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5 **IN THE COMPETITION**

Case No. : 1286/5/7/18

6 **APPEAL TRIBUNAL**

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8
9 Salisbury Square House
10 8 Salisbury Square
11 London EC4Y 8AP
12 (Remote Hearing)

13 Wednesday 24th February 2021

14
15 Before:

16 **THE HONOURABLE MR JUSTICE ROTH**

17 (President)

18 **PAUL LOMAS**

19 **PROFESSOR ANTHONY NEUBERGER**

20 (Sitting as a Tribunal in England and Wales)

21
22
23 BETWEEN:

24
25
26 **SAINSBURY'S SUPERMARKETS LTD**

Claimant

27
28
29 -v-

30
31 **MASTERCARD INCORPORATED AND OTHERS**

Defendants

32
33
34
35
36 **A P P E A R A N C E S**

37
38 Mark Brealey QC and Derek Spitz (instructed by MdR appeared on behalf of the Claimant)

39 Mark Hoskins QC, Matthew Cook and Hugo Leith (instructed by Jones Day appeared on
40 behalf of the Defendants)

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1
2 **Wednesday 24 February 2021**

3 **(10.30 am)**

4 **THE PRESIDENT:** Good morning, everyone. I will start as usual by reminding you
5 that this is a court hearing in the Tribunal, just as much as if everyone were
6 physically present in the courtroom, where I am sitting in Salisbury Square
7 House. An official transcript will be prepared and an official recording is being
8 made of the proceedings, but while they are being live streamed, it is
9 prohibited to make any unauthorised recording, audio or visual, of the
10 proceedings. To do so is punishable as a contempt of court.

11 So, Mr Brealey and Mr Hoskins, we have read your skeleton arguments, for which
12 we are grateful, and I think the first application, Mr Brealey, is yours, isn't it, for
13 the amendment?

14 **MR BREALEY:** I think so. Yes, just to formally introduce everybody, I think you
15 know, Sir, I appear on behalf of Sainsbury's and there is Mr Spitz remotely,
16 and you can see Mr Hoskins but there is a Mr Cook and Mr Leith also with
17 him, but remotely.

18 **THE PRESIDENT:** Thank you.

19
20 **Application by MR BREALEY**

21 **MR BREALEY:** As you say, I will start with the no MIF point.

22 As the Tribunal has seen from the skeleton, this no MIF point concerns, and this is
23 quite important, the MIT-MIF and how it was argued at the trial.

24 What I propose to do, in the light of particularly Mastercard's skeleton, is to take the
25 Tribunal through some of the core documents, then go to the Supreme Court
26 judgment on the MIT-MIF, and then draw together the reasons why the no

1 MIF counterfactual remains open to Sainsbury's.

2 So I want to go through the core documents, then to the principles set down by the
3 Supreme Court on the MIT-MIF, and then draw together the reasons why the
4 no MIF counterfactual is open to Sainsbury's.

5 I will do it in a logical order --

6 **THE PRESIDENT:** Sorry to interrupt you, when you say the no MIF counterfactual,
7 this is in terms of what level of MIF would be exemptible?

8 **MR BREALEY:** Correct.

9 **THE PRESIDENT:** That's what we are talking about, isn't it?

10 **MR HOSKINS:** Sorry, Sir, I have just been emailed to say there is apparently no
11 sound on the live stream for those watching on the live stream.

12 **THE PRESIDENT:** Thank you for that. I think we will pause then for a moment.

13 (Pause to deal with issues relaying audio on live stream)

14 **THE PRESIDENT:** We have been asked to give the technical team a bit more time
15 so we shall rise for, metaphorically, five minutes or so. You will get
16 a message when we can resume. Apologies to everyone.

17 **MR BREALEY:** Very well, Sir, thank you.

18 **(10.38 am)**

19 **(A short break)**

20 **(10.45 am)**

21 **THE PRESIDENT:** I am told that the registry here can hear us on the live stream.

22 Yes, good. Mr Brealey?

23 **MR BREALEY:** Thank you, Sir. For the purpose of the live stream, I will start with
24 the no MIF point. This concerns the MIT-MIF and how it was argued at the
25 trial, and what I propose to do is take the Tribunal through some of the core
26 documents, then through the principles set down by the Supreme Court, and

1 then draw together the reasons why the no MIF counterfactual is open to
2 Sainsbury's, and by that I mean what level of MIF could have been exempted.

3 What I will do is I will take it, essentially, chronologically, in a chronological way, and
4 start with the original statement of claim, which is in bundle B, tab 2. I am
5 looking at paper versions, I know Mr Hoskins is, I don't know whether, Sir, you
6 are -- yes, I think everybody is looking at paper.

7 So it's bundle B, tab 2. It starts at page 9, obviously. I just want to highlight certain
8 passages because it relates to the level of MIF, and in particular the MIT-MIF.
9 We have the summary of claim and then the background facts. We can
10 essentially pick it up at page 25, paragraph 39, where, halfway down the
11 page, you see, "Prevention, restriction and distortion of competition", and we
12 know that has been decided by the Supreme Court.

13 If one goes over the page, page 26, and then page 27, you will note, Sir, that we go
14 from restriction of competition to quantum of loss, we don't actually deal with
15 exemption formally, but as we will see, not only in this case but in other cases,
16 clearly the issue of quantum and exemption are inextricably linked. But we
17 don't actually aver the exemption, as such, we go straight to quantum.

18 At 48, we say:

19 "Pending disclosure and/or the provision of further information, the following
20 constitutes the best particulars of the loss and damage caused by
21 Mastercard's breaches of statutory duty, which Sainsbury's is presently able
22 to provide."

23 Then paragraph 49:

24 "The breaches of statutory duty have had the result that the MSCs paid by
25 Sainsbury's are higher than they would have been absent the unlawful UK
26 MIF."

1 Then 50:

2 "The measure of Sainsbury's damages [this is the measure] is the overcharge, which
3 reflects the difference between the MIFs reflected in the MSCs which
4 Sainsbury's has paid, and such MIFs as Mastercard could lawfully have set (if
5 any) [so we are floating there "if any"] absent the breaches of statutory duty."

6 Then, at 51 onwards, to, essentially, 58, we say -- we refer to the MIT-MIF:

7 "In quantifying the losses by reference to the MIFs that MasterCard could lawfully
8 have set Sainsbury's has followed the methodology adopted by the
9 Commission to assessing efficient interchange fees in its decision to accept
10 the MasterCard undertaking ... The Commission's methodology [this is the last
11 sentence] is based on the Merchant Indifference Test or MIT."

12 As I said at opening, it is very, very important to understand that we are relying on
13 the MIT-MIF.

14 Then 52, I will not go through it all, but:

15 "In order to determine what a lawful MIF would have been and would be, it is
16 necessary to determine efficient interchange fees."

17 Because efficiency is obviously a consideration in the exemption.

18 "Sainsbury's has applied the MIT to identify the MIT-consistent efficient interchange
19 fee ("the MIT-consistent MIF")."

20 Paragraph 53 is important because it gives you the sense of what the MIT is, the
21 Merchant Indifference Test:

22 "The exercise requires a comparison between the cost of cash payments and the
23 cost of card payments because the MIT-consistent MIF seeks to express the
24 level of interchange fee at which the merchant would be indifferent to whether
25 it accepted payment by cash or by card."

26 We will come on to the nature of the MIT later when we see the expert evidence, but

1 at 55 we say for illustrative purposes we conducted the MIT test over a period
2 of six years.

3 Then at 56, we give a summary of the calculation, and there is a more detailed
4 calculation in Schedule 1. You will see at 56.2 that the Sainsbury's present
5 best estimate of the MIT-consistent MIF calculated on the basis of Sainsbury's
6 data is 0.04 of the value of a credit card or debit card transaction.

7 Then at 57, we say the present estimate is that the overcharge would be a sum
8 based on the MIT-consistent MIF of 0.04%.

9 Then just -- it is not an unimportant point, as we will see later on -- at 58 we say
10 Sainsbury's believes the reason why the MIT-consistent MIF is lower than the
11 MIF reflected in the Mastercard undertaking is because the undertakings for
12 credit card were 0.3 and we were calculating it at that time as 0.04.

13 58.2 is quite important:

14 "The credit and debit card market in the UK is and was more mature than in many
15 other Member States."

16 Then:

17 "In a mature market interchange fees should reduce because there is less or even
18 no need to encourage payment by cards."

19 That is an important averment in the pleading.

20 So there are two things I just want to flag from this. The first is paragraph 50 where
21 we said the overcharge is essentially the difference between what MIFs could
22 lawfully have been set, if any. And also that we are trying to calculate
23 damages by reference to the Commission's methodology, the MIT-MIF, the
24 Merchant Indifference Test.

25 The defence is at tab 5, and it's just instructive to see what Mastercard was saying in
26 the defence. That's at page 105, tab 5, and the page, we can go straight to

1 page 129. Again I just want to flag a few things here. 129, paragraph 72,
2 this is page 129, at 70, where they say, paragraph 41 is denied, that is the
3 denial of the restriction of competition.

4 Then, 72:

5 "To the extent necessary to do so, Mastercard will contend and put forward evidence
6 to demonstrate that the criteria for exemption ... are met in relation to the UK
7 MIF for such period as is relevant."

8 So Mastercard are saying they will seek the exemption.

9 Then there are passages relating to passing on.

10 Then, at page 132, again we get, at 85 and 87, Mastercard saying that they will
11 adduce evidence in order to prove exemption.

12 Over the page at 134, the Tribunal -- these passages the Tribunal will have seen
13 because these relate to, essentially, the damages counterfactual. I just
14 emphasise, for example, that Mastercard is accepting there that there can be
15 a no MIF possibility. So, for example, at paragraph 94:

16 "The effect of any breach is not properly to be measured by reference to the
17 difference between the interchange fee that was imposed and the interchange
18 fee which could lawfully have been imposed ... since the claimant would not
19 have received the same Mastercard scheme if default interchange had been
20 substantially lower or zero."

21 Again we get, 97, Mastercard accepting that the case advanced against it could be
22 a lower UK MIF or no MIF if the Mastercard scheme had operated with no or
23 a lower UK MIF.

24 I won't go through all of the passages but Mastercard refer to a low or zero MIF,
25 there are a few passages there.

26 Lastly on the defence, Mastercard take issue with the way that Sainsbury's approach

1 efficient interchange fees. And if one goes to page 137, paragraph 112,
2 Mastercard say that Sainsbury's has not applied the Merchant Indifference
3 Test properly and that Mastercard will seek permission to call expert evidence
4 to do the job properly. That's paragraph 112.

5 113, you see there that Mastercard is saying that the Merchant Indifference Test has
6 its limitations. This was a big issue in the trial. Mastercard was concerned by
7 the MIT being applied as Sainsbury's applied it, and it would apply its own
8 exemption criteria.

9 Then at paragraph 118 at page 139, you will see there in 118(b) it is denied that the
10 maturity of the credit or debit card market in the UK is of any relevance or
11 provides any justification for interchange fees being lower than in a less
12 mature market.

13 So three points from the defence:

14 A zero or no MIF counterfactual is possible.

15 Mastercard doesn't like the way that Sainsbury's have calculated the MIT (a)
16 because of the calculations, and (b) because the MIT test has its limitations.

17 Thirdly, it regards the maturity of the payment card market as irrelevant.

18 So those were how the pleadings stood. Now I would like to turn, please, to the
19 Sainsbury's expert evidence. That is in bundle D4 -- we can put bundle B
20 away -- this is at D4, at tab 6. At tab 6, we see here the first expert report of
21 Mr von Hinten-Reed. And one looks at the table of contents, one can see
22 how many issues were in this case, because it was not only a trial on
23 quantum but on liability.

24 One sees at section 9, we have the Article 101(3) exemption conditions, because
25 what Mr von Hinten-Reed does is apply the exemption conditions to the MIF.

26 Then at section 10 you will see alternative methodologies to calculating the UK MIF.

1 I particularly want to highlight -- I will come on to it -- section 10.2.

2 **MR LOMAS:** Would it be possible to have the page numbers, please?

3 **MR BREALEY:** Of course. Simply what I am looking at is the table of contents, at
4 page 4, in this section I'm looking at the exemption conditions, and then
5 looking over the page at page 5, section 10.2, where the MIT-MIF
6 methodology is considered by reference to Article 101(3).

7 It was that passage that I really wanted to go to and we can pick it up -- it is quite
8 difficult today to impress upon the Tribunal the extent to which certain issues
9 were canvassed, but it is extremely important for today to look at page 228
10 and see how we were approaching the MIT-MIF.

11 I will take you through to this passage, and then Mr von Hinten-Reed in his second
12 report essentially repeats it but expands on it.

13 This is section 10.2.4 at page 228 in the section, essentially, on exemption. What
14 I just want to highlight to the Tribunal, because it becomes relevant, is that the
15 MIT was an upper bound, so the calculation based on the MIT was an upper
16 bound, a conservative calculation, and that Mastercard was put on notice of
17 the always card and issuer pass-through principles, which were subsequently
18 endorsed by the Supreme Court. That is the purpose that I want to go to this
19 passage.

20 So issuer pass-through and always card essentially were dealt with here and the
21 calculation on the overcharge just based on the MIT was an upper bound,
22 a conservative calculation of damages.

23 So I would like just to take us through -- it's essentially paragraph 725 to 748 which
24 are the relevant ones.

25 **THE PRESIDENT:** Would you like us to read them to ourselves?

26 **MR BREALEY:** Sir, yes, if you want to read, then I can just highlight -- it's

1 paragraphs 725 to 748. I apologise, in this copy the subheadings haven't
2 come out properly, but I don't think it matters.

3 **(Pause)**

4 When you are ready, Sir, I will just emphasise a few points.

5 **THE PRESIDENT:** Yes, thank you.

6 **MR BREALEY:** At paragraph 725, if I can just read it:

7 "The MIT-MIF may be a superior approach to the Mastercard MIF ..."

8 So this is the difference in the methodology, or the Visa II cost-based methodology
9 which Mastercard also prayed in aid, but the MIT-MIF does not mean that:

10 "... a MIF calculated using this methodology would necessarily satisfy the Article
11 101(3) exemption conditions in the UK during this claim period."

12 So the mere fact that you are calculating the transactional savings doesn't mean to
13 say that 101(3) is necessarily complied with.

14 We go on:

15 "The case for the MIT-MIF required that it --

16 **THE PRESIDENT:** We have read it now so you do not need to read it again but if
17 you want to make the points. You say what Mr von Hinten-Reed is saying is
18 it's in a sense a necessary condition that it satisfies the MIT-MIF but it is not
19 sufficient, I think as I understand it.

20 **MR BREALEY:** Yes, 726 is about the first condition of Article 101(3). The second
21 bullet point is about the fair share condition. Then over the page you have the
22 also indispensable.

23 Then at 727, it is recognised that the maturity of the market is relevant to whether
24 these conditions are satisfied, and that's why I would ask the Tribunal just to
25 note 727 and 728, which is talking about maturity.

26 **THE PRESIDENT:** I assume in 728, in the third line -- maybe it's just a typographical

1 error, it should be "unclear", shouldn't it?

2 **MR BREALEY:** Yes.

3 **THE PRESIDENT:** Yes.

4 **MR BREALEY:** Then at 731, I just want to highlight this, he is talking about the
5 always card. So in other words, the retailer makes a saving by accepting
6 a card but it doesn't necessarily create an efficiency if it's not an additional
7 card transaction.

8 What he is referring to there at 731 is the always card principle that the Supreme
9 Court ultimately endorses.

10 At 732, he continues with this.

11 Then at 733, he talks about the restrictions.

12 Then we get to the fair share. I won't kind of labour this but it is important to see this.

13 At "Fair share", 742:

14 "It might appear that by construction the MIF guarantees a fair share for merchants
15 since the cost (the MIF) is set equal to the benefits (the transactional
16 savings)."

17 That is the point I have just made.

18 "However, for this to be the case a MIF would have to be paid on those transactions
19 which would not occur in the absence of the MIF. If the MIF is paid on all
20 transactions then merchants would be paying for a benefit they would have
21 received anyway."

22 Again, the always card principle.

23 "In this situation, the total costs, MIF payments multiplied by total transactions, would
24 exceed the benefits."

25 It goes on, and this is essentially how you end up with the way he calculates the
26 overcharge in the subsequent section of his report. He cannot:

1 "It is not possible in practice to identify the additional transactions and pay the MIF
2 only on those transactions. The MIT-MIF would have to be paid on all
3 transactions."

4 Because --

5 **THE PRESIDENT:** I think we've got the point.

6 **MR BREALEY:** But then he says, and this is why I say the calculation is
7 a conservative upper bound:

8 "If merchants are to receive a fair share, the MIT-MIF should be viewed as an upper
9 bound for the level of the MIF and the actual MIF should be set below this
10 upper bound. Merchants would then pay an amount less than the
11 transactional savings on additional transactions and this would offset the fact
12 that the MIF is paid on those transactions that would have occurred absent
13 the MIF."

14 In other words, he is saying if you have got this additional transaction problem, the
15 MIT-MIF is the upper bound. And then again, at 746, he again notes that it is
16 an upper bound. And then at 747 he says:

17 "However, there is no evidence that would allow me to assess whether setting the
18 MIF below the upper bound would lead to fewer transactions than if it was set
19 at the upper bound."

20 So it's an absence of evidence. He concludes:

21 "I therefore conclude that if the MIT-MIF is viewed as an upper bound and the actual
22 MIF is set below the MIT-MIF upper bound, the resulting MIF would satisfy the
23 indispensable condition."

24 In a nutshell, he is saying: I could calculate the transactional savings, that's based on
25 Sainsbury's data, I can tell the Tribunal what the transactional savings are,
26 difference of cost of cash and cost of card, but I don't have the evidence to tell

1 me what are the additional transactions.

2 The simple point is that the principles of the Supreme Court have said that it is not
3 for Sainsbury's to adduce evidence of this, it is for Mastercard, and indeed for
4 Visa.

5 So when he calculates the overcharge, that is based on the MIT, on the transactional
6 savings, but one has to accept that that calculation be read in the light of the
7 evidence on the Article 101(3), section 9 conditions, and there is --

8 **THE PRESIDENT:** I suppose we should see 749/750, 749 is dealing with a fourth
9 condition, he says it satisfies the fourth condition, and 750 is his conclusion,
10 the methodology for setting an upper bound for MIF and it could be used to
11 set a MIF that satisfies the four conditions.

12 **MR BREALEY:** Yes. He is not in a position -- it is Mastercard's burden -- to say
13 how many additional transactions, what is being spent by the issuing banks in
14 order to promote additional transactions.

15 He repeats this in his second report -- we will just go to it because he gives an
16 example.

17 **THE PRESIDENT:** Can I just ask, in this report, when he goes on then to do his
18 calculation, which he does, of the damages --

19 **MR BREALEY:** At 314.

20 **THE PRESIDENT:** That's 314, is it?

21 **MR BREALEY:** Yes. So this is his section on overcharge, and the reason that,
22 essentially, we are before the Tribunal today is that Mastercard are saying,
23 well, in section 13 there is a calculation of the overcharge, and that calculation
24 simply takes the value of commerce, the MIFs that were actually paid, and
25 what the MIT was, the transactional savings.

26 But in my submission, that is a calculation of the overcharge, which essentially is just

1 taking the transactional savings. But that, we submit, is without prejudice to
2 what he said earlier, that now it depends on how many additional transactions
3 there are.

4 We say that on always card and issuer pass-through, Mastercard was put on notice,
5 but if they are not put on notice in section 13, we say that because the
6 principles of issuer pass-through and always card have been endorsed by the
7 Supreme Court, those are the principles. On remittal, those are the principles
8 which should be applied.

9 We should not be prejudiced by Mastercard's failure to adduce evidence on
10 additional cards. That is, in essence, the crux of the point.

11 As the Tribunal will have seen -- and this essentially endorses what our evidence
12 was -- the MIT in itself is not a silver bullet. The Supreme Court has said it is
13 the starting point, it's not necessarily the end point, because of issuer
14 pass-through and always card.

15 It is for Mastercard and the schemes to adduce that evidence.

16 As I say, there were lots of economic reports. I just go to his second report, so we
17 can put D4 away. The second report is at D5, tab 7. This is shorter because
18 it is essentially responding to the report of Mr Gunnar Niels. The only
19 passages I really want to refer to -- we can start at 102. I will not read it but if
20 the Tribunal --

21 **THE PRESIDENT:** Sorry, this is page 102 in the bundle, is it?

22 **MR BREALEY:** Yes, it's page 90 of the report but page 102 of the bundle.

23 **THE PRESIDENT:** Yes, thank you.

24 **MR BREALEY:** Actually, if we start at page 100, then I can ... at the top you see --
25 so page 100, 7.2, the results for using the MIT-MIF method to estimate the
26 lawful MIF. 421:

1 "The MIT-MIF is an approach to estimate the level of a MIF that would satisfy ..."
2 May satisfy exemption conditions, may satisfy. That's 422.
3 Then, really, if the Tribunal could just read 429, on page 102, to 443. He essentially
4 makes the same point, but at 442 he gives an example which is not in his first
5 report. So it's 429 to 442. So it's pages 102 to 105.

6 **THE PRESIDENT:** So 442, yes.

7 **MR BREALEY:** Well, it's 443, sorry.

8 **THE PRESIDENT:** Thank you. We will read that.

9 **(Pause)**

10 Yes.

11 **MR BREALEY:** So just to emphasise a point. The last few lines of 436, halfway
12 down that paragraph:

13 "A second feature of the MIT-MIF approach is that it sets the size of the MIT-MIF
14 level of MIF payment at the level of the benefits the merchant receives on
15 additional transactions that are shifted from cash to cards."

16 At 437, the point is made that it might appear that the MIF guarantees a fair share for
17 merchants since the MIF, the MIT-MIF, is set equal to the benefits. So that
18 essentially is his overcharge calculation. So when he does his overcharge
19 calculation, he is doing exactly what is happening in 437, he is looking at the
20 MIF set equal to the benefits. But then he goes on:

21 "However ..."

22 And you said I know the point, that would only be the case if the transactions would
23 not occur in the absence of the MIF.

24 That's the always card.

25 "If the MIF is paid on all transactions then merchants would be paying for a benefit
26 they would have received anyway."

1 **THE PRESIDENT:** It's the same point made in his first report, it's just illustrated.

2 **MR BREALEY:** It's illustrated in 442, 443 with an example.

3 **THE PRESIDENT:** Yes.

4 **MR BREALEY:** Then in the way that we opened the case -- we can put that bundle
5 away and pick up D1 and if one goes to page 73, this is in the section
6 "Exemption" under Article 101(3) TFEU, 73 and 74, I just want to highlight
7 paragraphs 194, 198 and 199. This is our opening skeleton. 194:

8 "For a restriction --

9 This is paragraph 194 at page 73:

10 "For a restriction to be exempted under 101(3) an efficiency gain must be identified
11 and that efficiency gain must be measured. It must be measured by reference
12 to a counterfactual of no MIF on the basis of restriction of competition. The
13 aim behind the MIT methodology is that the MIF captures the transactional
14 benefits for merchants that arise from card acceptance."

15 So again, we are making the point that the aim of the MIT methodology is the MIF
16 captures -- and we have underlined:

17 "... transactional benefits for merchants that arise from card acceptance. This is
18 regarded as an efficiency gain within the meaning of 101(3). The gain is
19 measured by reference to a cash comparator."

20 Then we can ignore 195, 196 and 197. Then at 198, we say:

21 "Thus, insofar as the UK MIF incentivises switching from less to more efficient
22 payment methods, from cash to cards and thereby generates transactional
23 savings for merchants, there is an efficiency benefit which benefits merchants
24 within the meaning of 101(3). For a more detailed explanation as to why
25 a MIT-MIF satisfies the conditions for exemption under Article 101(3)
26 reference is made to the first report in Mr von Hinten-Reed. He summarises

1 the Article 101(3) conditions at section 9 and states why the MIT is an
2 appropriate test for calculating a MIF in section 10."

3 Section 10 are the passages that we saw. So we are saying there, at 198, that
4 insofar as it incentivises additional transactions, then that would be an
5 efficiency benefit. And the Tribunal then, in 2016, was referred to the
6 evidence of Mr von Hinten-Reed.

7 **THE PRESIDENT:** Although you appear to say there, glossing a bit the more
8 detailed discussion by your expert, in 199, an explanation as to why a MIT-
9 MIF satisfies the conditions for exemption.

10 **MR BREALEY:** Yes. And it does. If all transactions are additional transactions, it
11 does, because there is --

12 **THE PRESIDENT:** Yes, I understand that, but that's not -- so it may satisfy, but it
13 may well not --

14 **MR BREALEY:** Yes.

15 **THE PRESIDENT:** -- but that's not what 199 says. "As such".

16 **MR BREALEY:** The first sentence, I can see that, but the "as such" I think is that if
17 one then goes to what I have just referred you to, Sir, in section 10 of his first
18 report, you would see that that supports what is being said at paragraph 198.

19 **THE PRESIDENT:** Yes. Then you state what he says the MIF is at 206. That's his
20 calculation of the MIT-MIF.

21 **MR BREALEY:** Yes, I take the point. Essentially it was not incumbent on us to do
22 any calculation. We could have just sat back and said it's a restriction of
23 competition. We actually -- the MIT is based on retailers' cost of cash. We
24 went before the Tribunal with the data relating to Sainsbury's cost of cash and
25 card, we calculated a MIT-MIF so that the Tribunal would be appraised of the
26 transactional benefits to Sainsbury's. The relevant UK MIT-MIF is, as

1 a matter of strict calculation, that is it, it is around 0.13 to 0.15 for credit cards,
2 but that is if the MIF is applied on all transactions.

3 **THE PRESIDENT:** Yes, although I think Dr Niels came out with rather different
4 calculations as to the MIT-MIF, didn't he?

5 **MR BREALEY:** Yes.

6 **THE PRESIDENT:** This is what your expert says it is. And he said it was something
7 else.

8 **MR BREALEY:** He did. I will come on to that because that's actually --

9 **THE PRESIDENT:** Can I just ask you this, you say it was not incumbent on you to
10 say what -- this was your claim for damages.

11 **MR BREALEY:** Yes.

12 **THE PRESIDENT:** You were coming before the Tribunal to say "We want these
13 damages", and "we calculate -- it's for you to prove your damages -- at so
14 much and that's what we want". You could have said, "We calculate our
15 damages on the basis of a zero MIF, because we don't accept any MIF on
16 this, Mastercard can prove otherwise, so this is our claim and here is the
17 quantification of it".

18 But in fact, as I understand it, you came and said, "Well, we'll quantify it on this
19 basis".

20 **MR BREALEY:** Yes.

21 **THE PRESIDENT:** If Mastercard had turned up and said, "Right, here is a cheque
22 for whatever that amount is", that would have been the end of the case.

23 **MR BREALEY:** Well, I mean obviously the Tribunal didn't -- we will come on to how
24 the Tribunal dealt with it in a moment, but had Mastercard come up with
25 a cheque based on 0.13 -- it depends how the judgment would have --

26 **THE PRESIDENT:** My point is there would not have been a judgment because this

1 was your claim and you have quantified your loss. You may say it's
2 a conservative quantification, you may say "We have used a MIT-MIF that's
3 only an upper bound", but that's the course you took, no doubt after a lot of
4 thought, and you came up with the figures that were then put forward --

5 **MR BREALEY:** Yes.

6 **THE PRESIDENT:** -- as your damages.

7 **MR BREALEY:** Can I answer it that way. Even if we had, does that mean that, on
8 remittal, we can't take advantage of the principles set down by the Supreme
9 Court? Even on that case against me, even if we did, does that mean that we
10 can't take advantage of the principles set down by the Supreme Court?
11 Which mean, well, you did calculate the exemption incorrectly.

12 **THE PRESIDENT:** I think that's the critical question, it seems to me.

13 **MR BREALEY:** Well, there are two points. The first is: even if that is the case, and
14 that is the case that you have just put against me and that Mastercard say,
15 that we claimed damages based on an exemption of a MIT-MIF.

16 I would submit that, in the light of the principles set down by the Supreme Court, we
17 are entitled to say when we made that calculation, we only made that
18 calculation as a starting point, not the end point. Because the principles laid
19 down by the Supreme Court say that Sainsbury's calculation, Mr von
20 Hinten-Reed's calculation, does not satisfy all the conditions of 101(3).

21 In other words, are we entitled to say, well, we didn't apply Article 101(3) properly.

22 This is the highest case against me. So you calculated, it is said, damages
23 based on a straight MIT-MIF, a MIF being paid on all transactions.

24 We know, from the Supreme Court, that that calculation is not a silver bullet. It is not
25 the complete analysis. If it's not the complete analysis, because it's only part
26 of the analysis, because it's only the starting point, are we entitled to say, on

1 remittal, when we made that calculation, we did not apply the principles set
2 down by the Supreme Court?

3 That is to say --

4 **THE PRESIDENT:** Or indeed the Court of --

5 **MR BREALEY:** Or the Court of Appeal --

6 **THE PRESIDENT:** I think they were in agreement on this.

7 **MR BREALEY:** Yes. So we have a calculation, it's called an overcharge, and it's
8 based on the MIT-MIF, it's payable on all transactions, we have not
9 considered always card and issuer pass-through, and now the case is being
10 remitted to the Tribunal in order for those principles to be applied.

11 In my submission, we are entitled to say, well, we got it wrong in the sense that we
12 didn't apply the exemption principles properly, we applied the MIT-MIF as if it
13 was a silver bullet, but we are being told by the Supreme Court that it's not
14 a silver bullet, and it's only the starting point of an analysis of an exemption.

15 **THE PRESIDENT:** You knew that, in the sense that Mr von Hinten-Reed explained
16 that, that it can be qualified, and he almost says what you have said, that it's
17 an upper bound and so on, but you put forward your calculations claiming
18 these amounts and you had to put forward your quantification of damage, that
19 you did have to do.

20 **MR BREALEY:** That leads me to my second point, which is that one of the reasons
21 that we went up to the Supreme Court, and the Court of Appeal, is that we
22 were arguing for these principles. In my submission, the calculation that was
23 made has to be read in the light of the further submission that it is for
24 Mastercard to prove additional transactions.

25 Otherwise, one has to look at his report in a holistic whole. One can't just say, right,
26 well he said that it is an upper bound, the MIF has to be lower. He actually

1 says the MIF has to be lower. But then say, well, you then abandoned all that
2 by calculating the MIF on the basis of a straight MIT-MIF, forgetting additional
3 transactions.

4 So that's the two points I make, the first is even if we did not apply the issuer
5 pass-through and always card, we are entitled to do so now in the light of the
6 direction the Tribunal has to apply the Supreme Court's principles.

7 Secondly, we did flag it -- we more than flagged it, we raised the point, and we said
8 we have no evidence of additional card and the report has to be read as
9 a holistic whole. The Tribunal was perfectly entitled to take that calculation as
10 a starting point and then say, well, does that lead to a fair share to the
11 merchants as articulated by Mr von Hinten-Reed?

12 Just as we said in opening, one looks at 194 and 198, we are making the point that
13 you can calculate the MIT-MIF but it will only create efficiencies -- this is
14 paragraph 198 -- insofar as a UK MIF incentivises switching from less to more
15 efficient payment methods, and it is not for us to prove that.

16 **THE PRESIDENT:** No, no, we've got that point.

17 **MR BREALEY:** I take the point that we were calculating an overcharge on the basis
18 of the straight MIT-MIF.

19 I have also -- can I go to Sainsbury's oral closing.

20 **THE PRESIDENT:** Yes.

21 **MR BREALEY:** Which you have probably seen. That's at bundle D7, tab 14, pages
22 95 to 99.

23 This was the damages -- so, again, obviously I won't read all this -- but this is the
24 exchange between myself and the Tribunal on the damages counterfactual.

25 **THE PRESIDENT:** Yes.

26 **MR BREALEY:** This is relevant to the point I have just made about the burden of

1 proof being on Mastercard to show additional transactions.

2 "What I intend to do ... I'll just go through the rest of the damages, the
3 counterfactual, look at Maestro and look at Amex".

4 When I go through this, Sir, I want you to realise also that what was being submitted
5 by Mastercard was the burden of proof was on Sainsbury's to prove an
6 exemptible level of MIF. That case was rejected by the Court of Appeal.

7 So when one is looking at how we approach this case, and we were putting forward
8 a calculation of a MIT-MIF, one has to recognise also that was in
9 circumstances where it was being argued against us that the obligation was
10 on us.

11 Also, when one looks at this exchange, the Tribunal seemed to be attracted by it.
12 But I will just pick up a few points if I can because what I am trying to say
13 here, to the Tribunal, is that exemption is a matter for Mastercard. If
14 Mastercard don't prove exemption, our measure of damages is prima facie
15 based on no MIF.

16 So, for example, at page 128 of the transcript, page 95:

17 [As read] So "Mr Smith: I suppose that was the question I was ... and the Chairman
18 put it much better. We are not actually talking about exemption here unless
19 we exempt the rates actually charged ... we are talking about what is the
20 highest level that would be exemptible looking at the circumstances in the
21 past.

22 "I do disagree with that, with respect, and the reason I disagree is because we are
23 coming to court, or the Tribunal, and we are saying there has been a breach
24 of 101(1), and the breach of 101(1) has led to an overcharge. Full stop. We do
25 not even get to exemption. Now the burden of proof is on Mastercard to say,
26 well, that overcharge is not the difference between zero and 0.9 because

1 actually I charged a lawful price because it would have been exempted at 0.3
2 or X, for example, so actually the lawful price was 0.3."

3 What I am trying to say there, and this is obviously in the context of our submissions,
4 that there is an overcharge based on a straight MIT-MIF, but if Mastercard do
5 not prove the conditions for exemption, our measure of loss is prima facie
6 zero, nothing. As I say, we go home.

7 Then at line 13:

8 "[As read] I can half understand that but as long as the Tribunal is not accepting
9 Mr Hoskins' point which is, for us, in some way to prove exemption. Or in
10 some way it is for him not to meet the rigours that the European Court has laid
11 down for a person in his position to prove an exemption."

12 "Mr Justice Barling: ... As I understand it your answer to his point, you have gone as
13 far as you have to go once you have proved the overcharge.

14 "Correct.

15 "Prima facia you say that is your – "I can go home" – that is your measure of loss
16 prima facia and if they want to go further than that, they have to show either
17 that they did charge a lawful - because there was an exemption, it was
18 exemptible, or can be exempted now, or the overcharge isn't as big because
19 there was a level between the two points."

20 **THE PRESIDENT:** Yes.

21 **MR BREALEY:** Again, there was a lot of issues in this case, but we had calculated
22 an overcharge based on a straight MIT-MIF. We had informed the Tribunal
23 that that was subject to the conditions of Article 101(3) and that a calculation
24 based on a straight MIT-MIF would not necessarily satisfy the conditions for
25 exemption. We had said we did not have evidence which would show
26 additional transactions. We said it was for Mastercard, and in this exchange

1 I am saying to the Tribunal it is for Mastercard -- I just need to rise to switch
2 a switch, if I can.

3 **THE PRESIDENT:** Yes, well would that be a sensible -- we do generally take
4 a break and I know we were a bit disrupted at the start. Would that be
5 a sensible --

6 **MR BREALEY:** Of course.

7 **THE PRESIDENT:** Is there anything more before you go in the transcript that we
8 have open that we should look at because we might be able to look at it?

9 **MR BREALEY:** Maybe just -- I have highlighted until page 133 of the transcript.

10 **THE PRESIDENT:** Right, we will read that and we will come back at 12 o'clock.

11 **MR BREALEY:** I hope my computer is going to work. Okay, thank you.

12 **(11.49 am)**

13 **(A short break)**

14 **(12.02 pm)**

15 **THE PRESIDENT:** Yes, Mr Brealey.

16 **MR BREALEY:** I don't think it matters but my camera, I can't see you, Sir, very well,
17 whether it's just me.

18 **THE PRESIDENT:** Can you see me now?

19 **MR BREALEY:** So just briefly, I think the Tribunal has the point, but I just want to go
20 to Sainsbury's written closing, and that is at D2. We can start at page 79.
21 Again this is trying to impress upon the Tribunal that there are lots of issues
22 here and we need to treat them to a certain extent as a holistic whole. So this
23 is page 79, D2, tab 3. This is in the closing, so the closing expands on the
24 opening.

25 **THE PRESIDENT:** Yes.

26 **MR BREALEY:** And remember that --

1 **MR HOSKINS:** I've been told the live stream sound isn't working again, I'm afraid,
2 sorry to interrupt.

3 **THE PRESIDENT:** Oh dear, I am sorry we are having such trouble today. We will
4 try and get that sorted.

5 **MR HOSKINS:** I have just been told it's back on now.

6 **THE PRESIDENT:** It's not, it's not, we are told it's not.

7 **(Pause)**

8 Yes, apparently it is. Yes, Mr Brealey?

9 **MR BREALEY:** So this is section C, the closing, expands on -- clearly there's been
10 a trial and we are dealing with some evidence. Page 79, section C,
11 exemption under Article 101(3). We set out the relevant test for exemption,
12 paragraph 197, as Sainsbury's explains in its opening submissions, and then
13 we have A, B and then C on page 80, bundle-page 80, and we mention the
14 conditions and the merchants can't be any worse off:

15 "Thus for the Tribunal to find any level of UK MIF during the relevant period would
16 have to meet the conditions for exemption under 101(3) Mastercard must put
17 forward robust evidence and analysis to demonstrate the existence of
18 efficiencies that arise, the consumers in the relevant market merchants would
19 obtain a fair share, the level of that MIF is necessary to achieve the
20 efficiencies."

21 So all the considerations that we have seen in section 10 of Mr von Hinten-Reed's
22 first report. At 198, we say that Mastercard have similarly failed to provide
23 this evidence. Then we say -- "before this Tribunal, instead of adducing the
24 required robust evidence analysis" -- we criticise the Mastercard evidence.
25 But the short point is they have not proved, we would say, that consumers in
26 the relevant market have obtained a fair share, for the reasons I have

1 articulated.

2 At paragraph 204, page 81, again we make the point that Mastercard must explain to
3 the Tribunal in detail the objective benefits created by the MIF, and the
4 importance of such efficiencies to verify what is the link and the claimed
5 efficiencies and what is the value of those efficiencies. All that goes to always
6 card and issuer pass-through.

7 At page 100, 263, the conclusion on the actual MIF, there is no serious attempt by
8 Mastercard to adduce robust empirical evidence.

9 Then I need to go to page 122, because it seems to be that Mastercard, in these
10 proceedings, focus on this.

11 **THE PRESIDENT:** Sorry, which page?

12 **MR BREALEY:** Sorry, page 123, bundle-page 123.

13 **THE PRESIDENT:** Yes.

14 **MR BREALEY:** I think the Tribunal has to recognise that there was an issue -- there
15 was much evidence adduced as to the correct level of MIT-MIF. The experts
16 were disagreeing as to the level of MIT-MIF.

17 **THE PRESIDENT:** Yes.

18 **MR BREALEY:** So there we get the criticisms levelled at Mr von Hinten-Reed's MIT-
19 MIF calculation, and we set out what are the criticisms. Here we are dealing
20 with the Mastercard criticisms of Mr von Hinten-Reed's calculation of the MIT-
21 MIF.

22 In this section, we say the criticisms are misplaced. This is at 349:

23 "Nothing that the Tribunal has heard during these proceedings casts doubt on the
24 appropriateness of Mr von Hinten-Reed's suggested UK MIT-MIF", because
25 they are both disagreeing as to the level. He is saying there's a level of a UK
26 MIT-MIF of 0.13-0.15 for credit cards. We say:

1 "The irony remains that while the burden of proof for exemption is on Mastercard, the
2 only party to have put forward any rigorous analysis of benefits and fair share,
3 a methodology that meets the requirements of 101(3), is Sainsbury's."

4 Again, that has to be read in the context of the start of this section, which is that
5 Mastercard have got to prove the benefits and fair share.

6 Then we have a conclusion of MIF estimates of transaction benefits. So again, this
7 is an important point. The 0.15% is an estimate by Mr von Hinten-Reed of
8 transaction benefits. That is essentially when one goes over the page to 126,
9 the overcharge, that is the calculation of the overcharge, which is a calculation
10 of a MIT-MIF.

11 **THE PRESIDENT:** Yes.

12 **MR BREALEY:** But that doesn't mean to say that that excuses Mastercard from
13 coming to court with robust evidence as to whether this MIT-MIF is applicable
14 on all transactions, additional transactions, because it is being submitted to
15 the Tribunal that Article 101(3) is not satisfied, not satisfied, unless
16 Mastercard adduce evidence of additional transactions.

17 Just to put the point another way, you asked me -- had there been a judgment, had
18 there been a judgment which said, "We award Sainsbury's damages of 0.15
19 for credit cards, but we don't go any lower than that. They said it was an
20 upper bound, it is not for Mastercard to adduce evidence of additional
21 transactions, it would be for Sainsbury's to do that, and therefore we are not
22 going to lower that threshold of 0.15", in my submission, on the basis of the
23 evidence that had been presented to the Tribunal, that would have been an
24 error. It may well have been that we would have taken the cheque, but that's
25 not the exam question. The exam question is: had the Tribunal said it is 0.15,
26 because that is the transaction benefits, but it is not for Mastercard to prove

1 whether they were additional transactions or not, we would have said that was
2 an error, in the light of how it was submitted and in light of the evidence.

3 I am coming to a close of the core documents. I won't go to the evidence of Gunnar
4 Niels because of the time. I will just quickly go to Mastercard's closing
5 submission. So we can put D2 away and take up D3. Again, it's very
6 detailed, but we can go to page 96, which is in the section on exemption.

7 It's paragraphs 282, 283 where all I want to refer the Tribunal to is that both Dr Niels
8 and Mastercard in closing said that the MIT-MIF, the way that Sainsbury's had
9 calculated the MIT-MIF, was incorrect and that the MIT-MIF was not in itself
10 the appropriate test for exemption.

11 So we had put forward a MIT-MIF based on certain calculations, and we see there,
12 282(a), the sort of disagreement about the level of the MIT-MIF:

13 "Cost data should be based on the Commission's long run econometric models, not
14 the short to medium term calculation."

15 There was a lot of debate over the sort of costs that should go into the MIT-MIF, and
16 so when one sees a section on the MIT-MIF and the overcharge, that is
17 Sainsbury's saying, well, it should be certain costs over time. It's quite difficult
18 to articulate the extent to which the experts disagreed on the exemption
19 analysis relating to the MIT-MIF.

20 **THE PRESIDENT:** Well, it is agreed, as I understand it, on the calculation of the
21 MIT-MIF

22 **MR BREALEY:** Yes.

23 **THE PRESIDENT:** They approach it a different way. We probably don't need to get
24 into why Dr Niels came up with a higher MIT-MIF than Mr von Hinten-Reed.
25 But where does Mastercard say that, never mind what the MIT-MIF is, even
26 Dr Niels' MIT-MIF is not the exemptible level of MIF?

1 **MR BREALEY:** Could you say that again, Sir?

2 **THE PRESIDENT:** Yes. I think you just said that Mastercard and Dr Niels say that
3 the MIT-MIF is not the appropriate test for exemption. I think that's what you
4 just told us. I can see here Mastercard referring to Dr Niels, saying the MIT-
5 MIF should probably be calculated at much higher levels than the calculation
6 of Mr von Hinten-Reed, but where do they say that in any event it is not the
7 appropriate test for exemption?

8 **MR BREALEY:** Well, it's ...

9 **THE PRESIDENT:** Because I thought that they were also saying that the MIT-MIF is
10 the right approach, it's just that Mr von Hinten-Reed has got the calculation
11 wrong, putting it bluntly, because he's used a methodology or taken costs on
12 a basis that isn't sound, and if you do it the way it should be done you get at
13 a MIT-MIF that is much higher, and indeed close, in effect, to the actual levels
14 of MIF that Mastercard was charging.

15 **MR BREALEY:** Okay, well there are a few things in there. I will answer it if I can in
16 this way: if one goes to page 116, that is the conclusion on the MIT-MIF --

17 **THE PRESIDENT:** Yes.

18 **MR BREALEY:** -- where Mastercard in closing are saying that von Hinten-Reed's
19 calculation of 0.15 is patently unreliable.

20 Then 346, they refer to Dr Niels' first report, and that's where you get the higher
21 credit card MIFs, or MIT-MIFs. You can see at 347. There's a question as to
22 whether, applying the principles of the Supreme Court, Mastercard is fixed on
23 those MIFs, whether it can go lower. It says that Sainsbury's cannot go lower,
24 the question is whether they can be lower --

25 **THE PRESIDENT:** But I mean, aren't they saying here -- sorry to interrupt you --
26 take Dr Niels' MIT-MIFs in broad terms, therefore the MIFs that Mastercard

1 actually charged, which are paragraph 346, are in precisely that range and
2 therefore exemptible?

3 **MR BREALEY:** It's a lot more complicated than that and I just -- I wasn't going to
4 but can we go to D6, because the answer to that is probably -- that's not the
5 correct approach. Page 105.

6 **THE PRESIDENT:** D6 is Dr Niels' report?

7 **MR BREALEY:** Yes.

8 **THE PRESIDENT:** At page?

9 **MR BREALEY:** 105. Can I just explain why I'm going to page 105. One sees there,
10 6A.2, "Theoretical and practical shortcomings of the MIT".

11 **THE PRESIDENT:** Yes.

12 **MR BREALEY:** So in a nutshell, Sir, what Dr Niels said, and Mastercard submitted,
13 were two things.

14 The first was that von Hinten-Reed had calculated the Commission's MIT-MIF
15 methodology incorrectly.

16 We have seen that von Hinten-Reed adopted the Commission's methodology and he
17 calculated it, he said, pursuant to that methodology.

18 Mastercard and Dr Niels said he had incorrectly undertaken the calculations. We
19 have already seen one, one was --

20 **THE PRESIDENT:** Yes.

21 **MR BREALEY:** -- costs on a short-term basis on a long-term basis.

22 But the second point, and the more fundamental point, is that Mastercard submitted
23 that the MIT, as a test, was insufficient.

24 You will see there at paragraph 6.9 onwards, that they undertake what became
25 known as an adjusted MIT-MIF. We submitted that when they had adjusted
26 the MIT-MIF, it wasn't actually a MIT at all. It wasn't a Merchant Indifference

1 Test because it wasn't a comparison with cash, it added on costs relating to
2 credit, payment guarantees; it was a mixture of the issuers' cost methodology
3 and the classic MIT test.

4 **THE PRESIDENT:** So the figure that we find in their closing, on the page you took
5 us to, page 116, paragraph 347, "On Dr Niels' analysis, the MIT-MIF would
6 have been in the range ..." is that what you have just called the adjusted MIT-
7 MIF?

8 **MR BREALEY:** Yes. And it goes way beyond the simple calculation that the
9 Commission advocated, which was whether a retailer would be indifferent.

10 So just to recap, criticised von Hinten-Reed's calculation relating to costs and time,
11 et cetera, but went far beyond that and did an adjusted MIT-MIF, and we
12 submitted that actually that wasn't a MIT at all, it was just a justification for
13 a higher MIF.

14 Essentially, Mastercard were submitting that the MIT, in itself, the sort of calculation
15 that von Hinten-Reed had done on the transactional benefits, was not fit for
16 purpose for exemption. Not fit for purpose.

17 To a large extent, that was accepted by the Tribunal. So they didn't accept the
18 calculation that von Hinten-Reed had done for an exemptible level, subject to
19 fair share.

20 If I can just show you, Sir, the passage from the Tribunal, because the Tribunal
21 essentially rejected any analysis based on the MIT-MIF, classic MIT-MIF. The
22 judgment is at C1 -- so we can put Dr Gunnar Niels away. But there is
23 a massive critique about the classic MIT-MIF from Dr Niels. Didn't accept the
24 Sainsbury's calculation at all.

25 The judgment is at C1, tab 1, and the relevant page is 182.

26 As I say, there has been substantial economic evidence on the level of MIT-MIF, the

1 adjustment of MIT-MIF, and at 182 we see at paragraph 289 how the Tribunal
2 dealt with the MIT-MIF:

3 "Both Mastercard and Sainsbury's addressed us on what might be an exemptible
4 level of MIF and adduced much evidence in this regard, in particular from
5 Mr von Hinten-Reed and Dr Niels."

6 This is at 289 at the bottom:

7 "In deference to the arguments and evidence of the parties it may assist if we make
8 the following points ..."

9 Quite a lot of this analysis, as you will appreciate now, Sir, is wrong. But if we go to
10 page 184 --

11 **THE PRESIDENT:** This was essentially obiter, was it, because they had already
12 said that --

13 **MR BREALEY:** Correct --

14 **THE PRESIDENT:** -- the MIF as set can't be exempted in 288, so they went on to
15 deal with this out of deference to the argument.

16 **MR BREALEY:** The reason I am referring to this is because essentially they say:
17 two sides have given this evidence as to what an exemptible level would be
18 and we reject both sides.

19 They accept, actually, Mastercard's view of the world more than Sainsbury's.

20 So at 3:

21 "We reject the MIT as an appropriate measure for an exemptible level of MIF. We
22 describe the MIT... a one-off transaction ... if cash is more expensive than
23 payment by card, the merchant will prefer payment by card."

24 So they set that out there. Then over the page at 185:

25 "There are many problems with the MIT ... problems arise out of the difficulties in
26 applying the MIT in order to calculate the MIT-MIF. The MIT being the extent

1 to which a merchant saves money by offering payment by card rather than by
2 cash."

3 If you go down to (ii), so this is 4(ii):

4 "More fundamentally [the Tribunal says] the MIT only works where payment by cash
5 is an alternative to payment by card. Only where these alternatives exist is it
6 possible to compute the cost advantages to a merchant of using one rather
7 than the other. The case of online transactions where cash simply cannot be
8 used thus presents something of a problem."

9 Then, at the top of 186:

10 "The MIT as a test is wholly unfit for purpose."

11 This is not the adjusted MIT-MIF, this is the Commission's methodology.

12 "We have already noted the MIT does not actually look at the advantages gained by
13 merchants through the use of cards."

14 That is an incorrect assessment.

15 Then, 5:

16 "This leads us to the most fundamental objection to the MIT, which is that it looks ...
17 to only one market, the acquiring market."

18 Well, that is an incorrect assessment.

19 **THE PRESIDENT:** This is all overtaken by the Court of Appeal and the Supreme
20 Court.

21 **MR BREALEY:** It is, and the Supreme Court, yes.

22 **THE PRESIDENT:** And they didn't of course, in this Tribunal, reach any conclusion
23 on the exemptible level of a MIF because they said the MIF wouldn't -- it's not
24 appropriate, it's a question of you look at bilateral fees, bilateral --

25 **MR BREALEY:** They obiter say something over the page about it being close to its
26 0.5, but, again, the basis for that is looking at the wrong markets, not

1 specifically looking at causal link, et cetera, et cetera.

2 **THE PRESIDENT:** Yes.

3 **MR BREALEY:** All I say is that Mastercard put in an adjusted MIT-MIF at a much
4 higher level, we put in a classic Commission-type MIF at a much lower level,
5 subject to a caveat of it having to satisfy the fair share and indispensability
6 requirements, and the Tribunal would have rejected the MIT as the
7 appropriate measure.

8 It certainly did not record any sort of concession by Sainsbury's, which -- once
9 Mr Hoskins has made his submission I will come back to the Court of Appeal
10 in Visa.

11 Can I make some wrap-up points on how it was argued --

12 **THE PRESIDENT:** I suppose you say you put those MIT-MIFs as the starting point.
13 That was Sainsbury's position, that the MIT-MIF is the starting point, and the
14 CAT does record that.

15 **MR BREALEY:** Yes. It is a starting point, and in that respect we got it right. If -- if --
16 it is held that we incorrectly regarded it as a starting point and the end point,
17 that is contrary to the principles as set out by the Supreme Court. But in my
18 submission, we said that it was essentially a starting point. It did calculate the
19 transactional benefits to the retailer, and that must be the starting point.

20 But we did submit to the Tribunal that the calculation of the transactional benefits
21 must be subject to evidence of whether those transactions are additional or
22 not. And that point, that submission, is ultimately endorsed by the Supreme
23 Court.

24 **THE PRESIDENT:** Yes, well you wanted to go to -- because you have had a lot of
25 time -- you wanted to go, you said, to the appeal judgments.

26 We have been through, I think, the core documents, so we had better move on --

1 **MR BREALEY:** I will move on. I will be five or six minutes and then I will finish,
2 because I am conscious that we have ...

3 **THE PRESIDENT:** Yes. We have read, all three of us, the judgments of the Court
4 of Appeal and the Supreme Court. We have not read, I think, the CAT
5 judgment in great detail.

6 **MR BREALEY:** Can I then just take the Tribunal to -- because, again, they are
7 lengthy and complex -- the relevant passages, but we don't need to read
8 them.

9 **THE PRESIDENT:** Yes.

10 **MR BREALEY:** So what I am looking at is the principles relating to the MIT-MIF.
11 So if one takes the Court of Appeal first -- both Court of Appeal and Supreme Court
12 are in bundle C2 and the Court of Appeal is at tab 5.

13 If one goes to page 85 --

14 **THE PRESIDENT:** Because I am working off another copy, if you can just give me
15 the paragraph numbers as well.

16 **MR BREALEY:** Of course. Paragraph 83, page 85, right at the bottom:

17 "We emphasise various principles which emerge from the guidelines and the ...
18 jurisprudence on Article 101(3), which are relevant to the present appeals."

19 They go through various principles. I just want to highlight the fourth, which is at
20 paragraph 88 at page 87. We are talking about the causal link and that if the
21 MIF incentivises the issuers to take steps they would not otherwise have
22 taken, and that the steps taken did indeed increase card usage. In fact, those
23 are essentially the issuer pass-through and the always card.

24 And then we see that at paragraph 242. Again, I will just highlight a couple of the
25 paragraphs. This is at page 118, paragraphs 242 and 245, where the Court of
26 Appeal is saying that when it comes to the causal link between the MIF and

1 the efficiency and the benefit, these principles of issuer pass-through and
2 always card are very, very important.

3 That's what the Court of Appeal is saying at 242 and 245. It is endorsing that
4 Mastercard and Visa have to prove issuer pass-through and always card,
5 i.e. that these transactions were additional transactions incentivised by the
6 MIF.

7 So that's 242 and 245.

8 Then if I go to the Supreme Court, you will have it but it's --

9 **THE PRESIDENT:** Do we want to look at what they say about the MIT as well?

10 **MR BREALEY:** I think we can do that by reference to the Supreme Court, because
11 the Supreme Court refers to it.

12 **THE PRESIDENT:** Yes.

13 **MR BREALEY:** But at 109 -- this is at page 91, back in the Court of Appeal --
14 page 91/108, essentially endorsing what we submitted to the Tribunal:

15 "This overlooks, however, that ..."

16 Paragraph 108:

17 "... whilst it is correct that the Commission and European Parliament have accepted
18 the MIT [that is the transactional benefits] for the purpose of setting an upper
19 limit or cap under the ... regulation ..., the Commission's consistent position
20 has been that adoption of the MIT alone will not lead to automatic exemption.
21 That is made clear by recital 14 ...

22 "As Ronit Kreisberger, for the Commission, explained in her submissions to us, the
23 Commission regards the MIT as a useful starting point but not as a substitute
24 for the facts of the case. As she put it, the MIT is not a 'silver bullet' for the
25 schemes. In other words, to obtain exemption, a scheme still has to back up
26 any reliance on the MIT as a benchmark with robust analysis and cogent

1 evidence."

2 This is expanded upon by the Supreme Court, where it analyses the MIT at
3 page 213, you probably have this highlighted, at paragraph 132. At 132,
4 page 213, where the Supreme Court says it is necessary to say something
5 about the reliance placed by Visa and Mastercard on the Merchant
6 Indifference Tests, the MIT.

7 The penultimate sentence of 132, and we have quoted this in our skeleton:

8 "[The payment cards] are 'must-take cards' that merchants cannot turn down. The
9 MIT seeks to put an upper limit on MIFs so that the schemes are not able to
10 exploit their market power over merchants."

11 Then the Supreme Court rejects the scheme's argument in 133 and 134, which
12 say -- it's basically the scheme was saying the interchange fee regulation and
13 the commitments were a proxy, and that is rejected.

14 Then at 135, again, these are the important principles, which essentially endorse
15 what Mr von Hinten-Reed said in section 10 of his first report:

16 "There is a further and more fundamental reason why the MIT does not assist Visa
17 and Mastercard on the present issue. It is not designed as a substitute for
18 the balancing test as a means of establishing efficiency and benefits under
19 101(3). It is rather designed to meet the specific concern that merchants may
20 be vulnerable because they are typically in a poor position to resist
21 consumers ... As a result, the MIT seeks to ensure that the collective
22 interchange fees do not rise above a level at which payment by card is more
23 expensive for merchants and other methods of payment."

24 Then at 136 and at 137, very, very important because it endorses the MIT, the
25 calculation that Mr von Hinten-Reed did of the transactional benefits is only
26 the starting point, it is not the end point.

1 At 136, the Supreme Court lays down the clear principles that the MIT, the
2 calculation of the transactional benefits, is subject to issuer pass-through and
3 always card.

4 So simply by measuring the transactional benefits, as the Supreme Court says at
5 paragraph 137, it's a starting point. So if I just read 137:

6 "In the present case [and, again], the Commission intervened before the Court of
7 Appeal and explained why Visa and Mastercard were wrong to suggest that
8 the MIT had been treated by it as an appropriate basis for assessing the issue
9 ... We agree with the conclusion of the Court of Appeal at paragraph 109 ..."

10 This is paragraph 137:

11 "... the MIT is a useful starting point but not a substitute for the facts of the case. It is
12 not a silver bullet. In order to obtain exemption, they still have to back up any
13 reliance on the MIT as a benchmark with robust analysis and cogent empirical
14 evidence."

15 If one reads back to paragraph 136, you need robust analysis and cogent empirical
16 evidence of issuer pass-through and always card transactions. And that's
17 what we did submit to the Tribunal, we say, and if we didn't submit that, in my
18 submission we are entitled to submit it now on remittal, because the Supreme
19 Court has said, well, Sainsbury's, you calculated the MIT as a starting point
20 but you didn't go further enough.

21 I know you have read the skeletons and we have various arguments about,
22 essentially, this being a mixed exemption and quantum issue. We are simply
23 trying to increase the quantum -- or not increase the quantum, but the
24 quantum be calculated on the basis of the correct principles.

25 As I say, if we got it wrong before, because we treated the MIT as a starting point,
26 we are entitled, pursuant to the remittal order, to say it's a starting point but it's

1 not the end point. But in my submission, we did say that before and what the
2 Supreme Court endorsed at 136 and 137 is what we had submitted to the
3 Tribunal, see section 10 of Mr von Hinten-Reed's evidence.

4 **THE PRESIDENT:** Yes.

5 **MR BREALEY:** Thank you.

6 **THE PRESIDENT:** I think, given the time, what we will do is we will rise now and we
7 will come back at 1.45.

8 **(12.42 pm)**

9 **(The luncheon adjournment)**

10 **(1.56 pm)**

11
12 **Ruling**

13 **THE PRESIDENT:** This is an application by the claimant, Sainsbury's, to amend
14 their particulars of claim in these proceedings, but it arises in somewhat
15 unusual circumstances. The case concerns damages for breach of Article
16 101 of the Treaty On the Functioning of the European Union arising from the
17 multilateral interchange fee, or MIF, set by the well-known Mastercard
18 scheme for credit and debit cards operated by the defendants.

19 The claim came on for a full trial before this Tribunal in 2016, resulting in a judgment
20 of the CAT in July 2016 awarding Sainsbury's substantial damages.

21 Another group of large retail chains brought an action against the same defendants,
22 which was heard in the Commercial Court. Contrary to the CAT, the
23 Commercial Court found that the scheme did not infringe Article 101.

24 Subsequently, a parallel claim by Sainsbury's against Visa, brought on a similar
25 basis, also was heard in the Commercial Court and two judgments were
26 handed down in November 2017 and February 2018, the second judgment

1 addressing exemption under Article 101, paragraph 3. Appeals in all three
2 cases were heard together by the Court of Appeal, which produced a very full,
3 single judgment in July 2018.

4 Insofar as relevant, the Court of Appeal held that the MIFs of both schemes infringed
5 Article 101 but remitted the cases to the CAT on various points.

6 As regards the Sainsbury's v Mastercard claim, the remittal was to deal with
7 exemption under Article 101, paragraph 3, on which the burden rested on the
8 defendants, and quantum.

9 Further appeals in all three cases went to the Supreme Court, which gave a single
10 judgment in June 2020. The Supreme Court varied the decision and order of
11 the Court of Appeal in certain specific respects.

12 For the present application, the terms of the order of the Court of Appeal in directing
13 remittal are important. As revised by the Supreme Court, paragraph 15 of that
14 order is the relevant paragraph. Insofar as material it states:

15 "The claims brought by Sainsbury's against each of Mastercard and Visa shall be
16 remitted to the Competition Appeal Tribunal for re-consideration, not retrial, in
17 accordance with the Judgment ..."

18 I interpose that is a reference to the judgment of the Court of Appeal:

19 "... of Mastercard's and Visa's cases advanced in the Court/Tribunal below that the
20 MIFs subject to these claims satisfy the conditions for exemption pursuant to
21 Article 101(3) TFEU [and other equivalent provisions of domestic and Irish
22 law]. The Sainsbury's v Mastercard proceedings shall also be remitted for
23 assessment of the quantum claim ... It will not be open to any party to
24 advance a new case or to adduce any fresh evidence on the remittals for
25 reconsideration and assessment of quantum in Sainsbury's v Mastercard."

26 Sainsbury's particulars of claim in the present proceedings are a full document

1 explaining the grounds on which it said that the MIFs infringed Article 101(1).
2 And they then have a section headed "Quantum of loss and damages". The
3 subheading is "Compensatory damages". At paragraph 50 it says this:

4 "The measure of Sainsbury's damages is the overcharge, which reflects the
5 difference between the MIFs reflected in the MSCs which Sainsbury's has
6 paid and such MIFs as Mastercard could lawfully have set, if any, absent the
7 breaches of statutory duty."

8 Then it proceeds to give details of quantum. At paragraph 56, the statement of claim
9 says this:

10 "A summary of the determination and application of the MIT-consistent MIF to the
11 quantification of Sainsbury's loss is attached as schedule 1 to these
12 particulars of claim. In essence, Sainsbury's case [and we emphasise the
13 words "Sainsbury's case"] is that:

14 "1. The MIT-consistent MIF in the market in which Sainsbury's operates is
15 substantially lower than the figures contained in the Mastercard undertaking.

16 "2. Sainsbury's present best estimate of the MIT-consistent MIF, calculated on the
17 basis of Sainsbury's data, is 0.04% of the value of a credit card or debit card
18 transaction.

19 "3. The actual total overcharge is calculated by determining the difference between
20 the actual interchange fees paid by Sainsbury's and the MIT-consistent MIF."

21 By the present application, Sainsbury's seeks to delete paragraph 56, which I have
22 just quoted, and a whole section in which that appears, between paragraph 51
23 and paragraph 58, dealing with the way Sainsbury's quantified its losses. In
24 essence, Sainsbury's wishes to argue that no level of MIF above zero
25 qualified for exemption applying the criteria for exemption as explained, and
26 the evidential tests that have to be met as set out, in the Court of Appeal

1 judgment and in effect upheld by the Supreme Court.

2 Sainsbury's say this is consistent with the Court of Appeal judgment. The remittal is
3 to proceed in accordance with the Court of Appeal judgment and it is for
4 Mastercard to establish the level of any exemptible MIF.

5 The question that we have to address is what is meant by the expression, in
6 paragraph 15 of the Court of Appeal order, as revised by the Supreme Court,
7 "reconsideration, not retrial, in accordance with the Judgment". And the
8 requirement or restriction in the same paragraph of the Court of Appeal order,
9 that:

10 "It will not be open to any party to advance a new case."

11 That is a particularly important restriction, since neither party is entitled to call further
12 evidence.

13 We consider that the course that Sainsbury's now seeks to adopt does amount to
14 advancing a new case.

15 Sainsbury's case at trial was that MIFs at the level calculated by their expert
16 economist as the MIT-MIF, that is to say MIFs corresponding to what is
17 referred to as the Merchant Indifference Test, were exemptible and, more
18 particularly, they advanced their claim for damages on that basis.

19 We have been referred to a number of documents in the skeleton argument for
20 Mastercard. It is sufficient for present purposes to refer to two in addition to
21 the particulars of claim from which I have quoted. First, there is the summary
22 of the parties' position on the issues before the Tribunal, that was prepared
23 and placed before the Tribunal where, at paragraph 4.2, as regards the issue
24 what would the resulting level of UK MIF have been, that being the MIF that
25 could be exempted, the claimant's position is stated as follows. "Mr Nils von
26 Hinten-Reed's expert opinion is that the MIT-MIF should be 0.17% for debit

1 cards and 0.15% for credit cards based on the claimant's data. Mr von
2 Hinten-Reed notes that these are close to the MIT-MIF levels estimated by
3 the European Commission under similar methodological choices ..."

4 Secondly, Sainsbury's written closing submissions at trial, where Sainsbury's legal
5 representatives in their written argument first stated at paragraph 349 that:

6 "Nothing that the Tribunal has heard during these proceedings casts doubt on the
7 appropriateness of Mr von Hinten-Reed's suggested UK MIT-MIF of 0.13 to
8 0.15% for credit cards and 0.11 to 0.17% for debit cards."

9 That deals then with the MIT-MIF.

10 Then, in section D of their closing submissions, when they come to address the
11 actual overcharge, counsel for Sainsbury's base their calculation on those
12 levels of MIT-MIF; and that produces their overcharge calculation set out at
13 paragraphs 360 to 364 as the amount that Sainsbury's is claiming and seeks
14 to recover.

15 Indeed, it seems that both sides' experts at trial argued for an exemptible MIF
16 corresponding to their respective computations of the MIT, although they were
17 far apart as to what figure that computation produced. Dr Niels for Mastercard
18 in his evidence said that the MIT-MIF that he calculated required some further
19 adjustment.

20 Mr Brealey points out to us that their expert, Mr von Hinten-Reed, in his two reports,
21 explained that the MIT-MIF was only an upper bound and that a MIF which
22 satisfies the criteria for exemption would be lower on account of what is
23 referred to as the "always cards" point and the "issuer pass-through" point.

24 Mr von Hinten-Reed explains those qualifications in his report. Mr Brealey says that
25 therefore a claim on the basis only of the MIT cannot stand with the way
26 Sainsbury's put its case by way of expert evidence and, more particularly,

1 cannot stand with the principles in the judgments of the two appellate courts.

2 As regards the appellate courts, we do not think that is quite correct.

3 The Court of Appeal stated, at paragraph 109:

4 "As Ms Ronit Kreisberger, for the Commission, explained in her submissions to us,
5 the Commission regards the MIT as a useful starting point but not as a
6 substitute for the facts of the case. As she put it, the MIT is not a 'silver bullet'
7 for the schemes. In other words, to obtain exemption, a scheme still has to
8 back up any reliance on the MIT as a benchmark with robust analysis and
9 cogent evidence."

10 The Supreme Court effectively endorsed this and discussed the MIT in more detail,
11 concluding at paragraphs 136 to 137:

12 "In a situation where a MIF satisfies the MIT and where the issuing bank recycles all
13 of its MIF income to cardholders, there should be no net detriment to
14 cardholders and merchants considered together. If, on the other hand, as in
15 the present case, the issuer pass-through is less than 100% (ie the issuer
16 retains a part of the MIF), there is likely to be a net loss to cardholders and
17 merchants considered together. A net benefit could still arise in these
18 circumstances, however, if the MIF revenue passed to cardholders caused
19 them to make greater use of their cards, so that merchants were relieved of a
20 sufficiently large number of transactions using a more expensive form of
21 payment, with the result that the loss to cardholders and merchants
22 considered together from reduced issuer pass-through was outweighed.
23 Whether this in fact occurs will depend on the extent of issuer pass-through,
24 the extent of always card transactions and the difference in cost for merchants
25 between accepting a scheme card and an alternative form of payment.

26 "As Mr Jon Turner QC put it on behalf of the AAM parties, the theory of the MIT does

1 not even purport to avoid the need to address such issues, which would be
2 essential if an appropriate balancing exercise under Article 101(3) were to be
3 carried out. These are highly relevant matters that can be brought into
4 account only on the basis of empirical evidence.

5 "In the present case, the Commission intervened before the Court of Appeal and
6 explained why Visa and Mastercard were wrong to suggest that the MIT had
7 been treated by it as an appropriate basis for assessing the issue of
8 exemption. We agree with the conclusion of the Court of Appeal (at
9 paragraph 109), accepting the submissions of the Commission, that the
10 Commission regards the MIT as a useful starting point but not as a substitute
11 for the facts of the case. It is not a silver bullet for Visa and Mastercard. In
12 order to obtain exemption, they still have to back up any reliance on the MIT
13 as a benchmark with robust analysis and cogent empirical evidence."

14 Thus the MIT is not completely irrelevant. It is a starting point. If Mastercard at trial
15 had accepted Sainsbury's calculation of the MIT-MIF, then there would have
16 been no dispute at all on the exemptible level and no issue on that point for
17 decision by the Tribunal. The argument on quantum would have been
18 confined to other issues, notably the question of pass-through.

19 The material which Mr Brealey showed us in the course of his argument
20 demonstrates that Sainsbury's at trial was well aware of these inadequacies of
21 the MIT-MIF as a basis for satisfying the criteria of exemption, and particularly
22 the always card point and the issuer pass-through point. As Mr Brealey said,
23 and we agree, the Supreme Court in effect endorses the points about the MIT
24 made by Sainsbury's expert, Mr von Hinten-Reed. In that respect, there was
25 therefore nothing new for Sainsbury's in the Supreme Court judgment.

26 But this was a damages claim. Sainsbury's, as the claimant, had to quantify its loss

1 and put forward the sums which it was seeking to recover. It is clear to us
2 that Sainsbury's chose to simplify their claim to get specific sums on account
3 of credit cards and debit cards and chose to advance their computation of loss
4 based on the MIT-MIF as calculated by their own expert.

5 That was their case. Mastercard did not accept that. They argued for a higher MIT-
6 MIF with adjustments. Mastercard can now pursue that argument on the
7 remittal of the case to this Tribunal.

8 Indeed, as the Supreme Court explains, the MIT is in effect a ceiling for the
9 exemptible MIF so Mastercard may well have to do so. If it is unsuccessful on
10 its level of MIT, it is hard to see how, consistently with the Supreme Court
11 judgment, Mastercard's case on exemption can succeed.

12 However, it is clear that to adhere to, and give effect to, the principles in the
13 judgment, Mastercard will have to do more than that and show also that a MIF
14 at that level will satisfy the conditions in Article 101, paragraph 3, applying the
15 evidential test which the appellate courts have set out. It will have to do so on
16 the evidence that has already been filed.

17 We are reinforced in the view that this is what is required by the Court of Appeal
18 judgment and order by looking at the position in the parallel case which
19 Sainsbury's brought against Visa. Unsurprisingly, there too Sainsbury's
20 recognised that a MIF equal to its calculation of the MIT was merely the upper
21 bound, but based its calculation of damages on that MIT-MIF as qualifying for
22 exemption.

23 It used the same expert in that trial, but the actual figures were slightly different
24 because there was some later adjustment. Sainsbury's acceptance of that
25 level of MIF is recorded in the judgment of Mr Justice Phillips at paragraph 9.

26 The Court of Appeal said this in its judgment:

1 "With regard to the nature and extent of the necessary reconsideration, both the CAT
2 case and Sainsbury's v Visa will go back to the CAT for reconsideration of
3 Article 101(3) exemption issues in accordance with this judgment. As part of
4 this exercise, we consider that the CAT should give effect to the acceptance
5 by Sainsbury's at the trial in Sainsbury's v Visa that MIF levels of 0.2% for
6 debit cards and 0.19% for credit cards would be lawful."

7 The order of the Court of Appeal for referral, therefore, said this, at paragraph 17:

8 "So far as concerns the Sainsbury's v Visa case, the Competition Appeal Tribunal
9 shall give effect to the acceptance by Sainsbury's at the trial in Sainsbury's v Visa
10 that MIF levels of up to 0.2% for debit cards and up to 0.19% for credit cards would
11 be lawful, these being Sainsbury's estimates of the UK MIT-MIF at the Sainsbury's v
12 Visa trial."

13 We emphasise those final words. Thus the Court of Appeal directed that Sainsbury's
14 should be held to the case it had advanced on the MIT-MIF as being the
15 exemptible level of MIF, although the judgment of the Court of Appeal
16 explained that the MIT was not the determinative factor in establishing the
17 exemptible level of MIF. The approach that we adopt is consistent with, and
18 indeed in our view required by, the judgment of the Court of Appeal and the
19 terms of its order.

20 However this is subject to one qualification. We are shortly to hear an application by
21 Mastercard that it can pursue on remittal of this case an argument that if the
22 level of MIF had been lower, then the scheme would have changed its rules to
23 the disadvantage of merchants, in particular as regards the payment
24 guarantee.

25 The MIT is the figure at which overall the merchant will be indifferent as to whether
26 a transaction is paid by cash or by card. If the rules of the scheme were to

1 change so that the benefit of card payment is reduced, then this would in turn
2 have an effect on the calculation of the MIT.

3 In response to Mastercard's argument on this at trial, Mr von Hinten-Reed made this
4 very point in his evidence (see his first expert report at paragraph 282).
5 Therefore, if Mastercard should be allowed to argue that the scheme rules
6 changed, then it seems to us Sainsbury's must be allowed to argue that this
7 would reduce the figure for the MIT and thus the MIT-MIF. That is not a new
8 case. It was the response which Sainsbury's made at trial and we consider
9 that it is consistent with the Court of Appeal order, and required by basic
10 fairness, that Sainsbury's should be able to pursue that argument.

11 If necessary, Sainsbury's expert could be invited by the Tribunal to clarify precisely
12 what effect any particular change in the scheme rules would have on his
13 calculation, applying the principles that he explains in his first report.

14 So that deals, I think, with the Sainsbury's application. We turn, I think, now, to
15 Mr Hoskins.

16 **MR HOSKINS:** Sir, in light of the indication you gave at the end of that judgment,
17 I would like to take instructions from my solicitors, because obviously that is
18 a pretty material implication, and that is obviously something I need to speak
19 to my solicitors about. If you could give us ...

20 **THE PRESIDENT:** If you would like ten minutes?

21 **MR HOSKINS:** I was going to say ten minutes.

22 **THE PRESIDENT:** It's 2.18 on the clock here; let's say 2.30.

23 **MR HOSKINS:** Can I just clarify one point, Sir, which in the judgment refers to the
24 argument about the scope of the scheme rules.

25 **THE PRESIDENT:** Yes.

26 **MR HOSKINS:** Is that observation limited, therefore, to the scheme rules point and

1 not to the switching point?

2 **THE PRESIDENT:** Yes.

3 **MR HOSKINS:** It's simply that point, thank you very much.

4 **THE PRESIDENT:** Yes, the switching point raises other issues.

5 **MR HOSKINS:** Thank you.

6 **THE PRESIDENT:** We will resume at 2.30.

7 **(2.18 pm)**

8 **(A short break)**

9 **(2.31 pm)**

10 **THE PRESIDENT:** Yes, Mr Hoskins.

11

12 **Application by MR HOSKINS**

13 **MR HOSKINS:** Thank you, Sir. Thank you for the time to take instructions, and my
14 instructions are that we should not pursue the second quantum point in
15 relation to the scope of the scheme, so the only point I have to address you
16 on is whether we can raise the switching quantum point at the remitted trial.

17 **THE PRESIDENT:** Yes.

18 **MR HOSKINS:** Can I begin by making an introductory remark about the scope of
19 this hearing, just to remind you why we are all here. It's the Tribunal's order
20 made on 16 December last year. That's bundle C2, tab 9, page 255. In
21 particular, it's paragraphs 2 and 3. These determine our task at the hearing
22 today.

23 The Tribunal ordered or directed that Mastercard was to file written submissions as
24 to the case that it should be permitted to advance in relation to the quantum
25 issue and Sainsbury's was to file responsive submissions. So, Sir, in our
26 submission, the purpose of this hearing is to determine the scope of the

1 arguments that the parties may make at trial. Its purpose quite clearly is not
2 to determine the merits of any of those arguments.

3 Sainsbury's has not made any summary judgment or strike out application, and
4 therefore consideration of the merits of the arguments are therefore simply not
5 on the table at this hearing.

6 I say that because some of the arguments that Sainsbury's have raised in their
7 skeleton argument seem to us to stray into the merits rather than the scope
8 territory. I will indicate those points when I come to them.

9 In our submission, it is not so much an application by us to run a point, we submit
10 that there is a live quantum issue that is still before the Tribunal that should be
11 heard at the remitted trial in October. That's the switching point.

12 If I could ask you to go to our defence -- that's at bundle B, tab 5, page 135 --

13 **THE PRESIDENT:** Bundle B, tab 5, yes.

14 **MR HOSKINS:** I am picking it up at page 135. The argument that we wish to make
15 in relation to quantum is this, in a nutshell: any award of damages must take
16 account of the fact that if Mastercard had operated with a lower MIF during
17 the period of the claim, that's lower than the actual MIF, transactions would
18 have switched to payment methods that had been more expensive for
19 merchants such as Visa or Amex.

20 I.e. in the damages counterfactual you would have to take account of the fact that
21 more transactions would have taken place on Visa or Amex than would have
22 been the case on Mastercard.

23 That's at paragraphs 102 to 109; I would invite you briefly to refresh your memory of
24 those paragraphs, please.

25 **(Pause)**

26 **THE PRESIDENT:** Yes. Can you just help me with 104, which -- it's probably my

1 failing -- I don't quite follow that. I see the switching point, which is 102 and
2 103 and then 105 to 109, but 104 just suggests without switching, there would
3 have been less transactions on Mastercard --

4 **MR HOSKINS:** Yes, it is a separate point, which is that there would have been less
5 transactions overall at merchants because of the more expensive payment
6 mechanisms being used to a greater extent, i.e. Visa or American Express.
7 So again, putting it in a nutshell, merchants in the damages counterfactual
8 would have been worse off to the extent that there were less transactions
9 overall.

10 So you're right, it's pleaded in amongst the switching point but it is different to the
11 switching point.

12 **THE PRESIDENT:** That is not the point you are seeking to run?

13 **MR HOSKINS:** We are seeking to run all of the ones in 102 to 109. I have used the
14 portmanteau 'switching point'. These are the paragraphs of the pleading --

15 **THE PRESIDENT:** Yes, I see.

16 **MR HOSKINS:** That was our pleading, it is our pleading, nobody has sought to
17 strike it out, we are not seeking to amend it. Those are the current state of
18 the Mastercard pleadings on this point.

19 Can I go next to the Tribunal's judgment. So that's bundle C1, tab 1 and pick it up at
20 page 4.

21 It is the contents page. The reason I take you to this is some of Sainsbury's
22 submissions take passages from different sections of the judgment out of
23 context, and it's important to know which bits of the judgment we are looking
24 at at each stage.

25 So just to burrow into ourselves, section H of the judgment is dealing with
26 infringement of Article 101.

1 Section I of the judgment, page 170 onwards, is dealing with exemptibility under
2 Article 101(3). It is effectively the same as exemption in the CAT judgment.

3 Then the section on damages is section K, pages 234 onwards.

4 I would like to begin in the section of the Tribunal judgment that is addressing the
5 question of restriction, so section H. If I could ask you to turn to page 85 --
6 actually, if we can start at page 83, you will see the heading of this
7 subsection:

8 "Effect of preventing, restricting or distorting competition: the law --

9 **THE PRESIDENT:** Sorry.

10 **MR HOSKINS:** So this is the law to be applied when considering whether something
11 is a restriction of competition by effect.

12 Then at the top of page 85, the Tribunal held:

13 "Whether there are such anti-competitive effects is determined by assessing what
14 the competition situation would be in the absence of agreement ..."

15 Paragraph 113 cites from the General Court's judgment in O2. If I could ask you
16 briefly to read that.

17 What the Tribunal is saying is as a matter of law, in order to determine whether an
18 agreement constitutes a restriction by effect, that requires a counterfactual
19 analysis and one has to compare the competitive or competition situation in
20 the factual with the competitive situation that would have existed in the
21 counterfactual absent the agreement. So standard competition law test.

22 Then, if we can go to page 102, paragraph 155, this is Mastercard's argument on
23 restriction of competition:

24 "Mastercard's argument was that faced with a scheme paying no UK MIF ... and
25 a similar scheme paying a materially higher MIF [Visa or perhaps Amex] there
26 would be a dramatic shift of issuing banks away from the Mastercard scheme

1 to a rival scheme so that the Mastercard scheme would not merely be
2 damaged but utterly destroyed."

3 And this came to be known as the death spiral argument, in somewhat dramatic
4 terms.

5 So this is the argument that is being looked at and dealt with in this section of the
6 judgment. It's not simply there would have been some switching, it is that the
7 level of switching would have been so great that Mastercard would have been
8 utterly destroyed.

9 If we can go next to page 104, paragraph 163, this is the Tribunal reaching
10 an interim conclusion:

11 "In conclusion, we consider that in the [restriction] counterfactual world [because we
12 are still dealing with restriction] faced with a unilateral elimination of the UK
13 MIF by Mastercard, Visa would have acted in its own best interests and, all
14 other things being equal, would have maintained its MIF at as close to its then
15 level as it felt it could achieve."

16 In other words, the Tribunal is saying for the purposes of the restriction
17 counterfactual you assume no Mastercard MIF, and the Tribunal finds that in
18 the counterfactual it has nonetheless to assume that Visa remains as close to
19 its actual as is possible. That's what the Tribunal found.

20 Then paragraph 164 basically says what would happen in those circumstances:

21 "Accordingly, the next question is what would happen if the Mastercard UK MIF was
22 zero, with the Visa UK MIF at a materially higher level. In these circumstances
23 would, as Mastercard suggest, there be a dramatic shift by issuing banks
24 away from Mastercard and towards, most probably, Visa."

25 Then at page 122, paragraph 197(1) and (2), and just to summarise the finding
26 there, the Tribunal found that the Mastercard scheme would not collapse in

1 the counterfactual, and that's because the Tribunal found that bilateral
2 agreements would be reached between issuing and acquiring banks and that
3 merchants would be prepared to pay fees which although lower than the
4 actual Mastercard MIFs, would be sufficiently high to sustain Mastercard as
5 a viable business.

6 If I could ask you to read paragraph 197(1) and (2).

7 **THE PRESIDENT:** We will just pause then.

8 **MR HOSKINS:** Certainly.

9 **(Pause)**

10 **THE PRESIDENT:** Yes.

11 **MR HOSKINS:** So that was, in short -- there's more to it, but that was in essence
12 the Tribunal's bilateral counterfactual. Can we go next, please, to page 154,
13 paragraph 231. This is where the Tribunal sets out its conclusion on the level
14 of the bilaterally agreed interchange fee for Mastercard credit cards. So this
15 is the bilaterals counterfactual. The Tribunal finds that the MIF for Mastercard
16 credit cards would be 0.5%.

17 Then the conclusion for debit cards, on the basis of this bilaterals counterfactual, one
18 sees paragraph 234:

19 "We consider that Sainsbury's would have agreed an interchange fee for debit
20 Mastercards of 0.27%."

21 So again still in the bilaterals counterfactual.

22 The Tribunal considered Mastercard's switching point insofar as it involved switching
23 from Mastercard to Visa and/or Amex in the section of its judgment dealing
24 with restriction by effect.

25 So I have shown you the broad conclusion on restriction, but can we go forwards,
26 please, to page 167. So we are still in the restriction part of the judgment, and

1 you will see the heading there, "Would the Mastercard scheme collapse in the
2 counterfactual?" So we are looking at switching but we are looking at it only
3 in the all or nothing, would it lead to collapse, not how much switching would
4 take place even if it didn't lead to collapse.

5 In relation to Visa, you will see in paragraph 260 there's a reference to the Maestro
6 example. Just to explain, the Maestro example refers to a period in the first
7 decade of the century when the UK MIF for Visa's debit card was materially
8 higher than the UK MIF for the Maestro debit card, which came under the
9 auspices of Mastercard.

10 Over that period, there was a material switch by issuers from Maestro to Visa debit.

11 The Tribunal had evidence on what was the reason for that switch and it
12 reached the conclusion, you will see at paragraph 260, that the level of
13 interchange fees [i.e. the differential between the Visa and Mastercard debit
14 interchange fees] was a factor bearing on the decision that issuing banks
15 would take into account when switching, but was not the only factor. And
16 that's the conclusion at 260. We will come back to the Maestro example.

17 But then the analysis in terms of would the Mastercard scheme collapse in the
18 counterfactual from the Visa perspective is then dealt with at paragraph 261:

19 "The question for us is whether the difference between a rate of 0.5%, i.e. the
20 bilateral interchange fee that we find would have been agreed in the
21 counterfactual world, and a rate of 0.8%, the rate that we assume Visa would
22 maintain for its credit cards ..."

23 So in this world you have got Mastercard at 0.5 and Visa at 0.8.

24 "... would be sufficiently great to cause such a shift [i.e. a shift that would lead to the
25 collapse of Mastercard]."

26 Then at (1):

1 "We concluded in paragraphs 159 to 164 above ..."

2 I showed you the conclusion in relation to those paragraphs earlier.

3 "We concluded ... that Visa's interchange fee should not be assumed to be the same
4 as Mastercard's on the counterfactual hypothesis ... Visa would seek to
5 maintain the differential between Mastercard's no default MIF and Visa's MIF
6 for as long as commercially possible."

7 Then at (2), five lines down, two from the bottom:

8 "Visa might well itself come under commercial pressure to follow Mastercard's lead
9 in abandoning the monolithic "one size fits all" MIF."

10 (3):

11 "In other words, the environment in which issuing banks would be considering
12 whether to move away from Mastercard and towards Visa would contain
13 within it a significant degree of uncertainty as to what Visa itself would do."

14 Then just skipping to the final sentence:

15 "We consider that these difficult questions would incline issuing banks to stay within
16 the Mastercard scheme."

17 Then over the page, paragraph 169(5):

18 "In the counterfactual world, we consider that both acquiring banks and merchants
19 would ... seek to persuade Visa both to lower its MIF and to encourage a
20 departure from a "one size fits all" interchange fee structure."

21 (6):

22 "In light of the foregoing, we consider it is by no means a safe assumption that Visa
23 would, in the counterfactual world, be able or inclined to maintain its MIF at
24 0.8%. Issuing banks would be aware that this rate would have the potential to
25 fall."

26 (7):

1 "Even if the MIF of 0.8% were maintained by Visa, we consider that issuing banks
2 would not be inclined to move away from Mastercard in so dramatic a way as
3 to materially prejudice the Mastercard scheme as a payment system."

4 So two points in relation to that. First of all, insofar as the Tribunal considered
5 switching, it was in the context of restriction and the relevant question it was
6 asking and answering itself was: would the Mastercard scheme collapse in
7 the counterfactual? To which the answer was no.

8 The second point is the Tribunal did not make a finding on the degree of switching
9 that would occur short of a degree of switching that would lead to collapse.
10 There is no finding in the Tribunal judgment that there would be no switching.
11 There is no finding in the Tribunal judgment on restriction as to what switching
12 would take place.

13 **THE PRESIDENT:** All of this, Mr Hoskins, is on the assumption that in the
14 counterfactual one should assume no restriction on Visa, no legal restriction?

15 **MR HOSKINS:** Absolutely. I am going to come to that. The reason I am labouring
16 this is it's one of my central points when I come to make my submissions.

17 Then in relation to Amex, you see that at paragraph 262 at the bottom of page 170,
18 and it's dealt with very shortly because they basically just read across to the
19 Visa reasoning:

20 "Mastercard also argued that it would have lost significant market share to Amex in
21 the counterfactual where it was prevented from implementing a MIF. We
22 reject this contention for the reasons provided in paragraphs 261(1) to 261(7)
23 above which apply mutatis mutandis."

24 Those are the paragraphs we have just looked at. And then there are some further
25 short observations on Amex. And then the conclusion at 263:

26 "Accordingly we do not accept Mastercard's contention that removal of the UK MIF

1 would result in the collapse of the Mastercard scheme."

2 So you have all the points I made in relation to Visa apply in exactly the same way to
3 Amex. The question asked was in the context of restriction, would there be
4 a collapse because of switching, but there is no finding that switching would
5 not take place, there is no finding as to the level of switching that would take
6 place.

7 It's a very black and white assessment, and that's not a criticism, it's because it was
8 done in the context of 'is there a restriction of competition'.

9 Then I can take the next parts, I think, more quickly, having set out what the
10 bilaterals counterfactual was.

11 If you can go to the exemption part of the judgment, which is obviously very short, at
12 page 180, again if you look at 179 you will see the heading, "Exemptibility
13 under Article 101(3) TFEU", and in short the Tribunal found that because of its
14 bilaterals analysis, the actual Mastercard MIFs could not be exempted. You
15 will see that in paragraphs 285 to 287. If I could ask you just briefly to refresh
16 your memory on 285 to 287.

17 **(Pause)**

18 **THE PRESIDENT:** Yes.

19 **MR HOSKINS:** The short point is, because of its bilaterals analysis, the Tribunal
20 found that the actual Mastercard MIFs could not be exempted.

21 I can move now to section K of the judgment, dealing with damages, at page 243.

22 We have at paragraph 420 quite a useful summary of the Tribunal's findings
23 up to this part of the judgment. You might want to look at 1 to 4.

24 **(Pause)**

25 **THE PRESIDENT:** Yes.

26 **MR HOSKINS:** And then, paragraph 422 on page 244, so moving into quantum, the

1 Tribunal said:

2 "A number of issues arise. We consider them under the following heads:

3 "(1) The overcharge. It is necessary to consider the extent to which Sainsbury's has
4 been overcharged. As to this:

5 "(i). It was common ground between the parties that the starting point for calculating
6 the overcharge was the difference between the UK MIF actually paid by
7 Sainsbury's and the highest lawful interchange fee that would have been
8 charged in the counterfactual world.

9 "(ii). In determining whether there had been an infringement of Article 101(1) in
10 section H above we had cause to consider both what Sainsbury's actually
11 paid in interchange fees and what the highest lawful interchange fee would
12 have been. We draw on the conclusions we reached in section H to inform
13 our assessment of the overcharge for the purposes of assessing damages."

14 So as we will see, there was not a revisiting of issues, such as degree of switching
15 et cetera, when it came to this section of the judgment on damages, there was
16 simply a referral back to the findings on switching in the restriction section. As
17 I showed you, that was a narrow consideration, would switching cause the
18 scheme to collapse, not an assessment of the degree of switching that would
19 take place.

20 Then at page 246, paragraph 424:

21 "As we have already noted, computation of the overcharge involves an assessment
22 of two values, Sainsbury's damages being the difference between the two: (1)
23 ... what Sainsbury's actually paid ... (2) ... what Sainsbury's would have paid
24 [absent the wrong committed by Mastercard]."

25 425:

26 "As we noted above, both of these values have already been computed for the

1 purposes of determining whether there has been an infringement of Article
2 101(1)."

3 So again, reliance on the restriction findings, not new findings for quantum.

4 Then at 427:

5 "As regards the highest lawful interchange fee that could have been paid by
6 Sainsbury's we concluded that the highest lawful interchange fees that
7 Sainsbury's would have paid would have been the equivalent of 0.5% in the
8 case of credit cards and 0.27% in the case of debit cards."

9 Again, simply carrying forward the findings in the restriction section.

10 In our submission it is quite clear that the Tribunal's findings on restriction, exemption
11 and overcharge were all firmly based on its bilaterals counterfactual, and
12 indeed on the findings in its restriction section, which were then just carried
13 forward throughout the judgment.

14 Can I move on next, please, to the Court of Appeal's judgment. You find that at C2,
15 tab 5; I would like to take it up at page 105.

16 **THE PRESIDENT:** Just one moment. Can we put the CAT judgment away?

17 **MR HOSKINS:** We can, yes.

18 **THE PRESIDENT:** Again if I could ask you, please, to give me paragraph numbers.

19 **MR HOSKINS:** Sorry, paragraph 173. It's actually the heading above 173 because
20 I want to show you that when the Court of Appeal came to consider the
21 bilaterals counterfactual and switching, it did so under the heading "The CAT's
22 reasoning on Article 101(1)", i.e. on restriction, not exemption, not quantum.

23 So that's the heading. As you know, the Court of Appeal struck down the CAT's
24 finding of a restriction on competition because according to the Court of
25 Appeal, the Tribunal's bilaterals counterfactual was not supported by the
26 evidence. You see that at page 107, paragraph 183. If I read from the

1 second sentence, four lines down, this is the Court of Appeal's finding:

2 "There was simply no substantive evidence supporting the proposition that bilateral
3 interchange fees would be likely to be agreed between issuing and acquiring
4 banks, at a level that would result in merchants paying less than the present
5 UK MIF."

6 Then paragraph 184:

7 "We accept Mr Hoskins' submission that the CAT's findings as to the likelihood of
8 bilateral interchange fees being negotiated between issuers and acquirers in
9 the counterfactual world should be set aside on the ground that it was
10 inadequately supported by the evidence. It follows that the CAT's evaluation
11 of the level of those bilateral interchange fees must also be set aside."

12 So it set aside the finding of restriction and it set aside the finding of the level of
13 bilateral fees that would have been agreed.

14 In striking down the Tribunal's bilaterals counterfactual, the Court of Appeal removed
15 not only the basis for findings on restriction of competition but also, as I have
16 shown you, for its findings on exemption and overcharge, because the
17 bilaterals counterfactual underpinned the findings on restriction and
18 exemption and overcharge.

19 As you know, the Court of Appeal expressly remitted the assessment of Sainsbury's
20 quantum claim back to the Tribunal. I will just give you the reference, we don't
21 need to go back to it. It's the Supreme Court order --

22 **THE PRESIDENT:** Yes, we have seen that.

23 **MR HOSKINS:** So our submissions are really very simple, and they are as follows.

24 The switching argument in relation to quantum is still pleaded in our defence, and it
25 is upon the basis of that pleading that the remitted trial must be conducted.

26 Secondly, the Tribunal only considered the switching point in the section of its

1 judgment dealing with restriction by effect and only on the basis of its own
2 bilaterals counterfactual. It did not consider the switching point in the
3 quantum section of its judgment. It did not in its judgment at any stage
4 consider what level of switching would take place short of a degree that would
5 cause the Mastercard system to fail completely.

6 The third point is that the Court of Appeal has struck down the Tribunal's findings on
7 restriction and its bilaterals counterfactual.

8 Therefore, our case is simply that the Tribunal must therefore consider this
9 outstanding issue in the remitted trial.

10 Sainsbury's has obviously raised a number of points as to why they say despite that
11 being our pleaded case and despite the bilaterals counterfactual having been
12 struck down, we should not be permitted to pursue that case.

13 If I could turn now to deal with them in turn.

14 First of all, Sainsbury's argues that Mastercard's switching point was raised in its
15 grounds of appeal for the Court of Appeal but not pursued. They say it would
16 be an abuse of process for us now to be allowed to raise these arguments.

17 It is absolutely correct that, on the last day of the appeal, because of a lack of time,
18 Mastercard did not pursue the switching point that had been raised in its
19 grounds of appeal. You have seen the extract from the transcript that is
20 referred to in Sainsbury's skeleton argument, but I don't need to take you to it
21 because that's absolutely right.

22 But that does not preclude Mastercard from pursuing the point in the remitted trial.

23 Can we go back to Mastercard's grounds of appeal. You will find them at D8,
24 tab 18 -- sorry, I have got the tab wrong.

25 **THE PRESIDENT:** It's 16, I think?

26 **MR HOSKINS:** Thank you, yes, page 10. The first ground, under the heading

1 "Liability":

2 "First the Tribunal erred (or alternatively erred in law) because it based its finding
3 that there was a restriction of competition on a counterfactual hypothesis
4 which was not contended for by either party and which was not supported by
5 any evidence."

6 And that was the bilaterals counterfactual. Then there were some other arguments
7 on liability. Then over the page, under the heading "Quantum", there were
8 three quantum points and the fifth one was:

9 "... the Tribunal erred because it failed to take account of a material issue when
10 assessing Sainsbury's loss, i.e. the extent to which there would be switching
11 from Mastercard to Visa and Amex under the Tribunal's counterfactual."

12 **THE PRESIDENT:** That is this point, isn't it.

13 **MR HOSKINS:** That's the point, absolutely -- well, it's the switching point, but the
14 submission I make, and the reason why we say we are allowed to run it, is of
15 course that switching point was made in the context of the Tribunal's bilaterals
16 counterfactual. So if we had failed on the first liability ground, say that the
17 Court of Appeal had found that the bilaterals counterfactual was correct and it
18 upheld that, the purpose of the fifth ground was to say, well, in the part of the
19 Tribunal's judgment dealing with quantum and based on the bilaterals
20 counterfactual, it failed to take account of the fact that there would have been
21 some switching. Because in the bilaterals counterfactual, the Tribunal had
22 found that Visa would have maintained its actual MIF for as long as possible
23 whilst Mastercard's would have been lower and there would have been
24 switching.

25 But in the context of a quantum analysis based on the bilaterals counterfactual, the
26 Tribunal failed to ask itself how much switching.

1 But, of course, that issue becomes irrelevant because we won on the first liability
2 ground. The Court of Appeal struck down the Tribunal's bilaterals
3 counterfactual and so when this matter comes back before the Tribunal, it will
4 be on a different basis.

5 **THE PRESIDENT:** Sorry to interrupt you, are you saying that the fifth ground was
6 conditional on the first ground? The fifth ground only arises if the first ground
7 fails? That's how the appeal was put.

8 **MR HOSKINS:** Sir, it's not expressed in that way.

9 **THE PRESIDENT:** Was it explained that way?

10 **MR HOSKINS:** We didn't pursue it before the Court of Appeal.

11 **THE PRESIDENT:** No, but you put in a full written submission.

12 **MR HOSKINS:** We did. The point that was put was in the section of the Tribunal's
13 judgment dealing with quantum, based on the bilaterals counterfactual, there
14 was no consideration of switching.

15 So put it another way, given that when we come back in October the basis of
16 restriction is going to be the one as found by the Court of Appeal and the
17 Supreme Court, that section of the Tribunal's judgment on quantum is not
18 going to be relevant to us because it's based on a bilaterals counterfactual
19 which the Court of Appeal has struck down.

20 So there is one switching pleading by us but it could arise in a bilaterals
21 counterfactual or it could arise in -- let me just for shorthand call it a Supreme
22 Court restriction finding. We don't have the former and we have the second.

23 Now, the fact that we didn't pursue the argument before the Court of Appeal, which
24 would have been on the basis of the bilaterals counterfactual -- because the
25 argument on the fifth ground for quantum would only have been, in the bit of
26 the Tribunal's judgment based on the bilaterals counterfactual, it failed to take

1 account of switching -- that's now gone.

2 We would not, before the Court of Appeal on the basis of these grounds, have run an
3 argument if we're wrong on the bilaterals counterfactual and you find against
4 us on some other basis of restriction, then the Tribunal failed to take account
5 of switching on the basis of a different restriction.

6 That would have been tilting at windmills and we didn't.

7 So it's like a domino argument. Because the Tribunal judgment is based on the
8 finding of restriction on the bilaterals counterfactual, when that goes, the
9 finding on exemption goes, the finding on quantum goes.

10 What are you left with? So we know that the bilaterals counterfactual has been
11 struck down. We know that quantum must now be assessed on a different
12 basis, i.e. the restrictions found by the Court of Appeal and Supreme Court.

13 We know that the issue of quantum has been expressly remitted to the Tribunal by
14 the Court of Appeal and Supreme Court. We know that on its face
15 Mastercard has a pleaded case on switching. There is absolutely no good
16 reason why Mastercard cannot run that pleaded case.

17 So that's the abuse of process point.

18 Now I move on to what are the more factual points raised by Sainsbury's. There are
19 three of them: the Maestro argument, the asymmetric counterfactual and the
20 Amex point.

21 So dealing first with the Maestro argument, just to see what the argument is, can we
22 go, please, to Sainsbury's quantum skeleton, that's bundle A, tab 3, page 30.

23 You will see the heading of this section is on page 29, "Mastercard's "prize evidence"
24 Maestro".

25 The point made by Sainsbury's is as follows. If you look at paragraph 21,
26 Sainsbury's contends that Dr Niels, Mastercard's expert, and here I am

1 quoting from the skeleton:

2 "... used the rate of decline in Maestro as the fundamental basis for the switching
3 counterfactual and sought thereby to reduce Sainsbury's damages by
4 reference to this rate of decline."

5 Paragraph 23, the second leg of the argument, picking it up in the second sentence
6 of paragraph 23, Sainsbury's contends that:

7 " ... Mastercard's expert used the Maestro evidence as the sole basis for the rate of
8 decline and this basis was dismissed after considerable time was spent on the
9 point. The whole basis for the expert evidence adduced by Mastercard
10 therefore was dismissed as unsound."

11 That's, it has put by the Tribunal, it's 'alleged'.

12 Neither of those arguments is correct. First of all, Dr Niels did not use the Maestro
13 evidence as the sole basis for his analysis of the extent of switching. The
14 Maestro evidence, as I referred to earlier, concerned the switch in the overall
15 market share in the United Kingdom for debit cards from Maestro to Visa
16 when the Maestro MIF was materially lower than the Visa MIF, and you will
17 see that was a nationwide overall market share analysis.

18 Tribunal judgment, C1, tab 1 at page 161, paragraph 251. This is summarising the
19 evidence of Mr Douglas, who was one of the Mastercard witnesses who gave
20 evidence about the Maestro experience in practice.

21 **THE PRESIDENT:** That's 251?

22 **MR HOSKINS:** Paragraph 251, yes. If I can ask you just to read down to the words
23 "Mr Perez".

24 **THE PRESIDENT:** Although 252 says this evidence sits uneasily with the
25 contemporaneous documentary evidence.

26 **MR HOSKINS:** There was no dispute that there was a switch. There was a dispute

1 about the reasons for the switch. I have shown you the Tribunal's finding
2 where they found that the difference in the Mastercard and Visa MIFs was
3 a contributing factor but couldn't be said to be the only factor for switching.
4 But the fact of the switching and the extent of it was not in dispute.

5 But the point I want to make is that the Maestro evidence related to a switch in the
6 market as a whole. You will see the reference to the UK debit market.

7 **(Pause)**

8 So Maestro is about a switch in the UK debit market. That's what that evidence
9 related to.

10 Dr Niels, on the other hand, if one goes to his first report -- so that's D6, tab 8,
11 page 160. This is the paragraph that's referred to in Sainsbury's skeleton for
12 today. Paragraph 7.45 you will see he says:

13 "As explained in section 7E, I used the factual decline rate in Mastercard's debit card
14 transactions at Sainsbury's as a proxy counterfactual decline rate in
15 Mastercard's credit card transactions at Sainsbury's if Mastercard had a lower
16 credit UK MIF."

17 So on its own face Dr Niels' analysis is based on the decline rate at Sainsbury's,
18 i.e. it's retailer-specific, not on a national decline.

19 So he is not referring, in paragraph 7.45, to the Maestro evidence of a decline in
20 Mastercard share across the UK, he is referring to Sainsbury's specific
21 evidence. So the first limb of Sainsbury's argument on this point is incorrect.

22 The second point is also incorrect. The Tribunal did not dismiss the Maestro
23 evidence as unsound.

24 **THE PRESIDENT:** Can I just ask you, in 7.45, where Dr Niels says "I used the
25 factual decline rate in Mastercard's debit card transactions at Sainsbury's",
26 I have not looked at section 7E, but Mastercard's debit card, is that Maestro

1 transactions?

2 **MR HOSKINS:** I don't think it's solely Maestro transactions. Maestro was one of the
3 factors, one of the debit offerings that Mastercard had, but they also launched
4 a card separate from Maestro as well, I am not sure whether the period quite
5 overlapped or not.

6 **(Pause)**

7 It would not surprise me if Mr Cook popped up with the answer on my WhatsApp.

8 **THE PRESIDENT:** It says at 7.32:

9 "... Mastercard's share of debit card transactions at Sainsbury's declines
10 significantly; following a similar trend like that of Mastercard's overall market
11 share in the UK debit card market."

12 So I am not sure it's very different whether it's Sainsbury's or the overall market, is it?

13 **MR HOSKINS:** No, absolutely, there was a decline overall in the market in the first
14 decade of the century. The point that's being made by Sainsbury's is that
15 Dr Niels' evidence is based solely on the Maestro evidence.

16 The point I am making is that that's not correct because paragraph 7.45 makes it
17 quite clear he is not relying simply on the Maestro evidence, he has looked at
18 evidence on use of Mastercard debit cards at Sainsbury's specifically for this
19 point.

20 But of course, insofar as there was a general decline in the market of use of
21 Mastercard debit card cards, then that will be reflected at Sainsbury's just as
22 much as it would in the economy as a whole. It's just a source of the
23 information point that I'm making.

24 **THE PRESIDENT:** Yes.

25 **MR HOSKINS:** The second point is that the Tribunal did not dismiss the Maestro
26 evidence as unsound. If we go to the Tribunal judgment, paragraph 260,

1 that's bundle C1, tab 1, page 167.

2 It's a paragraph we have seen already. So Sainsbury's allegation is the Tribunal
3 dismissed the Maestro evidence as unsound. You will see in paragraph 260,
4 quite the contrary. The Tribunal found the Maestro example demonstrates
5 that the level of competing interchange fees is a factor bearing on the decision
6 of issuing banks to participate in one payment scheme rather than in another.

7 **THE PRESIDENT:** Just a sec. **(Pause)**

8 Well, they say it's a factor bearing on the decision to participate in one scheme rather
9 than another. Don't they say above that it doesn't support the argument that it
10 will cause an issuing bank to change scheme.

11 **MR HOSKINS:** The argument they rejected that we put was that the main reason for
12 the switch in the Maestro example was the difference in the interchange fees
13 and the Tribunal rejected that argument. They said that was putting too much
14 weight on the differential in interchange fees.

15 So they accept and they find that the level, differential level of Mastercard and Visa
16 MIFs is a factor that might cause a bank to switch --

17 **THE PRESIDENT:** Where do they say that? They say it's a factor bearing on the
18 decision to participate in one scheme, in other words when you are starting
19 out, you are a new bank, you are a Monzo bank, that's come on to the market,
20 you decide which scheme shall we get our cards issued by, you will look at
21 the interchange fee.

22 They say that that's not the issue. The issue is whether a differential will cause
23 switching once you have signed up to the scheme. I think they say the
24 Maestro -- don't they say the Maestro example does not support the
25 contention that even with a significant difference there's going to be
26 switching?

1 **MR HOSKINS:** No, I don't think they do say that because the factual background
2 was that there was switching. If you look at paragraph 259, the conclusion on
3 the Maestro example, you will see that they reject the contention that it was
4 the main cause of the collapse.

5 But they then find that:

6 "We find that Mastercard has established no more than that Maestro's lower
7 interchange fees was one of a number of factors which led to the decision of
8 HSBC and RBS to reject Mastercard's bid in the procurement processes."

9 So, i.e. it was a factor in banks choosing to --

10 **THE PRESIDENT:** Yes.

11 **MR HOSKINS:** So just to give you what we were dealing with HSBC and RBS --

12 **THE PRESIDENT:** I don't know if we need to spend more time on Maestro.

13 **MR HOSKINS:** Fine. It shouldn't be in dispute that HSBC and RBS had migrated
14 their debit portfolios from Mastercard to Visa. You will see that, for example,
15 page 163, the heading of the slide on that page. So there had been switching
16 and the Tribunal found that the difference in interchange fee rates between
17 Mastercard and Visa was a factor in that switching. It did not find, as
18 Sainsbury's says, that the Maestro evidence was unsound, i.e. you don't look
19 at it at all.

20 This also shows -- this is why I made my comment at the start -- of course today we
21 are not dealing with the merits. The Tribunal is not going to wrestle today with
22 weighing up the evidence, it is simply: is this issue still a live one we can
23 pursue? And if Sainsbury's argument depends upon the Tribunal weighing up
24 evidence or trying to get to the bottom of it in any way then the answer is quite
25 simple: that is not a knockout blow for Sainsbury's today.

26 I am going to move on to the second of the three points, which is the asymmetric

1 counterfactual. Again so you can see the point in Sainsbury's quantum
2 skeleton, it's bundle A, tab 3, page 30, paragraphs 25 to 27.

3 **THE PRESIDENT:** Yes.

4 **MR HOSKINS:** They say under the heading "The unrealistic Visa counterfactual" --

5 **THE PRESIDENT:** We have read it.

6 **MR HOSKINS:** You have read it, I'm sorry. They say the crux here, according to

7 Sainsbury's, is the following, Mastercard proposed:

8 "... a counterfactual in which Mastercard's MIF was reduced to zero or a low level
9 but Visa's and Amex's interchange fees would remain at their original levels
10 [or close to those original levels]."

11 That's why it's called the asymmetric counterfactual.

12 According to Sainsbury's, the Court of Appeal rejected the asymmetric counterfactual

13 and therefore there is no point in us running it now because the Court of

14 Appeal has already found against us. That's the essence of this argument.

15 That argument is wrong for the following reasons.

16 First of all, the Court of Justice in the Mastercard case held that different

17 counterfactuals may be necessary to assess different issues in the same

18 case. It's not the case that you find one counterfactual for restriction, for

19 objective necessity, for exemption, for quantum. If I can show you that, you

20 will see it, it's cited in the Tribunal judgment, bundle C1, tab 1, page 86,

21 paragraph 117. You will see from 114 that this was a quote from the Court of

22 Justice judgment in Mastercard. It's paragraphs 162 to 163:

23 "Nevertheless, it is apparent in particular from para. 132 of the judgment under

24 appeal that, in order to assess the competitive effects of the MIF, the General

25 Court relied on ... the same counterfactual hypothesis it applied in order to

26 examine whether the MIF could be regarded as an ancillary restriction".

1 So the General Court put the same counterfactual to the question 'Is there
2 a restriction of competition?' as to the question 'Is the restriction an ancillary
3 restraint or objectively necessary?'.
4

4 Then at 163, the Court of Justice said:

5 "As is apparent from paragraph 108 of the present judgment, the same
6 counterfactual hypothesis is not necessarily appropriate to conceptually
7 distinct issues."
8

8 So that can hardly be a controversial suggestion that the counterfactual may vary
9 depending upon the legal question that is being addressed.

10 The second point is that the Court of Appeal rejected the asymmetric counterfactual
11 as being appropriate to considering the objective necessity or ancillary
12 restraint question. The Court of Appeal did not consider the appropriateness
13 of the asymmetric counterfactual as a damages counterfactual.

14 **THE PRESIDENT:** Mr Hoskins, ancillary restraints are a particular issue and the
15 Court of Appeal explains that in some detail in its judgment. The
16 counterfactual for damages, namely what would have happened had the
17 Mastercard MIF been at an exemptible level, still has to be a realistic
18 counterfactual, does it not? You cannot have an unrealistic counterfactual,
19 can you, for any purpose?

20 **MR HOSKINS:** This is my third point.

21 **THE PRESIDENT:** What's the answer to that question, does it have to be --

22 **MR HOSKINS:** Yes, my third point is the answer to your question. It's not a counsel
23 wriggle sideways, I promise. Our answer to your question is that it is
24 reasonably arguable, and that is the test we have for today, because you don't
25 have to decide the point, we say we are right, but all we have to say is it's
26 reasonably arguable that the appropriate damages counterfactual is

1 asymmetric for the following reasons.

2 We know what Visa's actual MIFs were during the claim period. That's a fact. The
3 purpose of damages in this case is to compensate Sainsbury's for any harm
4 caused to it by Mastercard's infringement.

5 If damages were awarded against Mastercard on the basis that both it and Visa
6 would have had lower MIFs, then that would render Mastercard liable not just
7 for the loss caused by it, but also for the loss caused by Visa.

8 **THE PRESIDENT:** But Sainsbury's is not recovering for MIFs it's paid to Visa. It's
9 got no claim against you for the amount it paid to Visa, has it?

10 **MR HOSKINS:** But it is recovering as a question of quantum the difference between
11 the actual MIFs and what they would have been if they had been lawful.

12 **THE PRESIDENT:** Yes, but the actual MIFs being the Mastercard MIF and what the
13 Mastercard MIF would have been in the counterfactual world.

14 **MR HOSKINS:** That's right. So the starting point is what is the --

15 **THE PRESIDENT:** What is the counterfactual world, that's the question.

16 **MR HOSKINS:** That's right. Just to break it down, the question is 'what is the
17 difference between the actual Mastercard MIF and the lawful level of the
18 Mastercard MIF?' and that gives you the prima facie level of overcharge. We
19 then wish to raise the switching argument, which is if one is looking back in
20 the past, if Mastercard had charged the lawful level of MIF, what extent of
21 switching would have taken place. Because there is in this case no joint and
22 several liability --

23 **THE PRESIDENT:** You are not being sued for the amount that Sainsbury's paid
24 Visa as a MIF, and Visa is not liable for the amount that Sainsbury's paid you.

25 **MR HOSKINS:** Correct.

26 **THE PRESIDENT:** So there's no joint and several -- Sainsbury's is claiming against

1 you for the amount that it paid you.

2 **MR HOSKINS:** Yes.

3 **THE PRESIDENT:** One has to ask what would have happened in the counterfactual
4 world.

5 **MR HOSKINS:** Yes.

6 **THE PRESIDENT:** The question is what is the realistic view of the counterfactual
7 world?

8 **MR HOSKINS:** That's right. And we have pleaded that switching would have taken
9 place because in the counterfactual world we know what Visa's MIFs were.

10 **THE PRESIDENT:** The Court of Appeal said that that is a completely unrealistic
11 view of the counterfactual world.

12 **MR HOSKINS:** And the Court of Appeal said that when it was addressing the
13 question of ancillary restraint, not the question of quantum.

14 **THE PRESIDENT:** Yes, because they didn't give judgment on quantum.

15 **MR HOSKINS:** That's right.

16 **THE PRESIDENT:** The question is, therefore, for quantum, does not the
17 counterfactual also have to be realistic?

18 **MR HOSKINS:** And that's the question that we wish to argue at trial.

19 **THE PRESIDENT:** And the Court of Appeal has answered it. They said this is
20 completely unrealistic.

21 **MR HOSKINS:** No, it said it's unrealistic in the context of objective necessity where
22 the question is: could the Mastercard scheme have survived absent the MIF
23 at the actual level that it had?

24 **THE PRESIDENT:** Let's just look at the Court of Appeal judgment, if we can do that,
25 because I am at the moment not persuaded that their observation must be
26 limited.

1 **MR HOSKINS:** I wanted to take you to -- if you go to C2, tab 5, it's page 76.

2 **THE PRESIDENT:** Sorry, if you can give me the paragraph --

3 **MR HOSKINS:** Sorry, paragraph 46.

4 Just so you know where this appears, the heading is at page 73 above paragraph
5 37, "Part III: The essential reasoning of the CAT, Popplewell and Phillips".
6 Paragraph 46 is describing what Mr Justice Popplewell found. If I can ask you
7 to read that, paragraph 46.

8 **THE PRESIDENT:** Yes.

9 **MR HOSKINS:** You will see the conclusion. So Mr Justice Popplewell's conclusion
10 that the MIFs as set did not restrict competition by effect or were objectively
11 necessary as an ancillary restraint, with the consequence they did not infringe
12 Article 101(1).

13 So that's purely a restriction Article 101(1) point, it's --

14 **THE PRESIDENT:** Yes.

15 **MR HOSKINS:** Then if you go to page -- I will give you the paragraph number in
16 a second -- paragraph 191, page 108. This is Part VII of the Court of Appeal's
17 judgment. The heading is "the ancillary restraint death spiral issue". Then if
18 you go over to page 110 above paragraph 198, this is where the Court of
19 Appeal reaches its conclusion on the death spiral issue. Do you see that
20 subheading?

21 **THE PRESIDENT:** Yes, and they say this counterfactual isn't relevant to the
22 ancillary restraints doctrine at all.

23 **MR HOSKINS:** That's right. So it's couched in terms of the ancillary restraints
24 doctrine, it rejects the counterfactual as being one that is valid for considering
25 the ancillary restraints doctrine.

26 **THE PRESIDENT:** Yes, but they go on, don't they, to consider at paragraphs 201 to

1 203 whether in any event it's a realistic counterfactual.

2 **MR HOSKINS:** Sorry, you are referring particularly for example to paragraph 203?

3 The second sentence:

4 "The critical point is that the hypothesis of the asymmetric counterfactual is that one
5 of the schemes would be prevented from setting any default MIF but the
6 Commission and the UK competition authorities and regulators would allow
7 the other scheme to carry on setting its default MIFs, without any constraints
8 being imposed. That seems to us to be completely unrealistic and
9 improbable. Realistically there would be similar constraints on both
10 schemes."

11 But, Sir, the crucial difference is, when it comes to quantum, we are looking back,
12 the counterfactual is looking back to what happened, and we know as a fact
13 that the competition authorities and regulators did not step in and cause Visa
14 to lower its UK debit and credit card MIFs. So the premise upon which the
15 Court of Appeal finds that this counterfactual is unrealistic and improbable for
16 the purposes of ancillary restraints cannot simply be read across to
17 a damages counterfactual because we know the authorities didn't interfere.

18 **THE PRESIDENT:** That would apply to this point as well, wouldn't it? The Court of
19 Appeal was also well aware of that. They didn't intervene to prevent
20 Mastercard doing it.

21 **MR HOSKINS:** No, they didn't, no.

22 **THE PRESIDENT:** So neither, but we are looking at a counterfactual world in which
23 Mastercard would have had to -- although they didn't -- charge only a lawful
24 MIF and could not charge more, in which case they say the same would have
25 applied to Visa.

26 **MR HOSKINS:** Sir, my submission is -- you have my submission on the substance

1 of this but our further submission is this is a point we shouldn't be deciding in
2 this way today. There is no strike out application --

3 **THE PRESIDENT:** It's not why that is relevant, this has to be remitted in accordance
4 with the principles in the judgment, which is the Court of Appeal judgment. If
5 the Court of Appeal held that this counterfactual is unrealistic, then to consider
6 the case in the light of that counterfactual is not consistent with the Court of
7 Appeal judgment.

8 **MR HOSKINS:** Well, Sir, I would certainly like to -- if this is to be dealt with in this
9 way, on a summary basis, I would certainly want to prepare more detailed
10 submissions on the point, to be perfectly frank. I have come to deal with it on
11 the basis of the order that was made and I would feel --

12 **THE PRESIDENT:** The order as made is specifically because of the requirements of
13 the order of remittal to see, in the light of that order, what points can be run.
14 That's why we are having this CMC, so that's exactly the point that you have
15 come here to address. You have highlighted the two points, now one point,
16 which you had run before, as you have shown us, it's in your pleading, and
17 you want to run, but the Court of Appeal said it's reconsideration in
18 accordance with the judgment of the Court of Appeal.

19 The question is for you to run the asymmetric counterfactual, whether you put it now
20 in the field of quantum, as opposed to another field, whether it's a realistic
21 counterfactual. Because it still has to be realistic. We can't award damages
22 on an unrealistic counterfactual, can we?

23 **MR HOSKINS:** Well, Sir, it's not unrealistic because it happened. You are being
24 asked to award damages for a historic period in time, a time that actually
25 existed --

26 **THE PRESIDENT:** But the counterfactual never happened, the counterfactual is

1 a hypothetical world that didn't happen. It's a world that never was, and it's
2 assuming that the Mastercard MIF would have been kept down to the lawful
3 level. It wasn't. That wasn't what happened. But we have to assume that we
4 are in a world where that was required and happened, and in that world what
5 the Court of Appeal is saying, as I understand it, the only realistic assumption
6 is that Visa would have been similarly constrained.

7 I just don't understand at the moment -- maybe it's my failing, maybe my colleagues
8 can help -- how that can be consistent with that section of the Court of Appeal
9 judgment.

10 You may have some point on Amex but as far as Visa is concerned ...

11 **MR HOSKINS:** So the question of is it realistic that in the period of the claim looking
12 backwards, that Visa would have had MIFs at a certain level, my submission
13 is it is absolutely realistic because those are the levels they had.

14 **THE PRESIDENT:** I see, yes.

15 **MR HOSKINS:** I understand that you can get into a debate about what the
16 appropriate counterfactual is for different questions in law, and my submission
17 is that the question of the realistic counterfactual for damages has not been
18 determined at all by the Court of Appeal or the Supreme Court, on the basis of
19 the restriction that they have now found.

20 In my submission, it would be unfair to decide what the appropriate counterfactual is
21 to assess quantum on the basis of that restriction, on a summary basis, on the
22 basis of the submissions you have heard today.

23 Can I deal briefly with the Amex point, and that completes my submissions on this
24 point.

25 Again, so we can see where the argument is. If we go to Sainsbury's skeleton, that's
26 bundle A, tab 3, page 31. It's paragraphs 28 to 30, and I am aware you have

1 read the paragraphs so let me again just summarise what the argument is.

2 Sainsbury's argues that the Tribunal found on the evidence that Mastercard would
3 not have lost significant share to Amex if it was prevented from implementing
4 a MIF because Amex would have faced very considerable pressure to lower
5 its discount rates.

6 Paragraph 29 of the skeleton refers to paragraphs 261 and 262 of the Tribunal's
7 judgment.

8 Sir, it is the case that we are in a very different situation between Visa and Amex
9 because, as you are probably aware from reading the judgments, Amex is
10 a three-party scheme not a four-party scheme and therefore Amex has never
11 had the legal problems that Visa and Mastercard have had in terms of legality
12 of the MIFs because it doesn't have MIFs. There is no anticompetitive
13 agreement because Amex just sets its own internal rates. So if you are
14 against me on the previous point, there is a free-standing argument in relation
15 to Amex because there is no question that Amex would have been able to
16 maintain its rates because 101 just simply does not bite on Amex.

17 If we go to the paragraphs of the Tribunal's judgment that Sainsbury's relies upon,
18 that's bundle C1, and if we pick it up at page 167, which is at paragraph 260 --
19 again, it's our old friend, this is the only place in which the Tribunal considered
20 switching. I have taken you through these paragraphs. I have shown you it is
21 in the context of analysis of 'was there a restriction', I have shown you that the
22 assessment of switching was limited to would switching cause the Mastercard
23 scheme to collapse, I have shown you that the consideration of Amex is --

24 **THE PRESIDENT:** It's 262, isn't it, paragraph 262?

25 **MR HOSKINS:** Exactly. Said to be mutatis mutandis with the Visa analysis. So the
26 point in relation to Amex is there was no assessment of the degree to which

1 switching would take place short of causing the collapse of Mastercard as
2 a scheme either in this section, dealing with restriction, or in the quantum
3 section of the Tribunal's judgment.

4 That's a matter that has been remitted to the Tribunal by the Court of Appeal and the
5 Supreme Court. It's a matter that's raised in our pleading and in relation to
6 the question of the unrealistic counterfactual that doesn't arise in relation to
7 Amex for the reasons I have just described.

8 So we should be allowed to run the switching point in relation to Amex as a quantum
9 point.

10 **THE PRESIDENT:** Yes.

11 **MR HOSKINS:** Sir, unless you have any further questions, those are our
12 submissions on the quantum issue.

13 **THE PRESIDENT:** Do my colleagues have any questions?

14 **MR LOMAS:** Nothing further from me.

15 **PROFESSOR NEUBERGER:** I have one question.

16 I didn't fully understand the point you are making as to the interrelationship between
17 the switching argument and the bilateral schemes. How does the switching
18 point apply differently under the bilateral scheme from what it would do under
19 any asymmetric charging system?

20 **MR HOSKINS:** It applies wherever there is a material difference between the Visa
21 and the Mastercard MIFs. But the degree of switching will vary depending
22 upon the differential. In the context of the Tribunal's judgment, it was dealing
23 with what will be a relatively narrow differential compared to the one that we
24 will have at trial almost certainly without giving anything up, because the
25 Tribunal found, for example, on credit cards it was 0.5% and Visa 0.8%, but
26 possibly coming down, and it was assessing switching catastrophic --

1 switching in that differential, and when we come to the remitted trial, the
2 differential is likely to be larger, so the degree of switching will vary. But you
3 are absolutely correct that the existing sub-switching will be a relevant issue
4 wherever there is a material differential between the Visa and Mastercard
5 MIFs.

6 **PROFESSOR NEUBERGER:** Thank you.

7 **THE PRESIDENT:** I think we will take a ten-minute break and we will return at just
8 before 4 o'clock.

9 **MR HOSKINS:** Thank you.

10 **(3.46 pm)**

11 **(A short break)**

12 **(4.04 pm)**

13
14 **Submissions by MR BREALEY**

15 **THE PRESIDENT:** Mr Brealey, we need not trouble you on the question of switching
16 to Visa, but we would like to hear from you, please, about switching to Amex
17 and whether that argument can be pursued by Mastercard for any of the
18 reasons.

19 **MR BREALEY:** Thank you, Sir. On that basis, could I go first of all to the notice of
20 appeal, which is at D8, 16, page 10.

21 The short answer, but I am going to develop it, is that the Amex point was subject to
22 the appeal and then was abandoned. I will try and develop that and explain
23 why that should not be remitted. That's the main point.

24 If we go to page 10, there are five grounds, six paragraphs but five grounds. The
25 first ground is in paragraph 2 and then the second paragraph is at
26 paragraph 3. That's the switching to Visa and Amex in the context of

1 restriction of competition.

2 Then the fifth ground, at paragraph 6, is the switching in the damages counterfactual,
3 the quantum.

4 So those are the two grounds on the appeal.

5 We can put that away and pick up Mastercard's Court of Appeal skeleton, which is at
6 D9, tab 18, page 69. We referred to this in the skeleton, but paragraph 240
7 says that the fifth ground has a degree of overlap with the second ground.

8 **THE PRESIDENT:** Sorry, I'm ...

9 **MR BREALEY:** Sorry, it's at page --

10 **THE PRESIDENT:** Yes, I see.

11 **MR BREALEY:** In other words, the counterfactual is the same. Visa and Amex.
12 We can put that away again for the moment.

13 **THE PRESIDENT:** Shall we look at what they say about the fifth ground while we
14 have this opened? It's addressed in the annex.

15 **MR BREALEY:** It is.

16 **THE PRESIDENT:** It might be helpful. Which is page 76, isn't it?

17 **MR BREALEY:** Page 76. And paragraph 19, again, failure to take account of a
18 material issue. 22, it refers to switching, refers to both Visa and Amex. Then
19 at 23(c), it refers to Amex: we don't accept that the claimant's expert accepted
20 that Mastercard would have lost 5%. That is over simplistic.

21 **THE PRESIDENT:** I mean, the claimant is -- I am looking at paragraph 22 -- the
22 Tribunal does not consider whether and if so switching would have occurred
23 in the counterfactual even if such switching would not have led to the
24 collapse.

25 **MR BREALEY:** Yes, that's right.

26 **THE PRESIDENT:** Which I think is correct, isn't it, they don't? They do it in the

1 context of a collapse, I think.

2 **MR BREALEY:** We would submit that it is a free-standing -- I will come on to this in
3 a minute -- rejection of Mastercard's switching to Visa and Amex.

4 I just want to, for the moment -- there's an overlap of the fifth ground of appeal.

5 We know that the fifth ground is a quantum switching Visa and Amex.

6 **THE PRESIDENT:** Yes, and that's paragraph 24, isn't it, here, "had the Tribunal
7 taken account it would have awarded lower damages".

8 **MR BREALEY:** Lower damages, yes. Then I think, for the last time hopefully, we
9 just need to look at the Court of Appeal's Order -- I know we have seen this
10 before but that is at C2, tab 6 -- because this refers to the scope of what can
11 be remitted. I just want to be crystal clear on the words. It's a sentence,
12 essentially. This is C2, tab 6, page 165.

13 We know that the Tribunal is going to reconsider the conditions for exemption, but
14 the sentence at the top of 165 says:

15 "The appeal --

16 **THE PRESIDENT:** I am sorry to interrupt you but I think we probably ought to read
17 the substituted paragraph, shouldn't we, in the Supreme Court order, because
18 they actually substituted a new paragraph 15?

19 **MR BREALEY:** Well, we can, but Mastercard say there is no difference between the
20 two in their statement.

21 **THE PRESIDENT:** There may not be but -- it's page 253.

22 **MR BREALEY:** So, "The Sainsbury's v Mastercard proceedings shall also be
23 remitted for assessment of the quantum claim."

24 That's in the middle of --

25 **THE PRESIDENT:** Yes.

26 **MR BREALEY:** But I think that also has to be read with the Court of Appeal,

1 because what the Court of Appeal say at 165 is:

2 "The appeal in Sainsbury's v Mastercard shall also be remitted to the Tribunal for
3 assessment of the quantum claim, based on the principles set out in the
4 judgment."

5 Mastercard in their skeleton say there is no difference between the two.

6 **THE PRESIDENT:** I think, as we have at the top of the Court of Appeal "in
7 accordance with the judgment", that means the principles in the judgment,
8 doesn't it?

9 **MR BREALEY:** What I would submit is that the switching issue cannot be remitted if
10 the switching point was raised in the appeal and then abandoned.

11 So if the switching point was raised in the appeal and then abandoned; or where the
12 Court of Appeal/Supreme Court dismissed the appeal on an issue.

13 So that second point is relevant to Visa squarely, because it has dismissed the
14 switching to Visa. But when the Court of Appeal says the appeal in
15 Sainsbury's v Mastercard shall be remitted, in my submission that has to be
16 read in the light of how Mastercard put its appeal. It says: the appeal in
17 Sainsbury's v Mastercard shall also be remitted.

18 What that means is that one has to identify what is being appealed, because if
19 Mastercard raise something on the appeal and then abandon it, in my
20 submission it is extremely odd for the Court of Appeal to say that should be
21 remitted.

22 What I would like to do is explain how, if Mastercard was to revisit what it has
23 abandoned on the appeal, that would prejudice Sainsbury's, quite
24 significantly.

25 What I would like to do, given the time, is just go to our skeleton argument and
26 emphasise certain of the paragraphs, because I know that the Tribunal has

1 read it.

2 The short point is that if Mastercard raised the switching Amex issue on appeal and
3 then abandoned it on appeal, it cannot be the intention that the Court of
4 Appeal would have remitted that issue that was abandoned.

5 If I could highlight certain paragraphs of the skeleton argument -- I will just put the
6 bundles away. I can start at paragraph 7 of the skeleton, which is in tab 3,
7 page 26. So it's our skeleton, on the switching point, paragraph 7, page 26.
8 I will try and save the Tribunal from going to too many documents, but that
9 paragraph refers to Mastercard's closing, which you will need to pick up.

10 **THE PRESIDENT:** Paragraph 6 ...

11 **MR BREALEY:** 7. At page 128 of the closing, we have the appropriate damages
12 counterfactual, according to Mastercard.

13 At 390 and 391:

14 "The Tribunal must decide what the appropriate counterfactual is for the assessment
15 of damages. A counterfactual in which Mastercard's MIF was zero or low but
16 Visa's and Amex's fees remained at their actual levels. A counterfactual in
17 which both MasterCard and Visa's MIFs were zero or low but, Amex was free
18 to set its fees at the level it can negotiate with merchants. MasterCard
19 submits that it is the first counterfactual that should be adopted."

20 Then, I don't think we have seen this before, but if one goes to page 308, these are
21 the flow diagrams we have referred to in paragraph 7 of our skeleton.
22 I mention 308 -- it looks completely and utterly complicated, I know, but all
23 I want to do is say this is the range of the damages counterfactual. If one
24 looks at the top where it's 0.5 for credit cards and here we have migration to
25 Amex at 0.15 for credit cards, and also, if you will go to 312, we have an
26 interchange fee, a MIF, of 0.44, so Dr Niels is modelling various interchange

1 rates and setting out the damages, and the 0.44 clearly is close to the one
2 that the Tribunal landed on.

3 But this was the damages counterfactual and it referred to Amex.

4 At paragraph 8 of our skeleton, we make the point, and it's a correct point, a fair
5 point, that the modelling of switching to Visa and Amex was based simply on
6 a range of different but lower interchange fees being paid. It was not
7 dependent on whether the interchange fees were paid as a result of bilateral
8 negotiations or on a multilateral basis, which was a point that was made to
9 Mr Hoskins.

10 It is not sensitive to whether it's a multilateral interchange fee or a bilateral, the
11 modelling is based on the rate of interchange fees.

12 We have seen -- I will not go to the documents -- paragraphs 10, 11, 12 and 13 --

13 **MR LOMAS:** Mr Brealey, I do not want to interrupt, I understand your point the
14 modelling was made on both, but isn't that consistent with the point you took
15 us to at paragraph 390 on page 128, that Mastercard was setting out two
16 versions of the counterfactual, Visa and Amex at the actual levels, or Visa low
17 and Amex at the actual level, and then plumped for option one?

18 So what they have done is modelled by reference to the first of those two options,
19 which was the case they elected to make. Isn't that the connection?

20 **MR BREALEY:** That is the connection, but one sees, for example, at 312, the 0.44,
21 we see on the left-hand side volume migration to Amex only.

22 **MR LOMAS:** Okay, thank you.

23 **MR BREALEY:** I am trying to pick up how the Amex point is being fed into this. So
24 Amex --

25 **THE PRESIDENT:** Can I just ask, sorry, when it says limited to 5%, that's what?

26 **MR BREALEY:** That's what -- I can come to it if necessary, I don't think I need to.

1 **THE PRESIDENT:** I just want to understand it, that's all.

2 **MR BREALEY:** It's Mastercard in their skeleton say that Sainsbury's, through
3 Mr von Hinten-Reed, accepted that there would be migration to Amex of 5% if
4 there was a low interchange fee. Actually, that is not what he said. And for
5 the note it's D4, page 171. It was dependent on many assumptions, some of
6 which the Tribunal referred to, and we set out at paragraphs 28 to 30 of our
7 skeleton, and I will come to it.

8 But the answer to that point is Dr Gunnar Niels is saying that is a 5% migration to
9 Amex.

10 **THE PRESIDENT:** I see. Then the next column, where it's not limited to 5%; that's
11 the difference, is it?

12 **MR BREALEY:** Yes.

13 **THE PRESIDENT:** Yes, I see.

14 **MR BREALEY:** Then you have Visa and Amex.

15 **THE PRESIDENT:** Then you have the two of them, and of course that has a much
16 more dramatic effect, yes.

17 **MR BREALEY:** So that is the appropriate damages counterfactual. It was not
18 sensitive to whether it's bilateral, multilateral, and it concerned both Visa and
19 Amex.

20 I now turn to paragraphs 10, 11, 12 and 13 of our skeleton where we set out how the
21 appeal, which was the fifth ground of appeal on quantum, was in the notice of
22 appeal, was an agreed issue, and was then abandoned. The important bit, to
23 respond to your question, Sir, after the break, is on the Amex, and this is my
24 paragraph 14. On the appeal, the switching point, both for Visa and for Amex,
25 involved a mixture of fact, principle and law.

26 We raised three main issues on appeal, with which Mastercard at first disagreed but

1 then subsequently abandoned its opposition.

2 If we could just go to that so I can highlight them -- we set them out, but it's at D8,
3 tab 17, page 194. So paragraph 554. By its fifth ground, that is the quantum,
4 the switching to Visa and Amex -- so it's page 194 of the bundle,
5 paragraph 554. I think someone is typing, I don't know -- it's not me anyway.

6 So, "by its fifth ground of appeal MasterCard contends that the CAT Judgment
7 should be quashed and remitted for further consideration because, when
8 calculating damages, the CAT did not consider the effect of Issuing Banks
9 switching from MasterCard to Visa (or Amex) if, in the counterfactual,
10 MasterCard's interchange fees were less than those offered by rivals. This
11 argument also relates to the first and second grounds of appeal because the
12 first, second and fifth grounds raise similar issues ... In Sainsbury's
13 submission, the damages counterfactual advanced by Mastercard is
14 misplaced for four reasons."

15 In our skeleton we have amalgamated the first and second, but the first one is
16 essentially the unrealistic counterfactual, the Visa --

17 **THE PRESIDENT:** Yes, that's the Visa point.

18 **MR BREALEY:** Then the second point, above paragraph 559, is that we submitted
19 that the Tribunal did consider switching from Mastercard to Visa and Amex.
20 So this is all the evidence that Mr Hoskins wants to pray in aid, but we say
21 that it did properly consider the switching to Amex. Mr Hoskins may disagree
22 and he may want to raise this in October, but we had a huge debate about it
23 before the Tribunal before, and we say that the Tribunal did properly consider
24 the evidence of switching to Visa and Amex.

25 Then, lastly, we raised the point, which is mixed fact and law, because, again,
26 Mastercard say they brought forward various Mastercard employees to say

1 what would happen if there was a low interchange fee and there would be
2 switching to Amex in the premium sector.

3 We say that that was too speculative and too remote. So we were saying that the
4 damages counterfactual on this switching issue was too remote. Too remote
5 to be taken into consideration in the assessment of damages. In the context
6 of the assessment of damages, speculation as to the extent and timing of any
7 migration raises matters that are simply too remote to be taken into account.

8 Essentially it was opinion evidence by the Mastercard employees about what a third
9 party, the issuing bank, would or would not do.

10 So we were ready to argue that, and at 561 all the way, really, to the end of the
11 document.

12 563 actually we refer to certain cross-examine -- at the top of page 197:

13 "That would apply to Amex as it would to Visa?

14 "Answer: it would."

15 I do not expect the Tribunal to really, with the greatest respect, understand all the
16 nuances that were going on with the switching to Visa and Amex, save to say
17 we made various arguments about switching to Amex, first of all, that the
18 Tribunal did properly consider it and, secondly, that Mastercard's Amex
19 counterfactual was too speculative.

20 It is, we would say, simply not within the remit of the Court of Appeal's and Supreme
21 Court's Order for all these arguments to have been raised on appeal and then
22 the rug gets pulled from our feet and all of a sudden they are not going to be
23 raised on appeal but they are going to be argued afresh on remittal.

24 That's why I say the remittal Order has to be interpreted. It says the appeal shall be
25 remitted, and if Mastercard did raise a point on appeal and then abandoned it,
26 that switching point is not within the terms of the remittal order.

1 We set out at paragraphs 28, 29 and 30 parts of the Tribunal's judgment. I have
2 mentioned the von Hinten-Reed 5% point. But all these issues, these factual
3 issues, would have been debated before the Court of Appeal. It is, in my
4 submission, a simple proposition, but the proposition is a correct one, which is
5 that, having raised the switching Amex point on appeal, Sainsbury's come to
6 argue it, it is not appropriate for Mastercard now to seek to reargue it on the
7 remittal, where we had before the Court of Appeal, said the Court of Appeal
8 had properly considered Amex and, in any event, the Amex damages
9 counterfactual was too remote.

10 I finish with a real difficulty here, which is that, if I go back to paragraph 21, where we
11 say Mastercard's expert Dr Niels sought to use the Maestro story as the proxy
12 for the switching point, Mr Hoskins says that's incorrect, but I went back to
13 their closing at D3/4/130 and it was quite clear that the Maestro evidence,
14 which essentially the Tribunal rejected in the main, was a central plank in the
15 modelling that Dr Gunnar Niels made.

16 I leave the Tribunal with this thought, which is: does that mean that Mastercard can
17 reargue that prize evidence on remittal? Does that mean that the Tribunal's
18 rejection of the prize evidence, the Maestro story, is up for grabs again? In
19 my submission, it's not, because we would have argued this on appeal and
20 Mastercard abandoned the appeal on the point.

21 **THE PRESIDENT:** Yes, thank you.

22 **MR BREALEY:** Thank you, Sir.

23 **THE PRESIDENT:** Yes, Mr Hoskins, you can briefly reply.

24
25 **Reply by MR HOSKINS**

26 **MR HOSKINS:** I will be very brief in reply. So this is an abuse of process point

1 that's been put, so the crucial thing to look at is what is the scope of the
2 appeal that we first of all put forward and did not pursue. Can we go to our
3 grounds, please, bundle D8, tab 16, page 11:

4 "Fifth, the Tribunal erred because it failed to take account of a material issue when
5 assessing Sainsbury's loss, i.e. the extent to which it would be switching from
6 MasterCard to Visa and Amex under the Tribunal's counterfactual."

7 I didn't do this point justice when I opened the case and you asked me the question:
8 was this ground expressly limited to switching under the Tribunal's bilateral
9 counterfactual? Absolutely it was, on its face. If we go to our skeleton in
10 support of the grounds, so that's D9, tab 18, page 76, Mastercard's fifth
11 ground --

12 **THE PRESIDENT:** Just one moment.

13 **MR HOSKINS:** It's D9/18/76. It's Mastercard's skeleton argument for the Court of
14 Appeal.

15 **THE PRESIDENT:** Yes, I am sorry, I mislaid the bundle. This is D9 at ...

16 **MR HOSKINS:** Tab 18, page 76. Mastercard's fifth ground of appeal, failure to
17 consider relevant matter:

18 "Mastercard's fifth ground of appeal is that the Tribunal failed to take account of
19 a material issue when assessing Sainsbury's loss, i.e. the extent to which
20 there would be switching from Mastercard to Visa and Amex under the
21 Tribunal's Counterfactual."

22:

23 "Tribunal judgment 260 to 263 considered whether there would have been sufficient
24 switching in the Tribunal's counterfactual that the MasterCard Scheme would
25 have collapsed and concluded this would not have occurred. This analysis
26 appeared in the section of the judgment dealing with restriction of competition.

1 However, the Tribunal does not consider anywhere in its judgment whether
2 and, if so, to what extent, switching between MasterCard and Visa/Amex
3 would have occurred in its counterfactual".

4 I.e. the bilaterals counterfactual. 23:

5 "Any analysis of this issue would have concluded that, in the Tribunal's
6 Counterfactual, the volume of transactions which took place on MasterCard
7 cards would have been substantially lower ..."

8 Et cetera.

9 It's quite clear on the face of the grounds and on the face of the supporting skeleton
10 argument that this ground of appeal was limited to the question of quantum on
11 the basis of the Tribunal's bilaterals counterfactual. Now that being the case,
12 our decision not to pursue that point cannot possibly amount to an abuse of
13 process because --

14 **THE PRESIDENT:** Can I ask you, this was abandoned on the last day of the appeal
15 and wasn't it clear that the bilaterals counterfactual, nobody was supporting it.
16 Sainsbury's were not supporting it --

17 **MR HOSKINS:** Correct. Well, it had been discredited by both Mr Justice Popplewell
18 and Mr Justice Phillips. So, absolutely, it was effectively dead in the water by
19 the time we got anywhere near it. And without waiving privilege, you will
20 understand why we did not feel we would take up the Court of Appeal's time
21 on a quantum argument based on the Tribunal's bilaterals counterfactual.

22 **THE PRESIDENT:** But the argument, as Professor Neuberger has said, is relevant
23 on a multilateral counterfactual.

24 **MR HOSKINS:** It is, but we hadn't raised it on any other counterfactual. We didn't
25 know precisely what the Court of Appeal was going to find on restriction. As
26 I said earlier, not having put forward any specific ground of appeal in general

1 terms, at the end of a two-week hearing before the Court of Appeal, if we had
2 tried to raise new grounds that were not actually covered by our original
3 grounds, I can feel fairly confident we would have been given very short shrift.
4 I do not think we can be criticised for not seeking to amend our grounds of
5 appeal on the last day of a two-week hearing to argue a point of principle that
6 might have come up upon remittal.

7 The point was, on the facts of this particular appeal, we took the view we didn't need
8 to run this because we thought we were going to win on ground 2, and we did.
9 So the abuse of process point is, with all due respect, just completely built on
10 sand.

11 If we are in the business of parsing people's submissions, if we go back to
12 Sainsbury's Court of Appeal skeleton which Mr Brealey took you to, so that's
13 D8, tab 17, page 195. Paragraph 559, which Mr Brealey did not read on --
14 this is what Sainsbury's understood to be our ground of appeal:

15 "The CAT did consider switching by Mastercard Issuing Banks to Visa and Amex in
16 the context of its conclusion that absent the MIF, there would be bilateral
17 agreements between acquirer and issuer under which retailers would pay a
18 sum equivalent to 0.5% for credit cards."

19 So our grounds were quite clearly on their face limited to the bilaterals
20 counterfactual, our skeleton limited to the bilaterals counterfactual and
21 Sainsbury's understood that to be the case.

22 Unless you have any further questions ...

23 **THE PRESIDENT:** No, I think we will then withdraw from the hearing for five or ten
24 minutes. We will then let you know what we proceed to do.

25 **MR HOSKINS:** Thank you.

26 **(4.42 pm)**

1 (A short break)

2 (4.57 pm)

3

4 **Ruling**

5 **THE PRESIDENT:** Paragraph 15 of the order of the Court of Appeal as revised by
6 the Supreme Court says, insofar as material, at paragraph 15:

7 "The claim [...] brought by Sainsbury's against ... Mastercard shall be remitted to the
8 Competition Appeal Tribunal for reconsideration, not retrial, in accordance
9 with the Judgment, of Mastercard's ... case [...] advanced in the ... Tribunal
10 below that the MIFs subject to these claims satisfy the conditions for
11 exemption pursuant to Article 101(3) The Sainsbury's v Mastercard
12 proceedings shall also be remitted for assessment of the quantum claim."

13 It seems clear, on any fair reading of the order, that the assessment of the quantum
14 claim is also to be conducted in accordance with the Judgment. The
15 judgment there being referred to is the judgment of the Court of Appeal as
16 qualified by the judgment of the Supreme Court.

17 In the light of that order, on the Sainsbury's v Mastercard case returning to this
18 Tribunal, we ordered on 16 December that Mastercard should file written
19 submissions as to the case it should be permitted to advance in relation to the
20 quantum issue.

21 Mastercard has duly done so. The matter that now falls for decision is whether
22 Mastercard should be permitted, as it wishes, to argue on quantum that the
23 amount of damages should be reduced to take account of such case as it can
24 prove that there would likely to have been switching away from Mastercard to
25 Visa and/or Amex in the event that Mastercard was confined to charging
26 a much reduced MIF.

1 There is no doubt that that was part of Mastercard's defence in the Tribunal, so this
2 would not be a new case.

3 We think it is necessary to consider that proposition separately as regards Visa and
4 as regards Amex.

5 The reason for that is as follows.

6 The assessment of damages is to be achieved by comparing the amount that was
7 charged to Sainsbury's as the MIF element of the merchant service charges,
8 compared to the amount that would have been charged had the MIFs been
9 kept at a lawful level. In other words, one is comparing the actual world that
10 occurred with the counterfactual world, which is, of necessity, hypothetical.

11 The question therefore is what is a realistic counterfactual, what is a realistic view of
12 the hypothetical world? The question of a so-called asymmetrical
13 counterfactual whereby Mastercard was confined to charging a low MIF but
14 the competing Visa scheme was not so confined was considered in the Court
15 of Appeal judgment. That is because both this Tribunal and
16 Mr Justice Popplewell at first instance had applied such an asymmetrical
17 counterfactual, whereas Mr Justice Phillips, in the third trial, had rejected it as
18 unrealistic.

19 The Court of Appeal addressed the point in this way at paragraph 202 of its
20 judgment:

21 "The asymmetrical counterfactual which Mr Justice Popplewell accepted assumes
22 that Mastercard would be prevented from setting default MIFs but Visa would
23 remain unconstrained. As Phillips J said at paragraph 168(ii) of his first
24 judgment addressing the mirror argument made by Visa in that case, that
25 situation is 'not merely unrealistic but seems highly improbable'. As Phillips J
26 said, the schemes are engaged in the same business using the same model

1 and are fierce competitors. We were not impressed in this context by the
2 arguments on behalf of the schemes that there have been other
3 inconsistencies in approach on the part of the Commission and other
4 competition authorities and regulators. Whilst there have been differences in
5 the detail, as appears from the chronological background set out at Part II of
6 this judgment, the competition authorities and regulators have sought to
7 constrain both schemes in a broadly similar fashion. We consider that
8 a realistic counterfactual would assume that if one of the schemes was unable
9 (whether for commercial or legal reasons) to set default MIFs, the other
10 scheme would be similarly constrained."

11 Then in paragraph 203, the Court concludes:

12 "Realistically there would be similar constraints on both schemes."

13 The judgment proceeds, at paragraph 207, to determine that the two schemes are
14 materially identical for the purpose of the Article 101 analysis.

15 Mr Hoskins, recognising the force of those observations, stressed that this part of the
16 judgment is concerned with the question of whether the MIFs that were set
17 restricted competition under Article 101(1) and not with the quantum of
18 damages. He said that the different counterfactuals can apply as a matter of
19 law for different purposes. That is in some circumstances entirely correct, but
20 in our view it does not take him very far. The counterfactual to be applied in
21 any circumstance, and certainly when it comes to the calculation of damages,
22 has to be a realistic one.

23 The Court of Appeal has explained why an asymmetrical counterfactual as between
24 Mastercard and Visa is wholly unrealistic.

25 The fact that regulators have not intervened to impose a cap at the material time on
26 the Visa MIF is in our view irrelevant. They had not done so either as regards

1 the Mastercard MIF. The question is in a counterfactual world where, as the
2 Court of Appeal judgment says, for legal reasons Mastercard's MIF was
3 reduced to the exemptible level and had to be a lawful MIF, Visa would be in a
4 similar situation. As the Court of Appeal there says, that is the only realistic
5 assumption that can properly be made.

6 The Court of Appeal refers also, at paragraph 53 of the judgment, to the observation
7 of Mr Justice Phillips in his judgment, that:

8 "He thought it difficult to conceive of circumstances in which one scheme would be
9 unable to set any MIFs while the other continued to operate unconstrained.
10 More importantly, such an assumption would mean that two unlawful schemes
11 could each escape censure merely by virtue of existence of the other, which
12 could not be right."

13 By parity of reasoning, if the asymmetrical counterfactual could be applied when it
14 comes to computation of damages, Mastercard could reduce the damages
15 which it has to pay to Sainsbury's by reference to switching to an
16 unconstrained Visa scheme, and Visa could reduce the amount of damages
17 which it has to pay in the parallel claim brought by Sainsbury's against Visa by
18 reference to an unconstrained Mastercard MIF.

19 As Mr Justice Phillips pungently observed, that could not be right.

20 Accordingly, it is quite clear to us that, in reconsidering the issues in accordance with
21 the Court of Appeal judgment, it is not open to Mastercard to put forward an
22 asymmetrical counterfactual and that there would have been switching to
23 Visa.

24 I turn then to the question of Amex. Amex is in a different situation because, unlike
25 the Visa scheme, the Amex scheme is not directly comparable to Mastercard.
26 It is not a four-party scheme, and the interchange fee is not fixed on the same

1 multilateral basis, so there is not the equivalent restriction of competition, as
2 Mr Hoskins pointed out.

3 The argument based on the judgment of the Court of Appeal therefore does not
4 apply. Instead, the objection to Mastercard relying on switching to Amex was
5 based on what happened in the appeal proceedings before the Court of
6 Appeal. In particular, Mr Brealey relied on the fact that by its fifth ground of
7 appeal before the Court of Appeal, Mastercard had alleged that the decision
8 of the CAT was defective because it had failed, when dealing with quantum,
9 to address Mastercard's argument that there would have been switching to
10 both Visa and Amex under the counterfactual which the CAT had applied.
11 That counterfactual was one of bilateral interchange fees, instead of a MIF.

12 That ground of appeal was explained in Mastercard's skeleton argument for the
13 Court of Appeal.

14 It came at the end of that skeleton. I should first go, before turning to the skeleton, to
15 the list of issues which the parties placed before the Court of Appeal, where
16 the fifth ground constituted issue 13, framed as follows:

17 "Did the Tribunal in the Sainsbury's v Mastercard case err because it failed to take
18 account of a material issue when assessing Sainsbury's loss, i.e. the extent to
19 which there would be switching from Mastercard to Visa and Amex under the
20 Tribunal's counterfactual."

21 It was so explained, as one would expect, in the skeleton argument of Mastercard for
22 the Court of Appeal (see paragraphs 19 to 24 of the annex to the skeleton).

23 Sainsbury's put in grounds in its skeleton for rejecting that argument.

24 What happened was that, we were told on the last day of the appeal hearing,
25 Mr Hoskins said to the Court of Appeal:

26 "My Lords, I have some good news for you, which is given the time constraints, I am

1 instructed not to pursue issues 11 and 13. That is just to allow the court and
2 the Bar to focus on what is the most important point, which is issue 12."

3 That's the issue concerning pass-on. Issue 13, as I have just indicated, is the issue
4 that I am now addressing.

5 Mr Brealey says that, therefore, Mastercard abandoned this issue on appeal and it
6 cannot be a correct interpretation of the remittal that they can now run it
7 before the Tribunal.

8 We have not found this point all together easy, but, on balance, we think that the way
9 the appeal was expressed did put this point in the context of the bilaterals
10 counterfactual, which the CAT had adopted.

11 We are not sure that there is any real distinction in the logical basis of the fifth
12 ground of appeal as applied to a multilateral interchange fee as opposed to
13 a bilateral interchange fee, but the ground was so confined. It was then not
14 pursued in the circumstances indicated in what Mr Hoskins said to the Court
15 of Appeal, in the statement that I have just quoted. We think it would be harsh
16 to say that, in those circumstances, Mastercard should for that reason alone
17 be precluded from continuing to run that case, which was always part of its
18 defence. We do not think that would be an abuse of process and it certainly
19 does not fall outside of the terms of the remittal.

20 For those reasons, which I have expressed briefly given the time of day, we hold that
21 Mastercard is permitted to run the argument that there would have been
22 switching to Amex if the MIF had been at a lower level.

23 **MR HOSKINS:** Thank you, Sir, I think that concludes the business before the
24 Tribunal today.

25 **THE PRESIDENT:** I hope so, given the time.

26 **MR HOSKINS:** Thank you.

1 **THE PRESIDENT:** Is there anything in the order which should be drawn up -- and
2 perhaps you can draw it up between you and submit, I hope, an agreed
3 order -- what, if anything, should be said about costs?

4 **MR HOSKINS:** I think I am content with -- as long as Mr Brealey agrees that this
5 should just be costs in the case; that if Mr Brealey was to seek his costs for
6 any particular aspect, because he won that aspect, you understand I would
7 make counter applications; but as long as he's content with the costs in the
8 case order we can certainly live with that.

9 **THE PRESIDENT:** You are muted, Mr Brealey.

10 **MR BREALEY:** That was going to be my suggestion as well.

11 **THE PRESIDENT:** It's good to end on a note of mutual agreement. So costs in the
12 case.

13 **MR BREALEY:** Thank you.

14 **MR HOSKINS:** Thank you very much.

15 **(5.15 pm)**

16 **(The hearing concluded)**

17

18