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IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1431/5/7/22 (T)

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Friday 17 May 2024

Before:

Sir Mr Marcus Smith
The Honourable Lord Erich
The Honourable Mr Justice Ian Huddleston

BETWEEN:

Adur District Council & Others

Claimants

v

Traton SE & Others

Defendants

A P P E A R A N C E S

Thomas De La Mare KC and Flora Robertson (Instructed by Fieldfisher) on behalf of the
Claimants

Sarah Abram KC and Rachel Oakeshott (Instructed by Slaughter and May, Allen Overy
Shearman Sterling, Herbert Smith Freehills) on behalf of MAN, Scania, Iveco

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Friday, 17 May 2024

(10 30 am)

Hearing for Strike-Out or Summary Judgment

MR DE LA MARE: I appear with Ms Robertson, Ms Abram and Ms Oakeshott appear for the OEM Defendants -- Iveco, MAN and Scania -- and this is an application for strike out/summary judgment.

I am not going to bore you with the principles in relation to that. You know all of that, and I am not sure the addition of copious other authorities -- *Okpabi, Duchess of Sussex*, etc, really adds much to the elucidation of the issues.

THE CHAIR: No. I think those are best kept to Reply if the Respondents raise points that need to be addressed.

Mr De la Mare, before, though, you really launch into your points, I will give the usual livestream warning.

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We have one other point on jurisdiction which is this: we have a mixture of Parties from, certainly,

1 England, Wales and Scotland. We have given some
2 thought -- I am not sure if they are represented but if
3 they are, then the same point applies there -- we were
4 minded to think that we ought to say that so far as the
5 Application to Strike Out is concerned, it ought to be
6 the case that we would apply whichever jurisdiction the
7 relevant Party was belonging to.

8 In other words, we have a trifurcated appeal
9 because, in a sense, this is quite fundamental to the
10 different Parties and the different jurisdictions.

11 Now, I appreciate that is not very efficient, and it
12 may well be that no one avails themselves of that
13 particular route, but that was our preliminary thinking,
14 and it may be that over the course of the day the
15 Parties could think about that themselves and give us an
16 indication as to whether that is an appropriate course,
17 or whether we ought to be doing the undoubtedly simpler
18 course of simply saying, "well, most come from England
19 and Wales, so let us do England and Wales".

20 MR DE LA MARE: In the course of preparation for this case I
21 must admit I have been particularly struck by the
22 Anglo-centric nature of some of the arguments in
23 relation to remoteness.

24 This case is, at its heart, about rules of
25 remoteness that are common to all tort or delict,

1 whether it is English law remoteness, Scots law,
2 Northern Irish law. That point is resoundingly clear
3 from *Sainsbury's* and the other cases citing *British*
4 *Westinghouse*.

5 The principles that you are being asked to develop
6 here apply, and this is a point I cannot emphasise
7 enough, to all torts, all delicts, and that is
8 a critical point when one comes to look at the issues of
9 policy in particular, because the argument that the
10 Defendant wishes to amend to adopt, which is that the
11 receipt of grant funding from any form of Central
12 Government, be it the Scottish Government, the English
13 Government or in Northern Ireland, the argument they
14 wish to adopt has resonance for all forms of tort or
15 delict claim bought by bodies that are funded
16 exclusively by public money, and it is one of the
17 reasons why we think -- obviously -- the point is suited
18 for resolution on the point of law, because nothing is
19 going to turn on the particular amount of money, and the
20 point is of incredible importance, because the logic of
21 the case is that no publicly-funded body that takes all
22 of its funds from public money can ever bring a tort
23 claim if it has any form of balanced budget obligation
24 because they will never suffer any loss, and there is
25 not a trace of that principle anywhere in the law.

1 There are hundreds of tort claims that have been
2 brought by Local Authorities in the field of competition
3 law, in the field of general tort law, and no one has
4 ever suggested, "well, you have not suffered a loss
5 because you reneged on our contract, or we ripped you
6 off, you just raised Council Tax or some other charge or
7 you got more money from Central Government so you
8 suffered no loss", so that is why I think you are quite
9 right, the resonance of these issues is to general tort
10 law in all of the jurisdictions affected, and obviously
11 in the case of the Scottish Fire Authorities that
12 received the entirety of their funding from the Scottish
13 Government, the point arises in the most adamant or
14 crystalline clear fashion.

15 There are two issues, as you know. There are the
16 now well-trodden issues of factual causation, factual
17 remoteness, and that, in itself, requires the
18 application of a general test of remoteness. That, in
19 itself, has baked-in general considerations of policy
20 about how connected a transaction needs to be in order
21 to be taken into account in the calculation of damages,
22 and our case here, in a nutshell, is that everything you
23 need to know is contained in the cases of *NTN* and *DAF*
24 because they are the application of those very
25 principles in the context of a strike out or summary

1 judgment, one of which is in the context of the Trucks
2 Cartel and indeed one of which, as we will see from the
3 pleadings, is an identical pleading to that currently
4 now partially advanced by the Defendants.

5 The only thing that is new about this claim is the
6 application of those principles beyond supply and
7 negotiation to what the Defendants want to characterise
8 as "downstream pricing" but we say are taxing or
9 charging decisions governed by public law. That is the
10 first issue.

11 The second issue, and it is novel, the novelty is
12 that in part, I think, the fact that the Defendants have
13 had the audacity to claim, or plead their claim of
14 causation in the way that they have, the novelty lies in
15 the fact that the court is going to have to grapple with
16 what rules of remoteness apply, in particular, to public
17 bodies facing tort claims, and whether or not Defendants
18 can wash off liability by pointing to balanced budget
19 obligations, receipt of private funds, where the
20 consequence of so doing is to leave no one with a claim
21 and their harmful conduct, and their overcharge
22 effectively uncompensated, and we say that is an
23 obviously unacceptable result, in particular when you
24 are dealing with a Public Authority which is,
25 effectively, a trustee in many ways, for its residents

1 and ratepayers, and will take any receipt it gets and
2 use it to the benefit of those who have been affected,
3 if the economic pass-on case of the Claimants is
4 accepted, have been affected by the conduct in question.

5 So those are the issues in a nutshell, and I propose
6 to address the issues as following: first of all I am
7 going to take you to the Pleadings. I should emphasise,
8 I am not intent on making pleading points. My learned
9 friends have indicated they wish to amend to make
10 arguments that other Parties have made but have settled
11 out, etc. I just want to show you what is and is not
12 pleaded in the picture of the Pleadings, and that, then,
13 has a very important time, because I want to then show
14 you the mis-matches between the Pleadings and my learned
15 friend's expert evidence, the evidence from Mr Noble,
16 and there are very fundamental mis-matches between the
17 legal case on pass-on and the economic case of pass-on
18 that Mr Noble has set out.

19 Third topic, and you will tell me if I am teaching
20 grandmothers to suck eggs, there's quite a bit to get
21 through, is the law in relation to pass-on. It is pretty
22 dense. You may well have grappled with it much
23 beforehand. Please speed me up if I take too long in
24 relation to that.

25 Fourth topic, I am going to take you quite quickly

1 through the law on undertakings, which we say is
2 relevant to both levels of causation but, in particular,
3 issues of legal policy, and really the end point is your
4 decision in *Max Recycle* and your conclusion at paragraph
5 42.6 of *Max Recycle* that even commercial waste which was
6 charged for reasonable cost recovery was not economic
7 activity for the purposes of the subsidy rules and, by
8 logical extension, the competition rules, and if that is
9 the case, then the whole suite of Local Authority
10 Services which we are concerned with here are not
11 activities in a market, they are not in any way caught
12 by the competition rules.

13 Fifthly, I am going to recap the key issues on the
14 facts, and then having that very long run-up I can
15 actually take you through the issues, Issue 1 and
16 Issue~2, pretty quickly, because when you get down to it
17 the issues between the Parties are actually quite short
18 and sharp.

19 So, the first topic is the Pleadings, and I should,
20 at this juncture, confess that I am having a, "computer
21 says no" moment because my iPad crashed.

22 THE CHAIR: We have things on paper but do you want us to
23 rise for a couple of minutes?

24 MR DE LA MARE: No, I think I have got enough open that
25 I can continue without any problem, so can we start with

1 the Pleadings?

2 There are two or three Pleadings to look at. They
3 all go to the case that has been heard, which is that
4 Overcharge has been avoided by one of three means. The
5 first, and this is how it is pleaded, is by prices paid
6 by customers for services, and we take that as requiring
7 repleading to mean, in fact, the taxes that ratepayers
8 have paid, and, where applicable, the public service
9 charges that a Local Authority in its discretion has
10 chosen to levy that are relevant. There has been a lot
11 in the mix. I think it has boiled down to only garden
12 waste and bulky items. That is the first head.

13 The second, which is pleaded, and this is identical
14 to the plea in *NTN* and *DAF* is negotiated reductions in
15 prices charged by other suppliers to Local Authorities.
16 What that means is your staff costs, or if you contract
17 out, let us say, building work through a procurement,
18 what you pay to the company from whom you are procuring
19 building or education or whatever other services, so
20 that is the second head.

21 The third head, and this is by way of threatened
22 amendment, is that it is said that any amount of central
23 grant used to fund the activities of Local Authorities
24 by Trucks is a form of pass-on.

25 So let us look at the Pleadings.

1 THE CHAIR: Just pause there, Mr De la Mare. You are quite
2 rightly addressing us on the basis that these proposed
3 amendments are in, and that seems to us right. If you
4 lose, then the amendments go in automatically. If you
5 win, then they do not, and that is the way it works.

6 MR DE LA MARE: Exactly.

7 THE CHAIR: Good.

8 MR DE LA MARE: I do not want to run this case on a pleading
9 point.

10 THE CHAIR: No. So we are basically running on the basis
11 that they are in --

12 MR DE LA MARE: If they are arguable.

13 THE CHAIR: -- if they are arguable.

14 MR DE LA MARE: The usual threshold for an amendment, and
15 that is why, actually, whilst there is
16 strike-out/summary judgment application we say there is
17 an implied application to amend at large, to regularise,
18 the defective Pleading that is currently before the
19 Tribunal that does not, in fact, reflect Mr Noble's case
20 or the case that they now want to run, and to run the
21 arguments they wish to run, so you would need to get to
22 the substance of the argument.

23 So, first of all, the MAN Pleading, it is in bundle
24 {A/8/1}. The relevant paragraph is 25, which is at page
25 {A/8/10} to 11.

1 Now, with all politeness to Mr Jowell and his team
2 who settled this Pleading, it is about the most
3 elliptical Pleading you could imagine. The MAN
4 Defendants aver that the Claimants passed on any
5 Overcharge, run off Overcharge or Umbrella Overcharge in
6 whole, or, alternatively, in part, as follows to their
7 Customers, and/or insofar as they sold any Trucks, which
8 is the subject of this claim, to the Purchasers of those
9 Trucks.

10 As you are aware, that is a completely separate head
11 of pass-on and doesn't arise for the present
12 circumstances.

13 A couple of points to note. There is an averral of
14 complete pass-on. It is a positive case, and that is
15 very important given what Lord Justice Green said in
16 *NTN*. The positive case is that the whole of any
17 overcharge that may have arisen -- of course denied, but
18 it is a contingent case -- has been passed on, and that
19 is it. There is no mechanism beyond "to their
20 customers" identified therein, and that is, we think,
21 the Council Tax charges case, reading it as generously
22 as we can. That is the first Pleading.

23 The Iveco Pleading is at {A/10/1}. Here, the
24 relevant plea is at 34 {A/10/27} and you are going to
25 see, and I am afraid I am not going to be very polite

1 about it, some of the utter garbage that has been
2 pleaded by way of pass-on as boilerplate in relation to
3 this case, so {A/10/27}, paragraph 34. You will see:

4 "Iveco will say as follows: it is denied ..."

5 So, again, positive case, "that the Claimants will
6 be able to recover damages". Why? For four reasons of
7 mitigation:

8 "Increasing the prices charged to customers".

9 So again, still that language of "prices" and
10 "customers". It has obviously been transferred over
11 from the regular commercial claims; disposal of any
12 Truck -- that is the second point we have seen before,
13 not relevant here -- obtaining any reduction for prices
14 paid for ancillary products or services. That is about
15 the procurement of the Truck-dependent services, etc, or
16 Truck chassis, so that is not relevant here, and then
17 (d):

18 "By reducing their costs by negotiation with any of
19 their other supplies or other third parties".

20 I think it should be "suppliers". That is directed
21 at staff costs and procurement for education or matters
22 of that kind, so it is being said that you keep all of
23 your costs under control and if your costs for Trucks go
24 up you are going to reduce your costs elsewhere as a
25 Local Authority. Then look at the garbage at 34.2, 3 and

1 4.

2 MS ABRAM: I am sorry to interrupt, sir, but just to save
3 the Tribunal's time, we have actually indicated to the
4 Claimants that the pleas in 34.2 to 4 are not pursued:

5 MR DE LA MARE: Absolutely, but it is pretty revealing about
6 the Pleading approach that has been adopted hitherto,
7 and the kind of umbrella approach.

8 THE CHAIR: Sure, but as we discussed, it is going to be
9 corrected.

10 MR DE LA MARE: Absolutely. One of the things that needs to
11 occur is the deletion of all of this plea. That is it
12 in terms of the pleas of the Parties.

13 What we got earlier on this week from Herbert Smith
14 was an indication that the remaining OEM Defendants, now
15 that Volvo have settled out, intend to adopt Volvo's
16 plea, and Volvo's plea is at {A/9/1}, and the relevant
17 Pleadings we think they intend to adopt, and there has
18 been no indication that it is going to be put any
19 differently, are at 6(i), that is page {A/9/4}, this is
20 the plea that you must take account of the higher fees
21 or charges for the provision of services, so the first
22 Pleading to actually engage with the features of Local
23 Government, and the funding by grants or revenue
24 provided for those purposes by Central Government or
25 other Government bodies, so that is the only plea of

1 grant funding, and then that is expanded at 38(b), page
2 {A/9/20} where we say that they say if they did incur
3 higher costs, you must take account of the extent to
4 which they passed on those increased costs or burdens to
5 their other Counterparty -- to their Counterparties or
6 to other Parties in the form of higher fees or charges
7 for the provision of services or higher rates, and so
8 suffered no (alternatively, less) loss. To the extent
9 that they funded purchase or lease of Trucks and that
10 was funded by grants, that is, again, the Claimants
11 suffering no loss.

12 What this seems to be focused on is actually rates
13 of fees or charges, but not tax. Not Council Tax.
14 There we go.

15 Put the three together and you have three core
16 allegations: raising Council Tax, raising charges or
17 fees -- four allegations: grant from central funds and
18 negotiation with suppliers.

19 What you will note is not there, and my learned
20 friend's skeleton is very firm that it is deliberately
21 not being pleaded and it is not part of their case, is
22 any what one might call "*Sainsbury's* Category 2 case"
23 which is the reduction in expenditure. That has not
24 been pleaded, and is not asserted as a matter of law to
25 be a form of pass-on.

1 The fact that the Council may have reduced services
2 in care or in relation to social work or whatever it may
3 be -- library cuts -- that is not said to be any form of
4 relevant legal pass-through.

5 MS ABRAM: That is correct.

6 MR DE LA MARE: That is relevant for this reason: it is the
7 first clear indicator of the real importance to have
8 focused on the difference between what an economist
9 considers to be pass-through, and what a lawyer
10 considers to be legally assertible pass-through, or
11 relevant mitigation. It is not asserted that that
12 constitutes -- those cuts -- constitute mitigation, and,
13 of course, each of the other one of the four categories
14 I have identified raise contestable issues as to whether
15 or not they amount to legal causation, whether applying
16 the general factual test or some wider public policy
17 analysis.

18 That terrain is really important when you come to my
19 second topic, which is, principally, about Mr Noble's
20 report. That report is in Bundle B, tab 18 {B/18/1}. I
21 am going to invite you to read this very carefully,
22 because this is, in truth, effectively the contours --
23 at least the partial contours -- of the case that they
24 wish to amend to plead, because the case, as we shall
25 see, is that, effectively, the plausibility test

1 identified in *DAF* and *NTN*, etc, plausible pass-on, is
2 passed by dint, principally, of this economic analysis.

3 Let us look at Mr Noble's core conclusions, first of
4 all at page {B/18/4}, paragraph 1.5. He says:

5 " ... there is a realistic prospect ..."

6 That is the summary judgment test:

7 " ... that the Adur Claimants have passed on part or
8 all of any overcharge".

9 It is based on two key points. Point (i):

10 "Unlike commercial enterprises, Public Authorities
11 face a statutory requirement to set a balanced budget
12 such that, when faced with increased costs, they have an
13 obligation to increase their income or reduce costs ..."

14 And note this, right from the get go he accepts
15 "which they may do via service reductions", both of
16 which constitute pass-through from an economic
17 perspective. That is the first point, and you see the
18 mis-match has already started, because there is no plea
19 that the reduction in costs via service reductions is
20 pass-on for the purposes of law.

21 Then the second point --

22 THE CHAIR: Just pausing there, though, and just so that we
23 can understand how we should be treating this report,
24 Ms Abram, you accept that we effectively put a line
25 through these paragraphs? I mean, they represent the

1 expert's opinion, but since there is a mis-match between
2 the way you are putting your case, quite deliberately,
3 and the way the economist understands it, these are
4 expressions of opinion that just don't assist, taking
5 matters forward. Have I got that right?

6 MS ABRAM: I would not accept that, sir, because what
7 paragraph 1.5 does is summarises Mr Noble's opinions on
8 the whole of the report, including price increases and
9 cost reductions -- service reductions, which we do not
10 rely on, are one element of that, but, look, we are
11 perfectly prepared to be straight with the Tribunal
12 that, as Mr De la Mere says, and this, or course, is
13 well-established in the jurisprudence, there may be
14 a gap between what counts as pass-on from an economics
15 perspective and what counts as pass-on from a legal
16 perspective, and I will address you on that in
17 submissions, but it is just that service reductions --
18 couple of words in that paragraph -- that are affected
19 by that, sir.

20 THE CHAIR: I suppose what you are saying is that given that
21 Mr Noble is giving a report as an expert economist, the
22 policing of what he says lie ill in a lawyer, and we
23 must take this as his economic evidence and then do our
24 best to shoehorn it, or use it, in the legal framework
25 that obviously prevails.

1 MS ABRAM: It would have been quite wrong for us to try and
2 alter what we asked Mr Noble to say, and when he is
3 reflecting the economics perspective of pass-on, so that
4 is why, I am afraid, and I will sit down, but I am
5 afraid it is totally wrong to suggest that Mr Noble's
6 report is somehow our case. He is an independent expert
7 who is doing his job properly as an independent expert
8 should.

9 MR DE LA MARE: There are going to be two principal points
10 in relation to this, the first that the gaps identified
11 by the report compared with the Pleadings as to the
12 difference between economic and legal pass-on are highly
13 material. That becomes all the more apparent when you
14 look at an area like grant funding that Mr Noble treats
15 as economic pass-on, but which we say, in law, is
16 incapable of being pass-on. That, then, feeds into how
17 you apply the *DAF* test, because the *DAF* test requires
18 specific identifiable price increases for particular
19 classes of person to be identified, and if you can't say
20 where in the melange of economic pass-on a particular
21 overcharge is going to come out in the wash, you are
22 going to fail the legal test in *DAF*, and that is why,
23 with respect, this argument is what I would call a,
24 "Blondie" argument -- the song "One Way or Another".
25 Their real case is effectively there are lots of

1 mechanics going on here, they are all economic forms of
2 pass-on. Because you have a balanced budget obligation,
3 one way or another you are going to pass on the loss,
4 either to the Central Government Grant or in the form of
5 cuts, which he says, as an economist are (Inaudible) or
6 in the form of charges, or in the form of Council Tax,
7 and that does not wash as a legal case, so it is
8 important to understand what he is saying. I then show
9 you the second key thing which is relevant in relation
10 to the issue about charges.

11 His case is that commercial waste services
12 constitute a benchmark service that shows that there is
13 a strong degree of costs reflectivity in the charges in
14 question, such that you can infer that that is a case
15 across all of the relevant charges, ie bulky items,
16 garden waste. The fundamental problem with that is that
17 we have been clear from the outset in the application
18 that the strike-out case is not directed at commercial
19 waste revenues, and the reason we made that concession
20 from the outset is from the perspective of factual
21 reliance, given the statutory obligations which I know
22 are well known to you from the *Max Recycle* case, we
23 thought it arguable that there would be a case of
24 factual pass-on in the case of that narrow category of
25 charge where there is both an obligation to charge, so

1 everyone has to charge for the service, and there is an
2 obligation to make reasonable cost recovery, the basis
3 of the charge, and those features are simply in the
4 present in any of the other charges. They are both
5 optional and, ultimately, at the discretion of the local
6 authority as to how they set them, subject to a cap,
7 which is that the fees cannot be more than cost
8 recovery.

9 THE CHAIR: Just going back to paragraph 1.5 and the point
10 you made with regard to service reductions, just
11 thinking about why they might be relevant. I wonder
12 whether they are not relevant in a negative way, in that
13 if you accept the premise that is informing Mr Noble's
14 thinking, namely the requirements to set a balanced
15 budget, if you can show that there have not been service
16 reductions then that rather indicates that the pass-on
17 operation, broadly construed in the economic sense, must
18 have occurred in some other way, and so although it is
19 not the way the claim is being put, it is actually
20 relevant to where the point bubbles up, so if you found,
21 for instance, that you had all the service reductions
22 taking place because of the Overcharge, you would then
23 say, well, on the pleaded case they lose because it is
24 something that they are not seeking to recover by way of
25 the articulated claim. They have made a deliberate

1 decision not to claim it, and there we are, but if you
2 show that there have not been these service reductions,
3 then the point popped up elsewhere in an area where they
4 are making a case.

5 MR DE LA MARE: The problem that they face, that unlike
6 a normal market service where the revenue in question is
7 derived from the sale of the product or services, either
8 the products or services bought or the new product or
9 services incorporating a cartelised product, unlike
10 that, there are other mechanisms in play -- there are
11 five mechanisms in play, and Local Authorities operate,
12 effectively, by an overarching scheme of political
13 decision-making and cross-subsidy. Where do you choose
14 to spend your money within your envelope of public law
15 discretion? Do you choose to prioritise weekly bin
16 collections over ubiquitous library services? Those are
17 the types of choice that are made in delivering the
18 basket of services, and that is quite unlike any market
19 in question where the choice you have to make is: now
20 that I have bought my cartelised LCD monitor, how am I
21 going to resell it, or how am I going to price the
22 product in which I have incorporated it? Once you have
23 multiple mechanisms in play, and once the law is clear,
24 as it is, that you have to identify a specific price
25 increase that is attributable to the particular

1 Overcharge in question, those multiple mechanisms are
2 hugely problematic for a Defendant, because they have to
3 identify where the specific prices are going to come
4 out.

5 It is not enough to simply say -- and this is the
6 argument explicitly rejected by Roth, J in *DAF* and Lord
7 Justice Green in *NTN*, it is not enough to say that
8 "economic theory says it will come out in the wash
9 somewhere", that is not enough. It is not enough to say
10 that companies will generally maintain their
11 profitability, economic theory dictates as much, you
12 have to identify particular price increases that flow,
13 and where there is an absence of data, if you are going
14 to make an inference on the basis of economic theory, it
15 must enable you to identify, with precision --
16 sufficient precision, (Inaudible) excepting -- where the
17 price rise comes out, and that problem of multiple
18 mechanisms becomes all the more problematic when
19 a number of the mechanisms in question may amount, in
20 economics to pass-through, but in law do not.

21 For instance, if Central Government grant does not
22 amount in law to any form of pass-on, it is clearly an
23 absolutely central part of the funding package and the
24 balanced budget decisions -- how can you work out where
25 the particular Overcharge has landed? Has it landed in

1 Council Tax? Has it landed in the central grant? Has
2 it landed elsewhere? If you identify the case on
3 negotiation as being hopelessly vague, as I'll show you
4 it is, and that comes down, again, you have a problem of
5 multiple mechanisms, how do you work out where anything
6 comes out in the wash?

7 THE CHAIR: Does it amount to the -- really what you are
8 saying is that this is just actually impossible to
9 demonstrate? I mean, let us give an example where, say,
10 a Local Authority, faced with an Overcharged Truck says
11 in terms, "we are raising our community charge by £200
12 per household in order to recover the costs of these
13 Trucks which are very expensive". No hint of awareness
14 of Overcharge, they are just saying "these Trucks are
15 pricey and we are therefore charging each and every one
16 of our constituents £200 to cover these costs".

17 I know it is a slightly mad example, but extreme for
18 good reason. In that case are you saying that it is
19 not --

20 MR DE LA MARE: In that case, in that extreme example where
21 you have said, "my bulky item charge was previously £5
22 but because of the cost of Trucks, I have had to buy
23 a new, shiny Scania Truck, I am now, in consequence of
24 that, going to pass on the entire cost of the Truck to
25 you in bulky item charges because that is all it is used

1 for, and the price increase is this", in those
2 circumstances you would meet the test of factual
3 pass-on. I would still have my arguments of legal
4 policy because I say that that is a non-economic form of
5 activity at the end of the day. The downstream Party
6 has no claim, and the economically and legal policy
7 rational thing to do is to concentrate the claim in the
8 Local Authority which is effectively a trustee for its
9 citizens and they will have the benefit of the Local
10 Authority making recovery, but in that extreme
11 circumstance, yes, you would meet the test of factual
12 pass-on, but it is about as far-removed from the reality
13 of Local Government budget setting as it is possible to
14 imagine, because what the evidence shows, and there
15 really is not anything to gainsay this, is that
16 everything precedes on the basis of aggregated costs and
17 decisions about "here is my grant revenue, from the
18 Welsh Government or from the Scottish Government or the
19 (inaudible) Government, here is my overall plan of
20 expenditure -- these are the things I want to do, the
21 services I want to provide, libraries open the following
22 hours, bins collected at whatever hours, road repairs at
23 whatever level of standards I want to mend the potholes
24 which seems to be nothing at all at the moment" and so
25 forth, and once you've planned your scheme of works you

1 then work out whether or not the Council Tax increase to
2 fund all of that, combined with the revenue from what
3 charges you are going to levy, balances your books. If
4 the Council Tax is too high beyond certain politically
5 unacceptable thresholds, you have to cut back your
6 budget. You have to adjust your spending plans.

7 In that process there is just literally no prospect
8 of there being the type of cost-specific, granular
9 identification of the kind you posited, because you are
10 dealing with a basket of Local Authority Services.

11 THE CHAIR: Entirely fair enough, and I obviously accept the
12 example is an extreme one, but it is helpful to flush
13 out the important facts in the case at this stage. I
14 appreciate you have got your policy argument to come,
15 but can I, therefore, just throw this into the mix,
16 because it does, it seems to me, to be relevant to the
17 question of strike out. As you will know, in
18 *Interchange Fees* we have a major trial, not involving
19 public bodies, or not very many, an interchange fee
20 trial exclusively dealing with pass-on at the end of
21 this year.

22 MR DE LA MARE: Yes.

23 THE CHAIR: Now, one of the big disputes, and it is
24 a dispute between the Parties, it is an open question,
25 is how far one can resolve the question of pass-on in

1 complex facts by reference to broad brush econometric
2 evidence, and there's a massive dispute which we are
3 nowhere near resolving because it is a matter for trial,
4 a massive dispute between the Parties as to whether you
5 need to go to the granular level, look at it through
6 sampling or specific material, or whether you look at it
7 from the top down level of what economists say will work
8 as a matter of theory, obviously shoehorning that theory
9 into the way the law works, and that is a problem which
10 we will have for the future.

11 My point is, though, these are all matters which are
12 up for trial, and the more we sort of hear about the
13 complexity of the facts here, the more it feels that
14 this is something which, first of all, we should not be
15 deciding in advance of *Interchange Fee 2*, but, secondly,
16 we ought to be getting the benefits of *Interchange 2*
17 when considering this question.

18 MR DE LA MARE: That is a premise that is predicated on
19 assuming that the cases are, in any way, comparable, and
20 the essential difference in this case is that there is
21 no relevant economic activity. The Local Authorities do
22 not act like economic actors. There are any number of
23 indicia about that. The fact that one Council may, for
24 political reasons --Wandsworth -- may charge Council Tax
25 at £900 and keep its budget to an absolute bare minimum,

1 another Council like, let us say, Camden, may choose to
2 invest heavily in its education and library services,
3 and has a Council Tax of £3,000, that is a pretty good
4 tell that you are not in any kind of market --

5 THE CHAIR: Mr De la Mare, do not get me wrong, I completely
6 understand that. My point was a rather more pessimistic
7 one, which is this: we have, in *Interchange Fee 2*,
8 a range -- the aim is to construct a range of market
9 entities, and you are right, most of them are commercial
10 not public bodies, though there are some which come
11 close to -- or closer to -- public bodies than others,
12 but let us accept your point that it is commercial
13 bodies, and that they are, for the sake of argument,
14 different to public bodies, as you are saying. My point
15 is this: given that we actually do not know, because we
16 have yet to try it, how we are going to go about it in
17 the commercial area, how can we be satisfied that we are
18 able to say, "well, it is unarguable here" because we
19 actually do not know how it is going to be decided or
20 argued when we come to the facts in what may well be
21 a simpler case.

22 MR DE LA MARE: For the very simple reason that here you
23 will not be able to do an econometric analysis. No such
24 analysis will be possible.

25 Consider the heterogeneity of the Local Authorities.

1 I might have a Local Authority that is highly urban and
2 with a large concentration of rateable businesses. It
3 may be extremely affluent. How does that compare to
4 a rural area with substantial rural poverty, greater
5 distances for waste Trucks and more roads to be repaired
6 and all those issues, where there is a Labour Council as
7 opposed to a Tory Council, where there are regular
8 changes in Councils, etc. The cases are utterly
9 heterogeneous, and that means that you cannot take data
10 in relation to one Council and aggregate it with data in
11 relation to another Council, and thereby make an
12 econometric model. It is just utterly unsafe because
13 they are in no way comparable.

14 In the way that you get comparability when Parties
15 are selling the same product on the same market, or
16 buying the same product in the same market, so once you
17 are outside a market you cannot answer these questions
18 with general econometrics.

19 The only option, therefore, is a quantitative
20 analysis, and that is effectively what Mr Bezant
21 proposes, and that entails going to every Local
22 Authority and investigating, in the case of every Local
23 Authority why, from year-to-year, because they will
24 change from year-to-year as policy changes, as political
25 control changes, as demographics change, why you have

1 set your waste charge at £10 this year, or £15 the next
2 year, why you have given a rebate to those with
3 Universal Credit one year and not the next year. You
4 will have to exhume the entirety of the local political
5 and policy decision-making to understand what
6 considerations have gone into shaping Council Tax, into
7 shaping the level of service, the area that service is
8 applied, and shaping the level of charge. It is
9 a completely different exercise.

10 THE CHAIR: Again, completely fair point, Mr De la Mare, and
11 again, it reflects the debate that we had in the earlier
12 stages of *Interchange Fee* where the argument was: do we
13 do it at the granular level or do we do it top down, as
14 we call it, and although we have mixed and matched, it
15 is top down, supplemented by a sampling basis.

16 Now, let us say, for the sake of argument, you are
17 right that no economist will say "we can do this top
18 down because the sample is simply too variegated to
19 permit extrapolation by statistical means", and --

20 MR DE LA MARE: No one is proposing any of that.

21 THE CHAIR: No, no. I am translating the thought process in
22 *Interchange Fees* to here, so I can quite see why you are
23 saying that. One pivots, then, to the granular, and, as
24 you say, no one is really up for going through each and
25 every Party and extracting volumes of data, but does it

1 not mean that instead of saying you strike it out, you
2 find a better way of trying it which, in this case,
3 might be sampling.

4 MR DE LA MARE: Only if there is a prospect of crossing the
5 threshold of showing, on the facts, that there will be
6 a specific and identifiable increase in price, and that
7 is the basic problem. That is the basic problem in
8 relation to grant on the level of factual causation,
9 because there is no way that you are going to show that
10 grant, which is given before budgetary decisions are
11 even finalised, that the Grant is causally related to
12 subsequent decisions about what Trucks to buy. The
13 Grant comes first. The decisions come after. That's
14 the wrong way around for the law of causation. It may
15 be economic pass-on, and what economic pass-on means in
16 that context is the Party who is bearing the ultimate
17 burden. That is not the same as pass-on in law.

18 THE CHAIR: What about the temporal question, then? Given
19 that you have budgets and Grants that go year-on-year on
20 year, why cannot anterior costs be reflected in a later
21 Grant, or in a later variation of the tax charge? One
22 cannot look at these things siloed.

23 MR DE LA MARE: Because there is no evidence that that is
24 how Central Government sets the floor by which it gives
25 grants to all Local Authorities. What Mr Noble is

1 driven to speculate, and I will show you -- we have been
2 somewhat diverted from the bits I wanted to show you --

3 THE CHAIR: I am sorry, Mr De la Mare.

4 MR DE LA MARE: -- what Mr Noble speculates is that there
5 may have been ad hoc requests for Top Up Grants, et
6 cetera, and that may be relevant, but if you ask what
7 methodology is being proposed here, the methodology, as
8 we understand it, is an overarching qualitative legal --
9 economic theory from Mr Noble, which is encapsulated in
10 paragraph 3.6, which is because of the balanced budget
11 obligation, these Parties are exactly like Parties in
12 perfect competition, fully effective, perfect
13 competition because of the balanced budgets. That is
14 the theory, and then he says "the way to test it is to
15 go in and look at the papers to see how the various
16 budgetary decisions are reached, and how the prices are
17 fixed", with the overwhelming assumption being that that
18 process will show that, one way or another, there has
19 been pass-on through one of the mechanisms -- grants,
20 Council Tax, etc, even if you cannot disaggregate or
21 identify anything specific going on in relation to
22 Trucks. In other words, because they have to balance
23 all of their costs you can infer that they have balanced
24 their costs in relation to Trucks in one of these
25 various ways. That is the analysis.

1 Now, a couple of things if we go back to Mr Noble's
2 report to note, first of all. There is a little bit of
3 an uncomfortable elision in his paragraph 2.7. What he
4 does in section 2 is summarise the arguments in the
5 application {B/18/6}. Arguments in the application are,
6 obviously, by reference to the pleaded case, and at 2.7
7 he describes the relevant passages from our application,
8 dealing with the question of negotiation with suppliers,
9 ie the part of the case that has been pleaded, he calls
10 that "cost savings initiatives". As we will see when we
11 look at the rest of the report, that then morphs into
12 the topic of cuts. It is not about supplier
13 renegotiation, it is not about staff negotiations or
14 public sector pay deals or anything of that kind. That
15 label, "cost savings initiatives" becomes how Mr Noble,
16 in his section 3.4, deals with the topic of cuts which
17 he says are economic pass-on. What he never grapples
18 with is the fact that that is not a part of the pleaded
19 case, how is he going to identify which bit is which.

20 Then section 3 deals with the prospect of pass-on,
21 the balanced budget perspective. {B/18/8}. Here, at
22 3.1, we have the key overarching argument, which is that
23 at 3.5 and 3.6. He says:

24 "Commercial entities operating in a market,
25 characterised by perfect competition, facing common

1 increases in their input prices ..."

2 So everyone facing the same increase in supply costs
3 from a Cartel or from whatever source will, because
4 their margins are already at competitive level, be
5 compelled to pass on those costs in full, and that is
6 the standard economic theory that says in a market costs
7 will always be passed down to the consumers.

8 Now, he says:

9 "In contrast to commercial entities ..."

10 3.6:

11 "... Local Authorities cannot make any profits. 18
12 This is because of the balanced budget requirement,
13 which implies that costs must equal revenues..."

14 Here is the key point, and it is, with respect to
15 Mr Noble, incoherent. He says:

16 "For this reason ..."

17 It is a non sequitur:

18 "For this reason Local Authorities can be thought of
19 as being similar to commercial entities that are under
20 strong competitive pressure".

21 That is just a total non sequitur. Test it in this
22 way: I am the Bar Council. I have an obligation to have
23 a balanced budget. Does that mean that the fees that
24 are charged to silks over juniors, or to those based on
25 income thresholds, come out on the basis of market-based

1 imperatives? No. All that it means is that whatever
2 discretionary powers the Bar Council has it has to
3 exercise in such a way that its revenue matches its
4 costs. It does not tell you anything more than that at
5 all. It does not suggest that you are going to have to
6 approach pricing of services, or the formulation of
7 taxes on any particular basis whatsoever. That is the
8 central rock on which the entire case of economic
9 pass-on is based, because what then follows after that
10 core reasoning is, effectively, an indication that what
11 is going to be done is to investigate the budgetary
12 process to show that at all stages balanced budgets
13 occur, and that the cost of Trucks go into the costs of
14 those budgets one way or the other -- they either go in
15 as capital costs, if the Trucks are bought outright, or
16 they go in as revenue costs if they are leased, even if
17 they are bought outright, if it is financed, the finance
18 cost then goes into a revenue payment, recurring
19 payment, it all goes into the budget one way or the
20 other and it all comes out in the wash. That is the
21 basic argument that is made.

22 I should -- I point out, repeatedly and correctly,
23 Mr Noble accepts that all of that is -- has to be
24 conditioned by the fact that cuts may occur, so, for
25 instance, if you look at his diagram at 3.1, and you

1 look at the arrow, he indicates that revenue constraints
2 can trigger cost savings initiatives {B/18/8} and so on
3 and so forth. In relation to treatment of Trucks at
4 {B/18/11} 3.21 and following you can see is the case
5 that they all go in as either revenue or capital costs
6 {B/18/13} and then at 3.3, he explains how that all
7 comes out in the various outputs. An economist would
8 call it "pass-on". He describes how the Council Tax --
9 and this just quickly reiterates the evidence of
10 Mr Williams in many respects. You set your budget,
11 starting with what you know to be your capital grants --
12 and your revenue grants from the Government {B/18/14},
13 what you project to be your income from your services,
14 and then what your Council Tax requirement is, and you
15 then work out whether or not it is too high to stomach
16 and you need to make a further round of cost reductions
17 to bring it down to a level that those that control your
18 Council consider to be politically acceptable.

19 Government grants at 3.35 to 37 are treated as
20 a form of pass-on {B/18/15}, and then you get the
21 central conclusion at 3.4 2 {B/18/16}:

22 "In contrast to profit-maximising entities, Local
23 Authorities are required to keep a balanced budget -- if
24 costs go up, then so must income (assuming other costs
25 are not cut)".

1 Then at 3.4, 3.44 and following, page {B/18/17} he
2 is dealing with what he is labelling "cost savings
3 initiatives". Here you see the morphing of supply
4 negotiation which is pleaded into cuts which isn't
5 pleaded, and he agrees with Dr Frank that cost savings
6 measures are a potentially important consideration in
7 the mitigation analysis, therefore additional
8 expenditure on Trucks could also be funded through cost
9 savings and other areas of Local Authority budget:

10 "Authority wanted to free up funds in its capital
11 account, it could cut back on capital spending (e.g. by
12 not repairing a road). If, instead, it wanted to use the
13 revenue account ...it could reduce its revenue spending
14 (e.g. by reducing wages through redundancies ..." etc.

15 That is, of course, as anyone who has ever read the
16 newspapers will understand, is an absolutely integral
17 part of the difficulties of Local Government. It is
18 working out where and how to make cuts from time to
19 time. Absolutely central to the whole account.

20 The problem is he treats this as pass-on as an
21 economist, and the law and my learned friend don't treat
22 this as a relevant consideration at all, and that leads
23 you to the difficulty of working out where the
24 particular mechanic then operates.

25 Where we get to with Mr Noble is two basic points.

1 Basic point one is that the case made at 3.6 that Local
2 Authorities can be expected to operate like perfect
3 competitors is obviously wrong. It is impossible to
4 reconcile with all of the facts that are, in fact,
5 before the court -- the variation in Council Taxes, the
6 variation in all of the discretionary charges. How can
7 you have a market, perfect competition, where one Party
8 decides to charge nothing for garden waste or bulky
9 items, someone else decides to charge £10 after your
10 first two or three trips, and someone else goes for
11 something closer to cost recovery. That is not
12 a market. How can you have a market delivering Council
13 Tax varying by a factor of 300 per cent? That is not
14 a market.

15 So, it is false on its premise. That is the first
16 problem. The second problem is that it is no more than
17 an argument of economic theory, and the law to which I
18 will turn to next shows that that is insufficient to
19 generate a defensible case of pass-on.

20 Mr Bezant's report really follows the same
21 methodology. What he does is describe with greater
22 granularity what the Defendants propose to do by
23 qualitative analysis in terms of picking through
24 documents to hunt for the snout, which is the budget
25 document that says, against all of the evidence from my

1 clients, "well, we are increasing the Council Tax by an
2 extra £5 to recoup the cost of the Trucks that we are
3 now buying this year from Scania", or whatever. That is
4 effectively the thrust of Mr Bezant's proposed exercise.
5 He describes the qualitative exercise.

6 What neither Mr Noble or Mr Bezant do at all, in our
7 submission, is grapple in any realistic way with the
8 evident heterogeneity of the Local Authorities. They
9 both blithely assert that what will happen is they will
10 find representative Local Authorities. They did not
11 identify any criteria by which such representativeness
12 will be established, and we do not think, and we cannot
13 think of any criteria by which that can be done,
14 precisely because there are differing levels of
15 affluence, differing patterns of urban versus rural,
16 different instances of commercial or industrial
17 ratepayers. The geography, topography and demography of
18 the country means that it is hugely, hugely variable.

19 The most, if you think that there is any case that
20 could go to trial that could be done, is just to simply
21 allow -- and this is what happens in other forms of test
22 case litigation like the diesel litigation I am
23 bedeviled by -- is you allow the Defendants and the
24 Claimants a number of picks each for cases that they
25 want to try out and then you learn whatever lessons you

1 can from those cases and the Parties can then attempt to
2 extrapolate whatever learning they can to the wider
3 cohort. That is really the best you can do in the
4 circumstances of such evident heterogeneity.

5 What is never going to happen is an economist, or an
6 econometrician, is going to come up with some magic
7 formula because it is never going to address the
8 political decision-making or the policy that is made
9 from time to time in a particular area, and that leads
10 to a very, very critical distinction with cases that
11 operate as markets. In markets, you can assume, if
12 someone survives in a market, that they act in an
13 economically rational fashion. There are various
14 economically rational inferences you can make about how
15 those Parties will approach things like pricing. If
16 that isn't the dominant consideration for taxation, that
17 is not the dominant consideration for charging. You
18 cannot make any assumption about stability at all, and
19 that is a really important issue when you come to the
20 position explained in Pike 2, paragraphs 22 and
21 following, approximately, about the documentary gaps,
22 because there plainly are huge problems with having all
23 of this old budgetary information in relation to these
24 obscure garden waste charges and Council Tax decisions
25 from 1999 and what have you.

1 The technique that was used in the *Chunghwa* case to
2 address budgetary gaps is making reasonable inferences
3 on the basis of what the Parties do now, and on the
4 strength of expert evidence as to what would be
5 economically rational. You make a reasonable inference.
6 That technique doesn't work in the face of political
7 decision-making. You cannot assume that because the
8 garden waste charge is, let us say, £10 in 2009, that it
9 was not £50 or no pounds the year before, because there
10 might have been a change in political control, it is not
11 anything that is determined by any predictable and
12 stable economic logic.

13 That is the set-up for the expert evidence, and what
14 we really have is an exercise predicated on an argument
15 of economic theory accompanied by a highly
16 documentary-intrusive and highly burdensome disclosure
17 exercise that will have to exhume the entirety of
18 available political decision-making in relation to
19 a number of topics: central Grant, negotiation with
20 suppliers, Council Tax setting and charge setting. Of
21 course, a lot of this evidence that has to be exhumed is
22 going to be difficult to obtain. The relevant
23 Councillors may be dead, the people who recall why
24 Councils did what they did at a particular time, what
25 lay behind a decision that is only lightly minuted, etc,

1 may be long gone, and you are going to have to
2 effectively reconstruct the political and policy culture
3 of each Council over time to try to arrive at what they
4 would have done, so that is the problem. Let us now
5 turn to the law, my topic 3.

6 THE CHAIR: Well, just to push back a little bit on that, is
7 that not rather close to the point that was argued by
8 the retailers in *Interchange Fee*, namely that the
9 subjective thinking behind price increases was something
10 that needed to be thought about and demonstrated
11 (Inaudible) and which, I think (Inaudible) we rejected.
12 Does one have to get into the subjectivities of thought
13 in terms of decision-making in relation to a price
14 increase? If you did (Inaudible) thinking about it, so
15 if, as a matter of fact, the way in which it has been
16 passed on is by reference not to cutting of services but
17 by, let us say, increasing charges, then that is what
18 happened, even if that was not part of the mindset of
19 the decision-makers.

20 MR DE LA MARE: With respect, that does not work in this
21 context for this reason: take garden waste, for example.
22 A large proportion of the Councils don't charge for
23 garden waste at all, so there cannot be any issue about
24 pass-on there, and let us assume that if they assert
25 that there is no garden waste charges in any year, there

1 is going to be no further disclosure obligations. You
2 then go into those that do. You will have to
3 investigate the origins of the decision to begin to
4 exercise the power to charge, and why the charge has
5 been set at a particular level and in a particular way,
6 and whether or not the thinking behind that is economic
7 or policy is going to inform the CAT as to whether or
8 not there is a relevant degree of causal connection
9 between the Trucks and any increase in price, because an
10 increase in price that you have not in any way related
11 to Trucks is not passed on. So, bulky waste may be the
12 best example, bulky items might be the best way to
13 illustrate this.

14 You might start off with a bulky item charge that is
15 intended to recover the costs of the extra Trucks that
16 you have to get in to pick up the mattresses and
17 furniture and take them to the waste transfer facility,
18 and then as a matter of policy you may decide, well, we
19 have a problem with flytipping in the area. We do not
20 want to set the charges that high, because we will end
21 up paying more, dealing with the problem of flytipping
22 and matters of that kind, and we want to incentivise
23 people to get the bulky items into the system in an
24 orderly fashion and that is what we are going to do,
25 even though that is not, in any way, recovering our

1 costs, so we are going to give the service away for free
2 to everyone or free to those who can least afford it. We
3 are going to have a price that is enough to make sure
4 that they will stick to their appointment, but not so
5 much as to recover the cost of taking away the mattress,
6 or you are going to get two free trips a year, it is
7 only the third one you pay for.

8 Now, understanding what lies behind decisions of
9 that kind is absolutely integral to working out whether
10 any test of factual pass-on is satisfied, because the
11 reasoning process may reveal that the way that the
12 charge is set has absolutely nothing at all to do with
13 Trucks or the cost of Trucks whatsoever, so even if the
14 cost has gone up or down, that is irrelevant, in the
15 grand scheme of things.

16 That is very different to the retailer scenario,
17 because at the end of the day what matters is the
18 retailer scenario in the actual adjustment of the end
19 price which is the means by which you generate your
20 revenue, and there is a correlation between the revenue
21 and the costs in a way that just does not emerge in
22 relation to the relationship in a Public Authority
23 context, so it sounds adjacent, but when you unpick it,
24 with respect, it is not the same issue at all.

25 Topic 3, the law and pass-on.

1 THE CHAIR: That you can take quickly. To the extent that
2 it becomes contentious, I suspect you are best
3 addressing it in reply.

4 MR DE LA MARE: What, the law on pass-on?

5 THE CHAIR: Yes.

6 MR DE LA MARE: I just wanted to set out what I thought were
7 the relevant --

8 THE CHAIR: Of course.

9 MR DE LA MARE: I am not going to walk you through the
10 cases, because probably countless others have done so,
11 even in relation to *DAF Trucks* hot off the press from
12 the Court of Appeal -- that is grandmothers and eggs
13 type territory -- but the tour de raison is this, you've
14 got *British Westinghouse* which is -- everyone accepts
15 a foundation stone of the general common law test of
16 remoteness for this type of mitigation of loss, and that
17 has been applied by the Supreme Court, by Lord Justice
18 Green, etc.

19 You then have the judgment of this Tribunal in
20 *Sainsbury's* where the fourfold considerations are set
21 out. It is very important to understand what those
22 fourfold considerations are. They are not all four
23 forms of passing on, they are four forms of response to
24 the fact of Overcharge. The first one, not doing
25 anything in having a profit margin hit is obviously not

1 passing on. The second one, reduction in expenditure,
2 is also not passing on, because if you reduce your
3 expenditure, you are either reducing the service you
4 provide, and thus your revenue-earning capacity, or you
5 are reducing the quality of your service through
6 imponderables like reduced marketing, et cetera, which
7 affects your future revenue -- think *Newcastle Football*
8 and all those arguments. It does not equate to any form
9 of passing-on, it is just taking the hit.

10 It is only categories three and four that the law
11 treats as potentially pass-on, which is renegotiation
12 with suppliers, and category four, which is increased
13 prices.

14 Then you have *Sainsbury's* in the Supreme Court which
15 we have all argued about endlessly, and insofar as it
16 endorses this Tribunal's reasoning, you have the
17 slightly Delphic comments picked up on by the CAT in the
18 *DAF* case at the end of paragraph 2.15 and what is meant
19 by that. Our skeleton, which says very clearly, that
20 all that is being said is that there are no problems of
21 legal causation that arise in a completely conventional
22 supply chain case, and that is what *Interchange* was. It
23 was a case with a completely conventional set of people
24 in an economic supply chain -- direct purchasers,
25 indirect purchasers, end consumers, etc. That has been

1 the characteristic of all of the cases.

2 Then you have what we say are the two key cases for
3 present purposes. You have the *DAF* amendment decision,
4 Roth, J, at D/18, you have the Court of Appeal and *NTN*
5 and I do want to take you to those cases relatively
6 briefly, and then you have the comments in the final *DAF*
7 case and the Court of Appeal in relation to it about the
8 relevant standard, and we set out the relevant quotes
9 from that in our skeleton. I will not repeat it, but
10 that is where you have the necessity for an identifiable
11 specific increase of price in relation to a particular
12 class of purchasers, etc. That is where you get the
13 requirements of specificity that have to be met in order
14 to get home.

15 Bundle D, the authorities {D/18/1}. What this case
16 and *NTN* were about, were both about renegotiations with
17 suppliers, and so that is one of the pleaded heads of
18 loss -- and pass-on in this case -- and the reasoning in
19 these judgments is directly transposable to the pleas in
20 this case, not least because it is the same Cartel, the
21 same allegations. Has the quality of evidence improved
22 at all since *DAF Trucks* in relation to negotiations with
23 suppliers? And the answer to that is obviously no, it
24 has not changed one bit, and the balanced budget
25 obligation does not change a thing.

1 What we cannot identify in my learned friend's
2 skeleton argument, or, indeed, anywhere in Mr Noble's
3 report is any attempt to deal with the negotiation with
4 suppliers point at all. The reason for that in
5 Mr Noble's report is, if you remember, and as I showed
6 you, paragraph 1.7 and paragraph 3.4, he takes the
7 pleaded case to which he had responded, negotiation with
8 suppliers -- and morphs that into price cuts -- reducing
9 services, etc, so he has changed what was a Category 3
10 *Sainsbury's* plea into a Category 2 plea, and what that
11 has done is left a double hole -- the negotiation case
12 that is pleaded and advanced is never substantiated, and
13 the cuts case is, but that is not being pleaded.

14 So, the key points to note about *NTN* and *DAF* is
15 that their result is directly transposable to the
16 pleaded case in relation to negotiation with suppliers,
17 but, more broadly than that, we say the logic of that --
18 those cases -- is also transposable in an appropriate
19 case to cases involving downstream activity, because the
20 principles that are set out or identify what is
21 sufficient evidence are, general.

22 So, if you look at paragraph 20 you can see the
23 similarity of the next plea in this case {D/18/8}.
24 30(c), pretty much the identical plea that you saw in
25 the Iveco Pleadings. 22, recapitulates the summary

1 judgment. 23, look at this for the chimes in the present
2 case {D/18/9}:

3 "DAF further pleads it cannot further particularise
4 its case until it obtains disclosure".

5 That is one of the dominant themes in my learned
6 friend's skeleton argument. Instead, *DAF* relies on
7 economic theory for which we read Robin Noble:

8 "... ie that a business faced with increased supply
9 costs in one area will seek to compensate for that extra
10 cost by reducing other costs in order to preserve the
11 (inaudible) ..."

12 Substitute for that economic argument the economic
13 argument that a public body with a balancing books
14 obligation is to be treated as if it were a perfect
15 competitor. *DAF* says that beyond invoking that
16 elementary theory until how it sees *Royal Mail* and *BT*
17 approach the issues of cost control and budgeting, it is
18 not in a position to plead. Again, that is identical to
19 the case made here, then at 24 there is an acceptance of
20 the causal {D/18/10} connection requirement.

21 25 goes over familiar ground from *Sainsbury's*
22 {D/18/10}. Then if you look at {D/18/12}, 27, in
23 particular look at (b):

24 "Cost reduction would have been pursued by a
25 business such as the Claimants' as a matter of course...

1 but general budgetary control is insufficient to
2 establish a causal connection ..."

3 This is what is being argued by Mr Lask(?), well,
4 that is exactly the same here. If you look at (d):

5 "Economic theory is not itself a sufficient basis
6 for a defence to be pleaded ..."

7 That is identical to the contention that we would
8 make. Look at (g) {D/18/12}:

9 "More detailed factual and expert analysis by the
10 Claimants, of the kind that would be required ... is
11 impractical and disproportionate", and again we say that
12 that is exactly the same here....

13 The response of *DAF* is essentially that *Sainsbury's*
14 *v Visa* gives a green light to plead, and when you look
15 at the substance of my learned friend's skeleton
16 argument and her response to the four factors identified
17 in *DAF* here and in the Tribunal's final judgment, her
18 answer is much the same. It is, well, neither necessary
19 or decisive, these particular factors. You can ignore
20 them and approach the matter on the basis of economic
21 theory.

22 Then 32 is a really critical observation {D/18/14}.
23 Roth, J says:

24 "... it is not only in follow-on claims under EU and
25 UK competition law where this issue may arise but many

1 commercial claims for damages by businesses, where what
2 is alleged is that financial loss was caused by a breach
3 of contract that left the claimant to continue to run
4 its business with its cash balance or income adversely
5 affected. Even with a relatively straightforward case of
6 non-delivery of goods in breach of contract for which
7 the claimant obtained a replacement supply in the market
8 at greater expense the claim for the difference between
9 the contract price and the market price could be met, on
10 this basis, with an argument that the claimant mitigated
11 its loss on that contract by reducing prices on other
12 supply contracts" or, indeed, by putting up its prices
13 elsewhere."

14 That argument is about a hundred times a fortiori in
15 this case once you take into account the arguments that
16 are being made about Government Grant, taxation, the
17 bundling of services, etc, and I go back to my point.
18 It is impossible to see how, if my learned friend's
19 arguments are correct, how any non-departmental
20 Government body, whether it is the Environment Agency,
21 whether it is this Tribunal, whether it is the European
22 Commission -- how any of them could ever bring a claim
23 for loss because, in each case, the wrongdoer would be
24 able to say, at every stage "you've got to balance your
25 books, you are going to get the money from central Grant

1 so you haven't suffered a loss". It is literally that
2 stark.

3 Take the Schindler claim brought by the commission
4 in relation to their lifts. That would be met with the
5 answer, "well, you get your money from the contracting
6 parties, the Member States". Take the claims that
7 occupied this Tribunal for years in relation to Local
8 Authority bid rigging. That would be met by the claim
9 that you have not suffered any loss on the inflated
10 prices through the procurements, because you have
11 increased monies from Central Government.

12 The compass of this argument is enormous.

13 Then, 33 the Tribunal identifies as extremely
14 relevant, the cost of disclosure in relation to the
15 speculative case of pass-on and the barrier that has to
16 the principle of effectiveness as endorsed in
17 *Sainsbury's* in the Supreme Court, and the Tribunal says:

18 "We have considered whether this principle may be
19 contravened in certain cases by such a burden imposed on
20 the pursuit of a claim for damages against a cartelist
21 such as *DAF*" {D/18/15}.

22 That is a major consideration for how you approach
23 questions of sufficient case and practicability for the
24 purposes of remoteness, because if you are going to
25 entertain speculative cases, the price you have to pay

1 is entertaining vast expensive disclosure obligations
2 that may generate very little benefit.

3 THE CHAIR: The corollary of your argument, I would ask you
4 this, that if one were to try to put together
5 a collective proceeding of taxpayers who had suffered an
6 additional tax burden because of the unlawful
7 Overcharge, so the people at the end of the chain, and
8 they sought to recover their additional tax burden from
9 the original tort-feasor, that would be unarguable and
10 would have to be struck out, otherwise you would have
11 double recovery.

12 MR DE LA MARE: I do not shirk from the conclusion that
13 those that receive services -- Local Authorities -- are
14 outside the scope of the relevant torts. It is not
15 surprising that torts are designed to ensure the proper
16 effective working of markets for those that participate
17 in markets, and standard scope of duty arguments suggest
18 that there has to be an end to the forms of wrongful
19 conduct within the scope of the tort, and to say that
20 a Party that is receiving service from a public body
21 that is not regulated by competition law is outside the
22 scope of duty seems to me to be obviously the right
23 answer.

24 THE CHAIR: No, Mr De la Mare, do not get me wrong. I am
25 not doing anything other than seeking to establish the

1 implications of what your --

2 MR DE LA MARE: Absolutely, but again, in parsing the case
3 law, understanding that critical difference in this case
4 compared to everything that has gone on before is
5 absolutely vital, because all of the previous cases are
6 cases involving multiple Parties in the same economic
7 supply chain. Go back to *Devenish v Aventis* which my
8 learned friend prays in aid, and which I remember well.
9 The problems in *Devenish v Aventis* arose from the fact
10 that both an indirect and a direct purchaser were
11 bringing a claim together, and where the facts were such
12 that there was a very, very, very clear case of full
13 pass-on by the direct purchaser to the indirect
14 purchaser, they were seeking to circumvent that by
15 framing their claims in restitution and account of
16 profits instead of conventional damages, so that the
17 direct purchaser got a disgorgement remedy and the
18 indirect purchaser got damages. That was the argument
19 that was rejected pretty briefly by Lewison, ~J, and in
20 yet more trenchant terms by Arden, LJ on the appeal,
21 when only *Devenish*, the direct purchaser, the only Party
22 with an interest in the restitutionary remedy, appealed.
23 That is a case where, if you grant inconsistent
24 remedies, there is a real risk of double recovery of
25 incoherence. There is no such risk if you accept my

1 submission that once you get to, and beyond, the end of
2 the economic supply chain, there is no claim in law
3 because there is, in those circumstances, no prospect
4 whatsoever of double recovery.

5 Indeed, the considerations of policy --
6 effectiveness, effective remedial protection -- begin to
7 work very differently in those circumstances because it
8 is the public body that is providing the service that
9 then, effectively, advocates the claim, distributes the
10 benefit to its ratepayers and residents, and that is the
11 answer that policy should suggest prevails.

12 Back to *DAF*. The crunch is then paragraphs 35 to 37
13 {D/18/15}:

14 "... it cannot be enough for a defendant to plead
15 that a Claimant's business input costs as a whole were
16 not increased, or that as part of the Claimant
17 business's ordinary financial operations and budgetary
18 control processes its overall expenses were balanced..."

19 You cannot just run a kind of per se case of
20 economic logic, even in a case when you are dealing with
21 a market and economic activity, and even where that
22 argument has some intuitive attraction, and that is
23 because the law requires something more by way of
24 proximate causative link, and you get that from *British*
25 *Westinghouse*, and it is the requirement that the action

1 is identifiably arising out of the transaction in
2 question. That is the key issue, and that is why
3 grants, for instance, must fail at the get go, and then
4 the logic of 39 and 40 applies directly to the
5 {D/18/17}, similar pleas here:

6 "We note that *DAF* has not pleaded, and therefore we
7 assume is unable to plead, that either *Royal Mail* or *BT*
8 in fact mitigated the loss caused by the alleged
9 overcharge by negotiating reduced prices for particular
10 items or with particular suppliers..."

11 It is exactly the case here. There is no plea that
12 reducing staff costs, or cut back on your building
13 costs, or driving a harder bargain, and for that reason
14 the conclusion at 41 to 42 is, first of all, directly
15 transposable to negotiation {D/18/17}, which is pleaded,
16 but is also transposable, once you take account of the
17 four factors at 42, 43 {D/18/18} as transposable in an
18 appropriate case, which this case is because there is no
19 downstream market, to allegations that costs are being
20 passed on through taxes or public sector charges, and
21 those four factors, as you know, are knowledge of the
22 nature and the amount not of the costs in question, but
23 of the Overcharge, and that has been a consistent
24 feature of the case law. That is impossible to satisfy
25 here.

1 The gross amount of the proportionate expenditure
2 and its relative size. Well, here, it is absolutely
3 tiny, as you have seen from Mr Pike's summary evidence,
4 as you have seen from the further witness statements.
5 It is considerably less than 1 per cent, and the numbers
6 that are provided in the witness statements, even those
7 are substantially inflated for two reasons. The first
8 is that all that is presented are the numbers for the
9 whole cost of the Truck, rather than the putative
10 Overcharge. The Overcharge may be 20 per cent, 10 per
11 cent, 5 per cent, or whatever, so you are going to
12 reduce it by a factor of 80 per cent at the very least.

13 The second reason it is inflated is that all the
14 evidence shows that what is really material in the
15 budgetary process are the costs of borrowing, not the
16 actual outright costs of the purchase, the cost of
17 borrowing over a seven-year period.

18 THE CHAIR: Mr De la Mare, I am conscious we have
19 a shorthandwriter. When you reach a moment that is
20 convenient, we will take a break, but I do not want to
21 interrupt your ...

22 MR DE LA MARE: Can I just finish up with *DAF*?

23 THE CHAIR: Of course.

24 MR DE LA MARE: So we have the four factors, the gross
25 amount as -- the relative ease of reducing input costs

1 by negotiation as shown by other negotiations, in
2 particular in *DAF* the issue was as shown by the
3 negotiations with *DAF* itself, and there was no such
4 evidence, none here, and any other evidence of
5 renegotiation, so those four factors, on the particular
6 facts of this case, apply not just to the plane of
7 negotiation, they also apply to Council Tax.

8 So I will go on to *NTN* after the break, and be as
9 quick as I can with that case which I know you know
10 well.

11 THE CHAIR: I am grateful. We will rise, then, for ten
12 minutes. Thank you.

13 (11.53 am)

14 (A break was taken)

15 (12.08 pm)

16 MR DE LA MARE: Sir, in the 50 or so minutes that remain to
17 me before I hand over to Ms Abram, I am going to have to
18 adopt something of a blistering pace, forgive me. There
19 is quite a lot to get through.

20 *NTN*. We set out in our skeleton a number of the
21 passages from Lord Justice Green's judgment
22 concentrating on the front end of that case, but what
23 is, I would suggest, perhaps in many ways more
24 informative for the present purposes, is not so much the
25 test that Lord Justice Green identifies as to what is

1 required in order to show an arguable case, but how he
2 then goes on to apply that on the facts of that case.
3 It was another supplier negotiation case, an offset
4 case, where they pointed to the sophisticated mechanisms
5 operated by motor vehicle manufacturers to keep costs
6 under control, effectively procurement-type operations,
7 and the argument was that you, the motor vehicle
8 manufacturer, concerned to keep costs down, would drive
9 incredibly hard bargains in that context to effectively
10 recover any costs that you found yourself exposed to,
11 and the analysis, in particular, at 50 and following is
12 extremely exacting.

13 First of all, the first premise is Lord Justice
14 Green alights upon the fact, as I mentioned earlier,
15 that what is being pleaded is a positive case, and I
16 showed you the aspects of the Pleadings that our
17 positive case effectively says "you need to be able to
18 substantiate that with more than basic assertion based
19 upon economic theory. You cannot have a case based on
20 inference". In that case what happened was that there
21 was substantial and very detailed voluntary particulars
22 provided by the manufacturer in question, and even that
23 case did not pass muster because, upon analysis, Lord
24 Justice Green said, really, this is a case of inferences
25 being made from an economic model, and that does not

1 begin to meet the test that is identified earlier in the
2 judgment, that requires the identification of particular
3 identifiable price increases.

4 In particular, if we look at paragraph 64 to 65 --

5 THE CHAIR: We had better get that up on the screen,

6 I think.

7 MR DE LA MARE: It is Authority 19. {D/19/1}.

8 After the test, which is dealt with in section C,
9 you've got the analysis of the Pleadings at D, the
10 alternative defence of mitigation by set-off at 40, and
11 then -- and section E, which is really the critical part
12 for our purposes, the analysis of the Pleadings set
13 against the *Sainsbury's* test, etc. {D/19/15}.

14 64 to 65 is, in our submission, particularly
15 critical {D/19/21}:

16 "The existence of a system to reduce costs is no
17 guarantee of its success and it is not an inference
18 which can therefore be inferred from the pleaded
19 facts..." that it has succeeded:

20 "There are innumerable reasons why even with the
21 best system in the world, a purchaser could never be
22 certain of its efficacy in suppressing input costs to a
23 level which counteracted supra-competitive prices
24 charged elsewhere".

25 It is that reasoning that transposes directly to,

1 let us say, Public Authority procurement, which is the
2 equivalent mechanism in play for the most part for these
3 authorities, to say that they would not begin to
4 generate the sort of pass-on by way of savings in other
5 negotiations relied upon.

6 That is why we say the reasoning from *NTN* and *DAF*
7 transposes immediately here, and if you look at 67, the
8 sanity checks {D/19/22}, we would encourage you to run
9 the same kind of sanity checks. All you have to do is
10 look at the prices and the price variations and those
11 sanity checks are not met. There is obviously not
12 a competitive market functioning, and 68, the appellant
13 argues that FCA, Fiat:

14 "... is a large and sophisticated entity with
15 contract negotiating power over its suppliers".

16 That is an unreal submission if directed at a small
17 District Council such as the many Parties I represent:

18 "... but even if this be so, it does not address an
19 important, admitted, fact in this case. It is clear from
20 the Decision, and its description of the cartelists and
21 their turnovers and the international scale of their
22 operations, that they were major corporations who
23 designed their cartel with the specific objective of
24 neutralising such negotiating power ..."

25 There are similar features in the Trucks Cartel. So,

1 there we have it, and you have the Court of Appeal's
2 endorsement of the four factors at 70 to 77. {D/19/22}.

3 It is those cases that we think are of the most
4 direct relevance here. All of this reasoning was, of
5 course, endorsed by the Court of Appeal *DAF* case and I
6 am not going to take you through that.

7 Then my topic 4, this is a short one: the law on
8 undertakings and economic activities.

9 There are three cases of relevance *FENIN*,
10 *Barnehagers* which is an EFTA Surveillance Court decision
11 applying the EU principles, and *Max Recycle*.

12 *FENIN* is the classic case that establishes that if
13 you have a body that is delivering public services, in
14 that case it was the Spanish National Health System,
15 then when it is purchasing its requirements to run such
16 a system, even on the purchasing side it does not
17 operate as an economic undertaking, it is outside the
18 scope of the competition rules, and what that tells you
19 is, effectively, anyone who is buying Trucks or any
20 other items -- services, products -- required to deliver
21 on their public service obligations is effectively, in
22 competition law terms, the end user. Their purchase,
23 according to the logic of *FENIN*, is the end of the
24 economic cycle. That means, and this is potentially
25 very stark, that even if the public body can have what

1 would otherwise be monopsony power on the buying side,
2 it is outside the scope of the competition laws. A very
3 good example is accumulative Legal Aid by the Lord
4 Chancellor from criminal practitioners. It is a
5 monopsony buyer but it is a Public Authority, and that
6 is why Sir Christopher Bellamy's report into Legal Aid
7 services concludes that it is all regulated by public
8 law and not competition law.

9 So that is them. *Barnehagers* shows just how far the
10 principle goes, because it is no answer to say that the
11 relevant public sector undertaking delivering public
12 services does so in a context where there are private
13 operators in parallel, and it is no answer to say that
14 they levy substantial charges for the service in
15 question.

16 *Barnehagers*, it was about the delivery of nursery
17 care in Norway. There was a vibrant private sector
18 childcare provision, but there were mandatory, if you
19 like, universal service obligations on the relevant
20 Local Authorities to provide nursery care. The Local
21 Authority nursery care was more expensive, no doubt
22 because they had to address rural Norway rather than
23 population-dense Oslo, and there were questions about
24 subsidy that arose in that context, and the critical
25 reasoning of the court is even though substantial

1 charges were levied by the Public Authorities for the
2 delivery of this universal service, that did not turn it
3 into economic activity for the purposes of the relevant
4 rules.

5 THE CHAIR: It is a kind of asymmetric economic (Inaudible)
6 for the purposes of the claim (Inaudible) but valuation
7 of pass-on (Inaudible) end user.

8 MR DE LA MARE: Absolutely. Then the last piece, and this
9 is, of course, your decision in *Max Recycle* at {D/21/1}
10 of the authorities bundle, the critical holding here is
11 at 25 to 26, because having addressed the subsidy rules
12 on the basis of it requiring two separate legal
13 personalities in order to trigger the operation
14 {D/21/25} of the Act, you also addressed section 7.2,
15 which is the provision in the Subsidy Control Act that
16 says:

17 "An activity is not to be regarded as an economic
18 activity if or to the extent that it is carried out for
19 a purpose that is not economic'".

20 That, in a round about way, is what you called "the
21 functional test", and it is the test used, identified in
22 *FENIN*, to identify whether or not the service is within
23 the competition rules or not, and the whole purpose of
24 section 7.2 is to exclude from the antisubsidy rules
25 those bodies that are, in fact, not in the field of

1 economic activity, but public service activity.

2 You held at 47.7, very clearly, that even the
3 commercial waste collection service {D/21/27} was not
4 one that was engaged in economic activity. It is based
5 on a statutory duty to collect, arrange for the
6 collection of waste, which is a statutory duty primarily
7 driven by environmental or public health concerns rather
8 than an economic purpose:

9 "Further, unlike a private operator the Council
10 cannot refuse to collect or arrange for a collection as
11 long as the customer is willing to meet the reasonable
12 charge levied by the Council".

13 So even in relation to the high watermark charging
14 (inaudible) which is commercial waste which, for reasons
15 of factual causation, as I have explained, we have
16 chosen not to go after in this application, even in
17 relation to that, the law is clear that there is no
18 relevant economic activity, and if that is the case in
19 relation to commercial waste pursuant to a duty,
20 pursuant to a duty to charge a reasonable cost recovery,
21 how much more so is it in relation to the rest, the
22 totality, of the services that are provided for free?
23 Bear in mind, Council Tax is a basket of all of those
24 services: care, education, roads, transport, etc, etc,
25 etc, some of which services embrace the Trucks, but all

1 of which, with the minor exceptions of garden waste and
2 bulky items, are provided free at the point of sale.

3 There is no tenable argument that the services
4 encompassed by Council Tax are in any way commercial
5 activities governed by the competition law.

6 If they are commercial activities they are
7 necessarily undertaken by trading companies which do
8 generate profits and losses for the Local Authorities
9 which go into the budgeting process, may operate to
10 defray Council Tax, but those services are not the sorts
11 of services we are dealing with here at all, like
12 operating a leisure centre or other discretionary spend,
13 things of that kind.

14 Applying the logic of *Max Recycle* and *FENIN* for that
15 matter, all of the Truck-dependent services that we are
16 concerned with -- mending roads, Fire Services,
17 residential rubbish collection, etc -- they are all
18 outside the scope of the competition laws. That is
19 relevant, both to the questions of factual and legal
20 causation, as I will come to explain.

21 Topic five, the material features of this case. I
22 am not going to take you through the detailed, one might
23 say "tedium" of the ins and outstanding of precepting
24 authorities and non-precepting authorities. The subject
25 matter is extremely complicated, but I do not think the

1 issues of principle are, really, much elucidated by
2 going through any of that.

3 THE CHAIR: We do not really need to go to these in detail.

4 MR DE LA MARE: Yes. As my learned friend has very fairly
5 said, to the extent that we are planning things like
6 amendment or assignment to address some holes that may
7 have arisen by reference to arguments that may arise,
8 you will deal with that in due course. What we are
9 concerned with today --

10 THE CHAIR: We are concerned with the point of -- well,
11 general arguability. I mean, if one can cure something
12 by way of Pleading, then it will be cured and we will
13 manage that process.

14 MR DE LA MARE: Yes.

15 THE CHAIR: If one can cure something by way of Pleading we
16 will manage that process.

17 MR DE LA MARE: Yes. If one can clear something by a
18 Pleading, fine, there may be limitation issues that
19 arise in relation to that. If you can cure it by
20 bringing in -- consolidating a new claim, as is possible
21 against Scania for which time is still running, that is
22 another option, and that is what has been canvassed, so
23 we will address that.

24 THE CHAIR: Yes. All I am saying is the granularity in that
25 regard is something that you can move on with very

1 quickly.

2 MR DE LA MARE: I am grateful.

3 You have my dominant theme on the facts. What they
4 do is deliver services regulated by and governed by
5 public law. The "governed by public law" bit is pretty
6 important, because the history of judicial review in
7 relation to these types of service provision is one of
8 target duties, of minor but core irreducible duties, and
9 then large-ranging discretion governed by public law as
10 to how you allocate funds to do what you want to do.
11 So, for instance, you may have a core educational
12 obligation which may crystallise in particular
13 obligations in relation to particular people in very
14 limited circumstances, but, more broadly, your target
15 duties under the various acts to secure education for
16 everyone in the area are discharged by putting in place
17 general arrangements of the kind that you think will be
18 sufficient, and the Court, typically, will not
19 second-guess funding decisions and funding arrangements.
20 In a JR context and you are acting for a Local Authority
21 it is at that stage you trot out Lonfuller(?) and you
22 point to the multifactorial problems that arise from
23 funding decisions and how the Court needs to back off.
24 That is the terrain we are in, and the reason it is
25 relevant is because it is necessary to understand that

1 is the terrain we are in when you understand the process
2 for Council Tax formation and the service provision that
3 underlies it, because what underlies it is a series of
4 political policy decisions in all of the areas, in all
5 of the services in which the relevant Local Authority is
6 obliged to act, as to whether, if it is a question of a
7 power only, or how, if it is a question of a duty, to
8 deliver against the relevant objectives in question, and
9 what concerns to take into account, and what you have
10 is, effectively, a process where, if you were describing
11 it as a private lawyer in a context governed by
12 commercial considerations which it is not, of
13 effectively cross-subsidisation, because you may choose
14 to take money that is available from one source and use
15 it to prioritise something that you, for your local
16 political reasons, think is more important. You may
17 prioritise mending roads over bin deliveries. You may
18 prioritise libraries. You may prioritise education.
19 Those are all intimately linked political decisions that
20 are made in the process of budget formation, and that is
21 the bit where you get to your Council Tax requirement,
22 and whether or not the response to your Council Tax
23 requirement and the applied Council Tax is to cut
24 services, or increase Council Tax to raise it to the
25 level required to meet the full set, the full roster, of

1 your public service ambitions for your particular area.

2 That is quite unlike any decision-making that any
3 private Party makes, because when a private Party is
4 making decisions about downstream revenue, it is
5 basically taking its input costs from running its
6 business -- purchasing the relevant items, its staff
7 costs, etc -- and then designing a price that will
8 enable it to make a return on those particular costs and
9 generate a profit sufficient to justify the investment
10 of the capital tied up in the business. That kind of
11 thinking is something just completely absent in this
12 context.

13 Instead what you are doing is taking the
14 publicly-available resources, the extent of which is in
15 the gift of, to a very large extent, and the decision
16 of, Parties over whom you have little or no control,
17 namely Central Government -- Central Government decides
18 how much Grant you get, revenue or capital, it decides
19 the relevant rates of business rates and the relevant
20 proportion of business rates gathered that then go into
21 the Local Authority budget -- all of that is out of your
22 control. You take the resources available to you, you
23 see what monies you can raise by charging that you are
24 willing to countenance, whatever your political reasons,
25 and it may be that you are unwilling to countenance any

1 charging (inaudible) or any cost recovery charge, and
2 then you set your Council Tax against the political
3 constraints that exist as to how high a Council Tax you
4 will set, and they will be particularly acute, one way
5 or the other, depending upon your political persuasion,
6 and against the soft and hard legal constraints that
7 exist on the levels of Council Tax that are permissible,
8 all of which are described in the witness statements, so
9 it is really the soft constraints like the obligations
10 to have Council Tax referendums, and matters of that
11 kind if Council Tax gets to a certain level that
12 influence or shape the practical envelope for raising
13 tax.

14 What that tells you in the real world is that if you
15 are going to investigate in any way the budget-setting
16 process to identify whether or not there are any *DAF*
17 -compliant specific and targeted increases in Council
18 Tax.

19 The field of inquiry in terms of disclosure is very
20 wide indeed. You cannot focus simply upon the
21 Truck-dependent services, because the budgetary
22 decisions are made by reference to all of the relevant
23 services and all of the relevant costs and all of the
24 relevant objectives, and there is a cat's cradle of
25 funding considerations, a cat's cradle of activity sits

1 behind the Council Tax budget, and that is what makes it
2 practically, legally and causally unconnected to the
3 issues of Trucks, because it is a tax that is quite
4 unlike an output price for a resold good or service or
5 a new good or service incorporating, or based upon,
6 a particular cartelised item, it is a new basket of
7 public service formulated by reference to political and
8 local policy. It is just not in any way comparable to
9 the kind of downstream product that is -- that
10 ordinarily would be the subject of inquiry for
11 downstream pass-on, so that is the context.

12 You have my basic point about heterogeneity.

13 Indeed, there are the following, I think, key
14 differences between this case and the conventional
15 downstream case: it is not a market driven by economic
16 activity, it is one in which the investigation of
17 decisions as to what to do are investigation of choices
18 made on non-economic but rather policy or political
19 ground. They are not static for reasons I gave before,
20 because policy, politics, demographics, realities like
21 that all change, and it may be a local change or it may
22 be a Governmental change -- reductions in the amount of
23 Grant available following further cuts or matters of
24 that kind.

25 You have the heterogeneity of the Local Authorities

1 which means that they are each effectively worlds of
2 their own and lessons cannot be transposed from one to
3 the other, and you have heterogeneity of decision-making
4 across the whole suite of issues.

5 That is why we think the challenges here are
6 formidable, and they are not simply met by Mr Noble's
7 report -- it is paragraph 3.6 -- and its invocation of
8 the budgetary process, because it does not begin to
9 identify a plausible case by which specific identifiable
10 increases for specific classes of Parties affected can
11 be identified.

12 Where, in the Blondie song, does it come out at the
13 end of the "one way or another" process?

14 The last point on the facts is how significant are
15 Trucks in relation to all of this, and paragraph 24(b)
16 of our Skeleton pulls together all of the references,
17 both in relation to Local Authorities generally and in
18 relation to Fire Authorities, and, of course, I accept
19 that Trucks are more intensively used in the case of
20 Fire Authorities because they are a single-purpose
21 entity, generally speaking, if they are a sole fire
22 agency, other than one consolidated with a County
23 Council, but even there the relevant references show
24 you, particularly once you account for (Inaudible) you
25 account for Overcharge rather than Truck cost, the

1 numbers are extremely small, and, of course, there was
2 no visibility about this problem, and it is a point Lord
3 Justice Green picks up in *NTN*, I think, there is also no
4 general furore about the level of charges in the way
5 that there was for many years about *Interchange*, whilst
6 matters were visibly litigated, and, of course, the last
7 point to note is that for many of the authorities, their
8 Truck purchasing needs are spread across different
9 departments, so it is most unlike *Interchange* where, if
10 you are a retailer, if you are *Sainsbury's*, the
11 percentage that you are going to be paying for the MIF
12 is an absolute headline number. You cannot escape from
13 it. You are going to be acutely aware of it, and in the
14 retail margins applying in the groceries market, and
15 that is going to be a very central consideration.
16 Compare and contrast the local authority where you might
17 have two Trucks used for road repairs, two Trucks used
18 for this, two Trucks for that, two Trucks for fire, all
19 bought at different times and spread across -- it is not
20 collected together as a topic, "Truck purchasing", in
21 the way that *Interchange* is necessarily a topic before
22 the relevant price setters in a retail context, and that
23 is also highly significant.

24 All of those factors leads to the position I
25 described earlier, which is that regression is even

1 possible, doing an econometric model and so what we are,
2 I think, all agreed, is looking at qualitative evidence
3 against some form of economic theory or other theory as
4 to how prices are formed.

5 That is then the run-up, in our submission, to the
6 issues in relation to factual causation, and at that
7 point it is probably easiest to pick up our Skeleton
8 Argument, because the way that we approach that is
9 simply to plug those facts into the relevant test
10 supplied by *NTN* and the various *DAF* cases, and to point
11 out that the four factor test, which is the dominant
12 test, it is the test endorsed repeatedly, effectively,
13 by the Court of Appeal, is incapable of satisfaction in
14 this case, and if you take, first of all, Council Tax,
15 which is the first thing that we address, paragraphs 23
16 and following, the Cartel was secret, no knowledge of
17 Overcharge or specific increase, that obviously applies
18 here in compare and contrast, as I have just explained.
19 {B/1/9} *Interchange*. The relative size is tiny, you
20 find the numbers I have put earlier. They are still
21 tiny, even if you look at the relevant overcharge.

22 They are, of course, spread across various
23 authorities and public service providers, and in that
24 context, we say there is just no realistic prospect of
25 being able to establish a causal link between the

1 Overcharge and a particular change in Council Tax, and
2 so rather than doing that, the Defendants' case is,
3 well, there must be a link because of your obligations
4 to run a balanced budget, which is exactly the argument
5 of economic theory of the kind advanced unsuccessfully
6 in both *DAF* and (Inaudible). It is exactly that
7 high-level argument that was deemed to be insufficient
8 in the ways I have shown you.

9 Thirdly, there is no logical relationship or
10 association between Trucks Overcharge and the product
11 (Inaudible) ie Council Tax, and that is because, for all
12 the reasons I have underlined, Council Tax is a basket
13 charge for all of the rest {B/1/10} affected or mediated
14 or shaped by all of the relevant political decisions.

15 The only answer to all of this is to invoke the
16 perfect competition argument in section 3.6, and that,
17 with respect, falls down, because that is not how they
18 operate, given that is (Inaudible) price set.

19 Then the last factor, and this goes back to
20 a question you asked me earlier {B/1/11}, identifiable
21 claims by purchasers downstream. There are two problems
22 here in this case. There is the problem I identified to
23 you from the get go candidly as the consequence of our
24 legal policy argument, which is that Parties taking
25 public services from a body outside the competition

1 rules have no claims at all. That means ratepayers who
2 may have paid too much Council Tax, or residents who may
3 have suffered from cuts in libraries or whatever it may
4 be as a consequence, have no claims within the scope of
5 this tort against the tort-feasors. That is the logical
6 consequence, but, equally, if it is just merely on the
7 plane of factual causation, if you reach the conclusion
8 that applying the *DAF* test there is no identifiable
9 price increase paid by any identifiable class of person,
10 what you are, in effect, concluding, even if there is
11 a potential liability, is that the Party downstream will
12 be unable to establish upstream pass-on to them, and,
13 therefore, will have no claim. The logical corollary,
14 even of factual investigations in relation to causation,
15 is if the identification is too vague, too oblique as to
16 satisfy the test in *DAF*, there will be no Parties who,
17 in fact, can bring claims downstream, because they won't
18 be able to satisfy the requirement to show the loss has
19 been passed on to them as their loss. That is why that
20 criterion is relevant, even in relation to the
21 consideration of factual causation, and it is impossible
22 to satisfy in this case.

23 There is no cohort of Local Authority rate payers
24 kicking the doors down to this Court to bring a claim,
25 and there are endless, insuperable obligations to any

1 Party seeking to bring such a claim, not least of which
2 is the heterogeneity of analysis for every one of the
3 Local Authorities. This is not a scalable claim,
4 because you cannot make any assumptions from what
5 happens in Local Authority A as to what happens at Local
6 Authority B, and for that reason you cannot build the
7 CPO, you cannot fund a claim like this, and the Tribunal
8 would not certify it. Not only is there no identifiable
9 class of purchasers, but we suggest that even if one
10 were to say, well, Council Tax (Inaudible) some amount,
11 the CPO would be unviable.

12 Of course, the Defendants do not even accept that
13 forensic challenge because their case is that it is
14 enough that they can say that pass-on will have occurred
15 somewhere by one of the mechanisms such that you get
16 into Mr Noble's logical world where books have to be
17 balanced and that means the costs have been passed on,
18 either to the capital Grant, to the suppliers, to the
19 taxpayers or to the chargepayers. What is nowhere
20 attempted is to explain which bit of cost has been
21 passed on to whom. If you do not do that there is no
22 downstream claim.

23 The absence of those four factors, according to
24 authority, means that absent something more the claim is
25 unsustainable, and there is nothing more. There has

1 been no other feature pointed to to suggest that the
2 claim is sustainable. The case basically rests in
3 relation to Council Tax upon Mr Noble's and Mr Bezant's
4 balanced budget analysis.

5 It is not plausible that an analysis of our records
6 is going to reveal smoking guns of the kind my Lord
7 posited. There is no evidence of any of that. There is
8 no possibility of econometric analysis, and the process
9 of investigations -- back to paragraph 32, Roth, J's
10 decision -- is obviously going to be extremely expensive
11 for something that may produce a mess.

12 For all those reasons, the Council Tax claim has to
13 fail on the plane of factual, conventional Westinghouse
14 remoteness.

15 The position in relation to charges is slightly
16 different in that the evidence shows that amongst the
17 limited cohort of Local Authorities that did charge,
18 that cost recovery considerations played some part at
19 some times in some of the decisions. We cannot say that
20 they did not have some approximate eye at some times on
21 costs in certain instances.

22 What my learned friend has done is effectively
23 picked out those instances and said, "aha! That must
24 mean that, then, it is justified to investigate this
25 whole topic on the plane of factual causation", but,

1 with respect, you cannot take the smooth without the
2 rough in this connection. What you have to grapple with
3 is, first of all, the fact that approximately half in
4 those cases or more, of the Local Authorities never
5 charged at all, that means that your balanced book
6 analysis means you are acting like a competitor is
7 incredibly suspect. That is point one.

8 You then have to grapple with point two, that even
9 those that charged only began to do so, so far as there
10 is information, comparatively lately in the Cartel.

11 Point three you have to grapple with is that the
12 evidence, read as a whole and fairly, shows that there
13 was a very wide range of considerations taken into
14 account by different Local Authorities as to how to set
15 those charges, and cost recovery was only a concern for
16 some authorities in some circumstances at some time,
17 and, fourthly, you have to take into account how
18 vanishingly insignificant all of this is in terms of
19 actual potential quantum and cost when one compares it
20 to the likely cost of the disclosure exercise, because
21 what we are talking about in relation to the bulky items
22 and garden waste is for those authorities that have such
23 services, at most the cost recovery that relates to the
24 one Truck, maybe two in the larger area, that goes
25 around picking up mattresses and when it is not picking

1 up mattresses, delivering wheelie bins or whatever else
2 it may be doing. It means, in relation to garden waste,
3 you have to look at those Parties that subscribe to the
4 service and when, and what revenue accrues, and the
5 numbers in question relative to the overall value of
6 this claim, are really, you know, insignificant, and
7 that leads to, effectively, a situation where the
8 Defendants are advocating an extremely
9 document-intensive, extremely expensive disclosure
10 exercise for the investigation of a number that is
11 likely in the context of the value of the claims to be
12 a rounding number. It really is disproportion
13 personified, because the level of charges generated,
14 even by those authorities that had any charging in the
15 space relative to the value of the claims, is incredibly
16 small. That is what we say about charges, and as our
17 skeleton explains, the four criteria are equally failed
18 in relation to charging as they are in relation to
19 Council Tax.

20 Then we have Government Grant which we have not
21 addressed fully in our skeleton because of the
22 developments of this week, and my position on the plane
23 of factual causation in relation to Government Grants is
24 that you simply fail the test of factual causation in
25 circumstances, first of all, where the Grant is anterior

1 to the budget in question being set, and, secondly,
2 where the motives for the Grant in question do not, in
3 any way, and there is no evidence to suggest they do,
4 logically connect with the topic of Trucks at all.

5 The Government, in deciding how much Revenue Grant
6 to make, or how much Capital Grant to make does not
7 decide it on the basis of the Council's anticipated
8 Trucks expenditure at all. It is taken on a much more
9 macro basis. That is the position. Your chances of
10 establishing any form of factual link between the level
11 of Grant sufficient to meet the *DAF* test and the
12 Overcharge in relation to the Trucks is unreal.

13 Those Grants actually are a very useful point, then,
14 to segway into issue seven, because much the most
15 compelling answer to the Government Grant case is the
16 straight case of legal policy which is that in legal
17 terms, this is *res inter alios acta* of the kind that the
18 Courts will consistently say is not relevant, for
19 reasons of policy, to the reduction of loss. The
20 closest analogy, I think, in relation to this are either
21 the cases of insurance proceeds or the cases of
22 benevolent donations.

23 Note, in relation to both of those examples, the
24 decision to, or the obligation to provide the relevant
25 sums that would, but for the rule of policy, match or

1 meet the loss, is consequential upon the tort, so they
2 both at least conform to a test of factual causation.
3 If you raise money for somebody who is a victim of a
4 railway accident, you do so because the accident has
5 occurred, and you feel sympathy for them, and you donate
6 in those circumstances. The decision to donate, like in
7 the case of *Redpath* which is the leading case on
8 charitable benevolence to -- I think, those types of
9 issues, the decision to donate was motivated by the fact
10 of the accident or the tort, and it is the same in
11 relation to insurance monies. The obligation to provide
12 the insurance, placed beforehand, is triggered in terms
13 of monies that replaced the loss upon the occurrence of
14 the event which may be tortious or a breach of contract
15 or what have you, so at least it conforms to --

16 THE CHAIR: I am not really familiar with cases of
17 benevolent donations. Can you just explain to me what
18 was involved there?

19 MR DE LA MARE: Yes. So we put an excerpt in from *McGregor*
20 and, indeed, from (inaudible) on damages that deal with
21 benevolent donations, and the law is, as a matter of
22 policy, if you contribute to a charity that goes to
23 meeting the costs of someone affected by an accident
24 that, is not treated as relevant to the fact that the
25 Party has received ancillary benefit on policy grounds.

1 There are some very important corollaries of that,
2 and it really goes back to why this argument is so
3 basically unattractive. If I choose to give you
4 resources that are then your resources to spend as you
5 see fit, that is my choice. There are many contexts in
6 which that occurs. My granny might give me £1 million
7 to spend on what I like, and I may choose to spend that
8 £1 million on cartelised Trucks, if I am a strange
9 person. Chris Eubank has a love of purchasing trucks.
10 Might buy a lot of trucks with my granny's money, but
11 the fact that I have paid for these Trucks out of my
12 granny's largesse is completely irrelevant in the law to
13 the facts of whether or not I have suffered any loss,
14 because I have transacted for the Truck, I have paid too
15 much for the Truck and my resources have been diminished
16 in consequence, and the fact that my resources from
17 which I made the purchasing decision stem from someone
18 else's decision to give me money is legally irrelevant,
19 and that informs how the law responds in both of the
20 examples, because in the case of insurance, the response
21 of insurance is not to say that the insurer has a claim
22 in their own right against the Party that has committed
23 the tort, the response of the law of insurance is rights
24 to subrogate the rights to sue under the contract, in
25 other words to sue in the name of the Party that

1 suffered the original loss.

2 That is how the law responds in the context of
3 insurers. In the context of voluntary donations, if I
4 give money to a charity, the charity spends the money on
5 Trucks, let us say Truck to say carry food to a food
6 bank, and they paid too much for it, I, as the voluntary
7 donator to the charity don't have a cause of action in
8 consequence of the fact that my money has not gone as
9 far as I had hoped it would go. There is no claim. The
10 only claim is the claim of the charities, and it is
11 exactly the same, in our submission, in relation to
12 Government Grant, exactly the same.

13 THE CHAIR: Is there a paragraph reference to this that
14 I can look at in due course?

15 MR DE LA MARE: The benevolent donation -- I don't know if
16 the authorities have made it to your desk. I am sorry,
17 I should say we provided them pretty late to my learned
18 friend. It is {D/42/5}. This is an area where, I
19 suspect, English law should probably be seen alongside
20 Scots law. I don't know what the response of Scots law
21 is in these circumstances, but it may well be
22 irrelevant.

23 Our basic position is that for reasons of policy,
24 monies given by Government to a Party -- and it does not
25 matter for the purposes of this analysis who the Party

1 is, whether it is another public body, as in the case of
2 Local Authorities, whether it is a Grant, let us say,
3 given to an acting company. It does not matter at all.
4 Let us say I run a troop based on public subsidy. The
5 fact that I can fund my activity and purchase my
6 cartelised products only because of money given to me by
7 the Government is completely irrelevant, in my
8 submission.

9 That is a hard-edged conclusion of legal policy. I
10 do not shirk from that, just as the conclusions in
11 relation to insurance and benevolence are. That is
12 a point Lord Justice Green made, I think, in the *ATM*
13 case adverting to these categories of case where the law
14 will treat the loss as sustained, notwithstanding that
15 there are other sources of income that replace it. That
16 is where we are at. That is where we must be at,
17 because the converse of the position, as I identified
18 earlier, is that unless that is the response of the law,
19 no body -- I mean that, no body -- funded by public
20 funds can ever bring a claim in contract or tort if they
21 have any form of balanced book requirement, which are
22 ubiquitous.

23 So, if I am, for instance, an NHS Primary Care
24 Trust, or a Foundation Trust or what is now, I think,
25 called an "ICB" replacing the old Criminal Court

1 commissioning groups, I get my money to provide health
2 in my area from public sources. I have my own legal
3 personality, I have my own statutory duties. I have to
4 discharge them by reference to the money I am given, if
5 I buy cartelised products with those monies, according
6 to the logic of this case, I have no claim which would
7 come as news to the 130-odd NHS bodies that were in the
8 generic Medicines Cartel claim. That would come as
9 news. It would come as news to everyone casting
10 a weather eye over all of the predatory pricing
11 decisions going through the Tribunal, and as I said
12 earlier, it would come as news to anyone who dealt with
13 the bid-rigging cases, almost all of which were directed
14 at Local Authorities in the context of procurements, but
15 that is the logic of the argument. Those Parties have
16 no claim.

17 That is a crystalline point of law. You cannot
18 answer that crystalline point of law by saying "oh well,
19 it is a point that has not been addressed, it is novel
20 and important and we should address it on the facts"
21 because the facts are not going to make any difference,
22 not least you could not have facts any starker than the
23 facts in relation to the Scottish Fire Authority which
24 show that the Scottish Fire Authorities got all their
25 funds by Capital Grant from the Scottish Government, so

1 the point is either good or it is bad, and it needs to
2 be resolved, not least because it has extremely
3 wide-ranging legal ramifications, not just in this case,
4 but beyond. Any time a public body wants to assert
5 these rights they may well face these arguments
6 otherwise, so that is Capital Grant.

7 The considerations of policy in relation to Council
8 Tax are from a different origin, and they stem from the
9 fact, first of all, that the downstream Parties are
10 neither going to sue, nor -- and this is what is
11 distinct compared to the other cases, in our submission,
12 do they have any cause of action.

13 The second point that is distinct in this case, and
14 that justifies a different rule of policy is the fact
15 that the public bodies in question cannot and will not
16 profit from any recovery, so the danger of any -- and I
17 do not shirk from the analogy -- any *Hanover Shoe*-like
18 solution -- is that the direct purchaser receives
19 a windfall which works its way immediately into the
20 pockets of the shareholders rather than resounding to
21 the benefit of the Parties downstream who buy the
22 products and the goods in question. There is no such
23 danger in relation to public bodies that are obliged to
24 provide services, obliged to balance their books, and
25 will spend the money, the very worthy enterprises that

1 the acts, the Local Governments acts, etc, require them
2 to spend their money on, so there is no problem there.

3 There is no problem of double recovery because there
4 is no legal basis or prospect of a downstream claim, and
5 it is double recovery that inform cases like *Aventis* and
6 the concerns in *Sainsbury's* where there were the
7 downstream claims that manifested themselves in the
8 merits case.

9 There were real concerns of effectiveness, because
10 if this argument works in this context, where does it
11 begin to end, and how is there effectively an effective
12 remedial regime providing effective redress against the
13 harm in question, because you are left with a cohort of
14 harm that is uncompensatable, unrecoverable. It is not
15 a choice between over-compensation and
16 under-compensation, it is a choice between no
17 compensation, which is effectively what the Defendants
18 push for, and effective compensation. The reason it is
19 effective compensation is because the Local Authority
20 will spend the money for the benefit of its residents
21 and ratepayers, so there is no problem on that front in
22 our submission. The solution advances the effectiveness
23 aims of competition law which all the cases --
24 *Sainsbury's*, etc -- show to be germane, and, of course,
25 it is a solution that brings with it very obvious

1 procedural economies, because it then becomes
2 unnecessary to investigate the supposed downstream
3 pass-on through taxation, the highly splintered claims,
4 the five different mechanisms by which the loss may go
5 elsewhere, and instead you have one claim that
6 concentrates and rules them all, which plainly satisfies
7 criteria of effectiveness.

8 None of that contravenes any principle of EU law or
9 domestic law because it is all predicated upon the fact
10 that this Party is the end consumer at the end of the
11 supply chain.

12 If that analysis is good in relation to Council Tax,
13 it is also correct in relation to the charges. The
14 charges are similarly no form of economic activity set
15 on the basis of public sector considerations, and there
16 is no prospect of someone building a glow(?) to recover
17 the garden waste charges or the bulky items charge that
18 one particular Council may have charged at a particular
19 time or other. Just impossible in law or in fact to
20 countenance any such claim, and so all the points I made
21 previously in relation to Council Tax reiterate and
22 respond here.

23 In terms of the answer that these arguments received
24 from my learned friend, beyond outright novelty, which
25 is no answer for the reasons they gave, beyond the basic

1 invocation of the compensatory principle from *Aventis*
2 which is no answer in circumstances where the law
3 already recognises reasons or cases of policy where the
4 fact that you have made good your loss from an
5 alternative source is no answer to the claim, they are
6 just simply seeking to invoke those very same rules of
7 policy in this case, and in circumstances where no one
8 has had the temerity until this case to suggest,
9 effectively, that Local Authorities cannot suffer loss,
10 or cannot suffer complete loss because of the way they
11 are constructed, we say there is no answer to any of
12 this, and the point should be resolved, and be resolved
13 now, it is being now that is the time that delivers the
14 real prospects of procedural economies and savings in
15 this case if we are correct.

16 I do not shirk from the fact that, you know, the
17 point is an important point of law. It may well be
18 appealed, so those procedural economies may have to
19 await any resolution by the Court of Appeal or beyond,
20 but that point should be resolved now, so that we do not
21 go off in some wild goose chase looking for every single
22 budgeting document for every single one of these 130-odd
23 Local Authorities or Fire Authorities for an exercise
24 that is not just legally suspect, but legally flawed.

25 Unless there is anything else I can assist you with,

1 I have managed to finish at 1 o'clock.

2 THE CHAIR: I am very grateful. One point arising out of
3 the matter you have just raised. Suppose we say
4 amendments (Inaudible) strike out there would very
5 likely be (Inaudible). How would one case-manage the
6 difficulty? I mean, one of the big advantages
7 (Inaudible) this saves an amount of procedural pain in
8 terms of expense.

9 MR DE LA MARE: It does, yes.

10 THE CHAIR: But, of course, we have got a timetable moving
11 forward. What would we do?

12 MR DE LA MARE: I think the honest answer is there is plenty
13 else to be getting on with in relation to Trucks, and we
14 are obviously implicated in all the upstream pass-on and
15 the Trucks resale issues and all those have to be dealt
16 with. This is a discrete issue that affects just my
17 clients and the Scottish look-alikes, and by the way,
18 the fact that the Scottish look-alikes are not here is
19 nothing to the point. If we win they get a free ride.
20 The idea that those cases will go forward in
21 circumstances --

22 THE CHAIR: No, fair enough. So what you are saying is that
23 we should -- actually, whatever the position one ought
24 to be parking public body pass-on for a later date.

25 MR DE LA MARE: Yes. Mr Pike agrees. That is the logical

1 consequence, I accept.

2 THE CHAIR: Then going back to the questions that
3 (Inaudible) at the outset, namely (Inaudible) are
4 difficult questions which are being considered
5 (Inaudible) areas, or -- why don't we just say this is
6 very difficult, is obviously related to pass-on
7 generally, shouldn't we just be case-managing the Local
8 Authority pass-on question differently in the Trucks
9 wave 2 proceedings?

10 MR DE LA MARE: There is two answers to that. The first is
11 for the reasons I gave earlier, the issues that arise on
12 the plain of factual causation are not the same, but,
13 secondly, the issues that arise in relation to legal
14 policy have no resonance in any other litigation. This
15 is the first case where those issues have arisen in
16 a Cartel context, and, you know, in relation to Grant
17 and everything else, actually in any context, so there
18 is nothing to be done by staying these points to wait
19 for the issues to be resolved on *Interchange* because
20 they will not be addressed on *Interchange*. They will
21 not arise on *Interchange*, because *Interchange* is
22 a conventional supply chain case, so I fear -- you may
23 not like me for saying this -- I fear the answer is
24 "grasp the nettle".

25 THE CHAIR: We are very happy to grasp nettles provided --

1 MR DE LA MARE: The gloves.

2 THE CHAIR: The gloves. Exactly. Thank you very much. We
3 are very grateful. Just before we rise, it will have to
4 be a hard stop at 4.15 because my colleagues have got
5 other jurisdictions to get to. Would it assist if we
6 started at quarter to?

7 MS ABRAM: I mean, we are in difficulty in the sense that I
8 am in Mr De la Mare's hands as to how long he will need
9 to reply. He has been two-and-a-half hours. I would
10 think I probably will need two hours so I think starting
11 at quarter to might be helpful, though I am sorry that
12 curtails the lunch break.

13 THE CHAIR: No, not at all.

14 MR DE LA MARE: I am most grateful. My learned friend has
15 been perfectly reasonable and I have basically thrown
16 herself on my mercy but I went as quickly as I could and
17 there is a lot to get through.

18 THE CHAIR: No criticism at all. I do not want anybody to
19 feel under pressure. We will start at a quarter to two,
20 but we will have to finish at 4.15. Thank you very
21 much.

22 (1.03 pm)

23 (Luncheon adjournment)

24 (1.46 pm)

25 Submissions by MS ABRAM

1 THE CHAIR: Good afternoon.

2 MS ABRAM: Good afternoon. I would like to do six things,
3 if I may. First, I am just going to raise a couple of
4 points on the law of summary determination. Second,
5 just one point on the law on pass-on. Third, I will
6 address pass-on by the Local Authority Claimants, and,
7 fourth, the Fire and Rescue Claimants, fifth, the legal
8 policy arguments, and, sixth, the argument that there
9 should be summary judgment because it would be
10 inefficient or disproportionate to try the pass-on
11 Defendants.

12 Before I do those things, I just step back, if I
13 may, and address the warring cry by which Mr De la Mare
14 led his submissions, and we say that this reveals that
15 the whole application is plagued by insoluble cakeism.

16 So on the one hand, the battle cry is that if we are
17 right in the pass-on defence, no Local Authority can
18 ever bring any tort claim in any circumstances, and, on
19 the other hand, the complaint is made against us that
20 our allegations of legal pass-on are narrower than what
21 would count as pass-on from an economics perspective.

22 Now, obviously, the two do not sit together because
23 to the extent that we are alleging that there are points
24 that would count, may count as pass-on from an economics
25 perspective like service reductions, but we do not rely

1 on these as legal pass-on. Quite clearly, there is
2 absolutely no basis to suggest that Local Authorities
3 would, by dint of our pass-on defence, be put in
4 a different position from any other prospective
5 Claimant. All we are arguing is that the compensatory
6 principle in the pass-on defence applies to Local
7 Authorities in exactly the same way as it applies to any
8 other Claimants. The categories in *Sainsbury's*, in
9 paragraph 205 of *Sainsbury's*, apply to Local Authorities
10 just like they do to any other Claimant in any other
11 circumstance in a competition claim.

12 It may just be helpful to ground that point by
13 starting with paragraph 1.5 of Noble which Mr De la Mare
14 showed you, which is in {B/18/4}. You will recollect
15 that it was 1.5(i) that Mr De la Mare focused on, and
16 Mr Noble says there:

17 "Unlike commercial enterprises, Public Authorities
18 face a statutory requirement to set a balanced budget
19 such that, when faced with increased costs, they have an
20 obligation to increase their income ..."

21 Pause there. We say that may amount to pass-on in
22 a legal sense if there is an increase in Council Tax or
23 charges:

24 "Or reduce costs ..."

25 And again, that is category 3 of *Sainsbury's* where

1 there is a reduction of costs by negotiation with
2 suppliers may count as pass on, which they may do via
3 service reductions, and we do not rely on that as
4 pass-on from a legal perspective.

5 So really what the question before the Tribunal
6 boils down to is sort of a version of the great waterbed
7 metaphor that we often use in these cases where it is
8 accepted by both sides that the Local Authorities do
9 not -- the Local Authorities will contain within
10 themselves any Overcharge that they suffer in the sense
11 that they have to balance their budget, and the question
12 is where they squirt out the Overcharge through the
13 various levers -- to mix my metaphors horribly -- that
14 they could pull to achieve balancing their budget to
15 match up reflecting any Overcharge so, it is really
16 a question of allocation. Do the ways in which those
17 levers are pulled, does the hole through which that
18 water squirts, reflect legal heads of pass-on or not?

19 I say that you only have to express it in those
20 terms to make it clear that that is a paradigmatic
21 question for trial. It is clearly a question of fact as
22 to which evidence will be required.

23 Mr De la Mare answers that in a couple of ways. The
24 first thing he says is, actually, that is just not good
25 enough. It is no good to talk about different holes

1 that the water might be squirting out of. What you have
2 to be able to do in order to establish pass-on is you
3 have to be able to trace through a specific cost to
4 a specific Overcharge through the supply chain and show
5 exactly where that specific cost ends up at the
6 downstream level.

7 Well, we know that is wrong because there is
8 authority directly contrary to it, so I am going to show
9 you that before we move on to deal with that.

10 That is in {D/22/60}, and it is *Chunghwa* so
11 *Granville v Chunghwa* which I know will be familiar to
12 the president at least, and I just need to take you to
13 one paragraph of this which is 180 at the bottom of page
14 60 there, and that is the judge, Judge Pelling sitting
15 as a judge of the High Court, saying that:

16 "It follows from this that although the Defendants
17 bear the legal burden of proving downstream pass on ..."

18 We accept that:

19 " ... I reject as wrong the notion advanced by the
20 Claimants that downstream pass on can only be evidenced
21 by tracing the change in cost of the LCD panels ..."

22 The cartelised product in that case:

23 " ... from the claimant's purchases through to
24 a change in sales price to the end consumer and any
25 submission that I should conclude that the Defendants

1 have failed to discharge their burden because the
2 material does not exist to enable such an exercise to be
3 carried out. Where documentary evidence is limited,
4 such an approach would effectively make it impossible to
5 demonstrate pass-on ..." which would be contrary to the
6 Supreme Court in *Sainsbury's*".

7 So while the Court accepted Mr Augustin's evidence
8 that you could not trace changes in panel prices
9 through, that is only the part of the inquiry and not
10 the end of it, and so that deals with -- and that deals
11 with that point, but if one thinks about it rationally,
12 it is clear as a matter of logic that that must be
13 right, just from the way that the categories in
14 paragraph 205 of *Sainsbury's* in the Supreme Court
15 worked, because there is nothing in the Supreme Court or
16 any of the other judgments to suggest that pass-on is
17 somehow an all-or-nothing issue, that you either have
18 pass-on or you have not. All of these cases, as we
19 know, are greatly consumed with assessing the amount of
20 pass-on on a scale from zero to 100 per cent, and it may
21 well be that a Claimant in any particular circumstance
22 has passed on 20 per cent of its loss, passed on
23 economically 60 per cent of its loss, not passed on the
24 rest of its loss, and that -- the full position will be
25 a matter for evaluation on a factual basis, using expert

1 evidence, and so the second thing that Mr De la Mare
2 says is look, well, this is all just too complicated.
3 There are too many factors coming into play. There is
4 political will, there's a multifactorial analysis
5 required. There is no way that the Court can analyse
6 the extent of pass-on in these circumstances.

7 We have put in evidence, which has not been
8 contested by the Claimants, about how our experts would
9 intend to do that.

10 Now, it may ultimately end up that the Tribunal is
11 or is not satisfied with the exercise that our experts
12 intend to do, but there is uncontested evidence before
13 the Tribunal as to what in their opinion could be done
14 to assess the amount of pass-on, and since it seems to
15 be denied that this is possible, despite the lack of
16 evidence in response to it, I should show you that as
17 well, and the first important bit is in Noble, so that
18 is {B/18/29}. If I may respectfully do so, I commend to
19 the Tribunal's attention, of course, the whole of
20 Mr Noble's admirable expert report, but, in particular
21 section 5 which is only a few pages long, and which sets
22 out exactly what he proposed to do and how that would
23 answer the question in this case, but for present
24 purposes I will just pick a couple of paragraphs.

25 So if you start at 5.3, you see that -- this is

1 picking up on those methodology statements that were
2 before the Court in the December CMC. So:

3 "I consider two of the approaches will be most
4 applicable: the general cost quantitative approach for a
5 number of targeted Claimants, and the qualitative
6 economic approach for the group as a whole".

7 That is described as the hybrid approach, and then
8 if one goes to 5.5 over the page at the top of page
9 {B/18/30}, Mr Noble explains in relation to the
10 quantitative approach:

11 "While it may be challenging to identify the
12 mechanism for pass-on at a Truck level, or even at the
13 level of all Truck purchases, using factual evidence,
14 I can identify the overall cost bucket that Truck
15 expenditure falls within, and empirically estimate the
16 relationship between this overall cost bucket and the
17 various Local Authority revenue streams, for overall
18 pass-on. Similarly, I can estimate the relationship
19 between the cost of providing the services, and the
20 prices charged for them, using empirical analysis of
21 data from a targeted Claimant, for chargeable services".

22 Then further explanation at 5.7 of the qualitative
23 assessment, so Mr Noble considers the group of Local
24 Authorities to be relatively homogeneous rather than
25 heterogeneous, as is said against me, but it is said

1 there at 5.7:

2 "The qualitative assessment therefore, can provide
3 an analytical framework to draw together all the key
4 principles and features of the various markets ..."

5 And you see in the middle of 5.7 the sentence
6 starting:

7 "It may be useful to collect limited evidence from
8 the whole Claimants pool at this point to enhance the
9 group-wide applicability of the analysis".

10 We will come back to this later in the context of
11 what is said to be totally disproportionate proposals to
12 try this, but I just want to deal right up front with
13 the idea that everyone agrees that an econometric
14 analysis is impossible because that is absolutely not
15 the case. In fact no one has actually put in evidence
16 saying an econometric evidence would be impossible. The
17 evidential position before the Tribunal is the opposite.

18 That is what Mr Noble says.

19 And we should not forget the forensic accountants.
20 Mr~Bezant has also put in a report, so if one turns to
21 the previous tab, that is {B/17/1} and if you just pick
22 up a similar point on {B/17/13} of Mr Bezant's report,
23 and again it is section 4 of his report where he
24 explains what he would do for a forensic accounting
25 analysis of these issues. 4.5, as he explains in his

1 methodology statement, again, that statement from
2 December:

3 " ... a forensic accounting approach to assessing
4 supply pass-on".

5 We know one:

6 " ... relates to an investigation of the accounting,
7 costing, pricing and budgeting processes used by the
8 Claimant ..."

9 2 is the key bit:

10 "Focuses on the factual and financial evidence to
11 identify the salient features of these processes and how
12 they interact to determine the pricing outcomes, and
13 hence the causal mechanism between any Overcharge
14 incurred by a Claimant and its downstream prices ..."

15 And then 3 explains how it would be done, so we are
16 just a bit confused by the idea that it is just
17 impossible to use quantitative or qualitative techniques
18 to analyse the extent of pass-on.

19 The other answer, and I will come on to this later,
20 is that it is totally clear from the Supreme Court in
21 *Sainsbury's* that even if the precise quantitative
22 assessment is not possible in particular circumstances,
23 of course that does not mean that the Tribunal just
24 throws up its hands and decides not to do it at all.
25 What it has to do is find an appropriate case management

1 approach to estimate the level of pass-on, and I will
2 come back to our proposals on that at the end, if I may.

3 THE CHAIR: Yes, on the basis that courts almost always
4 operate on the basis of imperfect evidence and they have
5 to do their best.

6 MS ABRAM: Yes. It is an element of the broad axe, sir.

7 So with that, let me address my first substantive
8 point, which is the law on summary determination, and it
9 is helpful, I think, just to anchor the Tribunal's
10 assessment in a couple of cases, and I think the first
11 that it is useful to look at is at {D/17/1}, and that is
12 *Okpabi* in the Supreme Court. Let me start by saying
13 that the detailed facts do not really matter. For our
14 purposes, all the Tribunal needs to know is that the
15 case concerned a jurisdiction dispute and the key
16 question was whether the Claimants had a realistic
17 prospect of establishing that the anchor Defendants had
18 owed them a duty of care, so it was a realistic prospect
19 type of jurisdiction dispute. I want to show you three
20 bits of it.

21 The first is on page {D/17/6}. It starts on page 6
22 at the bottom, and again just to anchor this, paragraph
23 21, it is a citation from the guidance of Lord Hope in
24 *Three Rivers*, the well-known guidance about summary
25 determination, and it is paragraph 95 on the following

1 page of that quote that I want to pick up. {D/17/7}.

2 This just sets out the parameters, it sets out the rules
3 of the game that we are applying here, and I will pick
4 that up, if I may, on the seventh or so line of
5 paragraph 95 at "for example" at the end of the line:

6 "For example, it may be clear as a matter of
7 law ..."

8 Lord Hope says:

9 " ... at the outset that even if a Party were to
10 succeed in proving all the facts that he offers to prove
11 he will not be entitled to the remedy that he seeks. In
12 that event a trial of the fact would be a waste of time
13 and money, and it is proper that the action should be
14 taken out of Court ..."

15 So that is the threshold, that is the test that this
16 Court is applying. Is it clear as a matter of law as to
17 the question of legal policy which is, I will come on to
18 say, a mixed question of fact and law, but raises point
19 of law, is the claimant's argument clearly right as
20 a matter of law:

21 " ... in other cases it may be possible to say with
22 confidence before trial that the factual basis for the
23 claim is fanciful because it is entirely without
24 substance".

25 So in this case we are looking at the factual basis

1 for a defence rather than the claim. The point is the
2 same, so it needs to be fanciful and entirely without
3 substance:

4 "It may be clear beyond question that the statement
5 of facts is contradicted by all the documents or other
6 material on which it is based. The simpler the case the
7 easier it is likely to be to take the view and resort to
8 what is properly called summary judgment. But more
9 complex cases are unlikely to be capable of being
10 resolved in that way without conducting a mini trial on
11 the documents without discovery and without oral
12 evidence.

13 Now, that reference to complexity is particularly
14 resonant because, of course, the Claimants repeatedly
15 describe the pass-on defence both factually and the
16 legal policy aspect of it as "complex" and "novel", so
17 alarm bells should, in my submission, be ringing
18 straight off the blocks.

19 So second, I just want to show you a couple of
20 extracts from *Okpabi* itself just to show that these
21 principles will remain in place. If I could pick up at
22 page {D/17/27} of the bundle, you see above paragraph
23 103 the heading "The Mini Trial". I am just showing you
24 that to situate you because the criticism of the Supreme
25 Court is that the First Instance Court did a mini trial

1 without proper access to documentary disclosure and
2 cross-examination, and then one goes over the page to
3 {D/17/28}, and this is the criticism of the First
4 Instance Court for that, so where there is a mini trial
5 the result is that instead of focusing on the pleaded
6 case and whether that discloses an arguable claim, the
7 Court is drawn into an evaluation of the weight of the
8 evidence and the exercise of a judgment based on that
9 evidence. That is not its task at this interlocutory
10 stage. The factual averments made in support of the
11 claim, here the defence, should be accepted unless
12 exceptionally they are demonstrably untrue or
13 unsupportable -- a really high threshold for summary
14 determination on a factual point.

15 Finally on that note, page {D/17/33} of the bundle
16 above paragraph 126, the documentary evidence:

17 "Conducting a mini trial also led to the Court
18 making inappropriate determinations in relation to the
19 documentary evidence. Since the Court was making
20 a decision on the evidence, it effectively had to
21 conclude that the prospect of there being further
22 relevant evidence on disclosure could and should be
23 discounted".

24 So again, if it is to be said nothing relevant could
25 ever come -- nothing relevant will change the Court's

1 view on this, could not come out of the woodwork, that
2 is a really high bar, and the test is articulated by the
3 Supreme Court, just so you have the reference to where
4 they crystallise the test, is at the end of paragraph
5 128 on the following page, last three lines, the test
6 is:

7 "In other words are there reasonable grounds for
8 believing that disclosure may materially add to, or
9 alter the evidence relevant to whether the claim has
10 a real prospect of success".

11 So those are the parameters, those are the rules
12 that we should be applying, and the second case just,
13 again, to set out the framework, I just want to take you
14 to one paragraph of *TfL v Lloyds Bank, Floyd*, LJ's
15 ruling in that case, and that is at {D/13/1}, and I am
16 going to start at page {D/13/6}, so the facts of that
17 case do not matter at all for present purposes. It was
18 a summary judgment application by a Defendant in an
19 unjust enrichment claim concerning the recovery of a
20 debt. What matters are the principles that the Court
21 sets out, so I just take you to page 6, because it is
22 a convenient citation at paragraph 26 of the *Easyair*
23 principles set out by Lewison, ~J (as he then was). I am
24 not going to go through those. They are super-familiar.
25 I just pick up on the following page (vii) {D/13/7}.

1 This is the point prayed in aid, I think by the
2 Claimants in this case:

3 "It is not uncommon for an application under Part 24
4 to give rise to a short point of law on construction".

5 That is the basis for us to decide those short
6 points of law on construction at summary stage, but the
7 paragraph I do want to take the Court to is 27, and
8 there are a number of directly relevant points in
9 paragraph 27, so Floyd, LJ says, picking up on the first
10 line:

11 "I would add that the Court should still consider
12 very carefully before accepting an invitation to deal
13 with single issues in cases where there will need to be
14 a full trial on liability involving evidence and
15 cross-examination in any event ...

16 Point one, we rely on that. Point two, coming
17 straight up:

18 " ... or where summary disposal of the single issue
19 may well delay, because of appeals, the ultimate trial
20 of the action".

21 Again, squarely in issue in this case, and then
22 skipping a couple of lines down below the citation:

23 "Moreover, it does not follow from Lewison,~J's
24 seventh principle ..."

25 The one I showed you:

1 " ... that difficult points of law, particularly
2 those in developing areas, should be grappled with on
3 summary applications ... such questions are better
4 decided against actual rather than assumed facts. On
5 the other hand it may be possible to say that the
6 trajectory of the law will never on any view afford
7 a remedy".

8 Again, that is the kind of test that we are applying
9 here. Is the trajectory of the law such that this
10 pass-on defence is never going to fly, to put it
11 colloquially.

12 Now, that is what I wanted to say about the summary
13 judgment threshold, and the second thing I just wanted
14 to address is just one point on the test for pass-on,
15 and that is about where the four factors, the four Royal
16 Mail factors fit into the test for the pass-on defence.
17 That is because I just want to be sure that the Court is
18 appropriately situated about where they sit, because my
19 learned friend said, doubtless without meaning this
20 quite literally, but at various points that the four
21 factors were the dominant test for pass-on, and that
22 they have been endorsed repeatedly by the Court of
23 Appeal and the point that I just want to show the
24 Tribunal is that although we do not denigrate the
25 relevance of the four factors, they are not in any sense

1 a test, an exclusive litmus test for the presence or
2 absence of pass-on, and that is made very clear by the
3 Court of Appeal in *Trucks Trial 1*.

4 Now, *Trucks Trial 1* is subject to a significant
5 health warning, because, as you know, it is subject to
6 a pending application for permission to appeal to the
7 Supreme Court. Now, until one knows the outcome of that
8 application of any appeal, one cannot take the words of
9 the Court of Appeal quite as gospel in the one way might
10 otherwise do so and that does rather illustrate the
11 difficulty that runs through this application, because
12 there is every chance that in this developing area of
13 law, the rules might change, *Interchange* is just one
14 example of that, of course.

15 Let me show you the position as it stands now, so
16 that is {D/23/1}, and I will pick it up at page 14,
17 paragraph 154, so this is just dealing with the place of
18 the four factors and their relevance in *Trucks Trial 1*.

19 So 154:

20 "The CAT concluded that none of the ..."

21 THE CHAIR: (Inaudible).

22 MS ABRAM: I have given the wrong reference. It is page 53,
23 not page 14. Sorry. {D/23/53}. So 154:

24 "The CAT concluded that none of the four factors
25 was present in this case, a conclusion which was not

1 challenged on appeal".

2 So that is the background, and then if you skip to
3 the seventh line of the same paragraph it explains where
4 that fits into the case, and the position is:

5 "In circumstances where none of the four factors
6 which might establish the requisite degree of proximity
7 to establish a direct causative link between the
8 Overcharge and the prices charged by the Claimants is
9 present, it is both logical and common sense to conclude
10 that there would need to be some other evidence of
11 factual causation to establish that requisite degree of
12 proximity".

13 Then 156, while I am there, on the relevance of
14 facts to determinations of pass-on:

15 "In my judgment, *DAF*'s argument on this Ground is
16 really an attack on what was an evaluative judgment by
17 the majority of the CAT that, on the factual and expert
18 evidence before it, *DAF* had not established that the
19 prices charged to the Claimants' customers would have
20 been lower in the counterfactual absent the Overcharge.
21 This Court would not interfere with that evaluative
22 judgment of an expert Tribunal in the absence of an
23 error of law".

24 The relevance of that is just to show how important
25 the evidence is in these determinations of pass-on, and

1 again, another reason why the Court should, in my
2 submission, be extremely reluctant to determine them in
3 the absence of a trial.

4 So that is what I wanted to say about the law.

5 Now I would like to turn to the actual application,
6 if I may, and start with -- by addressing the factual
7 position in relation to the Local Authorities.

8 Now, before I start on that, I want to explain why I
9 am addressing the factual position of the Local
10 Authorities, and unlike Mr De la Mare, I am going to
11 take you to the evidence put forward by the Claimants in
12 support of their application, and I think that is really
13 important to do for two reasons. The first is that it
14 is accepted very frankly, and you will see from the
15 evidence, that the relevant facts are really complex,
16 and that really brings out how inappropriate they are
17 for summary determination. We also say that there are
18 important supporting features of the evidence in favour
19 of the Defendants' pass-on defence, and the second
20 reason why I need to go to the evidence is that it is
21 unconscious of the test, I need to go beyond economic
22 theory in order to show that there is a pass-on defence
23 that should not be struck out, so for both those reasons
24 it is important, but before I go there, let me give you
25 another example of a case where causation issues have

1 come up to show you how the fact-finding aspect of the
2 Court's exercise is important, and I am going to do that
3 by reference to one of the *res inter alios acta* cases
4 that Mr De la Mare mentioned in his oral submissions.
5 It is not in the bundle because this point only came up
6 during the hearing this morning, but we have *Fulton*
7 *Shipping*, if we may. It is an old friend, and I have
8 told Mr De la Mare about it over lunch so I don't think
9 anyone is unhappy. Not particularly unhappy, anyway.

10 (Handed)

11 Of course, *Fulton Shipping* is an old friend but just
12 in case it is helpful to give a recap of what the facts
13 were because they are helpful for this case, you will
14 remember that it was a case where charterer has
15 repudiated a charterparty two years before its end date,
16 and the owners then sold the vessel and sued for the
17 loss charterparty rate for the remaining two years of
18 the charterparty. The charterer said, "well, hang on,
19 you have to give credit for the substantial amount that
20 you received and the sale of the vessel because you got
21 more when you sold the vessel than you would have done
22 if you had waited for the end of the charterparty two
23 years later" and the Supreme Court rejected that
24 argument because the sale of the vessel was not caused
25 by the repudiation of the charterparty.

1 The reason I am showing you this is to show you why
2 it is necessary to consider the facts in order to
3 determine points of factual causation in a way the clue
4 is in the name, but also the legal causation point along
5 the lines of the *res inter alios acta* point that is
6 taken against me, and so if I could just pick it up at
7 paragraph 30 of the report, so page 14, and that just
8 sets out the test, so if one picks up at the fourth
9 line:

10 "The essential question is whether there is
11 a sufficiently close link between the two ..."

12 Between the wrong and the loss:

13 " ... and not whether they are similar in nature.
14 The relevant link is causation. The benefit to be
15 brought into account must have been caused either by the
16 breach of the charterparty or by a successful act of
17 mitigation".

18 So that is the basic test, and then paragraph 31 you
19 see the Court goes on to identify the facts found by the
20 arbitrator to identify the benefit that the charterers
21 were seeking to have brought into account, and then the
22 Supreme Court expresses its judgment based on those
23 facts as found by the arbitrator. That difference or
24 loss was, in my opinion (paragraph 32) not, on the face
25 of it, caused by the repudiation of the charterparty,

1 and it goes on in paragraph 32 to 33 to refer to the
2 absence of a relevant causal link.

3 Now, that is just one example. It is just one
4 illustration of why you need to understand the facts
5 before you can determine a pass-on defence.

6 Now, when I talk about the facts in relation to the
7 Local Authorities, I am going to set aside the legal
8 policy argument that the pass-on defence just should not
9 be available against Local Authorities. I will come to
10 that in a minute, but just to focus on the factual
11 causation point, the starting point is that there are
12 two important pieces of common ground. The first is
13 that where a Local Authority performs a service for
14 which it applies a charge that has to be based on costs,
15 that is commercial waste collection, that there is at
16 least arguably factual causation, and that is why there
17 is no strike out application in relation to the
18 commercial waste collection, because it is accepted
19 there's arguably factual causation.

20 The second important bit of common ground is the
21 statutory obligation to balance the budget. No one is
22 going to take you through the law on that, but just in
23 case it is helpful to have the reference, it is cited --
24 the legislation is cited at footnote 40 of our skeleton
25 on page 8, just in case you want to check that out.

1 We say that the obligation to balance the budgets is
2 a really important starting point because it brings the
3 Local Authority close to that example of a business
4 operating in a market where costs are close to price
5 because of vigorous competition.

6 Now, Mr De la Mare says "well, that is not a very
7 good example because Local Authorities are not competing
8 with each other" and I say, with respect, I am afraid he
9 has not correctly understood the point that Mr Noble is
10 making. The economic point that is being made is that
11 in a world -- whether due to competitive forces or
12 a statutory obligation the result is that you are not
13 charging profits, your services are not being carried
14 out at a profit, and you do not have a tranche of money
15 into which you can absorb any alleged overcharge as in
16 this case. There is a high likelihood of pass-on
17 because you have nowhere to go.

18 In the case of a business, your price is already cut
19 to the bone, so if you suffer an Overcharge you are
20 going to have to raise your prices in order to avoid
21 becoming loss-making. In the case of a Local Authority
22 you have got an obligation to balance your budget, so
23 you have no cushion into which you can go for that
24 reason either, so it is nothing to the purpose that
25 Local Authorities are not competing with each other.

1 I want to go, if I may, first, to the evidence of
2 Council Tax, and I am going to take a worked example, if
3 I may, from Blackpool Council which is in Mr Bezant's
4 report, because this really shows the extent to which
5 the balancing books obligation matters, and the
6 granularity of that exercise, so it is in {B/17/21}.

7 This is an illustration of the build up of the
8 revenue budgets for 2015 to 2016, just by way of
9 example. The key figure that I need to show you is in
10 box 1, so the top left-hand corner of the page. You see
11 the first line of the table under the heading "general
12 fund estimates -- net expenditure" and this is in
13 thousands, so estimated net expenditure is £128,073,000
14 for Blackpool Council.

15 Then you see that that is precisely matched by the
16 forecast revenue figure. So if you go over the page to
17 figure 5.2 {B/17/22}, you see an extract of the same
18 year's overall budgeted expenditure and income, and you
19 see, again, the first substantive line:

20 "General fund estimates, net expenditure". It is
21 exactly the same figure, 128.073, and then all of the
22 figures below sum up the amount of money that had to be
23 achieved by means of the net expenditure, so you see
24 that the Council Tax requirement in the bottom line,
25 45.535, that is the delta between the other income and

1 the net expenditure, and so we are talking here not
2 about a pound-perfect accounting exercise, but
3 a thousand pound-perfect accounting exercise, so
4 a really closely granular one.

5 Let me just take you back a few pages in the report
6 to show you the sorts of things that Blackpool Council
7 were taking into account when they did that balancing
8 exercise. So if you go to page {B/17/10} of the tab,
9 paragraph 3.17 at the bottom of the page, and this
10 explains -- Mr Bezant explains here that Blackpool
11 estimated a budget gap of 25.2 million during this
12 budget-setting process, and identified 34 initiatives to
13 achieve a balanced budget including, 1:

14 "Contractual savings in the street lighting and
15 waste collection PFIs of 2.35 million".

16 Now I can't obviously go behind that information.
17 We only have the information that we have, but that
18 might be a really good example of cost mitigation
19 through negotiation with suppliers because it looks like
20 they are going to their PFI partners and saying "I need
21 to save it £2.35 million", in that context, and, of
22 course, whether or not that is right, again, I am going
23 to say it again, it is a paradigmatic question for
24 trial. That is what trials are for, to work out what
25 that line in the budget saving exercise represented or

1 not.

2 So what I should do, I think, is to compare the
3 sorts of figures we have seen there against the sorts of
4 figures that are in these claims to give you some idea
5 of the relative degree of magnitude of the balance --
6 the budget balancing exercise against the amount that is
7 claimed. We do not have these figures for Blackpool
8 Council but I will take Conwy Council for sample
9 figures. We only have what we have, but if you look at
10 page {B/17/25} of the same report, you see at the top,
11 table 5.1, again, these figures are in thousands, and
12 these are Truck costs, and they are estimated by an
13 agency that has done some work for the Claimants in
14 these cases, and you will see the sort of level of
15 magnitude of the costs that we are talking about in
16 Trucks every year, so hundreds of thousands, sometimes
17 millions, low millions of pounds, and on that point,
18 just while we are looking at that table we should make
19 it clear that we do not accept that these costs are
20 somehow negligible. They are certainly not negligible
21 in the context of the budget balancing exercise, but
22 they are not negligible in any normal sense, in any
23 ordinary sense either.

24 You can see, if you go to the bottom line of that
25 table, the percentages that the estimated Truck costs

1 reflect of the budget for the Environmental Services
2 Department, which is obviously the relevant one. These
3 are not tiny costs in the same way that they were in
4 *Royal Mail* or in *BT*.

5 If you just -- again, to give you another gauge,
6 another anchor to the relevance of these costs, the
7 materiality compared to the exercise that the Council
8 was doing, if you look at 5.12 on the previous page, so
9 page {B/17/24}, this records that in this regard, during
10 its 2015/16 budget-setting process, Blackpool Council
11 estimated a net overspend of £714,000 for its previous
12 year's budget, and stated the reasons for the over
13 spendings, but then, second paragraph, the quotation:

14 "It is expected that in accordance with previous
15 convention any overspendings on service budgets as at 31
16 March will be recovered in the following year
17 2015/16 ..."

18 So it can't at all be suggested that these levels of
19 cut costs are not material in the context of the budget
20 balancing exercise, or somehow that the Councils would
21 not have had to take them into account, even if they
22 could not be balanced out in the same year. You can see
23 that they would have to be balanced out over the next
24 year, so in the overall envelope of the period of time
25 to which these claims relate, we say the evidence

1 available is strongly consistent with the idea that one
2 way or the other budgets were balanced to take this into
3 account sufficiently.

4 Now, I hear Mr De la Mare snigger at "one way or the
5 other", but I do not shy away from that because that
6 goes back to the waterbed point and where the water is
7 squirting out, and it is a question for analysis at
8 trial as to whether the way that the 759,000 from 2012
9 to 2013 was taken into account, for example, was via
10 Council Tax increases, rise in charges for bin
11 collection, service reductions, a combination of all
12 three, very likely, but it is just not something that
13 you can decide today with the evidence that you have
14 available to you.

15 What I want to do as well is show you the position
16 in the words of the Local Authorities because that also
17 supports the OEM's case, and I would like to take
18 examples from each of the English, Welsh and Scottish
19 Local Authorities, and again, I am going to take you to
20 this evidence because it supports the connection between
21 costs and Council Tax, and you were not taken to it in
22 opening submissions, so let me show you, first, an
23 English Local Authority which is Mr Williams of
24 Liverpool Council, City Council, which is in {B/11/1},
25 page {B/11/6}. So Mr Williams is explaining -- the

1 opening words of paragraph 15:

2 "We have only limited leeway to adjust the Council
3 Tax rate. The total that can be generated from Council
4 Tax by an authority is dependent on the political
5 pressures ..."

6 As my learned friend said:

7 " ... and statutory requirements to set a balanced
8 budget. In addition to this, the Council will also take
9 into account the following factors ..."

10 There's a whole list of factors, many of them are
11 not relevant but, 15.2:

12 "Fluctuations in costs due to inflation or other
13 factors".

14 One of the factors that may drive a change in
15 Council Tax is fluctuations in cost. Then 16:

16 "In my experience the usual outcome is that once the
17 level of Council Tax is set, there will be an estimated
18 shortfall in funding ..."

19 As we saw from Blackpool:

20 " ... to meet the forecast expenditure for the year
21 ahead and the resultant budget gap is addressed as part
22 of the budget setting process. This will involve making
23 decisions to reduce costs and spend in the budget ...
24 and/or to consider increasing the level of Council Tax
25 further".

1 {B/11/7}. Finally on this report, on this witness
2 statement, paragraph 18, over the page {B/11/8}. This
3 is the sign-off on this section:

4 "Therefore, as illustrated above, increases in costs
5 do not necessarily lead to a corresponding increase in
6 Council Tax levels but merely feed into the bigger
7 picture".

8 This is evidence of precisely the point that the
9 Defendants have pleaded.

10 THE CHAIR: You don't disagree with this, do you?

11 MS ABRAM: No. No. We accept that there may well be
12 other -- of course there are inevitably other factors
13 affecting Council Tax and charges for services, but all
14 we need to do in order to satisfy the Tribunal today is
15 to show that there is an arguable case that any
16 Overcharge, any increase in costs fed into prices in the
17 form of Council Tax to some extent. It is not an
18 all-or-nothing question. I do not have to show you
19 a 100 per cent pass-on, still less do I need to
20 demonstrate it to the balance of reasonable
21 probabilities before I have seen any disclosure or been
22 able to cross-examine any of the witnesses.

23 THE CHAIR: I mean, taking -- going back to 15.2 on the
24 B/11/6, fluctuations in cost (Inaudible) might have
25 a very tricky question. Suppose you've got various

1 costs, one going up, the other going down, and how does
2 one deal with the netting-off of increases against
3 decreases? Now, I don't know, but you would say one
4 needs to have an approach that is consistent with
5 whatever the law is.

6 MS ABRAM: Yes. That is absolutely right, and of course it
7 is right that the econometricians and the forensic
8 accountants will have that grapple with exactly that
9 sort of question when they try and take out their
10 non-relevant variables from their models, but this is
11 exactly what they do all day long. This is the exercise
12 this we are all familiar with, and what I am really
13 saying is that there is nothing special about this case.
14 It is just a case that calls out for factual and expert
15 evidence in the same way as any other case.

16 That is an English Local Authority, just to give you
17 an example. I'll give you the example of a Welsh County
18 Council next, just to cover a different jurisdiction, so
19 if you go to {B/12/4}, so paragraph 13 is the Amanda
20 Hughes, I should say, Conwy Borough Council, so
21 paragraph 13:

22 "The Welsh Government issues a draft indication of
23 the funding level in December and, once this is known,
24 we have greater clarity on the scale of the funding gap,
25 which needs to then be met by increases in Council Tax,

1 use of one-off reserves or service efficiencies or
2 cuts".

3 Again, it is the idea that you have a budget gap and
4 you need to find a way to fill it, and paragraph 22 to
5 similar effect on page {B/12/6}:

6 "Any shortfalls in overall funding from the Welsh
7 Government cannot be made up by increases in Council Tax
8 alone ..."

9 So it is part of the picture, and, finally,
10 a Scottish example, Brian Porter at {B/9/1} of the
11 bundle, page 7, paragraph 32 {B/9/7}. Mr Porter says:

12 "The difference between the total revenue funding
13 received by the Local Authority, fees and charges, the
14 use of balances and the total budgeted expenditure is
15 met by Council Tax. This is a tax levied on individual
16 properties".

17 Then it explains, unsurprisingly because we have
18 seen it again and again:

19 "In calculating Council Tax funding, the Highland
20 Council assesses its total net service expenditure. The
21 Scottish Government revenue grant is deducted and the
22 remaining balance is the amount to be met from local
23 taxes. Council Tax is the balancing figure against net
24 expenditure".

25 Then the punchline, paragraph 34:

1 "The net expenditure will include an element of
2 expenditure on vehicles. There is however no linear
3 relationship between the cost of a Truck and Council Tax
4 rates".

5 Well, I don't need to argue that there is a linear
6 relationship. That is not the test that I need to be
7 aiming at. It is not the target that I am going for,
8 but what the evidence is repeatedly doing is showing
9 that there is a link between costs and Council Tax, and
10 that is totally unsurprising, given the obligation to
11 balance the budget.

12 Of course I need to give you a major health warning
13 here, which is that all of this evidence -- it is
14 partial, it is self-selected. There has not been
15 comprehensive -- there has not been a disclosure
16 exercise. I have not had the opportunity to
17 cross-examine these witnesses, and so this is the very
18 best of the way the Claimants can put their case on this
19 issue, and so none of this detracts from the need for
20 a trial on these issues, but what I say is that the
21 evidence so far available is totally consistent with our
22 position that there is an arguable pass-on defence
23 through Council Tax.

24 I am not relying on broad economic or business
25 theory in the terms of the prohibition in *DAF, Royal*

1 *Mail* and in *NTN v Atlantic*, I am relying on the specific
2 obligation to balance the budget, combined with the
3 actual evidence that the Claimants have put forward, so
4 that material, that evidential material, enables me to
5 deal in short order with the three points that are made
6 against me by my learned friend in relation to Council
7 Tax, so the first is that any Truck Overcharge accounted
8 for a small proportion of Council budget, and the simple
9 answer to that which I have already given you, is that
10 Local Authorities owed an obligation to balance their
11 budgets at a level granular enough to require any Truck
12 Overcharge to be taken into account, and the witnesses'
13 evidence shows that increased costs are one of the
14 things that they will balance with increases in Council
15 Tax, so in this context I say that size does not matter,
16 and the extent to which there was pass-on through
17 Council Tax rises is that factual question, the
18 paradigmatic question for trial.

19 The second point that is put against me is that
20 Council Tax increases are not directly related to costs
21 because they are subject to political will, so this is
22 the, "no linear relationship" in the words of Mr Porter
23 who was the last witness that we looked at there, but
24 that is relevant to the extent of pass-on. It is not
25 relevant to its existence, and again, it is a question

1 for trial what the strength of political will is, how
2 much that is a factor, and how much costs are a factor.

3 Then the third point that is made against me is that
4 the four factors that were identified as relevant in
5 *Royal Mail* are not present in this case. I have already
6 made the point on that that the importance of those
7 factors is very substantially exaggerated by the
8 claimant's submissions because they are not some kind of
9 exclusive litmus test for pass-on, but I would just like
10 to address the second and third *Royal Mail* factors,
11 because they do not quite operate in the way that the
12 Claimants have suggested in this case, and I know you
13 are familiar with the factors, so I'll not take you back
14 to the law on them, but you will recollect that the
15 second factor is the size of the alleged Overcharge.

16 Now, the reason why the size was important in *Royal*
17 *Mail* and *BT* is that it was impossible to determine
18 whether any part of the Overcharge had been allowed by
19 the regulator to be passed through into the regulated
20 costs that *Royal Mail* and *BT* were allowed to charge, or
21 whether *Royal Mail* and *BT* had been required to absorb
22 any Overcharge, or the Overcharge that was found in that
23 case, absorb that Overcharge in the means of reduction
24 of their profits, and one only has to repeat that,
25 really, to make it clear why it does not apply in the

1 same way here, because Local Authorities, as we have
2 heard this morning, are not profit-making bodies. There
3 is no question of them being able to absorb any
4 increased costs by means of taking a hit on their own
5 profits. Their obligation to balance the budgets is, in
6 effect, neutral. There is no cushion.

7 The third factor, again, that I would just like to
8 pick up, the third *Royal Mail* factor that I would like
9 to pick up is the link between the subject matter of the
10 Overcharge and the product or service to which the
11 pass-on argument relates. We say that there is a direct
12 link here, because it is reflected in the obligation to
13 balance the budget. The Local Authority needs to buy
14 Trucks. It uses those Trucks to supply bin collection
15 services, for example, non-chargeable bin collection
16 services, bin collection services are one of the aspects
17 for which local residents need to pay in the form of
18 their Council Tax. There is a very direct
19 relationship -- much more direct than in *Royal Mail*
20 where the cost of transportation was one of the elements
21 you buy when you buy a stamp, or in *BT* where Trucks were
22 used incidentally in *BT's* services, the link here is
23 much more direct, so we say that those factors do apply
24 much more closely here.

25 That is what I wanted to say about Council Tax.

1 I would like to move on, if I may, to chargeable
2 services.

3 Now, it may be that the differences between my
4 learned friend and me on chargeable services have
5 narrowed during the course of his submission, because,
6 actually, he frankly accepted that in the context of
7 chargeable services there is evidence from a number of
8 Local Authority Claimants that there was a connection
9 between the costs of providing those services and the
10 charges levied for those services, and so I don't think
11 it is any longer contended that there is no link between
12 costs and price in that context for any of the Local
13 Authority Claimants. Really what the arguments seem to
14 boil down to orally, so far as I could tell, was that it
15 would just be inefficient and disproportionate to try
16 this point because it did not relate to that many
17 Claimants, and because not all of the Claimants charged
18 for these services for the whole of the relevant period.

19 Well, to the extent that the Claimants did not
20 charge for the whole time, or for some of the relevant
21 period, there obviously won't need to be a trial at all,
22 so I am afraid that is not a very good point on
23 efficiency or proportionality, and the big picture point
24 on proportionality is -- I will take you to *Sainsbury's*
25 on this at the end -- is that you do not just not try an

1 issue because you are worried that it might be
2 inefficient. You find an efficient way of trying that
3 issue.

4 So I just want to make a couple of short points,
5 then, on chargeable services, and the first is mindful
6 of the efficiency point, is to start by showing you how
7 little difference to the shape of the case this
8 chargeable services point actually makes, so it is my
9 version of a storm in a tea cup point, but I am using it
10 as a sword instead of defending myself against it, and
11 I can take this from Noble -- from a table appended to
12 Noble's report which is in {B/18/41}.

13 You do not need to try and absorb the contents of
14 this table, but let me just explain what it does.

15 You see in the columns you have "commercial",
16 "garden" and "bulky" and that identifies which of the
17 Claimants charged for each of those services. Because
18 there is no strike-out application in relation to
19 commercial waste collection charges, there will have to
20 be a trial in relation to those charges for all of the
21 ones with the Y in the first column, and that is the
22 great majority of Claimants.

23 It has actually been strangely difficult to
24 elucidate of them Adur Claimants how many of the charged
25 for commercial waste, but it is somewhere between 80 and

1 85. So the vast majority, and then the following two
2 columns, the garden and bulky waste, and what you can
3 see is that in almost all cases where a Claimant charged
4 for garden and/or bulky waste, for all or some of the
5 period, they also charged for commercial waste. That
6 really matters to the efficiency from an efficiency
7 perspective, because what it shows is that trying the
8 chargeable waste element in relation to garden and bulky
9 waste will just add very little to the scope of the
10 trial, because you are going to be there and you are
11 going to be deciding these issues in relation to
12 commercial waste anyway. That is why I say it is
13 a storm in a tea cup.

14 I will just show you the evidence establishing the
15 link between costs and charges in this context. I'll
16 just take two examples. The first one is in Mr Pike's
17 evidence, so Pike 2 {B/5/17}.

18 If I could just ask you to run your eye over
19 paragraph 53, you see just a few examples of Councils
20 charging for garden waste collection by reference to
21 costs, and another example just for bulky waste, just to
22 make sure that I have covered both of those bases at tab
23 7 of the bundle {B/7/5}, paragraph 1, this is the
24 witness statement of Mr Sherratt who is of Durham County
25 Council. He is talking about bulky waste collection

1 charges. He says at 21:

2 " ... no reference to fully recovering the costs of
3 the service, including the costs of any vehicles ... we
4 have increased our costs gradually since this time as
5 a reflection of the rising costs to the Council for
6 delivering the service ..."

7 Again, this makes my point for me, certainly at the
8 summary determination stage. There is an acknowledged
9 link between cost and price in that context, so again,
10 just taking that back to the legal test in *NTN*, I am not
11 relying on broad economic or business theory. I am
12 relying on the claimant's own evidence that says there
13 is a link between costs and charges. I will come back
14 later to how we can try this issue proportionately, but
15 having established that there is a link, that is the
16 case management question for the Tribunal. It is no
17 longer a question of summary determination, and we have
18 some proposals that we hope will be very helpful in that
19 respect.

20 That is what I wanted to say about Local
21 Authorities. I would like to move on, now, to Fire and
22 Rescue Services, if I may.

23 Again, by taking the facts in detail in this way,
24 what I am seeking to demonstrate is that we are not
25 operating at a level of generality, either in legal

1 terms or in factual terms. Our position is totally
2 anchored to the actual evidence in the case, and we have
3 done all that we can to show that we are going beyond
4 the broad economic theory, so we are doing what is
5 required by *NTN*.

6 I want to make three points about the claims by Fire
7 and Rescue Services, and the first is -- I keep harping
8 on about the unsuitability of an issue for summary
9 disposal where it relies heavily on factual evidence
10 that we have been unable to test through disclosure and
11 cross-examination, and that is a really important point,
12 but there is actually a still more profound version of
13 that point in relation to Fire and Rescue Services, and
14 that is that the Claimants have made four attempts now
15 at setting out the factual context to the claim brought
16 by the Fire and Rescue authorities. You've got Pike 2
17 which has detailed evidence on this, Pike 3, which
18 substantially revised this passage of Pike 2, you've got
19 the claimant's original Skeleton Argument which I am
20 going to work from for the purpose of my submissions
21 because it is the most recent attempt to articulate the
22 factual position, and then you have a revised version of
23 their Skeleton Argument that was served a few days after
24 their first skeleton.

25 Just to illustrate the difficulties that the

1 Claimants doubtless understandably find themselves in in
2 setting out the factual basis for their case, if you
3 just have a look at Annex B to their skeleton which is
4 at the very end, and you just cast your eye over the
5 footnote at the bottom of Annex B, so what comes out of
6 those is that a number of Claimants seem to have been
7 named in error, and further applications seem to need to
8 be made in order to try and ensure that the Parties
9 named as Claimants actually have claims to bring.

10 Now, the pass-on defence to the Fire and Rescue
11 authorities would not be suitable for summary
12 determination, even absent this point, but it absolutely
13 would not be safe for the Tribunal to summarily dispose
14 of the pass-on defence in circumstances where the
15 Claimants do not even know who is entitled to bring
16 their claims, and what the proper scope of those claims
17 are. I say it is doubly unsuitable for summary disposal
18 for that reason.

19 The second point that I would make on the Fire and
20 Rescue Services is that such factual material as is
21 available suggests that there is either full or very
22 substantial pass-on by the Fire and Rescue Authorities.
23 As I say, I will take that from the Claimant's Skeleton
24 and if you pick it up on page 21 of their Skeleton at
25 47A {B/1/22}, so although it is slightly painful I am

1 going to take these categories in turn because, as I
2 say, it is really important to us that we demonstrate to
3 you we have properly thought about these questions, and
4 we are on top of the evidence, and we know what it
5 shows. 47(a) relates to the Scottish Fire and Rescue
6 Service, so you see the opening words of 47(a):

7 "The Scottish Fire and Rescue Service ... purchased
8 vehicles using Capital Grants from the Scottish
9 Government".

10 Now, pausing there, if that is the case you would
11 think there must have been full pass-on by the Fire and
12 Rescue Service authorities because the purchases are
13 being funded by grants from the Scottish Government, so
14 it is totally unclear why they have any right to claim
15 at all, but then the Skeleton goes on:

16 "However, there is no causal link between the manner
17 or source of the claimant's funding and the Overcharge".

18 But you know, there is no footnote there. We cannot
19 find any evidence that is in the case to support that,
20 so if you consider, if the Tribunal considers that the
21 assertion in that sentence merits further consideration
22 at trial, then that would be a matter for evidence at
23 trial, but certainly the evidence that is available so
24 far before the Tribunal supports the first sentence
25 which is that the Scottish Fire and Rescue Service

1 purchases the vehicles using the Capital Grants from the
2 Scottish Government but not the security, so actually,
3 the evidence before the Tribunal suggests full pass-on
4 by the Scottish --

5 THE CHAIR: (Inaudible) the only feasible Claimant in 6.
6 That is interesting, isn't it. Why should that be
7 right? One can think that -- I mean it is your pass-on
8 point, if the economic loss (Inaudible) Fire and Rescue
9 Service and then presumably loss has been borne by the
10 person who made the Grant.

11 MS ABRAM: That may well be the case and no claim has been
12 brought by the Scottish Government, so that is
13 confusing, so then we go on to 47(b) and (c) which I can
14 take together. These are the Welsh Fire Authorities and
15 the English County Council Fire Authorities.

16 Now, both of these are funded through their Local
17 Authorities, so the consequence is that any increase in
18 the Fire Authority budget is passed to the Local
19 Authority and effectively becomes the Local Authority's
20 problem. Again, one would expect that in those
21 circumstances the loss is borne by the Local Authority.

22 THE CHAIR: Is this really a way -- it may not be capable of
23 being answered today in which case do say so, but it is
24 a way of ring-fencing certain services against erosion
25 by cuts? I mean, one can say how a Fire Service, for

1 example, needs to be protected from cuts, so you have
2 (Inaudible) system where the funding is protected.
3 (Inaudible) those costs have got to be managed.

4 MS ABRAM: I don't -- I am not sure we are able to help at
5 all on that point, I am afraid.

6 MR DE LA MARE: (Inaudible) scale of the Fire Service
7 authority that services a number of Local Authorities.
8 One levy goes down to the relevant authorities that
9 contribute to the Fire Service for their area, so you
10 may have five or six contiguous Local Authorities, one
11 Fire Service serving them all, generating the economies
12 of scale, and then the levy goes to each Council for the
13 Council to then meet, which it will do so through its
14 ordinary budgeting process if necessary, Council Tax, if
15 necessary, cuts. It feeds into the budgeting process.

16 Yes, and as Mr Pike reminds me, this is only
17 a solution adopted in Wales. There are effectively
18 three Fire Authorities in Wales that adopt this levying
19 approach, and for two out of the three, I think it is
20 the case that all of the relevant Local Authorities are
21 before the Court in any event, the ones with the
22 asterisk in the appendix are the ones where there are
23 not Claimants and where our proposals about amendments,
24 assignments, further claims, etc, are live.

25 MS ABRAM: So that is all except for the miscellaneous group

1 in 47(d), and in 47(d) these group together various Fire
2 Authorities who are said to issue precepts that feed
3 directly into bills charged by the Local Authority, but
4 collected at the same time as Council Tax, so any
5 increases in the costs borne by these Fire Authorities,
6 again, prima facie, seem to be borne by the taxpayer.

7 Now, there are some allusions in the evidence to
8 that not being right, because, apparently, the amount of
9 the precept is said to be affected by political will,
10 but again, the Tribunal cannot decide whether or not
11 that is right on this application or on the evidence
12 available to it, so again, it is a question that would
13 need to be tested at a trial.

14 Then the third point that is made on Fire
15 Authorities is, as Mr De la Mare gave you a taste of
16 just now, it is suggested that none of this matters,
17 actually, because to the extent that the wrong Claimant
18 is named, and there will be assignments to the extent
19 that Claimants are named in error, they will sort that
20 out, to the extent that no proper Claimant is named they
21 are going to issue a new claim against Scania, all of
22 these issues are said to be capable of resolution, but
23 none of that is for you today. The only question today
24 is whether my clients' pass-on defence has a realistic
25 prospect of success.

1 So, stepping back just on the Fire and Rescue
2 Claimants, just to tie that up, I respectfully say that
3 it is rather ironic, actually, that the Tribunal is
4 being asked to consider whether to strike out my
5 client's defences to the Fire and Rescue Service
6 claimants' claims, because they seem to have so little
7 idea of who the appropriate claimants are, or will they
8 have any right to claim at all, and of course, if the
9 shoe were on the other foot and I had made a strike-out
10 application making all of those points and saying "they
11 have got no idea where the claims lie" and "this just
12 cannot be allowed to carry on", they say, "leave it with
13 us. It is a question for evidence. It is a question for
14 trial. We will convince the Tribunal at the trial that
15 we do have the right to claim and we will dig into all
16 of this." That is exactly what should happen.

17 Now, I am about to move on to the legal policy
18 argument. I just wonder, if that is a convenient
19 moment, it might be good for the transcriber to have a
20 break.

21 THE CHAIR: How are you doing for time?

22 MS ABRAM: I have to finish by quarter to and I will do
23 that.

24 THE CHAIR: Very grateful. Thank you very much. I'll rise
25 for ten minutes.

1 (2.54 pm)

2 (A break was taken)

3 (3.05 pm)

4 THE CHAIR: Good afternoon.

5 MS ABRAM: So I am on the fifth of my six sections, and I am
6 moving into the legal policy argument.

7 So I'll start, if I may, by addressing the substance
8 of the point on its merits, and then make my submissions
9 as to why we say it is unsuitable for summary
10 determination in the Claimant's favour, but it might
11 just be first helpful to anchor the point in those legal
12 principles concerning summary determination that we
13 looked at in the beginning, because without wanting to
14 give away the ending, that is where I'll be ending up.

15 The first point is that points of law, as Lord Hope
16 said in *Three Rivers*, may be suitable for summary
17 disposal where they are clear. Points of disputed fact,
18 where the evidence is unclear, will not be suitable.
19 Novel points of law will be unsuitable for summary
20 disposal, especially in developing areas because those
21 points are best decided against the actual facts, and
22 the Court should be wary of deciding points of law on
23 a summary disposal application if that might generate
24 appeals and jeopardise the trial date. Those are the
25 principles.

1 Just to remind the Tribunal of the argument, it is
2 that the Tribunal should introduce a new rule of legal
3 policy to the effect that there cannot be pass-on in
4 a legal sense from Local Authorities to residents
5 because a Local Authority will not be acting as an
6 undertaking when it is dealing with residents, so in
7 other words, the argument is that as a matter of legal
8 policy there is, or there should be, a rule that a Local
9 Authority can claim compensation for loss it has not
10 itself suffered.

11 Now, the Claimants themselves will say, totally
12 frankly, that this is a novel point and a complex point,
13 and that it is entirely un-addressed in the case law
14 that no English Court has yet grappled with it. Indeed,
15 so far as I know, no Court in any jurisdiction has ever
16 grappled with this point. I am not aware of any
17 previous occasion on which it has even been suggested to
18 any Court in any jurisdiction, and that is, we say,
19 unsurprising, because the argument is demonstrably wrong
20 because it is inconsistent with the compensatory
21 principle, so to show you that I need to show you
22 *Sainsbury's* in the Supreme Court which is at {D/15/65}.

23 Sensible to start at 194, and this is the Supreme
24 Court saying:

25 "It is trite law that, as a general principle, the

1 damages to be awarded for loss caused by tort are
2 compensatory. The Claimant is entitled to be placed in
3 the position it would have been in if the tort had not
4 been committed".

5 That is the basic principle, and then we can go on
6 to paragraph 196. Now, the Court has just discussed
7 *Hanover Shoe* and the treble damages in US law. At 196
8 the Court says, by contrast with the US:

9 "In the UK there is, as is well known, no
10 entitlement to treble damages, nor is there any
11 exclusion of pass-on as an element in the calculation of
12 damages and the normal rule of compensatory damages
13 applies to claims for damages for breach of statutory
14 duty ..."

15 And lots of citations, then a few lines below:

16 "In this respect, English law and Scots law ..."

17 So both the same in this sense:

18 "...are consistent with EU law which now requires
19 Member States to ensure that there is a pass-on
20 defence ..."

21 And we are going to come back to the damages
22 directive, so I'll not read that bit out for now, but to
23 carry on with *Sainsbury's*, we then have an explanation
24 of pass-on principle, 197 {D/15/65}:

25 "There are sound reasons for taking account of

1 pass-on in the calculation of damages for breach of
2 competition law. Not only is it required by the
3 compensatory principle but also there are cases where
4 there is a need to avoid double recovery through claims
5 in respect of the same Overcharge by a direct purchaser
6 and subsequent purchases in a chain to whom an
7 Overcharge has been passed on in whole or in part".

8 Now, I pull two points out of that paragraph. The
9 first is the fact that the pass-on defence is required.
10 It is not optional, it is required by compensatory
11 principle, and the second is the words, "But also", so
12 what the Court is saying here is that not only is
13 pass-on necessary just as part of the law because it is
14 part of the compensatory principle, but an additional
15 reason is that it may also be necessary to avoid double
16 recovery. It does not say "pass-on only applies where
17 there are claims by downstream purchasers such that
18 double recovery must be avoided". That is a, "but
19 also". It is an additional point, so it is always
20 required.

21 Just while I am on this judgment, I want to take you
22 to another passage of it that is relevant to this point,
23 but also to the proportionality and efficiency point
24 that I need to end on, and that starts at page {D/15/69}
25 of the judgment, paragraph 216 at the bottom of the

1 page. This paragraph is just to set the scene, so the
2 legal burden, that is to establish pass-on, lies on the
3 operators of the schemes, which means the Defendants, to
4 establish that the Claimants have recovered the costs
5 incurred, and then:

6 "But once the Defendants have raised the issue of
7 mitigation, in the form of pass-on, there is a heavy
8 evidential burden on the Claimants to provide evidence
9 as to how they have dealt with the recovery of their
10 costs in their business. Most of the relevant
11 information about what a Claimant actually has done to
12 cover its costs, including this particular cost, will be
13 exclusively in the hands of the Claimant itself. The
14 Claimant must therefore produce that evidence in order
15 to forestall adverse inferences being taken against it
16 by the Court which seeks to apply the compensatory
17 principle".

18 So there's no objection to a Claimant having to
19 provide disclosure in relation to a pass-on defence.
20 This is the Supreme Court telling us.

21 Then over the page at {D/15/70} 217:

22 "The Court in applying the compensatory principle
23 is charged with avoiding under-compensation and also
24 over-compensation. Justice is not achieved if
25 a Claimant receives less or more than its actual loss.

1 But in applying the principle the Court must also have
2 regard to another principle, enshrined in the overriding
3 objective that legal disputes should be dealt with at a
4 proportionate cost. The Court and the Parties may have
5 to forego precision, even where it is possible if the
6 cost of achieving that precision is disproportionate in
7 allowing estimates".

8 Now, I rely on that passage for two purposes. The
9 point is for the point I am currently addressing, so
10 over-compensation is the denial of justice, just in the
11 same way that under-compensation is, and the second is
12 as to proportionality and efficiency which I'll come
13 back to, but what this is saying is that just because
14 you need to make an estimate doesn't mean that you do
15 not try at all.

16 We can skip forward there to 220:

17 "As we have said, the relevant requirement of EU law
18 is the principle of effectiveness".

19 Which was much prayed in aid by my learned friend:

20 "The assessment of damages based on the
21 compensatory principle does not offend the principle of
22 effectiveness provided that the Court does not require
23 unreasonable precision from the Claimant".

24 So again, that goes to the evidential requirement,
25 how heavy it should be on the Claimants, and then 223

1 {D/15/71} referring to submission guidelines:

2 "In discussing those articles of the damages ..."

3 Which I'll take you to in a moment:

4 "The 2019 Guidelines recognise that the National
5 Courts, in addressing the issue of pass-on, will have to
6 resort to estimates".

7 Again that is relevant to these points about
8 proportionality and efficiency that I will come back to,
9 but for present purposes the English law position is
10 that you have to avoid both over- and
11 under-compensation, and justice is not going to be
12 achieved if the Claimant is over-compensated and we can
13 see that completely reflected in the damages directive,
14 and that is to be found in {D/40/1} and I would just
15 like to start on page 1, just to make clear that the
16 damages directive wasn't in some way enacted by
17 a legislator that did not know Public Authorities exist.
18 The damages directive is an instrument of general
19 application, and it applies to Public Authorities in
20 just the same ways as it does to any other potential
21 Claimant, and you can see that in recital 3 to the
22 damages directive, which is talking about the right to
23 bring a claim, so if you look, penultimate line of the
24 first page of page 1 in Recital 3, it says:

25 "The full effectiveness of Articles 101 and 102 and,

1 in fact, the practical effect of the prohibitions laid
2 down therein, requires that anyone, be they an
3 individual, including consumers and undertakings or
4 a Public Authority, can claim compensation before
5 national courts for the harm caused to them by an
6 infringement of those provisions".

7 So this legislator knew about Public Authorities.
8 This is not part of a scheme that somehow takes Public
9 Authorities out of account. The right to full
10 compensation is then embodied in Article 3 of the
11 directive which is on page 12, and you can see Article
12 3.1, so the basic rule:

13 "Member States shall ensure that any natural or
14 legal person who suffered harm caused by an infringement
15 of the competition law is able to claim and obtain
16 compensation for the harm".

17 The bit of particular relevance is 3.3:

18 "Full compensation under this directive shall not
19 lead to over-compensation, whether by means of punitive,
20 multiple, or other types of damages".

21 Of course, there are various different ways, as that
22 provision reflects, in which you have a risk of
23 over-compensation, and one of them is the unavailability
24 of the pass-on defence, and so in order to ensure that
25 does not happen, you get Article 13 of the directive on

1 page {D/40/16}, so in the middle of the page, under
2 "Passing-on Defence":

3 "Member States shall ensure that the Defendant in an
4 action for damages can invoke as a defence against the
5 claim for damages the fact that the Claimant passed on
6 the whole or part of the Overcharge resulting from the
7 infringement of competition law".

8 Then it talks about burden of proof. That is
9 a requirement that there should be a pass-on defence.

10 Now, there is no hint in the damages directive, no
11 suggestion that the rules do not apply to Public
12 Authorities, that somehow these rules exclude Public
13 Authorities from their scope, and we know the legislator
14 had them in mind from Article 3.

15 So what you have is a very clear position in English
16 law that the compensatory principle prevents
17 over-compensation. You have the damages directive
18 saying that is required as a matter of EU law. It did
19 not need to be specifically enacted in English and UK
20 law because UK law already had the compensatory
21 principle, and so we did not need to enact those, those
22 provisions specially, and so the Adur Claimants face the
23 formidable obstacle of trying to persuade you that the
24 normal rules do not apply to normal authorities, despite
25 there being no hint in any legislation or any case law

1 to suggest that that is the position. They say that
2 that is the case, that the Tribunal should make some new
3 judge-made law for Local Authorities, providing that the
4 normal compensatory principle, the normal rules in
5 *Sainsbury's*, paragraph 205, the categories of pass-on,
6 do not apply to them.

7 I think, on analysis, there are five reasons that
8 are put forward by my learned friend for that. The
9 first is to say that this is a case of *res inter alios*
10 *acta*. Well, it has never been suggested to be a case of
11 *res inter alios acta* before. If that were to be the
12 case, you can see from *Fulton Shipping*, which I showed
13 you earlier in a different context, what that would
14 require would be an analysis of the causal link between
15 the wrong and the benefit. Now, of course I will say
16 this that needs to be done on the facts of the case, and
17 that is, in itself, a sufficient reason to deal with
18 this application, this limb of the application, but I
19 have also issued the challenge that the law on *res inter*
20 *alios acta* is much trodden in these courts, and there
21 have been multiple Supreme Court authorities in this
22 area over the last few years, and if there were any
23 reason to think that there were any exception to the
24 compensatory principle in this sort of context, then
25 there would be some sign of it in the law, and there is

1 nothing, so that is the first point.

2 The second point is this interrorem argument, what I
3 described as "cakeism", suggesting that the Local
4 Authorities would never be able to bring a claim if the
5 pass-on principle applied to them, and I have addressed
6 that. I have said, "we just say they are in the same
7 position as any other Claimant" so if they are in
8 Category 3 or 4 of *Sainsbury's* paragraph 205, they have
9 reduced their costs by negotiation with other suppliers,
10 if they increased their -- the prices that they charge
11 for their services, Council Tax charges and so on, then
12 pass-on applies to them but we are not making that point
13 in relation to service reduction, so that is wrong.

14 The third point is, I think, a legal point, which is
15 an argument that you can only have pass-on between
16 undertakings or to the first non-undertaking in a chain
17 of supply. I think that is the relevance of those cases
18 on undertakings that the Tribunal was taken to, so it is
19 suggested that because the Local Authorities are said
20 not to be acting as undertakings in the course of their
21 responsibility, they cannot pass on loss. There is
22 absolutely no trace of that in the law. There is no
23 suggestion to that effect. You do not find it in the
24 damages directive, for example.

25 You cannot take anything useful for this purpose in

1 general, a very useful case, but *Max Recycle* is not
2 relevant for this purpose, because it was a case
3 addressing, even on agreed facts, actually, whether
4 a particular Local Authority appeared to be conducting
5 an economic activity for the particular purpose of the
6 rules in issue there. It has no relevance at all to
7 this case, and even if there were some resonance of the
8 characterisation of a Local Authority as an undertaking
9 or not in the general law, that would require
10 a fact-intensive assessment to determine whether, in
11 particular circumstances, a Local Authority was acting
12 as an undertaking.

13 I just want to show you that. That is in {D/37/1}
14 and this is some OFT guidance, so if I could pick it up
15 on page {D/37/9}, so it is 2011 guidance, but it is
16 still the relevant guidance for this purpose, and I know
17 the President will have seen this before and doubtless
18 in *Max Recycle* and others, but it talks about when an
19 entity will be acting an undertaking and when it will
20 not for the purpose of public bodies, so if you start at
21 2.6:

22 "Whether a particular activity carried on by
23 a public body is treated as an economic activity
24 necessarily depends on the specific facts at hand. For
25 this reason, past cases may provide only limited wider

1 guidance to public bodies ..."

2 So a fact-intensive assessment, and then 2.7:

3 "In broad terms, a public body should ask itself the
4 following questions for each of its activities
5 separately".

6 So it is not just an overarching assessment, it is,
7 as I know you know from *Max Recycle*, for example, you
8 look at am I acting as an undertaking when I am charging
9 for commercial waste, when I am charging for bulky
10 waste, when I am operating a swimming pool and so on, so
11 am I offering or supplying a good or service as opposed
12 to, for example, exercising a public power, and then if
13 so is that offer of a supply or commercial rather than
14 exclusively social nature, and you get a bit more colour
15 on the second criterion if you go to page {D/37/15} of
16 the bundle at 2.20 at the top of the page, and it talks
17 about the assessment of whether an activity is of an
18 exclusively social nature as opposed to a commercial
19 nature, and it says:

20 "This will necessarily be highly fact specific and
21 must take account of all aspects of the activity in
22 question. While certain individual features of an
23 activity, such as, for example, a lack of connection
24 between the cost of providing a good or service and the
25 price, if any, paid by end users may suggest that an

1 activity is inherently uncommercial, all aspects of the
2 activity must be considered as a package, rather than
3 feature by feature".

4 So I take two points from that. The first
5 superficial point is that to the extent that this
6 guidance gives you any substantive help on this case,
7 there is an indication that connection between cost and
8 price will be an indicator towards an entity being an
9 undertaking, so to the extent this argument has got any
10 relationship to legal principle, and that is unhelpful
11 to the Claimants, but the second point for present
12 purposes, for summary judgment purpose, is that if this
13 point were pressed at trial, if it had any foundation in
14 the law, then it would necessitate an evaluation at
15 trial of whether the Local Authorities were actually
16 acting as undertakings in relation to each of their
17 relevant activities, and so that is another reason why
18 these points are just fatal to the legal policy
19 arguments raised by the Claimants.

20 The fourth point that is put against me on this is
21 that there can only be pass-on in a legal sense if the
22 person to whom loss is passed on can, themselves, make
23 a claim, and it is said, look, the taxpayers can't bring
24 a claim, wouldn't be able to get the funding to bring
25 a claim, and so there can't be pass-on.

1 I think it a large extent this argument was actually
2 premised on the service reduction point, because it was
3 said, well, of course, if someone's swimming pool is
4 open for an hour less than a day because of an
5 Overcharge on Trucks, they can't bring a claim against
6 Iveco and Scania and MAN, and we do not press service
7 reduction as an element of pass-on, so I think to
8 a large extent this falls away.

9 THE CHAIR: I didn't understand that to be Mr De la Mare's
10 point. I think he was addressing the concern that one
11 could see, for instance, expressed by Mr Ridyard in
12 Trucks 1, which was that if there was pass-on, which he
13 thought, disagreeing with the majority, there was, you
14 would have an ineffective black hole in the sense that
15 there would be no claim by those actually suffering the
16 loss, and no claim by those who didn't suffer the loss
17 because they passed it on, and I think Mr De la Mare's
18 point goes to that. He is saying that there is no claim
19 as a matter of law, not as a matter of practicality or
20 anything else, there is no claim as a matter of law in
21 the taxpayer. That is something that will be struck out
22 not because it is unmanageable, just because it isn't
23 a claim in law, and that is because he is right, as he
24 would say, about the location of the claim in the Public
25 Authority, so he is making the no double recovery point

1 in that way.

2 Now of course, it all turns on whether there is
3 a claim at the end of the chain or not, but I think that
4 is why Mr De la Mare was making the point in that way.

5 MR DE LA MARE: (Inaudible) that is true, and I said it in
6 terms, whether or not it is a ratepayer, someone who is
7 a resident in receipt of service, and for that matter
8 the Government has volunteered in providing a grant.
9 None of these three categories of Parties have a claim
10 in law. Why? Because they are outside the economic
11 supply chain in question, and they are in the realm of
12 public law service provision. That was my first case.
13 My second case is, irrespective of that point, failure
14 on the plane of causation means that there is no
15 realistically assertible claim downstream, both because
16 of the absence of identification of who suffered what
17 loss and when, and because of the impossibility of the
18 claim. It is the impossibility of the claim that was
19 the concern that was particularly animating Mr Ridyard
20 in Trucks, so that is the second string to my argument.
21 The first string is there is no claim in law for any of
22 these Parties.

23 MS ABRAM: And of course the difficulty that one encounters
24 there is the Supreme Court in *Sainsbury's* where they say
25 that the need to avoid over-compensation is mandated in

1 order to do justice, and also that the pass-on defence,
2 and I particularly emphasised that passage, you will
3 recollect, is required not only to avoid
4 over-compensation but also to avoid double recovery, but
5 avoiding double recovery is not -- is an extra, is an
6 optional extra in some cases, and the compensatory
7 principle by itself is a sufficient reason to require
8 the pass-on defence, so I am afraid -- and of course,
9 Mr Ridyard's dissent in *Trucks* was expressly disapproved
10 by the Court of Appeal in *Trucks Trial 1*, so I am
11 afraid, again, that limb of the argument does fall foul
12 both of the Court of Appeal and the Supreme Court.

13 So the final point that I think was put against me
14 on this is that it would be a good idea for the pass-on
15 defence not to apply to pass-on by Local Authorities and
16 Fire Services, because if they received compensation
17 they will apply that compensation for the good of the
18 people that they serve, and so, in a sense, it serves
19 fairness or justice in some broader sense for them to be
20 the ones that are compensated.

21 Now, we know that that is nothing to the purpose,
22 because, again, we know from *Devenish*, and we also know
23 from *Brit Ned* in the Court of Appeal, of course, that
24 the Court doesn't have discretion to award compensation
25 to a person that hasn't suffered a loss. Compensatory

1 damages need to do exactly what they say on the tin and
2 they are not a matter of discretion, so again, that runs
3 counter to the law.

4 So that is what we say about the substance of the
5 point. We say it is wrong.

6 We say there are three reasons why there should not
7 be summary disposal of the point in the Claimant's
8 favour. The first is just that, that it is wrong, and
9 so there is no reason for there to be summary
10 determination.

11 The second is that even if the Tribunal considered
12 there is some merit or interest in the point, any
13 finding in the Claimant's favour which would effectively
14 create new judge-made law and fly in the face of that
15 established line of authority that I have identified
16 would, with respect, cry out for appellate review, and I
17 took you, at the beginning, to Lord Justice Floyd's
18 dictum in *TfL v Lloyds Bank* where he said the court
19 needs to be really cautious about deciding points of law
20 with the potential consequence that appeals will mess up
21 the management of the case, and that is a real issue
22 here, and it is felt particularly strongly by those
23 behind me, because, as I know the Tribunal is aware, and
24 we have seen a letter from the president yesterday on
25 supply pass-on in relation to a whole load of other

1 Claimants, that exercise needs to be progressed with
2 speed, and it is not being progressed in relation to the
3 Adur Claimants at the minute.

4 Regardless of the outcome of this application, that
5 will need to be moved forward because there is a lot of
6 pass-on material that is still relevant, particularly on
7 the commercial waste aspect, and so although it feels
8 like we have got a long time until the trial, that is
9 not something that -- that is not realistic in
10 circumstances where there is so much to be done.

11 The third reason why this point is unsuitable for
12 summary disposal is the point made by Lord Hope in Three
13 Rivers that it is clear points of law that are suitable
14 for determination at a summary stage, or Floyd, LJ
15 cautioning against deciding difficult points in areas of
16 developing law, and I would say that that warning
17 applies with particular force here where the point is
18 actually not -- is not a pure point of law, but it is
19 a mixed point of fact and law because of the need to
20 understand whether, or when, Local Authorities are
21 acting as undertakings, so it is not a point where you
22 can actually isolate the law from the facts at all, so
23 unsuitable for all those reasons.

24 That is what I want to say about the legal policy
25 point.

1 The final point I just want to address is
2 proportionality, efficiency and proportionality.

3 Now, I have shown you the law, the Supreme Court
4 saying the Court has defined an efficient way to try
5 these points. It may very well be necessary to resort
6 to an estimate. Sometimes, and we accept this, it is
7 necessary to resort to an estimate even if, with a very
8 expensive exercise it would be possible to do
9 a quantitative analysis, so we accept all of that, and
10 then it is a case management question for the Court as
11 to how you manage the determination of these issues.

12 What the Court mustn't do is throw up its hands and
13 say "this is all terrifically difficult to determine so
14 we are just not going to do it at all", but happily
15 you've got some proposals before you for how this point
16 could be determined, which we say are eminently
17 proportionate.

18 I'll just show you them in Noble and Bezant, so
19 starting with Noble, in {B/18/32}, can I just ask you to
20 remind yourselves of paragraphs 5.14 and 5.15? So it is
21 this sampling approach, the hybrid sampling approach.
22 I'll not take you to it, but just remind you that for
23 the December CMC the methodology statement of Mr Frank
24 for these Claimants also endorsed the idea of a sampling
25 approach for this kind of exercise, so everyone is ad

1 idem on that.

2 Just before we leave Noble, can I show you 5.21? So
3 starting at the bottom of page {B/18/33}, Mr Noble says:

4 "I also note that I already anticipate undertaking
5 pass-on analysis for (i) Adur Claimants for commercial
6 waste, and (ii) other Local Authorities that are not
7 part of the strike out application..."

8 Then he says:

9 "I anticipate that the work detailed above is likely
10 to be a small addition to this and, under my hybrid
11 approach, I would apply my supply pass-on findings for
12 the targeted Adur Claimants to other Public Authority
13 Claimants, and vice versa..."

14 So, a small addition to the work required.

15 So the other point that I want to take you to on
16 methodology is Bezant, which is the previous tab, so
17 {B/17/14}. Again, if I could just ask you to remind
18 yourself of paragraph 4.12? So we hope that is
19 a proportionate approach to trying this issue, and we
20 can draw two further specific points out of it as well
21 that are really key to the test for summary judgment.
22 The first is -- the first goes to Mr Noble's point that
23 the amount of analysis required would be a small
24 addition to the work otherwise required, and I showed
25 you at the beginning of my submissions *TfL v Lloyds Bank*

1 where Floyd, LJ warned about the Court considering
2 carefully before accepting an invitation to deal with
3 single issues in cases where you will need a full trial
4 of liability involving evidence and cross-examination in
5 any event, and of course in this case liability is a bit
6 strange because it is a follow-on claim, but the point
7 stands with equal force. A very substantial trial is
8 going to be required in any case.

9 One reason why this case really epitomises that
10 danger is because of the acceptance that there is an
11 arguable pass-on defence in relation to commercial
12 waste, allowing the strike-out application wouldn't
13 actually even deal with pass-on in relation to even
14 these Claimants, because you are still going to have all
15 of the commercial waste issues to deal with, and the
16 second point that goes to the test for summary judgment
17 is that that -- I don't want to call it a shopping list
18 because they are very modest lists, actually, of
19 additional information and sources required by Mr Noble
20 and Mr Bezant, but the targeted and specific nature of
21 those documents really underlines the fact that this
22 test passes -- this case passes the test of the Supreme
23 Court in *Okpabi* where they say "is there a realistic
24 prospect that further evidence will come forward that's
25 relevant to this issue". I am paraphrasing, but clearly

1 further disclosure is likely to be highly material in
2 this case, so that is what I wanted to say about
3 a proportionate approach to trying this.

4 Just to pull the threads together, just to be clear
5 about where that takes us all, I would say, again, to
6 mix metaphors horribly, that red flags should be waving
7 and alarm bells should be ringing at the idea that there
8 might be summary judgment in this case of the pass-on
9 defence. In fact, the issues are eminently unsuitable
10 for summary dismissal. They raise complex points of
11 fact that need to be considered at trial. In some
12 instances, particularly the claims by the Fire and
13 Rescue Services, the factual material, so far available,
14 supports my clients rather than the Claimants.

15 The argument that, as a matter of legal policy they
16 cannot pass on any loss lacks any legal basis, it is
17 contradicted by the established law. Even if it was
18 arguable, it is established that new points of law in
19 developing areas should be considered against actual
20 rather than assumed facts, and, of course, there is
21 a difficult factual context here due to the undertaking
22 issue, and, of course, any decision in the Local
23 Authority's favour would cry out for appellate
24 consideration, and then even if it were successful, the
25 application would make vanishingly little difference to

1 the actual scope of the trial, so for all of those
2 reasons we say that this is not an appropriate case for
3 summary determination.

4 Now, just before I sit down I should address the
5 question that you asked at the beginning, sir, about
6 appeals. This is actually just a single set of
7 proceedings. They were commenced in the High Court.
8 They are English proceedings, and so it seems to us that
9 the natural route of any appeal, hopefully there will be
10 no appeal, but any appeal would just be to the Court of
11 Appeal, because it is just an -- it's just one English
12 claim. I wonder whether my Lord might have had in mind
13 that there were multiple sets of proceedings within the
14 strike-out application.

15 THE CHAIR: There may well be. It is very hard to keep
16 track. Thank you.

17 Submissions in Reply by MR DE LA MARE

18 MR DE LA MARE: We completely concur with that, because as I
19 recall when I went through these issues, and it was one
20 of the points I think we raised, that all of the Parties
21 jumped on board, the transfer order itself actually,
22 reserves questions of appeal to the English Court of
23 Appeal, so I do not think there is any issue about
24 destination of appeal.

25 Can I start with a couple of introductory remarks?

1 I am accused of cakeism which is always a loaded term to
2 a posh man like me who might be passed off as the main
3 user of that particular term, and I have to say I don't
4 understand the charge, because I was very careful when
5 describing the width of the submission my learned friend
6 was necessarily making, and the width of the submission
7 I described in relation to Grant was this, that any
8 body, any non-departmental Government body that is
9 funded entirely by Grant is going to have to meet the
10 charge that because all of their funding year-to-year
11 comes from those central funds, that they are incapable
12 of suffering loss. That is the basic charge. That is
13 the logic of the case directed at Grant, and, in
14 particular, you've got the high point of the Scottish
15 Fire Authorities which fit that fact pattern, and that
16 case wasn't answered. The answer that was given was
17 directed only to, effectively, the whole waterbed
18 argument, which is to say -- and really, this is my
19 learned friend's case, I call it the "Blondie case", she
20 calls it the "waterbed case". It does not matter which
21 hole in the waterbed the water leaks out of, the
22 pressure of the body on it is going to force it out one
23 way or the other.

24 The problem with that argument, in circumstances
25 where you don't have any kind of match between the heads

1 of pass-on that are, in fact, pleaded, the heads of
2 pass-on that economists call pass-on but are not
3 recognised in law in pass-on, and the case that is put
4 is that the water may leak out of holes that are not
5 legally relevant. That draws you into the issue that
6 all of the case law identifies, and I think that my
7 learned friend accepts, which is that you have to
8 identify, by whatever means is robust and solid, that
9 where the Overcharge ends up, how much and who is
10 bearing it, and that is because it does feed into
11 downstream actionability, if there is any claim in law,
12 because a claim that is passed on in that way will
13 trigger a claim downstream, and because, for the reasons
14 of policy, it takes you into the concerns about whether
15 or not that is an efficient system of law.

16 So I reject the allegations of cakeism. I think
17 you've got to deal with some of the arguments, most
18 obviously the argument in relation to Grant and Council
19 Tax, on the basis of the generic fact pattern. That
20 feeds into the second introductory point I would make,
21 which is this: my learned friend is very keen about
22 Pleading points against us, hence that fascinating
23 exegesis, Fire Authorities, but quite content to accept
24 the generosity going the other way.

25 We have not taken any Pleading points about the

1 Defences or their inadequacies, and that is because the
2 essence of this exercise, if it is anything at all, is
3 to identify the viable, arguable parameters of any claim
4 in relation to pass-on, and that, given the manifold
5 inadequacies of the current Pleadings, is very much
6 a two-way street, because whatever you decide is no
7 doubt going to be met for this pressing trial my learned
8 friend is so keen to emphasise, by a conforming Pleading
9 explaining what their case actually is in relation to
10 each of these various heads of pass-on.

11 That is the opening terrain.

12 Summary judgment. I do not really have a great deal
13 to say about Opkabi and TfL 6 beyond this: in my
14 submission, it is far more useful to look at the
15 authorities that grapple with the relevant thresholds of
16 arguability and satisfactory Pleadings, that is the
17 issue in the case, far preferable to look at the actual
18 cases that wrestle with that in the particular context
19 of pass-on. The learning from the *DAF* amendment case
20 and the *NTN* case is precisely about what type of claim
21 will pass through that threshold in the context of
22 pass-on in a competition action and that, surely, when
23 the Court of Appeal has so very recently given it so
24 much careful thought, and where you have the very robust
25 judgment of the very experienced Lord Justice Green

1 pushing back against cases built, essentially, on
2 economic evidence, that is surely the starting point,
3 and the principal optic through which to look at the
4 question of summary judgment.

5 In any event, with respect to my learned friends,
6 some of the statements she drew from the cases are apt
7 to mislead, if taken in isolation. There are cases --
8 *Arkin*, for instance, in the bundle at D/6/9, paragraph
9 21, that also extol, in an appropriate case, the utility
10 of resolving questions of law, and, obviously, it is
11 a question of judgment as to how useful it will be in
12 any particular context.

13 A pass-on, my learned friend's second topic, her
14 principal emphasis here was to point out that the four
15 factors from the *DAF* test weren't some kind of statutory
16 formula of tabulated reasoning. I never suggested they
17 were. I was very careful in my submissions to point out
18 the approach of the Court of Appeal, which was to say
19 those factors are, you know, necessarily going to be
20 important and relevant considerations, point one, and,
21 point two, any case that does not satisfy some or all of
22 those is going to need something special beyond that in
23 order to make the case pleadable, and that is exactly as
24 we understand the law, paragraph 154 of *DAF* in the Court
25 of Appeal, which my learned friend took you to, reflects

1 that submission, so with respect, we do not really see
2 what the point is being made.

3 The forensic challenge that my learned friend has to
4 meet is why it is, for instance, that the case on Grant
5 or Council Tax, should, nevertheless, go ahead on the
6 basis of a case that flunks those factors. That, then,
7 takes us into topic three, which is the factual
8 position.

9 My learned friend started off by saying the facts
10 are very complex, and that is a basis for huge suspicion
11 about summary judgment. She then went on to say that
12 certain points were common ground between us.
13 Basically, how the Council Tax requirement operates, and
14 how it treats all of the relevant expenses. I never
15 attempted to suggest that somehow the totting up of
16 expenses excluded Trucks. Of course it does. That
17 process, in our submission, is tolerably plain and
18 tolerably straightforward, and once you understand how
19 it operates as a political budgeting process, the
20 impossibility of relying upon *Fulton* for some kind of
21 narrow application, *res inter alios acta* in this
22 context, falls away.

23 Consider the facts of *Fulton*. The transactions in
24 question were all about the same ship. They were all
25 about the charterparty failure, or the termination of

1 the charterparty and the sale of the ship. How far
2 removed is that in circumstances where the court went on
3 to find that the sale was *res inter alios acta*? How far
4 is that removed from a situation in which, on the one
5 hand, you've got a secret Cartel leading to the increase
6 of a tiny amount of prices in the grand scheme of the
7 overall budgets of Local Authority, and at the other end
8 of the scale you've got an incredibly complex political
9 decision-making process about how to set that Council's
10 priorities as to where to spend the budget overall.
11 They are utterly incommensurable. There is nothing in
12 the material to suggest that in the course of those
13 budgeting processes, beyond costs in some general sense,
14 that there is any focus at all on the costs of Trucks,
15 still less any putative Overcharge, and to pray in aid
16 what is a process of public law, which is to set the
17 amount of a tax directed at the provision of a basket of
18 public law services, the recipients who, almost without
19 exception, do not pay for them, and to say that
20 necessarily within that you can infer some level of
21 charge with the kind of precision identified by the
22 Court of Appeal in *DAF*, a specific charge directed to
23 a specific class of people, is obviously impossible.

24 So what my learned friend then did was took you
25 through a tour of what she says was the relevant

1 evidence, and we started with Mr Bezant, and the worked
2 example of Blackpool. Do, by all means, go back and
3 re-read that, because I would suggest that the material
4 doesn't really come up to proof.

5 What it shows, in general terms, is precisely the
6 process that our witnesses fairly described -- working
7 out your initial capital allowances, working out your
8 projected future costs and income, and of course you
9 have got to look at your future costs for the year
10 ahead, not the current costs, so the fact that the
11 evidence says you have to take into account inflation or
12 cost increases, it is inherent in that budgeting
13 process, and then you come to the sticky end of working
14 out how much you are going to put up Council Tax, and/or
15 how much you are going to cut services in order to live
16 within whatever political cloth you have. The high
17 point of my learned friend's case in this respect was
18 paragraph 3.17, and the allusion to negotiation with the
19 street lighting PFI people my learned friend said was
20 evidence of the kind of supplier negotiation that has
21 been pleaded, and that is, with respect, fanciful. PFIs
22 do not renegotiate in that way. The evidence seems to
23 address the potential of withdrawal or limitation of
24 services from scope, ie not buying services covered by
25 PFI.

1 So really, that was a pretty telling attempt to make
2 bricks without straw.

3 Next, it was suggested that these costs are not
4 negligible, but that entirely neglected the proper focus
5 which I was careful to draw attention to, which is that
6 the relevant cost element as the case law has found, is
7 the element of Overcharge, not the cost of the item as
8 a whole. It neglected the factors that I pointed out
9 that the relevant figures, both for the Local
10 Authorities and for the Fire Authority directed at the
11 overall cost of Trucks including chassis, whereas the
12 relevant focal point is, in fact, the Overcharge, as
13 financed, which is a much smaller number, and once you
14 take those points into account we are in precisely the
15 type of realm of undetectably small charge that is
16 addressed in the *Royal Mail* case.

17 So the evidence supports the idea that all of this
18 is extremely small, and then you come to the various
19 references in cases like *Williams v Hughes*, etc, all of
20 which accept, of course, that costs go into the mix, but
21 what goes into the mix is costs as a whole, costs as an
22 aggregate, cost as the entirety of the provision of all
23 of the services across the range of public services
24 provided. There is nothing to suggest that there is any
25 focal point on the costs of Trucks, and absent that, in

1 such a process where there are at least five mechanisms
2 in play, the process of trying to identify where in the
3 sausage machine any putative Overcharge will come out,
4 if it does, indeed, come out at all and doesn't manifest
5 itself in outright cuts and services which we are all
6 agreed is not Overcharge, is impossible to understand.

7 Now, this is an entirely novel exercise because
8 there is no Cartel case in which, in relation to
9 downstream purchases, the Tribunal has been
10 effectively -- or any Court -- has been effectively
11 invited to infer or speculate or guesstimate where it is
12 in some such public budgeting process, and from which
13 pot of public money the relevant Overcharge comes out.

14 The waterbed analysis is completely new in that
15 respect, and to point to the passages from Williams and
16 Porter, etc, that recognise that costs do go into the
17 budgeting process, as is inevitable, as some proof that
18 it will be plausible that at the end of the day Council
19 Tax will be found to have some identifiable increment
20 attributable to Trucks, or that you will be able to
21 identify some increment in Government Grant that is
22 identifiably attributable to the costs of Trucks, absent
23 a case where the Government provides the entirety of the
24 funding, except that. That is fanciful.

25 It is then said, well, there is a major health

1 warning to be taken from the supposed fact that this
2 evidence is partial, self-selected, etc. It is a bit of
3 a difficult argument to advance in circumstances where,
4 first of all, the evidence is conspicuous if nothing
5 else by its fairness and by its willingness to identify
6 points against itself, and, secondly, it is deeply
7 unfair in circumstances where there is very clear
8 evidence from Mr Pike in his second witness statement at
9 paragraph 22 and following, that the very, very acute
10 difficulty of marshalling and identifying evidence of
11 the kind sought by the various disclosure
12 questionnaires, because of the nature of the inquiries,
13 and because of the age or span of the relevant Cartel,
14 and the departure of the people with the relevant
15 knowledge, so we do not, for a moment, take the point
16 about partiality seriously.

17 That, then, takes us on to the fourth topic which is
18 Council Tax, and my learned friend purported to answer
19 the *DAF* criteria but with respect, on analysis, she did
20 not. It is indubitably the case that the charges in
21 question are very, very small by reference to the
22 relevant budgets. She tried to answer that by saying,
23 well, size doesn't matter. That is a convenient
24 argument when the very first thing that the law says and
25 recurrently does say, and it has at least the merit of

1 some intuitive appeal about it, is "the larger the
2 relevant cost centre is and the larger the relevant
3 Overcharge is the more likely a Party is going to have
4 consciously or otherwise obviously addressed that and
5 addressed it in their downstream pricing or taxing" so
6 an argument that size doesn't matter is, with respect,
7 impossible to square with the authorities, and it is
8 impossible to derive from the balanced budget type
9 arguments, not least because companies pore over their
10 P&L account in just the same way anyway. That was
11 effectively the argument being made by *NTN* in the
12 context of the ballbearings Cartel and the
13 sophistication of the company's mechanisms for driving
14 costs down.

15 Her second point was it is nothing to the point that
16 this is all infected or tainted or driven by political
17 decision-making. That only goes to the extent of
18 pass-on. There's a certain initial forensic appeal to
19 that argument, but it falls away when you really ask
20 yourself what is the exercise that I am being asked to
21 do in order to work out where this particular Overcharge
22 is, and the exercise that is being asked is an extremely
23 difficult one that lies outside this Tribunal's main
24 expertise. It is, as I indicated previously, to try to
25 reconstruct the political decision-making that goes into

1 the kind of multifactorial public sector budgeting
2 decisions, so you cannot answer that by saying "oh well,
3 as long as it generates something I am home and dry".
4 If the real force of the point is the nature of the
5 exercise tells you how difficult or impossible or
6 speculative the exercise is to begin with, it's just not
7 a credible outcome that, at the end of this, you are
8 going to arrive at, even with a broad axe, at sensible
9 numbers attributable to each of the leaks in the
10 waterbed.

11 The third point that was made is, well, the four
12 factors in *Royal Mail*, their importance is exaggerated.
13 Well no, they are not exaggerated. Paragraph 154 says
14 they are the right forensic starting point, and if you
15 cannot satisfy them you need to show something,
16 something, as Lord Justice Green was so very clear
17 about, that goes beyond a case of economic analysis.

18 Of course, the key hole if all of this is the total
19 failure to answer the point that we made about the hole
20 in the case about cuts. Cuts is the missing part of the
21 story. Cutting services, cutting the quality of
22 service, deciding whether or not to offer a service,
23 deciding how and when and on what basis to charge is
24 a central part of the story, and if it is accepted that
25 reductions in service provision and quality are not

1 pass-on, the imponderables of this waterbed argument
2 become so much the harder. So that is Council Tax on
3 the plane of factual (Inaudible) we then come to
4 chargeable services, and it is right to say, I sought
5 realistically to accept, that there were some areas in
6 relation to chargeable services where there are
7 indications of some consideration of greater
8 cross-reflectivity. That is what the evidence shows and
9 I did not seek to suggest otherwise, and it is right to
10 suggest that our argument here was very much at the end
11 of "this is not worth a candle, this is a massively
12 disproportionate exercise that will generate extremely
13 expensive disclosure for no sufficient or material gain,
14 and therefore it should not be countenanced", when there
15 is absolutely nothing to suggest the ready availability
16 of the kind of evidence that makes this exercise useful,
17 and the answer my learned friend ultimately gave in
18 relation to that was: there is no incremental work
19 because we are going to be doing all of this in relation
20 to commercial waste anyway.

21 Now, there are two answers in relation to that. The
22 first is, if I win in relation to legal policy, it may
23 well be that the commercial waste arguments themselves
24 become legally unsustainable. Very careful at the
25 outset to say the concession we made in relation to

1 commercial waste was on the basis of an arguable case of
2 factual proximity, not the legal case. That is the
3 first answer.

4 The second answer is, in fact, it is a non sequitur,
5 because the forensic exercise that is required to look
6 at the decisions about how you set and frame reasonable
7 cost for commercial waste services in circumstances
8 where you are obliged to charge commercial waste service
9 recipients at a reasonable cost is a non sequitur, but
10 that generates immediately the information you need in
11 relation to the adjacent questions of how to set bulky
12 item charges or how to set garden waste, and that is
13 because, first of all, it is in a different part of the
14 waste business. It is in relation to the residence part
15 of the business, not the commercial, and, secondly, it
16 is because the key issue in that context is how the
17 relevant decisions are reached, first of all as to when
18 to commence charging, and, secondly, as to the
19 principles entirely open to you at your public -- your
20 discretion to shape however you want, subject to a cap
21 of no more than cost recovery, how you shape the
22 principles as to the particular charges scheme you
23 adopt, and that is not material that is readily going to
24 come to mind when you are investigating the commercial
25 waste services. That is material, as I said in opening,

1 that may well require you to investigate with the
2 relevant Council officers and relevant Councillors what
3 the thinking was, what the policy was at the time in
4 relation to those particular issues, which is not the
5 same as the much more narrow question of how do we
6 calculate what is a reasonable cost for a cost recovery
7 obligation in relation to commercial waste, but the far
8 bigger point, actually, with respect to all of this is
9 that you mustn't lose sight of the fact that even if
10 there is any adjacency in relation to the waste issues,
11 commercial waste versus garden waste issues, there is
12 absolutely no adjacency between the Council Tax issues
13 and the charging issues, because the documentary stream
14 that you are going to have to investigate in relation to
15 the budget setting processes, which is going to involve
16 all of the mechanics about how all of the decisions
17 about what particular services to take on, not to cut,
18 etc, taken at the Local Authority, how there is an
19 interaction with the Grant funding body, etc, that is an
20 entirely separate documentary stream to the particular
21 documents that relate to charges decisions in relation
22 to charging powers. It is very important not to lose
23 sight of that when considering the merit or otherwise of
24 my learned friend's submissions that -- which culminated
25 in, that this adds nothing to the overall complexity of

1 the case that is going forward in any event.

2 Then Fire and Rescue. I do not have a great deal to
3 say in relation to this, other than the basic charge
4 that -- because there have been changes in the case
5 here, or changes in evolution as to who the relevant
6 Parties are, and additional complexities revealed, that
7 basic charge does not, in my submission, substantiate
8 the case made by my learned friend which is that we are
9 wrong on the points of principle in relation to factual
10 and legal remoteness. It may be that we have the wrong
11 Parties. That will be cured in the manner we suggested.
12 It may be that there are nice and narrow issues as to
13 whether or not extant claims by Councils in their claims
14 for Truck-dependent services embrace invoicing in the
15 levying case, and if not whether or not amendment or
16 fresh claim is made, but none of that has any bearing at
17 all on whether or not we are right on the central case
18 that Council Tax or Grant, on the claim of factual or
19 legal causation, and that is particularly so in relation
20 to precepting where, of course, the precepts in question
21 go straight on to the Council Tax budget, and the
22 evidence is that the process in setting Fire Authority
23 budgets which involves Councillors from the relevant
24 authorities is just as political as the process in
25 relation to Council Tax, not least because, at the end

1 of the day, it is all a contribution to the tax burden
2 borne by the relevant taxpayer in the area, and that is
3 politics with a capital P.

4 So, notwithstanding the charges of irony about my
5 learned friend being able to strike out our case, etc, I
6 really do not think there is any forensic weight in any
7 of that at all.

8 Then we come on to the piece that is missing from
9 all of this in some account. My learned friend dealt
10 with Council Tax, she dealt with chargeable services.
11 She dealt with the Fire Authorities. She never
12 addressed the issue of renegotiation in any meaningful
13 sense. I think the case is there pinned on Mr Bezant
14 and Blackpool. She never answered the charge made,
15 which is that in renegotiation, cases certainly no
16 better, and in some respects comfortably worse than the
17 cases that were rejected in the context of Trucks,
18 specifically in *DAF*, and in the context of Baring in
19 *NTN*. There is literally no material to suggest that the
20 Local Authorities which already have statutory
21 procurement obligations in relation to most of their
22 expenditure would have been able to do X, Y and Z in
23 relation to the costs of Trucks, and that argument is
24 pure speculation.

25 So that, then, leaves us with the last two topics:

1 policy and logistics. I am not going to say anything
2 about logistics because that is, really, probably, for
3 future case management if this application fails, but it
4 was striking that my learned friend was driven to
5 effectively a simplification, a caricaturisation of our
6 case, because our case doesn't exclusively turn on the
7 non-actionability in the hands of customers, or
8 consumers, residents, call them what you will. That is
9 certainly a material factor upon which we rely. It does
10 not exclusively turn upon the practical impossibility of
11 any claim, for that is a relevant factor. It depends
12 upon the combination of all of those features, together
13 with the extant law in relation to recognised categories
14 of situations where loss may occur but the policy of the
15 law is to say it does not count towards litigation, and
16 here, the starting point is obviously Government Grant,
17 and, with respect, my learned friend could identify no
18 good reason why there should be some sort of chasing
19 through the public purse by dint of the fact that
20 a Public Authority has been vested with funds by another
21 authority, and, in particular, there is no good reason
22 to do so if the Party providing the funds would not,
23 itself, have any cause of action.

24 All you are doing is fashioning an entirely
25 artificial defence for a Party that does not deserve it.

1 Where is the merit in saying there is pass-on to Central
2 Government, and Central Government does not have any
3 claim, when, at the end of the day, the Party that has
4 ultimately lost, if you were to adopt Mr Noble's
5 economic analysis, is the taxpayer, and when recovery by
6 the Local Authority is an effective redress for that
7 problem.

8 So, what, then, of the five reasons we have given?
9 The first, *Fulton*. Well, I have kind of answered that
10 already. It is in terms of causal connection, a mile
11 away from the situation we are faced with, with either
12 Council Tax or Grant. Decisions about what Grants are
13 given and at what level are political decisions taken by
14 others, and it has nothing to do with the cost of
15 Trucks. The cakeism answer I have addressed already.

16 The allegation that this is all somehow inconsistent
17 with, or at variance with the damages claim is a strange
18 one, because the point we made in our Skeleton, it was
19 us that was relying upon the damages directive, is that
20 the language of the damages directive and the guidelines
21 that accompanied it, are predicated on the clear
22 assumption that all of the Parties who are going to be
23 bringing the claims are Parties within the relevant
24 economic supply chain of the market or markets affected
25 by the (Inaudible). That is why the language of the

1 directive is about direct purchasers, indirect
2 purchasers. That is why there is a presumption of
3 pass-on to indirect purchasers, because the presumption
4 of pass-on, in a market, is, in fact, the manifestation
5 of economic logic of the kind Mr Noble identifies in the
6 conventional commercial context. That is what informs
7 the presumption of pass-on. It is the very fact that we
8 are outside that chain that generates the basis of the
9 principled arguments we have advanced, and you cannot
10 infer anything from the fact that Recital 3 refers to
11 public undertakings, when all that recital is doing is
12 identifying that public undertakings may be end users
13 just like consumers who have rights to sue, but that
14 does not take you anywhere.

15 Then we get to the arguments that the assessment of
16 whether or not the Local Authorities here are engaged in
17 commercial service provision is a highly fact-sensitive
18 matter that could only be resolved at trial, and that
19 is, with respect, a nonsense. There is not a single
20 service that was identified where you could make any
21 credible argument that the service in question was
22 commercial service provision. Mending the roads is not
23 commercial service provision. Providing a free Fire
24 Service is not commercial service provision. Of course,
25 that argument is structurally inconsistent with the

1 argument my learned friend commenced with, because the
2 argument she commenced with was an argument that says
3 what is special about Public Authorities is not that
4 they are in a market but that because they are public
5 bodies and because they have the special balanced budget
6 obligations of public bodies, they are expected to play
7 like they were commercial bodies.

8 You cannot have it both ways.

9 There is, and in particular in the light of *Max*
10 *Recycle*, no basis to say that there is any real argument
11 about the fact that we are concerned exclusively with
12 public service provision. We are not in the kind of
13 National Air Traffic Control case of which the OFT 1389
14 case is directed at, some heavily-charging fee-paying
15 service that may or may not be said to be commercial
16 service provision, not least because the great totality
17 of the fees and services in question are provided
18 without fee.

19 Then it said that we are in error by saying that it
20 can only be pass-on if there is no prospect of
21 downstream claim, as to which we say, well, no. We are
22 not, and the passages in *Sainsbury's* to which my learned
23 friend refers are obviously directed at a completely
24 different context about the potential obstruction of a
25 pass-on claim between different levels of the same

1 supply chain, so you cannot read *Sainsbury's* in the
2 expansive fashion identified.

3 Then it was said it is inconsistent with summary
4 disposal, one, because it is wrong. Well, that is
5 neither here nor there. We say it is right and that is
6 why it is appropriate for summary disposal. Secondly,
7 that it will generate an appeal, but if the point is
8 obviously so clear and so important that it is going to
9 generate an appeal anyway, where does that take you?
10 The really critical issue is whether or not you have the
11 sufficient facts you can to identify the issue of
12 principle that arises, and in relation to Council Tax,
13 in relation to Grant, you plainly do have all of the
14 relevant facts that you require, and indeed, we also say
15 you have them in relation to public services because
16 they are -- public service charges because they are
17 clearly non-economic, and then the very last point, it
18 was said the third reason it is unsuited for disposal
19 now is the whole question of Public Authorities means it
20 is a question of mixed fact and law, if the predicate is
21 wrong the point is wrong. It plainly isn't open to
22 reasonable argument.

23 Forgive me for going two minutes over when I know
24 you have to get back, at least some of you, to Scotland
25 and Northern Ireland and unless there is anything else

1 I can assist with, those are the points I wanted to
2 make.

3 THE CHAIR: You are both quite right to remind us that these
4 are transferred proceedings from the English High Court.
5 There's two issues which I wonder if you might help me
6 with arising out of this, I'll deal with the first issue
7 and then hear you on that and then give you the second
8 issue.

9 The first issue is that -- and this only applies in
10 relation to the Scottish Claimants, it does not apply to
11 the rest. We have a situation where we have Scottish
12 Claimants and virtually all the Defendants are outwith
13 the UK, so it goes back to a more fundamental question
14 as to what is the ground of jurisdiction for the English
15 High Court in the first place to be dealing with claims
16 by Scottish Claimants. If perhaps you could hear me out
17 before you take instructions on it?

18 MR DE LA MARE: I am so sorry.

19 LORD ERICHT: Yes. You brought this claim, and I am
20 wondering on what basis you brought this, and what do
21 you say the ground of jurisdiction is for the English
22 Court to hear a dispute between Scottish Claimants who
23 are outwith the English jurisdiction and defenders who
24 are outwith the UK jurisdiction and therefore outwith
25 the English jurisdiction.

1 MR DE LA MARE: Well, I haven't gone back and looked through
2 the details of the Parties, so it is a bit of a flanker,
3 but as I recall there are anchored Defendants, that's
4 the basis for the claim. Effectively, there are
5 Defendants within the various groups who are domiciled
6 here. Once you have the anchored Defendants, the
7 question -- I think the proceedings were still issued
8 when we were still subject to the Brussels Recast
9 Regulation regime. Once you have an anchor Defendant
10 you are then, under Article 4 of Brussels Recast and
11 Article 8, entitled to bring in any other Parties
12 necessarily connected and that is how the other entities
13 within the various groups were brought in.

14 The second point I would make is there was never any
15 jurisdictional challenge, so, with respect, concerns
16 about jurisdiction are gone. They are done and dusted.
17 The jurisdiction was taken by the High Court, the case
18 was properly constituted by the High Court, and it was
19 properly transferred by the High Court to this Tribunal,
20 so, with respect, the issue of jurisdiction in that
21 sense is a dead letter.

22 LORD ERICHT: Do you have anything to add to that?

23 MS ABRAM: We also believe that we are (inaudible)
24 defendants and we are not taking any point on
25 jurisdiction. To be fair, Mr De la Mare is right, that

1 if we were going to take that point, the moment has
2 passed.

3 THE CHAIR: Thank you. I think, though, at the risk of
4 running the clock down still further has made a point
5 which we did make expressly at the case management
6 hearing in Edinburgh which was that we do have claims
7 from three jurisdictions. We are managing those in the
8 way indicated. We are going to have to remove the tie
9 in respect of appeals, so that we can deal with the
10 matter de novo in the manner addressed in our
11 communications to the Parties. As we made clear in
12 Edinburgh, which is why we are going to be instituting
13 a two -- three-Tribunal, probably two-Tribunal process
14 as we discussed, all of that works, but I think the
15 Parties should be under no illusion that we will be
16 seeking in each of the three jurisdictions the removal
17 of the ties that in each of those cases send appeals
18 back and fetter the ability of the Tribunal to deal with
19 matters in the round, because, of course, those claims
20 were transferred in circumstances where there
21 (inaudible) intended to be part of a greater whole.

22 Now, that is not a matter for the Parties, it is
23 a matter for the Tribunal to deal with with its related
24 jurisdictions, but I think --

25 MR DE LA MARE: It is a question of (Inaudible) Parties may

1 need to understand what is being proposed and have
2 a chance to express views on it.

3 THE CHAIR: Well, that is fair enough, but I think we are
4 some way down that road because we have had a couple of
5 hearings at which the due constitution of a Tribunal was
6 discussed.

7 MR DE LA MARE: Understood. That is, with respect, an
8 entirely separate issue.

9 THE CHAIR: Well no, it is not.

10 MR DE LA MARE: I have misunderstood. Forgive me, my Lord.

11 THE CHAIR: It is quite closely related to this point,
12 because we are going to try to ensure that we allocate
13 the rule 18 jurisdiction appropriately, issue-by-issue,
14 proceedings-by-proceedings. What I do not want to
15 happen is for Parties to pop up saying "well, in this
16 particular case which is being harmonised with others
17 you cannot do what you were planning to do, however
18 sensible it is, because of the manner in which matters
19 were transferred in".

20 MR DE LA MARE: Thoroughly understand the thrust of your
21 point, sir. If it is directed, in particular, as I
22 apprehend from Lord Ericht's question, the position of
23 the Scottish entities, the Scottish Fire Authorities,
24 etc, against the backdrop of there being extant Scottish
25 claims that are effectively constituted in this Tribunal

1 in Scotland, and against the backdrop that obviously if
2 one is delving into Local Government law, and, in
3 particular, Scots Local Government law, then Scotland
4 may well commend itself as the appropriate place to deal
5 with those issues. Equally, if one is delving into how
6 and why the Scottish Government does what it does,
7 again, that would seem to say Edinburgh, but quite how
8 we get to that position I think we would need to think
9 about carefully, but obviously, as a general
10 proposition, the Tribunal should draw, wherever it can,
11 sensibly, upon its peculiar cross-jurisdictional
12 expertise.

13 THE CHAIR: Yes. Well, that is what we have said we are
14 going to do. I think the point I am making is there
15 will obviously be consultation with the Parties about
16 the exercise of the rule 18 jurisdiction, clearly, but
17 what we are not in the business of doing is having
18 a series of jokers in the pack coming up because you
19 have different matters. I am not really in the business
20 of sending things three directions. We are going to
21 have certain areas where it will be quite clear what is
22 going on. There will be certain areas where we just do
23 not want to have multiple appeals going in all kinds of
24 areas, and that is what I am flagging now, as I flagged
25 before.

1 MR DE LA MARE: All I can say is for my part, on behalf of
2 my clients, we will engage with that as constructively
3 as we can. Totally see the force in that as a proposed
4 way forward. I suspect the devil, as ever, is in the
5 detail.

6 THE CHAIR: The devil is in the detail. It is just that I
7 want the detail to be within the parameters of the
8 combined proceedings that we are trying to case manage
9 here, and let me be clear, this is going to be for the
10 proceedings in all three jurisdictions, all of the
11 transfer rules follow the model that Farley, J, when he
12 was president, implemented as the way of transferring
13 matters in. The problem is no one envisaged the idea of
14 warehousing of claims in the way that we are dealing
15 with now.

16 MR DE LA MARE: It would not be the first time, and no
17 criticism for anyone is intended (Inaudible) given the
18 now complexity of the subject matter and the particular
19 complexity of jurisdiction, difficult points of
20 technical detail like that might not have been given the
21 full thought that they might merit. I totally
22 understand.

23 THE CHAIR: That is where all I am coming from. There is no
24 intention of shutting out any Party from participating
25 in that jurisdiction.

1 MS ABRAM: Just to echo, absolutely understand that point.

2 I think I should just make the point from a Defendant
3 perspective that not all the OEMs are here today. Of
4 course, not all the Claimants are here either, but, for
5 example, I am usually for Volvo and today I am for three
6 other OEMs, so perhaps a discussion for another day when
7 everyone is here.

8 THE CHAIR: Yes. The only reason I am raising it is because
9 Mr De la Mare, in response to Lord Erich's point,
10 raised reliance on the transfer order, and that is
11 something which -- and no criticism of Mr De la Mare, he
12 was not present in Edinburgh, you were. That is
13 something that we discussed then. We have also
14 discussed in the context of the two Tribunal approach
15 where we get, effectively, a bank of five, but through
16 two separately instituted -- now, that has not been put
17 in place yet, but part of that is exactly this sort of
18 detail which Mr De la Mare is quite right, no one ever
19 expected would happen when these cases came in, but it
20 is part of the rearranging of the furniture that we need
21 to undertake, and I would not want anyone to think that,
22 having mentioned it in the past, it is not still very
23 much in our minds now. I am very conscious that we have
24 not constituted two Tribunals, and that is something
25 which we will have (Inaudible).

1 MS ABRAM: I am sure everyone will take that back to the
2 appropriate place.

3 LORD ERICHT: Just following on from all of that, my second
4 issue, and it is a purely practical issue, if there's an
5 appeal from today's hearing and it goes to the English
6 High Court, then issues of Scottish law are not foreign
7 law here, because we are a UK Tribunal, and there are
8 some issues of Scottish law in this case, certainly
9 a Scottish Local Government law, and possibly whether
10 the damages passages in *McGregor* are reflective of
11 Scottish law, and it is a controversial matter. You
12 will find some cases which kind of suggest they are and
13 some that do not, and, in fact, when one drills down to
14 the actual point there may be no difference, but it is
15 not obviously exact replication in Scotland, so I am
16 just wondering as a practical matter, if this is
17 appealed to the English High Court and there has to be
18 a discussion of either (Inaudible) Scottish law, how
19 does an appeal Court deal with these which would be
20 questions of fact in an appeal?

21 MR DE LA MARE: I think the legally correct answer to it
22 (Inaudible) the governing law of this case is still
23 English law. The fact that this is a Tribunal providing
24 a UK resolution does not detract from the fact that the
25 relevant governing law has to be identified, and --

1 because the Scottish Claimants, amongst others, have
2 properly constituted a claim here, no one has suggested
3 it is governed by anything other than English law,
4 English law is the governing law. That said --

5 LORD ERICHT: I thought I had heard submissions from you to
6 the extent that Scottish law in tort and delict from the
7 same.

8 MR DE LA MARE: It is the governing law of the tort. It is
9 not the governing law of the obligations of Local
10 Government bodies. The governing law of the tort is
11 English law. The governing law of the bodies, in terms
12 of what to do, is plainly Scots law. Nobody is
13 suggesting otherwise. So that is a -- if you like,
14 again, a cat's cradle. I have no doubt that
15 particularly with my Lord's expertise, anything that you
16 had to say on Scots law is going to be treated extremely
17 carefully and referentially by our Court of Appeal, and
18 the ordinary rule will be that insofar as there is Scots
19 law authority bearing upon a common issue of legal
20 policy, that will be looked at extremely carefully in
21 the context of working out where the English rule
22 ultimately aligns.

23 MS ABRAM: (Inaudible).

24 THE CHAIR: Thank you very much. Very grateful to both, and
25 your legal teams for going through this material so

