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IN THE COMPETITION
APPEAL TRIBUNAL

Case No 1054/1/1/05
1055/1/1/05
1056/1/1/05

Victoria House,
Bloomsbury Place,
London WC1A 2EB

31st March 2006

Before:
SIR CHRISTOPHER BELLAMY
(President)

DR. ARTHUR PRYOR
DAVID SUMMERS

Sitting as a Tribunal in England and Wales

BETWEEN:

MASTERCARD UK MEMBERS FORUM LIMITED
MASTERCARD INTERNATIONAL INCORPORATED and
MASTERCARD EUROPE SPRL

ROYAL BANK OF SCOTLAND GROUP

Appellants

supported by

VISA (EUROPE) LIMITED AND VISA (UK) LIMITED

Intervener

And

OFFICE OF FAIR TRADING

Respondent

supported by

BRITISH RETAIL CONSORTIUM

Intervener

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CASE MANAGEMENT CONFERENCE

APPEARANCES

Mr. Nicholas Green QC (instructed by Lovells) appeared for the First Appellant, MasterCard UK Members Forum.

Mr. Thomas Sharpe QC and Mr. Matthew Cook (instructed by Jones Day) appeared for the Second Appellant, MasterCard International and MasterCard Europe .

Mr. Mark Hoskins (instructed by Ashurst) appeared for the Third Appellant, Royal Bank of Scotland Group

Sir Jeremy Lever QC, Mr. Jon Turner, Mr. Josh Holmes and Mr. Meredith Pickford (instructed by the Solicitor, Office of Fair Trading) appeared for the Respondent.

Mr. Stephen Morris QC and Miss Kelyn Bacon (instructed by Freshfields Bruckhaus Deringer) appeared for the First Intervener, Visa (Europe and Visa (UK).

Mr. Aidan Robertson (instructed by Dechert LLP) appeared for the Second Intervener, British Retail Consortium.

1 THE PRESIDENT: Good morning, ladies and gentlemen. Since we last met there has been a
2 number of developments in this case. We have had:

- 3 - a letter from the European Commission in response to the Tribunal's letter,
- 4 - the Office of Fair Trading's Defence,
- 5 - Statements of Intervention from the British Retail Consortium and from Visa
6 respectively; and
- 7 - various observations from the parties in preparation for today's hearing

8 and, of course, we are very grateful for all those additional items and material.

9 It seems to us that we now have one or two rather important strategic decisions to take
10 as to how this case is going to develop from here, which probably depends on a variety of
11 interlocking issues, some of which are highlighted in particular in the observations we have
12 had from Visa, but are also reflected in the position taken by the various parties. It might be of
13 some use if I could just indicate one or two preliminary thoughts that the Tribunal has had on
14 the situation that now presents itself in this case, bearing in mind first of all that these are only
15 very preliminary observations; and secondly, that we may not be able to resolve matters today
16 without having more detailed argument hereafter.

17 Among the questions that occur to us are the following: has the Office of Fair Trading
18 significantly changed its case or not and, if so, in what respects? Depending on the answer to
19 those questions, what are the consequences for these proceedings, in particular having regard
20 to the three options that are set out in para.10 of the Visa observations in particular and also
21 having regard to the Tribunal's case law as to the circumstances in which it is necessary and/or
22 desirable, and/or appropriate to permit the appeal proceedings to develop and broaden the
23 position taken in the Decision, and the circumstances in which it is, on the other hand desirable
24 to remit the matter for the administrative procedure to recommence on whatever basis it is now
25 suggested it should do so. That is one set of questions.

26 The answers to those questions are also, in our provisional view, particularly affected
27 first of all by the fact that Visa finds itself in what appears to be something of a Nutcracker
28 position and at some risk (so Visa submits) of having what is, in effect, a *de facto* Judgment
29 against it, without there having been an administrative procedure at all as regards them. That
30 is one aspect.

31 Another aspect which perhaps comes more into focus as a result of the OFT's
32 Defence, although in a way that at the moment is not entirely clear to us is how far this case,
33 as presently constituted, is going to result in a determination of the issues, or how far it is
34 envisaged that there are further administrative procedures that are in contemplation either as a

1 result of the apparent change in the MasterCard arrangements, though query whether that is a
2 change of substance or form, or because of continuation of the proceedings against Visa or
3 because in some way this Decision is now said to be less decisive than it was once thought to
4 be having regard, among other things, to the statements in the Defence that the Decision may
5 be regarded as “indicative rather than dispositive” – whatever that may mean, which at the
6 moment is not clear to us.

7 However, if there were to be further administrative proceedings after these Appeal
8 proceedings that could be a relevant factor in whatever shape these proceedings will take,
9 bearing mind that even at the level of this Tribunal there may be an Appeal from the Tribunal
10 to the Court of Appeal, and there may at some stage be a suggestion that some questions or
11 other might be referred to the Court of Justice in Luxembourg. If all that were to take place
12 and then after that it was thought to be necessary to have a further administrative procedure
13 with the possibility of a yet further Appeal to the Tribunal we are getting into a situation which
14 is frankly not a very attractive situation from the point of view of the working of the system as
15 a whole. We would like some exploration of all that, in particular from the point of view as to
16 whether, given the disjunction in timing between the Visa proceedings and the MasterCard
17 proceedings in the administrative sense, it would not be sensible for the administrative
18 procedure to resume in a way that enables both bits of it – or all bits of it – to catch up so that
19 we eventually have one Appeal dealing with everybody’s final position and go on from there,
20 instead of the rather disjointed and somewhat disconnected situation that we have at the
21 moment.

22 In that further connection, the new material that we have had indicates that there are
23 also various international developments in the pipeline or going on, including apparently
24 envisaged proceedings by the Commission in relation to MasterCard which does bring into
25 play Article 16 and what the Tribunal should do about that, and also other proceedings in other
26 European countries and elsewhere. We have seen a report of the recent settlement in
27 Switzerland. As a Tribunal we had a background knowledge of the proceedings in Spain, but
28 we have only the haziest idea as to what is actually going on around the Community and
29 elsewhere, and we wonder in the back of our minds whether the modernisation system is
30 actually working as it is intended to do at the moment.

31 Those are a number considerations that we would like the parties to think about and in
32 due course help us on. In addition there is one other point that we would like to mention at the
33 moment, namely, at a very basic level at this stage the Tribunal does not yet have a “feel” – if I
34 can put it that way – for how the MasterCard and Visa systems actually work. For example, it

1 pops out *en passant* practically that one could suggest that the MasterCard system is not a four
2 party system, but a five party system and that there is some settlement arrangement of some
3 kind, or some clearing house or other inserted in the arrangements. It would appear to us (at
4 least hypothetically) that there are or may be some circumstances in which at least in part the
5 system is *de facto* a three party system rather than a four party system because a lot of
6 acquirers must be acquiring transactions that are made by their own issuers. To what extent
7 that occurs is quite an interesting question bearing in mind that, at least according to the
8 Cruickshank Report, the acquiring side of the market seems to be fairly concentrated and it
9 was always thought to be the case that the personal banking sector in this country was also
10 fairly concentrated. So there must be to some considerable extent one would have thought,
11 though we have only the haziest idea about all this, a situation in which a large number of
12 transactions that are acquired are acquired by issuers who themselves are on the other side of
13 the transaction. Where that gets one, one does not know, but it is the sort of fact that any
14 Tribunal trying to understand how a market works would like to know simply by way of
15 background. Similarly, exactly what the position is in general about merchant service charges
16 and what the position is in general about competition in the issuing side of the market is not
17 addressed in any detail in the Decision. So we would like to find some way of improving our
18 background knowledge of all that without suggesting that it necessarily affects the way the
19 arguments are presented. We would just like to have a feel for the way the market works and,
20 as the Tribunal has done in other cases, some kind of site visit, or way of getting a better feel
21 for the way this market is actually working might be a suggestion that we might want to make
22 at some point. However, the main question at this stage is whether or not this case continues
23 and, if so, in what shape or form, or whether it goes back to the OFT for the administrative
24 procedure to resume and in either case what exactly would be envisaged.

25 I think those are some quite important questions before we can actually get anywhere
26 near the agenda that was provisionally circulated for this case management conference. As is
27 our usual practice it may very well be that it is useful for us to rise for a few minutes and just
28 see where we are and give us a chance to observe what we have just said, or it may be that you
29 have already thought about some at least of those points and are in a position to begin to
30 address them. Would you like to start, Mr. Green?

31 MR. GREEN: Thank you very much. We have given this issue very considerable thought and
32 indeed that will surprise the Tribunal and perhaps it will assist if I give you a thumbnail
33 summary of certainly MMF's position and I anticipate that of the other Appellants.

34 THE PRESIDENT: Yes.

1 MR. GREEN: In a nutshell my clients, and indeed the other Appellants feel very strongly that
2 having spent five and a half years going through the administrative procedure with the OFT
3 and at least four iterations of a case now a case which has changed in the Defence, that it is of
4 very great importance indeed that an independent objective, fresh set of judicial eyes examine
5 this issue before we get thrust back into the merry-go-round of yet further possibly years of
6 administrative proceedings. If I may I will come back a little later to explain what the new
7 proceedings would entail, what factual and economic issues would arise out of the new par
8 system and triangular settlement system contemplated in the Defence.

9 THE PRESIDENT: Yes.

10 MR. GREEN: We feel very strongly that we need the Tribunal's guidance, that the Tribunal will be
11 able to go some way in dealing with the legal, evidential and economic issues and there are a
12 number of suggestions that we have to make about the process which the Tribunal could
13 pursue in the Autumn, but we are very anxious that we do not get thrust back into the
14 administrative procedure without judicial guidance. I anticipate also that the Office of Fair
15 Trading will say the same thing. They have stated as much twice in their press releases and
16 you may have seen even yesterday ----

17 THE PRESIDENT: I am sorry, I do not know that we are abreast of press releases.

18 MR. GREEN: Well I will come back and explain what the OFT has said, but by way of a nutshell
19 you may or may not have seen even yesterday the Office of Fair Trading's annual plan for
20 2006-07 was issued and published on 29th March (just two days ago) and under the heading
21 "What we have done well" – "significant successes" – "...we took a decision against
22 MasterCard ... and issued a statement of objections on similar issues against Visa."

23 The Decision, as it presently stands, is a binding precedent. It has been scrutinised
24 with great care by authorities around Europe. We know on our side that the Commission is
25 watching with great interest what happens in these proceedings and if this Decision is not
26 addressed judicially it will have a far greater impact than it deserves, even on the OFT's new
27 Defence, and we sincerely urge the Tribunal to assist the parties now before we go back for the
28 second round of proceedings, MasterCard two and Visa one. We view that as of very great
29 importance.

30 Our observations as to the next steps in this case are therefore conditioned by the
31 nature of the OFT's case. What I would like to do is first of all summarise the principal
32 differences between the Defence and the Decision so that you have an idea of how the case has
33 changed. I would then like to explain how we say that that impacts upon an Appeal which we
34 are inviting you to continue with in the autumn.

1 First, I will deal with the basic position – what is the Defence and how does it
2 interrelate to the Decision? I am not going to ask you to ask you to open the documents – if I
3 were to do a systematic analysis it would take a considerable amount of time – but I would like
4 to summarise the principal differences. In relation to market definition, the Decision and the
5 relevant paragraphs are 153, 154 and 149(i). The Decision says that “Market definition is a
6 key step in identifying competitive constraints acting on a supplier”. The OFT says in the
7 Decision that there is a “... (wholesale) market for the provision of card transaction services
8 between issuers and acquirers”, and that MIF is the price acquirers pay to issuers for
9 completion of purchases made using consumer credit and charge cards issued under the
10 MasterCard brand.

11 In the Defence the position changes and market definition is not of determinative
12 importance when assessing restrictions of competition (para.98), and nothing ultimately turns
13 on whether the relationship between issuers and acquirers can be described as a market
14 (para.101), nor does it matter whether the MIF is a price (para.101). Market definition is
15 important because, as you will have seen from the Defence, the thrust of it is that the MIF
16 impacts upon competition with other payment systems.

17 So far as collective price restriction is concerned, in the Decision ----

18 THE PRESIDENT: Just making an observation as we go along, Mr. Green – we will hear what the
19 OFT says in a moment – but it may be that what precise label one gives to the MIF and exactly
20 what the boundaries of the various markets are – or indeed whether there is a market at all at
21 the central part of the system ----

22 MR. GREEN: The wholesale level.

23 THE PRESIDENT: -- the wholesale level, may be points of argument but they may not, at the end
24 of the day, be completely decisive of the substantive issue that we have to resolve.

25 MR. GREEN: In giving you the list I am not suggesting there is any greater or lesser importance to
26 any one of these issues ----

27 THE PRESIDENT: No, but it is important to get a feel for what the changes are to weigh whether
28 the case is tryable or not basically.

29 MR. GREEN: We understand that, yes. So far as the collective price restriction is concerned, the
30 essence of the OFT’s case and, indeed, very much the essence of the case hitherto was that the
31 MMF Rules deterred incentives to enter into bilateral agreements, and that bilateral agreements
32 were necessary and a required part of the four party scheme. It is referred to in many places
33 but, for example, paras. 396 to 399 and 445 of the Decision. The appropriate counterfactual,
34 therefore, was bilaterals with fallback arbitration.

1 So far as the Decision was concerned, the OFT deliberately took no position on zero
2 interchange fee, that is set out in para.375. In 375 the OFT says that there is no presumption
3 that a zero or a par interchange fee is any better or any worse than a negative or a positive one.
4 That section of the Decision which is described as “general economic principles” is in fact a
5 distillation of a Paper given by the former Chairman, Sir John Vickers in Santa Fé at a banking
6 conference last year and some paragraphs of that section are almost word for word from Sir
7 John’s Paper.

8 The new Defence accepts the logic of the OFT’s previous Decision, or own Decision,
9 that in fact bilaterals are problematic when they operate in conjunction with an “honour all
10 cards” rule (HAC rule), and the OFT now accepts that bilateral agreements are not practicable.
11 They therefore say that in the absence of bilateral agreements a new counterfactual arises
12 which is costs lie where they fall. In other words, an issuer – and it is the issuers who bear the
13 preponderant part of the costs – will have to bear all of the costs that it incurs.

14 THE PRESIDENT: Unless they negotiate something different, presumably?

15 MR. GREEN: They could negotiate with an acquirer but the proposition set out in the Defence is
16 that bilateral agreements are, for the reasons set out in the Article 81(3) part of the Defence and
17 as pointed out in the Notice of Appeal, impracticable.

18 SIR JEREMY LEVER: Not generally.

19 THE PRESIDENT: As a Tribunal we find this a rather difficult area because the documents
20 produced by the Appellants clearly envisage bilateral negotiations and they clearly envisage
21 the encouragement of bilateral negotiations as the notification stresses. If it is now suggested
22 that that is not the case, one wonders why those documents ever said what they did in the first
23 place.

24 MR. GREEN: The documents encourage bilaterals with a fall back MIF. In the early part of the
25 ‘90s there were some bilaterals. As the system evolved they became less practicable but the
26 rules did not change, but it is still possible for bilaterals under the rules to be concluded.

27 THE PRESIDENT: So that is at least one possibility that one cannot entirely jettison.

28 MR. GREEN: No, we do not suggest that it can be jettisoned, indeed the way in which the
29 restriction is articulated by the Office of Fair Trading is that the MIF is a disincentive to the
30 conclusion of bilaterals. They do not say that they are fettered or prevented, or prohibited.
31 They simply say that the restriction of competition emanates out of a deterrent. They describe
32 it variously as a strong deterrent, or a serious deterrent.

33 THE PRESIDENT: We will hear from Sir Jeremy in a moment, but is the position now effectively
34 that instead of saying there has to be a fall back MIF pending bilateral negotiations, or if

1 bilateral negotiations for one reason or another do not happen, you do not actually need to have
2 something, you can just do it ----

3 MR. GREEN: You do not have anything.

4 THE PRESIDENT: You do not have anything.

5 MR. GREEN: There is no interchange.

6 THE PRESIDENT: That a zero fee, or something at par which I think might be slightly different ----

7 MR. GREEN: Yes, they are.

8 THE PRESIDENT: -- but let us come back to that, is a fall back?

9 MR. GREEN: Yes, there is not an interchange because there is no agreement between acquirer and
10 issuer, there is simply a default *a priori* situation pursuant to which the issuer bears the cost
11 because they cannot be transferred to the acquirer.

12 THE PRESIDENT: So the acquirer says "I will honour your card but I will not actually transfer any
13 money to you. I will knock off 6p for the privilege of processing it, and that is what I am
14 going to do".

15 MR. GREEN: Or the issuer simply says ----

16 THE PRESIDENT: Or the other way around.

17 MR. GREEN: Yes. Whereas the Decision focused upon the viability, the practicability of bilaterals
18 and evidence was adduced, for example, from Sweden and Australia to suggest that they were
19 viable, and that was the counterfactual against which the status quo ante, the MIF, was to be
20 compared. Now it is said: "Oops, we recognise that that is not feasible and we have a new
21 factual default position which is par ----"

22 THE PRESIDENT: Well again we will hear from Sir Jeremy, is it a new position or an alternative
23 position?

24 MR. GREEN: It is utterly new for the simple reason that in para.375 the OFT said they had no
25 presumption hitherto.

26 THE PRESIDENT: Yes, at least they mention it in 375 but do not develop it.

27 MR. GREEN: Absolutely. We are not saying that this case is so novel ----

28 THE PRESIDENT: It must have occurred to somebody along the line that this was a possibility.

29 MR. GREEN: Indeed, indeed. As I said, we want to be able to proceed with this case and we will be
30 suggesting procedural steps which will enable us to do so, and we think it is a pragmatic and
31 sensible way.

32 Now you see Sweden has gone as a comparable, Australia has gone as a comparable,
33 the notion of comparing the bilaterals' counterfactual with the MIF disappears and we have

1 this new counterfactual which is a new factual economic scenario which is not addressed in the
2 Decision, but which is addressed in the Defence and in the expert's report.

3 There is one other aspect before I just move on. Arbitration was viewed as part of the
4 acceptable fallback in the Decision. It is now suggested, albeit only in a footnote (footnote 91)
5 that arbitration now may itself be in breach of Article 81(1).

6 THE PRESIDENT: Forgive me for interrupting, please just accept that one is thinking aloud to try
7 to get into the case.

8 MR. GREEN: Yes, indeed.

9 THE PRESIDENT: My personal understanding was that if it was being suggested that by an
10 arbitration procedure that would be only another way of arriving at the same result because of
11 guidance given by MasterCard would enable the Arbitrators to more or less fix a default
12 interchange fee on much the same principles as the existing default fee works, that would not
13 be much of a change basically.

14 MR. GREEN: That I think is the gist of footnote 91.

15 THE PRESIDENT: Yes.

16 MR. GREEN: Another aspect, which is different – or at least a variation – in the Decision the Office
17 of Fair Trading was quite explicit that it was not concerned with trying to establish whether a
18 bilateral fee as negotiated would be lower or higher than the MIF, it simply said it will be
19 different (paras. 459, 461, 496, 499). In para.502 of the Decision the OFT goes on to say that
20 it is not necessary then to do a comparison between the bilateral fee and the MIF level, because
21 they say that is not relevant to Article 81(1). Now, because bilaterals have evaporated either
22 wholly or predominantly from the scene the question of whether the counterfactual gives rise
23 to prices which are different to, or the same as, or higher or lower than the MIF becomes, for
24 obvious reasons, really fundamentally different, although you will have seen from the Defence
25 that the Office of Fair Trading do say though without evidence that the MIF is too high, they
26 use a number of pejorative terms, it cross-subsidises, it is lining the pockets of the issuers and
27 things like that. But there is a different case now on the rates and the prices of the
28 counterfactual as against the basic position.

29 THE PRESIDENT: Yes. Your previous case was that on any envisaged bilateral system the
30 interchange fees would be higher – or might be?

31 MR. GREEN: It might be either higher or in fact ----

32 THE PRESIDENT: Or no different.

33 MR. GREEN: -- it could be similar.

34 THE PRESIDENT: Yes.

1 MR. GREEN: But there was nothing to actually suggest they were so materially different such that
2 when you compared them with the existing MIF that that would have any knock-on effects on
3 competition. That, in a nutshell, is the collective price restriction.

4 So far as exemption is concerned, in the Decision (paras. 586, 523, 526, 558-584) the
5 OFT said that if one sets aside the question of extraneous costs then the MIF could be
6 exempted. But now it is said in para.22 of the Defence that the statement in the Decision was
7 in effect *obiter*; that the previous perceived benefits under the first exemption condition fall
8 away (para.26 of the Defence) and there are various points made about the burden of proof in
9 134. So the position on exemption has shifted.

10 As to extraneous costs there is a dispute between the parties as to how the OFT
11 identified the counterfactual in the Decision, but that I think is not so much a difference as a
12 point of argument, but more fundamentally you will have seen the OFT have effectively
13 abandoned the question of payment and transmission costs as a benchmark for what is an
14 integral cost to be included in an interchange fee, and they have said that interchange fees
15 should not include anything over and above the Maestro debit card costs.

16 THE PRESIDENT: Is that argument understandable as a way of quantifying what the transmission
17 costs may be?

18 MR. GREEN: They have moved away from an effort to actually quantify them on a cost basis, and
19 an appropriate proxy is to simply take present debit card costs, and that interchange fees should
20 not exceed debit card costs and they have given us the Maestro brand as the benchmark.

21 So there are some significant changes in the case, and one can see that indeed from
22 the Office of Fair Trading's suggested list of issues where they are largely done by reference to
23 the Defence not the Decision. So far as our position is concerned in relation to this change, as
24 I emphasised at the outset, the Appellants wish the Appeals to proceed to a substantive hearing
25 in the Autumn. You will have seen that the BRC in para.4 of its skeleton makes the same
26 point, they want the proceedings to be heard as expeditiously as possible – they even suggest
27 that it would be desirable to have a Judgment before the end of the year. You will have seen
28 from the OFT's skeleton that they do not propose to withdraw the Decision. Their skeleton
29 proceeds upon the unequivocal basis that the case should proceed to a substantive hearing –
30 indeed, it may well be that the difference between the Appellants and the OFT is that we wish
31 to proceed. The OFT will wish to advance the arguments in the Defence and we will all say
32 that we will have to see in the Autumn precisely how far down the road the Tribunal can
33 actually go. The only party that even moots the point is Visa. Visa's position is equivocal; it
34 refers to the possibility of remittal, but only somewhat half heartedly as one option amongst

1 others. With respect to Visa, this is something of a kite-flying exercise. Visa clearly feels
2 forensically disadvantaged by being an Intervener, and they have therefore mooted this
3 possibility as a means of restoring litigation parity or tactical equality with MasterCard. Now,
4 Visa is an Intervener, it has been given rights to intervene in this case quite fully – it has
5 already put in economic evidence. There is no reason why, in these proceedings, it should not
6 have the opportunity fully to represent its position. But nothing in the skeleton arguments of
7 any other party suggests that the Tribunal should adopt any peremptory setting aside or
8 remittal of this case and, indeed, so far as remittal is concerned the new proceedings
9 anticipated by the Office of Fair Trading are in relation to the New MasterCard case, and the
10 Visa system, not the old MasterCard rules.

11 THE PRESIDENT: Well just before we go on to the new case, Mr. Green, if we go to your
12 consolidated list of issues that you and the other Appellants have helpfully put together – the
13 draft of 27th March – and we look under the heading “A. General Issue No.2”. Issue No.1 has
14 asked the question “Has the OFT advanced arguments that are different?” and you have just
15 explained, I think, certain ways in which they are different – the question whether they are
16 contradictory is probably a development of that, but there are certainly some respects in which
17 they appear to be, at first sight, different. Then the question is “Is it open to them to advance
18 such arguments?” Now, I suppose putting it in very general terms the situation the Tribunal is
19 anxious to avoid, if we are to go on with the case, is finding ourselves later on in some sort of
20 blinkered position where we can only deal with a bit of it because some bit or other was not in
21 the Decision, and that therefore what you say you want, which is an overall judicial
22 determination of the case, becomes rather difficult because of the procedural complexities
23 which have arisen – that is one risk.

24 The second risk that we do not particularly want to run is finding that at some later
25 stage one or other of the principal parties or interveners Appeals on the basis that we should
26 never have gone down this route at all and that we are stuck with the Decision and we should
27 not have contemplated hearing anything more than was in the Decision and that the whole
28 thing went off the rails at this stage. We need to think very hard about both those problems.

29 MR. GREEN: In a few moments, if I can, I am going to try and identify what we think is open to the
30 Tribunal in a substantive hearing in relation to the Defence specifically.

31 THE PRESIDENT: Because an Appeal that goes off at half cock for whatever reason is not a very
32 attractive proposition to the Tribunal.

33 MR. GREEN: Understandably so. But those are the positions of the parties. None of the principal
34 parties wish the matter to be ----

1 THE PRESIDENT: What is your answer to some of the questions in issue no.2 provisionally? Is it
2 open to the OFT to do so? Because if your answer to any of those questions is “no” then there
3 is not much point in going on.

4 MR. GREEN: What we are going to suggest to the Tribunal is that there are a number of things to
5 which the Defence is going to be highly relevant and perhaps I will identify them now. First, it
6 is clearly open to the Appellants and to the Tribunal to look at the Defence to see how the
7 OFT’s case has changed so that when you review the Decision you will see which parts have
8 been resiled from. That is a fairly straight forward exercise of comparison.

9 Secondly, there remain very fundamental points of law which straddle the Decision
10 and the Defence. The Defence in these regards simply adds another dimension, or adds flavour
11 to principles and issues of law which already exist. For example, there is a very big difference
12 between the parties as to the borderline between Article 81(1) and Article 81(3) as it applies to
13 interchange fees, and that of course straddles Defence and Decision. There is equally the issue
14 of what the relevant counterfactual is and what the law relating to that is, which arises in the
15 Decision and the Defence. There is the point of principle identified in para.502 of the
16 Decision, which his once you have identified what may be described loosely as a viable
17 counterfactual what do you do with it? Is it there fore comparison purposes with the pre-
18 existing agreement or, as the OFT say in the Decision, do you not have to undertake a
19 comparison? If it is viable then that is sufficient to establish the restriction. But there is a very
20 fundamental point which arises out of both Decision and Defence, which is whether it can
21 seriously be suggested, as the OFT now fairly squarely does, that an interchange fee which was
22 set at zero is not a breach of 81(1) but an interchange fee which was set at fractionally above or
23 below zero would be a restriction under 81(1).

24 THE PRESIDENT: An interchange fee collectively set at?

25 MR. GREEN: Collectively set at zero.

26 THE PRESIDENT: It is difficult to collectively set anything at zero because zero is your starting
27 point.

28 MR. GREEN: It is slightly more complicated than that. It arises in a very stark way in the defence
29 as well as the Decision and, indeed, through the expert evidence of Messrs Carlton and Frankel
30 who say, in what they describe as the “triangular settlement system” – one is getting into
31 something of the detail here – the network operators can set charges including the imposition
32 of “Network charges”, and one is moving, even on the OFT’s Defence case, back into a
33 situation of what may in substance be balancing charges.

1 THE PRESIDENT: Yes, and this point is where we get hazy about what the facts are. Who is the
2 network operator, and how does the network operate?

3 MR. GREEN: I understand that, these are matters we ourselves have been looking at and it is not
4 quite as complicated as one imagines.

5 THE PRESIDENT: No, well maybe it can be very easily explained which would be good.

6 MR. GREEN: It can indeed and, if the matter proceeds, we can obviously provide factual
7 descriptions of the system, and provide the relevant details, we do not view that as a problem.
8 However, there is also a big issue as to what are the relevant factors going to Article 81(3),
9 who is the consumer, for example, in this? What is the relevance of the consumer under 81(3).
10 If we were wrong about 81(1), we have arguments which relate to both Decision and Defence
11 about our standard of proof – our burden of proof – in establishing benefit to consumer. Those
12 are just a few examples of issues which straddle both and which are very fundamental to how a
13 case would move forward. Now, there are two ways in which the Defence would be relevant,
14 first, as a comparison with the Decision; and secondly, because there are common legal issues.
15 The third is what does one do about the OFT's case *simpliciter*? It seems to us that if the
16 Tribunal were ----

17 THE PRESIDENT: Before we go on to that, Mr. Green, the various points you have mentioned so
18 far tend conceivably to highlight the underlying issue, is one addressing those various points
19 on the basis of what is in the Decision or on the basis of what is in the Defence and, if the
20 latter, on what jurisdictional basis do we do it?

21 MR. GREEN: You can certainly do it on the Decision and we will not say in September that you are
22 prohibited from doing it in the light of the Defence – they highlight the issue. This brings me
23 to the third point, what do you do about the Defence *simpliciter*?

24 THE PRESIDENT: What do we do about it, yes. Have we got jurisdiction, either by necessary
25 implication or because we view jurisdiction on the merits as enabling us to deal with a deeper
26 or broadened case, as I think Parliament would very much want us to do if we possibly can?
27 Or, are we stuck with the Decision, or is there a situation where all the parties, with varying
28 degrees of reluctance or enthusiasm (as the case may be) actually want the case decided on the
29 basis of the pleadings and the Decision looked at together.

30 MR. GREEN: Can I tell you what we will find it impossible to do, which is a practical
31 consideration?

32 THE PRESIDENT: Yes.

33 MR. GREEN: And that then takes us to what it is possible to do. It seems to us that come
34 September it is not going to be possible for the Appellants to put in evidence which would be

1 comparable to a reply to a statement of objections which analyses in enormous depth the
2 matters that we would wish to address if a statement of objections properly formulated had
3 been submitted to us on the par issue and the triangular settlement issue and so on.

4 THE PRESIDENT: I am just writing that down, because it is quite important.

5 MR. GREEN: It is important, but my colleagues will express what they wish to do in relation to
6 Reply evidence because we do feel we can do something. It is a process we have started
7 already. We will be able to put in reply evidence which addresses the new case, the par theory,
8 the triangular settlement system issue and so on, and we will be able to do this from our
9 different vantage points. I will come to the perspectives that we differently have in relation to
10 that in a moment. We certainly can address the issues at the same sort of level of generality as
11 Carlton and Frankel do and as the OFT does in its defence. Now, if we were going to do a full-
12 blooded reply to the Statement of Objections it would be a very substantial task. But when it
13 comes to the Defence we think it is relatively straightforward, if we have sufficient time to do
14 it, it is a task we can achieve to address the sorts of issues which arise in relation to our system
15 – what that means for settlement systems, for credit card systems, what it means for
16 competition with other payment systems, and we can identify what we say are the illogicalities
17 in the OFT’s new position; why it would not work, why the position as set out in the Defence
18 is not something which could remotely come close to satisfying the proper burden or standard
19 of proof – more a Judicial Review-type merits’ Appeal, rather than simply saying to you “Here
20 you have everybody’s full blown case on the par system, decide the nuts and bolts of it down
21 to the Nth degree. So at this level we do believe we can address the logic and consistency of
22 the OFT’s Defence.

23 For our part, what we have done to understand the par Defence is to start working
24 with each of the individual banks, or a number of them – we have to do it separately because
25 they have strict confidentiality issues as between them – saying “What does this mean for
26 you?” By way of illustration there are a number of different business models in the banking
27 world, there are the High Street retailers, the big banks, the retailers – the Tesco-type of
28 organisation; then there are the internet banks and the mono-line banks, such as MBNA or
29 Capital One. They will all be impacted differently by a system under which they have to bear
30 higher costs, and they have to see how they dissipate those costs whether through higher
31 cardholder charges or otherwise. But we can work through that. We can work through the
32 manner in which a par system would operate and we can provide the Tribunal with evidence as
33 to how that would operate.

1 We will not be able, for example, to say that if all the costs are loaded on to the issuer
2 that is going to result in the death of MasterCard, we will not be able to go to the level of
3 econometric analysis which says we have modelled perfectly what is going to happen, but we
4 can provide a detailed economic and evidential critique at the same level as Carlton and
5 Frankel have or probably considerably beyond that. Therefore, we are not going to say to the
6 Tribunal when we come to the Autumn: “You have no jurisdiction to even look at the Defence.
7 There is a technical point which is we do not think you will be able to uphold the Decision by
8 reference to the Defence, they just do not match”. But when I said at the outset that we are
9 anxious for a judicial set of eyes to look at this we envisaged that the Tribunal, if it were to set
10 aside the Decision, would be saying on the par system “These are the sorts of issues which will
11 need to be examined, these are the complications, this is our provisional view, this is how it
12 interrelates with Article 81(1). This is how you will apply the counterfactual or Article 81(1)
13 analysis to these issues” – in much the same way in which the Tribunal has given guidance in
14 some of the earlier *Freeserve* cases or evening *Express/Wiseman*. There is quite a long way
15 down the road that we believe the Tribunal can go.

16 THE PRESIDENT: Do you envisage a situation in which the Tribunal could reach a state of
17 knowledge in which it could rule on whether either the existing agreement – well you may say
18 it is rather hard to do it in relation to the existing agreement under Appeal because that is no
19 longer in force.

20 MR. GREEN: It is no longer in force, no.

21 THE PRESIDENT: – at the time qualified for exemption and/or whether with the following
22 modifications the agreement might qualify for exemption and/or whether this is completely
23 hopeless there is no question of any kind of exemption for this agreement on the information
24 that we have?

25 MR. GREEN: To be frank I do not know the answer to that at this stage, because we have not
26 worked through the evidence that we are presently working through.

27 THE PRESIDENT: Forgive me for interrupting you again, Mr. Green ----

28 MR. GREEN: Not at all.

29 THE PRESIDENT: -- one is thinking aloud, but this kind of approach producing the evidence in
30 rebuttal is obviously getting quite a long way away from the Decision and the issues that were
31 in the administrative procedure and a whole lot of new stuff, and everybody, as it were, shifts
32 on to a new terrain – or at least the new terrain is additional to the old terrain – and we are
33 getting much more into the position where the Tribunal is being invited to try the case, as
34 distinct from hearing an Appeal on the merits of the Decision now that the Tribunal has power,

1 of course, to take any step the OFT could have taken, or take its own Decision and all the rest
2 of it, and will do so in appropriate circumstances if that is the right and just course to take. I
3 suppose another possibility, though perhaps more speculative, is that we take this case in
4 stages. It may be that at a certain point that matters crystallise or issues drop away and one is
5 in a position to say “Well, this, that and the other is now fairly clear, but we need to dig a bit
6 further on this ...” for example, I just do not know.

7 MR. GREEN: You are quite right, Sir, the jurisdiction of this Tribunal is the Decision and the
8 Notice of Appeal targeted at the Decision, which is why I started by saying that the OFT does
9 not abandon the Decision, that is still a live issue and it is still the principal target for us, we
10 feel we have to have that set aside because we believe it to be defective.

11 THE PRESIDENT: Well it is binding on the Civil Courts apart from anything else.

12 MR. GREEN: And it is not impossible, it has been mooted in the Press that you may get consumers
13 suing us for damages on that.

14 THE PRESIDENT: Yes.

15 MR. GREEN: So who knows. The Decision is the bedrock of the Appeal. The jurisdiction of the
16 Tribunal arises in this way, if the Decision is set aside and one says “Then what?” The
17 Tribunal is perfectly entitled to say “We have set aside the Decision. It has been demonstrated
18 to us there is, in fact, a different, alternative way of looking at this issue, the par system/the
19 triangular settlement system”. As to that, it seems to us our views, albeit provisional, are that
20 the OFT has not addressed A, B, C, D, E issue, because that is what the Appellants told us and
21 we accepted, or the Appellants are wrong on that and the OFT was quite right to address A, B,
22 C or D, but they would have to put this more formally in a Statement of Objections. That is
23 why I said you retain jurisdiction because of the Decision, but a consequence of that is that the
24 Tribunal is able to give guidance to the parties, and it may not mean that it is going to be a
25 “trial” of the par system, but we have many Appeals in the Tribunal which have fallen short at
26 the trial which nonetheless are merits’ Appeals.

27 Why should the Tribunal go down this route? The OFT’s Press releases have made it
28 really very clear. When the OFT launched its new MasterCard investigation it issued a Press
29 release in which it said that the Tribunal was ----

30 THE PRESIDENT: Have you got the date of that?

31 MR. GREEN: 2nd February 2006. The OFT said, and I am quoting:

32 “The judgment to be made by the Competition Appeal Tribunal in the appeal
33 proceedings against the OFT’s Decision of 6 September 2005 is likely to have a
34 substantial, and potentially decisive, impact on the new investigation which has now

1 been launched. Accordingly, any investigative steps, which will be taken prior to the
2 conclusion of those appeal proceedings will be confined to the gathering of certain
3 further information about MasterCard's new interchange fee arrangements. The OFT
4 does not propose to issue any statement of objections, nor to reach any decision as to
5 infringement, until after the conclusion of the appeal proceedings."

6 We take the same view and again we may come at this from a different angle from the OFT,
7 but we want a guidance from the Tribunal so that if we go into a new round of administrative
8 proceedings we do not find that we get iterations 6, 7 and 8 coming to us in a series of new
9 statements of objection. That would simply be a counsel of despair for my clients. Five and a
10 half years is long enough ----

11 THE PRESIDENT: Quite, absolutely. On that point, and it may well be a question in a moment for
12 Mr. Sharpe rather than for you, Mr. Green, I think we are quite interested in what the reason
13 for the change in the MasterCard arrangement was and whether in practice it is more than a
14 formal change or whether it is another way of doing what is effectively more or less the same,
15 because the answer to those questions may or may not suggest that the new procedure against
16 MasterCard is a procedure more of form than of substance, or it may be the other way around.
17 I just do not know enough about the new situation to be able to judge that at the moment.

18 MR. GREEN: From my perspective I think that is something Mr. Sharpe needs to address you on.

19 THE PRESIDENT: Yes, quite.

20 MR. GREEN: Can I just say something about the preparation that we would envisage going
21 forward. We believe we can complete our investigative exercise and produce reply evidence
22 by the end of May, in about five weeks' time.

23 THE PRESIDENT: By the end of May, did you say?

24 MR. GREEN: The end of May, May 26th.

25 THE PRESIDENT: That is more than five weeks.

26 MR. GREEN: It is more than five weeks, it is a bit longer than that.

27 THE PRESIDENT: It is two months.

28 MR. GREEN: It is just under, yes.

29 THE PRESIDENT: Whatever we do, Mr. Green, if we do go on the Appellants will get the time
30 they need, there is no doubt about that.

31 MR. GREEN: Thank you. Just one important point which needs to be addressed: the Appellants are
32 extremely different, indeed, the banks themselves have a very different interest to MasterCard
33 International, but there is an acute confidentiality problem which we actually referred to in our
34 very first skeleton, and we have never troubled the Tribunal with because, between ourselves,

1 we have worked it out. Between even individual members of my own client we have immense
2 problems of confidentiality. We have to collect information on a bilateral basis rather than
3 collectively. We have different categories of business plan and that makes it difficult. There is
4 confidentiality between the Banks and MCE/MCI. MCE/MCI is a network operator, it is a
5 settlement organisation as well. It keeps proprietary information away from the banks, not
6 least because my clients are also members of the Visa system. My clients also have
7 confidentiality issues within their own organisations between issuing sides and acquiring sides.

8 THE PRESIDENT: Yes.

9 MR. GREEN: And between the MasterCard business and the Visa business, issuing and acquiring.
10 We will put our own evidence in and we will address the par system from a bank's perspective
11 and MCE/MCI will address it from a network operator or a settlement organisation's
12 perspective and it is really not possible to work together and we plainly cannot work with Visa.
13 But that is the difference between the parties, and we believe we can address this issue in some
14 considerable detail, and satisfactorily if we are given until towards the end of May and that is
15 not going to affect an Autumn hearing time at all. We would suggest at the end of that process
16 there is another CMC to see where we have got to, to consider where experts should meet and
17 how, and in respect of what, and that can easily take place in June or July – if it is thought
18 desirable at all at that stage.

19 THE PRESIDENT: I do not know if you have any preliminary thoughts on how the present situation
20 now bears on the expert evidence because to some extent cases are somewhat bedevilled by the
21 impression that the two arguments do not really intersect at any point.

22 MR. GREEN: Well they do not and at the moment we do not see benefit in the experts. Messrs.
23 Carlton and Frankel have addressed something which we have not addressed.

24 THE PRESIDENT: It is rather difficult to try a case when there is no ----

25 MR. GREEN: No collision.

26 THE PRESIDENT: -- no collision.

27 MR. GREEN: We are desperate for a collision, yes.

28 THE PRESIDENT: The upper and lower jaws do not seem to coincide, so we have nothing to bite
29 on.

30 MR. GREEN: We think there might be some dental re-alignment after May with the possibility of
31 something to bite on June/July, that is why we suggested a CMC after that date with a view to
32 reviewing that.

1 THE PRESIDENT: Yes, on that timetable any such CMC could not be later than about 3rd week of
2 June, I think, because we would need time ourselves to sort out what had happened, and where
3 we were.

4 MR. GREEN: Certainly, if you were wanting then to have presentations of some description from
5 experts, or some process involving experts before the Summer ----

6 THE PRESIDENT: Yes, we still have a bit of time.

7 MR. GREEN: Yes. But that is where we are. We are, as I have said, very anxious that the matter
8 proceeds. We think that it can be done, somewhat through gritted teeth we will not be
9 submitting in the Autumn there is a neat procedural way through this, just set it aside because
10 they have changed their position. That will not be a ground that they will be taking.

11 THE PRESIDENT: You will not take that point, you will not say we should actually set it aside
12 because ----

13 MR. GREEN: On pure procedural grounds.

14 THE PRESIDENT: On pure procedural grounds.

15 MR. GREEN: We will address the par system. It may well be that we will say you cannot, as it
16 were, uphold a decision on an entirely new factual basis when we have never had a proper
17 chance to reply to it, but that would simply be a somewhat technical ground for saying that you
18 cannot uphold a decision on entirely new grounds, but we are not going to say you cannot look
19 at it and that you cannot express whatever view that, in the light of argument, you think is
20 appropriate about it.

21 THE PRESIDENT: It is a bit unsatisfactory if we get into a position, for argument's sake, where we
22 hear a great deal of argument about a par system and hypothetically speaking there are then
23 two possibilities. The first possibility is that we say that the Appellants have convinced us that
24 this stuff about a par system is not persuasive, then basically we fall back on whatever it is we
25 have got which, at that stage, is going to be quite complex. However, I suppose we might say
26 that it all has to go back or we might say there would be scope here for some sort of exemption
27 or something. On the other hand, we might say "We have heard all this, and it is pretty plain
28 on the basis of what we have heard so far that the OFT's par system thesis is a workable thesis
29 in the sense that the scheme will not collapse if something went down if there was this
30 alternative." Then we are into the question of deciding whether there are some of those
31 various issues that you mentioned, namely, whether viability is enough to take you into the
32 exemption arena, or you are not in the exemption arena, but at that stage we do not particularly
33 want the risk of somebody saying "Oh well, they could not really make that finding against us

1 because we did not have the chance to do it with the detail that we would like to do it”, we do
2 not want to get into that problem.

3 MR. GREEN: Off the top of my head there are probably a number of options. From the Appellants’
4 point of view we might invite you to say that on any view a par system and a triangular
5 settlement system is simply, on the basis of the OFT’s case, just not sustainable ever. Or, that
6 you may, having heard argument, say the OFT have not, on the basis of its Defence, met its
7 burden of proof of establishing an Article 81(1) infringement, but we can see in principle there
8 is something in this. We may then set aside a decision for a wider range of grounds, but next
9 time around we are not going to say that the OFT cannot advance a par system in a Statement
10 of Objections – it is more of a Judicial Review type approach. The OFT may say we have met
11 our burden of proof in the Defence and that is that. Or, they may say “We have established in
12 principle that this is viable and it is something which can go forward”.

13 THE PRESIDENT: That is the problem I still have at the moment, when you mentioned the question
14 of “next time around”. If there is going to be a next time around, should not that next time
15 around happen sooner rather than later?

16 MR. GREEN: That is what we are extremely anxious to avoid without knowing what the principles
17 are. One has to remember we have had two Rule 14’s, mini-SO ----

18 THE PRESIDENT: Absolutely.

19 MR. GREEN: After a Decision five months we get a change.

20 THE PRESIDENT: We are very well aware of those points.

21 MR. GREEN: There is not a lot more I can really say.

22 THE PRESIDENT: Thank you, yes.

23 MR. GREEN: I think it is probably better now I allow Mr. Sharpe to make his points.

24 THE PRESIDENT: I think we will hear the Appellants and then Visa, and then we will come to the
25 OFT and the Interveners, if that is convenient, Sir Jeremy. Yes, Mr. Sharpe?

26 MR. SHARPE: I am going to be very brief. MasterCard International and MCE would regard any
27 delay in these proceedings preventing a resolution of the dispute between us with abject
28 despair. I will not repeat the arguments.

29 THE PRESIDENT: What is the dispute between you as you now see it? Is it the Decision or the
30 Defence, or both?

31 MR. SHARPE: We are content, because we are confident that we can deal with the matters raised in
32 the Defence, for you to approach the matter on the basis of the Decision, the Defence and
33 indeed any further evidence they may bring forward, we are very content to deal with that.
34 Our only concern, which I think, Sir, you flagged, is having enough time to be able to inform

1 the Tribunal of what our arguments are in relation to those new points. Armed with that, we
2 are ready and rearing to go.

3 THE PRESIDENT: So you are happy, somewhat confused though the situation may be
4 procedurally, you are prepared to face up to the substance of the issues that you would like to
5 have decided ----

6 MR. SHARPE: Very much so.

7 THE PRESIDENT: On any basis?

8 MR. SHARPE: On any basis.

9 THE PRESIDENT: And you would feel, so long as you have the time, procedurally comfortable
10 with us taking a punt at the issues of substance.

11 MR. SHARPE: At the risk of sounding flip this case has a superficial complexity ----

12 THE PRESIDENT: Yes, I know exactly what you are going to say. Boiled down it is not that ----

13 MR. SHARPE: Boiled down, absolutely.

14 THE PRESIDENT: It may be a tricky issue but one can see what the issue is and what the
15 arguments on both sides are.

16 MR. SHARPE: Not assisted by the Defence, but that is how they run their case. Now, we are
17 content, we have enough time, and we have put forward 26th May with some care. It was not a
18 ranging shot thinking you might split the difference between 21st April and 26th, we sat down
19 and thought how much time we need – I confess allowing a few days off at Easter, but not very
20 many – also working it with our economists and we are confident that if we take 26th May
21 within a day or so we can meet the Office of Fair Trading’s first economics’ dialogue, if there
22 is going to be such a dialogue at that time. I think this is probably the most appropriate way
23 forward.

24 I would say finally that I think the Tribunal ought to be impressed by the unanimity of
25 view of all the parties. Clearly there will be concern with you on rights, natural justice, fair
26 hearing and the possibility of an Appeal – certainly from our perspective. I think speak on
27 behalf of all the Appellants and perhaps the Intervener, Visa, we are ready and able to go
28 forward. We want to go forward and get a resolution. that is particularly so for MasterCard –
29 not just for the legal attacks elsewhere, but there are the commercial issues as well that this
30 would resolve.

31 If you wish me to talk about the new scheme I will, but ----

32 THE PRESIDENT: Well are you just able to help us in very general terms as to whether the change
33 that took effect in November 2004 I think is a change that affects the principles that we have to
34 deal with, or does it not, and whether you can help us what the reason for that change was.

1 MR. SHARPE: I can discuss all of these matters, some of them are confidential, but can I try and
2 keep it to essentials?

3 THE PRESIDENT: Yes.

4 MR. SHARPE: There are a number of things going in within the MasterCard organisation. One of
5 them is a matter of public record, namely the possibility of MasterCard itself floating away
6 from its members – at the moment it is, as you know, a members’ organisation.

7 THE PRESIDENT: When you say “floating away” you mean ----

8 MR. SHARPE: I mean floating.

9 THE PRESIDENT: Floating on the Stock Exchange you mean?

10 MR. SHARPE: Yes. That is planned and it is not necessary for me to go into any details particularly
11 about it now. Secondly, what has been removed from the scheme which is in contention
12 before us is that element of collective agreement of the MIF. We are here to defend that
13 collective agreement, nothing wrong with it, but it is inappropriate in a system where
14 MasterCard International was an independent financial institution detached from its members,
15 and as I understand it the members would cease to have a significant or voting shareholding in
16 the new financial undertaking floated on the Stock Exchanges.

The new scheme envisages MasterCard International laying down the conditions
under which its members would operate with each other in relation to the interchange fee, so it
would cease to be a collectively agreed interchange fee as between its members.

17 THE PRESIDENT: Just help me how that works because of sitting down and collectively agreeing
18 something you say we will collectively elect somebody to set our fee, that does not actually
19 change it, does it?

20 MR. SHARPE: That is a matter of contention and argument but perhaps not for now. The
21 mechanics of the setting of the interchange fee is that it will be set by MasterCard and it will be
22 a licence condition that anybody who seeks a licence and has a licence under the MasterCard
23 scheme will obey that and if they do not like it they can go elsewhere.

24 THE PRESIDENT: I do not want to get into trying to look at what the new arrangements more than
25 absolutely necessary. I am just trying to get a feel for how complex any further administrative
26 procedure would be on the new arrangements to the extent that it would be better for those
27 administrative procedures to happen now rather than not, as it were.

28 MR. SHARPE: Well I think we must agree with the Office of Fair Trading. The Office of Fair
29 Trading could have brought proceedings against the new scheme in parallel with these.

30 THE PRESIDENT: They have now brought proceedings and there are those proceedings going on,
31 so why should all the proceedings not follow the same rhythm basically?
32

1 MR. SHARPE: Sir, as I understand it they have not brought any proceedings in relation to the
2 revised scheme. I think we have had a letter requesting information. I think there has been a
3 press release saying they are not going to take any further action for the time being, that is all,
4 so no proceedings have been brought?

5 THE PRESIDENT: What about the European Commission, what is the situation there?

6 MR. SHARPE: Let me take instructions ----

7 THE PRESIDENT: Visa contends that there are some proceedings pending between you and the
8 Commission.

9 MR. SHARPE: There are proceedings against Visa, I understand they have a Statement of
10 Objections, but I think Mr. Morris is better placed to deal with that. As you know, MasterCard
11 is, and has been for some considerable time, waiting for a supplementary Statement of
12 Objections from the EC Commission. At the moment we have no definite idea when that
13 Statement of Objections will be received. (After a pause) I have been instructed – and I think
14 I should have mentioned – the current proceedings that the EC Commission are engaged in,
15 like the OFT is directed to the historic situation and they are dealing with that situation as it
16 existed prior to November.

17 THE PRESIDENT: But do the current proceedings involve the domestic interchange fee?

18 MR. SHARPE: My understanding is no, nor is there an indication that they will. In fact, Sir, I think
19 I should say there is every indication that the EC Commission is really waiting upon events
20 here.

21 THE PRESIDENT: And the supplementary Statement of Objections is still about the historic ----

22 MR. SHARPE: The historic international scheme, yes. (After a pause) We see no compelling
23 reason to remit the matter or to delay matters. We are all ready to go subject to giving us
24 adequate time. Unless I can assist you further – I may want to come back on other matters in
25 relation to MCI's role and the way the pleadings should be done, but perhaps we will leave it
26 there.

27 THE PRESIDENT: Yes, thank you. Royal Bank of Scotland?

28 MR. HOSKINS: I have nothing to add. We obviously take a joint position.

29 THE PRESIDENT: Yes, thank you. Yes, Mr. Morris?

30 MR. MORRIS: I hate to break up the party ----

31 THE PRESIDENT: That is all right. Let us see how we get on.

32 MR. MORRIS: Can I start by saying that Visa very much shares all the concerns that you expressed
33 at the outset and the issues and problems that you identified that arise from the disconnect

1 between the Defence and the Decision. I will come, if I may, in a moment to those particular
2 concerns, but Visa's position effectively in our skeleton we refer to three courses – 1, 2, and 3.
3 THE PRESIDENT: Yes.
4 MR. MORRIS: As I have just understood what has been said by Mr. Green and Mr. Sharpe, Mr.
5 Sharpe is all for course 3, let us go ahead, full case, on a hearing on the merits in relation to
6 everything.
7 THE PRESIDENT: That seems to be the Appellant's position.
8 MR. MORRIS: Contrary to what Mr. Sharpe indicated that is not Mr. Green's position.
9 THE PRESIDENT: Yes.
10 MR. MORRIS: Mr. Green is really for course 1, which is go ahead, rule on the Decision and whilst
11 you are at it make some observations about the new case. Course 1 in my skeleton is to carry
12 on with the case but rule on the Decision only. Course 2 is to consider setting aside the
13 Decision and remit now, and course 3 is go ahead and hear the full case on the merits, by
14 which I mean the OFT's Defence.
15 THE PRESIDENT: As I at least understood Mr. Green's position, it was possibly somewhere
16 between course 1 and course 3, that is to say you have to deal with the Decision and it would
17 be jolly useful if you did, but we can also address the Defence, albeit not in quite the detail that
18 we would have done if there was an Statement of Objections but nonetheless we can make a
19 good fist of it and I would be jolly useful to have your view on all that too.
20 MR. MORRIS: Without ruling out the possibility that when it then goes back to round two ---
21 THE PRESIDENT: Without completely ruling out the possibility ----
22 MR. MORRIS: -- that when it goes back to round 2, issues on the Defence ----
23 THE PRESIDENT: Someone might think of something new?
24 MR. MORRIS: Yes, and that he expressly said that he would not be in a position to put in a full
25 defence on the at par case. Leaving that aside, Visa's position is as follows. Visa does say that
26 the case in the Defence is a new case and we do say that it differs substantially and materially
27 from the Decision. We say that the consequence of that – although it is probably not a matter
28 for decision today - is to satisfy the Decision and go back now, and that is really for the
29 reasons that you set out at the outset this morning.
30 THE PRESIDENT: The Tribunal was not attempting to reach a conclusion beyond setting out some
31 questions.
32 MR. MORRIS: I am adopting the points that you raised, and I am going to address them if I may.
33 the first concern, or matter that you raised was ----

1 THE PRESIDENT: If this were a serious suggestion, Mr. Morris, we would have to have full
2 argument on it, so I think at the moment we are only exploring heads of argument, and I do not
3 think we can rule on it without going into a lot of detail as to whether it really is a new case,
4 what the implications are of that new case, what is left of the Decision, and all the rest of it,
5 plus the *Argos* and *Napp* precedent.

6 MR. MORRIS: Sir, that is entirely what I was going to suggest in any event.

7 THE PRESIDENT: You carry on for the moment.

8 MR. MORRIS: If I may, just to try to highlight to you the difficulties ----

9 THE PRESIDENT: There are some changes in the OFT's position but to what extent it is a
10 fundamental shift rather than a representation of some of the arguments and the introduction of
11 some new point is still, I think, for argument hereafter, but that is something I do not know that
12 we can deal with today.

13 MR. MORRIS: Indeed. Let us look at the difficulties with not determining this point either now or
14 shortly and just going on to a main hearing. The first point which you identified was the
15 nutcracker position of Visa, and the fact that there is no doubt that if this Tribunal were to go
16 ahead and make a Ruling it would be making a Ruling and whatever Ruling it made would
17 effectively be determinative as against Visa in circumstances where Visa has not had any
18 administrative procedure at all and where Visa would be deprived of the right to put in that full
19 response to SO case, the opportunity to do which Visa would wish to do.

20 Mr. Green, on his instructions, may deem it appropriate for him to waive that right
21 fully and to deal with the case in that way, but Visa would certainly want the opportunity to
22 meet its own case and remember, of course, although the principles are the same there may be
23 differences of detail about how the systems work. The second point, of course, is the point
24 about the indicative Ruling. Where are we going to be in any event at the end of this whole
25 process? We are going to be back before the OFT with procedures in relation to Visa and
26 procedures in relation to MasterCard. Can I just clarify my understanding of the position?
27 There is an SO that has been issued as against Visa which has been suspended, but no doubt
28 that SO would have to be re-written because it does not tie in with the Defence. As I
29 understand it, and I stand to be corrected, the press release that Mr. Green referred you was a
30 statement by the OFT that it intended to investigate the new MasterCard arrangements, but it
31 would not actually issue a Statement of Objections until after these proceedings, but there is a
32 Statement of Intention that (what I call) MasterCard 2 will be investigating. So you have the
33 problem there that you are going to go back in any event.

1 You then have the question, as you also identified, of proceedings elsewhere –
2 Proceedings in Europe, proceedings in other jurisdictions, and you finally identified the
3 problem of this Tribunal proceeding to a hearing in September and ruling on some matters and
4 not ruling on others, or ruling in terms of principle, with possibilities of appeals and
5 possibilities of the case going on and then ultimately coming back and again the possibility of
6 further proceedings before the OFT. We (Visa) do think that the potential for a disjointed
7 procedure, as well as deprivation of substantial rights as far as Visa is concerned, are matters
8 which should lead this Tribunal to consider very carefully now whether there is any point in
9 going ahead with these proceedings. Now it may be, as you say, that you take the view
10 ultimately that these differences are not as great as we say they are, but we do say that if you
11 come to the conclusion that these are substantive differences – I could but I will not expand on
12 that.

13 THE PRESIDENT: That is probably for another day.

14 MR. MORRIS: If you assume that they are for the purposes of the present argument, we do submit
15 that really in those circumstances the only course would be remission.

16 THE PRESIDENT: It is a tricky one, is it not, Mr. Morris, because in all cases that are in one way or
17 another ‘a test case’, the parties that are not part of the test case find their fate decided by what
18 the test case is. In this case you have the advantage that you are here and you do know what is
19 going on and you are very familiar and on top of all the arguments ----

20 MR. MORRIS: Completely.

21 THE PRESIDENT: -- so it is not as if you are not being heard at all. So in some respects it might be
22 said that the point “We are entitled to and deserve and would need to respond to an Statement
23 of Objections might resolve itself or be affected by “Have we got a full and ample opportunity
24 to put in the appeal proceedings the points that we feel ought to be made”, from the point of
25 view of defending your right to be heard.

26 MR. MORRIS: But what do we do about things that relate specifically to Visa and the difficulty of
27 not having separate proceedings, and confidentiality issues?

28 THE PRESIDENT: If there are things that relate specifically to Visa, those remain matters for any
29 subsequent proceedings there may be against Visa which enables them to distinguish their
30 case, or say that it is different or that they are not bound by it, it is not *res judicata*, they can re-
31 run the whole thing, etc. etc. I do not know, I am just thinking aloud on all these points.

32 MR. MORRIS: So am I, of course.

33 THE PRESIDENT: Yes, quite.

1 MR. MORRIS: That is of course strictly true but of course your view on any particular point of
2 principle, for example, the at par approach, might depend upon what you know, not just about
3 what MasterCard say about it, but what Visa say about it and need to examine how the Visa
4 system works which, at the moment, is not in play in terms of those details. This was my
5 distinction between the last CMC between Visa specific facts and Visa facts which have an
6 impact on the points of principle. That is one point.

7 The next point is that for this Tribunal to start trying in September to pick out points it
8 can decide and cannot decide, is going to make it exceptionally difficult, and if we come to a
9 situation where we get to September and the Tribunal takes the view “Well actually we can
10 only go this far” and it will all depend on the facts in the end as they are found in the next
11 procedure, where have we got? In our submission, in an ideal world, of course, one would like
12 the whole thing to be decided, it has taken a long time and we understand MasterCard’s
13 concern about that, but there is a real risk in any case where the facts and the principles and the
14 law here, and the economics are all intertwined. It is in our submission a very risky course for
15 the Tribunal to seek to pick out principles in circumstances where there is going to be in any
16 event the matter remitted to deal with the new MasterCard arrangements and the Visa
17 arrangements.

18 THE PRESIDENT: Mr. Sharpe at the moment invites us not to pick things out just to decide the
19 whole shooting match.

20 MR. MORRIS: To which my answer is that as a matter of principle that is not something which is
21 appropriate, but we will leave that to one side. As a matter of practicality from Visa’s point of
22 view Visa would not wish effectively to be giving up its right to an administrative procedure.

23 THE PRESIDENT: Which it would not be.

24 MR. MORRIS: Well it would if all the substantive issues were being decided. If the at par issue was
25 being decided that issue would be determined, if it were decided that an ‘at par’ system was a
26 viable proposition.

27 THE PRESIDENT: That would be our view on whatever it was we had before us at the time. As in
28 many cases, there are very many cases – take newspapers, for example, the *Aberdeen Journals*
29 case set a framework and dozens of other newspapers were not there at the time and had no
30 way of having an input but that was the framework it set. That is the way the system works,
31 there are precedents and for other people sometimes it is not completely satisfactory, but you at
32 least have the chance to participate in the proceedings as fully as we can make it. It may well
33 be – and again we are going a bit further than we probably can go at the moment – to take a
34 specific example in relation to your fear that we need a lot of detail about how the Canadian,

1 Dutch and Danish debit card systems work, it may be that we do not actually really need to go
2 into that beyond knowing that there are various systems around the world on some 'at par'
3 basis which are in different countries and are not credit card systems.

4 MR. MORRIS: Mr. Green referred to the sort of evidence that he would be attempting to get in
5 relation to that and said that we can make comments on the at par system but in that time will
6 not be able to run full econometric models and put forward to you the full case we would do
7 had we got an administrative ----

8 THE PRESIDENT: Well he is keeping his options open ----

9 MR. MORRIS: He is.

10 THE PRESIDENT: -- which is not entirely satisfactory, I see that point.

11 MR. MORRIS: Yes, and we are saying as we currently see matters, we are not in a position to waive
12 our entitlement to do what we would want fully to do in an administrative procedure.

13 THE PRESIDENT: Well nobody is inviting you to do that.

14 MR. MORRIS: With respect, Sir, if it were the case that the Tribunal went ahead, then for the matter
15 to go back to the OFT for us to put in fuller evidence and for the matter then to come back to
16 the Tribunal on the same point about whether an at par system was viable we would suggest
17 with respect would be a rather odd result and one which the Tribunal would find rather
18 difficult to deal with. It is not really satisfactory for there to be two different Rulings about the
19 'at par' counterfactual from this Tribunal – one in this case and one in the Visa case.

20 THE PRESIDENT: Yes.

21 MR. MORRIS: I am not sure if I can take the matter further.

22 THE PRESIDENT: So what is your position?

23 MR. MORRIS: Our position is that we do say it is a new case. We say that probably has to be ----

24 THE PRESIDENT: So what of your three alternatives do you go for?

25 MR. MORRIS: We are suggesting course 2, subject obviously to a condition upon determination
26 that it is a new case – sufficiently new ----

27 THE PRESIDENT: Which we would have to have argued not to day but on another occasion.

28 MR. MORRIS: Unless everybody accepts here today that it is a new case. If everybody accepts ----

29 THE PRESIDENT: Well the Tribunal is not in a position to accept that at the moment.

30 MR. MORRIS: Well that is our position.

31 THE PRESIDENT: Yes.

32 MR. MORRIS: Thank you.

33 THE PRESIDENT: Yes. Sir, Jeremy?

1 SIR JEREMY LEVER: May it please the Tribunal. First, we at any rate are grateful to the Tribunal
2 for its observations at the beginning of the hearing today. What you said was not wholly new
3 to those of us who have been thinking about it, but those considerations have not yet been
4 considered by the Chairman and Chief Executive of the Office, and quite clearly they are going
5 to have to be considered by them. Before I say anything more, you say to me “What are you
6 going to ask us to do about this?” I tell you what I would suggest that you do, permission had
7 been sought to file Replies, we have not opposed that. My learned friends have made it clear
8 that it is not just a permission of which they may not avail themselves, they will avail
9 themselves of it. When the Replies have been filed that is the moment when the Tribunal will
10 be very much better placed to take stock of the position and to decide what, from its point of
11 view, on the basis of the fuller material then before it, is best.

12 Perhaps I can now say a few words about how we find ourselves where we are.

13 THE PRESIDENT: Yes, that would be helpful.

14 SIR JEREMY LEVER: When we said that the Decision is indicative and not dispositive that is
15 because it relates to arrangements that are no longer in existence.

16 THE PRESIDENT: Well it is still dispositive as to what the situation was as regards those
17 arrangements.

18 SIR JEREMY LEVER: That is absolutely true and would have civil consequences in relation to
19 private law actions if they were brought; that is absolutely right. But as a matter of public law
20 it was declaratory but it did not say “You must stop”, it did not impose fines – it could not do
21 because there was in this case ----

22 THE PRESIDENT: Well it did not say “you must stop” because the arrangements had changed.
23 There were no directions because the agreement was then in the past.

24 SIR JEREMY LEVER: Absolutely. So when we came to file a Defence, we had Notices of Appeal,
25 we had to think about everything. We concluded that the proper course was to set down what
26 the Office accepted was the best basis on which to defend its conclusions.

27 THE PRESIDENT: But I have still not got my head around this “indicative but not dispositive”
28 point, because a decision is a decision.

29 SIR JEREMY LEVER: It is a decision.

30 THE PRESIDENT: And that is your decision. It is a decision to find that this agreement falls within
31 s.2 and does not qualify for exemption under s.9.

32 SIR JEREMY LEVER: That is right, and the Office adheres to the conclusion and the Decision that
33 the MIF attracts the operation of Article 81(1), the Chapter I prohibition, and the existing one
34 is not capable of exemption under Article 81(3).

1 THE PRESIDENT: When you say the existing one, you mean the one up to 2004.

2 SIR JEREMY LEVER: Yes, the one with which the Decision was concerned. It is true and I do not
3 in any way seek to shrink from saying this, that in some respects the route by which one
4 reaches that conclusion in the Defence differs from that taken in the Decision. The difference
5 may not be as great as is suggested and the case set out in the Defence is basically a very
6 simple one. If I can just say briefly a word about that?

7 If you want to participate in the MasterCard scheme, and I use the present tense rather
8 than constantly going back ----

9 THE PRESIDENT: Yes.

10 SIR JEREMY LEVER: You as an acquirer know that you are going to have to pay an interchange
11 fee unless you can persuade an issuer bilaterally to waive it. That is a rule of the scheme, and
12 the effect of that is that something like very, very roughly £400 million per year is paid by
13 acquirers to issuers. If you add to that the Visa corresponding figures and you look at credit
14 card interchange fees I surmise you are likely to get to about a billion a year. That money gets
15 drawn from – I am very careful not to use emotive terms – merchants because it is passed on of
16 course as a common cost by acquirers to merchants. The Office’s position is that the level will
17 matter because it may be that at a certain level you can say you have to have such a level or it
18 has real advantages if you have such a level, such that either you can rely on necessity or you
19 can rely on the four conditions enunciated in 81(3) being satisfied. That has not been shown in
20 the present proceedings. It might be in relation a new MIF, but it has not been shown in
21 relation to the one with which the Decision is concerned.

22 It is a very, very simple case indeed that is advanced in the Defence. It is a different
23 case in the sense that one reaches the conclusions by a different route. When we embarked on
24 this exercise we ----

25 THE PRESIDENT: Can you just help me, Sir Jeremy, in relation to this different route – is the route
26 an alternative route to the route reached in the Decision, or is it in substitution for?

27 SIR JEREMY LEVER: It is in substitution. I think one sees that in particular in relation to the
28 question of arbitration. Of course, if an issuer and an acquirer bilaterally agreed “We ought to
29 have some interchange fee because there is a real advantage as between us if we do, and if we
30 cannot actually agree it we will submit it to an arbitrator”, and that was entirely bilateral of
31 course that would not attract the operation of Article 81(1). However, if you have a scheme
32 under which you are going to have to pay an interchange fee as a rule of the scheme unless you
33 can persuade the issuer to waive it, and in the end it might be set by an arbitrator, you might

1 nevertheless be exposed to this collectively imposed liability. So there one sees that the
2 reasoning in the Defence is in substitution for the reasoning in the Decision.

3 THE PRESIDENT: If we just move away from arbitration to the idea of bilaterals. The reasoning in
4 the Decision was based on the idea that a collective agreement to have an interchange fee that
5 moved from acquirer to issuer would not necessarily infringe Article 81 if the level of that fee
6 were set by bilateral negotiation, although the principle that there should be a fee, and that that
7 fee should flow from acquirer to issuer was nonetheless still a collectively agreed principle.

8 SIR JEREMY LEVER: The counterfactual said that unless and until you have agreed an interchange
9 fee it is, as you call it, a trading at par, costs lie where they fall. But the counterfactual
10 envisaged that these bilaterals would all be made and no view was expressed about the level of
11 interchange fees that would emerge from the bilateral negotiations and with arbitration in
12 default the present arbitration – as I see it – is not arbitration at all, it is that MasterCard sets
13 the fee, but something is left in about the possibility of arbitration if they do not agree. That
14 was in the counterfactual and in the Decision and it is not in the counterfactual in the Defence.
15 The route is therefore different.

16 THE PRESIDENT: Perhaps I need just to go back to the Decision and look at it again. But it seems
17 to the Tribunal that there are at least three separate issues: first, should there be an interchange
18 fee at all, and as I understand it the ‘at par’ argument in the Defence is saying that you do not
19 actually need collectively to agree anything you can just simply do it at par. The second
20 question is assuming there has to be some collective agreement is the collective agreement that
21 the fee is (a) zero, (b) flows from the acquirer to the issuer; or (c) flows from the issuer to the
22 acquirer, and as Professor von Weizäcker says you cannot *a priori* rule out any of those
23 possibilities.

24 SIR JEREMY LEVER: I think it is perhaps not quite like that?

25 THE PRESIDENT: No, good, well thank you for helping me.

26 SIR JEREMY LEVER: The Defence takes the position and retains two ways of looking at it, one is
27 the collective price restriction, the other is the extraneous costs.

28 THE PRESIDENT: Well let us not worry about the extraneous costs for the minute.

29 SIR JEREMY LEVER: The collective price restriction says that if you have an agreement that a fee
30 must be paid, unless you can persuade bilaterally an issuer to waive it and say “No, I do not
31 want one” but otherwise it has to be paid, howsoever it be fixed, then if you want to maintain
32 that in place you have to justify that under 81(3). You may be able to, we express no view
33 about that, you have to look at the fees that it has actually set and you will have to look at the
34 justifications and see whether each of the four conditions are satisfied. The extraneous cost

1 restriction says that you might have a collectively agreed interchange fee that was set at such a
2 level that it did not have the effect of preventing, restricting or distorting competition and at
3 that level would be – if one goes down the extraneous cost restriction road – one appropriate to
4 a payment transmission card. In the administrative procedure when payment transmission
5 costs were mentioned MasterCard said that would be frightful and would destroy any
6 substantial interchange fee. When they come to this Tribunal they say that it is actually not too
7 bad, it is about the same today. That is the reason why the Office’s position has changed and it
8 says “If you look at a level that is appropriate to payment transmission the best thing from
9 which to start is the very, very much lower debit card level – Maestro in MasterCard’s case
10 because that is now their debit card. So that is the way the matter develops and one
11 recognised that one was putting forward a different argument, an argument in substitution to
12 arrive at the same result ----

13 THE PRESIDENT: Sorry, can I just go back for a moment? My first question, I just leave it there
14 for the moment because it will be I think apparent from the Decision, in the counterfactual
15 assumed in the Decision, which was a bilateral negotiation, was the underlying assumption in
16 that bilateral negotiation that we were talking about a fee that flowed from the acquirer to the
17 issuer, or was that in itself part of the bilateral negotiation – i.e. whether it was something that
18 flowed from the issuer to the acquirer as well as the possibility of it flowing from the acquirer
19 to the issuer? Do you see what I mean?

20 SIR JEREMY LEVER: Yes. I think I would have to look very carefully at the wording.

21 THE PRESIDENT: Because it is not at all clear at first sight to the outsider which way this fee
22 should flow.

23 SIR JEREMY LEVER: No, no, and I would need to look very carefully at the precise words of the
24 Decision.

25 THE PRESIDENT: Well let us park that problem for the moment, that is one point I just wanted to
26 flag up. The second point, when I ask you whether it was alternative or substitution, the
27 Appellants in their documents make it perfectly clear and invite us to believe that bilateral
28 negotiation is something that is encouraged, so why is it that the Office is backtracking off that
29 possibility?

30 SIR JEREMY LEVER: I think that the Office saw that to say to people you cannot participate in the
31 MasterCard Credit Card Scheme unless you make an agreement with the issuer to pay an
32 interchange fee, you cannot participate as an acquirer, that that was, as it were, the root of the
33 evil, that is the problem, that that is the basic ultimate restriction, that is the rule. If you would
34 allow me one moment? (After a pause) It may be ----

1 THE PRESIDENT: It may be the rule, but why are you now saying that bilateral possibilities should
2 be left out of the count for the purposes of deciding how that rule operates?

3 SIR JEREMY LEVER: The Defence does not rule out the possibility of bilaterals, people are free
4 to make bilaterals if they are genuine ----

5 THE PRESIDENT: Well that is why I want to clarify whether this was an alternative case or a
6 substitute case?

7 SIR JEREMY LEVER: In the sense that it leaves it – and the Office could not object – to people,
8 issuers and acquirers genuinely and bilaterally making agreements with each other about
9 payments one way or the other, those would be independent agreements entered into on a
10 normal commercial basis and in that sense certainly what is said in the Defence is alternative, it
11 does not exclude that possibility and indeed, for various reasons I am not in a position to say to
12 you absolutely unqualified – and this can be another complication – that what is said in the
13 Defence is wholly in substitution for what is in the Decision.

14 THE PRESIDENT: Yes.

15 SIR JEREMY LEVER: At this juncture it was indeed felt that it would be extremely useful, given
16 that the case made in the Defence is a pretty simple one, that it would be very useful to get the
17 views of the Tribunal even though we realise that there were significant differences in the way
18 in which we got there. Having said that ----

19 THE PRESIDENT: Simple, but new after five and a half years of administrative procedure.

20 SIR JEREMY LEVER: Yes, that is so. What you said this morning is going to have to be
21 considered very carefully by the Office, because indeed it would not be in the public interest if
22 we get to September/October – at that point it is not quite clear what mixture of Mr. Morris's
23 course 1 and Mr. Morris's course 3 is actually envisaged by Mr. Green – there is a bit of
24 difficulty about that – that we then get an Appeal to the Court of Appeal; that we then get,
25 perhaps running along beside it, a reference by this Tribunal or the Court of Appeal to
26 Luxembourg. We possibly get an appeal to the House of Lords, and that all this time the
27 current arrangements continue in place and, if my arithmetic is right, and whether it is a billion
28 pounds per year or less than a billion, large sums of money are passing via acquirers from
29 merchants to the banks, and the merchants do not like it, and the Office of Fair Trading has
30 formed the view that at the present level it is strongly against the public interest.

31 THE PRESIDENT: But whatever we do, if your clients withdrew the Decision, or said that they
32 wanted to bring these proceedings on in parallel with any Appeals that may be made against
33 any further decisions that are in the pipeline, that would still involve an administrative delay
34 which, judging on past performance may be quite considerable.

1 SIR JEREMY LEVER: Yes, and that is why I would suggest that the Tribunal should indeed take
2 stock of the position after the Replies have been filed. In the meanwhile we will take
3 instructions at the highest level from the Office of Fair Trading, but at that stage the Tribunal
4 will be in a very much better position to take stock of the position and to judge which of the
5 courses ideally identified by Mr. Morris is appropriate and whether one needs to tighten up on
6 the definitions and, if so, how, so that we do not find that if the case goes forward to
7 September/October that we suddenly find that we are not in agreement about the basis on
8 which the hearing was being held.

9 THE PRESIDENT: That approach would involve quite a considerable investment by the Appellants
10 in the Replies without quite knowing what was going to happen.

11 SIR JEREMY LEVER: I understand that and that I why I have been careful to say that at that stage
12 the Tribunal would be in a position to take stock of the position, but I will of course take
13 instructions in advance.

14 THE PRESIDENT: And if we look at Mr. Morris's three possibilities, no one seems to be arguing
15 for number one in its purest form, that is to say we simply carry on, we deal with the case as it
16 is made in the Decision and nothing else, ignoring or not taking account of new material. The
17 MMF Appellants seem to want to do a sort of number one plus exercise that would, to some
18 extent, bring in the new materials but basically regard this as an Appeal still on the existing
19 Decision although quite how far that goes at the moment remains obscure. Maybe they can
20 clarify it but it is not completely clear at the moment. Visa is quite clear that they want
21 number 2, and MasterCard International is quite clear that they want number 3. Do you have a
22 position as the Respondent as to which is the desirable one?

23 SIR JEREMY LEVER: I am saying that if the Tribunal is to take the Decision the right course is to
24 decide which is the desirable one when it has read the replies.

25 THE PRESIDENT: Forgive me for pressing you, but ----

26 SIR JEREMY LEVER: I would need to take instructions.

27 THE PRESIDENT: You have no instructions.

28 SIR JEREMY LEVER: Not on that issue given what has been outlined by you today, which it is
29 right to say these were matters that had not wholly escaped our attention but I do not have
30 instructions on them. We are concerned with public expenditure, but also public interest.

31 THE PRESIDENT: We spent a lot of money today on a matter on which you have not got any
32 instructions and it is quite expensive, Sir Jeremy.

33 SIR JEREMY LEVER: Unfortunately the Chief Executive has not been available this week, that is
34 the reason for that, it is unfortunate but there it is.

1 THE PRESIDENT: Visa put these submissions in – it is true they only came on 27th March – but
2 there has been quite a lot of time for people to think about this crucial issue.

3 SIR JEREMY LEVER: On this crucial issue we have formed a very definite view, a submission,
4 that the time for the Tribunal to take a Decision on them, and you cannot take one before then,
5 is when the Replies are in. It is unfortunate that if the Replies lead to the conclusion that Mr.
6 Morris’s number 2 course should be adopted, well the Replies will have served a very useful
7 purpose in that sense. But it would be unfortunate. Therefore, in that sense I have had clear
8 instructions that that was the best thing that we could submit today to the Tribunal being the
9 right course for the Tribunal to adopt.

10 THE PRESIDENT: You are probably, in general terms, familiar – Mr. Turner certainly is very
11 familiar because he argued the cases – with the Tribunal’s existing case law as to the kind of
12 considerations that come into play when we are considering whether to go on with a case that
13 has broadened and deepened in the course of an Appeal, which often happens, and when we
14 are actually faced with a significantly new change, where we say “We cannot short circuit the
15 administrative procedure”, and it must surely have been possible for the legal team to consider,
16 in the light of what you say the changes in the Defence are, which side of that particular line
17 this case tends to fall.

18 SIR JEREMY LEVER: I think we have given considerable weight not only to that case law, of
19 which we are well aware, it presents problems so far as this case is concerned, but also the
20 points made by Mr. Green, that if it be possible to bring on for a productive hearing in
21 September/October that will really help everybody to see their way forward as to the future,
22 then there is a strong public interest in trying to do it.

23 THE PRESIDENT: Well we have a lot of sympathy for that point of view – a lot of sympathy.

24 SIR JEREMY LEVER: That is a consideration that we have taken into account. All we can say at
25 the moment from “What should the Tribunal do?” is wait until you have seen the Replies and
26 then let us take stock of that, you can take stock of the position.

27 THE PRESIDENT: Speaking as it were off the cuff and personally, my personal overall approach
28 would be to try to minimise cost and to assist a speedy resolution of whatever issues we have
29 and to bring this case as far forward as we conveniently can as expeditiously as we
30 conveniently can. But, we have to make sure that the right to be heard – in whatever form that
31 right is respected – is indeed respected.

32 SIR JEREMY LEVER: There the problem as to whether we are really asking the Tribunal to take a
33 new Decision. That is the problem. I understand that ----

1 THE PRESIDENT: It is not something that we would necessarily shrink from doing if we had the
2 material available to do it.

3 SIR JEREMY LEVER: Again, I suggest that it would be easier to take that decision after one has
4 seen the replies. I understand it would be appreciated if we could have a few minutes'
5 adjournment so that I can take some further instructions ----

6 THE PRESIDENT: Yes, of course.

7 SIR JEREMY LEVER: -- in light, in part, of what has been said this morning, but I am not
8 promising to come back and tell you the course that we would today recommend.

9 THE PRESIDENT: No, well we are very happy to give you that time. I know this has been quite
10 hard work, but it may be useful just to hear Mr. Robertson's position before we break, if you
11 would be so kind, but just let me say whatever your instructions may in the end be, I think in
12 the end it is going to have to be up to the Tribunal to decide what is going to happen. Thank
13 you very much indeed. Yes, Mr. Robertson, sorry you have had to wait so long.

14 MR. ROBERTSON: I can be very brief. It will come as no surprise to the Tribunal to learn from
15 our written observations that BRC's position is that we would vote for the third of Mr.
16 Morris's options. We think the Tribunal is likely to be in a position to hear the case at the end
17 of September/beginning October, and it would be able to take a meaningful decision.

18 Just in light of some of the Tribunal's observations earlier on this morning, you said
19 there were certain other factual matters that you wanted to get to the bottom of, things like
20 MSCs, you raised the possibility of a site visit, if we can put arrangements in hand without
21 waiting for the Replies to come in ----

22 THE PRESIDENT: Absolutely, yes.

23 MR. ROBERTSON: If you want to ask first questions of retailers about information, MSCs, we will
24 be happy to provide it. As for site visits, we would be happy to co-operate in arranging for a
25 suitable site visit from the retailer perspective. A similar site visit was done in the store cards
26 inquiry, for example.

27 THE PRESIDENT: That is helpful, thank you, Mr. Robertson. In that case we will rise, shall we
28 come back at a quarter to one and then see whether or not we are going to take an early lunch?
29 We will rise on that basis.

30 (The hearing adjourned at 12.30 p.m. and resumed at 12.45 p.m.)

31 THE PRESIDENT: Yes, Sir Jeremy?

32 SIR JEREMY LEVER: I hope that the further instructions that I have taken enable me to answer
33 your question more constructively. What course would the Office itself at this stage like?

34 THE PRESIDENT: Yes.

1 SIR JEREMY LEVER: And it is subject to seeing the Replies. Subject to seeing the Replies,
2 provided that the basis of the hearing in September/October can be sufficiently clearly defined
3 – the parameters sufficiently clearly defined that we do not run a serious risk of running into
4 great difficulty at that hearing on the basis “Oh we cannot go into any of that” because that is
5 outwith the Decision, something of that kind; providing we can avoid any misunderstanding at
6 this juncture, and providing there is not the danger of an Appeal on the basis that the hearing
7 should never have gone into those questions, the Office would favour a hearing such as would
8 enable the Tribunal to say “We are satisfied that the conclusions reached in the Decision that
9 the MMF attracted the operation of Article 81(1), that conclusion is correct, and we are
10 satisfied that it was not capable of exemption under Article 81(3)”, or certain conditions would
11 still need to be proved in order to reach those conclusions, if those facts were established and
12 that would establish it, otherwise not. If we can have a hearing in which the Tribunal has a
13 sufficiently free hand to do that then the Office believes it would be desirable.

14 THE PRESIDENT: Or the opposite, presumably.

15 SIR JEREMY LEVER: Or the opposite.

16 THE PRESIDENT: In other words, in your submission sufficient to decide whether or not it fell
17 within s.2, whether or not it qualified for exemption under s.9, and possibly indicatively if we
18 were able to get that far, assuming that it did not qualify for exemption under s.9 what sort of
19 things might qualify for exemption under s.9?

20 SIR JEREMY LEVER: Absolutely. If there can be a genuinely productive hearing that enables
21 people to go forward (both the Office and the parties) with a much better informed view,
22 because we have the Tribunal’s view, about how this case should be approached, that would be
23 a real plus, and the Office accepts that subject to the parameters being sufficiently clearly
24 defined that we are not at risk of scrapping on procedural questions, either in this Tribunal, or
25 in the Court of Appeal then it is a good thing and that we should look at the Replies very
26 carefully for that purpose. I hope that is helpful.

27 THE PRESIDENT: Yes, thank you. Yes, Mr. Green, I think we may need to consider this a little
28 over the luncheon adjournment. I think we should stay with it for the time being and see if we
29 can reach some sort of conclusion. At the moment we have a reasonably clear indication from
30 MasterCard International, British Retail Consortium and now OFT as to what they would like
31 to do. I think we can understand your position up to a point, but it is a somewhat ambiguous
32 basis upon which to proceed as I have so far understood it and I may not have understood it yet
33 completely.

1 Insofar as I think you were telling us that you would not, by the end of May, be able
2 to deal with the case in the sort of detail that you would do were the Defence a Statement of
3 Objection, that possibility (assuming we are not deciding was a difficulty) could be met by
4 giving you some more time, and it may be better to bring this case on even later than presently
5 envisaged rather than stop it altogether and send it back, for example, if you had until the end
6 of July, or you had until the beginning of September, or whatever. I know that is not
7 desirable from a number of points of view, bearing in mind among other things, the public
8 interest to which Sir Jeremy referred us, but that sort of point I would have thought could be
9 accommodated in a case management sense. But if we were to go on, and we have not
10 forgotten at all Visa's submissions, we would need absolute clarity as to what the parties
11 agreed the scope of what it was we were deciding was, and that we were in a position to decide
12 it on a fair and proper basis as far as at least the principal appellants were concerned.

13 MR. GREEN: The position that we are in at present, setting aside the question of time to put in
14 further evidence, is this: we believe we have ample time in order to put forward evidence
15 which will demonstrate that the OFT's par case is deficient in logic, that it is inadequate in
16 terms of the assumptions made, or the facts which were asserted ----

17 THE PRESIDENT: I am sorry, I am just taking a note – “deficient in logic, inadequate on facts” ----

18 MR. GREEN: That it is riven with unproven assumptions, and I would describe that as almost “JR
19 merits” loosely, it is attacking the logic, consistency and adequacy of the case put forward.
20 That is an exercise which we are well able to do within the next seven, eight weeks. If, on the
21 other hand, we were to put in what one might call Competition Commission style evidence –
22 we of course do not have the burden of proof, it is the Office of Fair Trading who has the
23 burden of proof to establish a breach of ----

24 THE PRESIDENT: That is one of the issues in the case, at what point does the burden of proof
25 shift?

26 MR. GREEN: If, on the other hand, it was being suggested that what we needed to do was first of all
27 to examine quantitatively the extent of the increase in costs to be borne by issuers, and then to
28 address the extent to which issuers can make up lost revenues from elsewhere given the
29 different types of banking models that we are dealing with.

30 THE PRESIDENT: This is on the debit card basis?

31 MR. GREEN: Costs lie where they fall.

32 THE PRESIDENT: If the costs lie where they fell what would the effect of such a rule be vis-à-vis
33 your members.

1 MR. GREEN: Exactly, yes. That may take us longer because it is a more complicated exercise.
2 Now, it is not to say that we will not be addressing that by 26th May. We will be identifying
3 and discussing that issue, but we see a difference between what I have loosely described as the
4 JR merits, which is attacking the Defence as it presently stands, we think we can do that
5 adequately. But if you were going to take the decision we think that the par system is perfectly
6 adequate in every respect. For example, could we take the risk of not going out and collecting
7 information on Netherlands and Denmark, or Canada and the US. We can collect a certain
8 amount of information, but do we need witnesses of fact. In the same way that in relation to
9 Sweden there were witnesses of fact about the Swedish system. That is what slightly troubles
10 us, but that is why we think ----

11 THE PRESIDENT: As at present advised we are rather doubtful whether it is actually going to be
12 useful to have evidence about Denmark and the Netherlands and Canada.

13 MR. GREEN: You may be right, we do not know at this stage. That is part of the problem. There is
14 a great deal of common ground it seems to us now that the Appeal can go ahead, as Sir Jeremy
15 put it “there is a real plus” in it going ahead, there is important guidance which can be given.
16 We can go ahead and deal with the issues in the Decision, both legal and factual and we can
17 deal pretty substantially with the issues in the Defence. One of my problems is that, having
18 embarked upon the process of collecting evidence, we are not quite certain how far we are
19 going to get within seven or eight weeks. We have started on it, we have the economists
20 working on it and we are speaking to the banks. It is a process we are actively engaged in and
21 it may be, come May, we will be fully in a position to deal with everything we wish to deal
22 with, but we are at an early stage.

23 The common ground between us all, save Visa, is that there is great benefit in this
24 matter going ahead. We would invite the Tribunal to decide now that the matter can go ahead
25 – can go ahead definitively – MC, MCI seem to wish to put in every bit of evidence that they
26 think is relevant to rebut the burden of proof, well you will have that.

27 THE PRESIDENT: We have a clear position from MCI, we know what their position is.

28 MR. GREEN: And our position is that we will be putting in s much as we feasibly can by May 26th.

29 It may be as much as ----

30 THE PRESIDENT: Well it is very difficult for any court in the Tribunal’s position to say “We will
31 hear the case on the basis of what the parties can feasibly put in in the time available” rather
32 than “We will hear the case on the basis of the evidence that it is appropriate to hear the case
33 on”, and if you need more time to put it in then I think we will have to let you have the time,
34 because we cannot really embark on something that is neither the one thing nor the other. We

1 are either going to decide this case on as full as possible a basis we can, or we will send it
2 back, basically.

3 MR. GREEN: Well as you know, we have absolutely no desire at all for it to be sent back at this
4 stage?

5 THE PRESIDENT: No, you cannot have it both ways, I think.

6 MR. GREEN: Well with respect I am not asking for both ways. We are simply in the position, and
7 it may be that extra time will sort this out, but we are not in the position to know at the moment
8 whether we will have completed the full scale review that we need to do within that timescale
9 – maybe we will. When one actually breaks down this par system, and you actually strip it
10 down into its constituent parts and analyse it, we do not think it is even half-baked, it has not
11 even identified where the flour and the water is. Identifying that and explaining to you in
12 sufficient detail that you understand it, and understand the factual basis of that, takes quite a lot
13 of effort. We have different categories of bank and have to analyse the impact of shifting all
14 the costs on to the issuers' side of, and so on. But we certainly do not wish this matter to be
15 dealt with peremptorily, and if the Tribunal takes the view that it wishes to have as full
16 evidence as possible then we will do what we can to meet that objective, undoubtedly. It
17 maybe then it is really a question of timing.

18 THE PRESIDENT: We would not want to get ourselves into the position where your clients were
19 doing the best they could in the time available and saying "Well, if we had had more time we
20 could have done more."

21 MR. GREEN: We hear exactly what you say about that. That is not satisfactory. If you want more
22 time to do what it is you think you want to do then, depending on an argument about how
23 much time you really do need, it would be better on one view to continue the proceedings on
24 an elongated timetable than to run the risk of lack of clarity as to what it was we were deciding
25 and on what basis we were deciding it when we get to a hearing.

26 MR. GREEN: Well I understand that. Since it is two minutes to one, can we come back at 2
27 o'clock?

28 THE PRESIDENT: I think we had all better come back at 2 o'clock. If the Royal Bank of
29 Scotland's case develops in the meantime, Mr. Hoskins, you will let us know I am sure. I have
30 to hand down another Judgment at 2 o'clock, so we had better say ten past two.

31 (The hearing adjourned at 1.00 p.m. and resumed at 2.15 p.m.)

32 THE PRESIDENT: Yes, Mr. Green.

33 MR. GREEN: We have now had an opportunity to discuss matters and let me make the position
34 clear. We would propose to serve evidence by 26th May. We will put in our full response to

1 the Defence. If, perchance, we need more time we will ask for it but for the moment we will
2 work to 26th May. On this basis we will invite – and do invite – the Tribunal to rule that the
3 case goes ahead, that the Office of Fair Trading’s highly caveated position following the
4 receipt of Replies is, we submit, quite unacceptable. In other words, the OFT are not in a
5 position to say that if they do not like our rebuttals because it demolishes their Defence, they
6 want to wriggle, that we are in this mess because of their conduct, we want the matter to go
7 ahead, we will deal with their Defence fully in our Reply evidence. We would like to keep the
8 dates that we already have pencilled in at least free provisionally with a CMC in the second
9 half of June.

10 THE PRESIDENT: When you say “deal with it fully” you mean put in your answer?

11 MR. GREEN: We will, and I think what it actually means, and it is probably as well that I try and be
12 as specific as I can as opposed to the implications of this, it seems to us that once we put in our
13 full evidence all arguments are open to us of whatever nature at an Autumn hearing, save only
14 that we will not submit that a particular option is unavailable to the Tribunal because we have
15 not had enough time or enough opportunity to address the Defence, which I think is the gist of
16 the issue.

17 THE PRESIDENT: Just say that again?

18 MR. GREEN: We will not submit that a particular option is unavailable to the Tribunal because we
19 (MMF) have not had enough opportunity or time to address the Defence. In other words, we
20 are not going to take a procedural point that we have not had a proper opportunity to address
21 the Defence and therefore for some reason an option is not available to the Tribunal.

22 THE PRESIDENT: So do I understand that to mean that as far as we can see at the moment you are
23 not taking procedural points, full stop. The case is going on as on the basis of the defence and
24 your reply to that defence?

25 MR. GREEN: I think that is right, I do not want to beg the question of what is meant by “procedural
26 points”, but for the avoidance of doubt it would remain open to us, as it would in any civil or
27 commercial trial, to simply say that the OFT has not proven its case. It only remains open to
28 us to submit that on all the evidence, including the full rebuttal of their Defence.

29 THE PRESIDENT: Yes. The points that remain open to you obviously remain open, but you are not
30 saying that any specific procedural points that might, or could perhaps be taken as a result of
31 the way this case has developed are not going to be taken on your client’s case?

32 MR. GREEN: I think that is right. I have not got my mind around whether there is anything outside
33 of my concession which flows from the fact that we might not otherwise have had any time. If

1 we have had enough time and enough opportunity to meet the Defence, which we now accept
2 we will have had, there are no procedural points we can take from that.

3 THE PRESIDENT: No.

4 MR. GREEN: And I do not think there are any other procedural points floating around – I cannot
5 think of any.

6 THE PRESIDENT: We will assume, unless we hear to the contrary by, say, the end of next week
7 that you are renouncing procedural points.

8 MR. GREEN: I think you are absolutely right, we will just need to see whether there is anything ----

9 THE PRESIDENT: As I think MasterCard International has already done, and no doubt the Royal
10 Bank of Scotland will tell us what its position is if it is in any way different. But that gives you
11 time to make sure that whatever step it is you are taking in full knowledge.

12 MR. GREEN: Yes, I think that is right, but I am grateful for just having a bit of time to think that
13 through.

14 THE PRESIDENT: Of course, although it does not necessarily resolve what we are going to do, but
15 never mind, that is your position.

16 MR. GREEN: That is our position. We believe that so far as Visa is concerned, it should be entitled
17 to have a full opportunity to address the issues, and I should be subject to the same timetable.
18 It is a perfectly reasonable timetable which the Appellants believe they can utilise sensibly. So
19 far as site inspections are concerned we think the solicitors can correspond with the Tribunal
20 after the hearing on that, and we will come up with some sensible suggestions as to what might
21 be useful.

22 THE PRESIDENT: Yes, that will be helpful, that can be done through the Registry in the normal
23 way.

24 MR. GREEN: Exactly.

25 THE PRESIDENT: Let me go back to the OFT. How does that strike you, Sir Jeremy? One
26 obvious problem that arises is that if they come back with a whole load of stuff on your
27 Defence, then are you going to want another opportunity to put something in and then where
28 does it all stop?

29 SIR JEREMY LEVER: I was going to make two comments, Sir. The first was that as I understood
30 my learned friend, but I may have misunderstood him, he is not reserving the “right” to say
31 “Oh the Office of Fair Trading is not entitled to run that case because it departs substantially
32 from the Decision”. As I understand it, he is content to address the case that is made in the
33 Decision, which is the case that I shall be putting to the Tribunal.

34 THE PRESIDENT: A case that is made in the Defence, or in the Decision as read with the Defence.

1 SIR JEREMY LEVER: Yes. But insofar as there is a difference between them I shall be addressing
2 you on the basis of the Defence.

3 THE PRESIDENT: As I understand it, Mr. Green is not taking a procedural point.

4 SIR JEREMY LEVER: We together understand that.

5 THE PRESIDENT: That is my understanding.

6 SIR JEREMY LEVER: Yes, and with regard to the other question, I can only say you heard what,
7 on instructions, I said before the short adjournment, but when we read the Reply and the
8 material that is filed with it, I have to reserve the position to make whatever application may be
9 necessary to the Tribunal. I cannot at this stage foresee precisely what that might be, and I
10 need just to say that but that is inevitable, I think.

11 MR. GREEN: Can I clarify Sir Jeremy's first point? I am not certain what he means by "pointing
12 out inconsistencies", it seems to me that is ----

13 THE PRESIDENT: As a matter of argument on the substance you would, I would have thought, be
14 entitled to say "Look, they said that in the Decision, they now say this in the Defence,
15 goodness knows, Tribunal, it is all a lot of whatever" as a matter of submission in the polite,
16 articulate and reasoned sense that we are customarily addressed. But what I understand you to
17 be saying on behalf of your clients, is that no one will take the procedural point that says "No,
18 Tribunal, you simply cannot look at that way of addressing this case, because it is not in the
19 Decision."

20 MR. GREEN: That is right, we will be pointing out inconsistencies, we will be making the normal
21 forensic range of submissions. We will not say to you: "You cannot look at it because it is not
22 in the Decision".

23 THE PRESIDENT: Thank you. Is that your submission too, Mr. Hoskins?

24 MR. HOSKINS: It is, Sir, yes.

25 THE PRESIDENT: Thank you.

26 MR. SHARPE: Sir, may I make one point?

27 THE PRESIDENT: Yes, please, Mr. Sharpe, and then I will come to Visa who is dying to say
28 something.

29 MR. SHARPE: It is really a point to try and reconcile Sir Jeremy's submissions about the
30 relationship between the Decision and the Defence. For our part, and I suspect the others, it
31 would be immensely helpful if one of my friend's learned Juniors could go through the
32 Decision indicating those elements of the Decision paragraph by paragraph on which they no
33 longer rely, rather than us having to guess, and then Sir Jeremy saying "Well actually the

1 Defence takes precedence". We think that would be consistent with the practice elsewhere and
2 it would be the most useful and expedite the business of assembling our replies.

3 THE PRESIDENT: Well any clarification the OFT can usefully give on that point would obviously
4 be welcomed.

5 MR. SHARPE: And if it could be furnished to us as soon as practicable because I think it would
6 help us in our Reply in the tight timetable that I think we are dealing with – tight but
7 manageable timetable.

8 THE PRESIDENT: Yes. On that last point, Sir Jeremy, I am still slightly in the dark as to which
9 bits are really alternatives and which bits are really substitutions. Without making matters
10 more complicated than they are on, for example, a point like the bilateral point, I personally
11 read your defence more as putting forward another way of looking at it, rather than a wholesale
12 abandonment of the position as was set out in the Decision, but I think it would be useful if
13 your clients could, perhaps within 14 days, clarify vis-à-vis the Appellants, give the Appellants
14 the kind of clarification they are seeking.

15 SIR JEREMY LEVER: We will, of course, look at that very carefully. We will tell them within 14
16 days what, if anything, we feel that we can usefully do. If they are dissatisfied they will no
17 doubt come back and complain to you.

18 THE PRESIDENT: Yes. Well anyone can apply at any moment to us about anything.

19 SIR JEREMY LEVER: Exactly. I do not want to give any undertakings today, but that is how we
20 would propose to deal with that.

21 THE PRESIDENT: Yes, thank you. Now, Mr. Morris, can I just elaborate on how we feel in broad
22 terms at the moment? As we see it, the question of how far the Defence differs from the
23 Decision and how far there really is a change of heart, and how far there is a fundamentally
24 new situation is going to be more conveniently addressed once we have the Replies, rather than
25 having to address it now – that is the first point. If, at that stage, or at the present stage if you
26 persuade us to the contrary, there is still a real issue either in our own minds or by reference to
27 an application by one of the parties, for example Visa, that it really is too difficult and we
28 should send it back, we would then set a date for that matter to be argued as a separate matter
29 in which we would then go in detail into the question of whether there really has been a
30 change, what the significance of the change is, and whether there is a prejudice to the rights of
31 the Defence in hearing it. On the kind of timetable that the Appellants at least are suggesting at
32 the moment, which is Replies at the end of May, that is an issue that we would probably have
33 to hear, if it was still a live issue, say, at the end of June or some point like that, and that is

1 when we would decide that point (if that point were still being pursued for example by Visa).
2 That is how we are seeing the situation at the moment, if that helps you at all.

3 MR. MORRIS: I am grateful for that indication. If I may I will take some instructions in a moment
4 on that indication. Can I make one initial observation on that, and it is this. On the assumption
5 that Visa had maintained its position that this case is a new case, which certainly as I stand
6 here today, we do, certainly in the light of the very clear statements made by Sir Jeremy Lever
7 earlier, where he used the words “in substitution”, and we will not go there but he recognised
8 that this is a case “in substitution.”

9 That approach is in some ways helpful because it leaves it open for us to make that
10 case, leaves us also in a quandary about what we do at the Reply stage. Does Visa spend the
11 next two months rushing around trying to deal with the substance of the at par issue, because it
12 might turn out to be its last shot at it for ever and a day, or does it say “No, it is all right, we
13 will wait. We will put in a Reply” which is actually tantamount to a detailed argument about
14 why it is a new case, and what the consequences are of that new case, by reference to the
15 Tribunal’s jurisprudence to date “*Napp*” in particular, and I do not need to say any more. That
16 puts us in a difficulty and it is for that reason that we said right at the outset of today’s hearing,
17 and we rather got the impression at that stage that the Tribunal itself was not averse to that
18 situation, we think that the preferred course is actually to resolve that issue before Replies are
19 put in. When people say “Replies” that term has a mixed meaning in this Tribunal, does it
20 mean a reply in a pleading sense? Or does it mean reply evidence? It means reply evidence
21 generally. Although as I have said I will take instructions, I would submit that that solution,
22 whilst not necessarily the worst solution from our position, does raise a difficulty, a real
23 difficulty.

24 It may be that we will say “Actually, we are not going to put in any evidence on it, we
25 are not going to deal with a new case. Our Reply is going to be the case for why this is a new
26 case, and why it cannot go any further”, and that thereafter if you were to rule in June against
27 us on that point then one gets to the next stage about evidence, but then really all you have
28 done then is actually shift the timetable further down the line, whereas if one had a hearing,
29 say, within the next month (if that were possible) on this issue, you are actually going to save
30 time in the end. That is my initial reaction, but if I may just turn around and take some
31 instructions, those are the observations I have. (After a pause) Indeed, the only point I would
32 add is that the observation was made earlier today by Mr. Green that they could not do a proper
33 job on the at par, now I understand what his position is and that is his prerogative, but we
34 certainly feel that not only would two months be enough anyway, that is one question, but we

1 do not really want to be put in the horns of that dilemma. We do submit, Sir, on the basis of
2 what has been said today by the OFT, and on the basis of the case law that there is a very big
3 issue here. It may well be, and we understand the Tribunal's concern, the difficult position it is
4 in, and we totally understand the position of everybody else in the room "We will just go ahead
5 because that is the sensible solution". That is not a solution which commends itself to Visa
6 from its point of view, but moreover, it is a solution which does have big consequences for the
7 relationship between the Office of Fair Trading and this Tribunal's jurisdiction, and what one
8 can and cannot do with a Decision. Those are important issues. I do not propose in the light of
9 the observations I have just made to develop that. Ultimately we would want a reasoned Ruling
10 on this point and we would want to have the opportunity to make full argument on it.

11 **THE PRESIDENT:** Let me give a provisional indication as to the way I think our minds are
12 working, and then we will have to go around the table and see what the reaction is to your
13 submissions. First, if this case, as advanced in the Defence, is likely to figure in the OFT's
14 thinking, either in the present proceedings, or in other administrative proceedings, some work
15 on that has to be done anyway at some point, so it might perhaps be the case that the work that
16 has to be done is not going to be wasted.

17 Secondly, there are fairly self-evident public interest issues in taking any ultimate
18 decision as to whether we are going to go on with this case on the basis of as full information
19 as we possibly can. At the moment it is not wholly clear to us, and will not be clear, so we
20 think, until we get the Replies, how far there is so fundamental a divergence between the
21 Defence and the Decision that we really are obliged to have the whole thing re-done at the
22 administrative stage.

23 Thirdly, if we continue with the Replies we are at least making reasonable use of the
24 time available, and if we just stop now and put the thing on hold until whether we have decided
25 whether we are going to do anything, by the time we have had that hearing, had a detailed
26 argument and given a Judgment about it, if we then go on we will in the meantime have lost
27 quite a lot of time. That is balanced against the work that may have to be done in the
28 meantime on the Replies. But putting into the balance that that work may not be wasted in the
29 end, whatever the procedural outcome of this case, it seemed to us at the moment on balance
30 better to go ahead with the Replies, while keeping open the option still of sending it back once
31 we have heard argument on that point.

32 As far as the replies are concerned (specific replies) there may well be scope for
33 discussing exactly what sort of shape of document the Tribunal would need – and Sir Jeremy
34 will no doubt hear what we say – for example, we think it somewhat unlikely that we will need

1 to know in detail how the Danish, Canadian and Dutch debit card systems work insofar as
2 such information is not publicly available in public documents, or what the Decision of the
3 Reserve Bank of Australia was, what has developed in Australia, other than what is on open
4 shelves. So we do not actually envisage a very full investigation by the Tribunal of
5 comparables in international jurisdictions as distinct from grappling with what is, at the end of
6 the day, a relatively simple issue (both of principle and law) which is: are there alternative
7 scenarios in which the scheme could work as a scheme with the existing rule? Then,
8 depending on the various scenarios addressed in the Defence, etc., does the existing rule
9 produce benefits that nonetheless entitled it to either show that it does not fall within s.2 or
10 qualifies under s.9? Those are, I think, issues that can be addressed without undue
11 complication. That is our general feeling, but you may want to come back on it and obviously
12 we would need to hear the other parties on this timing question.

13 MR. MORRIS: Just to take your example of the other jurisdictions, and I understand why you are
14 saying what you are saying, but at the moment the OFT's case as it stands places reliance upon
15 those other systems as being evidence that the at par system is "workable", "viable" or
16 whatever they say it is, and while they continue to rely upon that evidence we have to
17 investigate it, or may have to investigate it. If the OFT were to indicate, well actually they no
18 longer rely on that, or the Tribunal was going to give such a steer to the OFT that you would be
19 very interested in that, that may be another matter. But that does not deal with the problem of
20 what we need to do in the time available. Obviously we will go around the table in the room
21 and I will take instructions, and it may be that we will come to a judgment as to how best we
22 want to play the Reply, what we say in it, the way we argue it, whether it is the argument that
23 we have had today fully expanded, and the extent to which we go further, and the extent we
24 explain to you why we have not been able to do it in the time available. That may be the
25 solution.

26 However, Visa does submit that this is a very clear change and that the law is pretty
27 clear. We are concerned that if the matter is not clarified we will drift into a hearing in
28 September where everything is up to grabs without a delineation beforehand of what is or is
29 not, and we do not want that to happen.

30 THE PRESIDENT: I see that, and we are not unsympathetic to the points you make.

31 MR. MORRIS: I am not suggesting you are unsympathetic, but given the mood of the room I wish
32 to make those points and make sure ----

33 THE PRESIDENT: No, quite right, and it is a very difficult conundrum where there is no obvious
34 way of squaring this particular circle.

1 MR. MORRIS: Yes, and there is a question ultimately of whether the parties by consent can give
2 this Tribunal jurisdiction which it otherwise does not have.

3 THE PRESIDENT: It would be up to us in the end to decide whether we have jurisdiction in the
4 light of the reasoned argument on the changes, consideration of our existing jurisprudence
5 either in its existing or some modified form.

6 MR. MORRIS: Yes, that is the point I make. I will sit down and take instructions, perhaps ----

7 THE PRESIDENT: But we do not actually want to decide that now until we have got the replies,
8 that is the point. Just before you do sit down – sorry to keep you on your feet a moment longer
9 – certainly as far as our provisional view is concerned in relation to international comparisons
10 it might or might not be helpful to know that there is a debit system in operation in some other
11 countries that works on this alleged basis, but we do not actually think it is very helpful –
12 going to be likely to be very helpful – to us to investigate in any detail those systems, because
13 we are dealing with **this** system, and **this** case.

14 MR. MORRIS: That is interesting.

15 THE PRESIDENT: And in general international comparisons are fraught with difficulty anyway.

16 MR. MORRIS: Yes.

17 THE PRESIDENT: So there we are. What shall we do? Shall we go round and see what the
18 position of the parties is on Visa's position while Mr. Morris is taking further instructions?

19 MR. GREEN: Mr. Morris says there are some clear legal principles here. There is another very
20 strong legal principle which applies in the civil courts when a party is applying for a stay,
21 which is that a claimant or a plaintiff is entitled to have his/her case heard. We have a
22 statutory right to challenge the Decision, which is dispositive, and which may have civil
23 consequences, and each and every one of the Appellant wishes this matter to go ahead, and it is
24 a very strong thing indeed for an Intervener to derail statutory rights of Appeal, particularly
25 when that Intervener is not being denied a full opportunity to participate and protect its
26 interests to the same degree in these proceedings. We are certainly not saying that they should
27 be limited, they should avail themselves of the same opportunities as we have to put in a full
28 response to the OFT Defence. If we can do it there is no reason why they cannot do it.

29 Once replies have been submitted we will, I anticipate, even more strongly submit to
30 you that the matters should then go ahead. We will have incurred much more substantial costs
31 and a great deal of effort and, yes, it may be the case that the work would not be wasted, even
32 if it were remitted, but we will be a long way down the line – not far in date from a hearing –
33 and we will wish the Tribunal to rule upon our submissions.

1 Finally, a postscript so far as comparables are concerned. You may have noticed that
2 the Australian Competition Tribunal said precisely the same thing in relation to its *F Post*
3 Judgment, that the position in relation to other Member States, other countries which are
4 simply different ----

5 THE PRESIDENT: Merchant service charges in South Africa, I seem to remember. Yes.

6 MR. GREEN: Thank you.

7 THE PRESIDENT: Mr. Hoskins?

8 MR. HOSKINS: Nothing to add.

9 THE PRESIDENT: Mr. Sharpe?

10 MR. SHARPE: I am in complete agreement with Mr. Green.

11 THE PRESIDENT: Yes, Sir Jeremy? How does the OFT see the position of Visa in this situation?

12 SIR JEREMY LEVER: On this issue we find ourselves in agreement with Mr. Green, that if Visa,
13 having read the Replies, believes that it is right to go down course 2, to bring the matter to a
14 halt at that juncture it really must make a formal application to that effect then. Anybody who,
15 at that juncture, feels in the light of the Replies that that is the right course needs to do it then,
16 when they have read the replies. Otherwise, we get into the very position that you rightly said
17 at the beginning of the day that one would want to avoid, we may go through the whole of this
18 procedure, get a very carefully considered Judgment of this Tribunal, and Visa then goes to the
19 Court of Appeal and says "They should not have done it". That would be very unfortunate
20 indeed.

21 If they feel very strongly that the procedures before this Tribunal should come to a
22 halt – if anybody feels that very strongly – then after consideration of the Replies that is the
23 moment that they are going to have to say so.

24 THE PRESIDENT: Yes. Could I just, in picking up one or two of Visa's concerns, explore with
25 you the following. The expert evidence put in by Doctor Carlton and Professor Frankel in part
26 is economic analysis and, in a sense, analytical and theoretical evidence of the kind you would
27 expect from economists and, in part, is actual factual evidence invoking various systems in
28 various other countries, and all that sort of thing which, if it were to be relied on by the Office
29 as evidence, would in the ordinary course of events need to be substantiated in some way, need
30 to be proved, or agreed or something, and would or might need some sort of factual
31 investigation. In the normal way one would not allow pure factual evidence in via the route of
32 an expert economic economist's report, because it is a very indirect way of bringing primary
33 facts to the Tribunal's attention. So we are wondering very much as to whether we need to go

1 into those sorts of examples that those economists draw to our attention, other than note that
2 they exist as a background matter.

3 SIR JEREMY LEVER: I will be corrected if I am wrong but I think they have always given the
4 source for the statement. They have always referred to a published document that provides the
5 material in question. I believe it is never a question of “I happen to know that”.

6 THE PRESIDENT: No, no, I am not suggesting that they have, but what we are trying to avoid, I
7 think, or what we would wish to avoid, if it is possible, is a sort of satellite investigation as to
8 what exactly does happen in Canada or Denmark – I think Mr. Summers will recall from the
9 *Premier League* case when there was a lot of evidence about what happened in Mexico, and
10 what happened in Uruguay and so forth and so on, it is not actually of much use at the end of
11 the day to this Tribunal deciding what is to happen in the United Kingdom in the
12 circumstances we have now got with a credit card scheme.

13 SIR JEREMY LEVER: The problem, I think, for the economist is that the economist is essentially
14 an animal who observes what happens in the real world, and if he deals with the whole thing
15 completely *a priori*, there is a danger that he will deal, if I may say without sounding as though
16 it is objectionable, in theory but there is absolutely nothing in practice – is there – to indicate
17 that these theoretical aspects ----

18 THE PRESIDENT: No, but it is your job as the competition authority to say “Yes, we are the
19 competition authority and we very much approve of the way they do it in Denmark, and that is
20 what we rely on, as you did in the Decision in relation to Sweden and Australia now
21 abandoned, rather than produce an economist who says “Actually, they have a bright idea in
22 Canada”.

23 SIR JEREMY LEVER: One of the first things we will do after this hearing is to go and look at any
24 international comparisons or data to which Professor Carlton and Dr. Frankel refer and that is
25 something we have to come back to you about as to whether we think it is useful for the
26 Tribunal to know that there is that Judgment in place, or that Decision in place or not, but that
27 is something we will do.

28 THE PRESIDENT: Well we may have to give a direction on this sort of evidence, theoretical,
29 economic evidence etc., is one thing but primary evidence about what happens in other
30 countries is widening it out very considerably.

31 SIR JEREMY LEVER: Yes, well we will take note of what you said and think about it, and see
32 whether we can come forward with something constructive and helpful.

33 THE PRESIDENT: Thank you. Yes, Mr. Robertson?

34 MR. ROBERTSON: Nothing to add.

1 THE PRESIDENT: Yes, Mr. Morris?

2 MR. MORRIS: Can I make two observations. One is in response to the point that you have just
3 raised. The point you make about the factual evidence being now adduced through an expert
4 about the at par systems in other parts of the world, we would submit it is precisely the sort of
5 area of investigation that the administrative procedure at the first stage is about, and it is
6 precisely for that reason that we say that actually this new case should go for an administrative
7 procedure, because in those circumstances the OFT could have done what they did in relation
8 to Sweden, they could go and get their evidence, put that evidence to the parties, and the
9 parties would have an opportunity to respond and have a full factual inquiry. So we say the
10 point you raise actually supports our point about the appropriateness of it being dealt with here.
11 Just for your note, para.110.1 of the Defence is effectively the entirety of the case of the at par
12 and the evidence relied on, and that evidence is Professor Carlton's evidence. But that is a bit
13 of a side swipe and an immediate reaction.

14 On a more general issue of where we are going, I think Visa is content to go down
15 the route that you are suggesting but as presently advised Visa will be seeking a Ruling on the
16 issue of whether this is a new case and what the consequences are, and although I would
17 imagine we will be making our case for that in the Reply, but we will be seeking such a
18 Ruling.

19 THE PRESIDENT: Well as Sir Jeremy has just pointed out if anybody does wish to seek a Ruling of
20 that kind it is much better that it is done now.

21 MR. MORRIS: I am putting a marker down now, partly in response to Sir. Jeremy and I do not
22 disagree with him, it is certainly something that I could not recommend that we would leave
23 until September. I am sure that if I came to you in September you would not be very pleased
24 to hear it.

25 THE PRESIDENT: We need to have clarity on this issue.

26 MR. MORRIS: Yes, and so do we.

27 THE PRESIDENT: And so do you. We probably need to decide it around about the end of June
28 anyway, so we know where we are before we get into the Summer and all the rest of it.

29 (The Tribunal confer)

30 THE PRESIDENT: Mr. Morris, in case it was not clear, the way our mind is working is that if the
31 Replies, which I think are the Replies in the wide sense that you indicated, were working to the
32 timetable of the 26th May with people being entitled to ask for further time if that really does
33 prove too tight, if in the case of Visa that were to include an application to stay the Appeal and
34 remit the Decision to the Office, if that continues after reflection to be Visa's position it would

1 be convenient if that application were made in the Reply so that we could then start the process
2 of dealing with it as a separate issue.

3 MR. MORRIS: I can see that. Can you just bear with me one moment.

4 THE PRESIDENT: But I do not want to commit you to actually making it, then that would be the
5 time to do it.

6 MR. MORRIS: I can see the sense of rather than putting a Reply in and then a week later putting in
7 an application – I do not think we have any ----

8 THE PRESIDENT: That is only a formal point.

9 MR. MORRIS: I think it is sensible. Can I just take instructions for one moment?

10 THE PRESIDENT: Yes, of course.

11 MR. MORRIS: (After a pause) The other question which I want to flag is this, which I did raise a
12 moment ago, namely, the question of whether or not – assuming we take the view that we take
13 then we do make the application, whether at the same time we would be expected to be
14 meeting the evidence on the assumption that application failed, or whether or not we would
15 then – if the application did fail – have an opportunity thereafter to put in such evidence as was
16 necessary. There is this point about do we have to do the work now in any event?

17 THE PRESIDENT: Well I am hoping, since everybody else is doing the work you would be able to
18 do the work too. That may well be a certain amount of duplication, but for the reasons that I
19 have already outlined we cannot arrive at a wholly satisfactory conclusion for everybody. We
20 are very open to the idea of giving directions about the scope of the evidence that would be
21 helpful to us and we are not attracted by the idea that you can slip in evidence via an expert
22 economist's report and expect us to take that evidence as primary evidence.

23 MR. MORRIS: I have made the point, we will do our best.

24 THE PRESIDENT: So can we leave it that you will do your best and if you get into difficulties and
25 want to come back to us and say “Look, this is frankly impossible, we have got into a very
26 difficult situation” then we will listen.

27 MR. MORRIS: And I am effectively putting a marker down, as it were, asking for that to be noted,
28 and we will consider our position no doubt in the next few days as to where we are going to go.
29 I am grateful for that, Sir.

30 THE PRESIDENT: Thank you very much for your help, Mr. Morris. So I think where that probably
31 takes us in the light of the discussion is that we simply need to direct as far as today is
32 concerned, that the Appellants and the two Interveners will serve such replies as may be
33 advised by 26th May, and it may be difficult to make any more precise directions at this point.

34 MR. GREEN: I do not think BRC have anything to reply too.

1 MR. MORRIS: They are on the other side.

2 MR. GREEN: They are on the other side, yes.

3 THE PRESIDENT: They are indeed on the other side.

4 MR. ROBERTSON: I was not envisaging putting in a reply at this stage.

5 THE PRESIDENT: Thank you, Mr. Robertson, that gets me out of that difficulty, thank you very
6 much. (Laughter) I suppose technically they could have done something, but never mind, they
7 do not want to. Yes, Mr. Morris?

8 MR. MORRIS: Sir, there is one other matter which I have failed to mention, which was to very
9 much endorse Mr. Sharpe's suggestion and to urge the OFT to give this clarification about ----

10 THE PRESIDENT: What is alternative and what is in substitution.

11 MR. MORRIS: What in the Decision is still pursued and what is not. That may make our position
12 also ----

13 THE PRESIDENT: Well that is a very useful facet of going on for the time being I think.

14 MR. MORRIS: Yes, although I am not sure Sir Jeremy gave an undertaking I am trying to give a
15 little bit more force to that suggestion.

16 THE PRESIDENT: If you want an order from us – I do not know whether we need an order or not,
17 Sir Jeremy – but our understanding is that you will, within 14 days, indicate to the Appellants
18 and the Interveners any paragraphs of the Decision that are either not relied on or relied on in
19 only a qualified way, indicating what the qualification is.

20 SIR JEREMY LEVER: I was not quite that definite!

21 MR. MORRIS: That is what I thought.

22 THE PRESIDENT: Well let us see how definite we can get.

23 SIR JEREMY LEVER: What I said was that we would, within the 14 days, indicate whether that
24 was something that we thought could be done. (Laughter)

25 THE PRESIDENT: Now come on, come on.

26 SIR JEREMY LEVER: I do not want to say that we will do it because the Junior to whom it is
27 entrusted may come to me and say “Look, it is perfectly clear on the Defence what the case is
28 ...” (Laughter) He may say “Do we rely on this paragraph of the Decision in connection with
29 the Defence as put?” You can see circumstances in which we might and we might not. What I
30 simply do not want to say on the hoof, without having looked at the problem and sized it and
31 seen whether it is practicable, oh yes, we can definitely do it. I have clearly got the message
32 that you would like to see it done. Clearly if we do not do it I have to come up with some very
33 good reasons why we are not doing it. I just do not want to be committed.

34 THE PRESIDENT: Yes, thank you.

1 (The Tribunal confer)

2 THE PRESIDENT: I think, Sir Jeremy, we will not actually make an order, but we very strongly
3 hope and expect that within 14 days you will give some clarification to the Appellants as
4 indicated and if that is not done it may be we will have to give the Appellants more time and so
5 forth. But it really is now time at this stage for the Office of Fair Trading to either put up or
6 shut up and make absolutely clear what its position is. Is that understood as clearly as I can
7 politely indicate? I think the answer is “yes”.

8 SIR JEREMY LEVER: I do not know that it will be done quite as has been suggested, but I have no
9 reason to suppose that something that is not perfectly adequate cannot be produced. It is
10 simply that I do not want today to commit to doing something which proved technically very
11 difficult.

12 THE PRESIDENT: We could make an order, but we will not make an order on the basis that you
13 are going to make your best endeavours to produce the clarification that the Appellants seek.

14 SIR JEREMY LEVER: Absolutely, I am very much obliged, Sir.

15 THE PRESIDENT: Are there any other issues?

16 MR. SHARPE: Sir, the direction about the division between expert economic evidence and factual
17 evidence, I think it was left somewhat vague.

18 THE PRESIDENT: It is left somewhat vague, and I am not sure the Tribunal has had an opportunity
19 to think through what that would mean or would entail.

20 MR. SHARPE: Well should we proceed on the basis of ignoring the evidence in our Replies until
21 we have had some guidance?

22 THE PRESIDENT: Well it is difficult for us to give guidance without looking in detail at what the
23 reports say and what is relied on and all the rest of it. But the general thought is as follows:
24 the primary role of economic evidence is to help us and the parties on what sound economic
25 principles apply in a given situation would involve. We would not normally see it as
26 appropriate to introduce via that route primary facts which are relied on in their own right as
27 primary facts from which we can draw factual conclusions about the way things work or not
28 work. So as at present advised, beyond noting that around the world there are various systems
29 which apparently work in a certain way if they are debit systems, we do not at this stage –
30 subject to any further direction – require the parties to go into the details of those systems that
31 are sought to be introduced into evidence.

32 MR. SHARPE: Thank you very much, Sir.

33 THE PRESIDENT: Is that reasonable for the moment? If there is a change in that situation we will
34 have to alert you to it and give you time to deal with it.

1 SIR JEREMY LEVER: I might just say this, we do not want a situation in which it is said “You
2 have come up with some theoretical arguments, so far as you are aware there is not a single
3 place anywhere in the world where such a system operates at par”.

4 THE PRESIDENT: It can be agreed, it could be said “We agree that here is no credit card system in
5 the world that operates at par, but there are a number of debit systems in various countries”.
6 That is all we need to know, or whatever it is.

7 SIR JEREMY LEVER: If it is possible to agree that, that may help, but we do not want a situation in
8 which because the economists are not allowed to mention a fact of which they are aware ----

9 THE PRESIDENT: No one is suggesting that they are not going ----

10 SIR JEREMY LEVER: I am sure you are not.

11 THE PRESIDENT: -- to be allowed to suggest it, but what we do not want at the moment at least,
12 subject to further reflection, is the sort of evidence we have got at the moment about Sweden,
13 which says that “Oh well Sweden is explicable for all these sorts of reasons”. We just do not
14 want to go into that unless somebody says we absolutely have to.

15 SIR JEREMY LEVER: I have had painful experience in the past myself, Sir, of getting embroiled in
16 foreign ventures.

17 THE PRESIDENT: “Abroad” is a very dangerous place, Sir Jeremy. (Laughter) We should stay well
18 away from it.

19 SIR JEREMY LEVER: “Abroad is bloody”.

20 THE PRESIDENT: Well, that may be going a bit far, but anyway.

21 MR. GREEN: Can I just clarify on that point, and we are very grateful for the indication, there is no
22 need for our economist to address fully – or even at all – foreign comparables, but we are not
23 precluded from mentioning them, because there are one or two points which apparently arise,
24 for example, I think in Denmark which apparently are positively helpful. But we do not want
25 to be precluded ----

26 THE PRESIDENT: No one is precluding anybody from doing anything.

27 MR. GREEN: We fully understand the sentiment.

28 THE PRESIDENT: The general principle is that we are not necessarily going to be helped by
29 detailed factual investigation into foreign systems in other countries, and that is probably as
30 best we can do at the moment.

31 I think the only other point that is left from our somewhat ragged agenda is the issue
32 of costs, which we did raise on our agenda and about which it is probably at this stage very
33 difficult for us to do or say anything very much, except we continue to be very exercised by the
34 costs of this case, especially any additional cost that may be incurred by hearings like today,

1 and we continue to exhort the parties to minimise costs where possible, bearing in mind there
2 is a very strong public interest in these proceedings that is likely to affect any orders of costs
3 (if any) that we might make at the end of the day, but beyond that I think it is very difficult to
4 go at this stage.

5 Are there any other observations, applications or comments before we adjourn?

6 SIR JEREMY LEVER: Sir, there is a difference between the Office and the Appellants at the
7 moment I think as to the utility of a structured discussion of experts, and no concluded view
8 can be formed until one has seen the replies. On the other hand, it could be useful to pencil in
9 a date because the people concerned are all busy and may have other commitments. The dates
10 that I now have written down, in the light of the 26th May decision for filing of replies to the
11 Office of Fair Trading Defence and to BRC's intervention, perhaps 12th and 13th July would be
12 a convenient time – if there is to be a structured discussion – for the economists to come. It
13 would enable the Tribunal to ask them any questions that it had to clarify economic issues.
14 That is one point I think you may want to reinstate into the agenda.

15 Another point is that it may be useful to pencil in a further CMC following after 26th
16 May. A possible time period for such a CMC would be week commencing 19th June – if
17 possible I would be very grateful if 21st June could be avoided for personal reasons, but one
18 day that week. It may be helpful to think about that before we separate and I think that for the
19 substantive hearing that affects Mr. Morris in particular, and I think it affects Mr. Christopher
20 Carr, as to whether the hearing for the second half of September, or the end of the last week of
21 September should be adhered to or put back which would help my learned friend, Mr. Morris.
22 In light of everything it might be prudent to reserve two weeks on the basis one would hope it
23 would not take that long, but if it did not take that long the time I am sure would be welcome
24 so far as the Tribunal was concerned, because while things were fresh in its mind it could start
25 to make progress in giving Judgment.

26 THE PRESIDENT: Thank you. Your solicitude, Sir Jeremy, is much appreciated. (Laughter)

27 SIR JEREMY LEVER: I think the question of core bundle can best be addressed after Reply. I
28 know my learned friends feel that it would be a sterile and costly exercise, but perhaps that
29 could be left over. Constraints on costs we certainly would welcome and, of course, we are
30 very conscious of the fact that we, the taxpayer – that is how I like to think of us – are involved
31 in that connection and insofar as my learned friends are able to make common cause and
32 allocate issues, that does help to keep costs down and make things more manageable.

33 There is one final, purely administrative point, that I would hope to have a discussion
34 with the Chairman and Chief Executive of the Office of Fair Trading next week. I had planned

1 to go away on the Friday, if it were possible to release to us, even in uncorrected form, a copy
2 of the transcript that might be helpful to have available at that meeting with the Chairman and
3 Chief Executive of the Office. I understand that amazingly the transcript should be with the
4 Tribunal by Monday night or Tuesday morning, and if it could be made available to us by
5 Thursday morning that would be an immense help.

6 THE PRESIDENT: The transcript will be available well before Thursday, Sir Jeremy, it will be on
7 the web on Tuesday at the latest.

8 SIR JEREMY LEVER: That takes that off my mind, I am much obliged, Sir.

9 THE PRESIDENT: Yes, Mr. Morris?

10 MR. MORRIS: As regards the one particular issue in relation to my particular circumstances in
11 September/October, obviously in many ways we do not know where we are going in this case,
12 it would nevertheless be helpful to me to have an indication as to whether this request was
13 something which was regarded by the Tribunal as a possibility or not, because that would
14 affect my arrangements for that time. Some indication of where the Tribunal is on this would
15 help. If it is the case that it is not on the cards I would rather know sooner rather than later.

16 THE PRESIDENT: Well the Tribunal's experience is that the Judicial Studies' Board, despite its
17 fierce outward appearance, is actually quite understanding and I would not in the ordinary
18 circumstance think that a Judicial Studies' Board engagement would prevail over the general
19 case management of the case as a whole – certainly from the point of view of an Intervener.

20 MR. MORRIS: I see that, Sir, and I am quite sure what Mr. Carr's position currently is, but my
21 understanding is that as far as everybody else was concerned nobody had a problem with it. I
22 hear what you are saying but if the Tribunal equally did not have a problem with it then I
23 would persist in the request.

24 THE PRESIDENT: It is rather difficult at the moment to be more precise about the hearing because
25 I think this case is still evolving at the moment.

26 MR. MORRIS: Very well, I raise it and I hear what you say.

27 THE PRESIDENT: All I am doing in response to what I took to be your request is giving an
28 indication that we would not normally regard a Judicial Studies' Board engagement as an
29 overwhelming reason for altering a date that we would otherwise fix.

30 MR. MORRIS: I am grateful for the indication.

31 MR. HOSKINS: May I say if necessary that it is an application that we would oppose because of
32 Mr. Carr's availability.

33 THE PRESIDENT: Thank you, Mr. Hoskins. We will rise for a moment to consult our diaries.

34 (The hearing adjourned at 3.15 p.m. and resumed at 3.29 p.m.)

1 THE PRESIDENT: As far as dates are concerned, we are minded to set aside June 19th and June 20th
2 – 19th for the next CMC, and if there is some application that we need to decide we will hear
3 that on the 20th.

4 As far as the rest of the dates are concerned, as far as the experts involved it is a little
5 early, I think, to tell exactly what we should be doing about that, but we will certainly invite
6 the parties to write to us with various possible dates and then we will sort that out behind the
7 scenes.

8 As far as the hearing itself is concerned, we are not yet in a position to say, until we
9 know whether or not there is going to be any application, whether there is going to be a hearing
10 at all, so I think the best course at the moment is to leave the provisional block that we have
11 (18th September for two weeks) and revisit that later. But if the main hearing is to proceed
12 that, at the moment at least provisionally, is the time slot that we would at this stage envisage,
13 so thank you for that, Sir Jeremy. Beyond that I do not think there are any further directions
14 we can usefully make.

15 Very well, thank you all very much indeed.

16 (The hearing adjourned at 3.30 p.m.)