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IN THE COMPETITION

Case Nos. 1266/7/7/16

APPEAL TRIBUNAL

Victoria House,
Bloomsbury Place,
London WC1A 2EB

18 January 2017

Before:

THE HONOURABLE MR. JUSTICE ROTH
(President)
PROFESSOR COLIN MAYER CBE
CLARE POTTER

(Sitting as a Tribunal in England and Wales)

BETWEEN:

WALTER HUGH MERRICKS CBE

Claimant

- v -

MASTERCARD INCORPORATED & ORS

Defendant

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CPO APPLICATION HEARING

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THE PRESIDENT: Yes Mr. Harris?

MR. HARRIS: Good morning, Mr. President, sir; members of the Tribunal.

Sir, as you know, I appear today on behalf of the Proposed Class Representative, Mr. Merricks. Mr. Merricks is in court behind me and I am assisted by Mr. Bacon QC and Ms. Wakefield instructed by Messrs Quinn Emanuel, and the two experts who put together our joint report, Dr. Veljanovski and Mr. Dearman are also present.

THE PRESIDENT: Thank you.

MR. HARRIS: My opponents are -- the team is led by Mr. Hoskins and he's assisted today by Mr. Cook, Mr. Singla and Mr. Williams QC, and as you know he is instructed by Messers Freshfields.

May it please you sir, there are one or two minor points about timetabling that I would like to begin with.

THE PRESIDENT: Yes.

MR. HARRIS: I hope the Tribunal has received, rather later than we had hoped, for which we apologise an outline of areas of broad agreement consistent with the timetable indications that the Tribunal gave yesterday. Just one or two minor points that need to be resolved, potentially now or possibly as we go on, they are as follows; we propose, with the Tribunal's permission, to give our repudiatory on the non-funding issues during the course of tomorrow. That is to say after I have opened them and my experts have dealt with the non-funding issues, and Mr. Hoskins has had his response, whilst everything is still fresh in the mind, reply then as opposed to punting that off.

THE PRESIDENT: Yes.

MR. HARRIS: The corollary of that, of course, sir, would be that Mr. Williams, on the timetable put forward by the Tribunal, would open with his objections on funding issues after my reply on the non-funding issues, and that would, one imagines, therefore, be tomorrow afternoon at some point, and then, again, consistent with the timetable put forward by the Tribunal, that would lead to either a conclusion of Mr. William's submissions on funding tomorrow afternoon at some point, or, if they haven't finished, then they will need to be finished off on Friday morning, and in that regard, obviously we will play it by ear, sir, but we would, with great respect, and with apologies for the fact that we have been the cause of some of this inconvenience, ask if the Tribunal might be prepared to consider, if necessary, sitting slightly later than normal tomorrow, if needs be, to allow Mr. Williams to finish, or perhaps better

1 still, to start, if needs be, a little earlier on Friday to allow him to finish, and for Mr. Bacon to
2 then deal with the response on funding issues. Not something we need to decide now but I
3 thought I would lay it squarely on the table.

4 THE PRESIDENT: Yes, so we do it, really, the hearing in two parts?

5 MR. HARRIS: In many ways in two parts.

6 THE PRESIDENT: Yes, and we do appreciate. That has a certain logic to it.

7 MR. HARRIS: I am grateful.

8 In that regard, Mr. Hoskins has very kindly said that he is amenable, if needs be, to starting
9 early on the Friday, or, for that matter, sitting a little late on the Thursday, and we are, of
10 course, grateful to Mr. Hoskins and his team.

11 THE PRESIDENT: Well, we will see how we get on.

12 MR. HARRIS: Yes. One further issue does arise about timetabling on the funding matters is Mr.
13 Hoskins has -- and doubtless he will advance this in a moment if he needs to -- has suggested
14 that his side should be allowed to have a reply or a reply on funding issues, and we have
15 resisted is that for the simple reason that this is our application, and we have put forward our
16 application on funding. It has been dealt with fully in writing and Mr. Hoskins will have a full
17 and proper opportunity to put his point in opposition orally and then we should have the last
18 word, after all, it is our application, but Mr. Hoskins doesn't see it quite like that. He says,
19 "Oh, well, Mr. Williams is already going first and then I want to reply". We say that is not the
20 right approach.

21 THE PRESIDENT: Well, we will see how we get on. It is often the case where a defendant raises
22 an issue, and opens it effectively, that it does, then, have a right of reply, but if you then want
23 to say something afterwards in comment on that I don't think we would shut you out.

24 MR. HARRIS: No, sir, and I am grateful for that.

25 THE PRESIDENT: I think we would be able to deal with it in a way that is satisfactory and fair.

26 MR. HARRIS: So I simply remark in that regard that, of course, and again with apologies, Mr.
27 Bacon, who is dealing with those issues on our team, won't be available after Friday
28 lunchtime.

29 THE PRESIDENT: So he is available today, that doesn't cause a problem, he is not available
30 tomorrow.

31 MR. HARRIS: That's right.

32 THE PRESIDENT: He is available Friday morning?

1 MR. HARRIS: That's right, and that is why, sir, we have suggested if the need arises, possibly
2 sitting a bit late for Mr. Williams to finish on the Thursday and possibly, in any event, starting
3 a bit early on Friday to deal with the funding issues.

4 THE PRESIDENT: Yes.

5 MR. HARRIS: So there it is.

6 THE PRESIDENT: Well, we will try and accommodate his availability.

7 MR. HARRIS: I am most grateful. The only other timetabling issue that arises, again, not
8 necessarily for decision at this moment, is just with the Tribunal's position and in light of the
9 fact that the Tribunal is going to be asking questions of Dr. Veljanovski and Mr. Dearman and
10 according to the letter, the possibility of some limited cross-examination by Mr. Hoskins, we
11 would simply raise the possibility of the need for some short re-examination, and that would
12 be the orthodox course. It may not arise, but we wouldn't want to be shut out if and to the
13 extent --

14 THE PRESIDENT: No. That is entirely fair.

15 MR. HARRIS: I am grateful. I don't know if Mr. Hoskins has anything to add on timetabling.

16 MR. HOSKINS: Just very briefly, I have said I am happy to accommodate Mr. Harris, as long as
17 we are not prejudiced in any way, which is fairly obvious. I think the maximum amount of
18 time myself and Mr. Williams will need will be five hours, which is effectively one day, and
19 I just don't want to find a situation on Friday morning where it is being said that Mr. Williams
20 must hurry up, he must truncate, because the problem is not of our making. We are just trying
21 to be helpful. I just put down that marker, and I am grateful for the indication that Mr.
22 Williams should have a chance to reply to Mr. Bacon's oral submissions.

23 THE PRESIDENT: We don't anticipate that the funding issue will take that long to argue.

24 MR. HOSKINS: That is why I am happy to go -- I just put down a little marker we don't want to be
25 prejudiced. That is all.

26 THE PRESIDENT: We have read what you have said about it. It has been covered in writing in
27 some detail. They are fairly short points.

28 MR. HARRIS: Thank you sir. So I will launch in with some --

29 THE PRESIDENT: Well, before you do that can I just raise some issues on confidentiality?

30 MR. HARRIS: Yes, sir.

31 THE PRESIDENT: If we take Bundle C which is where we have got the funding agreement, which
32 is tab 8, it has been marked-up showing what is confidential. If you go to page 6 in the
33 document which is page 248 in the bundle, I was struggling to understand why, at the top of

1 the page there, subparagraph (g) and subparagraph (i) are said to be confidential. Apart from
2 anything else, Section 4.2 --

3 MR. HARRIS: Sir, they are not. Thank you for drawing that to my attention.

4 THE PRESIDENT: So we can say those two are not confidential. In that case, if one goes to the
5 reply document which is at your Reply at tab 3, page 52 in the document, page 176 in the
6 bundle, we can remove the, "Confidential", marking on that page.

7 MR. HARRIS: Yes, sir, that is correct. I apologise. That is -- I think the historic marking of a
8 document and it was not taken out -- apologies.

9 THE PRESIDENT: If we go, then, to page 55 in this document, a few pages on, page 179 in the
10 bundle at paragraph 147, there is something in brackets there which is said to be confidential,
11 but, in fact, paragraph 211 of the Mastercard submission is not said to be confidential. If you
12 look at your paragraph 68 back on page 30 of this document, it says, in paragraph 68, second
13 sentence:

14 "The only parts to which Mastercard refers over which the Applicant wishes to maintain
15 confidentiality are paragraph 207 and 208 of the Response as well as the identity of the
16 funding vehicle".

17 So 211 is not confidential.

18 MR. HARRIS: Sir that is correct, and I am very grateful to you for picking it up. 207 mentions that
19 the sum in question --

20 THE PRESIDENT: So does 211.

21 MR. HARRIS: I accept that. Sir, may I just take one moment?

22 THE PRESIDENT: Yes. (Pause).

23 MR. HARRIS: Sir, I am told that the figure is not confidential.

24 THE PRESIDENT: Well, if we delete -- if we just say, "Mastercard submissions", and delete at
25 paragraph 207-211 and say:

26 "Market correctly rehearsed the fact that, pursuant to the funding agreement", and you
27 say the figure is not confidential, 10 million of adverse cost cover has been secured,
28 then thus we can remove the confidentiality of that paragraph.

29 MR. HARRIS: I believe so.

30 THE PRESIDENT: In which case, as I see it, the only thing that remains confidential in your
31 Reply is paragraph 150 and nothing else is.

32 MR. HARRIS: Yes that is right.

1 THE PRESIDENT: Well that is helpful, because, as you will have noticed, there are a number of
2 people in court, and they are entitled to access to the non-confidential versions, so if, please,
3 another version can be produced with only 150 redacted?

4 MR. HARRIS: I am sorry, the 10 million has been widely publicised.

5 THE PRESIDENT: Yes. Well, that is what I understood. That is why I was puzzled.

6 The other matter on confidentiality, Mr. Hoskins, please, in your skeleton at the very end,
7 pages 41-42, a point is taken about a third party Cost Order, and you say at paragraph 170, the
8 very end:

9 "If that interpretation is correct, Mastercard does not press that concern, if confirmation
10 is provided".

11 Has that been resolved?

12 MR. HOSKINS: Not as far as I am aware but I will take instructions.

13 THE PRESIDENT: Because, as I understand it, that is the only confidential part of this skeleton.

14 MR. HOSKINS: Well, the confidentiality isn't claimed by us it is claimed by the applicants.

15 THE PRESIDENT: No, I understand that, but it is the only reason that anything in this document --

16 but if you are not pursuing the point, then --

17 MR. HOSKINS: It has not been clarified. We have not received a response in relation to this. If it
18 can be done today before we stand up tomorrow --

19 THE PRESIDENT: Because then we could have -- we could remove, effectively, paragraphs

20 166-170 and have a completely open skeleton. That would be helpful. Thank you.

21 MR. HARRIS: Sir, I will endeavour to advance this point during the course of today.

22 Before making any introductory remarks may I just out of politeness, raise on behalf of Mr.
23 Bacon, obtaining permission for him to leave later on during today since his issues -- he's not
24 leaving right now, but when he --

25 THE PRESIDENT: Yes. Well, he can leave at any time.

26 OPENING SUBMISSION BY MR. HARRIS

27 MR. HARRIS: I am very grateful.

28 So, sir, what I am not proposing to do is, obviously, in light of all the written materials and the
29 great preparation that has gone into this, is run through at any great length the legal
30 framework or what is set out in the rules and guidance. That I am largely taking as read. I am
31 only going to refer to a few specific points. There is only one in the legislation, subject, of
32 course, to questioning from the Tribunal and various points in the rules and the guidance as
33 we run through.

1 What I propose to do is just spend five or ten minutes setting the scene with some
2 introductory remarks if that is acceptable, and needless to say, I am then going to go on and
3 deal with some discrete topics, you know, item by item, for example, common issues,
4 benefits, lack of compensatory principles, et cetera, so just a broadish roadmap.
5 There are essentially two main issues in our submission that are raised by Mastercard. The
6 first one is the alleged lack of adherence to the compensatory principles. In a nutshell it is
7 said, "People won't get back exactly what they lost, some will get more and some will get
8 less", but this is the point at which we say we fairly characterise Mastercard as a real wolf in
9 sheep's clothing. The gist of the argument distilled down to its bones is: well, your proposal
10 for this collective action is not sufficiently compensatory, so instead we say the consumer
11 should get nothing at all. The action shouldn't proceed. But that is despite the fact that
12 Mastercard has been proven to be a wrongdoer at the Commission level and we say, if our
13 case is right about pass-on, on a massive scale, with potentially very big numbers.
14 What Mastercard does in, we say, placing such reliance upon what it calls, "The
15 compensatory principles", it really acts to the exclusion of other fundamental principles and
16 most of all, we say, the fundamental principle of doing justice to those people who are victims
17 of this proven wrongdoing. We say many millions of them. So that is, if you like, overview
18 number 1 about the broad nature of the complaints. It subdivides, obviously, into various
19 other issues that I will be addressing under discrete headings like common issues, et cetera.
20 The other major branch of the attack is something not principally either for me or for today
21 but it is on the funding arrangement. This is a series of alleged difficulties raised with the
22 hope of getting rid of the claim altogether. We say very, very briefly, there is nothing in the
23 point, this is a well thought out, carefully put together arrangement using well-funded and
24 respectable funders who, incidentally, representatives of whom are available in court today.
25 Mr. Bacon, at the requisite time, he will address you on the nature and structure and the
26 substance of that funding arrangement, and also on the related issues, namely the alleged
27 conflict of interest which we don't accept on the part of Mr. Merricks, the alleged difficulty of
28 obtaining third party costs orders, and the -- potentially this issue about ability of the funder to
29 pay which may be taken care of during the course of today.
30 As to this first alleged problem, the alleged problem with compensatory principle, what we
31 say at its heart is the fundamental problem that Mastercard has is that aggregate damages are
32 expressly permitted under the legislation, and a lot of material flows through from that.

1 THE PRESIDENT: I think it breaks down, you put it as some people get more some get less, I think
2 as we understand it there are two quite distinct points. One is that there is no reliable and fair
3 way of calculating the aggregate damages. That is the first point, because, in particular, pass
4 through, perhaps also because of overcharge, and then, secondly, even if there were, then
5 there is no method that has been suggested for distribution that corresponds to compensation
6 for individual members of the class. Those are two quite distinct points.

7 MR. HARRIS: Absolutely, sir. I am going to be taking them each --

8 THE PRESIDENT: So some people get more, some get less, that goes to the second point. It is not
9 interfering with the first point which is unrelated to the position of the individuals.

10 MR. HARRIS: Well, save in this sense, sir, we say that it follows inexorably from the fact that
11 under section 47C.2, which you will find in Bundle D1 at tab 10 should you need to turn it up,
12 that the Tribunal -- so this is under the primary legislation, the Tribunal, and here I quote:

13 " ... may make an award ...(Reading to the words)... each represented person".

14 What we say as regards that is that it is a fundamental feature of the primary legislation that if
15 you are not going to be assessing the damages recovered in respect of each represented
16 person, then on our conception, and this is my submission, that inevitably leads to a situation,
17 or it could well inevitably lead to a situation in which some people get more and some people
18 get less than would be the case if you did an individual loss by loss approach.

19 Another way of putting this, sir, is that we say, and this is where we say Mastercard's
20 submissions are really, in many ways, at a broad level, shooting at the wrong target, we say
21 that it is perfectly acceptable, indeed, it is the very feature of this new type of regime that you
22 can do bottom-down calculations from an aggregate look at the class as a whole -- I beg your
23 pardon -- top down, of course, top down. Top down approach, rather than bottom up, so you
24 don't have to look at each individual loss and then tot it up to reach your aggregate --

25 THE PRESIDENT: Oh yes.

26 MR. HARRIS: So what my introductory submission is, and obviously we will be dealing with the
27 points in more detail as we go through, is that the compensatory principle submissions that
28 are advanced throughout my learned friend's case have to be seen in light of this new type of
29 approach where you can do top down, where you deliberately do not look at individualised
30 losses. We say that one of the issues that this Tribunal, with respect, will need to grapple with
31 is; what does that mean in practice? It is a new regime. Our submission is that effect must
32 sensibly be given to it, and we say that fundamentally in the two respects, or at least one of the

1 two respects which you identify, sir, Mastercard has failed to give enough weight to that basic
2 fact.

3 In fact, by way of introductory remark, I would say -- I would go even further. I would say,
4 with respect, that this is difficult to imagine a case in which an aggregate award of damages is
5 more suitable than this case. This case is, of course, a mass consumer claim. There is
6 relatively small per capita loss, because of the amount of the people in the claimant cohort is
7 so large, and we say it is precisely the sort of claim that Parliament had in mind when it was
8 enacting the Consumer Rights Act and in that regard I just make two subpoints.

9 First, it is very telling, we say, that there have not been any individual consumer claims for
10 this loss at all, as far as we are aware, and we say that largely says it all, despite the fact that
11 there are so many injured persons, and despite the fact that the aggregate amount of the loss is,
12 we say, so large, no one in practice has been able to come forward and actually make a claim.
13 That reflects, in many ways, what we say in our skeleton is the common ground between the
14 parties that individualised claims are, common word, "Impossible". They are impossible and
15 the proof is in the pudding. Nobody has been able to do it, or certainly nobody has done it.
16 Mastercard then say, well, look, what you have ended up with is a case which they say is
17 "Overblown". They seem to advance that criticism as if it were some kind of blocking
18 feature, an overblown claim, a big claim, a big mass consumer claim, "Well, you just can't do
19 it". At one point they say -- in fact in two points, in their response and then in their skeleton,
20 they say, "It leads to an exercise in impossibility". I appreciate to some extent they are talking
21 about a discrete point about pass-on, but overall the thrust of their submissions is, "You just
22 can't do it, it is overblown". We say, "Absolutely not".

23 If you look at one of the documents that we cited, and I am plainly not going to go through
24 them all, but it features in our skeleton at paragraph 7 and it features in our Reply at paragraph
25 31. It is the government's response to the consultation paper, and what this says, as you are
26 aware, members of the Tribunal, is that breaches of competition law, such as price fixing --
27 this is paragraph 7 of the skeleton, sir, if have you wanted to see it in writing, or the Reply at
28 paragraph 31 -- so:

29 "Breaches of competition law, such as pricing..."

30 Obviously that is this case:

31 "... often involve very large numbers of people each losing a small amount".

32 Well, that is our case. Going on:

33 "... meaning that it is not cost effective for any individual to bring a case to court".

1 Well, that is our case again:

2 " ... allowing actions to be brought collectively would overcome this problem.

3 Allowing consumers and businesses to get back the money that is rightfully theirs, as
4 well as acting as a further deterrent to anyone thinking of breaking the law".

5 I strongly pray that in aid. Far from being overblown, this is the epitome, it is an archetypical
6 example of a case, amongst others, that the government had in mind in putting together this
7 new regime where you can go top down and you certainly don't have to go bottom up, so we
8 reject the notion of it being overblown, and we also submit that it is difficult to see why
9 Mastercard should be able to pray in aid the fact that on our case they injured millions of
10 people.

11 What is more, they injured those people without those people even knowing that they were
12 being injured.

13 THE PRESIDENT: I don't think it is the fact that there are millions of people. That is the objection.
14 That is not our understanding.

15 MR. HARRIS: Well, save insofar as it adds to what is said to be the overblown nature of the claims,
16 the fact that there is pass-on spread across a vast array of merchants, is, to some extent, a
17 function of the fact that there are so many people who didn't --

18 THE PRESIDENT: Well, I think if there was -- whatever Mastercard would say -- if there was a --
19 we could feel, and you persuade us, that was reliable and fair method of calculating the
20 aggregate loss and although you say we need not concern ourselves with that at this stage, that
21 is not presently our view, a fair way in which it could be distributed to those with loss, the fact
22 that it is a large sum and that there are millions of people would not be an objection.

23 MR. HARRIS: Sir, I will move on and address that point.

24 THE PRESIDENT: So it is not the fact that it is a large claim, it is not the fact that there are many
25 millions who suffered, or, indeed, that individually it wouldn't be, on any sensible view,
26 feasible for consumers to bring individual claims. We all recognise that.

27 MR. HARRIS: Well, sir, let me take those points head on, if I may, in an introductory sense. I will
28 obviously, as I say, develop them further, but there is a distinction. We do accept that I have to
29 have a plausible claim, plausible basis for putting forward my aggregate number.

30 THE PRESIDENT: Yes.

31 MR. HARRIS: So I do accept that and I am going to be addressing it. Our experts are here further
32 to address it, and we have put it in writing.

1 Where we have a difference of view compared to Mastercard is on the amount of focus that
2 there should be placed at this hearing on the detail of the distribution method, so that we don't
3 accept, and I will obviously address that under another subheading, but I do accept on the first
4 one that I have got to have a plausible case on aggregate damages for the class as a whole, and
5 we say we have absolutely got that.

6 So, just taking the stages, but only at this stage in introductory sense, so we say we have got a
7 plausible case on the volume of commerce, that is very broadly speaking overall the number
8 of transactions with the UK businesses in the relevant time in respect of which the overcharge
9 was incurred, and that can be calculated using Mastercard's figures, and, indeed, that is what
10 the experts have done towards -- or the input from the experts -- towards the back of our
11 Claim Form with the boxes with the figures in.

12 No particular issue -- no issue is taken with that by Mastercard, certainly not for today's
13 purposes, so we would say that of the three stages in the analysis, VOC, overcharge and then
14 pass-on, we could, for today's purposes, effectively tick that box.

15 On overcharge, again, no particular issue is taken by Mastercard for today's purposes with the
16 fact that one could go about ascertaining, on a common basis, that is to say on an aggregate
17 damages basis, the overcharge that affected all of those transaction.

18 Of course, there will be, and there may be, as there were in the *Sainsbury's* case, slightly
19 different overcharges for slightly different -- generated by slightly different types of card, but
20 then that was readily capable of being dealt with in *Sainsbury's*, including by the use of
21 blended rates, but what we say is important on step number 2 at this overview level is that
22 there is -- there doesn't seem to be any kind of attack on the notion that the overcharge will
23 affect the class in a common way.

24 THE PRESIDENT: Is that right? That is accepted?

25 MR. HARRIS: Well, there is no challenge to any of that in either the response document or the
26 skeleton. All of the focus of Mastercard's challenge on quantum said to be so powerful that it
27 should result in no CPO as regards quantum, is about pass-on, and I am obviously going to be
28 spending some time on pass-on, and my experts are here to deal with that issue as well, but we
29 would say as regards overcharge, leaving aside the fact that there is no attack advanced on it,
30 we would say, effectively, and certainly for plausibility purposes at the CPO stage, that is -- in
31 many ways it is common ground because certainly as regards the cross-border mix, they had
32 to be reduced by Mastercard by way of an undertaking first given to the commission, they
33 were too high so they had to undertake to bring them down in the face of the regulatory

1 action, and then of course, as you know, I am not proposing at any stage to turn this up, but as
2 you they that subsequently turned into the -- effectively the interchange regulation at which
3 the -- what had been higher level were capped at lower levels.

4 So we say this as regards overcharge there is no particular difficulty at this stage, and there is
5 no doubt that they were higher than they should have been, the battleground at trial will be by
6 how much and what are the details.

7 THE PRESIDENT: Yes.

8 MR. HARRIS: So we say for today in these introductory stages, in these introductory remarks, that
9 you can effectively tick off boxes 1 and 2 of the three-part assessment of aggregate damages
10 which, as I say, are set out towards the back of the Claim Form and further developed in the
11 joint expert report.

12 Pass-on to the consumers, of course that is in dispute, but we say, and I am going to turn to
13 some more detail on this, but introductory remarks is we say that fundamentally, at this stage
14 of assessing plausibility on the face of the Claim Form, it actually need not detain us very
15 long, and that is because there is actually a remarkable convergence of views on that issue
16 between my side, who are contending for pass-on through the merchant level of the chain to
17 end consumers, my proposed clients through Mr. Merricks, and Mastercard, who have
18 consistently been arguing on the substance for the same sort of approach, pass-on through the
19 merchants who are currently suing them in other places, to -- who is this well, to none other
20 than my clients, end consumers.

21 Now, in due course I am going to take you to some of the extracts that are added to Mr.
22 Hoskins' supplementary skeleton, and I am also going to it take you to some extracts of the
23 experts' reports that were put in by Mastercard no less, in at least one of those cases which
24 show that the case that they have actively advanced, including with their expert evidence, that
25 they continue to advance in other courts than this one, as we speak, are -- is the same
26 fundamental theory about pass-on through from the merchant level of the chain on to the end
27 consumer level of the chain, namely my proposed clients.

28 So I will come back to that in more detail, but for present purposes, at this high level, that
29 ought not, therefore, to give rise to any fundamental difficulty when the test is broadly
30 plausibility on the face of the Claim Form in reaching your aggregate damages figure.

31 THE PRESIDENT: What happens if other courts, if those other cases, find that there was pass-on,
32 but not 100 per cent, different amounts, different industries.

1 MR. HARRIS: Well sir, I am glad you raised that point. I was going to come to it later but I will
2 deal with it now.

3 It is important to understand that our case is not a blanket 100 per cent head in the sand, "Let's
4 forget everything else that ever happened", our case is going to use evidence. Our case is
5 going to take account of evidence, whether it comes from other actions, whether it comes
6 from further expert analysis, whether it comes from expert analysis on the other side, whether
7 it comes from a market report, whether it comes from some other market investigation. It is
8 going to take account of those things, and Dr. Veljanovski who is going to be principally
9 dealing with this, you will be able to ask him questions about this, but he says in the common
10 issues part of the report, "I am going to have regard to evidence from the other sectors that are
11 being dealt with in the other actions, I will take account of them." At the moment, at the time
12 of writing that report he said, "I already think that they broadly cover 70 per cent of the
13 relevant sectors", as it happens that has moved on because Mastercard are being sued by more
14 people since the date of that report for more sectors but it is important to be clear about this;
15 we are going to take account of evidence and the common issues joint expert report says, "We
16 will be looking for more evidence".

17 Now, later on, when I develop this in more detail, one of Mr. Hoskins' complaints is, "Oh
18 well, you just won't be able to get it". A counsel of desperation.

19 THE PRESIDENT: Just to understand, so you are not saying that there is a 100 per cent
20 pass-through in all sectors?

21 MR. HARRIS: No. What the expert report says is at this stage, as a preliminary working
22 hypothesis for the purposes of an expert report pre-CPO, the economic theory supports,
23 particularly in cases where there are highly competitive conditions, full pass-through.

24 THE PRESIDENT: Well, that qualification is obviously very important.

25 MR. HARRIS: Absolutely, but it goes on to say, I am sorry to interrupt sir --

26 THE PRESIDENT: Yes?

27 MR. HARRIS: -- it goes on to say that we will have to look at other factors relevant to the various
28 sectors, but where we have a pretty fundamental divide between us is that we say that in the
29 context of an aggregate damages award where, by definition you are noting looking at
30 individualised purchasers, you are not going bottom up, likewise, we say it would be absurd
31 to think that you would nevertheless have to do a case-by-case, if you like, individualised
32 assessment of pass-on for all of the many hundreds, we say in that hundreds of thousands of
33 businesses that were accepting Mastercard through the relevant period.

1 THE PRESIDENT: No. I just want to understand what you envisage. I appreciate you don't have
2 the figures now, of different rates of pass-through, that is something that will be derived, you
3 say, in due course, but you envisage that there will be, and it will be approached on the basis
4 that different sectors have different degrees of pass-through?

5 MR. HARRIS: Different sectors may well have different degrees of pass-on.

6 THE PRESIDENT: That is -- when you said -- you put in the qualification, "Depending on how
7 competitive they are", I think the courts with some of the material quoted in the experts'
8 report, it will -- that will affect -- there may be other things as well, but there will be different
9 degrees of pass-through in different sectors, and that is something you envisage and you plan
10 to take account of? Is that --

11 MR. HARRIS: Sir, I am being whispered at. (Pause)

12 Absolutely. The position is we don't yet know at this stage of, if you like, a plausibility CPO
13 test, whether that will happen, but we are alive to the fact that it may or may even -- may well
14 happen, and if and to the extent that it turns out --

15 THE PRESIDENT: From what the expert says it is likely there is an issue.

16 MR. HARRIS: Yes. Well, yes. Let's not beat around the bush, it is likely. We are not suggesting
17 that every sector of the economy is going to be likely to be capable of being analysed in an
18 identikit fashion. That doesn't seem likely and the experts don't say that --

19 THE PRESIDENT: Well, they say it is a pretty extraordinary thing to say but so I want to make
20 sure that it is not being said.

21 MR. HARRIS: Absolutely. That is not being said. Where we draw the line is really twofold, and it
22 is important to distinguish the distinction of principle and then the distinction of, if you like,
23 chronology and timing of what we are doing today.

24 What we say is, in principle, it seems as though, from what we have seen so far, Mastercard
25 are always going to be saying, "Too much. You need more detail, you need more granularity,
26 you need more evidence, you need this, that and the other", because it is just not right, "This
27 merchant will have a different pass-on from that merchant, even within the same sector and
28 that sector will have a different pass-on from that sector", and we say, "Whoa, hang on a
29 minute, there is always going to be a clash there because in the context of what, is with
30 respect, a, to some extent, relatively rough and ready measure of justice, as witnessed by the
31 fact that you are even claiming aggregate damages, not individualised damages, there is going
32 to come a point at which the Tribunal, and we will be submitting this due course that the
33 Tribunal should say, "Well, what you have is enough. We need to be proportionate and

1 reasonable with the evidence that we have got available", but one source of evidence, sir,
2 before I turn on to the chronology point, is exactly the evidence that is being dealt with in
3 these other retail actions, and that is why, even before CPO, we have taken some, we say,
4 responsible steps to go and find out what that evidence is, what those pleadings are. We will
5 be looking at some of the extracts in the pleadings later on this morning.

6 THE PRESIDENT: Just so I understand how that would work, some of those actions have only
7 recently been started. What early stages do you envisage that, therefore, if a CPO is granted,
8 that then later stages of this case would be adjourned until after those other cases, hence you
9 have referred to getting, and we will look at your litigation plan, the experts' reports, have
10 been produced so that they can all feed into this case, because, I mean, some of these cases
11 have been lodged but they are at very early stages. There may be no material there.

12 MR. HARRIS: Sir, yes, and that is a bridge that we -- and this is not a cop out. That is a bridge we
13 don't yet have to cross, and it will be partly a question of case management, reasonableness
14 and proportionality. What we will have, we say, are quite a few examples of evidence that we
15 ought to be able, especially with comity between reports and case management at this case
16 management tribunal, to get our hands on relevant evidence from a large number of sectors,
17 but it won't be that that is viewed in isolation. As the common experts' report says, and as you
18 will hear from Dr. Veljanovski in particular on, there are other sources of relevant evidence,
19 in just the same way, I hasten to add, that there were other sources relied upon by Dr. Neils on
20 behalf of Mastercard in at least *Sainsbury's*, and I think he has been instructed in other cases,
21 so it wasn't just specific disclosure from specific actions, but it has always been on
22 Mastercard's side, not my side, I mean it is my side too, but what is important for today is also
23 Mastercard's case that you are entitled to look at macro studies, economic theory at a macro
24 level, and when we see the extracts from the pleading you will see some of the things that they
25 have cited, and indeed, they are identical in some respects, to things that we cite. I mean, they
26 are literally the same document.

27 Anyway, just coming back to one specific point, there would be the possibility of obtaining
28 disclosure in the other actions to the extent necessary, but we are not there now, and the
29 reason we are not there now is because of this chronology point. We say that the test today is,
30 yes, we are happy to explore with you and deal with you, the Tribunal, as best we can the
31 queries, but ultimately, have we got a plausible case on aggregate damages? Bearing in mind
32 that we don't have some just blanket, "It is going to be 100 per cent across everybody", it is
33 going to be more nuanced, but we can't tell exactly what is now, but we are alive to the fact

1 that it may well be, then that is plausible, particularly when it is not plausible, we say, for
2 Mastercard to say, "Well, look, you have to delve into the minutiae of Mastercard". I mean,
3 one of the examples they give is they hypothesise that, well, WH Smith might be different
4 from John Lewis on pass-on, even though they are, on one view of the world, in the same
5 sector. We say, "Well, possibly, but that one strikes us as very likely going too far", because
6 that is not going to be the sort of thing that you can sensibly and coherently and
7 proportionately do in a case of this size which is not intended to be perfect justice done to the
8 last penny. It is just not. That is not what we are doing.

9 So that is an outline, then.

10 What I would add, though, again, by way of these overview remarks, is that it is important in
11 this same regard that we don't have to have for our aggregate damages award, we don't have to
12 have anything at all from our consumer proposed cohort class. We just don't need that. That
13 is a telling feature, we say.

14 Mastercard say, "Oh well, you know, you need some records from some of the, if you like,
15 middle men, the merchants", and we say, "Well, yes, as I have just advanced, there will be
16 some need for some information within proportionate boundaries", but the guide doesn't say
17 that you can't do that, the guide suggests merely as one example of where it would be
18 appropriate to allow an aggregate damages award, is where you don't need any records from
19 the consumers. Well, that is us. We don't need a single record from the consumers for these
20 purposes.

21 So in outline terms, then, we say that this is clearly a sensible case to take forward on an
22 aggregate basis, and, critically, before I turn to the first of the topics in a little bit more detail,
23 critically, without this sort of claim, without -- indeed, without this very claim, there will be
24 no justice for these injured victims. There will be no justice because they can't do it by
25 themselves, the proof is in the pudding, and the other reason, as you picked up from the
26 written work is that we are right up against the limitation period, so they are not going to get
27 justice unless it is through this claim.

28 So, sir, those are the overview remarks, and then I was proposing to turn, now, to common
29 issues in a little bit more detail. That is obviously a foursquare ground of attack by Mr.
30 Hoskins and his team, but I would like to begin by just reminding the Tribunal that the phrase
31 with which we are concerned is, "Same, similar or related". That is what you have to ask
32 yourself today. We say, "Is there a plausible case, have we done enough, to demonstrate to
33 you that it is plausibly, coherently, if you like, same, similar, or related".

1 What it does not say is that they have to be identical. Absolutely doesn't say that, but you
2 would be forgiven for thinking from the submissions that are advanced against me, that
3 Mastercard believes that although it uses those words, indeed it repeats them, what it really
4 means is, "Oh, they have got to be the same", because what they say, the gist of their
5 submissions is, "Well, there are too many differences. There are lots of differences and
6 therefore things are not common", but that is not what the test is. First of all it is only
7 plausibility, or something like that, and, secondly, it is same, but also includes similar or
8 related.

9 You will have seen from the guide, I don't propose to turn this up unless you would like me to
10 do so, but at the guide paragraph 6.78 it talks about, "Without requiring individual proof", so
11 in the same way what section 47C sub 2 talks about, without the need to assess individual
12 damages, that is reiterated in the more, if you like, fleshed out guide, so we have the primary
13 legislation, the rules and then the guidance, they are all talking about proceeding in aggregate
14 damages cases without requiring, "Individual proof", quote-unquote.

15 So obviously we accept that people within the class will have different purchasing histories.
16 Obviously someone has spent more in this year and more in that year, etc, etc, but the whole
17 point of the aggregate damages is that the way of reaching your aggregate damages pot still
18 covers the loss of the whole of the class viewed as a whole.

19 In other words, put the same point a different way, the whole point of their regime is to avoid
20 the need to look at individual purchasing history, so every time Mastercard raises in its
21 submissions, "Oh well that doesn't take account of the fact that this individual may have done
22 this, this individual may have done that, this individual has spent more", we say, "Well, no
23 problem. That is what the regime is designed to avoid".

24 This point reoccurs in a couple of places. At the moment I am making it generically, but it
25 reoccurs in the context of benefits which is going to be a separate heading that I address, and
26 it also reoccurs in the context of compound interest, which, again, is going to be a separate
27 heading that I address. Broadly speaking, in both cases one of the responses is: well, insofar
28 as you are saying it is insufficiently individualised, it doesn't take account of this person may
29 have had that benefit and that person may have had a different one, or this person may have
30 had a debit balance for this long, or credit balance of this for that long, so that is benefits and
31 compound interest, it doesn't take account of them and they are different. We say, "Well, we
32 know, but this is an aggregate damages case. We are proceeding on an aggregate basis", and,
33 "Without requiring individual proof".

1 THE PRESIDENT: That, of course, is why some cases, even though they can't be brought
2 individually, are just not suitable for collective proceedings.

3 MR. HARRIS: If it went so far, yes, and what Mastercard obviously wants to persuade you is, look,
4 there are so many problems here you just go --

5 THE PRESIDENT: Yes. That is a question of degree.

6 MR. HARRIS: A question of degree, but the fundamental question today is: have we got a
7 plausible case on the pleadings, including, most relevantly, by reference to the three steps in
8 the aggregate damage analysis, and we say absolutely inevitably yes.
9 Now, later on, when we head towards trial, I have no doubt there will be -- I will develop this
10 later -- all kinds of issues about alleged benefits. We could see that detaining people and
11 being quite difficult. Likewise, there might be similar issues about compound interest, but
12 they are not for today. What they don't mean is that we have somehow got a fundamental
13 problem across the class as a whole.
14 Indeed, we say that all the members of the proposed class, the class definition has been put
15 together carefully, have suffered some loss caused by Mastercard, and the aggregate level of
16 that has been sufficiently accurately, or will be sufficiently accurately calculated.

17 THE PRESIDENT: You say it is not for today. You have canvassed in your Reply the possibility
18 of a subclass. That is something we need to consider today. If it is going to be approached by
19 subclasses, that is something we need to grapple with.

20 MR. HARRIS: So I accept that, but that is, in our respectful submission, sir, that is on a discrete
21 issue which is the possibility of subclasses in respect of compound interest.

22 THE PRESIDENT: No, I thought it was about -- perhaps I misunderstood.

23 MR. HARRIS: Talking about benefits, sir.

24 THE PRESIDENT: I thought it was talking about benefits.

25 MR. HARRIS: Yes. Benefits I am going to develop. It is a subclass possibility, but at a later stage.
26 This will all become a bit --

27 THE PRESIDENT: Well, subclasses one would normally think about now.

28 MR. HARRIS: Well, can I come on to it? I will address it.

29 THE PRESIDENT: If one cannot deal with it as common across a class, one might be able to deal
30 with it by having subclasses.

31 MR. HARRIS: Yes.

32 THE PRESIDENT: That is why you would have a subclass because you can't do it across the class,
33 but then that is something we have to address at the outset.

1 MR. HARRIS: You are quite right, sir, to pick me up on that. So when I reach benefits I will
2 address you on where we say the possibility of a subclass arises. I caveat, even now before I
3 reach it, if benefits is even a good point, okay? So I will come on to that, and likewise I will
4 briefly come on to the possibility of subclasses under the heading of compound interest, so
5 those are the two areas where they potentially arise, but I also take this opportunity to draw
6 the Tribunal's attention to the fact that we have Mr. Dearman and Dr. Veljanovski here and
7 they can also address issues about how to go about, for example, approaching compound
8 interest on an aggregate basis, so it may be that the subclasses don't arise.

9 What I was just saying was the need for the Tribunal to have regard to the fact that there are
10 same or similar or related issues that can be common issues and they do not have to be
11 identical, and I just draw your attention as well to the fact that the supposed difficulties raised
12 by Mastercard about the lack of the same loss to the members of the class wouldn't be fatal in
13 some other highly relevant jurisdictions. Now, I am not going to be spending much time
14 today drawing your attention to our Reply annex, but this is one of the times when I will.
15 Could I invite you to pick up our Reply? I think you will find that in core bundle tab 3, and at
16 the back we have our annex on other jurisdictions which, of course, was responsive to what
17 was put in by Mastercard.

18 THE PRESIDENT: Yes.

19 MR. HARRIS: For the moment, I just want to draw your attention to the heading on the fourth page
20 of that document which is page 201 of the bundle, internal page 77. I think it might be the
21 fourth page, under the heading, "Commonality and Proof of Loss", so obviously the germane
22 heading for the present purposes. 200, and here they are talking about Canada:

23 "In order to establish the commonality ...(Reading to the words)... when the time
24 comes".

25 Now, on this issue, that is what we say is the tried and tested route at the certification stage in
26 that jurisdiction which is the most germane in our respectful submission, and what we see
27 here is that as I am submitting, what is not fatal to a claim at this stage is the fact that there
28 may be some differences even in the amount of recovery. They can be dealt with in due
29 course, and what we are really talking about here is: is this plausible overall?

30 THE PRESIDENT: Well, they can be dealt with later, and they certainly wouldn't be dealt with
31 now, but we need, it seems to us, to be satisfied that there is a fair methodology by which they
32 can be dealt with later.

33 MR. HARRIS: Yes.

1 THE PRESIDENT: If there is any fair methodology by which they can be dealt with later, then
2 there is no point going down this route.

3 MR. HARRIS: I accept that, sir. I completely accept that.

4 THE PRESIDENT: While we are on the Microsoft case which does seem a helpful case, it is, of
5 course, a decision of the Supreme Court of Canada, there is a -- I think you may cite part of it,
6 a passage which perhaps is helpful. You have got it, as you have raised it now, perhaps it is
7 worth looking at. Would this be a sensible time to do it?

8 MR. HARRIS: I was proposing --

9 THE PRESIDENT: Do you want to come back to it?

10 MR. HARRIS: Sir, did you mean that you have passages that you want to -- I am going to be taking
11 you, in not too long, to some other passages in the Microsoft process case, for example, what
12 we extract at 203, and then I am also going to be taking you to some of the other issues in the
13 US law annex on similar issues.

14 THE PRESIDENT: Yes. I don't want to take you out of your course. If you want to come back to
15 it later that is fine.

16 MR. HARRIS: Why don't we do that, so I will come back to it and if I haven't dealt with the bits
17 that are of interest to you, sir, then we will deal with it there.

18 So, summary so far, loss overall three steps, no, we say, particular issues, certainly for this
19 stage at the VOC step, step 1, no issue with the overcharge, certainly of plausibility test at this
20 stage, I have dealt with all of those, not every part of the loss has to be common, let's see what
21 Microsoft has to say by analogy in Canada, and then we come on to third step, a pass-on.
22 Now, to some extent I have already opened on this. The current approach of the experts is
23 that it is full or very high pass-on, but we do accept that the question of pass-on has to be
24 evidence-driven, but we do not think, in our submission, that it is realistic to expect there to be
25 ever some full trial-style examination of each and every merchant. What we say there, the
26 additional point I have to add there, sir, is that one wouldn't, in our respectful submission,
27 even do that were this an individual. Let's say, for instance, I hypothesise, there was a
28 billionaire, and the billionaire had spent, I don't know, 300 million disposable income every
29 year for the claim period in Mastercard-accepting shops. Well, plainly that person is going to
30 have a lot of overcharge damages, and it might, therefore, be on a per capita basis, sensible for
31 that person to come forward and say, "Well, I will bring my own claim". Of course, by
32 definition that person has got the resources to deal with the need for inter alia experts, but it
33 still doesn't follow that where that billionaire has spent his disposable, or her disposable

1 income across probably literally thousands, if not tens of thousands of Mastercard-accepting
2 outlets, that in facing an individual claim this Tribunal would say, "Well, Mr. Billionaire, you
3 now have to prove the pass-on that each and every one of that, say, 10,000 merchants that
4 you used in the 16-year period", and we literally have 10,000 Sainsbury's-style trials on
5 pass-on. That doesn't follow at all and we don't accept that. We say that even in that
6 circumstance you would have to adopt a reasonable and proportionate -- for instance,
7 possibly sector by sector, and, in that regard I also emphasise a point that is not really
8 accepted by Mastercard, that what does the Tribunal do when faced with evidential
9 difficulties? It doesn't just throw up its hands and say, "Oh, my good, that is all a bit too
10 difficult. We are finding it problematic to get the perfect evidence so we don't do it at all".
11 Well, that is Mastercard's, "This an exercise of impossibility", that is their submission. We
12 say, "No, no, no. That is not what happens at all". You do the best you can to do what, in this
13 context, is slightly rougher justice on an individualised basis than in other cases but you do
14 the best you can with what you have got on a proportionate basis, and that is exactly what we
15 say should happen in this case.

16 I said I would go back to the annex, and this is the first point where I wish to do so. The
17 exercise in impossibility submission of Mastercard is exactly not what happens in the US. If
18 you were to turn a couple more pages over in the annex, so we are now within the US section,
19 and to pick up at paragraph 220 which you will find at the bottom of bundle page 211, there is
20 reference in -- well, I will read the whole of 220. It refers to *Bigelow v RKO*, so 220:

21 "Finally United States courts do not require what Mastercard characterised as an
22 'accurate' measure of class-wide references. In fact the US Supreme Court has stated
23 that at the class certification stage ...(Reading to the words)... seek to avoid liability".

24 They are talking here about the certification stage:

25 "May not seek ...(Reading to the words)... to calculate".

26 Well, that is exactly what Mastercard is saying here as regards pass-on.

27 MR. HOSKINS: Could you finish the quote, please, Mr. Harris, because it more accurately
28 represents what our submission is.

29 MR. HARRIS: No problem. The quotation which I expressly rely on reads as follows:

30 "In such a case, even where the defendant ...(Reading to the words)... uncertain".

31 Well, exactly. That is exactly what we say. We say you have to proceed on a just and
32 reasonable estimate based upon the relevant data that you are able to get in a -- we say in a

1 proportionate manner. You are allowed, if this were the US at the certification stage, to
2 proceed on probability and inference as well as upon direct and positive proof.

3 When you explore this issue, if this is one of the issues you are going to explore with the
4 experts, by reference to their common experts' report, you will see that that is exactly what
5 they are proposing to do. Exactly.

6 We say, to take an example, that sector-by-sector, such as addressed at this stage by Dr.
7 Veljanovski is a just and reasonable approach, just as *Bigelow v RKO* suggest you should do,
8 and what we say is that we cannot expect too much at this stage. It is not the function of this
9 hearing, in our respectful submission, to expect there to have been a fully worked-out expert
10 report that shows in great detail how, precisely how, even a sector-by-sector will be taken.
11 That is because at the CPO stage it is sufficient to have generalised evidence of pass-through
12 to mount a plausible case. I am going to come back to that phrase because it comes out of one
13 of the US cases. Generalised evidence of pass-through so as to amount to a plausible case
14 overall for the aggregate number, and one shouldn't, in our submission, think that
15 pre-certification, when doubtless in most cases the budget constraints are going to be tight,
16 that the experts should have been expected to have gone into the N-th degree about exactly
17 what evidence can be obtained, exactly how it will be analysed --

18 THE PRESIDENT: I am sorry to interrupt you, but that is why I wanted to suggest that you look at
19 what is said on that very point by the Supreme Court of Canada in the case you mentioned.
20 Perhaps it would be worth looking at, because it is dealing with the point you are making it is
21 the case you cite, which is the Microsoft case which you refer to at page 201 of this helpful
22 survey of other jurisdictions, you cite it extensively, but there is one paragraph in it which
23 does seem to summarise the point, and so perhaps we should look at that.

24 MR. HARRIS: 201?

25 THE PRESIDENT: In 201, that is where you refer to the Microsoft case. On page 201, if we
26 actually look at the case --

27 MR. HARRIS: It is tab 75, which is --

28 THE PRESIDENT: Bundle D8, isn't it?

29 MR. HARRIS: Yes.

30 THE PRESIDENT: I thought it was tab 83.

31 MR. HARRIS: You are right, sir. I apologise, sir. That is D8, tab 83. Sir, I rely on this case --

32 THE PRESIDENT: Well, I understand that, but if you look at paragraph 118 where Justice
33 Rothstein, speaking for the court, says:

1 "In my view the expert methodology must be sufficiently credible or plausible to
2 establish some basis in fact for the commonality requirement. This means that the
3 methodology must offer a realistic prospect of establishing loss on a class-wide basis so
4 that if the overcharge is eventually established at the trial of the common issues, there is
5 a means by which to demonstrate that it is common to the class, ie passing-on has
6 occurred ...(Reading to the words)... applied".

7 That seems to us it be a good starting point. Is that something you would accept?

8 MR. HARRIS: Sir, I don't resile from that at all. What we say is that we do have -- and you will be
9 -- you have seen the common issues report, I have already opened to some extent in
10 summarising what that says, and we will in due course, perhaps this afternoon, have Dr.
11 Veljanovski, but we say absolutely, we have a sufficiently credible --

12 THE PRESIDENT: But you accept the -- understood -- but you accept that is a fair sort of starting
13 point?

14 MR. HARRIS: I accept that at this stage you are entitled to make reasonable enquiries into the
15 realistic methodology and, not limited to that but whether it can be grounded in the particular
16 facts of this case, and whether there is some evidence of the availability of some data to which
17 the methodology is to be applied. I have no difficulty with any of that. Those are absolutely
18 issues that are talked about in the common experts' report, so we have got our overall theory
19 about the damages, we have got our overall economic theory that doubtless will not come out
20 at any length today about economic theory of the pass-through which of course has been
21 advanced by Dr. Neils for Mastercard as well, and then we have got how to apply it to the
22 particular facts of this case in question, well, we have got the proposal about sectorial analysis
23 and by reference not just to, if have you like, macro sector studies, like grocery enquiries, or
24 petrol enquiries, or some other enquiry, but also by reference to the specific cases that have
25 proceeded, are proceeding and are about to proceed, and let's not forget this point, disclosure
26 orders as well, so in the scooters case reference was made at the CPO stage to disclosure, even
27 pre-CPO, but this Tribunal has, you know, obvious and active case management powers. I
28 am not talking here necessarily limited to disclosure from other live cases, although it would
29 include that, but it may be that on a proportionate and reasonable basis, and taking into
30 account, you know, as part of the proportionality analysis cost considerations, disclosure
31 could be sought from other third party sources. For instance, this may not be one that ends up
32 being a good example, but, for instance, let's say that we have got good sources of evidence
33 for, say, 90 per cent of sectors, including by reference to existing cases, sectoral studies,

1 market analysis and what have you, but then a point is taken at a later stage that, I don't know,
2 for the sake of argument, one sector of the economy, I don't know, whatever, children's
3 clothes, it doesn't really matter, it is just a hypothetical, that really isn't covered sufficiently
4 well by, say, the petrol study and the grocery study and the fact that Ocado have sued and
5 Sainsbury's have sued and it is not an HMV case so it is nothing to do with retail goods, at that
6 point, and the Tribunal says, "Well, I am just not quite satisfied enough that you are going to
7 be doing enough on a -- even a sector-by-sector analysis", at that case it may be that we have
8 to have some third party disclosure, but we are quite a long way away from there. Picking it
9 up at 118:

10 "There must be some evidence ...(Reading to the words)... to be applied".

11 Well, plainly we could get relevant data about pass-on from the business or sector in question,
12 is that potentially available? Yes. Disclosure.

13 THE PRESIDENT: That might involve significantly more third party disclosure than your
14 litigation plan envisages which, as I understood it, maybe I misread it, didn't involve third
15 party disclosure beyond what had been disclosed, or pleadings in the other actions against
16 Mastercard.

17 MR. HARRIS: Sir, may I just take an instruction on that point? (Pause).

18 Well, sir, there are a number of responses to that. The first is that we have contemplated
19 already some third party disclosure. Secondly, it is potentially a moving target because it is
20 dealt with to some extent in the litigation plan by reference to, I think it is in the guide,
21 paragraph 65, where it says -- I beg your pardon -- in the litigation plan, perhaps we should
22 just turn that up so that you can see where that is.

23 Now, I have that behind tab 8F of the -- what I think is Bundle A. 8F of Bundle A so I need to
24 turn it up as well. In particular, if you were to turn it up --

25 THE PRESIDENT: Page 17.

26 MR. HARRIS: Page 17, so at the bottom of page 16:

27 "Disclosure by the proposed class representative".

28 Well that doesn't detain us:

29 "Disclosure by a non-party is contemplated ..."

30 Here already in the litigation plan:

31 "Rule 63 allows the Tribunal ...(Reading to the words)... against third parties", and (a)
32 and (b).

33 Then there are references to existing cases against Mastercard, and then at 67:

1 " ... is aware that several other claims continuing".

2 As I said earlier on in opening, there are more claims coming out on a relatively regular basis.
3 The litigation plan, as you know, sir, is a moving document. It moves with the way the
4 litigation progresses or it can do, and it certainly has to be moved in a proportionate manner,
5 so whilst I take the point, sir, that there can be, and there may need to be some non-party
6 disclosure, that may need an adjustment to the budget, but we are not there now.

7 THE PRESIDENT: But you are there in this sense, and you know that there are a limited number of
8 actions, retailers of various kinds against Mastercard, there may be a couple more coming,
9 although at some point limitation starts to kick in, as you have pointed out, and you would
10 know whether, therefore, you envisage disclosure from merchants of their data of the kind
11 that Sainsbury's had to disclose in the Sainsbury's action, and that is something one would
12 have expected you to think about at this stage. It is not as though another 300 claims against
13 Mastercard are going to be lodged by retailers from all over the place.

14 MR. HARRIS: Well, sir, yes, with respect we say that is a fair comment, and to the extent
15 necessary we have thought about that because what we do say is that if and insofar as the
16 other sources are not sufficient, which we will not know until, if we get certification, we have
17 then drawn them all in, then there is a further source, namely third party disclosure, but to
18 some extent, sir, it is, if I could put it like this, it is premature, because we don't yet know what
19 the relevant and acceptable sector-by-sector definitions will be. So -- and that is a critical
20 consideration.

21 If having assimilated market studies in groceries and petrol and other areas, and by reference
22 to disclosure in all of the live actions and the ones just started and possibly some more by the
23 time we get there in this case, it turns out that we can credibly and sensibly persuade the
24 Tribunal that that covers all relevantly described sectors, then we will not need any third party
25 disclosure. My point is now --

26 THE PRESIDENT: Well, you say -- I don't quite understand this, I am sorry. You say, "Persuade
27 the Tribunal". If you get the CPO then you go ahead and you prepare your case. The Tribunal
28 isn't going to review how well you are doing it.

29 Now, you would come to trial, and then you would have to, on the evidence you have
30 gathered, and your expert evidence, say, "This is our case and it is a plausible quantum", and
31 so on. We wouldn't be sort of constantly reviewing your expert assessment along the way.
32 You can come back and ask for more disclosure if you say -- disclosure from someone else if
33 you say you need it.

1 MR. HARRIS: Well, sir, maybe, is my answer to that, because our understanding from the rules
2 and the guidance, and I welcome this exchange because if this is not the right understanding
3 then we need to know it, is that there is -- I think it says, I haven't got my finger on the
4 paragraph number, "Very active case management", I think it is paragraph 6.7 of the guide by
5 the case management part of the Tribunal, as opposed to the trial part of the Tribunal, there
6 being a distinction between the two, I think it is paragraph 6.7, very active case management,
7 so at the moment we were, I think, proceeding on the basis that we might come along to the
8 case management side of the Tribunal, namely this Tribunal, not the trial Tribunal and be
9 saying, "Well, we have got this information, that information and the other information, we
10 propose to proceed on the basis of -- say on the basis of sectors, these are the sectors, but if the
11 Tribunal is not happy that that is sufficient, or thinks that the sector definitions are wrong, or
12 Mastercard takes issue with them, then there might be further interchange with the Tribunal".

13 THE PRESIDENT: I don't think that can work at all, otherwise -- we couldn't reach a view without
14 hearing from Mastercard and we would have adversarial argument at every stage. There is
15 case management in the sense that we will look at every request for disclosure, timetabling,
16 cost budgeting and so on, but not assessing whether your evidence stacks up.

17 MR. HARRIS: Sir, well in those circumstances, I take that point.

18 THE PRESIDENT: It would be impossible.

19 MR. HARRIS: Well, the answer, then, is that I have taken those comments on board, they, if I may
20 say, make a lot of sense, and we would therefore have to address the question of whether, on
21 our own view, there is insufficient coverage, and if we can't obtain that material from
22 non-third party disclosure, then third party disclosure will have to be the way that it goes, but
23 I don't shy away from that. I mean, I accept that insofar as there is insufficient coverage, then
24 as the case moves forward we will have to obtain that coverage with evidence. Indeed, that is
25 one of my points.

26 One of my points is we don't just have some theoretical model of 100 per cent pass-on, but we
27 are evidence-driven, and it is a very fair point, sir. I mean, ultimately up to me and my team if
28 we think we have got enough evidence, and to go about getting it. If that requires a further
29 development of paragraph 65 of the litigation plan, and then some specific applications, so be
30 it, and the litigation budget will have to be adjusted accordingly. Sir, may I just take one
31 moment?

32 THE PRESIDENT: It may be, of course, if -- what happened in Sainsbury's is the one thing we
33 have full experience of because it went through to trial -- that evidence is complicated.

1 MR. HARRIS: I accept that, sir, but, I mean, ultimately it is what it is. If there needs to be a
2 sufficient coverage of -- on a proportionate basis of pass-through then we will have to do what
3 it takes to adduce that evidence. There are going to be many parts of this case that are
4 complicated. That is one of the reasons why there is pretty fearsome looking litigation
5 budget. I mean, those are the facts of life.

6 I mean, another example which we will come on to later this morning is benefits. If relevant,
7 I could see that being all manner of detailed and complicated evidence. Sir, may I just take
8 one moment? I am being whispered at.

9 THE PRESIDENT: Of course. (Pause).

10 Mr. Harris, I have been reminded that we need to give a break to our transcriber, if you want
11 to take instruction, perhaps that is a sensible point and we will come back at five to twelve.

12 (11.48 am) (Short break)

13 (11.57 am)

14 MR. HARRIS: Sir, thank you, thank you to the shorthand writers.

15 I have three further points to make on this specific issue before moving on, with your
16 permission, to the next.

17 The first one is; could I ask you to turn up the budget itself? You will find that in Bundle C,
18 tab 6. You might want to pull it out. It is one of these folded-out documents.

19 THE PRESIDENT: Yes.

20 MR. HARRIS: For these purposes can I just draw your attention, please, to one of the central
21 columns? It is number 4, "Disclosure". One doesn't really need to look at the -- you know,
22 the breakdown, but it comes to a large figure down at the bottom.

23 THE PRESIDENT: Yes.

24 MR. HARRIS: And then the note is footnote 4 or column reference 4 halfway down between the
25 two holepunches:

26 "Disclosure -- includes... (Reading to the words)... in respect of disclosure".

27 You can see how sizeable the number is, so this is very much a matter within the
28 contemplation of the parties on the existing plan and the existing budgets, but, as I said
29 before, this is not written in stone in any event.

30 THE PRESIDENT: No. Well, the figures clearly may change, but ...

31 MR. HARRIS: But it does contemplate the very thing that we are now talking about, so that is my
32 first point. My second point --

1 THE PRESIDENT: So it contemplates -- because third party disclosure, you normally pay the costs
2 of the third parties making disclosure, don't you?

3 MR. HARRIS: Yes.

4 THE PRESIDENT: So that is what is accounted for here a bit. Is that right? It doesn't quite apart
5 that way because it looks as though -- I'm just trying to understand that -- there is no
6 allowance in disclosure for paying others outside the Applicant's legal team and, as I see it, an
7 e-disclosure provider.

8 MR. HARRIS: Well, save for the rather large figure in column sir, sir, that mops up all other costs.

9 THE PRESIDENT: Yes.

10 MR. HARRIS: But the key point, sir, is that it is plainly not written in stone, and it is sizeable and
11 it is flexible. It does contemplate third party disclosure to the extent necessary, but that then
12 takes me on to the second point, sir, which is that we were exploring before, you and I sir,
13 whether -- what if I don't have evidence that particularly gets me home in certain areas. That
14 is a matter for me, and you quite rightly pointed out it is really a matter for me, and I take that
15 point, but what is the corollary? Let's say I don't come to the Tribunal at trial, and I don't
16 satisfy you that as regards, say, some sector worth, say, 10 per cent, I mean, obviously figures
17 out of the air, that I have demonstrated to sufficiently high standard, pass-on for that sector,
18 well, that means that I don't win for that part. It doesn't mean that you don't certify now, what
19 it means is that we have got an inability to show how our aggregate damages translate
20 through to one sector of the economy on this hypothesis, and, of course, we know that we will
21 then be able to take that sector, whatever it may be, and go back it the volume of commerce
22 and say, "Okay, well, we have not proven it".

23 So, to give you an example, I mean, again, just plucking the examples from the air, let's say it
24 is -- whatever -- again, children's clothing, assume that were a relevant sector, and I haven't
25 demonstrated to the Tribunal's satisfaction at trial that I can show any pass-on for that sector,
26 for the sake of argument, then we know who the retailers are that are being -- merchants -- are
27 who are children's clothing merchants, because we get a list of the people who -- from
28 Mastercard, or we have already got a list of the people from Mastercard --

29 MR. HOSKINS: No you haven't got a list because we weren't able to give you one which was
30 sufficiently detailed.

31 MR. HARRIS: Well, sir, again, we don't need to descend, necessarily, into --

32 THE PRESIDENT: Yes. You say you take those purposes --

1 MR. HARRIS: You then take out the people from that sector and the VOC is diminished
2 accordingly, so my second response is; obviously I am going to do what I and my team
3 consider to be sufficient to demonstrate to the trial Tribunal that I have got X amount of
4 pass-on for relevant sectors, in the manner that we have already discussed, but what happens
5 if I don't? It doesn't mean that the claim fails in limine, what it means is that I haven't
6 established one part for one sector, so that gets taken out. So that is not a fatal flaw for this
7 stage.

8 Then the third point, sir, which I am going to develop in a minute, after I have shown you just
9 one more case in the annex, is that have you hypothesised with me a moment ago that we have
10 seen, I think your phrase was, and understandably, we have seen, you know, what pass-on
11 looks through in Sainsbury's, I paraphrase, but we don't accept, certainly not without
12 argument, that that is the, if you like, litmus test or standard for what we need to show for
13 pass-on on this claim. I am going to come to the relevant paragraphs in a minute but as you
14 well know sir, that was a case in which a distinct point was made about what the size and the
15 nature of the obstacles were for establishing pass-on "As a defence". That is not me. I am not
16 a defendant. I will show you those passages in a minute, but that is another point, you see.
17 So, sir, when we talk about and we hypothesise and speculate at this stage about, well, how
18 much may we need from what sectors and how much may it cost and how invasive it may be
19 and how it may be taken forward at trial, I don't accept that we necessarily have to do
20 everything that was done in the X weeks of Sainsbury's trial, because that is not the task that
21 faces me, even on the Sainsbury's judgment, but just before I come back to Sainsbury's,
22 because other criticisms are levelled against me in this case by reference to Sainsbury's and I
23 want to address them, but just before I do that, if you still have the annex to hand --

24 THE PRESIDENT: Sorry, the annex?

25 MR. HARRIS: Annex to our reply, Bundle C, tab 3 towards the back, and here I am in the United
26 States section, and I just wanted to draw your attention to the paragraph 213 case, that is the
27 polyurethane foam antitrust litigation which there has been a fair bit around the world, and we
28 cite from that case in 213, so taking it over the page to the top of 207:

29 "The court observed amongst other things ...(Reading to the words)... in the amount of that
30 pass-through", in other words, one of the points that I have just been making.

31 This is talking about how does one go about assessing claims for certification. So at this
32 stage, generalised evidence of overcharge pass-through, and it doesn't defeat it because there
33 might be instances in which Direct Purchaser failed to pass on an amount, et cetera, and it

1 goes on under the heading -- well, you can read for yourself if needs be, sir, members of the
2 Tribunal, the indented citation about generalised evidence.

3 THE PRESIDENT: Shall we just read that?

4 MR. HARRIS: Yes, sir, if you wouldn't mind, yes. (Pause).

5 THE PRESIDENT: Yes.

6 MR. HARRIS: So, sir, I am going to deal with some of the more detailed criticisms levelled against
7 us by reference to Sainsbury's, and in that regard could I invite you, please, to turn it up? I
8 have a separate copy but you will find it in D4, tab 49. In the first instance, can I just remind
9 you, I expect you, sir, and members of the Tribunal, are very familiar with this, but just so that
10 we can locate it directly, paragraph 484 of the judgment of the Tribunal, that is on internal
11 page 269 of the judgment.

12 Now, sir, 484 makes the following points --

13 THE PRESIDENT: Just one moment.

14 MR. HARRIS: I beg your pardon.

15 THE PRESIDENT: Page 269 internally, yes?

16 MR. HARRIS: Yes.

17 THE PRESIDENT: Yes.

18 MR. HARRIS: Just with an eye on the clock for time constraint reasons I am not going to read out
19 all of 484. I don't shy away from anything, I just want to draw your attention to subparagraph
20 4.

21 MR. HOSKINS: I would ask you to read 3, sorry, before we come to 4. Thank you. 484 sub 3.

22 MR. HARRIS: Then picking it up at 4, this is where the Tribunal sets out, in the sentence above the
23 (i):

24 "We consider that the legal definition of a passed on cost differs from that of an
25 economist in two respects (i) whereas an economist might well ...(Reading to the
26 words)... the pass-on defence ..."

27 As a legal concept:

28 " ... is only concerned ...(Reading to the words)... customers".

29 Then secondly:

30 "The increase in price must be causally ...(Reading to the words)... demonstrably so".

31 So Mastercard were running a case about pass-on and they were met with the judgment that
32 is, as a matter of law, given that you are a defendant, given that you are trying to -- if this is
33 not a too unfair way of putting it -- shuffle off responsibility by saying that the damages

1 weren't suffered by you, Sainsbury's, they were suffered by your customers, you, the
2 defendant, have to meet this legal definition and picking it up, then, in 5, it says:

3 "Given these factors we consider that the pass-on 'defence' ..."

4 And that is very deliberate that that is in quotation marks, it is a legal concept here:

5 " ... were only to succeed ...(Reading to the words)... on this ground".

6 So there are a number of points just to draw out of this. First of all, it is legal, second of all it
7 is for a defendant and not --

8 THE PRESIDENT: But hang on. This was a claim by Sainsbury's. Mastercard were asserting
9 pass-on, so the burden was on Mastercard in that case to make the allegation that there was
10 pass-on, the burden was on them. In this case you are asserting pass-on as part of your claim
11 so the burden is on you. Is that not right? When you say, "The defendant is not me", drawing
12 a distinction, here the burden to show pass-through, it is part of your claim, it is indeed, the
13 foundation of your claim, isn't it?

14 MR. HARRIS: Yes, but as I am about to come on to, sir, there is a further point in this judgment
15 that they did accept that there was pass-on through to consumers on the facts of this case as to
16 50 per cent.

17 THE PRESIDENT: Yes.

18 MR. HARRIS: I am simply making this point, sir, that what is strictly found by Sainsbury's -- I
19 don't put it any higher than this, I am saying there is still a live argument about the nature of
20 the test that I will have to meet in order to satisfy this Tribunal as a claimant that I have a good
21 case on pass-on, and that is not dealt with in this case. I take your point about burden, fair
22 point, but that question is not dealt with in this case because that question didn't arise.

23 THE PRESIDENT: But clearly, the burden is on you in this case, in our case.

24 MR. HARRIS: Yes, but that is a burden point and I don't shy away from that, but what I will say,
25 sir, is, of course, that one of the two critical elements about the case that Mastercard had to
26 overcome as regards its defence in that particular Sainsbury's claim was at sub 5:

27 "Were only to succeed ...(Reading to the words)... downstream of the claimants".

28 Of course, Mastercard didn't do that in their case, but the very fact that I am here shows that
29 we can do that in this case, so there are differences. That is simply my point. It is not -- we
30 wouldn't accept for today's purposes that there is some repeat Sainsbury's exercise that I have
31 to do in order to satisfy my burden on pass-on in my case when I am not in their situation, and
32 on top of that, and as we know from Mastercard's submissions that they have made for
33 permission to appeal, there is the further point in Sainsbury's which is at paragraph 525 which

1 is that that Tribunal -- I am picking it up here -- as I expect you are familiar with, sir, and
2 members of the Tribunal, this is in the section considering how to calculate the losses, and in
3 particular what happened as regards interest, and (i) on internal page 285:

4 "Prima facie, Sainsbury's would have sought to pass on ...(Reading to the words)...
5 customers".

6 Well, we agree:

7 "Although Sainsbury's would not have been unconstrained ...(Reading to the words)...
8 for the ..." and then it is the legal reasons that I just took you to.

9 So what I say is that this is still quite a complicated field. This was a different case being
10 presented by a different person in a different way, and unable to advance, possibly for
11 presentational reasons, one doesn't know, one of the two critical points that I can absolutely
12 advance, namely that I represent past victims to whom the loss was passed on.

13 Then there is a little bit, we say, of a storm in a teacup about what Mastercard has done in its
14 pleadings in other cases, and that is why they put in their supplemental skeleton. I am going
15 to take you to one or two of the annexes to that supplementary skeleton in just a moment, but
16 what I say in overview is that the important points to emerge are that Mastercard, from those
17 pleadings and the way it is proceeding in these other retailer claims, clearly does think, and
18 has adduced evidence to show very high if not complete pass-on, to none other than the very
19 class of consumers who I propose to represent if I get permission, and Mastercard has set out
20 the stall across a variety of different merchants. Now, they have only annexed a few
21 examples, but we know they are being sued in other respects. One imagines that they have
22 produced what they think are the best examples, but what we can see is that there are different
23 merchants where they are running --

24 THE PRESIDENT: You are referring now to what?

25 MR. HARRIS: Sir, I am now in -- I will, in a minute, take you to some of the extracts attached to
26 the supplemental skeleton of Mr. Hoskins.

27 THE PRESIDENT: Yes.

28 MR. HARRIS: So that is where you need to locate yourself.

29 THE PRESIDENT: Should we put away Sainsbury's?

30 MR. HARRIS: Yes. I am done with Sainsbury's thank you. Yes.

31 THE PRESIDENT: I expect we will come back do it at some point.

32 The only point I was making was a general one, without looking at detailed evidence, maybe
33 you get to 50 per cent, but for the Tribunal to consider whether there was pass-on and how

1 much, and I think you have accepted it is not going to be 100 per cent everywhere, and it will
2 vary, there is quite a lot of evidence that was looked at. That is a general point, and therefore,
3 if you are going to get disclosure, third party disclosure from other merchants, that is
4 potentially quite wide-ranging. They are unlikely -- they may do -- to have a memorandum
5 saying, "The Bank is charging us a merchant service charge of X on credit card purchases", or
6 specifically Mastercard purchases, so, "We will increase all our prices by X, or half X, or
7 whatever, 30 per cent of X". If you do, then that is nice and simple, but if you don't, then one
8 gets into the complex questions of how -- what basis can the expert determine the extent of
9 pass-through.

10 MR. HARRIS: Well, yes, sir, potentially it is quite complex, but the fact that potentially, in a large
11 and important action, some parts of the evidence are quite complex, may even be quite costly,
12 that is not a barrier to certification in our respectful submission.

13 THE PRESIDENT: There does come a point of proportionality, does there not, when considering
14 whether a case ought to be -- proceed as a collective action when one thinks of what it is going
15 to cost and what the individual consumers might recover.

16 MR. HARRIS: Well, sir, no. I wouldn't accept that for this stage, not put in that way, because it is
17 up to us, we respectfully contend, to put forward a coherent and well-funded plan with
18 budget, and we say that we have done that and we can do that. We can move forward with
19 that if certified. It is flexible. It is large, and I don't accept that just because it might be costly
20 and difficult including across different retailers and different sectors, that would be a reason
21 for not allowing us to proceed. What it might be, as I said before, is that there might come --
22 obviously we hope this will never happen but it might come to the point where I am not able
23 to establish my -- to the requisite standard, pass-on for a particular area activity, a sector, but
24 then as I say, that means that I -- well, hard luck me, I don't succeed on that bit of trial.

25 THE PRESIDENT: Well, I was thinking of the observation made in the guide, that where the
26 estimated costs are so great compared to the likely award.

27 MR. HARRIS: Ah yes, but here we are talking -- I will take that one on the chin, sir, because here
28 the aggregate award is, we say, billions, and then there is more billions because of interest. I
29 am going to come on to that.

30 THE PRESIDENT: You say the actual individual -- the amount the actual individuals get is
31 irrelevant?

1 MR. HARRIS: Oh, absolutely because the whole thesis of this claim is that I am proceeding for
2 aggregate award across the class as a whole, and there, although my budget is significant, it is
3 miniscule compared to the damages that I am hoping to obtain on behalf of the clients.
4 So, just whilst we are in -- before I have a couple of quick looks at the annexures to Mr.
5 Hoskins' supplemental skeleton, it is worth pointing out that he has annexed people in, prima
6 facie, different sectors, and yet a similar case is run by Mastercard, so he has got a music
7 retailer which I think might be an administration, and a supermarket.

8 THE PRESIDENT: This is the supplemental skeleton?

9 MR. HARRIS: Yes.

10 THE PRESIDENT: Just a moment. (Pause).

11 Tab 15 of Bundle C.

12 MR. HARRIS: That may be right sir. I had mine separately because it came late in the day, but
13 certainly the skeleton is in my -- my version of tab 15 doesn't have is the annexes that came
14 with it.

15 THE PRESIDENT: Just one moment. (Pause).

16 We don't have the annexes.

17 MR. HARRIS: D12.

18 MR. HOSKINS: I think, sir, we provided the supplemental skeleton, we appended the short
19 relevant bits and we said we would put the whole documents this Bundle D12 so I think you
20 have the whole documents in D12, so that is why it is quite long.

21 THE PRESIDENT: So which tab is it?

22 MR. HARRIS: I am being told it is 143.

23 THE PRESIDENT: It is the full pleading so it is the whole of D12. Each one is a different case.
24 We will sort that out over lunch, if we have got it.

25 MR. HARRIS: So, I can take -- so if you have 143, what was annexed is just the passing-on bit, and
26 you will find that on paragraph 54 within the Ocado defence.

27 THE PRESIDENT: So 143 is the Ocado claim against Mastercard.

28 MR. HARRIS: Yes.

29 THE PRESIDENT: This is D12, 143.

30 MR. HARRIS: If you were to turn that up, please, in 143, internal page -- bundle page 4679 which
31 is paragraph 54.

32 THE PRESIDENT: Yes. Paragraph 54.

1 MR. HARRIS: Yes. So what you will see here, and this is the supermarket example, obviously,
2 Ocado, in 54 effectively denying the sufferance of any loss and stating that --

3 THE PRESIDENT: Well, any loss to the extent to which any overcharge was passed on.

4 MR. HARRIS: Yes. I was about to read it all:

5 " ... suffered any loss to the extent to which ...(Reading to the words)... passed on".

6 So it is putting this case, that type of supermarket merchant to proof of pass-on, and then they
7 go on even further to say:

8 "It is for the claimants to establish ..."

9 But then what is telling, and I accept that, and that is a duplicated, if you like, formula or
10 phraseology for the other extracts that we have been provided with, but it is telling that in 55
11 what it goes on to do is draw attention to the case that Mastercard will be running in
12 substance:

13 "In this regard Mastercard refers to the following ..."

14 And then, if you were to read -- perhaps if you could just cast your eye over A3(g).

15 THE PRESIDENT: Yes. Why don't we read 55 quickly? (Pause).

16 MR. HOSKINS: My Lord, it is stating the obvious, but if you could read 56 as well please?

17 THE PRESIDENT: Yes.

18 MR. HARRIS: I am going to come in a moment to 57, but for the moment 55, and I am including
19 56, is a case that Mastercard advances in that case, as they did in Sainsbury's, including, at the
20 end of 55(a) that:

21 "Economic theory states that in these circumstances ...(Reading to the words)... to
22 consumers".

23 So obviously there is a battleground, but Mastercard's position, even on its economic expert
24 evidence, as being a complete or high level of pass-on, and then it relies on these other
25 documents and I pause to note, showing a remarkable degree of similarity to the sorts of
26 documents to which attention is drawn in the common experts' report on my side, that would
27 indicate a high or very high, if not complete level of pass-on, so, for example, drawing
28 analogies with tax and what have you.

29 So -- and in a minute I am going to take you to the experts' reports, extracts of the experts'
30 reports from Sainsbury's where the experts retained by Mastercard itself advanced the very
31 proposition of -- I will not paraphrase it -- but pass-on in that sector to none other than the
32 people I hope to represent, but just before I leave Ocado can I just draw your attention to it
33 paragraph 57 as well? It is pleaded by Mastercard:

1 "Any loss which the claimant ...(Reading to the words)... to customers", ie to my
2 proposed clients.

3 Then there is a legal argument about some litigation point, but, sir, the point there is that
4 Mastercard's case is, as well as these generic forms of evidence and the expert evidence that
5 we will see in a minute, all pointing towards a positive case of full, if not full then large
6 degree of pass-on, but it also includes the fact that there was no practical hindrance, and I am
7 quoting from their own pleading, to, in this case, a supermarket claimant, from passing on the
8 entirety of the MSC, so that is consistent, obviously, with a case which is currently advanced
9 at this preliminary and plausibility stage by the joint common experts instructed on behalf of
10 Mr. Merricks it might even be 100 per cent. That is consistent with these pleadings, and then
11 if one were -- I presume it is -- somebody could find the record shop one which is tab 145, so
12 this was my point about how Mastercard has, itself, put forward extracts from a different
13 sector, namely record retailers, so HMV, and then basically there is a -- in the first instance, I
14 think, yes, you just need to look at the Re-Amended Defence and then you will find it within
15 the document, it is paragraph 117 under a heading, "Pass-on", which is internal page 53 or
16 bundle page 4749.

17 One doesn't need to be detained by this. I am very conscious of the passage of time. This is a
18 similar sort of approach, effectively put them to proof but then go on to advance a positive
19 case over the page at 120 about significant degree of pass-on, and indeed the documents are
20 the same documents.

21 THE PRESIDENT: Just one second.

22 MR. HARRIS: I beg your pardon. (Pause).

23 It is helpfully pointed out by those instructing me that the same point about no practical
24 hindrance to complete pass-on is in the record shop case at 121. In other words it is the same
25 approach.

26 THE PRESIDENT: Although if they didn't pass on, whether they could have or not, if they didn't,
27 then the consumers in your class to that extent suffered no loss.

28 MR. HARRIS: Sir, I think -- I am simply -- perhaps I have misunderstood you sir. I am simply
29 saying that Mastercard's case is that there was no practical hindrance to the record shop
30 claimants passing on the MSC, all of it, to whom -- to the people I propose to represent.

31 THE PRESIDENT: Well, yes. They say that, but in the context of then saying that the claimants
32 may not have passed on the full amount. If they didn't, they could have.

1 MR. HARRIS: Yes, but it is a question of -- we say at this stage it is a question of the plausibility of
2 whether or not there could have been either full or a high degree or whatever degree of
3 pass-on, and what Mastercard's case has been is that it could have done so in its entirety, and
4 that it is not relevant to my point, the fact that some particular claimant chose not to do so.
5 Perhaps the point that becomes even clearer, sir, if you see in our Claim Form, so either in the
6 core bundle at tab 1 or in Bundle A, probably tab 1 --

7 THE PRESIDENT: Do you want us to keep out D12?

8 MR. HARRIS: No, sir.

9 Sir, I am just invited to put that last point in a slightly different way.

10 THE PRESIDENT: Yes.

11 MR. HARRIS: The relevance of Mastercard's own case being that there is no practical hindrance to
12 complete pass-on is that we say that it is plausible -- it lends significant weight for the
13 purposes of today at any rate to our proposition that we will be able to establish that there has
14 been complete pass-on, or, at any rate, if not complete then very high. Mastercard are
15 themselves saying that there is no practical hindrance to that. It is my job to prove, if I can,
16 that that is what happened. That is how that point assists us for today.

17 THE PRESIDENT: Yes.

18 MR. HARRIS: I am grateful.

19 Then I said I would take you to the experts' report as well, and they have been inserted now at
20 tab D12, and you will find that -- oh, I am very sorry, I just put that -- I am sorry, I am finding
21 it a bit difficult.

22 THE PRESIDENT: The experts' report?

23 MR. HARRIS: I am very sorry, D12 towards the back, 160. I feel suitably chastened by not
24 knowing my own bundles.

25 So, this is an extract, if you turn in tab 160, to a pass-on analysis put in on behalf of
26 Mastercard by Dr. Gunnar Niels, well-known economist to this Tribunal. It invites -- and it is
27 quite a short extract, and I would invite the Tribunal's own time, just having regard to the few
28 pages that there are and the time available to me I just want to --

29 THE PRESIDENT: As I recall the Tribunal having considered this, heard Dr. Niels cross-examined
30 and heard full argument, did not find this persuasive.

31 MR. HARRIS: Well, sir, the --

32 THE PRESIDENT: What are you saying nonetheless we should find it persuasive?

1 MR. HARRIS: No. What I am saying, sir, a critical point for today's purposes; is there a plausible
2 case about pass-on and at a rather high level.

3 THE PRESIDENT: Yes.

4 MR. HARRIS: What you are met with today is a singular convergence of views between the two
5 parties before you about the plausibility of at least at the economic level a high degree, if not
6 complete pass-on, at least within some sectors.

7 THE PRESIDENT: Yes.

8 MR. HARRIS: It may be that I therefore don't need to --

9 THE PRESIDENT: But this isn't the view of the party, this is the view of an independent expert
10 which the Tribunal --

11 MR. HARRIS: That is not quite right, sir. The Tribunal didn't accept for the purposes of the legal
12 defence of pass-on that which Mastercard had made the relevant burden, which largely
13 involved looking at, if you like, more granular details of precisely how costs were or were not
14 passed on and how Sainsbury's put its budget together and made profits or didn't make profits,
15 et cetera, but that is not the test. Later on my submission will be that that is not necessarily
16 the test that confronts me, the Sainsbury's test shall and what is relevant for today's purposes
17 is that for the purposes of a legal a defence of pass-on, to some extent Dr. Niels' evidence was
18 side-lined as not directly relevant to that legal test, for that case --

19 THE PRESIDENT: Well, wasn't that because it was too general, and you actually looked at what
20 happened in Sainsbury's, and when you looked into detail Mastercard couldn't discharge the
21 burden, which was on them, and which is the burden that is now on you.

22 MR. HARRIS: Yes, but sir, but in another way, it was Dr. Niels' evidence -- this is where it
23 becomes quite complicated -- that enabled the Tribunal to find with a perfect degree of
24 satisfaction that there was, in fact, 50 per cent pass-on in that very case for the purposes of
25 assessing damages, and, in particular, interest, so we went to that passage of that was in 525
26 of the Sainsbury's judgment which relies, inter alia, of the economic theory of pass-on that
27 was advanced by none other than Mastercard, so --

28 THE PRESIDENT: To get to 50 per cent.

29 MR. HARRIS: Yes, but my point for today is; I am not trying to -- I don't have to persuade you, sir,
30 in my respectful submission, given the way in which my common experts' report is put
31 together, that I have a plausible case of 100% pass-on across the board in every sector. Not
32 our case.

33 THE PRESIDENT: You have disavowed that.

1 MR. HARRIS: Well, it might be that that is what the evidence shows, but that is an evidence
2 question. I don't disavow it in the sense that it might be that we can show very substantial
3 pass-on in all sectors, including up to 100 per cent.

4 THE PRESIDENT: I thought you accepted that there was likely to be differences between sectors.

5 MR. HARRIS: What I accepted is that the evidence is likely to be different and that may lead to
6 different -- I am not formally disavowing a case that I might be able to prove 100 per cent
7 pass-on --

8 THE PRESIDENT: But you have to look at it --

9 MR. HARRIS: That is the point, and so the point for today by reference to this report which very
10 expressly says that, for example, in paragraph 8.9, that I set out in section 8(b) how a strong
11 economic presumption of very high pass-on is consistent with how the European
12 Commission and OFT have expressed their theories of harm from interchange fees --

13 THE PRESIDENT: All I am saying is that he says it would be very high, the Tribunal, you say,
14 looking at all the evidence, ended up with 50 per cent.

15 MR. HARRIS: Yes, but -- yes, that's right, but that is entirely consistent with the case that I have to
16 mount today, sir, about how there is a plausible approach to pass-on that includes the very
17 same economic theory that Mastercard shares and has espoused and continues to espouse.

18 THE PRESIDENT: Yes. I see.

19 MR. HARRIS: So perhaps we don't need to read it any further, but those are -- that is the case. The
20 critical point, the critical point here is that what you do not have, sir, you do not have an
21 opponent -- Mr. Hoskins does not stand up and say, "There is no coherent case of pass-on to
22 downstream consumers, what is more, here is my report from my expert that says you are not
23 going to be able to make it out, full of holes". Quite the opposite.

24 Have I got a plausible case of pass-on to my cohort class? Absolutely. Does Mastercard itself
25 believe that there is a plausible case of pass-on to downstream consumers? Absolutely. Does
26 it believe that across different types of retailers in different sectors? Absolutely. Is it, in fact,
27 trying to prove that? I accept here that I am not talking about burden of proof, but is it, in fact,
28 in the real world, mounting a substantive case in these other disparate sectors about pass-on,
29 absolutely, and does it in fact say that there is no practical hindrance to complete pass-on
30 including in different sectors? Absolutely. Add that all up, have I got a plausible case? Very
31 much so. That is what it comes down to.

1 Now, sir, I have various other topics to deal with, I am very conscious of the time, and, you
2 know, I obviously have to press on. I could see how it is -- subject to how the Tribunal wants
3 to deal with this -- possible this it will not be a clean break at, if you like, 2 o'clock for experts.

4 THE PRESIDENT: That is all right.

5 MR. HARRIS: I am very grateful.

6 On a more minor point there is a criticism levelled at my proposed experts where you are
7 potentially using an average weighted pass-on rate across different sectors, but that is a
8 meaningless criticism. "Average weighted", just means that you take account of what is
9 happening in different sectors. You mathematically put them together into one weighted
10 average, so that is --

11 THE PRESIDENT: Yes. We understand what it is.

12 MR. HARRIS: It is neither here nor there.

13 I have dealt with the point that -- well, I will move on from that.

14 Now, another point is raised by my learned friend, domestic MIFs, and I quote, "Far from
15 straightforward". We say: So what? For today's purposes, have we got this plausible case?

16 Yes. It might be far from straightforward. We don't resile --

17 THE PRESIDENT: Sorry, which point is this?

18 MR. HARRIS: This is my learned friend says that in assessing whether or not to grant a CPO you
19 should have regard to the underlying substantive merits, and in particular 95 per cent of the
20 case is, "Far from straightforward", because it relates to domestic MIFs whereas the
21 Commission decision was about cross-border MIFs most directly, and we say not a relevant
22 consideration for today because it may well be factually complex, but we simply do not
23 accept the various assertions that are made in the response document by Mastercard about
24 domestic MIFs. They say, "Oh, well, you will never be able to prove causation". We say,
25 "Well, that is what you say, but we have not had any disclosure, there is a massive
26 information asymmetry here, and we say that we will be able to establish causation and the
27 critical point today is have we established a plausible basis on the face of the Claim Form?
28 Answer, undeniably, yes, including because we rely upon plausible suggestions in the
29 decision itself.

30 If I could just take you to those briefly, so you can see in our Claim Form at tab 1 of the core
31 bundle --

32 THE PRESIDENT: Just pause a moment, Mr. Harris. (Pause).

33 Yes. Sorry.

1 MR. HARRIS: I will take this as briefly as I can sir, so plausible basis, that is the question,
2 domestic causation, we look at the Claim Form, tab 1 of the core bundle, and it is paragraph
3 76. We extract various recitals from the Commission decision from which we are following
4 on, and it is really the highlighted parts, the emboldened parts, and in the interests of time,
5 with your permission, sir, I am just going to go to those. Core bundle tab 1, paragraph 76.

6 THE PRESIDENT: Yes.

7 MR. HARRIS: As I say, in the interests -- I know that the Tribunal has had the opportunity to read
8 this, I am just going to pick on the emboldened parts because they derive, come from the
9 decision:

10 "Does it give me a plausible basis for contending domestic causation".

11 Notwithstanding the assertions that Mastercard now makes without any evidence, yes. Look
12 at the first emboldened:

13 "Moreover Mastercard's MIF ...".

14 Pausing there, that means in the context of the decision cross border, multilateral interchange
15 fee:

16 "Also acts ...(Reading to the words)... on a domestic level".

17 Well, there is a plausible basis. It goes on:

18 "By agreeing ...(Reading to the words)... as minimum starting point".

19 There is a plausible basis. Over the page, 78, paragraph 411 -- sorry, no, that is not on this
20 point, but further over the page it is 81, second sentence of the citation:

21 "Mastercard's ...(Reading to the words)... various member states".

22 I accept that is not the UK, but it is where the rest of the citation goes to:

23 "Where local members ... (Reading to the words) ... interchange fees".

24 Then under the heading at 82:

25 "From within the EC decision cross-border MIF acts as a benchmark ... (Reading to the
26 words) ... in their country".

27 It goes on at the bottom of the page:

28 "Even in countries where Mastercard's ...(Reading to the words)... domestic MIFs".

29 So that even in those countries, ie. the UK:

30 "The cross-border ... (Reading to the words) ... domestic interchange fees".

31 Then in the footnote that go with these paragraphs, we have drawn attention to the sections of
32 the General Court judgment. As you will recall, this decision was appealed to the General
33 Court, then the Court of Justice. At footnote 39 we see how the GC interpreted these recitals

1 in the decision, and if you could just alight your eyes upon the emboldened part of footnote
2 39:

3 "MIF did not only operate ...(Reading to the words)... consumers", though that is a
4 slightly different point.

5 Then at footnote 45, again, the bottom sentence of the footnote:

6 "The fact that ...(Reading to the words)... interchange fees".

7 So, what we say, very briefly, is that it is a perfectly plausible case that where you have got
8 cross-border intra-EEA MIF fallbacks they can act, and the Commission seemed to think,
9 well, very much did seem to think, that they could act as a guidance, benchmark, for that
10 floor, and that people would build on top of them, and for plausibility purposes that is fine in
11 terms of the domestic case and it is also, before I move on, worth noting that, of course, had
12 Mastercard thought that this was a really good point and we had no chance of making this
13 out, well, they could have either sought summary judgment or strike out today, but they very
14 much haven't done that. Instead, all they have done is they are trying to have their cake and
15 eat it. They are trying to conjure up the spectre of some incredibly difficult case as regards 95
16 per cent of the value of the claim, but they do so simply on the basis of assertions, no more,
17 and we don't accept that, and we have a perfectly plausible case, so that is that.

18 Limitation is rather similar. Again --

19 THE PRESIDENT: Well, limitation has been parked, I think.

20 MR. HARRIS: Well, we say -- exactly. It just simply doesn't arise today.

21 THE PRESIDENT: No it doesn't, and I think that is agreed. If that is a good objection, it only takes
22 out part of the action for the early years. It doesn't preclude a CPO.

23 MR. HARRIS: I will move on.

24 I still have a number of important topics to do. I was going to turn next to issues of
25 distribution but I certainly haven't --

26 THE PRESIDENT: On the topic you have been addressing on the domestic MIF, and that is a
27 common issue, isn't it, that applies across the class. It is one issue that affects the whole class.

28 MR. HARRIS: It is just that -- the reason I have addressed it I hope as briefly as is reasonable is that
29 Mr. Hoskins says, no, this is a distinct reason for not allowing --

30 THE PRESIDENT: Yes, no, I understand why you addressed it.

31 MR. HARRIS: I am grateful.

32 Sir, I have a number of important topics still to deal with. I am going to turn next to
33 distribution and the criticisms at that stage, but I certainly have not forgotten benefits and any

1 issues of commonality that may or may not -- or for that matter compound interest which I
2 can take more briefly, and I was going to address you again briefly on compensatory
3 principles, that will not take so long.

4 THE PRESIDENT: Well, do you want to start on distribution?

5 MR. HARRIS: Yes. I am grateful.

6 So we say that this is not a direct concern of Mastercard, first, and, secondly, it doesn't arise
7 for detailed scrutiny at this stage. That is not to say that you couldn't or shouldn't enquire into
8 plausible and reasonable amount of thought that has gone into it. I accept that, but what I am
9 saying is that we have got to put this in perspective and see how and why it is generated under
10 the statutory and rule framework.

11 In that regard can I draw your attention, please, in Bundle D1 to the rules for collective
12 actions? In particular to rule 78.3.C. This is under the heading -- notably under the heading,
13 "Authorisation of the Class Representative", so when we talk about, as I am about to show
14 you, distribution plan comes in -- tab 13 -- so this is --

15 THE PRESIDENT: 78 subrule 3?

16 MR. HARRIS: Yes. So this rule, first of all, is about authorisation of Class Representative, not
17 about, if have you like, underlying merits of the claim and, secondly, it doesn't even mention
18 distribution plans. It just doesn't mention them. What it does say is in (iii)(c):

19 "In determining whether the proposed Class Representative ...(Reading to the words)...
20 including".

21 (c):

22 "Whether the proposed ...(Reading to the words)... includes".

23 Then various different things, none of which is a distribution method.

24 Now, again, I don't want to over emphasise this, all I am saying is that it doesn't feature in the
25 primary legislation, it doesn't even feature in the secondary legislation distribution plan, it
26 does, insofar as it arises as all, come in under the heading, "Authorisation of Class
27 Representative", and then it comes in by dint of having a litigation plan as a feature of the
28 adequacy of Mr. Merricks's ability to act as a Class Representative, and even there it does not
29 specifically say, "Distribution plan". Where do we get it from then? Where we get it from is a
30 different document, namely the guide, and I get the guide in tab 14 of D1.

31 THE PRESIDENT: I think we have it loose.

32 MR. HARRIS: I once did but it seems to have walked off.

1 Where do we get the reference to the distribution plan? Well, unsurprisingly, if we turn in
2 Bundle -- well, it is internal guide number 72. For anyone who is using the bundle copy it is
3 bundle page 122. Where does it first arise? Well, I will show you the bullet points where it
4 first arises in a minute, but the heading is, "Authorisation of Class Representative", again.
5 There is no mention of it in 29 or 30. Then there are some subindents to paragraph 6.30, go
6 over the page, they mirror the paragraphs of the rules, then so the third one then is:

7 "Any plan for the collective proceedings ...(Reading to the words)... 78.3.C".

8 Then what does it actually say? It says in a bit more fleshed out detail, well, what is
9 appropriate for the plan that the proposed representative puts together to show that he is a
10 proper proposed representative, and it is only here that we come across distribution at all and
11 it does appear, obviously, but how does it appear? Final sentence of that indent at the top of
12 internal page 73:

13 "Matters that may appropriately be set out in the plan include ..."

14 And then it is the penultimate bullet. There are lots of other bullets, all of which have been
15 dealt with, and indeed, distribution has been dealt with by Mr. Merricks in his litigation plan
16 as part of whether or not he is suitable to be authorised. What does it say:

17 "If it is proposed ...(Reading to the words)... members of the class".

18 So I am not dismissing it, I am just putting it, I respectfully contend, in the proper context, and
19 then whilst we are here, because I am obviously going to be dealing with, and so will our
20 instructed experts, dealing with the question to some extent of distribution, but there is an
21 issue about timing, so my two points at the outset were; let's put it in its right perspective,
22 where does it come from, you have seen that, and then there is a question about timing and
23 who is, if you like, entitled to make a big complaint about distribution, or how does it get
24 dealt with, so whilst we are in the guide can we please turn over to paragraph 6.8(ii) on guide
25 page 83? 6.82 and 6.83, taking them at the top:

26 "Where an aggregate award of damages has been made ..."

27 I would invite you to note that. We are talking about -- the heading here being, "Distribution
28 of Damages" -- it is talking here about a situation where the award has been made:

29 "... the Tribunal will give directions ..."

30 So after it has been made, then the Tribunal will give directions as to how each class member
31 or represented person's entitlement is to be calculated:

32 "Rule 92.2 ...(Reading to the words)... wishes to make".

1 I would invite you again to note that it says, "Such as specifying a formula", so it expressly
2 contemplated that when distribution arises after an aggregate award of damages has been
3 made, then there can be a formula to quantify an individual's entitlement to various other
4 things.

5 Skipping down:

6 "The Tribunal will expect ..."

7 So that is future, future tense meaning after the aggregate award has been arrived at:

8 " ... proposal or appropriate directions".

9 Then it goes on in 6.83:

10 "The question of ...(Reading to the words)... typically ..."

11 Again, worth emphasising:

12 " ... typically ...(Reading to the words)... argument".

13 So is the context, therefore, is as follows; it is not a primary concern, it is not even a secondary
14 concern, it does feature as a bullet point in the tertiary source so I am not dismissing it
15 altogether, but for whom is it a concern and when? Typically it is not a concern for
16 Mastercard at all, and when is it a concern? It is principally a concern as between the
17 Tribunal, if you like, as protector of interest for the class members at a later stage.

18 THE PRESIDENT: Well, I see all that, nonetheless we will have to, if a CPO is made, and in any
19 case where it is made, eventually, have to give directions for distribution, and if it appears at
20 the outset that there is no methodology that can produce fair distribution, and, therefore,
21 proper compensation, then that is something that must be relevant, surely.

22 MR. HARRIS: I agree, sir.

23 THE PRESIDENT: If one says; well, there will be a formula that details -- one can see there will be
24 a formula, everyone can understand that a formula will be arrived at but we can't work out the
25 exact formula today, that may be good enough, then one can have a discussion later if the
26 action succeeds, what it should be, but if -- and that is what is being said here, is that it is
27 impossible, is I think the word used, that any fair method -- now, if that is right that must be
28 something, surely, we can think about at this point.

29 MR. HARRIS: Yes. I agree.

30 THE PRESIDENT: And if we can think about it at this point, then it is right that it is something that
31 Mastercard can address us on.

32 MR. HARRIS: I don't demur from any of that, sir.

33 THE PRESIDENT: I think that is the level at which it arises.

1 MR. HARRIS: A very high level, sir, so we have got to bear in mind that effectively Mastercard, on
2 that basis, has to be able to establish that there is just simply no thought gone into it, and/or
3 insofar as there has been any thought gone into it it is hopeless.

4 THE PRESIDENT: Well, they don't establish no thought has gone into it, they have to establish
5 that no method has been proposed, or suggested, that makes any sense.

6 MR. HARRIS: I will take that.

7 THE PRESIDENT: Whether a lot of thought has gone into it or not.

8 MR. HARRIS: Absolutely. I will take that, sir. We say it is just wrong on its facts, first of all,
9 considerable thought has gone into it, and a proposal at this stage has been prepared for the
10 annualised distribution to class members for the years that they are in the class, so it is simply
11 wrong to say that there is no method of distribution at all.

12 THE PRESIDENT: Well, that is the method that is being proposed. I think that is the --

13 MR. HARRIS: But critically, but critically, that is the method that has been put forward at this
14 stage, bearing in mind where we are with the action at this stage, and what don't we know at
15 this stage? We don't know what the aggregate award of damages will be. We don't know
16 exactly what the size of the class will be, for instance, to take the most obvious example, who
17 opts in and who opts out, and, therefore, we don't know to what extent it will be proportionate
18 to have a more nuanced, or more detailed and/or more complex method of distribution to
19 people within the class, and it is simply not fair, in our respectful submission, to expect us to
20 be putting forward much more detailed methods of distribution at this stage when we don't
21 have regard to the relevant parameters.

22 THE PRESIDENT: All we want to do is to understand what are the possible methods. We have
23 had one proposed, which is take the total number in the class each year, total loss, as I
24 understand it, each year, divide one by the other.

25 MR. HARRIS: That would be one method.

26 THE PRESIDENT: That is the only method that has been put forward.

27 MR. HARRIS: That is the only method that has been put forward now at this early stage, but --

28 THE PRESIDENT: What other methods -- you say a lot of thought has gone into it, a lot of
29 discussion. What other methods might there be? It may be you can say that there are these
30 three possible methods, each of them would work and make sense, we don't have to finally
31 decide which one, but at least we can then see what the choice might be. At the moment, we
32 have got just that one proposal and whatever thought has gone into it, we have not heard
33 anything else.

1 MR. HARRIS: No, but, sir, perhaps after the short adjournment I can address you on the -- on any
2 more possible specifics, but I can introduce it in this way before we take -- if this is what the
3 Tribunal wishes to do -- take the short adjournment, that we have hired very experienced and
4 very professional Claims Administrators who have got a lot of practice of doing this in the
5 States, in consumer class actions, and there are more nuanced ways in which you can seek to
6 divide up aggregate damages pots than simply annualised per capita bases, but the critical
7 point, sir, is that two things: Firstly, what we have been told is that every single time that you
8 have put forward even what perhaps to you and I and people in this room might appear to be a
9 fairly mundane, relatively easy hurdle to overcome, every single time you put forward
10 something else, especially if it is asking for any sort of data, or input of that kind, what you
11 end up doing is reducing the amount of the damages that you get, reducing the amount of the
12 damages that you get that then get distributed. People don't come forward and claim, so one
13 always has to be extremely careful to make sure that the distribution method fairly balances
14 against the need for people actually to come forward and make the claim, because the last
15 thing we want is a massive pot of undistributed damages. Mr. Merricks is not here to obtain --
16 and no matter what my learned friends say --

17 THE PRESIDENT: Of course we accept the method has to be one that is practicable for consumers
18 to apply, and it does not impose such obstacles that nobody is going to go to the trouble of
19 meeting it.

20 MR. HARRIS: So, for instance --

21 THE PRESIDENT: It does not answer the point of -- is there any other method and what is it? You
22 say every other method meets that objection and this is why this is the only method. I don't
23 know if that is your case. We just don't know at the moment but I want to know. You think
24 about that, because you say a lot of thought has gone into it, and if there are other methods
25 that might work, you can explain them to us. At the moment, as I say, there is only one game
26 in town which has been the one that you have summarised.

27 MR. HARRIS: Sir, I will address you further on that.

28 THE PRESIDENT: That, obviously, has problems.

29 MR. HARRIS: Sir, I will address you further on that but I would just like to leave you, if I may,
30 with the thought that to some extent we don't know either. You say, well, we don't know, to
31 some extent we don't either because the amount of extra effort that you -- and complexity that
32 you introduce, also introduces a further degree of cost. Every single time, for example, you
33 have to communicate with a class this large on a bespoke level, it is hideously expensive, and

1 so if there were to be a more nuanced, or potentially more individualised approach to, for
2 example, the level of spend, not by reference to receipts, I mean that is obviously absurd, but,
3 for example, income brackets, then to what extent -- the question arises to what extent do you
4 make people then prove that they are within this income bracket or that income bracket, so
5 you could have graduated levels of per capita annualised distribution, so there is another
6 possibility, but we are acutely conscious, particularly because we have hired these
7 professionals who say to us, "Every single time you do that you cause the actual distribution
8 to plummet", so those are considerations that weigh heavily in our mind.

9 THE PRESIDENT: Yes. Thank you. We'll say 2.05 pm.

10 (1.05 pm) (Luncheon adjournment)

11 (2.08 pm)

12 THE PRESIDENT: Yes, Mr. Harris?

13 MR. HARRIS: Good afternoon, sir, members of the Tribunal.

14 Sir, I was addressing you on the methods of distribution, and at the moment I am going to take
15 you to some more specific matter that have been considered, so I will address that in terms,
16 but just before I get there, I would just like to remind the Tribunal of the stage at which we
17 talk about distribution, not back by reference to the rules, I have made that point, but just to
18 remind the Tribunal that we only talk about distribution when we have already reached an
19 aggregate award. An aggregate award has been given, so the justice of the case is that the
20 class as a whole has suffered is that amount in aggregate, and we are asking is ourselves the
21 next question, as a matter of justice, how do I hand it out? There are questions of fairness
22 there and justice and proportionality, and so the foundational point, sir, is: is it better to have
23 what may be a fairly rough and ready means of distribution which, in part, reflects the fact
24 that there is definitely not individualised assessment of loss, or is it better to have the other
25 outcome, which is the one proffered by Mastercard, which is: oh well, there are so many
26 difficulties with handing it out on anything resembling a compensatory basis that you
27 shouldn't have any CPO at all, therefore no aggregate damages, therefore no justice at all.
28 So we have got, sir, again, it is not just a question of putting it in its context by reference to the
29 rules, the guidance and what have you, but it is also a question of putting it in context by
30 reference to what is better, to have rough and ready, even if it is potentially very rough and
31 ready, or nothing at all?

32 THE PRESIDENT: Yes.

1 MR. HARRIS: The second point is that we have put forward, at this stage, annualised distribution
2 method on a per capita basis, but it could have been even more rough and ready than that. We
3 are not down at the very end of the spectrum. What it could have been is, 46-odd million
4 claimants, whatever, 5 billion, 10 billion, 14 billion of damages, whatever the number is, and
5 then we just divide the one by the other. We have not done that. That would be the most
6 rough and ready, but even that would be better than not allowing any form of recovery at all.
7 We have gone one stage further than that. Currently, even despite the lack of information
8 about how many people there will be and exactly what we will recover, we have gone one
9 stage further and we have said, "Look, it is better to have some annualised further
10 compensatory-ness", if that is even a word, built in, than not doing that at all.

11 Again, before I turn to the other specifics to which we have given my much vaunted "Much
12 thought" I know there were one or two sniggers before lunch when I kept repeating that, but
13 before I come to them, it is also worth bearing in mind that in our definition of, "Class", we
14 have again built in some features that go to compensatory-ness, so, for instance, the over 16s
15 and for instance the three-month residency period.

16 Now, of course, I accept that they are class definition points as opposed to distribution plan
17 points, but, nevertheless, thought has been given to this.

18 Now, again, just before I come on to the specifics, can I just show you a passage in the
19 funding agreement that makes good the point that I raised before? These two points, if you
20 like, blend into one, the point that I made before about proportionality and amount to spend
21 on distribution, so if you were, please, to take Bundle A --

22 THE PRESIDENT: Funding agreement is in Bundle C. That is the one that is marked-up.

23 MR. HARRIS: It is in both.

24 THE PRESIDENT: It is, but it is marked-up with confidentiality in bundle --

25 MR. HARRIS: I see --

26 THE PRESIDENT: So I suggest you stick to Bundle C, tab 10.

27 MR. HARRIS: I am happy to do that. Bundle C, tab 8.

28 The passage that I would like to draw to your attention on this precise point, please, is
29 paragraph 2.2 which is on internal page of the document 3 -- Ms. Wakefield extremely
30 helpfully reminded me, before I start blurting it all out, perhaps I could draw your attention,
31 please, without reading it out, to (iii), 2.2(iii). (Pause).

1 THE PRESIDENT: I think it is not breaking confidentiality to say what you are directing us to is a
2 provision relating to the costs of administration of proceeds, the details of which are
3 confidential.

4 MR. HARRIS: Yes, I accept that, sir, and what you will see is, of course, how the mechanism
5 operates, and it is entirely consistent with what I was setting out before, about the
6 proportionality. More can be spent or less can be spent but it does directly depend, as well as
7 in just a general common sense and proportionality sense, on what one recovers in the first
8 place.

9 One can see the difference between the numbers. It is potentially significant. It potentially,
10 therefore, depending upon what you get in the aggregate damages, makes a great difference in
11 a manner that we are just about to look at, to the specifics of what one could do by way of
12 more detailed, complex and inevitably costly distribution, so that is why the two points, if you
13 like, start to blend into one, so that is, if you like, the framework, and it is what I was
14 submitting before, and so let me give you an example -- let me give you many examples -- of
15 what other possible conceptual forms of distribution that there may be, and they, in part,
16 depend on how much you spent on them, but in every single instance as I am about to
17 adumbrate, it also in our -- what we are being told by our experts, experienced professionals is
18 it makes a direct impact on what people then actually do.

19 So, for instance, you might say, to give one extreme example, you might say methods of
20 distribution, "Well, show up with your receipts". Plainly in the real world it is a non-starter.
21 We have considered it, sentence a non-starter it hasn't been put forward.

22 THE PRESIDENT: Yes.

23 MR. HARRIS: Let me give a more -- so what do we do instead? We maybe find a proxy for what
24 people actually spend. One example might be, well, you go to income brackets. I have
25 mentioned that one just in passing before lunch but there are different ways of assessing
26 income brackets. Does one say to the 46 million claimants, "Right, well, show me some
27 evidence of your income bracket". Well, we are being told every single time you actually ask
28 for a record or an evidence you can just forget it, so we have written that one off. We have not
29 put it forward. It does not seem to us to be realistic.

30 You might have, you might have, income brackets, if you like, self-certified or somewhere
31 between proving it and just ticking a box saying, "This is what I think". You might, therefore,
32 say, as a proxy for the amount of spend, therefore, to make it, if you like, more,
33 "Compensatory", quote-unquote, "I was in the bracket 0-10,000 in the relevant year,

1 10,000-25,000, etc, etc", and you tick, but, although that is possible, what we are being told is
2 that first of all even something as simple as that in the real world deters people, and just
3 because they are filling in forms and boxes, it might not deter a single person in this room,
4 but we are far from representative of the 46 million people whom I am proposing to represent,
5 and people have other objections just to that one, I have got a whole load of others that I am
6 going to put forward in a minute, but people have objections to putting forward what they
7 consider to be private information, especially about income levels.

8 Then there is another problem, although this is conceptually possible, and we might even
9 publicise it and distribute and notify and all the rest of it, is do you combine it with the
10 annualised, so do you say that back in 1992 were you earning between 0 and 10 or 10 and 20,
11 et cetera, and then what did you do in 1993. Again, the more times you say to somebody,
12 differentiate yourself, please, between 1992 and income level, let alone with a piece of
13 evidence, the more they fritter away, and we are acutely -- Mr. Merricks in particular feels
14 very strongly and quite rightly about this -- he is not in the business of getting an aggregate
15 damage award that represents what we say, you know, the, "Bad guys", quote-unquote, have
16 discussed, and then not distributing it, so there is income brackets as a proxy for spending
17 levels, and that is some of the problems.

18 What about a different proxy? Again, that to which we have given express consideration, a
19 proxy of annual disposable income, so we say, well, people with higher disposable incomes, I
20 mean, not totally dissimilar, of course, to income levels, although conceptually distinct,
21 again, similar problems arise. How do they tell? Can they tell for each year? What degree of
22 proof do you need? Now, we could have put that forward but what we are saying now is that
23 doesn't seem to us to be a sensible thing to be saying at this stage.

24 It might be different if we get £8 billion of damages, let's say, and then you have seen the
25 mechanism in the funding agreement, and then there is this big chunk of money to say how do
26 we distribute it, it might be that that one presents itself as more proportional and reasonable
27 than just our current annualised distribution, even bearing in mind that that is not right at the
28 base level of justified 8 billion by 46 million.

29 There are other points, specific points that we have given consideration to, and, again, we
30 were hesitant, we have not put them forward because we are hesitant about them. Why don't
31 you, perhaps, weight it by region? Some people say, and then I am not going to fall into the
32 trap of naming a region in open court, but some people in region A might be said, on
33 demographics, that you can adduce by reference to national demographics statistics, spend

1 less than people in region B, and less than in C and more than in D and what have you, and
2 then so what you then say is, well, maybe, do you combine them? Do you say, well, what is
3 your income bracket and are you uplifted or down-lifted, down -- something, by reference to
4 region A, B or C? Again, possible, but what we are told is, "Try that and you just plummet off
5 the cliff in terms of what people will actually go and claim for".

6 Another thing that you could weight it by reference to age, on the not unreasonable
7 hypothesis that younger people, say in a -- provided they are within the claimant cohort,
8 possibly, for the sake of argument, 16-21, broadly equating to broadly student-type ages, less
9 broadly in terms of their income, their disposable income and what they spend and therefore
10 what they have lost, but then, again, you have got the problems of; is it self certification or is
11 it evidence, does it deter people, and what about at the other end of the spectrum? Is it right, or
12 it could be said, if you looked at the right demographics nationally, statistically old age
13 pensioners may have a little bit, on average, less, so again, they spend less, and then it may be
14 that people in the sort of middle age bracket have got a bit more, but again, are we saying to
15 people, even if we had a great big pot of money in order to do this, you actually have to say, at
16 all, let alone for each year, that this is what you -- this is what you were, I mean, ages, you
17 wouldn't have thought that would be too difficult, not least of all because, you know, you
18 ought to be able to say, "We need your date of birth and we can work it out ourselves", but
19 that has a slightly other invidious element to it which is -- one could easily see the headlines,
20 "Ageism rife in the mass consumer claim. People aged -- whatever, 45-55 -- are going to get
21 twice as much as people 16-21".

22 Now, it may be that that is because that is more compensatory than would otherwise be, but it
23 has a negative potential impact upon the conduct of the claim, and therefore people's
24 association with it and willingness to be involved in it, and again it can have an impact upon
25 distribution. Does one say that there are other relevant, if you like, generic national features
26 like does a family with children, can it be said that, as opposed to a family without children,
27 are going to just be spending more, more of their disposable income because, as some of us
28 with children know, they tend to be quite a drain, well, yes, maybe, maybe not, but the point is
29 that these are all further, more granular methods of obtaining what might be said to be a by
30 proxy basis because actual basis is just a total non-starter more detailed distribution, and we
31 have thought about them all, and what we say at this stage is we are not willing to put them
32 forward as concrete proposals, including because we don't know yet how many people are in
33 the claim and we don't know how much we are going to get, and this can, and sensibly will be

1 done, under the direction, the express direction and control of the Tribunal at a later stage if
2 and when we get our aggregate damages award.

3 Let me give you another example. Maybe we could sensibly -- and this is another one we
4 have given serious thought to -- maybe we, as a legal team for the proposed class, we should
5 profile people. We should say, "Well, for the sake of argument, ten profiles", so there is a
6 younger aged female in this bracket, possibly who lives in this part of the country, and,
7 therefore, that person, by reference to those three factors, is going to get X, and then there is,
8 you know, possibly a male at the height of his typical, if you do this on a typical basis, earning
9 potential in another area of the country, and that person is going to get 6X, okay? And we
10 profile it, and we say, "We want you to fill in when you put in your claim, actual claim, fill in
11 enough boxes", because frankly when are they ever going to be asking for data, it is just not
12 happening, and then we say, "Right, brilliant, you didn't know it when you filled in these
13 boxes but you now get 6X and you get X".

14 All of these things are possible but they all have downsides, obvious publicity downsides and
15 obvious practicality downsides, and most of it, and I simply can't emphasise this enough,
16 falling off the cliff edge in terms of what people will actually do.

17 Another thought that we have had is about whether there should be baseline amounts,
18 possibly by reference to profiling or possibly by reference to some of these other proxies that
19 I have been talking about, so to take a random figure, a baseline amount is anybody who
20 satisfies -- and then whichever of the other boxes you say you are going to demand, will get,
21 for the sake of argument, £100, for the sake of argument, but it is open to you, and
22 particularly if we have got enough budget to deal with this, it is open to you as an individual to
23 come along and say, "Well, I am not a £100 man, I am a -- whatever -- thousand pound
24 woman", not speaking literally of course, so I am going to come along and I am going to say,
25 "Here is some evidence that takes me out of the baseline camp and therefore I want a bigger
26 figure". It goes back, it is partly like my billionaire example earlier on, but on a less extreme.
27 So all of these things have been considered and what we say is that it might be that these arise
28 at a later stage. In various of the US cases various of these things have been tried, but with
29 varying degrees of success, and it is -- well, you have heard the main point. It drops off the
30 cliff edge.

31 Another thing that has been tried in some of the US cases, and again we have given serious
32 thought to, is whether you thought say at the outset, "Okay, well, we are proposing that this
33 division or that division or these divisions -- and what we are going to do is we are going to do

1 some spot testing, some checking", and that might or might not be done. It obviously has
2 some cost implications so that goes to budget but what one can never do is anything other
3 than very sporadic spot-checking. It is just simply not realistic.

4 What one hopes is that by saying upfront, "We will be spot-checking", and in fact then doing
5 some spot-checking, that it will make people a bit more loyal and faithful to the boxes that
6 they are actually ticking, okay? In other words, it is a bit more compensatory than mere self
7 certification without doing anything at all to back it up.

8 Okay, so all of these things can happen. We have given thought to all of them. We have not
9 gone for your utter, oh, X billion divided by 46 million, that is it, we have already said
10 annualised, we think that is sensible. Other nuanced approaches are potentially capable, they
11 are all remaining actively under consideration, we have got the budgetary back-up for this, we
12 have thought about it, and most critically of all, we have got the people who know, Epiq/
13 Hilsoft, they know how this works, and we are, at all stages, vitally concerned to make sure
14 that there is, in fact, proper distribution to the maximum degree possible, and that we will not
15 be left with holding an undistributed pot.

16 So that is what I have to say, sir, about distribution. I am conscious that I have still got a few
17 important topics to deal with. They are benefits, there is a short amount I want to say on
18 compound interest and conventional principles of compensation, and that might be, then, the
19 appropriate -- one or two words of introduction -- the appropriate point at which to call
20 experts for any questioning by the Tribunal.

21 So without further ado, then, benefits.

22 Now, this is a big point by Mastercard. They effectively say: well, some people would have
23 got benefits, that means they are not common to the other people who didn't get benefits and
24 in fact some people may have so many benefits that they are not victims at all. The benefits
25 might have outweighed the losses. What is interesting is what they do is they just assert all of
26 this at this stage. There is not any evidence at all, and I will take that as my second point, but
27 my first point is there is an issue of public policy to begin with as to whether or not one even
28 takes into account what are said to be relevant countervailing benefits.

29 We don't accept without more -- without argument and therefore not for today because this
30 isn't -- there is no strike-out or preliminary issue or anything about this, it is just an assertion
31 from Mastercard in its pleading -- we don't accept without more that it is appropriate as a
32 matter of public policy for what are asserted to be these countervailing benefits necessarily to
33 be taken into account at all. We have cited in our Reply or skeleton, I think it is the Reply at

1 23, the case of *Parry v Cleaver*, we don't need to take it out because we have set out the
2 relevant passage, I think it is Lord Reid, and he simply says that is question of doing justice on
3 the facts and in the context of each particular situation and by reference to the public policies
4 that are applicable in that situation.

5 Now, it happened to be a case about some personal injury damage and whether or not a
6 benevolent fund payment should be taken into account and/or insurance policies, such as
7 pension-type insurance, and the answer was reached that some of them should and some of
8 should not. Well, that is kind of my point. We have not had a debate here. This is an issue for
9 trial and we do not -- I will come on to in a minute on how we do not accept that these arise on
10 the facts, certainly not for today, but even if they did arise we do not accept without more that
11 they should be just lopped off.

12 THE PRESIDENT: It is a bit different. That is a collateral benefit case. There is a lot of law about
13 that. What is said here is that you say that you had to pay a higher price because of a merchant
14 service charge being passed on to you, and if, for that price, those who were cardholders then,
15 as a direct result of that payment, that payment went to fund -- it is not a collateral benefit --
16 the payment actually went to fund a lower rate of interest, you should not be able to claim for
17 the payment and not what you received in return for it, so it is not collateral in the same way
18 as *Parry v Cleaver*.

19 MR. HARRIS: And the key phrase, sir, if I may say, in that point you have just put to me is, "As a
20 direct result of". One of the key phrases -- we do not accept that many of these supposed
21 countervailing benefits are as a direct result of the MIF. That is a matter that Mastercard has
22 simply asserted. We do not accept it.

23 Let me give you a good example of one where we say they will never be able to make it out. It
24 is a very key one: Lots of the so-called, "Benefits", are loyalty schemes of one type or
25 another. Take an airline miles loyalty scheme as happens to be my own case. We understand,
26 and we will endeavour to prove, if this point is pursued, that those ones are paid for by the
27 MIF. They are paid for by the company that is effectively put in for --

28 THE PRESIDENT: Loyalty schemes may be, in terms of benefits, actually relatively trivial, and
29 therefore it is written up to try and persuade you that it is worthwhile, but in terms of the
30 actual interest rate you pay on borrowing on a credit card is quite significant for those who
31 are, I think the phrase is, "Revolvers", who do not pay off their credit card balance every
32 month.

1 MR. HARRIS: Sir yes. My point, and I am going to come on to what if they are right in a minute,
2 but at the moment I am on we simply do not accept that they are right, and how can it be said
3 today for the purposes -- have I got a plausible case on my Claim Form for certification that
4 because of something that they assert, and not put forward any evidence on and I just do not
5 accept, and is bound to be complex and arguable, how can that be a basis upon which they can
6 say, as they do, "Well, you just cannot have any certification. You just can't carry on", okay?
7 So interest rates may or may not be the case. We will have to look into the causation of is it
8 right that an increased MIF allowed you to have a decreased interest rate. Maybe. Maybe
9 not, but not for today. We have not begun to get close to establishing that for today.
10 So the foundational points are highly arguable, nothing has been brought to you today by way
11 of application. "I want to establish", so might the argument go, "As a preliminary issue that I
12 have definite benefits, as a matter of public policy they should definitely be taken into
13 account, and on the evidence I can show you that they are definitely causally related to the
14 MIF and therefore -- and what is more it relates to this type of person and this type of person".
15 None of that.
16 So what happens if, notwithstanding all of those objections which we say are enough to
17 dispose of this complaint levelled at us for today, what happens if, despite all of that, there
18 still remains some aspect of the benefits that is actually proven, then our submission is that
19 you don't need to worry for today because it can be taken care of at the back end, just as we
20 were looking at, in those extracts, I think I am right in saying it was the extract in our annex to
21 the radio case, but in any event, one of the ones I read out earlier on that says, "do not worry
22 about it at the certification stage you can take care of it later on if it turns out to be made
23 good", and what we say in this case is two things. First of all, if it turns out to be made good,
24 both on the law as a matter of public policy and on the facts, then you might be able to -- you
25 might have to in those circumstances, and you would be able to if you had to, create a subclass
26 of those people for whom benefits arise versus those benefits for whom no benefits arise, and
27 that division is easy to see. It is common ground that the only people for whom benefits
28 conceivably arise are actual Mastercard holders as opposed to all the other people in the
29 proposed claimant cohort who aren't Mastercard holders, so that is not so much of a difficulty,
30 and what we say then is: well, look, in those circumstances, if, after, on this hypothesis you
31 have won the legal argument about policy and you have established all the facts, you are then
32 able to show Mastercard that there is an average benefit per member of the subclass, ie.
33 Mastercard consumer cardholder for the relevant period of whatever, call it £20 per head,

1 well, fine. That is £20 per head less out of the aggregate award for those people who, one of
2 the boxes on the form, although this one may be capable of being subject to further proof from
3 Mastercard, because they know who their Mastercard holders were, is, right, well, okay, you
4 were a Mastercard holder of the relevant type of Mastercard in that year, that year and that
5 year, and therefore you have this amount deducted from you.

6 THE PRESIDENT: Yes. That ought to be manageable --

7 MR. HARRIS: It ought to be manageable.

8 THE PRESIDENT: -- without too much expense.

9 MR. HARRIS: Exactly, sir, and that is the end, really, of this objection, and it is important to know
10 how far this objection goes, because this objection goes so far as, effectively, to say that the
11 benefits would have to be looked at on an individualised basis, so I mean, it goes as far as to
12 say, "Well, this person has got more air miles than that person, or may have had a greater
13 credit" -- taken advantage of the credit period for longer than that person.

14 That is just wrong in principle. In the same way -- we are talking here about aggregate losses
15 where you do not prove individualised loss. It would be extraordinary, and we say wrong in
16 principle, for you to allow a claim to progress, which we say you should, where you get
17 aggregated damages at the front end, if you like, but then say, "Oh no, well, when it comes to
18 knocking bits off, that all has to be done on a purely personal, individualised basis". That is
19 not right.

20 If there is anything in the point you would knock it off on an aggregated basis in the manner
21 that I have suggested, so we say that that is a wrong approach by Mastercard, and it is another
22 example of where they fail to take sufficient account of the commonality wording in the rules
23 which is --

24 THE PRESIDENT: Just so I understand that, so it wouldn't be something for the form individually

25 --

26 MR. HARRIS: This particular one wouldn't.

27 THE PRESIDENT: -- it would be when calculating the aggregate sum, you would need to know
28 each year how many Mastercard holders are there, get some average view of benefit, multiply
29 that out and that would be deducted from the aggregate sum. That is how you say it would be
30 done, because it reduces the loss.

31 MR. HARRIS: Yes.

32 THE PRESIDENT: It is not about distribution.

1 MR. HARRIS: I believe that's right sir but since I am being whispered at may I just take one
2 moment?

3 THE PRESIDENT: Yes. (Pause).

4 MR. HARRIS: That's right.

5 THE PRESIDENT: Then on the distribution, second stage, you get the people to identify
6 themselves to Mastercard and it would affect their pro rata share.

7 MR. HARRIS: Yes, although as I said in that one you probably wouldn't need to rely on them self
8 certifying because Mastercard has records.

9 MR. HOSKINS: We do not have records of individual card holders because we do not issue the
10 cards, the banks do.

11 THE PRESIDENT: It is done by the banks.

12 MR. HARRIS: Their members do sir. We think that is manageable.

13 Can I just draw your attention, before I move on from this point, to, again, our annex, because
14 this finds absolute parallel in the certification stages in Canada and in the US, and I just want
15 to emphasise that we have, obviously, people from the US included in court today, expressing
16 some surprise at the notion that this should be a difficulty at this point this time.

17 THE PRESIDENT: Well, they have a different regime.

18 MR. HARRIS: So I accept that, I accept that, but I am just saying that as a matter of principle when
19 we are talking about the certification stage it is comforting to know that it is the sort of thing
20 that has expressly been addressed elsewhere and thought not to defeat what would otherwise
21 be a proper claim at this stage, and so I am turning in our annex to our Reply to, first of all,
22 paragraph 216 which is bundle page 208, and just before we turn to it, it is relevant to bear it
23 mind that one of Mastercard's point here is, "Well, some of these people may have had so
24 many benefits that they are net not victims," ie. they are just not victims.

25 This is what, for example, the US Supreme Court case in *Tyson* has to say at 216 and then A,
26 and then picking it such over the page:

27 "The fact that the Federal Court's lack of authority ...(Reading to the words)... jury
28 award".

29 In other words we say that those are effectively submissions that I am making. Then there is
30 a couple more passages, whilst we are in this part of the annex, if you were to look at the end
31 of paragraph 203 -- 213 --

32 THE PRESIDENT: Sorry, 203?

1 MR. HARRIS: No, sorry, my mistake, so it is paragraph 213, but you find the relevant bit at the top
2 of page 208 of the bundle. It is a long paragraph. This was citing from the polyurethane foam
3 case.

4 THE PRESIDENT: Yes. You asked us to read this already.

5 MR. HARRIS: Yes, you have got that, and then there is another case, *Re Nexium Antitrust* and that
6 one is to be found at 219 of this annex, paragraph 219 at B, quoting there:

7 "We do not think the need ...(Reading to the words)... class certification".

8 Then there are also references going forward in this document to the Canadian section,
9 paragraph 202 and 201, other references in *Process v Microsoft* which I think you may have
10 picked up before, 200, 201 and 203, so not fatal if there are uninjured members:

11 "Not fatal if ...(Reading to the words)... on the facts".

12 Indeed, the reference in 203 to the footnoted case of *Markson v MBNA* suggests that in
13 Canada it is not even fatal that, at the end of the day, that some class members who did not
14 actually suffer damage will receive a share of the award.

15 What these points do is they reflect -- and obviously we do not place too much emphasis on
16 them for the reason you gave, sir, but what they reflect is that this is a form, to some extent, of
17 rough and ready justice but that is exactly what Parliament intended it to be.

18 I would just note before I move on to my final two shorter topics, is the case of the replica kit
19 with which, sir, of course, you are very familiar.

20 In that case there could easily have been -- I appreciate that is a different regime, but what I
21 am saying is it is a regime under which rough and ready justice was the outcome. That was a
22 case in which you may recall, punters who had bought an overcharged replica shirt because of
23 a cartel in this country, were able to take in a shirt, without a receipt, not even necessarily with
24 a label, and say, "Right, I want may either £5 or £10 depending upon mostly the label".

25 MR. HOSKINS: Sir, this was a voluntary offering by JJB Sports which was my client, to suggest it
26 was somehow a legal framework remedy, it is simply incorrect, I am sorry.

27 MR. HARRIS: No, and I didn't put it forward like that. What I am saying is that there is a
28 compensatory scheme that gives rise to even a return to somebody who may not be an
29 injured person because the person who goes into the shop may have bought the shirt overseas.
30 There is no suggestion that the cartel covered those shirts, and then there is -- what it shows,
31 basically, is a rough and ready justice on a non-individualised compensatory basis, so I just
32 raise it in passing.

1 THE PRESIDENT: Well, it was effectively a settlement, wasn't it, but it wasn't one that needed
2 approval.

3 MR. HARRIS: No, actually, it's a point I would need to check. I thought it had needed approval,
4 but -- it was approved -- well, in Devenish they say that it was:

5 "In a Settlement Agreement between the parties approved by the Competition Appeal
6 Tribunal by Lord Carlisle".

7 Mr. Hoskins may know more about that.

8 MR. HOSKINS: It is not like this scheme, there is no -- there was no power under the former
9 procedure for the Tribunal to have to approve a settlement. The parties reached a settlement
10 and on that basis the claim for damages was discontinued.

11 THE PRESIDENT: And they informed the Tribunal?

12 MR. HOSKINS: That's right. Absolutely.

13 THE PRESIDENT: Yes.

14 MR. HARRIS: Well, there we go. We need not overplay it.

15 THE PRESIDENT: You have made a point on the other cases. Yes.

16 MR. HARRIS: Yes. So then that takes it me on to the question of compound interest. This is an
17 interest that we say the loss of use of money is common across the class. We say that that
18 can't sensibly be disputed. You either -- if you paid this overcharge, which we set out to
19 establish by reference to the aggregate damages in the three steps there, then you are
20 out-of-pocket. Broadly speaking, that means you are out-of-pocket in the sense that you have
21 less credit balance than you otherwise would, or you are in higher debit, lower, possibly, if
22 that is the right term, but a bigger debit balance than you otherwise would have done, and
23 either way you are losing out on the use of money on a compounded basis, or you are being
24 charged for the use of somebody else's money on a compounded basis, so this is commercial
25 in the sense that we are talking about commercial transactions. These are shop merchants or
26 other relevant Mastercard-accepting undertaking transactions. In that sense it is commercial,
27 and that is what gives rise, we say, to the sorts of presumptions that were referred to in the
28 Sainsbury's case about, well, in that sort of situation, you are talking about, broadly,
29 compounded interest. It is just common sense. Everybody knows that.
30 So the issue, really, here, is there is, we say, a commonality of some degree of loss by
31 reference to interest across the entire class, and arguably that is enough, because the phrase
32 for commonality is, "Same, similar or related". It does not have to be identical in all respects
33 and there can be later distinctions drawn if the need arises.

1 In that regard, can I just take you back, sir, to a point that you raised with me earlier about
2 subclasses?

3 In the guidance at section 6.79, which, if you need to turn it up in the bundle, is D14, or
4 Bundle 1 of D, and I am looking at paragraph 6.79, our reading of the guidance is that in fact
5 you don't have to decide now whether there would be a subclass. I said I would come back to
6 this point and here I am doing that. It reads:

7 "If it is not appropriate to make an aggregate award of damages for the entire class ..."

8 And here we are talking about interest:

9 " ... it may be possible to proceed to determine the entitlement of subclasses on a group
10 basis, amending the CPO as appropriate to authorise the appointment of class
11 representatives for those classes. If that is not possible the Tribunal may direct the
12 quantification of damages proceeds as individual issues".

13 So two points. First of all, it is not fatal at this stage to grant a certification just full stop, even
14 if there is anything in this point, maybe more than two points, next point, issue at the highest
15 level, the issue of interest is common across the class because everybody will have either
16 credit or debit, or a mixture of both, either sequentially or concurrently, and that it does not
17 need to detain you now for the certification stage because even if you were to take the view,
18 sir, members of the Tribunal, that: oh well, there is going to be, you know, a sufficiently
19 meaningful difference between, say, those people who are debit interest people versus those
20 people who are credit interest people, well, two things. Firstly, you can deal with that later,
21 that is what we think the guidance says, and, secondly, there is no difficulty in Mr. Merricks
22 representing both of those sets of people, no difficulty at all. There is no conflict if he says,
23 "Well, people who are in credit balance may have, on average, on an aggregate basis, this
24 amount of compounded interest for the claim period versus those people who were debit
25 people for the claim period and they have, on aggregate, this amount of loss".

26 Now -- and Mr. Dearman is here today, and we have given thought, and it is referred to in the
27 comment -- expert report to the question of compound interest, and we say that there are
28 perfectly coherent ways and means in which you can come to -- if you ever had to -- you
29 could come to an aggregate amount for the compound interest across the class as a whole, or,
30 for that matter, across subclasses if you felt that that was the better way forward, but what
31 they aren't is fatal flaws to granting certification at this stage. They are just not.

32 So, that is what I have to say about compound interest, and that takes me on to the last topic,
33 because you will have seen me deal with some of the more mundane things about things like

1 domicile date in our written document, but it is just very briefly on a tag that is levelled about,
2 oh, well -- I paraphrase -- the gist of it is sort of wholesale departure from compensatory
3 principles. Yes, you, Mastercard, you can have a broad axe and a sound imagination, but
4 actually you have wielded some sort of Thor-style mega-axe, and it has just gone far too far,
5 and we say absolutely not. We say the common-law has flexibility in it already, more than
6 sufficient to deal with that which is expressly contemplated by the primary legislation.
7 Let me give you an example. *Attorney General v Blake*. Crikey. Were not half of us
8 surprised when it was suddenly said, "Oh well, the government has suffered no loss at all but
9 nevertheless they can have ..." well, it effectively amounted to an account of profits from a
10 publisher. "No problem", eventually said the House of Lords. In fact there had been masses of
11 problems getting there. "No problem. The common-law can deal with that in" -- to do justice
12 and in what they thought was exceptional circumstances where there was no legislation, but
13 we have legislation mandating aggregate awards, and we say in terms it says, "Without
14 requiring assessment of individual loss", quote-unquote, and yet we are still being told by
15 Mastercard, "Oh well, you know, you are going off the deep end. You are going too far".
16 I don't propose to go through them all in detail but there are all kinds of other examples that
17 we have identified in the --

18 THE PRESIDENT: Well, that wasn't a compensatory award at all, Blake. It wasn't.

19 MR. HARRIS: Not on -- no --

20 THE PRESIDENT: The question was whether you could -- where you could not make a
21 compensatory award, make a restitutionary award, whether there were objections in terms of
22 the common-law. That was why it caused so much problem but they held you can extend the
23 categories for restitutionary award, but we are not dealing with restitutionary awards here,
24 since Devenish, so it is compensatory or nothing.

25 MR. HARRIS: I entirely agree with that, sir, and the point I was making, probably rather badly,
26 was a slightly different one, which is that we are told that it is common ground that the
27 common-law is flexible. You can have a broad axe, you can have sound imagination, and
28 what I am saying is that the common-law has demonstrated in other contexts a remarkable
29 degree of flexibility, including in, for example, *Attorney General v Blake*. I am not pretending
30 that it is closer on the facts to our case than it is, I am not pretending that any of them are.
31 Take *Wrotham Park* for example. That was a case in which there is not the slightest chance
32 that the holder of the covenant would have been prepared to relax it. Refused, point blank.
33 He said he wanted an injunction, but the court said, "Well, nevertheless, I am going to do

1 justice ..." for various reasons connected with the case, " ... and it involves me hypothesising
2 that you would have sold this covenant, even though you have refused point blank to give up
3 the covenant and I am going to suggest that there would have been, ex hypothesi , if you like,
4 reasonable negotiation for the giving-up of the covenant".

5 Let me give you another example. *Guido v van der Garde*. That was a case in which -- this is
6 one of a -- there are a whole series of cases like this about where you effectively buy a
7 bespoke package of rights or services, in that case it was to 6,000 kilometres of Formula 1
8 testing for an aspiring Formula 1 driver called Mr. van der Garde, and he paid whatever it
9 was, £X million for it, and then he was not given it. He was given something like 2,000
10 kilometres and there were 4,000 outstanding, and then he said, "Well, I want to be
11 compensated for the fact that I have not got my 4,000 bespoke Formula 1 kilometres with all
12 of the kudos that goes with it and the possibility of obtaining lucrative driver seats and
13 sponsorship and all the rest of it, and of course the court faced an incredible difficulty. How
14 on earth do you go about valuing something he wasn't given, given that there is absolutely no
15 market in these bespoke services?

16 One of the things they do, and I have seen this in other cases, is they say, well, crikey, that is
17 basically impossible, so what we are going to do is we are going to say, well, we will have
18 regard, as an evidential matter, to what you paid for those rights in the first place. There is no
19 market for it so we can't say you would have gone off and bought them elsewhere, but you
20 paid whatever, call it 6 million for 6,000 kilometres, it seems something like that, and you
21 only got 2,000 of it, so we will say that the bit you didn't get, you can have regard to the 4
22 million that you paid, that effectively wasn't given to you, so that is not a typical way of doing
23 it, but the common-law is sufficiently flexible to say that where there are evidential
24 difficulties, where there are -- and you need a novel approach to the assessment of
25 compensatory damages, you do other things. You have more flexible approaches. You have
26 regard to the evidence that you have got when there is not evidence that you just can't get,
27 because it does not exist.

28 So, there are all manner of examples, *Chaplin v Hicks*, loss of a chance, similar sorts of
29 things, and what we say, basically, is that we are not inviting you, we are expressly not
30 inviting you to depart from compensatory principles, what we are saying is that you have a
31 framework that has been set out by the statute against the background of things like the
32 consultation paper that I read out and is in our skeleton, and you don't need to depart. All you
33 need to do is recognise that if and to the extent that every single time that Mr. Hoskins tells

1 you, "It is not sufficiently compensatory, it is too far from compensatory", that is not a good
2 answer, because the common-law will contemplate all manner of situations within its current
3 guise, especially against the background of new legislation, to give effect to a new purpose
4 doing justice, even if it does not -- even if it means that it is not perfect compensation.

5 So those, sir, are the points that I wanted to make.

6 THE PRESIDENT: Yes. Well, can I ask you something about the class definition, and if that
7 contains your point? If you just look at your Claim Form, just trying to make sure I
8 understand it, which is at tab 1 of Bundle C, and you set out the proposed class definition at
9 paragraph 22:

10 "Individuals who, between 22 May 1992 and 21 June 2008 purchased goods and/or
11 services from businesses selling in the UK that accepted Mastercards".

12 Then the age and residence qualification, and you explain in paragraph 23(b), that they must
13 be individuals. The intention is to capture an individual purchased in their capacity as
14 individual consumers, and not for the purpose of business, and should not, then, the class say,
15 "Individuals who, between 22 May 1992 and 21 June -- purchased otherwise than in the
16 course of a business"?

17 MR. HARRIS: Can I take that under further advisement and come back to you? The reason, I
18 think, is that -- this is one of the instances where -- there are two points that I make
19 immediately. One of the instances where we are being told, and indeed the guidance says,
20 "Make your parameters basically, unbelievably simple and straightforward, because if you
21 don't, then, frankly, people fritter off and get confused", and when it comes to, "Are you in the
22 class or are you not in the class", this is a point -- we thought about this exact point, and the
23 feedback we were getting was that it could cause people to think, "Oh gosh, I don't know".
24 That is not necessarily people in this room, sir, but it is people who are in the 46 million, so
25 that was one point, and the second point is that --

26 THE PRESIDENT: But that is what you mean, isn't it?

27 MR. HARRIS: Yes. Yes. That's right so I don't shy away from that, but the second point, and
28 subject to being told that -- I am told it is also addressed in the FAQs, so we will turn them up
29 in a minute.

30 THE PRESIDENT: It may -- for example, there is a question of once you have a class definition,
31 people outside the UK who can opt in. Well, if they only purchased goods while they were in
32 the UK in that period where they were resident having subsequently left, because for a
33 business you may say it is unlikely, but it just seems to me that that is not a difficult concept,

1 and that is what you mean, and that is the basis on which you are then assessing the volume of
2 commerce, because you are not looking at business purchases.

3 MR. HARRIS: That is true, and that was going to be -- I will turn to the FAQ in a minute -- but my
4 second point.

5 Well, first of all, perhaps the overarching point is we will certainly take this under further
6 advisement in light of the concerns of the Tribunal, and if needs be the definition can be
7 amended, so we are not shutting that out.

8 Second point, we have got this point about how people can be deterred.

9 Third point is you are quite right about the VOC, but the VOC builds in, if you like, another
10 protection, if that is the right word, on this point, which is it is calculated by reference to
11 consumer credit card transactions, not by reference to either corporate or commercial credit
12 card transactions, credit or debit card, consumer credit or debit card, so the amount of the
13 aggregate award that is reached will not -- this may be just putting your point a slightly
14 different way back to you, sir, will not include the -- any purchases that were made by
15 individuals but who were acting for and on behalf of the business.

16 If you turn up the FAQs, I am afraid I wasn't -- it wasn't immediately in my mind.

17 THE PRESIDENT: I haven't looked at those. Where are they?

18 MR. HARRIS: Bundle A at tab 7. It does seem to address the point, it is tab 7 paragraph 16, so
19 internal page 6 of that document. So:

20 "Only individuals may be a part of this claim. The class does not include businesses or
21 other entities that ...(Reading to the words)... against Mastercard".

22 But I perhaps, "That is your own look out".

23 So that, we say, is pretty clear, and I am sure now, and I will be corrected if I am wrong, but
24 the reason it was done like this is because we had the exact conversation about should we try
25 and introduce some more words into the proposed class definition such as the ones you
26 suggest, or should we instead deal with it in the FAQs, and the advice we got from
27 professional, experienced people was, "Keep them out, deal with it in the FAQs", and in the
28 same way that Mastercard have raised a point about supposed clarification, businesses selling
29 in the UK, they say, oh well, what about somebody who goes into, say, Marks & Spencers in
30 Paris and buys there because Marks & Spencers also sells in the UK? Well, that is true, but
31 we think the normal reading of this means most people who read this are going to -- well,
32 everybody who reads this is going to say, "Oh, that means businesses of Marks & Spencers in
33 London", or wherever, Manchester, that is doing the selling, but what we have said we are

1 quite happy to clarify as necessary on things like FAQs. There is a bit of a compromise in
2 these things.

3 THE PRESIDENT: Yes. I see, and then the online, the other point explained in 23(b)(ii) which I
4 didn't quite understand, businesses that sell in the UK, you say the class definition captures,
5 businesses selling in the UK through channels such as the Internet, mail order or telephone,
6 with physical presence in another member state --

7 MR. HARRIS: I think that means it could include businesses selling in the UK through channels
8 such as those mentioned even though they have a physical presence.

9 THE PRESIDENT: Well, what I am not clear -- does it include, and -- purchases made from the UK
10 by Internet or telephone to a purchase made in the UK but by Internet or telephone from a
11 seller abroad, so I go online and I book or purchase from a seller in France online from the
12 UK.

13 MR. HARRIS: Sir, may I just take a moment? (Pause).

14 Sir, I am going to do my best with this. So an example would be take, say, Amazon or some
15 big international retailer, and they are selling something in the UK over the Internet which has
16 a sterling price, and that therefore has a sterling price as part of the VOC transactional value
17 that has an overcharge attached to it, because it is an example of a case where there might be
18 a cross-border interchange fee implications to that transaction, and the cross-border bit arises
19 in this way, that the acquiring bank of the retailer is likely to be in the other member state
20 where the merchant has the physical presence.

21 THE PRESIDENT: Yes.

22 MR. HARRIS: I am told that Amazon is a good example because they tend to do all their, if you
23 like, acquiring and other financial processing in other member states than the UK, in
24 Luxembourg, I am told, even though, obviously, a lot of the sales are taking place in the UK
25 with sterling prices to which an overcharge may --

26 THE PRESIDENT: Well, does it matter whether it is a sterling price or --

27 MR. HARRIS: Well, it matters in the sense -- no.

28 THE PRESIDENT: You are paying for it on your UK -- from the UK, presumably by a credit card,
29 it may or may not be Mastercard.

30 MR. HARRIS: I think, no, it was just a simple way of conceiving of it, is, you know, effectively to
31 a Brit, if you like, who falls within the class, and there is a good chance that that is going to be
32 in a sterling price but I think you are probably right, it wouldn't have to be, necessarily,
33 sterling price. The important point is that it is likely we say to be a cross-border -- it is a case

1 of a cross-border interchange fee because the issuing bank is likely to be in a different
2 member state than the acquiring bank.

3 THE PRESIDENT: The acquiring bank will be abroad.

4 MR. HARRIS: That is the point. The issuing and the acquiring banks are in different member
5 states which means cross-border MIF.

6 THE PRESIDENT: Yes, but why, on this definition is it limited to other member states? That is
7 what I don't understand. You say resident in the UK, business is selling in the UK, suppose
8 the business was in United States. That would still be within your class definition, isn't it, as
9 long as it is purchased from the UK.

10 MR. HARRIS: I think the answer to that -- sorry sir, may I just ... (Pause).

11 MR. HOSKINS: Sir, if I might help, different MIFs apply on sales to the US.

12 THE PRESIDENT: Well, I appreciate that, but I am asking the question.

13 MR. HOSKINS: Well, my understanding is that the claim doesn't -- because the rise in prices from
14 the US seller, you would have to show an increase in prices by the US seller as a result of the
15 relevant MIF as a result of the EEA MIF in fact in this case.

16 MR. HARRIS: I am grateful to Mr. Hoskins. That is partly, I think, the answer to your question,
17 sir.

18 THE PRESIDENT: But that isn't captured by the definition, "Businesses selling in the UK". That
19 would be businesses either in the UK or outside the UK selling into the UK. It is not restricted
20 to businesses in other member states of the EEA. If you want to incorporate that further
21 restriction for the reason Mr. Hoskins just gave, namely that if the business is selling into the
22 UK from a non-EEA member state, it is not paying the EEA MIF. That needs to be
23 incorporated, which it isn't.

24 MR. HARRIS: Sir, you may well be right. Can I take that overnight and think about it further?

25 THE PRESIDENT: Yes.

26 MR. HARRIS: The key point is we do accept that if it is not a cross-border MIF --

27 THE PRESIDENT: Well, cross-border EEA.

28 MR. HARRIS: Yes, well, in the sense that it is used in the decision.

29 THE PRESIDENT: Yes.

30 MR. HARRIS: Yes. It can't be -- I think Mr. Hoskins used a phrase, "International MIF". We
31 accept that. It has got to be cross-border, or we say the causal link between the cross-border
32 as found in the decision and the domestic MIFs.

1 THE PRESIDENT: So that will mean that if one has, say, purchased from -- paid by phone for a
2 hotel in Cyprus in 2003, that is not part of the volume of commerce, but if one does it in 2005,
3 after Cyprus joins the EEA, then it is within the volume of commerce. Is that how you are
4 doing it?

5 MR. HARRIS: Well, it certainly does have to be by reference to whether something is EEA or not,
6 so if that -- that is doubtless a good factual example chronologically, and that would have to
7 be taken into account. It does have to be a cross-border MIF or we say causally related
8 domestic MIF.

9 THE PRESIDENT: Yes.

10 MR. HARRIS: "Cross-border", I mean in the sense of the European Commission decision.

11 THE PRESIDENT: Yes. Well, that is helpful, whether you need to amend the class definition or
12 not, I don't know, but at least we know what we are talking about. That is why, am I right, that
13 is why an element of the damages is related to the cross-border MIF as opposed to the
14 domestic MIF?

15 MR. HARRIS: Yes, absolutely.

16 THE PRESIDENT: That is dealing with those sets.

17 MR. HARRIS: Yes, and there are lots of other examples. I mean, arguably the most obvious one is,
18 say, a Spanish national with a card issued -- well, a Spanish national who comes to Britain,
19 provided he was over 16 or she and met the continuous period of three months and buys some
20 things in a UK retailer that accepted is a Mastercard which was subject to the overcharge, and
21 that is a cross-border example, because the issuing bank is likely to be in a different member
22 state compared to the acquiring bank.

23 THE PRESIDENT: Yes. So someone who, say, studied here for three years in that period, well,
24 they wouldn't be probably in the class, because they may no longer be resident here on the
25 domiciled date, but they could opt in.

26 MR. HARRIS: Yes. On that one, yes.

27 THE PRESIDENT: And they would be on the cross-border.

28 MR. HARRIS: Yes, and one of the debates that was had in the written work was, you know, as
29 regards the three-month limit, if you didn't have something like that, then any person flying in
30 through --

31 THE PRESIDENT: Yes. We saw an example of that.

1 MR. HARRIS: So, sir, can we take that specific point about whether or not it needs to be tinkered
2 with the definition on advisement overnight and then unless I can assist further, there is Dr.
3 Veljanovski and Mr. Dearman, but just as a -- we had arranged for two chairs to be here.

4 THE PRESIDENT: Yes. Can you explain that? We are not clear at the moment, did they -- they
5 have quite different areas of expertise, one is an accountant and one is an economist.

6 MR. HARRIS: Yes.

7 THE PRESIDENT: Did they deal with different parts of the report or did they, as it were, each
8 write a paragraph together, or quite what is the approach that one should take to it? We do not
9 normally get expert evidence given jointly.

10 MR. HARRIS: Well, the broad -- as you say -- division is economics and econometrics, that later
11 arises with Dr. Veljanovski, and then accountancy for Mr. Dearman, and they will happily
12 explain further if you ask them questions, but for today's purposes, so, for example, to the
13 extent that you have questions about pass-on, well that falls into Dr. Veljanovski's sphere, for
14 the example -- if you had any questions, say, about compound interest, that would be Mr.
15 Dearman, but it may be that the best thing to do is to have them both -- we had anticipated
16 they would both be physically present upfront together and then depending on the question
17 one might have to take the microphone or relinquish the microphone.

18 THE PRESIDENT: Yes. So we would have them in the witness box together but on any question
19 they will tell us -- one would answer.

20 MR. HARRIS: That's right. Just before we get there, sir is, if I can just spend one minute just
21 adumbrating a slight concern that we have, we are happy to have the experts here, we have
22 asked for them, we are happy for them to be questioned, we are even happy, if the need arises,
23 for there to be some limited questioning by Mr. Hoskins, but we do just put down, if you like,
24 this marker that, of course, there is a danger, there is a danger that we might get a little bit of
25 a one-sided feeling from the -- by the end of that process in the sense that I don't have an
26 expert to cross-examine and I don't have --

27 MR. HOSKINS: Well, that is an advantage.

28 MR. HARRIS: No, sir --

29 THE PRESIDENT: The only economic expert evidence comes from your side of the case.

30 MR. HARRIS: No, sir, because in this case the difference is that I am confident that Dr. Niels, it
31 seems that is he is not here today but another expert is, but if Dr. Niels were up in the stand I
32 would be able to make great headway with him agreeing --

33 THE PRESIDENT: But you can't choose your --

1 MR. HARRIS: Absolutely, sir. That is a different point, but the point I am just saying is that there
2 is a danger here that there might be a slightly one-sided flavour to what goes on in a case
3 where, actually, also a remarkable convergence in views between what the economist for
4 Mastercard has in previous cases said and what our economist is saying.

5 THE PRESIDENT: Well, I have to say we do not see it that way. The question is whether you have
6 put forward a low standard, or low threshold but nonetheless an important threshold, a
7 plausible method of calculating loss and with reasonable expectation that the data is there to
8 support it. That is a question for your expert. Whether Mastercard would have been able to
9 call an expert to try and dispute that is neither here nor there, as they haven't asked to do so,
10 but that is entirely a matter for your expert and the way you wish to advance the evidence. I
11 really do not think cross-examination of anybody else's expert is really relevant. If they
12 wanted to put in evidence disputing that, then of course you could have challenged it, but they
13 have chosen not to do so.

14 MR. HARRIS: Sir, I will move on.

15 The other light touch point that I just raise is not so much for this case, but just a sort of
16 issue going forward, and we do have a full budget, both for this stage and we hope, if we get
17 certified, for later on, and we have been able to put in an expert report and we have been able
18 to bring today our common expert, but what we are saying is that we have not seen this
19 contemplated by the rules. We obviously saw what happened in scooters, we are delighted
20 that both of our experts are here today but we just simply say that there are cost implications
21 for cases going forward, if experts -- which the rules do not demand that they put in a report
22 and then they attend and then there are -- if there are extended periods, and simply just remark
23 that that could, in another case, have a deterrent or chilling effect, but there we go. We have
24 Mr. Dearman and Dr. Veljanovski.

25 THE PRESIDENT: It is probably a sensible moment it take a break before they both come into the
26 witness box. We will take five minutes.

27 (3.15 pm) (Short break)

28 (3.22 pm) DR. CENTO VELJANOVSKI (sworn) MR. DAVID DEARMAN (sworn)

29 EXAMINATION BY THE TRIBUNAL

30 MR. HARRIS: I obviously do not, unless you want me to, have any introductory, or to take them to
31 documents.

32 THE PRESIDENT: Do sit down, it is a bit of a squeeze, I am afraid. It is not a hot tub, it is a joint
33 tub. You have to nestle together.

1 Have you got with you a copy of Bundle A with your joint report in it? I think you have now,
2 a copy each, and it is at tab 5, I think, and you see that report there, and turning to page 40 at
3 the end of it, Dr. Veljanovski, is that your signature?
4 DR. VELJANOVSKI: Yes it is.
5 THE PRESIDENT: Mr. Dearman, is that your signature?
6 MR. DEARMAN: Yes it is.
7 THE PRESIDENT: Is this your joint report?
8 DR. VELJANOVSKI: It is.
9 MR. DEARMAN: Yes.
10 THE PRESIDENT: Does it represent your honest opinion in evidence to the Tribunal?
11 DR. VELJANOVSKI: It is.
12 MR. DEARMAN: Yes.
13 THE PRESIDENT: It was suggested before by Mr. Harris that Dr. Veljanovski, you were
14 responsible for the more economic aspects of this such as pass-through, is that right?
15 DR. VELJANOVSKI: That is correct.
16 THE PRESIDENT: And, Mr. Dearman, that you were dealing with the more accountancy-related
17 aspects. Is that right?
18 MR. DEARMAN: That is correct.
19 THE PRESIDENT: Can I also ask you to look, for that you need I think -- yes, it is in Bundle A as
20 well, perhaps it is -- well, no, it is not in mine, but it is Bundle C at tab 1 is the Claim Form. In
21 that Claim Form of Mr. Merricks, if you go to page 41, you see at the bottom of page 41,
22 paragraph 112, under the heading, "Particulars of Loss and Damage", do you see that? It says
23 in the last line, the following:
24 "Indicative figures have been prepared at this current early stage".
25 Then there follow various subparagraphs going through with tables and figures. Were either
26 of you involved in helping to prepare those figures?
27 MR. DEARMAN: Yes.
28 THE PRESIDENT: That was you was it Mr. Dearman?
29 MR. DEARMAN: Yes.
30 THE PRESIDENT: So we can, then, fairly ask you for some assistance in regard to that.
31 MR. DEARMAN: Yes.
32 THE PRESIDENT: Yes. Thanks very much.

1 If we go to the experts' report, just if you could just help us, in Section 4 of the report which is
2 page 18 you are dealing with the size of the proposed class. Was this part -- was this, Dr.
3 Veljanovski, was this your input here or was this Mr. Dearman?

4 MR. DEARMAN: Principally mine.

5 THE PRESIDENT: Yes. Just -- it is probably my failing, I was just trying to understand what has
6 been done. Looking at your table, 4.1, the total UK population, that is public statistics, is that
7 right, in each year?

8 MR. DEARMAN: It is, from the Office of National Statistics.

9 THE PRESIDENT: Yes, and similarly over 16s, and then -- so, obviously, column C, which is sort
10 of prima facie the class in each year, then you say, what I was trying to understand is -- at
11 4.1.3 you say you have made adjustments, and you say you have added those people, this is
12 your subparagraph A:

13 "All those people who reach the age 16 each year during the full infringement period".
14 But -- and if we are doing it on an annualised basis I didn't quite follow that, what you were
15 doing, and as I understood it, the column C in the table is the number of people over 16 at any
16 one time. Any one year.

17 MR. DEARMAN: Yes. So Table 4.1 sets out the -- those who were over 16 at the end of each of
18 those -- or actually it might be the midpoint of each of those years. What we have done is
19 almost like a triangulation of those individuals who reached 16 throughout the infringement
20 period, so in each year, obviously, you will have people who were under 16 in 1992, for
21 example, but reached the age of 16 in 1993. Similarly, there will be deaths of those who were
22 over 16 at the beginning of the infringement period, but may have not been in the class at the
23 end of the infringement period, so there is a sort of triangulation to get to the proposed class
24 which takes into account that those entering the class each year and those that have died
25 during the year, and also net migration is also taken into account.

26 THE PRESIDENT: Do you see, the number of people, as it were, alive today and who were at any
27 time -- became over 16 during the infringement period, is that right?

28 MR. DEARMAN: Yes. So as I say, behind this is a larger spreadsheet which looks at those who
29 are becoming 16 throughout the infringement period, and also those that died during the
30 infringement period who were over 16 at some point in the infringement period to get to the --
31 and then we also exclude those deaths post-2008 to get to the proposed class figure.

32 THE PRESIDENT: Yes, and then of people in that class, on the system of recovery that we heard
33 about, or distribution, rather, or even -- well, system of distribution, but also -- I am trying to

1 see how -- if the claim is calculated on an annual basis, the aggregate claim, are you using the
2 number of people in the class today or are you looking at it annually according to the number
3 over 16 each year?

4 MR. DEARMAN: Well that is really a distribution question, and it can be done as we heard earlier
5 in a number of different ways, but that is a way that it could be done, is to look at those who
6 are in the class each year and divide by the volume of commerce in that year but, as I say, that
7 is not something that I have addressed in this report. That is a distribution issue.

8 THE PRESIDENT: Well, is it only a distribution issue? Because the claim is only for the people in
9 the class. You have calculated the number in the class. You were then calculating aggregate
10 damages each year, so don't you have to make the calculation on the basis of how many
11 people in the class -- what is the aggregate number that year, their aggregate loss?

12 MR. DEARMAN: Well, the way we have approached the calculation is in different stages. So the
13 first stage is to look at the volume of commerce and the overcharge to get to an aggregate
14 assessment of damages. That is really one discrete calculation, and then the size of the class is
15 a separate calculation and it is really a matter of arithmetic how that is cut.

16 THE PRESIDENT: Yes. Perhaps we will come back to it when we understand -- look at how you
17 have done the volume of commerce calculation. At the moment it seems to me it has got to be
18 volume of commerce by the class, not volume of commerce by a lot of people who are not in
19 the class. Volume of commerce attributable to the class. Isn't that the question? Volume of
20 commerce attributable to the class in aggregate, but still to the class and not to anyone else.

21 MR. DEARMAN: Yes. I take the point, and the way the calculation has been prepared in this
22 report, as I say, is in two stages. The first was to assess the volume of commerce as an
23 exercise, the proposed class was another exercise, and there are -- I think there have been
24 issues raised in the submissions that may have to be addressed in terms of if there is any
25 mismatch between those two.

26 THE PRESIDENT: Yes. I see.

27 Then you go on in section 5 to look at the issue of aggregate award of damages. I think this
28 may be a question for Dr. Veljanovski. You talk about volume of commerce starting at 5.2.1.
29 You say:

30 "During the full infringement period for the reasons given above at 2.2.3 and 2.2.4 ..."

31 And that is a reference, I think, to the no discrimination rule which Mastercard applied, I
32 think, until January 2005:

1 " ... businesses generally did not surcharge consumers ...(Reading to the words)... with
2 some exceptions such as online airline ticket purchases".

3 Do you know when Visa dropped its non-discrimination rule?

4 DR. VELJANOVSKI: Not offhand, no.

5 THE PRESIDENT: Do you know if it is the same as -- it might be earlier or later than Mastercard?
6 Have you looked at that?

7 DR. VELJANOVSKI: No I haven't looked at that.

8 THE PRESIDENT: Is it only airline tickets -- you say, "Such as". I don't know, have you looked at
9 this at all, the other sectors where certainly we know from common experience that there is
10 this discrimination such as entertainment venues --

11 DR. VELJANOVSKI: Corner shops.

12 THE PRESIDENT: Corner shops and domestic insurance products, I mean, have you looked at
13 those, when that discrimination started?

14 DR. VELJANOVSKI: Yes -- when it started?

15 THE PRESIDENT: Yes.

16 DR. VELJANOVSKI: Not specifically when it started, but it is a very small proportion of the total.
17 There is an OFT report on this matter of surcharges, but generally it is virtually ignored in
18 terms of the volume of commerce it is such a small proportion.

19 THE PRESIDENT: Is it a small proportion in each sector? Because you go on to look at sectors, for
20 example, travel. Would it be a small proportion of travel?

21 DR. VELJANOVSKI: In travel it would be proportionately more, yes, and as we get towards the
22 end of the -- remember this infringement period is quite a long period, so before we paid by
23 cheque and as we get towards the end of the period, but it certainly isn't as frequent as it is
24 today.

25 THE PRESIDENT: Yes.

26 DR. VELJANOVSKI: So we would have to make adjustments, but I don't think it is a significant
27 factor in the calculations. It would be helpful if it was, but it is not.

28 THE PRESIDENT: That is something you would need to look into to adjust it, or do you think it is
29 so insignificant that even --

30 DR. VELJANOVSKI: I think it is relatively insignificant, certainly in the early part of the period.
31 As you get towards the end there might be some but I think we are just talking about a
32 percentage. It is not going to be -- a very low percentage. It is not going to be a significant
33 factor.

1 THE PRESIDENT: Yes.

2 DR. VELJANOVSKI: I think the *Sainsbury* decision notes that it is not a very common practice.

3 The European Commission decision notes that it is not a common practice.

4 THE PRESIDENT: Yes. Then you use -- at 5.2.4 you talk about the data from the UK Payments

5 Council, for purchases in the UK and purchases outside the UK, and that is the statistics that

6 distinguishes, is this right, from what Mr. Harris said a short while ago, between consumer

7 purchases and business purchases?

8 MR. DEARMAN: If I can answer that question?

9 THE PRESIDENT: Yes.

10 MR. DEARMAN: So the UK payments Council statistics report that we have used doesn't make

11 the distinction between business cards and non-business cards, but it is the same data that, as

12 I understand it, the OFT used, and in footnote 60 to their decision they said that business -- it

13 didn't -- they concluded that it didn't have a significant effect on their conclusions, or any

14 effect on their conclusions, and it represented less than 3 per cent of the -- you know -- the

15 total card transactions.

16 That data doesn't distinguish between those cards, unhelpfully.

17 THE PRESIDENT: So the volume of commerce here includes all card purchases, both business

18 and consumer?

19 MR. DEARMAN: It will, because that is the only data that was available to us at this stage.

20 THE PRESIDENT: Does it distinguish -- this is with UK cards -- does it distinguish online, or

21 payments made in the UK for foreign outlets but within the UK? You had the discussion a

22 short while ago that it was intending to cover purchases made from the UK, albeit

23 cross-border from a seller abroad, provided the purchase was made in the UK, say by

24 telephone booking, or now online booking in the more recent years. Does it distinguish that

25 level of purchases?

26 MR. DEARMAN: Again, it does not. It distinguishes between UK purchases and outside UK

27 purchases, but with more data there will be a cardholder present and cardholder not present

28 information that will facilitate that analysis in terms of identifying where transactions were

29 made with the cardholder present, which would suggest that the individual was travelling, and

30 cardholder not present, which would suggest that the cardholder was in the UK.

31 PROFESSOR MAYER: Can I just clarify that, so it includes all transactions made by UK

32 residents, irrespective of where they are purchasing in the world, so if they are purchasing

33 through the web in any country, that would be included in the statistics, would it?

1 MR. DEARMAN: The data is for UK cardholders, and it distinguishes between UK cardholders'
2 purchases in the UK and UK cardholders' purchases outside the UK.
3 PROFESSOR MAYER: Right.
4 MR. DEARMAN: That is the limitation on the data that we currently have available.
5 PROFESSOR MAYER: Okay, and if a UK cardholder purchases abroad and purchases
6 commodities abroad, those are included as well?
7 MR. DEARMAN: They are currently included because we can't identify what proportion.
8 PROFESSOR MAYER: I see.
9 THE PRESIDENT: That would be a purchase outside the UK then?
10 MR. DEARMAN: That would be in the purchases outside the UK.
11 THE PRESIDENT: But that figure would also include online purchases made in the UK from a
12 supplier abroad, it would also be purchases outside the UK.
13 MR. DEARMAN: That is my understanding based on my review of the data, yes.
14 THE PRESIDENT: And you say one might be able to break it down by looking at whether it shows
15 cardholder present or not.
16 MR. DEARMAN: Yes. With fuller disclosure potentially from Mastercard, the analysis would be
17 able to be much deeper and more robust.
18 THE PRESIDENT: So Mastercard -- the cardholder has their card from their issuing bank, not
19 from Mastercard. Isn't it the cardholder's bank that holds details about their purchases?
20 MR. DEARMAN: Potentially in terms of the transactions themselves.
21 THE PRESIDENT: So the disclosure would have to come from the various issuing banks, wouldn't
22 it, to get the information you were just talking about?
23 MR. DEARMAN: I wouldn't like to say where it would come from.
24 THE PRESIDENT: And for outside the UK it does not break it down for where so that you can
25 distinguish countries in the EA and countries outside the EA, or does it say where it is.
26 MR. DEARMAN: No it does not. It is just outside, but it is a reasonably small proportion of the
27 total, which is outside the UK.
28 THE PRESIDENT: And for the purposes of your volume of commerce figures have you taken just
29 purchases in the UK? What have you done?
30 MR. DEARMAN: For the --
31 THE PRESIDENT: Because you have got figures for, if one looks back at the Claim Form, you
32 have got volume of commerce, this is why I am trying to understand, you have got, on page

1 42, this is Bundle C, tab 1, page 42, you have got there a cross-border figure in volume of
2 commerce. That is actual card transactions.

3 MR. DEARMAN: That is -- the cross-border is the outside the UK purchases from the payment
4 statistics report.

5 THE PRESIDENT: Yes. From the report you have just been referring to, is it?

6 MR. DEARMAN: Yes. So that will -- that figure will potentially include -- so there may be an
7 overstatement in respect of those transaction from UK cardholders who are travelling abroad,
8 but this also -- what this data doesn't include is overseas cardholders purchasing in the UK, so
9 as we state in the report, there will be an element of overstatement and an element of
10 understatement in the VOC figures that we have for cross-border, given the limitations in the
11 data that we currently have available.

12 THE PRESIDENT: Yes. That is what you explain in footnote 81. Is that right?

13 MR. DEARMAN: I think we explain it in paragraph 5.1.2(a) on page 20 of the report.

14 THE PRESIDENT: Yes. I think at footnote 81 to the Claim Form, is that -- I am trying to see if that
15 is the same point.

16 MR. DEARMAN: Yes it is the same point.

17 THE PRESIDENT: In fact it is not just while they were in another member state, it is while they
18 were abroad, isn't it?

19 MR. DEARMAN: It is. Correct.

20 THE PRESIDENT: So that is what was puzzling me. It is that they were abroad. Yes. I see. That
21 is how it has been done. Yes. Thank you. I think Professor Mayer may have some questions.

22 PROFESSOR MAYER: Well, thank you very much for your report. What I would like to
23 do is just to go through the methodology and pages 42 and 43, the tables that you set out there
24 I think describe how you built up your figures in subparagraph (a), so, as I understand it, it is
25 essentially to work out the total volume of commerce and then to apply the margin between
26 actual and counterfactual interchange fees and then to estimate the pass-through at both the
27 level of the acquiring banks to merchants, and the merchants to consumers. That is correct,
28 isn't it?

29 MR. DEARMAN: Correct.

30 PROFESSOR MAYER: So if we could perhaps just take this by stages, and, first of all, look
31 at the question about how derived the relationship between volumes and the spread. Did you
32 take the average volume of commerce and then multiply that by the average difference
33 between the actual and the counterfactual? Is that how you derived the ...

1 MR. DEARMAN: Yes. So we took -- well, we took the volume of commerce and applied --
2 obviously there is different overcharges depending on which card and whether it is
3 cross-border or domestic.

4 PROFESSOR MAYER: Yes.

5 MR. DEARMAN: And applied that to the corresponding volume of commerce.

6 PROFESSOR MAYER: Right. So you didn't look at particular -- you didn't break this
7 down in terms of products by looking at the volume of different products and then multiply
8 that by the spread and then take the average of that, the weighted average of that?

9 MR. DEARMAN: In terms of the volume of commerce by product?

10 PROFESSOR MAYER: Yes.

11 MR. DEARMAN: No.

12 PROFESSOR MAYER: Because, I mean, I am just trying to work out, does one not want to
13 essentially work out what is the differential arising in relation to each product and then weight
14 those together by the volume of that product rather than just taking the average volume of
15 products and multiplying them by an average of the spread, because the two are actually
16 going to be quite different insofar as an average of a product is not the same as a product of an
17 average.

18 MR. DEARMAN: Can I just understand what you mean by an individual product? I mean, I think
19 potentially the data isn't available to us at the moment to undertake the calculation that you
20 are suggesting.

21 PROFESSOR MAYER: Right.

22 MR. DEARMAN: But if you could just clarify?

23 PROFESSOR MAYER: But to the extent that there are differences across sectors, does that
24 enter into your calculations at all in terms of the --

25 DR. VELJANOVSKI: If I could respond to that, I think the position we are in at the moment is that
26 we have -- as we pointed out in the report there are a number of different interchange fees or
27 MIFs, if you look at the OFT report they list some of them, I believe there are over 200 during
28 that period, and they give an average MIF, and we have come out with an average MIF
29 because we do not know which cards -- it is not a matter of product -- it is which card is being
30 used in a particular circumstance, so we have taken the average as they have done in
31 *Sainsbury's*, they took a weighted average, or just multiplied the interchange revenue by -- to
32 get an average and just applied that to the volume of commerce, effectively. That is the way
33 we have proceeded, and I am not sure that segmenting commerce by product category --

1 would certainly not address the issue of differential MIFs and differential -- or even counter
2 factual, differential counterfactual interchange, so I am not sure that that would progress the
3 analysis any further. I think that is ...

4 PROFESSOR MAYER: So you are not concerned about the fact that it is varying across
5 product and therefore -- that the difference between the counterfactual and the actual is
6 varying across sector, and that you are therefore not taking account of that?

7 DR. VELJANOVSKI: Well, let's explore that. I am not sure how it would necessarily vary across
8 sectors, because we have a situation where the overcharge and the counterfactual are really a
9 horizontal charge, and it is using a card, your card, to make varied purchases across a
10 spectrum of sectors, so the relevant consideration is what card do you have, and arguably you
11 could say, well, we need a separate counterfactual for each card or type of card, but I don't
12 think that is a workable approach, and it has not been used in any of the investigations into
13 cards, although there is a suggestion that some of these premium cards are probably being
14 charged, but I think if we go to the corporate level, pushing these cards into corporate cards
15 causes a bit of a problem, but I do not think there is a systematic variance that we could
16 identify, certainly not from the data that we had available to us, of different IFs and
17 counterfactual IFs across varying sectors. That is my understanding at the moment having
18 looked at the data jointly with Mr. Dearman.

19 PROFESSOR MAYER: Okay. So if we then look at the which in which you have
20 computed the pass-through as the difference between the actual and the counterfactual, now,
21 there are several different methods that are --

22 DR. VELJANOVSKI: The pass-through or the interchange counterfactual?

23 PROFESSOR MAYER: The pass-through, so the extent to which there is an effect of the
24 actual and the counterfactual.

25 DR. VELJANOVSKI: Perhaps you could just help me and point to which section of the report --

26 PROFESSOR MAYER: Okay. So basically looking at your calculations on 42, part C
27 where you take the counterfactual interchange fee and you apply it to volume of transactions.

28 DR. VELJANOVSKI: With respect, that is not the pass-through. Those calculations relate to the
29 overcharge.

30 PROFESSOR MAYER: Okay, so that is the overcharge calculation.

31 DR. VELJANOVSKI: Overcharge calculation, yes.

1 PROFESSOR MAYER: And what I am trying to establish is what is the counterfactual that
2 you have been using for that? For those calculations, and there are a variety of different
3 approaches that can be taken there.

4 DR. VELJANOVSKI: We have not pinned our colours to any particular approach, and if you look
5 at the various commission investigations, the OFT report, and, of course, the Tribunal's own
6 investigations in *Sainsbury's v MasterCard*, is that there is a difference of what the
7 counterfactual should be and what data should be used to calculate the counterfactual, so
8 initially when we started this work I thought it was a relatively simple task of taking the data
9 that was available on the actual average MIF and subtracting from that Mastercard's
10 undertakings from the Commission, and I thought, well, this is a relatively easy exercise,
11 because here we have Mastercard agreeing to undertakings to reduce the interchange fees,
12 and that has become basically law under the EU regulations.

13 However, when the Tribunal reported and basically slammed that approach to saying that no
14 sane business would adopt that merchant indifference test which was proposed by several
15 economists, then we switched tack and looked at, basically, alternative approaches to
16 estimating it, and so in our report we list a number of approaches. One could adopt a zero
17 interchange fee which was proposed, or there were a number of schemes in Europe that do not
18 have interchange fees, and there are a number of academic articles to say there should not be
19 interchange fees, and even if you use the merchant indifference test, in some jurisdictions,
20 when the central banks have gone out and collected data from the various merchants to
21 calculate the merchant indifference test, and they found that it is quite possible that even
22 under the merchant indifference test the interchange for the -- the optimal interchange fee
23 should be zero, but having read the *Sainsbury's* decision we veered more towards that basis of
24 -- at least that figure rather than that basis of calculation, because as you appreciate, the
25 *Sainsbury's* decision only overlaps with a small fraction of the infringement period that we
26 are concerned with, but I understand that the data that the -- that was used in the *Sainsbury's*
27 decision, the EDC studies, go back to 1993, and I think they are done biannually, or every two
28 years from 1993 according to the Office of Fair Trading, so there will be that database if you
29 want to use that sort of, what I call the, "Cost stack", approach, but it is a matter for further
30 analysis of what the counterfactual actually is, particularly when you recognise that that card
31 penetration was quite different in 1993 than it was at the end of the period, that the market
32 structure was quite different too, because in that period banks and both the issuers and the
33 acquirers, there was a large amount of integration in that sector, so we need to take into

1 account those factors in coming to some conclusion of what the annual counterfactual is, or
2 whether one counterfactual can be used for the entire period.

3 PROFESSOR MAYER: Do you have any sense as to the difference that emerges, for
4 example, between using the indifference approach?

5 DR. VELJANOVSKI: Yes. We can see that from the Mastercard undertakings and the *Sainsbury*
6 decision. I think *Sainsbury* came out a bit higher than the *Mastercard* undertakings. I think
7 I am correct in saying the *Mastercard* undertakings were a bit severe in comparison to what
8 the Tribunal itself has decided, what the appropriate -- having had a look at the *Sainsbury*
9 data, but I think it is a 0.1 or 0.2 percentage.

10 PROFESSOR MAYER: Right, so your assessment is that that would not significantly
11 change the estimates.

12 DR. VELJANOVSKI: Not really. I think I can say that. Yes.

13 MR. DEARMAN: Yes.

14 PROFESSOR MAYER: So if we then look at the pass-through element, you have taken,
15 and I think it is reasonable to say that it is quite widely accepted that between the acquiring
16 banks and the merchants it is 100 per cent, the merchants to consumers you also take as being
17 100 per cent.

18 DR. VELJANOVSKI: Yes, and an illustration, I suppose. We said in the report that at this stage
19 we do not know whether -- what percentage it is, and in discussion this morning we said that
20 the percentages could vary.

21 THE PRESIDENT: You say in the report that you deal with this in section 6, don't you, of your
22 report --

23 DR. VELJANOVSKI: Yes.

24 THE PRESIDENT: We see you have put it -- it is used as 100 per cent in the Claim Form, but in
25 your report, 6.2.2, page 31, you say:

26 "It is likely to be high".

27 You say, "50-100 per cent", and of course, when you are looking at totals of the region
28 canvassed in this case, that makes a vast difference, doesn't it, 50 per cent or 100 per cent.

29 DR. VELJANOVSKI: It does make a vast difference, and --

30 THE PRESIDENT: Billions of pounds, in fact.

31 DR. VELJANOVSKI: Yes.

32 THE PRESIDENT: So working out where it is going to be quite important.

1 DR. VELJANOVSKI: It will be important. I think the situation we have at the moment, in fact
2 from all the proceedings that have occurred, is that some experts have been arguing it is 100
3 per cent, it could well be over 100 per cent, we do not really know, for example, there have
4 been studies done in -- even in the food industry that indicates the pass-through is over 100
5 per cent, or cigarettes over 100 per cent, the Tribunal in *Sainsbury's* said it was 50 per cent
6 with respect to the interest calculation. It did not explain where it got that figure. Dr. Niels'
7 report, which views a lot of information on behalf of Mastercard, says it is 100 per cent. If
8 you read parts of the *Sainsbury's* decision it gives the impression that it is blindingly obvious
9 that it has to be 100 per cent otherwise there would be X businesses, I think was the phrase
10 used by the Tribunal in that case, if they didn't pass it through in a competitive market, so we
11 have to go, as we have indicated, sector-by-sector, to look at market conditions, to look at
12 what the evidence is to come to some final conclusion as to what percentage it may be overall.

13 THE PRESIDENT: Well, can you help me, unlike you and Professor Mayer I am not an economist,
14 but you say we have to go sector-by-sector. What will be, from an economic perspective, the
15 sort of criteria, when you look at a sector, that will determine what level of pass-through is
16 likely?

17 DR. VELJANOVSKI: Well, the standard parameters, if you like, of pass-through, and we have a
18 number of reports that have been published on behalf of the competition authorities to assist
19 people in looking at this, are, of course, the supply and demand conditions, and market
20 structure, and when I say, "Supply and demand conditions", I mean -- well, I mean essentially
21 that, but, you know, what is the nature of demand, was it akin to super pass-through, the
22 curvature is of a similar type, supply conditions, whether it is constant unit cost, whether the
23 overcharge is affecting marginal costs rather than fixed costs, what the market structure is,
24 whether it is competitive or monopolistic, how the type of pricing regime that uses -- in
25 *Sainsbury's*, for example, they accept almost de jour that if there was mark-up pricing it
26 would be 100% pass-through. Of course, I understand some of the tax cases, legal tax, where
27 there is restitution being sought, it is quite clear there, and as an economist one would accept
28 that even if there is mark-up pricing it does not mean that 100 per cent is pass-through, so if
29 you are looking at all those parameters to form some impression there would be objective
30 statistics out there about the elasticity in the various sectors, food, cigarettes are intensive
31 studies to look at elasticity figures, and in a number of sectors there will have been a lot of
32 work done on pass-through, in the financial sector, pass through of interest rates. We can't
33 open up a newspaper today without having some discussion of pass-through of falling value

1 of sterling, and whether food prices are going to rise as a result of that, how much are they
2 going to rise by, so those are the type of things we would look at and then we would search
3 through the evidence given in the various proceedings in the High Court and the Tribunal
4 itself, we have got the *Sainsbury* evidence, we would look at market studies, we would look
5 at research that has been done by academics, and maybe in some sectors we would be able to
6 do -- like, independent research, but we would principally be looking for evidence of how
7 they have passed through other costs, because the issue right at the front here that would
8 probably prevent us from doing an econometric analysis, is that the interchange fee has been
9 going through the entire period. My understanding at the moment is that it hasn't changed
10 that much. It may have come down a bit, but it tends to be fairly stable over the relatively
11 long period of the infringement, so there we have to look at what might be called indirect
12 evidence of pass-through rather than specifically -- and I think the, if I am not putting words
13 in if not this panel the Tribunal's own mouth is that the Tribunal in *Sainsbury's* seemed to
14 accept that if it is not a defence and it is an offence, that is an indirect purchaser is making a
15 claim, the approach is a bit more sympathetic because it is running with the right to
16 compensation for an illegal act, and so even though, as you, Mr. President pointed out, they
17 didn't take account of -- didn't take much account of Dr. Niels' evidence in respect of the
18 defence, they seemed to be fairly persuaded in terms of when they were awarding interest, to
19 say that, you know, 50 per cent would have been passed through. I admit that they hadn't
20 explained why they seized on 50 per cent, but perhaps it was just a fairness point.

21 PROFESSOR MAYER: But isn't it then an extreme to assume a 100 per cent pass-through?
22 I mean, it could only be lower, it can't be higher than that.

23 DR. VELJANOVSKI: Well, it can be higher in some sectors. As I have said, there is empirical
24 research showing, for example, for cigarettes, sometimes it is 700 per cent pass-through of a
25 tax increase, so I don't think we should limit the maximum to 100 per cent. I mean, I know in
26 the literature they do 100 per cent competitive and 50 per cent is the -- and therefore that is
27 why I have picked those two boundary figures, it may be 100 per cent in some sectors, and it
28 may not be in other sectors. Why did we pick the 100 per cent complete pass-through? We
29 could have picked any number of figures. That gives the upper bound of the -- at least the
30 upper bound of the claim.

31 PROFESSOR MAYER: So in terms of deriving -- if one wanted to derive an average then
32 one would do it basically in relation to the nature of the sector and one would wait to get on
33 the basis of sectoral composition --

1 DR. VELJANOVSKI: That is our thinking at the moment. If you turn to page 54, Appendix 3,
2 from the available data, this differentiates expenditure by sector, and as was said this
3 morning, in terms of the actions before the High Court and the Tribunal, this will cover 74 per
4 cent on this categorisation of card transactions, there will be information available from those
5 cases for 74 per cent. The ones missed out are mixed businesses, financial and other services.
6 Now -- so proof as it is there is 74 covered by those -- and if you take, for example, food and
7 drink, supermarkets, they comprise about 20 per cent in themselves, so there is a lot of
8 supermarket actions going ahead, and if you take motoring, I don't know what specifically is
9 in that category, but at least petrol is about 10 per cent of card transactions, and if you take
10 financial services, again, I am not entirely clear because this is just a categorisation on a like
11 basis by the UK payments Council, but in the financial sector although my knowledge at the
12 moment is no financial cases, in the financial sector there is a lot of research being done on
13 interest rate pass-through and other cost pass-through by the banks, by central banks, reserve
14 banks and other financial institutions, so we have an idea that at least in that financial sector,
15 with respect to interest rates, as a comparator, it is almost 100 per cent pass-through in that
16 sector, so that is our current thinking of the way to sort of --

17 THE PRESIDENT: Sorry, this is card purchases.

18 DR. VELJANOVSKI: Yes.

19 THE PRESIDENT: What is that in the financial sector? It is not paying banks. You say research
20 your banks but it is not going to be banks, is it? You don't pay your bank by credit card.

21 MR. DEARMAN: No. It could be insurance, Household insurance, car insurance.

22 DR. VELJANOVSKI: Yes.

23 THE PRESIDENT: Is there research on pass-through of interest rates in Household insurance?

24 DR. VELJANOVSKI: Well the Household insurance is probably one area where they probably add
25 a bit on, at least towards the end of the period --

26 THE PRESIDENT: They add what, sorry?

27 DR. VELJANOVSKI: There would be an administrative charge or a card charge, going back to this
28 surcharge point, but we do not know what lies behind these categories in any specific detail,
29 and this is just public UK payment data. We would have to start asking, you know, what
30 exactly is there.

31 THE PRESIDENT: Well, we know on some of them, presumably, motoring, you have said petrol
32 is significant.

33 DR. VELJANOVSKI: Other figures I have seen, petrol is about 10 per cent.

1 THE PRESIDENT: Isn't there -- taking the criteria you have given, supply and demand, curve
2 market structure, type of pricing regime, elasticity of demand, isn't that quite different
3 between, say, petrol service stations and car rental and, say, garage repairs? Those are very
4 different markets, aren't they? They might be in the same sector, motoring, but as markets,
5 economic markets, they are wholly different, aren't they?

6 DR. VELJANOVSKI: They are, yes.

7 THE PRESIDENT: So, the degree of pass-through on Avis rental cars may be quite different from
8 petrol service, might it not?

9 DR. VELJANOVSKI: It might. Yes.

10 THE PRESIDENT: There is no reason to think it should be the same.

11 DR. VELJANOVSKI: No, but I haven't said it was the same.

12 THE PRESIDENT: I see, but they are all in the motoring sector.

13 DR. VELJANOVSKI: Well, just go back one step, this data has been collated by someone else. It
14 is the only publicly available data. There is other data with respect to petrol purchases from
15 the Competition Commission, and from other card -- so these are crude segmentations of the
16 number of transactions. Obviously within each category there will be different types of
17 businesses, and we will have to make a decision about how that is going to be handled, if we
18 get the data that underlies it.

19 THE PRESIDENT: Because it -- this is what I am asking you, isn't it likely that -- well, there is no
20 reason to assume that the various markets within each sector will have the same degree of
21 pass-through because the parameters that you have outlined may be quite different, one
22 market to another.

23 DR. VELJANOVSKI: That is correct.

24 PROFESSOR MAYER: Isn't it also going to vary geographically in terms of the degree of
25 competition, for example, between supermarkets and different areas being greater than
26 others?

27 DR. VELJANOVSKI: It may.

28 THE PRESIDENT: How do you expect to get the sort of data that enables you to analyse
29 pass-through at the level of markets as opposed to these broad sectors? You referred to the
30 cases brought, but there are a whole lot of markets, some quite significant, where no case has
31 been brought against Mastercard.

32 DR. VELJANOVSKI: Yes. We will have to rely on third party studies, Competition Commission
33 reports, information that is available about market structure and demand and supply

1 conditions in those markets and come to some judgment, but there is going to be a high degree
2 of aggregation in dealing with this matter because the cost of looking at all these sectors at a
3 very detailed level is going to be certainly more than the budget that we have been given to do
4 this.

5 THE PRESIDENT: I am trying to get a sense of how high a degree of aggregation it involves. I
6 mean, if we take food and drink, take your list on page 54, would it be fair to say that
7 supermarket multiples, Safeways, Sainsbury's, Ocadors of this world, may have very different
8 rate of pass-through even if that is a common one, or reasonably common from, say, a local
9 convenience store?

10 DR. VELJANOVSKI: Well, observation tells you that that might be the case because convenience
11 stores generally have a surcharge, if you pay with a card at the moment, so they are arguably
12 doing more than 100 per cent pass-through of their --

13 THE PRESIDENT: But only to certain purchasers.

14 DR. VELJANOVSKI: Only to certain purchasers, yes. I think even when one is doing overcharge
15 with an econometric analysis for a sector you are going to have these differences of size
16 --econometrics tries to deal with that but this high level of aggregation, usually what comes
17 out is an average figure for that -- for the overcharge, and usually an average over the
18 infringement period, if you look at some of these econometric studies that have been done on
19 overcharges, but if we are being pushed to the granular level of, you know -- then that is going
20 to become a very complex task.

21 PROFESSOR MAYER: Is another issue the extent to which credit card as against cash sales
22 are made in different sectors? Will that not affect the extent to which there is a pass-through?

23 DR. VELJANOVSKI: Well, we have taken into account, obviously, in the class that some people
24 are using cash and some are using credit cards. It will have an effect to the -- if you have 10
25 per cent people are using cards and the overcharge has been spread over 100 per cent of the
26 customer base, then of course the overcharge is going to be as reflected in price, smaller, but
27 it is still being passed through.

28 PROFESSOR MAYER: Right.

29 DR. VELJANOVSKI: If 100 per cent of the people are using credit cards, then, obviously, that is
30 going to have a larger effect on price, so the answer to your question is yes, it does matter how
31 many people are using cards as opposed to -- that is a matter of how the price rises rather than
32 whether it is passed through.

33 PROFESSOR MAYER: Yes. I understand.

1 So there could be quite a significant variation across different types --

2 DR. VELJANOVSKI: In terms of the observable price.

3 PROFESSOR MAYER: So I was just wondering, you made a statement, if we could go to
4 5.3.21 of your report, this is in relation to the overcharge:

5 "Even if the overcharge is determined by a materially different ...(Reading to the
6 words)... range of different businesses".

7 Wouldn't it have to be the case that they are purchasing similar composition products across
8 different sectors at different points in time for that statement to hold?

9 DR. VELJANOVSKI: If I understood you correctly the answer is probably yes.

10 PROFESSOR MAYER: Right.

11 DR. VELJANOVSKI: Could you repeat what you said?

12 PROFESSOR MAYER: Is it not the case that the statement that you make there would only
13 hold if all consumers purchased similar composition of products, and indeed for the reasons
14 that we were just talking about, in similar areas of the country, at different points in time?

15 DR. VELJANOVSKI: Strictly, yes, but I think this was designed to deal with the proposition that
16 saw differences at the overcharge level and therefore that is a significant problem, but then on
17 the purchasing pattern for the consumers, they were buying from various services and
18 products perhaps across a whole range, so at this sort of level of aggregation one could take
19 the purchasing pattern of a whole class during a period, or something from the consumer price
20 index, how they purchased according to that, or adjust it for cash and purchases, so I haven't
21 thought about it completely, or we have not thought about it completely, I think there is a way
22 of adjusting to deal with that at the time, at least, and to reflect, somehow, the purchasing
23 pattern, perhaps use some adjustment for that, but as to your basic question, yes.

24 PROFESSOR MAYER: Right. So in terms of looking at the estimates that you derived, do
25 you think that these points about the variation across sectors, the variation across types of
26 consumers still allow one to say that there is a commonality in terms of the impact on the class
27 as a whole?

28 DR. VELJANOVSKI: No, it is a commonality that they suffered an overcharge. As I understand it
29 and have been instructed, you know, looking at where there are common issues, that was
30 well-rehearsed this morning, there can be differences, and if these differences turn out to be
31 significant then there can be adjustments, or in the extreme, the separation of classes, but -- in
32 subclasses -- but we are dealing here with a situation where there has been a legal act, we
33 believe that a significant proportion has been passed through, subject to verification, and that

1 is the commonality of the class, that they have suffered an increase in prices as a result of an
2 illegal overcharge, whether they have suffered differences, and to what extent these
3 differences are to be taken into account, in an approach that is designed to inherently be one
4 of aggregation and averaging, it seems to me -- well, it is inherent in the calculation.

5 PROFESSOR MAYER: Right. So in terms -- well, there is first of all a question of does
6 this derive the right aggregate number, but before one considers the impact on the distribution
7 across consumers, will this approach of essentially making a broad brush set of averaging
8 assumptions allow you to derive a correct aggregate figure, and how do you know whether or
9 not those assumptions that you are making en route are not leading to a serious violation of
10 that aggregate number.

11 DR. VELJANOVSKI: Well, that is presumably what is going to be tested by the Tribunal.

12 Mastercard will have its own experts --

13 THE PRESIDENT: Well, no, we are trying to understand the method you are using, and how it is
14 being done.

15 DR. VELJANOVSKI: Yes.

16 THE PRESIDENT: You say that you take these sectors you have got on page 54, but you have
17 recognised that within the sectors there might be many different -- many or some different
18 markets which may be quite significantly different in terms of pass-through one from another,
19 so I mention two, one is food and drink, the other is motoring because those are, I think, the
20 two largest shares of card expenditure. As I understand it, you recognise that within each of
21 those sectors there may be a number of markets with quite different rates of pass-through, so
22 to take what one might gain from the *Sainsbury's* case and say, "Well, that covers the whole
23 of the food and drink sector", seems likely to be misleading, because the degree of
24 pass-through in other parts of food and drink might be quite different, and, similarly,
25 motoring, to take what might emerge if you got information from a case brought by a car
26 rental company and applied it to garage repairs, might also be misleading. That is how I
27 understood you to recognise that. That would not be a good proxy for the whole of the sector.
28 Is that right?

29 DR. VELJANOVSKI: That is correct. These categories here are manufactured by the claimant
30 counsel to give some breakdown of card transactions.

31 THE PRESIDENT: So to do it in a meaningful way you would have to -- no one is suggesting you
32 do it merchant by merchant but you need to look rather more market-by-market, would you
33 not?

1 DR. VELJANOVSKI: Let's take the motoring sector. If I said that 10 per cent of that sector was
2 petrol and 3 per cent was car hire, I would know, for example, that -- well, I would be fairly
3 confident in saying that, you know, petrol prices, there was a pass-through over a period of
4 time, and that was approximately 100 per cent, give or take, on the 3 per cent I might find that
5 it is 75 per cent or something like that of pass-through, but after considering the nature of car
6 hire and the car hire sector, and then I would do the -- if I wanted to stick with this, and this is
7 at a very preliminary level, I would do a weighted average of that, those two percentages and
8 come out with a conclusion about what that is. I would present, you know, my reasoning, and
9 the available data to support that, so while this is being presented I don't want to be crucified
10 by Appendix 3 of this report --

11 THE PRESIDENT: No, we are trying to understand what you would be seeking to do.

12 DR. VELJANOVSKI: Well, that is what I would be seeking to do, and if someone -- if it became
13 abundantly obvious that that sector, you know, there were vast differences like mixed
14 businesses, I don't even know what that constitutes at the moment, then I would be concerned
15 about, you know, how one was going to calculate that.

16 THE PRESIDENT: And is there data for all these different various markets?

17 DR. VELJANOVSKI: Well, there is data for a lot of them, like travel, airlines have been studied to
18 the Nth degree about, you know, fuel surcharges, pass-through of various costs, so one
19 wouldn't have much of a problem, petrol and the supermarkets have been studied, we know
20 what the structure of these are, financial sector, depending on what it constitutes, so in a large
21 proportion of the very relatively large sectors, there is a lot of studies that have been done,
22 competition reports and market studies and reports, so I am not deterred at this stage in terms
23 of locating some meaningful information. In some cases you might have to buy the
24 information.

25 THE PRESIDENT: The data on spend is also -- that will be broken down on card expenditure by
26 different markets, will it?

27 DR. VELJANOVSKI: Yes because it has to relate to the value of commerce.

28 THE PRESIDENT: The -- no, I mean the figures, the actual figures for sales here, sales and
29 services, these are card expenditure figures.

30 DR. VELJANOVSKI: Yes.

31 THE PRESIDENT: Is that available broken down by markets? You say you have got this from the
32 UK payments Council.

1 DR. VELJANOVSKI: Well, as far as I am aware it is broken down as it appears here. We will have
2 to go back to the payments Council and discuss with them whether it can be broken down
3 more or what constitutes those particular categories and then we will have to form our own
4 judgment as to whether there are mark he's within these categories that need to be treated
5 separately, but I cannot say at the moment -- and some of these categories are obviously so
6 broad as to be fairly meaningless like, "Other services".

7 THE PRESIDENT: Yes.

8 DR. VELJANOVSKI: I think one would -- in some of these circumstances -- have to make some
9 broad brush estimates of what the pass-on rate is likely to be.

10 PROFESSOR MAYER: So I think that has been very helpful in terms of discussing the
11 aggregate number, and I think we probably want to draw it to a close for today, but I think we
12 would like to perhaps continue a bit tomorrow, if that is okay with you.

13 THE PRESIDENT: And I think, then, also, counsel may have some supplementary questions for
14 you. We need to stop now it is at 4.30. We will resume at -- were we asked to sit earlier?

15 MR. HOSKINS: I think the suggestion was Friday for Mr. Harris.

16 THE PRESIDENT: Sit late tomorrow is what you asked.

17 MR. HARRIS: If needs be. That is largely because we need to progress with Mr. Williams'
18 submissions on funding.

19 THE PRESIDENT: Yes. Well, just one moment. (Pause).

20 We are keen not to sit too late tomorrow so we will start at 10 o'clock tomorrow.

21 MR. HARRIS: Thank you.

22 THE PRESIDENT: So, Mr. Dearman and Dr. Veljanovski, thank you very much. You know that
23 you are not allowed to discuss your evidence with anyone else overnight.

24 MR. HOSKINS: Can I just do one very quick thing which is a very small point about deceased
25 persons within the class, and rather than waste time, I am going to hand up a short note if you
26 wouldn't mind reading it overnight, if you have any questions we will deal with it, but it saves
27 us having to take time up with it. (Handed).

28 THE PRESIDENT: And Mr. Harris is taking instructions about, I think, the issue at the end of your
29 skeleton argument about the confirmation that is sought, and therefore how that impacts on
30 that confidential section.

31 MR. HARRIS: I am, and on the points you put to me about class definition, and I just flag up a
32 simple concern, this is now the second supplementary skeleton that we have had. I have
33 opened our case now --

1 | MR. HOSKINS: Well, we can say it out loud or give you a note.

2 | THE PRESIDENT: It is just a note of what Mr. Hoskins is going to say. It is not unusual. You can
3 | respond to it orally. I would have thought it is for your advantage, you can look at it in
4 | advance and see it in writing, so 10 o'clock tomorrow.

5

6

