

OPUS 2

INTERNATIONAL

Sainsbury's Supermarkets Ltd v (1) MasterCard Inc, (2)
MasterCard International Inc, (3) MasterCard Europe S.P.R.L.

Day 12

February 18, 2016

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1 Thursday, 18th February 2016
 2 (2.00 pm)
 3 (Hearing in open court)
 4 Housekeeping
 5 MR HOSKINS: Good afternoon, sir.
 6 MR JUSTICE BARLING: Good afternoon. Nice to see everyone.
 7 MR HOSKINS: A popular day.
 8 MR JUSTICE BARLING: Yes, good.
 9 MR HOSKINS: Can we do some housekeeping first because you
 10 have been sent various bits and pieces.
 11 MR JUSTICE BARLING: Yes, we have.
 12 MR HOSKINS: We probably should take stock of what you have
 13 got and where we are at.
 14 I won't go through all the details, but in relation
 15 to Australia, you should have a composite document with
 16 certain -- it is not quite agree/disagree, but comments
 17 in it. So I think that ticks the box of what you were
 18 hoping for, at least I hope it does.
 19 MR JUSTICE BARLING: Thank you very much for that.
 20 MR HOSKINS: In relation to the Maestro story, we produced
 21 a narrative. Sainsbury's said they didn't like it, they
 22 hated it so much that they were not going to engage on
 23 it. So you have our narrative which we like a lot, and
 24 you have their answer to question 2, which is a graph,
 25 put in a sort of timeline. I'm sorry that's not quite

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1 what you were hoping for, but that's the best that could
 2 be done.
 3 MR JUSTICE BARLING: So that is Australia and Maestro.
 4 MR HOSKINS: That is right. And the third one was the
 5 general facts and figures. Most of that was within our
 6 knowledge and we provided that to the best of our
 7 ability. Hopefully, again, that is largely what you
 8 were hoping for.
 9 MR JUSTICE BARLING: Thank you.
 10 MR HOSKINS: Damages flowcharts. You can tell from the
 11 heavy tone of my voice it is not quite straightforward.
 12 MR JUSTICE BARLING: This is the dynamic spreadsheet one.
 13 MR HOSKINS: That is correct. You saw our original
 14 flowcharts that we put in with our skeleton argument.
 15 We invited Sainsbury's to collaborate with us.
 16 MR JUSTICE BARLING: Yes.
 17 MR HOSKINS: And there has been conversations, emails
 18 between the experts, and I have to say the letter that
 19 came this morning with Sainsbury's dynamic spreadsheet,
 20 if that's what we are going to call it, was a surprise
 21 and I'm afraid was inaccurate because it said
 22 Mr von Hinten-Reed had not seen either of the flowcharts
 23 or the explanatory note prior these being lodged with
 24 the Tribunal.
 25 But, with respect, he had been sent two versions --

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1 MR JUSTICE BARLING: Have we got that letter?
 2 MR HOSKINS: It came to you this morning.
 3 MR JUSTICE BARLING: It is at the back, is it?
 4 MR HOSKINS: Sorry, expertly filed. Do you want to read the
 5 letter before I make --
 6 MR JUSTICE BARLING: Probably ought to. Is it the one at
 7 the ... (Pause) Thank you very much.
 8 Yes.
 9 MR HOSKINS: So Mr von Hinten-Reed was provided with
 10 a draft, a sort of interim draft of what we had in the
 11 skeleton, plus the final version that we put into the
 12 Tribunal the other day.
 13 So I'm afraid that's inaccurate, and if there is any
 14 dispute we have the email correspondence, we can hand it
 15 up. But there may have just been a miscommunication
 16 between Mr von Hinten-Reed and Mishcons.
 17 MR JUSTICE BARLING: Hopefully that can be put right anyway.
 18 So we should substitute these, should we?
 19 MR HOSKINS: Can I just finish this and I will tell you
 20 where we have got to, because I'm making my noise, then
 21 I'll try and be -- let's take this forward, but I need
 22 to make these points. But let me just make these quick
 23 points.
 24 It is also said in that letter that as
 25 Mr von Hinten-Reed advised Dr Niels, Mr von Hinten-Reed

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1 has been working on the dynamic Excel spreadsheet. I'm
 2 afraid, again, that is not correct.
 3 Whilst Mr von Hinten-Reed has said he reserved the
 4 right to do his own work, he didn't actually tell
 5 Dr Niels he was working on this and the first time
 6 Dr Niels knew about the dynamic Excel spreadsheet was
 7 at 8.10 am this morning when it was sent to him.
 8 There is a degree of frustration, particularly on
 9 Dr Niels' part because he was hoping we could
 10 co-operate, and the intention of producing these
 11 flowcharts was to assist the Tribunal because you have
 12 got -- if you get to that stage -- to have to come up
 13 with a figure, you have got to come up with a figure.
 14 So we regret that as things currently stand, rather
 15 than being helped, you're probably in a worse position
 16 with more work to do because you have two versions. So
 17 the question I asked Dr Niels earlier today when I heard
 18 that this had happened, I said, look, can you work on
 19 the dynamic spreadsheet, because he has obviously not
 20 had a chance to comment on it, can you input into that,
 21 because he has certain comments on that where he
 22 disagrees. And he says, yes, because of the work we
 23 have already done on our flowcharts, he thinks it is
 24 possible to do that.
 25 I'm keen to offer that to the Tribunal because, as

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1 I say, the whole purpose of that was to help you. But
 2 I have to stress that if that's a worthwhile exercise
 3 there has to be genuine co-operation and, I don't think
 4 I'm putting words into his mouth, Dr Niels doesn't feel
 5 he has had that so far in trying to come up with
 6 a common factor.
 7 I put that out, and we are very happy to try to work
 8 on a common spreadsheet --
 9 MR JUSTICE BARLING: I appreciate you telling us all this,
 10 but are we to put this on one side for the time being,
 11 the hard copy one that you have provided, or are we to
 12 wait for some further and better --
 13 MR HOSKINS: I'm in your hands. It is what you would find
 14 useful.
 15 MR JUSTICE BARLING: With respect, we are in your hands
 16 because although we can make requests and obviously to
 17 some extent there is a certain amount of passivity in
 18 this. We will look at whatever is put in evidence at
 19 this stage, but we don't want to have to look at a lot
 20 of different things.
 21 MR HOSKINS: Absolutely, that is my point. We can either
 22 draw stumps now and say this process has finished and
 23 you will be left with flowcharts and a dynamic
 24 spreadsheet and you will have to marry the two somehow.
 25 MR JUSTICE BARLING: I am not sure whether the dynamic

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1 spreadsheet is going to be much -- I don't know how much
 2 I will enjoy that, frankly.
 3 MR HOSKINS: That's why I asked the question.
 4 MR JUSTICE BARLING: But --
 5 MR HOSKINS: We are willing to work on it if you would find
 6 it useful. But if it is not something you would find
 7 useful, we won't waste our time and your time.
 8 MR JUSTICE BARLING: I mean, the input, how will it differ
 9 from something that can be produced in this kind of
 10 form --
 11 MR HOSKINS: You need to ask Sainsbury's that question. You
 12 understand I have not had a chance -- none of us have
 13 had a chance to dig into it. We have seen certain
 14 points where we think actually we don't like the way
 15 that has been done, we do not think that's quite right.
 16 Do you want to park that? Mr Brealey and
 17 Sainsbury's have heard what I have said and what you
 18 have said, and they can have a think about it and we can
 19 take it offline and have a conversation between the
 20 parties and see if there's ... (Pause)
 21 MR JUSTICE BARLING: I think we will have to leave it with
 22 you for now, the parties, to try to reach some --
 23 I mean, obviously we would like you to help us and we
 24 don't want to have a lot of things that have overlapping
 25 effect. We would rather have one thing that dealt with

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1 these damage computations. I have no objections to
 2 looking at some flowchart which the parties agree
 3 represents the different scenarios or, indeed, if
 4 necessary, at something that -- as long as this dynamic
 5 spreadsheet can ultimately be put into hard copy form,
 6 I don't particularly want to play around with something
 7 myself --
 8 MR HOSKINS: Would you prefer us to try to agree the
 9 flowcharts?
 10 MR JUSTICE BARLING: -- speaking for me. (Pause)
 11 PROFESSOR JOHN BEATH: Is the Excel spreadsheet -- that's
 12 a programme, a computer programme. Is it intended to
 13 replicate some of these things that have already been
 14 hard copied? What is it designed to do?
 15 MR HOSKINS: I think you need to ask Mr Brealey that because
 16 it's his document. And to be honest, neither do I.
 17 That's my problem.
 18 MR JUSTICE BARLING: Obviously the more you can agree the
 19 better, and if you can agree something we will be
 20 grateful and we will look at that. If you can't agree
 21 something, then we will just do whatever seems to us to
 22 be best and you will have to provide us each with your
 23 best shot.
 24 As I say, I think we are very much in your hands on
 25 that.

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1 MR HOSKINS: Let us take that away. That's been a useful
 2 exchange from my perspective.
 3 MR JUSTICE BARLING: Okay. Right.
 4 MR HOSKINS: I hope it helped everyone else.
 5 MR JUSTICE BARLING: Any more housekeeping?
 6 MR HOSKINS: The final housekeeping is we filed the fifth
 7 report of Greg Harman, which deals with the benefits
 8 from Sainsbury's Bank to SSL and what would happen in
 9 a lower MIF environment.
 10 MR JUSTICE BARLING: Yes.
 11 MR HOSKINS: The only point is that Mr Brealey has said that
 12 Mr von Hinten-Reed would like some time to consider
 13 that, which is fair enough, so I have agreed that we
 14 won't cross-examine him on that issue until Monday
 15 morning.
 16 MR JUSTICE BARLING: Okay.
 17 MR HOSKINS: But then there is an issue, as I understand, he
 18 wants to be able to talk to his team about this issue,
 19 and given he is supposed to be in purdah --
 20 MR JUSTICE BARLING: I see. It is nothing something he has
 21 been -- from what you tell us, he won't be
 22 cross-examined about it.
 23 MR HOSKINS: No.
 24 MR JUSTICE BARLING: I think the main thing is, as long as
 25 he is not asked about it before he contacts his team,

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1 I don't think there would be any vice in him being able
 2 to contact his team on that point only.
 3 MR HOSKINS: As long as it is made clear. If he came into
 4 court on Monday morning and said "I have had various
 5 thoughts about the issues I was cross-examined on last
 6 week" --
 7 MR JUSTICE BARLING: That would be --
 8 MR HOSKINS: -- I will be jumping up, I hope you understand
 9 that.
 10 MR JUSTICE BARLING: I am sure that will be explained by
 11 Mr Brealey to him, that obviously he is not normally
 12 allowed to speak to anyone once he has started his
 13 evidence, but on the understanding that he only speaks
 14 to his team about that point, the contents of
 15 Mr Harman's fifth expert report, then we would not
 16 regard that as being improper.
 17 MR HOSKINS: Mr Brealey has suggested that a solicitor from
 18 Mishcons would supervise the process. I would be happy
 19 with that, but to be honest it is probably a bit
 20 cumbersome because it is going to be over the weekend
 21 and Mr von Hinten-Reed probably wants to be able to
 22 contact people. And I imagine whichever solicitor gets
 23 the plum job of having to police all sorts of internal
 24 conversations on a Sunday morning won't be too happy --
 25 MR BREALEY: I only offered if it is really essential and

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1 I am sure it is not essential.
 2 MR HOSKINS: I'm not pushing for it. Mr Brealey very fairly
 3 raised it.
 4 MR JUSTICE BARLING: Mr von Hinten-Reed is a professional.
 5 MR HOSKINS: That is my point.
 6 MR JUSTICE BARLING: And if he knows that it would be
 7 improper for him to do it, I'm quite sure he wouldn't
 8 do it.
 9 MR HOSKINS: That is right.
 10 MR JUSTICE BARLING: So I think we are all right on that.
 11 MR HOSKINS: That is the housekeeping.
 12 MR BREALEY: One thing, we have a new bundle, E3.14.
 13 MR JUSTICE BARLING: Yes.
 14 MR BREALEY: It came in, as I understand it, this morning.
 15 MR JUSTICE BARLING: Is that the one into which some of
 16 this -- no.
 17 MR BREALEY: As I understand it, they are almost exclusively
 18 documents that have not ever been disclosed. So they
 19 are not in the F bundles, they are not -- and so we do
 20 genuinely feel a little bounced on this.
 21 Mr von Hinten-Reed has clearly not had that much time to
 22 look at this bundle. So it is one thing to have
 23 a bundle of documents that is in the F bundles; it is
 24 completely another thing to have reams of learned
 25 articles, which I am sure Mr von Hinten-Reed knows

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1 about.
 2 MR JUSTICE BARLING: I'm afraid I didn't know about this.
 3 MR BREALEY: Then studies, credit card market studies and
 4 what not. We just haven't had time to look at this.
 5 I repeat, as I understand it, these are documents
 6 that have not ever been disclosed, since 2012 we have
 7 had this procedure. If Mr Hoskins is going to
 8 cross-examine Mr von Hinten-Reed on them, which
 9 I imagine he wants to, hence the bundle, I would ask the
 10 Tribunal to give Mr von Hinten-Reed some time just to
 11 take stock of what these documents are.
 12 MR JUSTICE BARLING: Also, I think it goes a bit further.
 13 If, at this stage, now that we have got so much into the
 14 trial, if there are going to be submissions about it or
 15 reliance upon these, and such that you might have wanted
 16 to have some reaction from your own witnesses about
 17 them, then obviously that's another reason.
 18 MR BREALEY: Absolutely.
 19 MR JUSTICE BARLING: So --
 20 MR BREALEY: It goes to weight. At the moment whether it
 21 goes to admissibility is one thing, but it certainly
 22 goes to weight. But it certainly goes to prejudice.
 23 We, for our part, are prepared to let it go, but if
 24 it proves difficult, we might have to jump up --
 25 MR JUSTICE BARLING: It may be at some stage Mr Hoskins --

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1 these have come obviously from MasterCard?
 2 MR HOSKINS: I think without fail they are all public
 3 documents.
 4 MR JUSTICE BARLING: Sure, but --
 5 MR HOSKINS: And I asked for it to go across flagging up
 6 that there were two economics articles, and I wanted
 7 Mr von Hinten-Reed to have time to look at them.
 8 I am not going to take him to those two articles
 9 until tomorrow, so what I would suggest is his homework
 10 tonight is E3.14, 265 and 266. And the rest is not
 11 nearly as daunting as it looks. They are really very
 12 concise factual points.
 13 But you will see it when it comes out. But I'm not
 14 trying to catch anyone out. And I would encourage him
 15 to read --
 16 MR JUSTICE BARLING: I think bear in mind though --
 17 MR HOSKINS: 265 and 266.
 18 MR JUSTICE BARLING: They are quite long, aren't they? 265
 19 isn't very long, but 266 is quite long.
 20 MR HOSKINS: No, it is two copies of the same article. It
 21 is an article which is 40 pages long, including the
 22 bibliography, and it is material, subject matter, that's
 23 very familiar to all of us by now.
 24 MR JUSTICE BARLING: Let's see where we get to, shall we?
 25 We will leave that in suspense at the moment and then if

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1 Mr von Hinten-Reed feels that because of any commitments
 2 he has, he needs to have a bit of a steer on which bits
 3 to concentrate on, then we can consider whether he
 4 should have it before he is asked questions.
 5 MR HOSKINS: The articles are self explanatory if you read
 6 them, sir. If there is any prejudice, Mr Brealey will
 7 shout or you will shout and we will deal with it as it
 8 comes.
 9 MR JUSTICE BARLING: Okay.
 10 MR NILS VON HINTEN-REED (affirmed)
 11 Examination-in-chief by MR BREALEY
 12 MR JUSTICE BARLING: Thank you, Mr von Hinten-Reed.
 13 MR BREALEY: We have to go to two bundles. We have to go to
 14 bundle D2 and bundle D2.1, which you have probably got
 15 in front of you.
 16 If you go first to D2, tab 2. Check whether that's
 17 your first expert report.
 18 A. It is.
 19 Q. Hopefully on page 412 is your signature?
 20 A. That is correct.
 21 Q. Just put that to one side. Then we go to D2.1, tab 3
 22 and flip through that document, which is your second
 23 report. 659.
 24 A. Yes, it is.
 25 Q. Is a signature there?

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1 A. Yes, it is.
 2 Q. Is it yours?
 3 A. Yes.
 4 Q. Then I think there is an addendum to the second report
 5 at tab 6, 769. Does that have your signature?
 6 A. Yes, it does.
 7 Q. Then we have at tab 8 a third expert report, page 780.
 8 And at 794, is that your signature?
 9 A. Yes, it is.
 10 Q. Can you confirm to the Tribunal that the opinions that
 11 you express in these reports represent your true and
 12 complete professional opinions on the matters to which
 13 they refer?
 14 A. Yes, they are.
 15 MR BREALEY: Mr Hoskins has questions.
 16 Cross-examination by MR HOSKINS
 17 MR HOSKINS: Good afternoon, Mr von Hinten-Reed. Can we
 18 start in bundle D2 at tab 2, page 126, paragraph 35.
 19 I don't know how ingrained this is in your memory.
 20 Have a quick look through. It is the last sentence
 21 I wanted to pick up on:
 22 "All other things equal, they [that's merchants]
 23 would not want to lose a sale to a competitor because
 24 the competitor accepted payment cards and they did not."
 25 A. I see that.

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1 Q. Why would a merchant lose a sale if it did not accept
 2 a payment card?
 3 A. Some customers like to pay with cash, some like to pay
 4 with a card. A customer that comes into a supermarket
 5 may decide that they want to actually only pay with
 6 cards, or only pay with a particular card. However,
 7 most people have a choice between cash and the card.
 8 Q. For some consumers certainly, therefore, payment cards
 9 have advantages over cash? For some?
 10 A. In terms of customers wanting to purchase within
 11 a store, they may find some convenience in terms of
 12 a card over cash in terms of the weight.
 13 Q. Are there any other advantages a cardholder might value?
 14 A. There may be.
 15 Q. What would they be? Sorry, you help me.
 16 A. There may be because you have a ready reckoner of what
 17 you have spent afterwards in terms of at the end of the
 18 month. You have an account. One can also see that with
 19 cash, when you withdraw cash, it may be a bit more easy
 20 to remember.
 21 Q. Any other advantages of payment cards?
 22 A. There may be, but none come to mind.
 23 Q. Can we go to E3.14, tab 267. You will see from the
 24 title page this is a credit card market study interim
 25 report. It is conducted by the Financial Conduct

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1 Authority UK and it is dated November 2015.
 2 If you go to page 5802 and if I can ask you to
 3 read 1.1 to 1.4 you will see the nature of the study
 4 that led to this interim report. It is page 5802,
 5 paragraphs 1.1 to 1.4.
 6 (Pause)
 7 Then over the page at 1.5:
 8 "The credit card market offers a range of products
 9 to meet varied consumer needs. Consumers value the
 10 flexibility offered by credit cards and use them in
 11 different ways, for example, paying off other debt
 12 (balance transfer cards), borrowing (0% purchase cards
 13 and ...(Reading to the words)... and building credit
 14 history (low and grow cards)."
 15 Those are other advantages of payment cards over
 16 cash, are they not?
 17 A. They are, Mr Hoskins.
 18 Q. Then 119, page 5806:
 19 "A major difference between credit cards and many
 20 other credit products is that both the amounts borrowed
 21 and the repayment schedules are flexible. Subject to
 22 meeting the minimum repayment, the consumer can decide
 23 how much to repay each month. This allows consumers to
 24 opt for a very low repayment rate, which may be
 25 necessary to tide them over in the short term."

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1 Can I ask you to read the last two sentences to
 2 yourself as an observation made about implications that
 3 might have over the longer term.
 4 A. Understood.
 5 Q. Again, insofar as paragraph 119 in the first three
 6 sentences recognises certain differences between credit
 7 cards and other credit products, do you agree that those
 8 are advantages that credit cards have over other credit
 9 products?
 10 A. To some extent, what we see in the first three lines are
 11 that the flexibility that the credit card product offers
 12 comes at a price and that price is interest. You pay
 13 later for the ability to borrow now and repay in the
 14 future.
 15 So in terms of comparing different payment methods,
 16 for example, a debit card does not allow you to have
 17 that ability but it does allow you to transact. So it
 18 is a trade-off as to your preference for consumption now
 19 over consumption tomorrow.
 20 Q. For some consumers, short-term flexibility will be
 21 an advantage to them, will be a convenience.
 22 A. I'm sorry, yes.
 23 Q. Then if you take it from 5841, our survey asks consumers
 24 to select what factors applied when they took out their
 25 main credit card. As shown in figure 10, for

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1 respondents overall the key driver was rewards followed
 2 by online purchasers.
 3 Then over the page at figure 10, you see a graph
 4 setting out the various responses which consumers
 5 replying in taking part in the survey gave as to why
 6 they took out a credit card.
 7 You will see that rewards is the top answer, 33%;
 8 online purchases second, 23%; and then a variety of
 9 other reasons.
 10 Would you agree that rewards are the main reason why
 11 consumers decide to take out a credit card, or do you
 12 have a different view?
 13 A. I think there are, quite frankly, two sorts and I think
 14 this study actually brings this out.
 15 There are two sorts of consumer: those who repay
 16 within the month, and they are called transactors, and
 17 there are others who are revolvers, that is people who
 18 pay later. If they pay later than the end of the month
 19 they pay interest. In return, the credit card companies
 20 do offer rewards, and for some people rewards are
 21 something they would like to have. And if you are
 22 a transactor and you pay everything off, you get rewards
 23 and you don't have to pay any interest. And if you are
 24 a revolver, well, you may get the rewards or may not,
 25 but you certainly pay interest.

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1 So in terms of your question, Mr Hoskins, what they
 2 get in response, what their benefit -- the benefit that
 3 they think they are deriving is both the flexibility of
 4 when they take their payment, at some cost in terms of
 5 interest, and then they get a reward. And some of them
 6 are paying fees as well.
 7 Sorry, Mr Hoskins, for my length.
 8 MR HOSKINS: No, no problem at all.
 9 A. Thank you.
 10 MR JUSTICE BARLING: There is a slight ambiguity in the
 11 question here because it could be that this is going to:
 12 how do you choose your credit card, ie which credit card
 13 are you choosing, as opposed to a question aimed at
 14 whether you want a credit card at all, ie what are the
 15 factors.
 16 I'm not entirely sure, if you look at "which of the
 17 following applied when you took out your credit card..."
 18 That sounds more like -- but then the choice aspect is
 19 what's the heading. I don't know.
 20 MR HOSKINS: I'm not sure I need to get into that.
 21 MR JUSTICE BARLING: It may not matter.
 22 MR HOSKINS: That's certainly not what I was aiming for.
 23 I understand the point.
 24 MR JUSTICE BARLING: No.
 25 MR HOSKINS: Is it fair to say, Mr von Hinten-Reed, both

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1 from this interim report and from the work you have
 2 done, that a significant number of cardholders value the
 3 rewards that are offered by credit card companies?
 4 A. Cardholders would like to get rewards.
 5 I'm sorry, Mr Hoskins, if I interrupt you. I will
 6 stop.
 7 Q. Vice versa.
 8 A. Okay. Good. I would be grateful for the question
 9 again.
 10 Q. I was trying to sum up where we had got to. The
 11 question was do you agree that a significant number of
 12 credit card holders value the rewards they receive from
 13 the credit card companies?
 14 A. Yes, significant numbers of cardholders do value
 15 rewards.
 16 Q. Do you also agree that significant numbers of credit
 17 card holders value the ability to make online purchases?
 18 A. Consumers or cardholders want the convenience of online
 19 purchases. They can use cards, it is not just credit
 20 cards, but also debit cards. So in terms of transaction
 21 online, you don't necessarily need a credit card, you
 22 could have a debit card.
 23 Online is where roughly cash, obviously, unless you
 24 post it to a bank, is not an option. So we have the
 25 situation where a card is necessary for that

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1 transaction. Not necessarily a credit card.
 2 Q. Paragraph 4.43, the second bullet, says:
 3 "As expected, these results vary based on the type
 4 of card a consumer took out. For rewards consumers,
 5 [second bullet], 22% to make safe online purchases."
 6 Are you aware of a difference in the protection that
 7 cardholders have depending on whether they use a debit
 8 or a credit card to make an online purchase.
 9 A. I believe -- and this is a piece of law, so you will
 10 have to correct me if I get the name wrong, but the 1974
 11 Consumer Credit Act applies to credit cards.
 12 Q. And under that Act, the cardholder has a right of action
 13 against the provider of credit if there is
 14 a misrepresentation or a breach of contract by the
 15 supplier. Is that how you remember it?
 16 A. I understand that to be the case. We will get into this
 17 probably later, but obviously the convenience that is
 18 derived from that particular thing, the safe online
 19 purchase, derives from that law.
 20 Q. And it only applies to credit cards, not to debit cards?
 21 A. That is my understanding. However, Mr Hoskins, I'm not
 22 a lawyer and if anybody would like to state that that is
 23 not the case, I would be happy to be corrected.
 24 Q. Don't worry, I have looked at it and you are right. If
 25 that's any comfort.

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1 A. That is a shock after so many years living in Belgium.
 2 Q. Can we go back to D2, tab 2, which is your first report.
 3 If we could go to page 127, you see:
 4 "Such effects do not stop there, however, as there
 5 may be secondhand effects that operate as follows."
 6 It is the next sentence I want to focus on.
 7 A. Could you point me to the paragraph, sir?
 8 Q. I'm sorry, it is 127 of the bundle, paragraph 37 of your
 9 report.
 10 A. I see, 37, yes.
 11 Q. The second sentence, you say:
 12 "The increase in cardholder use in turn encourages
 13 more merchants to want to be members of the platform."
 14 A. That is correct.
 15 Q. Can you just explain why that's the case?
 16 A. Well, the more acceptance -- the demand by cardholders,
 17 if that increases, also means that if a merchant accepts
 18 that particular card, then they are likely to get --
 19 more likely to get that sale.
 20 Q. So accepting cards has a value to merchants. That's one
 21 of them, isn't it?
 22 A. Well, for any individual merchant that may be the case.
 23 Q. And each merchant which accepts payment cards must
 24 consider that the value to them of accepting those cards
 25 is greater than the cost to them of doing so?

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1 A. The value to them of accepting a card is in terms of the
 2 transaction benefits or savings that they have achieved
 3 at the till between the sale that is via cash or the
 4 sale via the card. That is the merchant's value.
 5 The cardholder derives value from, as we have just
 6 discussed, the rewards and the benefits of acceptance by
 7 the merchant of the card to make that sale.
 8 Q. I don't think that's quite the answer -- it is not the
 9 answer to the question I asked. It is an answer to
 10 a different question.
 11 Each merchant who accepts cards must consider that
 12 the value to them of accepting cards is greater than the
 13 cost to them of doing so, ie the merchant's benefits
 14 from accepting cards outweigh the cost to them of doing
 15 so, otherwise they would not do it.
 16 A. Their willingness to pay the MSC, that is the benefit
 17 that they derive, okay?
 18 Q. Sorry, that is the benefit they derive. Who is "they"?
 19 A. The merchants.
 20 Q. And paying the MSC is a benefit to them?
 21 A. The MSC is a cost to the merchant.
 22 Q. Yes.
 23 A. Okay? Not a benefit.
 24 Q. I think you misspoke, that's why I was checking.
 25 A. I did misspeak and I appreciate you for correcting me.

23

1 Q. I'm not an economist, so I take things very (inaudible).
 2 MR JUSTICE BARLING: Sorry, I'm not sure I got the right
 3 answer there then. Does the benefit to the merchant of
 4 accepting --
 5 A. The benefit to the merchants is in terms of getting
 6 an additional sale to the merchant, okay, through the
 7 acceptance of the card and the very fact that
 8 cardholders want to hold that card.
 9 MR HOSKINS: The question I'm asking is the follow-up, the
 10 logic which flows from that, which is: therefore, each
 11 merchant which accepts cards must consider that the
 12 value of accepting cards is greater than the cost to
 13 them of doing so?
 14 A. They will do that in terms of accepting a credit card
 15 from a four-party system, or an Amex card with
 16 a three-party system. If there are benefits to
 17 acceptance, the cardholders would like it, then they are
 18 happy.
 19 Q. I think the answer to my question is "yes", but I don't
 20 want to put words in your mouth.
 21 Each merchant which accepts cards must consider that
 22 the value to them of accepting cards is greater than the
 23 cost to them of doing so?
 24 A. Each merchant, yes.
 25 Q. Yes. If the MSC of a particular brand of payment

24

1 card -- MasterCard, Visa, Amex -- exceeded the value to
 2 a particular merchant of accepting that card, then the
 3 merchant would choose not to accept that particular
 4 payment card?
 5 A. If each individual merchant finds value in accepting the
 6 card, it will accept the card.
 7 Q. Because the benefits outweigh the cost to that merchant?
 8 A. To that merchant. I distinguish here between individual
 9 merchant and thinking about whether each individual
 10 merchant accepts, and then thinking about whether all
 11 merchants accept. So the benefits to all merchants.
 12 So when a merchant thinks about the additional sale,
 13 sales, it may get from having or accepting an Amex or
 14 a Visa card or a MasterCard branded card, that's
 15 different from thinking about additional sales in the
 16 meaning of article 101(3), which is all about whether
 17 merchants as a whole think there are additional sales
 18 derived from the credit card and derived from the MIF.
 19 It is a crucial distinction for me, sir.
 20 Q. We are going to be here for quite a few days and -- it
 21 is entirely up to you, I can't stop you. If you want to
 22 try to guess what my questions are going to, I can't
 23 stop you. But there are specific questions. I have
 24 a professional obligation to cover all the relevant
 25 issues with you. I make that point. But you don't have

25

1 to try to pre-empt where I'm going, but you shouldn't
 2 feel constrained in giving full answers.
 3 A. I apologise, Mr Hoskins, I don't want to stop your line
 4 of questioning, and please --
 5 MR BREALEY: Similarly, Mr von Hinten-Reed should feel free
 6 to put everything in context.
 7 MR HOSKINS: If the MSC is set at a level that causes
 8 merchants to choose not to accept a card, that will make
 9 the card less attractive to cardholders?
 10 A. Yes.
 11 Q. Over time cardholders of that card would reduce the
 12 numbers of them?
 13 A. There would be an incentive on the part of the
 14 cardholders. This second round effect would go into
 15 reverse, yes.
 16 Q. Sorry, the less merchants who accept a card, the less
 17 attractive the card is to cardholders, the less
 18 cardholders will take out that card?
 19 A. Yes. And just to be quite clear, that can come through
 20 merchants not accepting a card, or merchants
 21 surcharging. So you reduce the demand for a particular
 22 branded card.
 23 Q. If cardholder numbers reduced, that would further reduce
 24 the willingness of merchants to accept those cards
 25 because it is less utility for merchants?

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1 A. Yes.
 2 Q. In relation to Amex, the fee charged by Amex to
 3 merchants is significantly higher than the fee charged
 4 by other schemes, is it not?
 5 A. That is the case, sir.
 6 Q. The evidence -- I have seen it, it is in Dr Niels' first
 7 report, paragraph 2.32. He says that on 2011 data, the
 8 MSC charged by Amex was around 2.5%, compared to
 9 an average of 1.35% charged by other card schemes. Does
 10 that sound right to you? Do you want to see his report
 11 before you answer? I'm quite happy to take you to it.
 12 It is around 2.5% for Amex and an average of 1.35% by
 13 other card schemes.
 14 A. Let's just say it is substantially higher, we would
 15 agree.
 16 Q. Does that seem roughly correct to you?
 17 A. It seems, yes.
 18 Q. Why do some merchants accept Amex?
 19 A. Because a particular type of customer wants to have
 20 an Amex which has a fee, and in return for the fee they
 21 also get very large rewards, sometimes five times, six
 22 times the amount of rewards for a premium card with
 23 a different brand.
 24 Q. But why do some merchants accept Amex? Not why do some
 25 cardholders take out Amex?

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1 A. Merchants accept Amex to the extent they believe that
 2 those cards actually generate sales for them. That
 3 wouldn't otherwise be the case.
 4 Q. Is it simply the flip side: why do some merchants not
 5 accept Amex?
 6 A. Some merchants do not accept Amex because maybe their
 7 client base is such that the costs and benefits of
 8 accepting them are much lower.
 9 Q. So there is a cost issue, or there might be, if they do
 10 not accept Amex?
 11 A. There may be.
 12 Q. Would they maybe not accept Amex because of the number
 13 of cardholders? Amex has less cardholders; is that
 14 an issue?
 15 A. Amex has less cardholders. Amex has a general issue of
 16 acceptance, so the issue is whether the cardholder goes
 17 into the store and sees whether Amex is actually on the
 18 till. Whether the merchant has put the Amex brand on
 19 the till depends on the number of potential clients it
 20 will get who hold Amex. It is sort of a circle.
 21 Q. There are a significant number of merchants who do not
 22 accept Amex?
 23 A. That is my understanding.
 24 Q. The number who do not accept Amex is greater than the
 25 number who do not accept MasterCard?

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1 A. I don't know the exact figure on that, but I would think
 2 it is probably correct.
 3 Q. And there are more merchants who do not accept Amex than
 4 who do not accept Visa?
 5 A. I would need to be drawn to the exact data on that.
 6 Q. It is just the general --
 7 A. I would say as a suggestion, I would say yes, let's keep
 8 that.
 9 Q. Why did MasterCard not charge MIFs at the same level as
 10 Amex's merchant fees?
 11 A. Because -- I may make a slightly longer intervention --
 12 MasterCard is a different type of system. It is more of
 13 a mass market credit card, has standard and premium
 14 aspects to it. The interests of MasterCard are -- if
 15 you want to use -- I don't want to use a legal term, but
 16 may I say the association of undertakings involves
 17 MasterCard in the centre, acquirers and issuers. And
 18 the objective of MasterCard is to maximise the output of
 19 the scheme, it is not necessarily to maximise the MSC.
 20 That's its objective. That is the scheme's
 21 objective. So the idea is to balance the interests --
 22 the willingness to pay of the merchants who are asked to
 23 provide revenue to fund cardholder rewards, and the
 24 interests of issuers and acquirers to take into account
 25 in setting that default MIF.

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1 Q. Say MasterCard got its sums wrong and the MIF it charged
 2 was too high so the system was out of balance, given the
 3 answers you have already given I think it follows that
 4 there is a risk that merchants would stop accepting
 5 MasterCard because the benefit to them of accepting
 6 MasterCard might come to be outweighed by the cost of
 7 doing so if the MIF were too high. Is that correct?
 8 A. That is correct. May I just have a slight -- so we are
 9 talking here about the merchants' on one side of the
 10 market willingness to pay. Are you charging them so
 11 much in terms of an MSC that they decide not to accept
 12 a card and/or surcharge? So this is the mechanism by
 13 which they then say, well, I'm sorry, your MSC -- as
 14 part of the MSC, the MIF is too high, would you please
 15 reduce it.
 16 Now, that mechanism is only as good as you have some
 17 other option. So buyer power on the part of merchants
 18 is only so good if they have another or different
 19 product to go to.
 20 So what we have as the current situation is two
 21 four-party systems roughly with credit cards, four-party
 22 system, and we have Amex, Amex being a different fee
 23 paying proposition. I think probably if I go back to
 24 that study which -- I have just been drawn attention to,
 25 the FCA credit card market study, I think probably that

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1 is borne out in there.
 2 Q. We are going to come to that issue, so you will get to
 3 say more about that later.
 4 A. Thank you.
 5 Q. Payment systems compete against each other, don't they?
 6 A. Payment systems compete against each other, that is
 7 correct.
 8 Q. If a payment scheme wishes to be successful, its terms
 9 of operation must be sufficiently attractive to issuers?
 10 A. Ultimately it has to be attractive to cardholders.
 11 Cardholders are issued cards by issuers.
 12 Q. But it must be sufficiently attractive not just to
 13 cardholders, certainly to cardholders, but it must be
 14 sufficiently attractive to issuers?
 15 A. Mmmhmm.
 16 Q. It must be sufficiently attractive to acquirers?
 17 A. Acquirers are processors. Ultimately the MIF is not
 18 a cost that they actually bear.
 19 Q. My question wasn't about the MIF. If a payment system
 20 wishes to be successful, its terms of operation in
 21 general terms must be sufficiently attractive to you
 22 have agreed with consumers, agreed with issuers. My
 23 question is it must also be sufficiently attractive to
 24 acquirers, because if it isn't, nobody will acquire?
 25 A. I think we are all agreed that there is a shared

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1 objective of maximising the number of MasterCard cards
 2 between acquirers, issuers and MasterCard. Now, how do
 3 you achieve that? That depends upon obviously the
 4 rewards and the fees that cardholders pay and, on the
 5 other side, who pays for that. That's the merchants,
 6 and you have got to make sure that the merchants don't
 7 pay so high a fee that their willingness to pay is
 8 exceeded. So there is this balance.
 9 In terms of attractiveness and -- it is not
 10 a negotiation, however -- between the acquirers and
 11 issuers, however, there is a shared objective. And not
 12 to use the horrible term "coordination", but that's
 13 roughly what it is. So each one has an interest in
 14 helping each other.
 15 Q. So I think you have just given this answer, but just to
 16 clarify, if a payment scheme wishes to be successful its
 17 terms of operations must be sufficiently attractive to
 18 merchants, just to complete the sentence?
 19 A. Okay, it has to be sufficiently attractive because the
 20 other side, it wants to have cardholders accepting cards
 21 and coming into its stores.
 22 Q. If a payment scheme's terms of operation are not
 23 sufficiently attractive, it will lose business to other
 24 payment schemes?
 25 A. I think I have said in my report that in terms of

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1 competition between payment schemes, there is upward
 2 pressure on -- in terms of the rewards and everything
 3 else. So that implies that the merchants have to pay
 4 more. So if, actually, we are talking about
 5 satisfaction -- remember they are the same people -- the
 6 issuers, they are the banks and the acquirers, then,
 7 yes.
 8 Q. So, sorry, the answer to the question "if its terms are
 9 not sufficiently attractive it will lose business to
 10 other payment schemes" was yes?
 11 A. Yes.
 12 Q. And in order to compete with each other, card payment
 13 systems will seek to increase the number of issuers
 14 holding its cards and the number of merchants accepting
 15 its cards?
 16 A. Yes.
 17 Q. A payment system can attract issuers by offering
 18 a higher MIF than competing payment systems?
 19 A. Issuers are attracted to a particular product by two
 20 things. One is the ability to finance rewards, and
 21 I think that comes through the MIF, and then the other
 22 thing that issuers are thinking about is the amount of
 23 interest income that they receive.
 24 The interest income, I understand, is in excess
 25 of -- well in excess of the interchange income, which is

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1 used to, in effect, finance competition between the card
 2 schemes in the intersystem market, and the interest is
 3 well above the amount that's caused by impairments, so
 4 when people don't actually pay off the card.
 5 So the issuer's interests are twofold. One is
 6 making sure that their cards are competitive vis-a-vis
 7 other issuers, and then ensuring that the benefits or
 8 the profits from lending exceed the cost and that's what
 9 happens.
 10 Q. So the answer to the question "a payment system can
 11 attract issuers by offering a higher MIF than competing
 12 payment systems" is yes?
 13 A. Is yes.
 14 Q. Can we go to your first report, so that is D2, tab 2 at
 15 page 226.
 16 Paragraph 520 at the bottom of the page:
 17 "It is clear from the above statements that in
 18 competing for issuers to issue their cards, Visa and
 19 MasterCard have a very strong incentive to increase
 20 interchange fees."
 21 A. That is the paragraph I was trying to explain, sir.
 22 Q. So Visa and MasterCard compete for issuers by offering
 23 higher interchange fees, that's what you say in 520?
 24 A. That is right, and that is basically for when we think
 25 of the current situation, so everything else being

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1 equal, we are economists, we tend to use this term,
 2 I don't put it everywhere, but everything else being
 3 equal, Visa and MasterCard competing in the intersystem
 4 market, then the pressure is on increasing interchange
 5 fees upwardly.
 6 Q. As I think you have already accepted, an issuer can
 7 attract cardholders by offering more rewards, correct?
 8 A. That is correct.
 9 Q. And providing such rewards to cardholders has cost
 10 implications for the issuer, someone has to pay it
 11 for it?
 12 A. Someone has to pay for it.
 13 Q. In relation to acquirers, how can a payment system
 14 attract acquirers?
 15 A. Acquirers are more sensitive than issuers to the other
 16 side of their market, that is the merchants. So they
 17 are interested in processing the transactions, for
 18 example, Sainsbury's.
 19 The MIF as part of the MSC is not something they
 20 bear. Obviously if the MIF was raised to a level that
 21 supermarkets decide to surcharge or not accept cards,
 22 that's not in the issuer's incentive -- interest -- the
 23 acquirer's interest.
 24 The other thing is that acquirers also have
 25 an intersystem incentive. They process both Visa

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1 branded cards and MasterCard branded cards. Now, they
 2 also have an interest in making sure that sales,
 3 transactions are done on those particular systems,
 4 unless -- because otherwise it is done on Amex.
 5 Now, obviously with the new licence GNS scheme, that
 6 is a four-party system where in effect in the UK Lloyds
 7 has issued you a MasterCard or has a MasterCard already
 8 and they are issued with an American Express. That's
 9 the only basic change to the system.
 10 Q. If a payment system has a large number of cardholders,
 11 that will make it more attractive to merchants and, in
 12 turn, will make it more attractive to acquirers,
 13 correct?
 14 A. Provided that the payment system does not charge too
 15 much to the merchants such that it is above their
 16 willingness to pay and they then reduce their acceptance
 17 or surcharge, that also has implications then for
 18 cardholders. So there is a balance.
 19 I apologise.
 20 Q. No, you finish if you have something else to say.
 21 A. There is a balance, I'm sorry, Mr Hoskins.
 22 Q. Acquirers, in order for it to be attractive for them to
 23 take part in the payment system, there have to be
 24 a sufficient number of cardholders holding the cards and
 25 a sufficient number of merchants accepting it?

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1 A. Yes. As I said, what you basically have in this
 2 four-party system is a shared objective of maximising
 3 the number of MasterCard issued cards, and that shared
 4 objective is from the acquirers, it is from the issuers
 5 and it is from MasterCard. So it is not like
 6 a bilateral negotiation.
 7 Let's distinguish the two things. Once you have
 8 this system, everyone has in a way -- I hate to use the
 9 word, but I will use it -- coordinated or shared
 10 objective.
 11 Q. I think you have already accepted the larger the number
 12 of cardholders a payment system has, the more merchants
 13 would be willing to pay to accept those cards?
 14 A. Up to a point, until the point where the individual
 15 merchant's willingness to pay is exceeded. Where that
 16 is you can only see when the pip squeaks, so to speak.
 17 And the point is that everyone on the acquirer's side is
 18 trying to ensure that -- I mean, they are closer to the
 19 merchants so they hear the noise more than the issuers
 20 who hear the noise from cardholders.
 21 MasterCard above it has an incentive to try to
 22 balance this, and I think from the testimony, I don't
 23 know whether it is this last week, probably two weeks
 24 ago now, I understand that MasterCard go out and think
 25 about how to consult both sides, the acquirers and

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1 issuers, on a default MIF. That's the role they play,
 2 and that's how they set the default MIF, I understand.
 3 Q. If we go back to your first report, page 133,
 4 paragraph 62.
 5 You say in the middle of paragraph 62:
 6 "I acknowledge that one distinctive ...(Reading to
 7 the words)... credit card take-up and usage."
 8 That is page 133, paragraph 62, the third sentence.
 9 Do you have that?
 10 "I acknowledge that one distinctive feature ..."
 11 A. Yes, I do.
 12 Q. If we can then look at Dr Niels' report, so that is in
 13 D3. You may want to keep D2 handy. Tab 3, page 254.
 14 At paragraph 340, you see he says:
 15 "This competition in issuing has contributed to the
 16 growth of ...(Reading to the words)... is more than
 17 double than that of the UK average."
 18 Next bullet:
 19 "The total value of card payments per inhabitant was
 20 significantly higher than the EU average."
 21 Next bullet:
 22 "Another study shows that the number of cards per
 23 capita in the UK has been over 2.5 over the relevant
 24 period, whereas the rest of the EU had an average
 25 of 1.5."

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1 Then he concludes:
 2 "These factors are likely to ...(Reading to the
 3 words)... between card schemes and issuers."
 4 Do you agree that these factors mean that
 5 competition between issuers for cardholders is more
 6 intense in the UK than in other EU states?
 7 A. The intensity of competition in the intersystem market,
 8 which is what this, I think, implies, is stronger than,
 9 for example, in Belgium.
 10 Q. It is stronger than any other EU state, isn't it, in
 11 the UK?
 12 A. I should say yes.
 13 Q. Staying in Dr Niels' first report if we can go to
 14 page 262.
 15 At paragraph 3.78, you will see that some of the
 16 figures there are confidential so neither of us should
 17 read them out. I think the safest thing is if I could
 18 ask you to read paragraph 3.78.
 19 In Dr Niels' opinion, UK issuers incur significantly
 20 higher costs in relation to credit write-offs than
 21 issuers in other EEA countries. Do you agree?
 22 A. They do. The paragraph is correct. But they also get
 23 higher returns, ie interest to cover it.
 24 Q. Then at paragraph 3.79, Dr Niels says:
 25 "The economic downturn during 2007 to 2010, which

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1 overlapped the claim period in the current case, has
 2 resulted in an increase in the number of bad debts and
 3 subsequent credit write-offs."
 4 Do you agree?
 5 A. The word "increase" is right --
 6 Q. So you would agree?
 7 A. I agree that it's increased. Recessions usually lead to
 8 an increase in bad debts. The question is whether those
 9 bad debts exceed the interest income, and I think from
 10 the FCA credit card market study, which I have been
 11 referred to, I was doing some homework the other day,
 12 I think chapter 5 is one you ought to be looking at in
 13 terms of thinking about how issuer costs, or the
 14 interchange fee as a perspective of an issuer's total
 15 revenue, and then thinking in terms of interest and
 16 thinking in terms of the impairments, that's where you
 17 will find the data for this issue, the total data, to
 18 both sides of this question.
 19 Q. If you go to page 255 of Dr Niels' report, he says:
 20 "Furthermore, in 2012 Retail Banking Research
 21 reported that premium cards, such as gold and platinum,
 22 represent 31% of all bank issue charge and credit cards
 23 in the UK. This suggests the presence of a strong
 24 premium card market. According to Keith Douglas, this
 25 is more characteristic of the UK card market than the

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1 rest of the EU."
 2 Do you agree?
 3 A. I agree with the second sentence:
 4 "This suggests the presence of a strong premium card
 5 market."
 6 The third sentence:
 7 "... this is more characteristic of the UK card
 8 market than the rest of the EU", I also agree.
 9 What I don't quite -- it is not that I don't agree,
 10 it is just that I don't understand whether of that 31%
 11 of all bank issue charge and credit cards in the UK,
 12 whether all of those are fee paying cards or whether
 13 they are non-fee paying cards.
 14 I only open this up because that's something that's
 15 not clear to me.
 16 Q. Can we go back to your first statement and go to
 17 page 231.
 18 A. This is D2, sir?
 19 Q. It is D2, that is correct. Page 231, paragraph 548.
 20 You say:
 21 "It has been correctly noted that Amex has
 22 a significantly higher market share in the UK than most
 23 or all other European countries. However, the Amex
 24 share is still small at around 9% to 10%, and such
 25 a small market share would not normally be considered to

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1 be significant."
 2 Is the 9% to 10% you refer to, the total credit card
 3 market? 9% to 10% of which market?
 4 A. Could I have a look at the disclosure documents? I just
 5 want to be very careful because Amex here has got the
 6 proprietary scheme and the GNS, and if I -- I'm just
 7 trying to think -- I thought the proprietary -- I would
 8 need, sorry --
 9 MR JUSTICE BARLING: You need to check something?
 10 A. I need to check something.
 11 MR JUSTICE BARLING: We need to have a short break at some
 12 point, so would this be a good moment while
 13 Mr von Hinten-Reed just checks the document he wants to
 14 check?
 15 A. Yes, I will need to have the relevant MasterCard
 16 documents in section 6.
 17 MR JUSTICE BARLING: That can be provided for you.
 18 MR HOSKINS: I am quite happy for someone in Mishcons
 19 to help.
 20 MR JUSTICE BARLING: We will just take the usual short
 21 break.
 22 (3.09 pm)
 23 (A short break)
 24 MR JUSTICE BARLING: Did you find what you were looking for?
 25 A. No, sir, but I think I have a way of answering the

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1 question.
 2 I wanted to provide the -- whilst I agree that 9%
 3 to 10% is roughly the whole American Express, the issue
 4 is the distinction between proprietary and GNS that
 5 I wanted to give you some more data on.
 6 I don't want to take it away because that means more
 7 time, but I think it is roughly around three for the
 8 four-party type Amex, and the rest is made up of the
 9 proprietary system. But this is from memory, sir.
 10 MR HOSKINS: But up to a total of 9% to 10%?
 11 A. Yes.
 12 Q. And the question was, of which --
 13 A. Of the payments.
 14 Q. Of credit card market?
 15 A. The total payment market.
 16 Q. The total payment market including what?
 17 A. Sorry, it is Visa, MasterCard, Amex.
 18 Q. Debit and credit?
 19 A. Debit and credit. That's my understanding.
 20 MR JUSTICE BARLING: Of the total payment card market, yes?
 21 Because we are excluding cash, obviously.
 22 A. Excluding cash. That's from my memory. I would like to
 23 make sure we get the right figure before this Tribunal.
 24 MR JUSTICE BARLING: Right.
 25 MR HOSKINS: The bulk of Amex's market share is in the

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1 premium credit card market, isn't it?
 2 A. Yes.
 3 Q. I'm not going to get economic terms. Its share of the
 4 premium credit card market, if you excuse the use of the
 5 term "market", is obviously substantially more than 9%
 6 to 10%?
 7 A. I need to check the figure. In terms of the market,
 8 I need to check that, I haven't had time. So if you
 9 bear with me I will come back to you tomorrow morning
 10 with that.
 11 Q. You may be thinking I need too much detail, (inaudible)
 12 too much detail, if Amex has 9% to 10% of the total
 13 payment card market in the UK and the bulk of Amex's
 14 business is premium credit cards, then does it not
 15 follow that Amex must have a substantially larger share
 16 than 9% to 10% of the premium credit card --
 17 A. Sorry, Mr Hoskins. I apologise for interrupting. If
 18 I have got it right that it is the payment card market,
 19 then if you subdivide that into a premium card market,
 20 yes, it would be a higher share.
 21 Q. A materially higher share, that's the logic?
 22 A. If I have got it right. I want to make sure I have got
 23 it right.
 24 Q. Can we go to bundle E3.12, tab 222. You should have
 25 a document entitled "UK strategy development, full

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1 market and strategy overview". It is dated
 2 31st August 2009 and it is a MasterCard Europe document.
 3 Do you have it?
 4 A. I do have it.
 5 Q. If you go through to 4943, just bear with me because
 6 this is a blue document and I want to make sure what
 7 I can say out loud.
 8 This is a blue page, so we have to be careful about
 9 referring to numbers etc, but you will see on the
 10 right-hand side of the page in bold, on top of the
 11 barchart there:
 12 "However, American Express remains dominant in the
 13 high transactor segment."
 14 That was MasterCard's view in 2009. Do you agree
 15 with that assessment?
 16 A. The words are stated there, but the two columns don't
 17 tell me how these columns are divided up into high
 18 transactor, or low or medium.
 19 Q. I'm not asking you to interpret the document. I'm
 20 asking you whether, in your opinion, you agree with
 21 MasterCard's stated view that Amex was dominant in the
 22 high transactor segment in August 2009?
 23 A. Well, these are loaded words, "remains dominant". I do
 24 not have enough information on this particular page to
 25 make that assessment.

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1 Q. Or in your knowledge?
 2 A. Not in my knowledge, no.
 3 Q. But you agree that Amex had a significant share of the
 4 premium sector?
 5 A. I would tend to agree with that.
 6 Q. Can we go to bundle D3, tab 3. This is Dr Niels' first
 7 report. At page 215. And at paragraph 3.28 you will
 8 see at the end of paragraph 3.28 Dr Niels says:
 9 "The threat to MasterCard's business from Amex was
 10 much more significant in the UK and during the claim
 11 period, ie from December 2006 onwards, than in relation
 12 to the intra-EEA cross-border market and time period
 13 covered by the Commission's 2007 decision."
 14 Do you agree with that?
 15 A. So, the two propositions I understand. So Amex is
 16 becoming a more significant competitor in the time
 17 period after the Commission's 2007 decision. I think
 18 the term "more" is right, and we have always said
 19 significant.
 20 Question whether significant is still 9% to 10%,
 21 not 40%/50%. The threat in terms of the intra-EEA
 22 cross-border market, well, that would be the case, yes.
 23 Q. If you go to paragraph 3.36 of Dr Niels' first report,
 24 he says:
 25 "According to Keith Douglas, in an attempt to enter

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1 the UK card market, monoline issuers such as MBNA and
 2 Capital One attracted customers by offering favourable
 3 balance transfer offers that were otherwise expensive.
 4 The monoline issuers also extended credit cards to less
 5 affluent customers. This has accelerated the growth of
 6 credit card usage in the UK. The same has not been
 7 observed in the rest of Europe."
 8 Do you agree with that?
 9 A. I would agree with that. I would also make just
 10 a little point on MBNA and Capital One. They have done
 11 the favourable balance transfer, that is right. They
 12 have gone for less affluent and they also have higher
 13 interest rates on their credit cards than other credit
 14 cards in the market.
 15 Q. Then paragraph 3.37 over the page:
 16 "According to Javier Perez, major UK retailers have
 17 exerted a strong competitive pressure on other issuers
 18 in the credit card market as they issued their own
 19 rewards-based credit cards in order to capture repeat
 20 customers."
 21 So he is referring to things like Sainsbury's Bank
 22 amongst others here.
 23 Do you agree that that concept of major retailers
 24 issuing their own rewards-based credit cards was not
 25 generally the case in Europe, ie not the UK?

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1 A. That is correct.
 2 Q. Then can we go to paragraphs 3.43 to 3.44.
 3 Dr Niels says:
 4 "The UK is Europe's largest e-commerce market."
 5 Do you agree?
 6 A. Yes.
 7 Q. He says that payment cards played a significant role in
 8 facilitating e-commerce. Do you agree?
 9 A. Facilitating e-commerce is one thing, creating the
 10 market is another. I'm not sure quite -- I mean, if it
 11 means facilitating payments, yes.
 12 Q. Certainly at its inception the main way that one would
 13 pay to make an internet transaction would be using
 14 a payment card, would it not?
 15 A. That is either debit cards or credit cards.
 16 Q. So payment cards would have played a significant role in
 17 facilitating e-commerce?
 18 A. Yes.
 19 Q. He says:
 20 "Credit cards have historically been the preferred
 21 option for online payments as compared with debit
 22 cards."
 23 Do you agree?
 24 A. Yes, and to the last sentence.
 25 Q. Do you agree that the risk of fraud is particularly

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1 material in the context of e-commerce?
 2 A. My own experience suggests that actually fraud is not
 3 necessarily high. Whether it is as high as in other
 4 distribution channels, I would have to think.
 5 Q. Do you agree that the risk of fraud is greater in the
 6 context of e-commerce than if one were to walk into
 7 a shop and make a physical purchase?
 8 A. That statement is not obvious.
 9 Q. It is not obvious?
 10 A. No.
 11 Q. Explain why. Let's assume I want to buy a record,
 12 a good old-fashioned vinyl record, and I can go down to
 13 my local record shop and pay them £15 and walk out of
 14 the shop with a record, or I can find it on the internet
 15 from someone in Germany and send off my money and see
 16 whether the record turns up. Why is it not obvious that
 17 the former is safer than the latter?
 18 A. So the latter you are paying by card so that somebody in
 19 Germany can send you the record?
 20 Q. For example.
 21 A. It is just from personal experience, I mean professional
 22 experience, that actually the costs of fraud on online
 23 systems have been remarkably low.
 24 Q. From a consumer perspective would they consider walking
 25 into a shop to purchase an item to be more secure than

1 an online transaction?
 2 A. From a consumer's perspective it may be the case, yes.
 3 Q. Can we go to your first report. That's D2, tab 2,
 4 page 76.
 5 A. 76?
 6 Q. 76. Paragraph 120. You will see the heading "Free
 7 banking".
 8 In paragraph 120, you say:
 9 "However, the House of Commons Treasury Committee
 10 correctly highlighted the point that banking is not in
 11 fact free in the UK."
 12 Do you accept that the prevalent model in the UK is
 13 free if in credit, ie you don't have to pay any banking
 14 charges provided you are in credit or provided you are
 15 not in debt?
 16 A. In terms of the customer who is not in debt, he may
 17 actually be a saver, and the savings rate is not
 18 necessarily at the rate it should be.
 19 The fact here is free banking is actually
 20 symptomatic of a broader issue, that is people are
 21 offered current accounts to get them to do other things.
 22 How you pay for that is in terms of either a lower
 23 interest rate in, for example, a deposit account than
 24 otherwise would have been the case, or some other
 25 method.

1 Q. Do you accept or not that the prevalent model in the UK
 2 is free if in credit?
 3 A. If in credit, yes.
 4 Q. Can we go to bundle D3, tab 3. It is Dr Niels' first
 5 report again. Page 256, paragraphs 347 and 348.
 6 You see in paragraphs 347, in the final sentence he
 7 says:
 8 "For example, in a consumer survey run by the FT in
 9 2008, most of the respondents opposed the idea that
 10 banking is something that should be paid for more
 11 generally. More recently ...(Reading to the words)...
 12 consumer panel showed that many banks in the UK believe
 13 that customers are resistant to paying charges and will
 14 switch provider if their banks were to abandon the free
 15 if in credit model."
 16 Do you agree that most consumers are resistant to
 17 paying charges for using payment systems?
 18 A. From a consumer perspective, it appears to be the case.
 19 Q. Do you agree that there are many more domestic than
 20 cross-border transactions using credit or debit cards?
 21 A. Yes.
 22 Q. Do you agree --
 23 A. In the UK, for UK issue credit cards. I apologise,
 24 Mr Hoskins.
 25 Q. Do you agree that the viability of a card payment system

1 will not be dependent on cross-border transactions?
 2 A. I agree.
 3 Q. Do you agree that the viability of a card payment scheme
 4 will be heavily dependent on domestic transactions?
 5 A. Will be heavily dependent on UK transactions, yes.
 6 Q. In this case your suggested counterfactuals are based on
 7 the assumption that if the MasterCard UK MIF had been
 8 lower during the period of the claim, the Visa UK MIF
 9 would have been at the same level, correct?
 10 A. That is correct.
 11 Q. And in your expert reports, you have not provided any
 12 analysis which considers the position if the correct
 13 counterfactual were to assume that the Visa UK MIF would
 14 not fall to the same level as the lower MasterCard UK
 15 MIF, in your reports.
 16 A. Shall I explain why or just simply say yes?
 17 Q. I would rather you just said yes, and then it is up to
 18 you whether you want to add to it.
 19 A. Okay, I will add to it in a second.
 20 Q. So the answer is yes?
 21 A. The answer is yes.
 22 Q. If you want to add to it, now is the time.
 23 A. Yes, because I didn't believe that the counterfactual of
 24 a high MIF and a low -- the high Visa MIF and a low
 25 MasterCard MIF was realistic.

1 I would like to explain. It will take probably
 2 a few minutes, is that okay?
 3 Q. The whole line of questioning is going to be precisely
 4 about this question.
 5 A. Okay. Then do the questions, please, sir.
 6 Q. If, when we have finished it, we have not covered any
 7 ground then please feel free to add.
 8 A. Yes.
 9 Q. But you will steal my thunder if you launch into it.
 10 A. I can't do that.
 11 Q. That would be terrible.
 12 We know what level Visa's MIFs were during the
 13 period of the claim, don't we?
 14 A. Yes.
 15 Q. And we know that they were not required, either by
 16 regulation or by commercial pressure, to significantly
 17 reduce their MIFs during the period of the claim.
 18 A. In terms of --
 19 Q. I mean prior to the regulation, I'm sorry.
 20 A. Prior to the regulation we do have the Visa commitments.
 21 Q. I'm talking about domestic UK MIFs, I'm sorry.
 22 A. And I'm sorry I misinterpreted.
 23 If it is domestic UK MIFs, that would be UK Visa
 24 MIF, that would be correct. The EEA MIFs stay -- enter
 25 the commitments.

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1 Q. In your first statements, that is report D2, tab 2, at
 2 page 226.
 3 Paragraph 520 we have seen before:
 4 "It is clear from the above statements that in
 5 competing for issuers to issue their cards, Visa and
 6 MasterCard have a very strong incentive to increase
 7 interchange fees."
 8 Over on page 523:
 9 "I conclude, based on the evidence above ...(Reading
 10 to the words)... setting its interchange fees and that
 11 this exerts upward pressure on interchange fees, schemes
 12 raise the latter to attract issuers."
 13 I think you have already accepted that the level of
 14 the MIFs set by Visa and MasterCard is therefore
 15 an important parameter of competition between payment
 16 schemes for issuers?
 17 A. I hope, and I think I said before, that in the
 18 intersystem market at the current level, if there are
 19 slight differences then there is upward pressure on the
 20 MIF.
 21 Now, and I don't want to steal your thunder, I do
 22 want to actually make quite clear at this point that
 23 I -- in my reports I have not assumed that the Visa MIF
 24 is unlawful. I have taken -- in fact, I try and avoid
 25 thinking about it in terms of the law. What I'm trying

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1 to do in my report when I consider a counterfactual of
 2 both MIFs being at zero, I kind of think of it in terms
 3 of a testing procedure. And the example -- I was going
 4 to think of a medical example for myself, but I was
 5 advised that isn't a good idea so I will do the one of
 6 the house.
 7 If you want to know whether a house has dry rot, and
 8 each time a test comes up it tells you that actually it
 9 won't -- it can't, it is not very helpful, and it is not
 10 very helpful -- and it won't tell you whether you do
 11 actually have dry rot. So applied to this, if I have
 12 a Visa MIF up here and a MasterCard MIF down here, if we
 13 think of that involving migration, so in other words
 14 issuers would migrate. So we talk about 520; if the
 15 incentive here is that the MasterCard issuer migrates to
 16 the Visa issuer, then the idea then is that basically
 17 MasterCard would go out of business.
 18 Now, equally if somebody comes along and called Visa
 19 into the next court the next week and says actually,
 20 let's flip this the other way round, we are going to
 21 argue MasterCard MIF is high and Visa MIF is low, then
 22 you will never be able to find whether actually this MIF
 23 is anti-competitive or not. In which case it is no real
 24 use to it, it always is negative.
 25 So it is in that sort of testing sense, testing

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1 procedure sense, that I consider that you have to have,
 2 for analysis purposes, okay, my economic purposes,
 3 a zero and zero.
 4 Now, the other point I would like to make -- and
 5 I think I made this clear earlier -- was that in 520
 6 I was thinking of an equilibrium, sorry to use the word,
 7 where Visa and MasterCard were fairly close, and if you
 8 had a small change then an issuer would say, well, hold
 9 on, if you don't give me more money in terms of a MIF,
 10 I may switch to actually brand my cards with a different
 11 colour.
 12 And remember that is quite a -- that's a -- I've got
 13 to remember the transcript, but that is a situation
 14 which is quite different from the one being proposed.
 15 The one being proposed is basically where Visa stays
 16 up, MasterCard stays down. So if everyone migrates to
 17 Visa, then we have got to consider a few dynamic issues,
 18 and one of them is basically the retailers, what's their
 19 response.
 20 In the current situation we talk about competition
 21 or buyer power, but they have no real buyer power. If
 22 the Visa and MasterCard MIFs were up here, they can
 23 choose the colour but they can't choose the MIF. They
 24 can compete on the acquirer margin; you heard from
 25 David Brooks and his witness statement that they can't

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1 compete on the MIF.
 2 Now, here's the situation. We also heard --
 3 I thought it was a really illuminating discussion with
 4 Mr Perez --
 5 MR HOSKINS: I'm not sure what -- this moves into
 6 submissions, sir, but I'm in your hands.
 7 A. No, no, it is an economic analysis, sir.
 8 MR JUSTICE BARLING: This is part of the dry rot example,
 9 but I think --
 10 A. Dry rot is what economists have.
 11 MR HOSKINS: A very lengthy example.
 12 A. Dry rot is what economists have normally.
 13 MR JUSTICE BARLING: Can you say what the dynamics would be?
 14 As I understand it, you can't imagine Visa staying up
 15 there --
 16 A. Exactly. I will explain that and hopefully in a cogent
 17 and quick way.
 18 So we have something which -- a piece of
 19 information, which I hadn't realised but actually is
 20 quite crucial, that issuers are forward looking. No
 21 issuer really wants to change cards unless it can see
 22 the situation being permanent. And the other thing
 23 I take from the evidence in court is that things take
 24 time. It is not instantaneous.
 25 So what's the response of a retailer or a group of

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1 retailers, knowing that, in effect, if you present this
 2 argument of Visa being high and MasterCard being low, is
 3 that all the issuers will have an incentive to run to
 4 Visa.
 5 Well, their response is roughly -- and you have
 6 heard it all before -- that if the MSC is high and all
 7 you are doing is switching from -- you have been waiting
 8 for this low MIF for ever more and then you are told
 9 that basically you have to go to Visa because your
 10 issuers have moved, you are not going to be very happy
 11 if you are a retailer.
 12 The way in which I would play it would be simple.
 13 You know it is going to take time to switch, you know
 14 you have a small amount of time to do it and to
 15 complain. It doesn't necessarily mean that you
 16 surcharge, or you don't accept Visa cards, but you can
 17 certainly put something in the Guardian or The Times or
 18 The Telegraph to say: if you do not reduce your MIF, we
 19 will do exactly that.
 20 The other thing this example actually shows is Visa.
 21 Visa will be susceptible to more anti-trust scrutiny.
 22 The BRC and EuroCommerce has a history of being active
 23 in this field. I am not saying whether it is lawful or
 24 unlawful. I'm not going there.
 25 So here we are in 2007. If you look at I think

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1 Dr Niels' figure 3.2, which is a diagram that goes to
 2 the market share of Visa and MasterCard, you will see
 3 that in 2007 Visa was in a horrible situation on credit
 4 cards, akin almost to MasterCard's claim on Maestro,
 5 just the other way round.
 6 So in effect when you have this situation where you
 7 have potential surcharging or non-card acceptance, and
 8 by the way that is a situation that happened in
 9 Australia with Amex --
 10 MR JUSTICE BARLING: Okay, I am sure you are going to be
 11 asked about that. I think we get the drift.
 12 What you are saying is there would be a range of
 13 pressures --
 14 A. Exactly.
 15 MR JUSTICE BARLING: -- that would be applied to --
 16 A. That Visa would basically lower the MIF.
 17 So you have two effects here. I'm not saying the
 18 dry rot effect, but you see the test and procedure
 19 effect. As an analyst, I think, can we -- and I'm not
 20 into the law --
 21 MR JUSTICE BARLING: I think we follow what you are saying.
 22 I think we'd better, for the sake of --
 23 A. No, we need, Mr Hoskins, yes.
 24 MR JUSTICE BARLING: We'd better have Mr Hoskins lead the
 25 questioning on this.

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1 A. Apologies, Mr Hoskins.
 2 MR HOSKINS: The question was: do you accept that the level
 3 of the MIFs set by Visa and MasterCard constitutes
 4 an important parameter of competition between payment
 5 schemes for issuers?
 6 A. It does, because the issuers want to issue cards, have
 7 competition between issuers on rewards towards their own
 8 customers.
 9 But that's in the case -- my 520 was in a case where
 10 we literally were in stability. It is a different issue
 11 when we have a different situation.
 12 Q. We have been told that Mishcons have entered into
 13 a conditional fee arrangement with Sainsbury's which
 14 provides for a success fee. Are your fees in this case
 15 in any way dependent on the results of this litigation?
 16 A. Absolutely not.
 17 Q. An auction is one of the paradigms of a competitive
 18 process; do you agree?
 19 A. Which type of auction, sir?
 20 Q. A standard auction.
 21 A. Okay, I will agree.
 22 Q. And the purpose of an auction is to get the highest
 23 price you can for the product you are selling?
 24 A. That's why I say it depends upon the auction.
 25 Q. In a standard auction.

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1 A. In a standard auction.
 2 Q. High prices are therefore not synonymous with
 3 anti-competitive behaviour, are they?
 4 A. No, not necessarily.
 5 Q. Can we go to your first report at D2, tab 2, page 226.
 6 Paragraph 516, the last sentence:
 7 "On the other hand, as noted by the Commission,
 8 issuers are members of both the Visa and MasterCard
 9 schemes and are therefore likely to choose whichever of
 10 the two brands of cards offers the highest interchange
 11 fees."
 12 Can you explain what you mean by that, please?
 13 A. I think I explained myself earlier, but if you want
 14 to --
 15 Q. I will tell you what I think you mean and you can tell
 16 me yes or no.
 17 A. Please.
 18 Q. You have accepted that interchange fees, the level of
 19 them, is an important parameter of competition between
 20 Visa and MasterCard. And so the logic of that is that
 21 if one scheme offers a greater MIF than the other, then
 22 issuers will be attracted to that scheme in preference
 23 to the one with the lower MIF?
 24 A. Where you have a situation, as I say, where we are very
 25 close to each other, then the next move of one to

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1 actually offer a higher MIF will lead to pressure from
 2 the other on their issuers. The issuers will put
 3 pressure on basically the merchants to pay more to fund
 4 schemes. I think that's related to the 520 point.
 5 Q. MasterCard's ability to compete with Visa would have
 6 been materially restricted if it had significantly cut
 7 its MIF whilst Visa had maintained its MIF at its actual
 8 level during the period of claim. I know that's not
 9 your counterfactual, but I want you to imagine that this
 10 is the counterfactual and answer the question on that
 11 basis.
 12 Do you want me to repeat the question?
 13 A. Please.
 14 Q. MasterCard's ability to compete with Visa would have
 15 been materially restricted if MasterCard had
 16 significantly cut its MIF whilst Visa had maintained its
 17 MIF at its actual level during the period of the claim.
 18 Do you agree?
 19 A. I think I set out in my second example the reason why
 20 initially it would be at a competitive disadvantage, but
 21 why the equilibrium eventually reached would be the
 22 same. So there would be no migration.
 23 Q. But I'm asking you to assume that throughout the period
 24 of the claim, Visa maintains its MIF at the actual level
 25 it had during the period of the claim. It is

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1 a hypothetical. It is not your counterfactual. But do
 2 you accept that MasterCard's ability to compete would
 3 have been materially restricted in those circumstances?
 4 It must follow from what you said before, if that
 5 helps, but you answer the question.
 6 A. Yes.
 7 Q. If MasterCard set a MIF of zero, or a very low MIF, that
 8 would provide a common floor to the MSCs charged by
 9 acquirers, wouldn't it?
 10 A. Of zero?
 11 Q. Yes.
 12 A. Yes.
 13 Q. As a matter of economic theory the level of the common
 14 floor does not affect competition between acquirers,
 15 does it?
 16 A. Where you have a coordinated MIF.
 17 Q. Sorry? The question is: as a matter of economic theory
 18 the level of the common floor does not affect
 19 competition between acquirers? Your answer is?
 20 A. Yes.
 21 Q. Yes, it does not affect, so it doesn't affect?
 22 A. It should not affect.
 23 Q. Credit cards provide cardholders with an interest-free
 24 period provided they pay the balance off each month,
 25 correct?

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1 A. Yes.
 2 Q. That's a benefit to those cardholders?
 3 A. It is a benefit to those cardholders. The issue I have
 4 is whether that benefit, in effect, could be provided by
 5 a credit card or, for example, a loan, or something
 6 else.
 7 Q. Who else benefits from the interest-free period apart
 8 from cardholders?
 9 A. Cardholders benefit this period, but pay back next
 10 period. Retailers also benefit this period, but don't
 11 benefit next period.
 12 Q. Merchants benefit because they don't have to wait to be
 13 paid; do you agree?
 14 A. They benefit to that extent.
 15 Q. Who bears the cost of the interest-free period?
 16 A. The cost could be borne by the issuer, either through
 17 its interest income, or it could be borne by the
 18 merchant through the MIF, don't know.
 19 Q. Issuers bear the cost because they have to pay the
 20 acquirers immediately, but they must wait to receive
 21 payment from the cardholder, correct?
 22 A. That's right.
 23 Q. Who benefits from the fraud guarantee?
 24 A. Consumers.
 25 Q. Who else?

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1 A. Retailers to an extent.
 2 Q. Merchants or retailers benefit because they get paid
 3 even if the card was used fraudulently, correct?
 4 A. They get paid.
 5 Q. Who bears the cost of the fraud guarantee?
 6 A. The issuers bear the cost and they get the revenue.
 7 Q. Who benefits from the cardholder default guarantee?
 8 A. May I just come back on the funding costs? Bear in mind
 9 this is a typical thing in financial services. You are
 10 offering something for free to entice people into other
 11 particular cards. So the issuers get a lot of benefits
 12 from doing this.
 13 Q. Who benefits from the cardholder default guarantee?
 14 A. Issuers and merchants.
 15 Q. Merchants benefit because they get paid even if the
 16 cardholder does not have the funds to pay for the
 17 purchase, correct?
 18 A. Yes.
 19 Q. Who bears the cost of the cardholder default guarantee?
 20 A. The issuer and the merchant.
 21 Q. Issuers bear the cost because they have to pay
 22 acquirers, but they cannot recover the money from the
 23 cardholder, correct?
 24 A. Correct.
 25 Q. I gave you a hypothetical a minute ago. I'm just going

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1 to build on it. So you will probably need me to say
 2 this question at least twice.
 3 If Visa had been able to apply its actual level of
 4 MIF throughout the claim period, what would have
 5 happened if MasterCard had offered a zero or a low MIF
 6 whilst keeping in place the interest-free period and the
 7 fraud in cardholder default guarantees?
 8 Let me put it another way: would that scenario have
 9 increased the competitive disadvantage that MasterCard
 10 was under in relation to Visa, ie not just lower MIF,
 11 but lower MIF plus existing interest-free period, plus
 12 existing fraud and cardholder default guarantees?
 13 A. If the MasterCard MIF goes down, then in theory the
 14 issuer has a choice whether to keep the benefits to the
 15 cardholders or reduce its profitability, reduce -- the
 16 profitability comes from the interest income it
 17 receives. So it has a choice whether to maintain it.
 18 Ultimately, there will be pressure on some of these
 19 benefits to cardholders.
 20 Q. And in order to palliate such a competitive
 21 disadvantage, MasterCard would probably have been
 22 obliged to make changes to its scheme rules to shift the
 23 cost of these benefits to the other side of the
 24 platform, either wholly or partially? In my
 25 hypothetical.

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1 A. In your hypothetical. But then we have also seen
 2 quite --
 3 Q. So is that a yes in my hypothetical?
 4 A. In theory. But I want to actually illustrate that we do
 5 have some evidence of what's happened when you do
 6 actually reduce MIFs, and that's in Australia.
 7 Q. We are going to come to Australia.
 8 A. Okay.
 9 Q. In the scenario we have just been imagining, where
 10 MasterCard makes changes to its scheme rules to shift
 11 the costs of benefits to the other side of the platform,
 12 the cost to merchants of accepting MasterCard cards
 13 would have gone up, correct?
 14 A. If there were true benefits to merchants and they bore
 15 them, then they would be paying for them and the costs
 16 would rise.
 17 Q. Many consumers in the UK value the ability use credit
 18 cards, don't they? We have seen that.
 19 A. We have seen that.
 20 Q. That includes the use of credit cards in e-commerce. We
 21 have also seen that, yes?
 22 A. We have seen credit cards facilitating payments. That
 23 doesn't mean the credit cards lead to e-commerce.
 24 Q. Do consumers in the UK value being able to use credit
 25 cards in e-commerce?

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1 A. E-commerce, the benefits are on the consumer side, the
 2 costs are on the merchant side of providing that
 3 distribution channel.
 4 Q. Do consumers value the ability to use credit cards in
 5 e-commerce?
 6 A. Consumers do value using credit cards.
 7 Q. Can we go to D2, tab 2. It is your first report at 176.
 8 At paragraph 246, you say:
 9 "In the unlikely event that issuers would choose to
 10 stop issuing credit cards in a low or zero interchange
 11 fee environment, it would appear likely that they would
 12 continue to issue debit and may increase the issuance of
 13 charge cards which, in turn, would require the
 14 continuation of a four-party scheme."
 15 If issuers were to cease to issue credit cards, that
 16 would remove a benefit valued by many customers in the
 17 UK, wouldn't it?
 18 A. There is a benefit on one side and they are paying for
 19 it in terms of interest.
 20 Q. If issuers were to cease to issue credit cards, this
 21 would remove a benefit valued by many consumers in the
 22 UK, wouldn't it?
 23 A. The issuers will only choose to stop issuing credit
 24 cards if the interest rates that are charged on the card
 25 are not there to cover the costs of issuing that

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1 particular card, including fraud.
 2 Q. If issuers were to cease to issue credit cards, this
 3 would remove a benefit valued by many consumers in the
 4 UK, wouldn't it?
 5 A. It is hard to imagine, given the level of interest
 6 payments relative to the costs of maintaining that, that
 7 issuers would have any incentive to stop issuing cards.
 8 Notwithstanding the level of the MIF.
 9 Q. Humour me. If issuers were to cease to issue credit
 10 cards --
 11 MR JUSTICE BARLING: You mean a particular issuer or all
 12 issuers?
 13 MR HOSKINS: Any issuer or all.
 14 MR JUSTICE BARLING: Any issuer, right.
 15 MR HOSKINS: This would remove a benefit valued by many
 16 consumers in the UK?
 17 You are obviously flummoxed with that. We will
 18 move on.
 19 A. No, sir. Credit cards provide benefits. Cards provide
 20 benefits. What we are talking about here is not normal
 21 competition and the benefit of a card. What we are
 22 talking about here is what are the benefits of a card to
 23 offset the restrictive effect of the four-party system.
 24 That is the framework in which we are working in, or at
 25 least that is the framework that I have been asked my

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1 questions.
 2 So in terms of the decision by an issuer to issue
 3 a card, that decision is about thinking whether the
 4 income they get, the interest rates and various other
 5 fees, will be greater than, for example, people who do
 6 not pay back their balances etc.
 7 Q. Can we go to page 179 of your first report,
 8 paragraph 257.
 9 A. Sorry, Mr Hoskins, you said 179 page?
 10 Q. Page 179, paragraph 257:
 11 "In his witness statement, Keith Douglas states that
 12 these factors are specific to the UK market. This
 13 suggests that in other markets in which the MasterCard
 14 scheme operates issuers do not provide, or to a lesser
 15 extent, low cost balance transfers, low interest or
 16 interest-free periods, credit card access to less
 17 affluent customers or higher rewards on cards."
 18 You go on to say in the next paragraph:
 19 "It follows that if schemes can operate in other
 20 markets without these factors, then they are not
 21 necessary for the successful operation of a four-party
 22 scheme."
 23 Then at 264 you say:
 24 "The evidence from Australia supports the idea that
 25 these factors would not have developed to the same

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1 extent in a low interchange fee environment."
 2 At 261, the previous page, you say:
 3 "As a result, arguing that an interchange fee is
 4 necessary to cover these costs is circular. Without the
 5 interchange fee, issuers would not have provided balance
 6 transfer offers at a low cost, would have set a higher
 7 interest rate, would not have lent to customers with
 8 higher risks of default, and therefore would have
 9 incurred lower costs which they would not need a high
 10 interchange fee to cover."
 11 Presumably the same logic that you have set out
 12 there applies to the fraud and default guarantees?
 13 A. Yes.
 14 Q. These are all aspects, both the ones we see at 257 and
 15 the fraud and default guarantees, of the UK market that
 16 have developed as a result of competition between card
 17 issuers, aren't they?
 18 A. Yes, competition between card issuers in the intersystem
 19 market, which is financed by high interest rates.
 20 May I just say, the high rewards on cards meanwhile,
 21 which is the fourth bullet of 257, the interchange fee
 22 charged from merchants to encourage cardholders to hold
 23 cards, that is financing that sort of benefit to
 24 cardholders and hence encouraging them to hold these
 25 cards.

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1 Q. And if these aspects of the UK market were removed, that
 2 would materially restrict competition between issuing
 3 banks, wouldn't it?
 4 A. In this part of the report we are talking about
 5 objective necessity, about whether a system could exist.
 6 Q. I'm asking a different question, please. If these --
 7 A. I understand.
 8 Q. -- aspects of the UK market were removed, this would
 9 materially restrict competition between issuing banks?
 10 A. The intensity of competition between issuing banks for
 11 parts of the market would be reduced.
 12 Q. And the aspects of the UK market that you refer to in
 13 paragraph 261 of your report are valued by customers,
 14 aren't they? Customers value being able to balance
 15 transfer offers at a low cost, they value rewards, they
 16 value low interest-free periods etc.
 17 A. They value them, but the question is who pays for them.
 18 Q. Can we go to page 184 of your report, paragraph 287.
 19 You say:
 20 "I would also add that a large premium market is not
 21 an essential feature of a four-party scheme...(Reading
 22 to the words)... The UK's mainstream credit card market
 23 is now, therefore, complemented by a strong premium card
 24 market that does not exist to any significant degree in
 25 most of Continental Europe."

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1 I think you agreed earlier that that was correct?
 2 A. Yes, sir.
 3 Q. Consumers in the UK therefore clearly value premium
 4 credit cards, correct?
 5 A. Sorry, can you repeat the question again?
 6 Q. Do consumers in the UK value premium credit cards?
 7 A. For those consumers who are willing to pay a fee, in
 8 many cases to achieve the rewards there is a benefit to
 9 them. From a premium card market.
 10 Q. And premium credit cards have developed as a result of
 11 competition between payment schemes in response to
 12 consumer demand in the UK, haven't they?
 13 A. Yes.
 14 Q. At paragraph 291 of your report, you say:
 15 "In terms of causality, it is the high interchange
 16 fee that came first. High rewards products, therefore,
 17 exist because interchange fees are high. Interchange
 18 fees are not high because of the existence of high
 19 rewards cards."
 20 In the absence of the historic rate of UK MIFs,
 21 consumer demand for premium credit cards would not have
 22 been met, would it?
 23 A. In terms of 291, we are talking about the introduction
 24 of high interchange fees, or basically it is the high
 25 rewards products were introduced because the interchange

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1 fee was introduced to facilitate a flow from the
 2 merchant to the issuer to encourage the cardholders.
 3 Now, given the competition, which we talked about
 4 in 250, there is a higher level of the MIF, banks
 5 issuers have been able to think about different products
 6 and then the causation is that way.
 7 Q. So it follows that in the absence of the historic rate
 8 of UK MIFs, consumer demand for premium credit cards
 9 would not have been met?
 10 A. Consumer demand for credit cards could have been met
 11 through interest income.
 12 Q. Explain? I don't understand that.
 13 A. Well, if interest income is actually at large, and
 14 actually banks are -- sorry, larger than the cost, and
 15 banks are using the credit card or the debit card, or
 16 any one of its financial products, to entice the sale of
 17 other financial products, then they have an incentive to
 18 do that.
 19 The free funding period, for example, is a good
 20 example of trying to entice customers onto a card, and
 21 if they are lucky and they become revolvers they are
 22 stuck with the card.
 23 So if you go to chapter 5 of the FCA credit card
 24 market report, you will see some interesting analysis of
 25 that particular situation in the UK credit card market.

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1 That's how competition works in financial services.
 2 There is an element of cross subsidy, and it is there to
 3 entice demand for other financial services.
 4 Q. Paragraph 291, if you go back to it, you said:
 5 "High rewards products therefore exists because
 6 interchange fees are high."
 7 Are you resiling from that statement?
 8 A. Interchange fees are the means by which those reward
 9 card products are currently financed. If -- everything
 10 else being equal, that is the case. If you then say,
 11 well, there is a dynamic here, do they -- if they wanted
 12 to achieve high reward cards and accept a different
 13 level of profitability from the issuer, that is up to
 14 them.
 15 But in terms of causation here, you have got to take
 16 everything being equal.
 17 Q. Did banks earn interest for consumers before credit
 18 cards existed?
 19 A. Sorry, repeat the question.
 20 Q. Did banks earn interest from consumers before credit
 21 cards existed?
 22 A. Yes, for example on loan products.
 23 Q. Did banks earn interest from consumers before premium
 24 credit cards existed?
 25 A. Yes, they did.

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1 Q. Do you agree, therefore, that the reason why premium
 2 cards were introduced was, as you say in 291, because
 3 interchange fees were high? That's what you say in 291.
 4 A. Interchange fees encouraged high reward schemes.
 5 Everything else being equal.
 6 It is related, Mr Hoskins -- I'm trying to be
 7 helpful here -- really back to paragraph 520, about the
 8 nature of competition in the intersystem market.
 9 Q. You have already accepted that the level of MIFs set by
 10 Visa and MasterCard constitutes an important parameter
 11 of competition between payment schemes for issuers.
 12 Between 2004 and 2011, you are obviously aware that
 13 in the UK Maestro went from having around 40% of the
 14 debit card market to around 2% to 3%, yes?
 15 A. My understanding is that is correct.
 16 Q. During that period the differential in the MIFs offered
 17 by Maestro and Visa debit was about 9.2 basis points;
 18 Is that correct?
 19 A. That is correct.
 20 Q. Given that the level of the MIF was an important
 21 parameter of competition between payment schemes, this
 22 differential must have been a material reason for the
 23 demise in Maestro's market share, correct?
 24 A. I think we need to actually look at the Maestro example
 25 in more detail.

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1 If you take Mr Douglas' witness statement, I believe
 2 he said that this process started at least in 2003. If
 3 we are led to believe that the MIF is the reason the --
 4 the differential is the reason why there is migration
 5 away from the Maestro card to the Visa debit card,
 6 that's the alternative, I would suggest that actually we
 7 need to look into that example in greater detail.
 8 One, that the actual Maestro system is not the same
 9 Maestro as I have in my wallet somewhere from Belgium.
 10 It is the Switch. So there was an element of
 11 functionality and there was a lot of correspondence
 12 between the banks about functionality.
 13 So HBOS left, I think, in 2005. I think there is
 14 a diagram somewhere that may help us that's been
 15 submitted I think today? I don't know. I have to ask
 16 the lawyers. That may help you in terms of thinking
 17 about who left when and for what reason. But in 2005 my
 18 understanding is that HBOS left.
 19 In 2006 I understand MasterCard came up with another
 20 product and was thinking about it and talking to the
 21 market. So the market was already realising that,
 22 actually, Maestro was not the product it necessarily
 23 should be. In 2007 I believe there was a tender that
 24 took quite a long time.
 25 Q. We have heard all this evidence, so if you want to make

1 an economic point, that's fine, but you don't need to
 2 recite the factual evidence before the Tribunal.
 3 A. Okay. The economic evidence is basically I would
 4 suggest that actually the interchange fee is not
 5 necessarily the reason why you observe what, in 2009, is
 6 a sharp -- or by 2009, is a sharp fall. The sharp fall
 7 starts, I think -- I have to refresh my memory -- but
 8 I think after 2007. That's when two issuers in
 9 particular, who were, by the way, net --
 10 MR JUSTICE BARLING: As has been said, I think we heard they
 11 represented various a very substantial part of the
 12 market share, these two.
 13 A. That is right.
 14 MR JUSTICE BARLING: And they both left, and that's when it
 15 fell off a cliff.
 16 A. That is right, and they were actually -- the economic
 17 point is they were net acquirers. If you are a net
 18 acquirer and believe that actually you want to have high
 19 interest, you don't necessarily want a high interchange
 20 fee if you are a net acquirer, and yet they are the ones
 21 who left. There's something going on.
 22 MR HOSKINS: Forget Maestro for a minute. Forget the
 23 details of Maestro.
 24 A. Okay.
 25 Q. We agree that the level of MIFs set by Visa and

1 MasterCard is an important parameter of competition
 2 between payment schemes for issuers.
 3 Imagine there was a differential in the MIFs offered
 4 by MasterCard and Visa of about 9.2 basis points and
 5 that Visa was the higher one. What would you expect to
 6 happen?
 7 A. Everything else being equal, on a debit card scheme
 8 there would be pressure --
 9 Q. On a credit card scheme.
 10 A. Well, a credit card scheme has interest income, which a
 11 debit card scheme doesn't. There are different
 12 dynamics.
 13 Q. Do you accept that the level of MIF set by Visa and
 14 MasterCard was an important parameter of competition
 15 between payment schemes for issuers in relation to
 16 credit cards?
 17 A. It is important in terms of the interchange fee
 18 financing rewards, which influences the intensity of
 19 competition.
 20 Q. So it is important to attract issuers that you have a
 21 sufficiently high level of MIF for credit cards?
 22 A. For credit cards.
 23 Q. So if you accept that, if there were a 9.2 basis points
 24 differential in favour of Visa credit cards over
 25 MasterCard credit cards, what would you expect to

1 happen?
 2 A. I think I have already said that if it were --
 3 everything else being equal, we would tend to see some
 4 migration. But, again, that takes time --
 5 Q. It does take time. How many years do you think it would
 6 take for that to happen?
 7 A. It depends upon the contract. What we do know from --
 8 I come back to the Maestro experience -- but that seems
 9 to be that it takes quite a long time. 2003 it started,
 10 2005, and we got 2007 or 2008. Correct me if I'm wrong,
 11 you have the data.
 12 It is not instantaneous.
 13 Q. Can we go to bundle A, tab 2, please?
 14 MR SMITH: Sorry, Mr Hoskins.
 15 MR HOSKINS: I'm so sorry.
 16 MR SMITH: Not at all.
 17 Mr von Hinten-Reed, taking Mr Hoskins' assumption of
 18 a 9.2 basis point difference between the Visa MIF, the
 19 higher one, and the MasterCard MIF, the lower one, is
 20 migration the only consequence or is there something
 21 else that might occur in this hypothetical situation?
 22 And I'm thinking of whether bilateral agreements might
 23 become more attractive in terms of negotiating
 24 an interchange fee that is not a default between
 25 acquirers and issuers, or is that something that you

1 discount?
 2 A. It depends whether the default MIF -- I mean, default
 3 MIF provides certainty for the system. If the default
 4 fee is not there for some reason, we then get into
 5 bilaterals. And depending upon the encouragement of
 6 bilaterals is the costs of bilaterals and whether
 7 they -- those costs exceed the transaction benefits.
 8 So I'm not quite sure about encouraging. Remember
 9 we are moving from a system under Mr Hoskins' --
 10 Mr Hoskins hasn't changed his four-party system in the
 11 scheme. We are not going into negotiation and
 12 bilaterals under his counterfactual, correct me if I'm
 13 wrong, Mr Hoskins.
 14 MR HOSKINS: That is right.
 15 MR SMITH: That may be right. I may be glossing Mr Hoskins'
 16 counterfactual, and to be clear, on my counterfactual
 17 I'm not assuming the absence of a MIF, I'm assuming
 18 a disparity of the 9.2 basis points between the
 19 MasterCard MIF and the Visa MIF.
 20 So there are two MIFs. It is just one is, for
 21 whatever reason, constrained to be lower than the other.
 22 What I'm seeking your help on is whether, in order to
 23 mitigate the competitive disbenefits that Mr Hoskins has
 24 been exploring with you, bilaterals are in any way
 25 an option, or whether you are discounting them, and if

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1 you are discounting them, why you are discounting them.
 2 A. The bilateral between an issuer and an acquirer. So the
 3 bilateral would mitigate it by somehow having some sort
 4 of fee income --
 5 MR SMITH: You could agree something different, is my point.
 6 A. You could agree something different.
 7 MR SMITH: If it is not something you feel you could assist
 8 us with as an expert then do say so.
 9 A. I do prefer not to assist you.
 10 MR HOSKINS: Can you go to bundle A, tab 2, please.
 11 Page 49.
 12 PROFESSOR JOHN BEATH: Sorry, that is internal page 49,
 13 is it?
 14 MR HOSKINS: I'm so sorry. It is page 211 of the bundle.
 15 So page 211 of the bundle. The figures in blue are
 16 confidential. Could you read (e) to yourself, please.
 17 You just accepted that in my counterfactual, with
 18 a differential of 9.2 basis points, one would expect to
 19 see some migration. If the disparity was of the order
 20 set out at (e), you would expect a flood of migration,
 21 would you not?
 22 A. In the example set by (e), if there was a flood, the
 23 argument here is roughly that the MasterCard scheme
 24 would go out of business.
 25 However, I have given you a counterfactual where

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1 actually the Visa MIF would respond to that and there
 2 would be no migration in actual fact.
 3 Q. If we stay in my world for a minute, because that's what
 4 we are talking about, you accept there would be a flood
 5 of migration?
 6 A. If, in your world --
 7 Q. Yes or no?
 8 A. Yes.
 9 Q. Yes. And the truth is that MasterCard would have been
 10 forced out of the UK credit card market, wouldn't it, at
 11 these sorts of levels?
 12 A. If you assume that it is instantaneous, if you assume
 13 that actually there is migration, then the idea then is
 14 that MasterCard scheme would collapse.
 15 Q. And even if it took the course of one, two, three years,
 16 it would have been driven out of the market, wouldn't
 17 it, on these differentials, in this counterfactual?
 18 A. If the differentials had been persistent, is what I said
 19 in my counterfactual that I alluded to earlier.
 20 MR HOSKINS: Sir, that is a good place for me to stop.
 21 MR JUSTICE BARLING: Thank you very much.
 22 Mr von Hinten-Reed, you are still giving your
 23 evidence so you shouldn't talk to anyone about the case.
 24 There is a matter, you were in court I think, you
 25 are going to pursue with your colleagues over the

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1 weekend; is that right?
 2 A. Only over the weekend, sir, and I understand the
 3 constraints.
 4 May I just raise one --
 5 MR JUSTICE BARLING: Yes.
 6 A. My wife is a member of CEG, she is marketing
 7 coordinator. Am I allowed to ring my wife in the
 8 presence of Mr Cotter to say I'm okay?
 9 MR JUSTICE BARLING: You can ring your wife any time you
 10 want, and you don't have to be with Mr Cotter.
 11 MR HOSKINS: You just can't ask her for advice in the case.
 12 MR JUSTICE BARLING: You can't talk about the case to her or
 13 anyone else while you are giving evidence, and I think
 14 the understanding is that you shouldn't raise the point
 15 with your colleagues that relates to Mr Harman's fifth,
 16 if I have got it right, until after your evidence
 17 tomorrow. Is that the preferred position?
 18 MR HOSKINS: That's my understanding of what
 19 Mr von Hinten-Reed wanted to do in any event. He
 20 probably has enough to think about.
 21 A. I just want to make sure we do the right thing by this
 22 Tribunal. I don't want to have any idea that on Monday
 23 morning you could ask me a question about what I have
 24 been doing on something else.
 25 MR JUSTICE BARLING: The only thing is I think it is better

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1 if you don't -- unless it is absolutely essential for
 2 you to speak to them, as it were, at a different time,
 3 I think it would be better to let as much of Mr Hoskins'
 4 cross-examination get under the bridge before you
 5 actually deal with the additional points.

6 So if you are content, then the weekend is a good
 7 time.

8 A. I'm more than content, sir.

9 MR JUSTICE BARLING: All right, good.

10 Thank you very much indeed.

11 MR HOSKINS: Thank you.

12 (4.30 pm)

13 (The court adjourned until 10.30 am
 14 on Friday, 19th February 2016)

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