevant factors. Ocado's and Allianz's responses suggest, for example, that too much 'latency' might lead to a finding of insufficient proximity. Allianz's skeleton argument ... further suggested that the 'relationship between what the overcharge is incurred on and the product whose prices have been increased' might be relevant. It appears unlikely that these factors are intended to be exhaustive: the Claimants presumably anticipate raising still further points in the future, but those points are as yet unknown.

"The result is that it is impossible to say with any certainty what evidence would have to be adduced in order to show the requisite degree of 'proximity'. Nonetheless, it is clear that consideration of this additional issue would place Trial 2 into serious jeopardy.

"First, the identification, extraction, cleaning and analysis of data ... relevant to 'proximity' would add [significant] work ..."

Over the page, please {RC-O/6/19}:

"An expansion of work for the experts is patently not feasible ..."

Then he goes on at 44:

"Second, the concept of 'proximity' as presented by the Claimants appears to be inherently entity-specific, despite the Tribunal having been clear that these proceedings are not progressing on a 'case by case line' but rather 'on the statistics'. Taking ..."

He goes on.

Then paragraph 45:

"The fact that the Claimants see this as an opportunity to adduce entity-specific evidence is clear from Primark's response ..."

Then you see in paragraph 46:

"The short point is that 'proximity' appears, on the Claimant's cases, to be entity-specific; and to the extent that the host Claimants are afforded an opportunity to make arguments on this basis, the same opportunity would have to be extended to all other Claimants. That would defeat the whole purpose of umbrella proceedings and would mean that Trial 2 could not take place in its current form."

If you look at the footnote, can we look at the footnote, please, footnote 30, he says this:

"In particular, given the entity-specific nature of the issue it would be inappropriate to rely on 'willing and able' claimants: disclosure would have to be given from a representative sample of Claimants."

That was absolutely fundamental, because you cannot just allow self-selecting claimants if you are going to try to -- if you are going to try to adjudicate on proximity, then it becomes absolutely fundamental that you -- well, if you can do it at all, other than on a claimant-by-claimant basis, you would have to then go back to sampling.

THE CHAIRMAN: What were you saying on that occasion was the test for factual causation?

MR JOWELL: "But for" causation.

THE CHAIRMAN: That is what you said, is it, in the skeleton?

MR JOWELL: Yes, yes. Paragraph 1, yes.

THE CHAIRMAN: Paragraph 1.

MR JOWELL: Yes. We can go back to page 1 {RC-O/6/1}. If we go -- you can see under paragraph --:

"The question ..."

Well, you can see paragraph 2 could not be clearer.

THE CHAIRMAN: Well, okay.

MR JOWELL: So if we had been told on that occasion, "No, proximity is in issue", we would say, "Well, in that case, let us go back to sampling, adjourn the trial, we cannot have self-selected disclosure, we cannot have self-selected claimants".

Now, as you see, in the meantime, what had happened was that you had started a process of the self-selected claimants. Now, important to appreciate, a few things to correct again. The qualitative evidence, as we call it, starts with data, okay? That happens in a judgment in January 2024, when the tribunal indicates that it is inclined not to be -- not to proceed with sampling but to request a list of Willing Claimants that may be prepared to give data, and you see that -- you can see the reference in paragraph 37 of our chronology which I referred you to, it is in {RC-G/16/20}. You can also see the same thing actually from my learned friend's chronology, which we do not entirely agree with, but if you go to {RC-M/330/1}, please -- forgive me, {RC-M/330/2}, this is my learned friend's letter, and if you see the first sentence of paragraph 5:

"As the Tribunal may recall, discussions regarding how best to obtain evidence from the merchant claimants were initially centred on the provision of quantitative data."

That is absolutely correct, and you can see -- and then, again you see in paragraph 6:

"... it was against this backdrop that the question of admitting quality of evidence in addition to the quantitative data being relied on by the parties' experts was discussed."

So it started with data.

Secondly, it was not the largest claimants who came forward with their data in all cases. The Willing Claimants were selected on the basis that they should be, as the Tribunal put it, not minnows, but most importantly on the basis that they were willing to provide readily available data in short order, and that was -- the expression used was provide the "low-hanging fruit". So the result is that the Willing Claimants are not a representative sample of the merchant claimant group, they are not a representative sample of the industry sectors of which they form a part, or the economy as a whole; they are self-selecting. I can show you the tribunal itself describing them as such if you go to {RC-D/27/1}. So this is the tribunal, and if we go to {RC-D/27/7}, you see in paragraph 11, the -- you will see in the middle of the paragraph, the chairman referring to them as the "(... self-selecting) Retailer Claimants", and if you go to paragraph 14, please, over the page {RC-D/27/8}, you will see, again around about the middle of paragraph 14, you see a sentence beginning "inevitably", and it says:

"Inevitably, it has involved selection, and that selection has not been on a neutral, sample basis, but on the self-selecting basis that we have described."

So certain claimants come forward who are willing to provide data. Some then withdraw. Pendragon withdraws. Pets at Home, Three, Jet2 say they are unable to provide data in time. Others are said, such as World Remit and Footlocker, are no longer necessary, and the -- and there are spats in which a number of the -- in which Mastercard and *Merricks* both object to the withdrawal of the -- of these claimants. So that is how one gets the data, not in any kind of selected sampling way.

Now, as to the qualitative evidence that they want to now use to disprove proximate cause, well, they came in as potential support for the data. Now -- and it was said to be relevant to the econometric modelling. Again, for your note, you can see this in Dr Trento. He says -- this is in {RC-M/76.1/3}, he says -- and I will just read it to you:

"Information on how costs (including the MSCs) were treated by the merchant claimants will be necessary to understand how such costs may have affected prices ... directly or indirectly. This knowledge is essential for the correct set-up of the econometric model."

That is what Dr Trento -- how it was put.

Now, Visa raise a number of objections to the introduction of qualitative evidence at this very late stage, even on the basis that it was only coming in to assist in the econometric modelling. If I can show you that and also the basis on which we understood it, if we can go to {RC-I6/3/1}, please. This is our skeleton argument in relation to -- Mr Piccinin's skeleton argument rather in relation to the qualitative evidence application. If we could go over the page to -- if we could go to {RC-I6/3/5}, and if you -- you see

11(a), and I think this is a very clear illustration of the basis on which we were proceeding:

"First, the starting point is that the pass-on question in these proceedings is fundamentally one of (economic) fact. The question is whether, if ... ('MSCs') had been lower, the Claimants would have charged lower prices to their customers; and if not, whether they would have agreed to pay higher prices to their suppliers. As established [at] ... the July ... and March ... Hearing, there is no further question of legal or 'sufficiently proximate' causation. Evidence may only be adduced for Trial 2 if it is useful for understanding whether pass-on occurred as a matter of economic fact."

That is the basis on which we were proceeding.

Now, the skeleton goes on to --

MR BEAL: Sorry, could you read subparagraph (b) as well.

MR JOWELL: Certainly:

"Second, pass-on may have occurred as an economic fact regardless of the means by which pricing decisions were reached. Since 'a decision to pass on is unnecessary', a pass-on defence can be established on the basis of the 'sort of counterfactual and econometric analysis advanced by Visa' ..."

Yes, indeed. That was our understanding and that is why we say this is an abuse of process, I am afraid, to now --

THE CHAIRMAN: Well, that is still your position, presumably.

MR JOWELL: Yes.

THE CHAIRMAN: Yes.

MR JOWELL: Yes, indeed.

Now -- and it is indeed still our position and that is why, when my learned friend says, "Well, why did you not seek an adjournment at the start of the trial", we did not seek an adjournment because, as I made clear in opening, we do not think that an adjournment was necessary because the question of proximate causal link does not arise, on our view, for determination in these proceedings. If it had, we make clear we would have sought an adjournment.

MR TIDSWELL: But the claimants agree with you, if you are right. If you are right on your case about the top-down approach, then, as I understand it, there is no dispute about that. No one is going to say it is not proximate if Mr Holt is right that Cost Of Goods Sold is the right proxy.

MR JOWELL: Well, I am not sure --

MR TIDSWELL: I asked Mr Beal that and he agreed with me.

MR JOWELL: I am not sure they do. I mean, I think they say we have to -- that we have to establish that that is actually -- you know, we have to actually look into the -- into each of these claimants and ask oneself --

MR TIDSWELL: Well, I do not think that is right. Certainly, as I understand it, he is accepting that if you establish that Cost Of Goods Sold is the right proxy, in other words that the arguments that he is making about the way it is characterised as an overhead, and so on, are not things we should be looking at and Mr Holt is right, variable cost, treat it as a variable cost, therefore the right way to look at it is Cost Of Goods Sold, as I understand it, there is no argument there about proximity or directness, he accepts that that gets you there.

What he says is, if you are not right about that, then obviously you have not advanced a case in relation to -- or at least you have got to advance a different case if you want to succeed in relation to the indirect means, and that is where this all comes in; it is not on his case, it is on your case.

MR JOWELL: But the problem -- the difficulty is that we do explain in the evidence the various different indirect methods --

MR TIDSWELL: That is --

MR JOWELL: -- but we simply do not --

MR TIDSWELL: -- your secondary case, though, is it not?
MR JOWELL: -- do not have the sort of -- we do not have the sort of disclosure that would be necessary in most of these cases to establish that sort of case, and if I may --
MR TIDSWELL: That is because you are advancing, essentially, a secondary case as a result of being faced with the arguments about the proxy --
MR JOWELL: No, I am sorry, that is --
MR TIDSWELL: -- because the way in which the --
MR JOWELL: Forgive me, I do not accept that characterisation. It is not --
MR TIDSWELL: Well, that is how it appears to me. When you look at Holt 11 and Holt 12, you suddenly see that you are having to deal with a situation in which Mr Holt might be wrong, and of course that is all for discussion and decision, but if it turns out that you are wrong in relation to Mr Holt, then you have got to advance a different case, which is that it goes into the pricing through the indirect means and that is where you need the evidence.
MR JOWELL: Sorry, it comes back, I am afraid, to a misconception about what Mr Holt's approach is. Mr Holt's approach was initially developed on the basis that there would not be any qualitative evidence at all

and that we would simply be talking about, well, what is the best economics proxy, and then what do the models and studies show.

MR TIDSWELL: Well, Mr Holt said for some time, right back to Holt 5, that it was Cost Of Goods Sold. He has been absolutely consistent in his position.

MR JOWELL: Yes, because, that is -- because, in his view, that mimics the economic --

MR TIDSWELL: Yes, that is --

MR JOWELL: -- characteristics. But then we see a different case being advanced by my learned friend, which is he says that -- he says, "Well, if you cannot establish for these particular -- we come forward with these claimants that we select out of this huge cohort, and we give you the documents we want to give you, and ha-ha, you cannot establish that there is a proximate causal link".

MR TIDSWELL: No, that is not -- I do not think he is saying that. I do not think he is saying that.

MR JOWELL: That is what he is saying.

MR TIDSWELL: He is saying that you have got the wrong proxy. He is saying you have chosen the wrong proxy and as a result you do not succeed, and so therefore you are forced to an alternative case, which is to find another way to deal with it.

MR JOWELL: No, we say -- we say -- we do not have time,

forgive me. A simple disagreement.
THE CHAIRMAN: I do not think we have had a break yet this afternoon, have we?
PROFESSOR WATERSON: I have not!
MR JOWELL: I am so sorry.
THE CHAIRMAN: We should take a break. How much longer have you got?
MR JOWELL: I will try to get through it in 15 minutes then. Sorry.
THE CHAIRMAN: Right, and Ms Tolaney, you will want a reply?
MS TOLANEY: Yes, I do. I think I have got half an hour.
THE CHAIRMAN: Right, so it looks like we will not get on to 2B this afternoon.
MR JOWELL: Forgive me.
THE CHAIRMAN: So you are all going to have to cut your cloth in relation to 2B, which is probably no bad thing.
(3.31 pm)
(A short break)
(3.41 pm)
THE CHAIRMAN: Yes.
MR JOWELL: Mr Tidswell asked where in Holt 11 does he address the indirect pass-on routes. For your notes, it is in paragraphs 148 to 162 of Holt 11, which is {RC-F/19/66-68}, and also paragraphs 222 and 230 of Holt 11, which you will find in {RC-F/19/86}.

Now, I was in the skeleton argument, which is in {RC-I6/3/1}, and I showed you the basis on which Visa were proceeding, namely that this was a "but for" causation hearing. I do very much commend the Tribunal to read Mr Piccinin's skeleton argument, because it contains also a host of concerns that we had as to the validity of the -- this qualitative disclosure and the -- and the concerns about how it could fairly be introduced, even in relation to this more narrow issue of the proxy selection and econometrics, at this stage in the proceedings. I do not have time to go through it, but it details in great detail our serious concerns.

Now, the solution that the Tribunal eventually adopted was to allow in the qualitative evidence relevant to econometric proxy, but it did so, as we understood it, subject to two critical safeguards. The one safeguard was the ability to ask, by way of Redfern schedules in due course, for additional documents. As it transpired, at least for Visa, that hearing was listed so late that it was not practical, in our submission, to seek extensive disclosure, and in any event, most of our requests that we did make were refused. But that should not matter, because there was also another more general safeguard, and that general safeguard was the then Chairman's requirement that the claimants should give, as he put it, "warts and all presentation of the evidence". He used an analogy with the obligation of utmost good faith in insurance law, that there should be, as he put it, "a fair presentation of the risk", and that you will see in -- I do not plan to go to it -- {RC-E1/8/47-48}. Put another way, as we understood it, what was being said was that, if it transpired that the self-selected disclosure of the self-selected claimants was inadequate, or incomplete, or unrepresentative of their full price-setting processes, then the Tribunal would not place reliance on it.

Now, as it has transpired, in our submission, for all the reasons we explain in our written documents, that is how most of the disclosure is to be characterised. It is inadequate -- it had been inadequately obtained by an inadequate process, without any solicitor supervision, without any proper identification of the proper custodians, without any proper keyword searches or hard-copy documents searched in many cases. It is inadequate, unrepresentative and incomplete. So the point that Ms Tolaney rightly made regarding the potential adverse inferences that can be drawn applies twice over in this case, once on the basis of the general principle in *Sainsbury's*, but a second time also as a result of the Tribunal's very particular requirements for this -- allowing the claimants this indulgence of selecting their own disclosure without having to provide really adverse documents.

THE CHAIRMAN: So the Tribunal said that it would place no reliance on it?

MR JOWELL: If it was not satisfied that the presentation was full and fair. In other words --

THE CHAIRMAN: You are saying that?

MR JOWELL: -- if it was not complete. We are saying that, so that is right. So we say -- we say, when you say -- in an exchange between yourself, Mr Chairman, and Ms Tolaney KC, I think you said, well, it is putting a lot of weight on adverse inferences. Well, we say -- well, we agree with Ms Tolaney that, actually, it is not, even on the basis of the *Sainsbury's* judgment, but one has to add to that that it is doubly so, because in this case it has been made very clear by the Tribunal that the disclosure had to be -- and the -- effectively the price-setting process had to be very fully and openly, fully and frankly presented, and that is --

THE CHAIRMAN: So you are saying that if there has not been a fair presentation of the price-setting -- the evidence --

MR JOWELL: Yes, a full and fair.

THE CHAIRMAN: -- in relation to the price-setting process, we should ignore that, whatever evidence has been produced?

MR JOWELL: Yes.

THE CHAIRMAN: Where does that leave us?

MR JOWELL: Well, it means you draw --

THE CHAIRMAN: That means you have no evidence of the price-setting processes.

MR JOWELL: You draw adverse inferences and you assume --

THE CHAIRMAN: Meaning what? That they did price-set by reference to MSCs?

MR JOWELL: That they price-set by reference to MSCs.

THE CHAIRMAN: Well, how can we possibly leap to that conclusion as a result of --

MR JOWELL: That is what an adverse --

THE CHAIRMAN: -- an inadequacy in the evidence?

MR JOWELL: Well, that is what an adverse inference is.

THE CHAIRMAN: Really? Okay.

MR JOWELL: Yes, we are saying --

THE CHAIRMAN: That is what you are saying we should do?

MR JOWELL: Yes. I mean, that was -- and adopt the proxies of Mr Holt, yes. That is what we say. That is the fair thing to do. I mean, the only alternative one can think of is, well, we have to start again.

THE CHAIRMAN: Okay, well, not the most attractive option.

MR JOWELL: No. But what one cannot do is say, well -- you know, find against us on the basis of --

THE CHAIRMAN: Or we make do with the evidence that we do have. But you are saying ignore the evidence because it has not been fairly presented and make adverse inferences.

MR JOWELL: Yes.

THE CHAIRMAN: Why do we not just use the evidence that we do have?

MR JOWELL: Because that is profoundly unfair to us, because we have not had an opportunity to assess the case. I mean, we have come into the court with self-selected claimants selecting their own documents. How can that be a fair trial under English law? To us, it is just extraordinary to think that it could be.

But there is another important reason why this cannot -- one cannot reliably adopt that approach, and that is because -- and it is my final point -- my final general point, you will be pleased to hear, and that is that --

THE CHAIRMAN: You have more specific points --

MR JOWELL: -- you have to bear in mind the sectoral basis in which this is all occurring, because I was in fact -- I should say, I was actually correct to say that there are claimants in every sector. The table that my learned friend took you to in Holt 11 is incorrect, and actually you can see that if you go to another table in Holt 11 which is correct. Could we go, please, to {RC-F/19/93}. You see here a distribution of claimants by Visa sector and you see on the far right, you can just see a faint line to the breakdown of the smallest slice in the right-hand circle, and it says "Health Care, 1", and that was the -- that healthcare had no claimants in the table that my learned friend took you to. But that is an error in the other table; this is the correct position. So you are actually dealing here with having to find pass-on rates for all sectors of the economy, or at least insofar as they are divided up by Visa into these 14 sectors.

Incidentally, for my learned friend's information, the claimants' experts -- his experts received a data pack from our experts with Mr Holt's 12th report, with the claimants in the various sectors, so they are able to check the position if they wish to do so.

Now, the sectoral approach that has been determined on and that I thought everybody was agreed on, certainly according to their skeleton argument, raises some insuperable difficulties for the approach that the claimants now urge on you. First of all, we heard almost nothing from my learned friend about the sectors in which there are no Willing Claimants at all. This is not a minor problem. There are six out of the 14 Visa sectors in which this is the case and they amount to 30% of the claim value. So there is no evidential basis on which to determine sufficiently close causal connection, which is what we have asked you to determine. The only basis on which you can determine this, on my learned friend's case, is Mr Economides' extrapolations, which I submit is no basis at all. You certainly cannot use those extrapolations to rule out proximate causation in sectors where it has had no claimant evidence at all, and this is particularly so given that all of the relevant evidence is in the claimants' possession, they have had an opportunity to come forward and give their evidence and they have failed to provide it, and if that is not an instance where adverse inferences can be drawn, I respectfully submit, well, what is?

But it does not end there, because even for the sectors where you have Willing Claimants, how do we know that the claimants -- these Willing Claimants' price-setting methods reflects the price-setting methods of others in the same sector? We have had no sampling, no one has ever ruled or agreed that they are representatives of their sector. These are, as the experts have observed, highly diverse sectors, with different types and sizes of companies, likely to have different pricing methods. Take, for example, the case of Tesco. I will give you a reference. It says it prices in a very different way to the relevant Willing Claimant. For your note, that is {RC-J4.10/39/5}, paragraph 12. So we say the Tribunal cannot fairly rule out causal links, or the pass-on defence, for any claimants in the sectors other than, at most -- and we say you cannot do it for them either -- the Willing Claimants. There is just no direct evidence as to how MSCs feature in their prices.

THE CHAIRMAN: So how do we deal with that? I mean --

MR JOWELL: One has to determine it on a top-down basis looking at -- looking at appropriate proxies and if necessary by informed guesswork, as Lord Briggs put it in *Merricks*. It may seem unsatisfactory, but that is the only practicable, proportionate approach that one can adopt.

So we say that -- in summary, that these are variable industry-wide costs that apply across -- and one is determining them across the whole sector and over the whole length of a very long claim period, and we suggest that you should not be beguiled by self-selected claimants' qualitative evidence giving self-selected documents to suggest that, effectively across the whole economy, costs would be treated in a way that would be contrary to their fundamental economic characteristics. If you follow their arguments to their logical consequence, to their logical conclusion, you get to a position where there will be almost no pass-on, which we suggest is simply an unreal conclusion that will lead to dramatic overcompensation to merchants, dramatic undercompensation to consumers, if not in this case, it will into so in others, because the approach would be carried across, and we say, therefore, that the appropriate approach is that of Mr Holt, to look at the -- to look at matters on an economic fundamentals basis.

If I may just say a few words on four -- very brief words on four other specific issues. First of all, Professor Waterson will be pleased to hear I am going to mention Marshall's third law. If I may, I am just going to read out what I have been asked to write -- read, rather --

THE CHAIRMAN: He set you homework!

MR JOWELL: -- because it is a long, long time since I did any economics.

Marshall's third law is about what the importance of an input good means for the elasticity of demand for that input good. Card acceptance is an input for merchants, and so Marshall's third law may imply that the demand is inelastic and so, all other things equal, that acquirer pass-on might be high, and of course, we are all agreed it is high. Mr Holt says that across all sectors of the economy it is 94%, so it is -- that does assist, from a theoretical point of view, but does not tell us where exactly the dial sits.

When it comes to merchant pass-on, the third law does not assist. The elasticity of demand that may be influential on merchant pass-on is the demand of consumers for the merchants' goods downstream. Whether the MIF is small or large, or a large cost, does not tell us anything about this, nor the other factors relevant for pass-on, and so I am told Marshall's third law says nothing of relevance about the rate of merchant pass-on.

PROFESSOR WATERSON: You have passed!

MR JOWELL: I am grateful. Please do not ask me to put that in with differentiation, because I will not be able to do it!

Now, the second issue I wish to just touch on is the question of whether Trial 2A includes economy-wide pass-on. Well, we say it does, on the basis of what was ordered, which you see in {RC-D/11/4}, paragraph 9, which states that -- well, let's look at it:

"A seven-week trial shall take place ... to address all issues relating to acquirer and retailer pass-on."

So we say that the economy-wide pass-on rate is therefore an issue within this -- should be an issue within this trial, and it is convenient to deal with it, you have all the sectors, it is simply a question of weighting the sectors appropriately.

MR TIDSWELL: How is it relevant to these proceedings? That is actually an issue relating to acceptability, is it not?

THE CHAIRMAN: Yes.

MR JOWELL: Well, it is also relevant in these proceedings, because it is relevant -- it is our preferred -- it is Mr Holt's preferred choice for those sectors where there is no data at all, so we do need to use it for --

MR TIDSWELL: (Off microphone) (inaudible) rather than (inaudible) *Merricks*.

MR JOWELL: Saracens(?), exactly, yes, and so -- and Mr *Merricks*, well, who knows, he may reappear, depending on ... Well, he will certainly be bound by these proceedings, so --

THE CHAIRMAN: What at the retrial?

MR JOWELL: I hope not!

I just want to make two other further just specific points. I am not going to go through the various --

I am not going to go into private session and go through all the points, because I am so far over time, I appreciate.

THE CHAIRMAN: Yes.

MR JOWELL: I am hope that Ms Tolaney will pick some of those up. I am sure she will.

The Chang paper that my learned friend is very fond of, the short answer to that is, it would not come close to meeting Mr Holt's requirements for reliable studies. It is not a study that even reaches a clear conclusion on the pass-on rate, which is one of the requirements. So it does not -- I am not even sure whether it is peer reviewed either, but it does not come close to meeting the requirements of Mr Holt.

Finally, I do want to deal with one thing and that is supermarkets. Now, it was said that Dr Trento had not relied on the public studies for supermarkets and that was off the back of his -- going to his expert report. Actually, he brought it up in the course of my cross-examination. Can I show you that {Day17/104}, and if you go to line 22 at the bottom, I say:

"All right.

"Let us move on to something else: the reliance on public studies or the lack of reliance. Now, in your first report, you do on occasion, I think, refer to empirical sectoral studies and to public data, but I think it is fair to say that on every occasion you do not place any reliance on them, is that correct?"

He corrects me:

"Except in the case of supermarkets, yes."

Then if we go to -- if we could go, please, to {Day18/49}, and if you go, please, to line 15, you see:

"Question: So, I mean, would it really be fair in a way to say that although it is -- despite all its limitations, one is thrown back on this study of 52 to 97%? Is that your position?

"Answer: I think it is fair to say that Marks & Spencer data, it became clear that it is not usable for robust analysis. Then I think the obvious conclusion is that we are left only with the study, I think with a note of caution there, which is we know from the literature -- for instance, if you look at the estimates of the literature, that Ms Webster looked at on the tax of tobacco, then you see estimates there that the range of 30% to 600%, which obviously are an indication that the pass-on is fact-specific, and therefore there are some facts that affect the rate of pass-on very widely, and this study analyses the pass-on of wages by supermarkets in the US from 2001 to 2012, I think, so it is --

"Question: It is not a dissimilar economy and not dissimilar time period, is it?

"Answer: I said yes. There is a note of caution there, that ...

"Question: But I think we discussed earlier, and I put to you, that you had not relied on the studies at all, and you kept saying to me, 'No, but I have in supermarkets'. So you are putting a bit of reliance on this, so I think it is fair to say --

"Answer: I think it is fair to say that. It is the only evidence that we have, and --

"Question: Is the 52 to 97% range.

"Answer: -- with a note of caution, this is the result."

So he accepted that that was his position for that sector.

Those conclude my submissions. Thank you.

THE CHAIRMAN: Thank you, Mr Jowell.

Ms Tolaney.

Reply submissions by MS TOLANEY

MS TOLANEY: I will simply pick up just a few points on the Merchant Claimants, so I will not be very long.

If I could start with [redacted] --

THE CHAIRMAN: Do you need to go into closed session?

MS TOLANEY: I do. Sorry, I do. Thank you very much.

THE CHAIRMAN: Can we do that, please. Thank you.

(In private)

(4.37 pm)

(The hearing adjourned until 10.00 am on Thursday, 3 April 2025)