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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 January 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

and

**MASTERCARD INTERNATIONAL INCORPORATED AND
MASTERCARD EUROPE SPRL**

and

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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HEARING (DISCLOSURE)

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 Incorporated and MasterCard Europe Sprl.

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

Mr. Jon Turner and Mr. Josh Holmes (instructed by the Solicitor, Office of Fair Trading) appeared for the Respondent.

Ms. Kelyn Bacon (instructed by Freshfields Bruckhaus Deringer) appeared for the First Intervener, Visa (Europe) Limited and Visa (UK) Limited.

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

1 THE PRESIDENT: Good morning ladies and gentlemen. I suggest we go round the table and see
2 what everybody's position is; five minutes each, Intervener, OFT and then Appellants. Yes,
3 Mr. Robertson?

4 MR. ROBERTSON: Mr. President, first of all, housekeeping matters, can I check that the Tribunal
5 have received a bundle for the hearing?

6 THE PRESIDENT: We may or may not have done, Mr. Robertson. We certainly have not consulted
7 it.

8 MR. ROBERTSON: It is the bundle which has the agreed schedule in setting out ----

9 THE PRESIDENT: Yes, bundle for hearing.

10 MR. ROBERTSON: The other housekeeping matter is, did the Tribunal receive a note?

11 THE PRESIDENT: Yes, thank you.

12 MR. ROBERTSON: The position is that, as set out in the note, we are applying for disclosure of
13 various documents.

14 THE PRESIDENT: We have read the note.

15 MR. ROBERTSON: The parties have made some progress. Some of our requests were acceded to
16 over the last couple of weeks, and we have withdrawn other requests.

17 You will see from the note that we have attempted to categorise the 39 requests into
18 two broad categories. At para.13 of the note, there are various documents for which we only
19 seek disclosure to our proposed confidentiality ring. Our confidentiality ring is counsel,
20 instructing solicitors, expert economists and a payment systems expert.

21 THE PRESIDENT: Yes.

22 MR. ROBERTSON: We seek disclosure of those documents simply because we do not see why they
23 should be withheld from a confidentiality ring. There is no problem about those documents
24 going any further. Any issue of confidentiality can be safeguarded in that way. It is going to
25 make practical preparation for the hearing much easier, and it will also make the conduct of the
26 hearing itself easier because there will not be times when counsel, solicitors, expert economists
27 have to withdraw while proceedings take place otherwise *in camera*. Those are those
28 documents.

29 The remaining documents, 27 requests, we have set them out at para.15 of the note,
30 and we set out what are our proposed headings for our Statement of Intervention.

31 It has been suggested that the British Retail Consortium is just here to offer moral
32 support to the OFT. That is very much not the case. The British Retail Consortium is best
33 placed in these proceedings to deal with the Appellants' assertions of the alleged benefits to
34 merchants of accepting MasterCard credit cards. From the merchants' perspective, as is set out
35 in the covering note, credit cards are an extraordinarily expensive way of accepting payment.

1 THE PRESIDENT: You envisage a fairly active Intervention?
2 MR. ROBERTSON: Active but focused and targeted only at those matters where the BRC is better
3 placed than the OFT to provide the Tribunal with factual information and submissions. We do
4 not anticipate overlapping or duplicating the OFT. That is very much not our brief. BRC does
5 not have an endless pocket to fund this litigation, so we want to be targeted and precise. That
6 is why we have pursued requests only for those matters where we can see the Appellants are
7 advancing a case that we think that we would be in a good position to respond to, but we
8 cannot at the moment see the underlying documents to which the Appellants referred.
9 THE PRESIDENT: The rest of the documents, if we just go on, would go to the confidentiality ring
10 and what you call this working group – is that right?
11 MR. ROBERTSON: That is right, to the working group and no further. The working group is
12 comprised of two persons ----
13 THE PRESIDENT: I think you are going to have great difficulty persuading us to make any order
14 regarding a working group at this point, Mr. Robertson.
15 MR. ROBERTSON: Right.
16 THE PRESIDENT: Your basic submission is that if these various things go to the confidentiality
17 ring, that can do no harm and it will help the case along?
18 MR. ROBERTSON: Yes.
19 THE PRESIDENT: Yes, thank you. What is the OFT's position?
20 MR. TURNER: Sir, we are not here to make detailed representations about any individual
21 documents. We want only to address the fundamental point of principle that has been raised
22 regarding the proper scope of the Intervention. Our point is that the proper scope of an
23 Intervention depends on the context of the case. This is a case where a big part of the
24 justification advanced by the Appellants for the collective agreement is that the merchants are
25 beneficiaries of the scheme. The Tribunal will have seen that the OFT is saying that the
26 merchants are victims of the scheme, and the merchants concur in that view.
27 THE PRESIDENT: Yes.
28 MR. TURNER: Sir, this is not a case of a new case being raised by the Office of Fair Trading on
29 Appeal, or anything like that. This is a recognition of the proper role of the BRC and their
30 ability to contribute to the Tribunal reaching the right result by seeing the documents which are
31 relied on in particular by the Appellants for the proposition that the merchants benefit from
32 their scheme. They need to be able to comment. It is difficult in advance for anybody, and
33 particularly for the BRC which cannot see these documents in full, to know whether they will
34 have something useful to say. Provided there are adequate confidentiality safeguards, the

1 OFT's position is that it is right in this case that the Intervener should be able to see these
2 documents.

3 We have only one further point which is that, in relation to the collective agreement
4 itself, there is a suggestion that the details of the agreement are to be treated as confidential
5 even though they are not confidential between the banks within the scheme – for example,
6 which categories of transaction have been agreed on and what the level of the agreed rate is.
7 Our position is that matters of that kind, which are aspects of the collective agreement itself,
8 should not be treated as confidential and that the BRC should have access to those documents,
9 or those details.

10 THE PRESIDENT: Thank you very much. MMF, I think, first, Mr. Green.

11 MR. GREEN: In brief, our position is follows: Mr. Robertson says that his submissions by way of
12 Intervention would be targeted and precise. This is not a fair characterisation of the
13 39 requests that we have had. Confidentiality is not going to be a solution to the problems
14 which arise because the issue is not who gets information, it is what BRC does with that
15 information.

16 THE PRESIDENT: How can they know what they can do with it until they have got it?

17 MR. GREEN: Well over 90 per cent of the documents in this case have already been disclosed. One
18 of our principal objections is that nowhere have we had an explanation, for example, of why a
19 particular percentage which has been redacted from one paragraph is remotely relevant to a
20 particular ground.

21 The scope of an Intervention, according to the Rules, is to address the issues in the
22 case. The issues in the case are set out in the Notice of Appeal. It is incumbent upon the
23 Interveners to say, "We wish to make a submission, for example, about Ground 7 in your
24 Notice of Appeal, this bit of information that you have denied us is relevant because ...". We
25 have never had that exercise which we have asked for on a number of occasions. Had we had
26 that exercise then we perhaps would have been more sympathetic to some of the specific
27 requests, but we have not been told why a particular piece of information is relevant to a
28 particular ground. What one sees in their schedule are claims such as, "We would be interested
29 in it, we need to see the case in the round, we can assist on such and such a point". There is no
30 linkage between the omitted information and the grounds.

31 THE PRESIDENT: So lack of particularity?

32 MR. GREEN: Lack of particularity, very serious lack of particularity.

33 A second objection: many of the 39 requests can properly be categorised under the
34 single headings and one of the most common requests against MMF is for what we view as the
35 "Crown jewels". This is all of the cost data which relates to the framework of the setting of the

1 interchange fee. A large number of requests simply trawl through the documents and say,
2 “Here is a figure which relates to that single issue, here is a percentage or a trend”.

3 THE PRESIDENT: This is the cost data on the basis of which the interchange fee is arrived at?

4 MR. GREEN: Indeed. It is the compilation of that figure, it is the computation of it, the allocation
5 of costs, trends in those costs. That is based on EDC costs studies which remain relevant
6 today. They describe the very structure of the myth and that is a vehicle which moves forward
7 in a relatively solid and inflexible form. It plainly changes over time, but if that information is
8 disclosed it gives what my clients see as the “Crown jewels”.

9 THE PRESIDENT: Are we not going to have to explain all that in our judgment?

10 MR. GREEN: Almost undoubtedly. You will need to address it in the questions relating to costs;
11 not all of it, because many of the issues that we have raised in our Notice of Appeal are what
12 we would describe as “issues of principle”.

13 Let me just slightly elaborate on what you will have to address. In relation to
14 extraneous costs, we have advanced a ground, and it is an important ground, to the effect that
15 the OFT have misdirected themselves as to an issue which they were required to investigate.
16 We have set out in considerable detail in a form which the BRC has seen in full what the point
17 is. One could describe it as a “process” point. We have adduced a short report from
18 Dr. Jenkins, which is described as “indicative”, demonstrating only that the point is a serious
19 one, it is not a flippant one, that if one actually looks at data which was in the possession of the
20 OFT it was an issue which was material and which they failed to address.

21 THE PRESIDENT: If we take, for example, the EDC costs studies, if it is the case that we are going
22 to have to deal with all that in our judgment, can you maintain at this stage confidentiality for
23 the whole study, which I think is what is being suggested at the moment, or is it something that
24 we are going to have to go into?

25 MR. GREEN: It is something which you will have to understand. You will not have to go into it in
26 an immense amount of detail, but you will have to understand it plainly. The Office of Fair
27 Trading is dealing with it. They have already posed requests for clarification to Dr. Jenkins,
28 who has already met with the OFT. The point which the Tribunal itself makes in its procedural
29 guidance is that an Intervener should not be there to duplicate issues which the OFT is
30 addressing. The cost data is not something that the BRC has particular expertise about. It
31 concerns the internal costs of banks. It is not something which directly relates to the skill and
32 expertise which a merchant representative body can bring to the appeal. The Office of Fair
33 Trading has already embarked upon this. They have, I think it is, nine economists working on
34 this case.

35 THE PRESIDENT: Nine?

1 MR. GREEN: Nine, eight from Lexecon and one from University College, London – nine
2 economists working on the case and a very experienced team of counsel, so they have 12 new
3 people who they have brought to the case and they have already started grappling with this
4 issue. It is inconceivable to us that the BRC can add anything valuable to this issue which the
5 OFT is not already going to bring to the table.

6 THE PRESIDENT: So point one was lack of particularity; point two is “Crown jewels”; and point
7 three is no added value?

8 MR. GREEN: Highly confidential “Crown jewels”, yes. Point four is that if the BRC is permitted to
9 have access to documents such as these, it is going to lead to a very substantial proliferation of
10 effort. We are told that the BRC wishes to produce empirical analysis. They have three
11 economists on their team. So we suppose that they will be producing their own expert opinion
12 evidence on these matters, and possibly factual evidence.

13 If that occurs, the three Appellants will almost inevitably have to respond to it. That
14 will be the three Appellants responding to whatever comes up from the Office of Fair Trading
15 and then over and above that new expert and/or factual evidence from the BRC. So we are
16 going to get a substantial proliferation of evidence. If the Office of Fair Trading is already
17 addressing these issues it is disproportionate to encourage the BRC, we would submit, to
18 reproduce the same arguments, replicate the same effort, which is then going to result in some
19 sort of inevitable spiralling of cost and effort. We could not have the situation whereby the
20 Appellants were not able to exercise their rights of defence in order to respond to new evidence
21 put in by a new party. So there will be a substantial spiralling of effort and energy.

22 The final point is that if this information is disclosed to BRC, there will then arise the
23 question of, “What do we do about Visa?” In principle, one could understand an argument
24 from Visa that there should be symmetry between disclosure, but it is inevitable that
25 confidential information which is disclosed to BRC which relates to our internal costs structure
26 may not be disclosed to Visa because they are competitors to MasterCard. We may very well
27 get a serious issue as to asymmetry of disclosure. That is simply going to add to the
28 complexity of the Appeal process. For example, in July, when the economists meet, we will
29 have economists nipping in and out of the room because the Visa economists are not allowed
30 to listen to argument X from the BRC economists. So an asymmetry of disclosure which could
31 very well arise will simply, we would submit, add to complexity.

32 THE PRESIDENT: What is the problem with a confidentiality ring at this stage?

33 MR. GREEN: A confidentiality ring is simply going to allow the information to go to the BRC. It is
34 not going to overcome the problem that they are going to duplicate because, in a sense, giving
35 them the material simply encourages them to duplicate. They say on the one hand that they

1 will not duplicate, but the nature of their schedule demonstrates that that is precisely what they
2 are going to do.

3 THE PRESIDENT: Thank you.

4 MR. GREEN: There is a technical problem with the extent of their confidentiality ring, which is that
5 one of the individuals – we can come to that at a later point – is someone who is an external
6 consultant who acts for banks and retailers and, if she came into possession of much of the
7 information we are talking about, we do not see how she could possibly wipe it clean out of her
8 mind in the future. That is perhaps a separate point.

9 THE PRESIDENT: That is a separate point and we will come to that later.

10 MR. GREEN: That is my five minutes.

11 THE PRESIDENT: Thank you very much, Mr. Green. Mr. Sharpe, you adopt all Mr. Green's
12 submissions?

13 MR. SHARPE: I would respectfully like to detain you briefly on some of my own, but formally of
14 course I underline Mr. Green's submissions and respectfully adopt them.

15 I think prudently, sir, we anticipated a brief opportunity to express our views and we
16 put them in writing on Friday in the form of a letter from Jones Day. Would you kindly
17 confirm that you have seen that?

18 THE PRESIDENT: I think we have seen it. You may need to take us to it.

19 MR. SHARPE: It is designed to inform the Tribunal and obviate the need for ----

20 THE PRESIDENT: Yes, we have read it.

21 MR. SHARPE: In which case I will not trespass any further on those points.

22 What I will now do is deal with two distinct things. First, let me underline one point
23 that Mr. Green made, which I think deserves further emphasis. This is the EDC study and the
24 role of the Tribunal. It has never been part of the Office of Fair Trading's case to go into
25 detailed accounting data of those matters which constitute the cost basis of the MIF. The
26 Office of Fair Trading's case has been based upon principle and they have drawn a distinction,
27 we say wrongly, between those costs which are payment system costs and those costs which
28 are extraneous costs. The Office of Fair Trading throughout these proceedings and in the
29 Decision say that once that issue of principle is established then the parties and the Office can
30 deal with the appropriate level thereafter. So, respectfully, it is no part of this Tribunal's
31 function to go into the detail, the accounting data, and so forth, of the EDC studies.

32 THE PRESIDENT: I think you are going to have great difficulty in persuading us not to look at the
33 underlying data in order to understand the principles that are being put forward.

1 MR. SHARPE: Sir, I accept that, but whether it is necessary in so doing to make judgments as to the
2 appropriateness of a particular level of a particular item of expenditure within that
3 I respectfully doubt. The Office of Fair Trading's case ----

4 THE PRESIDENT: There is quite a lot of evidence, not from your clients but from the Royal Bank
5 of Scotland, as to how one should approach these costs and the relationship between what are
6 said to be the interchange fees and what is properly attributable to processing and other
7 relevant costs.

8 MR. SHARPE: The fundamental issues remain issues of principle. Is it appropriate to divide costs
9 in this arbitrary way between extraneous costs and other costs? That goes to the heart of the
10 Office of Fair Trading's case.

11 As for the Intervention, the latest news this morning was the letter from Dechert of
12 26 January which contained in its (a) to (g) the basic reasons for their requests. They had not
13 at that time, nor until this morning, condescended to give any detail, a point which Mr. Green
14 made which I will not repeat.

15 I want to deal with one specific issue first, and that relates to (g), which I think refers
16 to the decision by MasterCard in November 2004 to make amendments to the MasterCard
17 International Rules.

18 THE PRESIDENT: Yes, we would be likely to be with you on that particular point, Mr. Sharpe.

19 MR. SHARPE: Thank you. I will not detain you any further on that. I think it is useful because it is
20 a prism through which we can see the extravagance of the Intervener's claims.

21 As for the other matters, I would bracket (a) and (d) as simply pointing to the same
22 issue, namely the proposition in their judgment that merchants secure no benefit and therefore
23 should not be obliged to pay any of the costs. Sir, that is not actually the Office of Fair
24 Trading's case. The Office of Fair Trading's case, not in dispute, is that individual merchants
25 will benefit from taking credit cards. Their case under the second head of exemption is that in
26 aggregate merchants as a class are not better off. It is a failure of comprehension. There is a
27 mile difference. One of the few differences in approach between MMF and MCI is that MMF
28 is prepared to defend the notion that there is an aggregate benefit, and it is on that that MCI
29 makes no comment.

30 THE PRESIDENT: Sorry, can you say that again? MMF says there is an aggregate benefit but MCI
31 does not ----

32 MR. SHARPE: MCI makes no positive case on that. It is prepared to rest its case in law on the
33 benefit accruing to individual merchants. That is simply (a) and (d).

34 There is a further contradiction in the Intervention. May I take you to their letter of
35 this morning?

1 THE PRESIDENT: The note, you mean?

2 MR. SHARPE: Yes. I will be very brief and in conclusion: the general thrust of our approach
3 which we expressed in the paragraphs we gave you on Friday is that it is an inappropriate and
4 extravagant intervention and their role should be somewhat more modest. In fact, time and
5 time again what they are seeking to do, having identified, assisted by us, weaknesses and
6 evidential gaps in the Office of Fair Trading's case, is come in and fill those gaps. I have to
7 say, sir, if the Office of Fair Trading attempted, in response to our Notice of Appeal, to do so
8 we would have the strongest possible objection to them doing so unless we had adduced new
9 evidence. What they are seeking to do, independently one assumes, is to fill the gap.

10 When it comes to their view on merchant benefit, which is such an important part of
11 the case – this is para.4 of their letter of this morning – as you see, they make the point that
12 there is essentially no distinction between the debit card and credit card as far as the merchants
13 are concerned. Of what relevance is that insight? The Office of Fair Trading's case manifestly
14 is that there is. The Office of Fair Trading has defined a relevant market in terms of credit
15 cards and charge cards. Is it part of their Intervention to seek to overturn the Office of Fair
16 Trading's case and essentially introduce a new case against MasterCard and MMF? If they
17 were to do so it would be alarming in the extreme. It might also be beneficial because clearly
18 it would define the relevant market much more broadly than the Office of Fair Trading is
19 seeking to do.

20 I offer that as an observation as to the nature of the Intervention – I make no comment
21 on the reasons behind it – but simply the extravagance of the Intervention and its
22 disproportionate character. As my friend put it, leading to a spiral; of necessity we will have to
23 respond, possibly by expert evidence, to whatever they are seeking to do, making these
24 proceedings unduly and unnecessarily protracted in support of cases and arguments which the
25 OFT, itself, does not appear to support.

26 THE PRESIDENT: Thank you. Yes, Mr. Carr?

27 MR. CARR: Thank you, sir. I do not know if you have a copy of a document marked "Annex"
28 which should be at the back of the big schedule. There is a big schedule with all the various
29 requests and the comments of the parties and at the back of that schedule there should be a
30 document.

31 THE PRESIDENT: There is a document, "RBSG comments".

32 MR. CARR: That is it.

33 THE PRESIDENT: Yes, we are there and we have actually read it.

34 MR. CARR: Thank you very much, that is extremely helpful. I do not propose to say anything that
35 goes outside the four corners of that document, if I can just draw your attention to the main

1 points. Under para.2.3 we explain why disclosure is not necessary. If I can be just allowed to
2 comment, the impression one is getting is that the British Retail Consortium are attempting to
3 enlarge the role that they will play and the issues that they will engage themselves on beyond
4 any reasonable measure. The particular arguments that we advance under 2.3 are really
5 directed to that. They have got a vast amount of information already, even as to the areas
6 which are confidential, and there are two in particular from our point of view. They are the
7 Oxera material first; and secondly, the strategic options or alternatives that would be available
8 to the Royal Bank of Scotland depending on certain outcomes. Those are the two particular
9 areas.

10 As to the Oxera material, the whole of the argument and the debate in the analysis is
11 already available to the British Retail Consortium, but there are some data materials that were
12 gathered by the Bank that are highly confidential, and the methodology and the data that the
13 methodology produced is a “business secret” and the Bank is extremely concerned that that
14 should go anywhere at all on however limited a basis that may be.

15 We have put forward under 2.3 the principal arguments as to why this material is
16 simply not necessary, not needed and inconsistent with the role of the Intervener.

17 On p.3 under 2.4, 5 and 6 we have set out the reasons why this Oxera material in
18 particular is so sensitive and confidential. In 2.6 we summarise under three heads what the
19 points are, the detailed methodology in collecting the data, the precise details of the
20 econometric specification used by Oxera, and then the base data, the specific results of the
21 survey, the raw data itself. Those are all highly confidential matters.

22 THE PRESIDENT: Mr. Carr, if this material at some point comes to be challenged it is going to be
23 very difficult for us to rely on it in your client’s favour if it remains, as it were, confidential
24 and therefore cannot be challenged.

25 MR. CARR: The OFT of course have seen it all. They are fully in a position to challenge it and
26 indeed are equipped with substantial resources and propose to do so. I respectfully suggest
27 that it will not be difficult for us to rely upon it. The only question is whether the challenge is
28 going to be duplicated by the British Retail Consortium.

29 THE PRESIDENT: Yes.

30 MR. CARR: We made the point on p.3 at the top of the page in sub-para.(d), line 4:

31 “The OFT has expended material effort during the administrative phase. Moreover, it
32 has now appointed further econometric experts who may be expected to continue to
33 address the issue.”

34 That is all directed to the Oxera material. The question is, is it all to be duplicated? One
35 suspects that the enormous trouble and time and cost which today’s outing has generated is

1 likely to be merely the precursor of what will happen if the Intervener is allowed to expand its
2 role in the way it proposes to do.

3 We are on p.4, and half way down p.4, response to request 39, 3.1, that deals with the
4 other main area of disclosure which is sought, namely the Bank's options which it would be
5 minded to pursue or would consider pursuing if the OFT's proposals as to the myth were
6 implemented. That is obviously highly confidential and sensitive business information.
7 Overall, the British Retail Consortium characterises the material in question as being either
8 theoretical or future or speculative. Those are mischaracterisations. These are "business
9 secrets" and the Bank is extremely anxious that they go no further.

10 Those are our submissions.

11 THE PRESIDENT: Thank you very much, Mr. Carr. Ms. Bacon, I was not really proposing to call
12 upon Visa since you are not really a party to this particular application.

13 MS. BACON: We are here mainly in an observing capacity today, but could I just make two very
14 short points?

15 THE PRESIDENT: Yes.

16 MS. BACON: Just for the record, we do support the position of the Appellants and if Visa were here
17 being requested to disclose its confidential information of a similar kind, we would be
18 vigorously resisting disclosure on exactly the same grounds.

19 The second point is this and it concerns the position vis à vis Visa and the BRC.
20 Mr. Green is correct to say that hitherto we have proceeded on the basis that we should receive
21 everything that the BRC receives. I can appreciate that there would be a legitimate concern on
22 the part of the Appellants if certain of the information which is now sought by the BRC were
23 disclosed to Visa. That would put us in a very difficult position because, in a way, as
24 Mr. Morris said at the last CMC, Visa's position in this Appeal is almost that of an Appellant.
25 We have a very strong interest in being here and if what BRC requests is actually disclosed to
26 BRC and not us we would be the one person in the room who would not have any entitlement
27 to comment or see that material, which would put us in a very difficult position and would
28 increase, as Mr. Green said, the administrative complexity of these already complex Appeals.

29 THE PRESIDENT: Thank you. Yes, Mr. Robertson, do you want to reply to those various points?

30 MR. ROBERTSON: Taking the point that has received the most attention, it has been suggested that
31 our Intervention will be extravagant, disproportionate, add no value, just lead to extra work for
32 everyone for no added value. That is not what we anticipate doing by way of our Statement of
33 Intervention. We have been absolutely explicit as to that from the outset. If we were to
34 duplicate or be prolix or just be extravagant then this Tribunal has a costs jurisdiction which it
35 exercises and in cases like, for example, *The General Insurance Standards Council* did so.

1 That is a discipline that we are well aware of. We know we would come in for criticism if we
2 were just repeating things. We do not intend to and we are not going to.

3 That also means that in relation to a lot of the material, when we look at it we will
4 have to liaise with the OFT to see the extent to which they are dealing with it, whether there is
5 anything that we can add. If there is not anything that we can add then we will not. At the
6 moment we are not in a situation of being able to carry out that assessment because the
7 material has been withheld from us.

8 The stress laid by Mr. Green on the “Crown jewels”, by Mr. Carr on the Royal Bank
9 of Scotland’s “business secrets” – at the moment we are discussing a confidentiality ring,
10 disclosure to a confidentiality ring. That has been regarded by the Tribunal in cases hitherto as
11 being adequate to protect confidential information. That is what we are seeking in this case.
12 I agree there is an issue as to the identity of the confidentiality ring but, putting that to one side,
13 that practical point, as a matter of principle, this is the way in which this Tribunal addresses
14 these difficult issues.

15 The third point that I would make is that Visa say they are in a difficult position.
16 Well, the fact that they may be in what they regard as a difficult position is not a reason for
17 refusing to disclose material to the BRC where the BRC is able, uniquely, to put the retailers’
18 position in front of the Tribunal to the extent that has not already been properly advanced by
19 the OFT. This material will enable us to liaise with the OFT. At the moment there are things
20 they cannot discuss with us, points they cannot run past us to see whether they are correct or
21 not. So, not only does this hamper the BRC’s Intervention, it would hamper the OFT in the
22 conduct of its Defence.

23 THE PRESIDENT: It is not a point the OFT has made so far.

24 MR. ROBERTSON: I leave that for Mr. Turner. That certainly seems to be a point that occurs to us.

25 Then as to lack of particularity, at this stage we are faced with reports in which
26 figures have been extensively redacted. We are being given the conclusions from reports
27 without looking at the underlying material. Our economist has not been able to go through the
28 various economic studies that have been advanced to see whether the conclusions drawn have
29 been correct. You do need to see the underlying figures. At the end of the day, as you pointed
30 out, this Tribunal is going to have to grapple with the facts as to cost allocation to determine
31 whether the OFT has got it right or not in relation to its calculation of genuine costs and
32 extraneous costs. I do not see any alternative to that and I do not see why we should be shut
33 out of that process.

34 Mr. Sharpe raised a specific point about our final request as to the position from
35 November 2004 onwards. You indicated the Tribunal’s position. We will not pursue that

1 request. We have explained that, from the retailers' point of view, the first we knew about it
2 was when the Decision was published. No retailer realised that things had changed
3 dramatically in November 2004. That is why we have been pursuing the request but we now
4 withdraw it in view of the Tribunal's indication.

5 Sir, those are my submissions.

6 THE PRESIDENT: Thank you very much, Mr. Robertson.

7 MR. GREEN: Sir, can I just make one point in reply?

8 THE PRESIDENT: I think, Mr. Green, we have heard enough, thank you very much. We will just
9 rise for a few minutes.

10 (Adjourned for a short time)

11 [For ruling see separate transcript]

12 THE PRESIDENT: That, I think, Mr. Robertson, is our Ruling on today's application. Unless there
13 are observations or comments on that, we would like to take this opportunity to raise a more
14 general concern we have about the management of this case and in particular the cost, which is
15 a matter that has already been drawn to our attention in the course of argument this morning.
16 Despite the fact that these Appeals are consolidated, we seem, in effect, to still have three
17 Appeals on foot. The experience of handling this particular application suggests that the
18 relevant work is still being tripled with enormous expenditure of cost and time on behalf of the
19 parties and indeed on behalf of the Tribunal. Simply to organise a hearing today with so many
20 parties, all with slightly different, but not fundamentally different, points of view does take an
21 enormous amount of time and effort and cost. We, therefore, propose at the next case
22 management conference to give further consideration to how this case can be managed and
23 organised from the point of view of costs, and indeed, perhaps in a provisional way, as to what
24 our attitude should be to costs in a case such as the present.

25 We may well reserve the possibility of asking the parties now for a budget for the case
26 and considering what, in general terms, the proper approach to costs in cases like this is.

27 From the Appellants' point of view, if I may say so, it is not necessarily in the
28 Appellants' interests to drown us with documents and information and to duplicate
29 submissions so that we have to spend a lot of time reading everything three times over just in
30 case something has been missed, either at the level of the Tribunal's judicial assistants or at the
31 level of the Tribunal itself. So we simply leave you with the message that it is in everybody's
32 interests to try to get this case down to a manageable size so that we can meet the timetable
33 which has been set. There is, I would have thought, some law of diminishing returns where
34 one can over-egg the detail, and it should be possible to identify the main points without undue
35 difficulty and to concentrate on them.

1 I think that message, if I may say so, Mr. Turner, is as much for the OFT as for
2 anybody else. There seems to be quite a large team, we are told, building up on your side, but
3 it is absolutely essential that the Appeal remains manageable from the Tribunal's point of
4 view.

5 MR. TURNER: Sir, if I may just comment on that, the reference to nine economists was something
6 of an exaggeration.

7 THE PRESIDENT: It was a bit of advocate's licence, was it?

8 MR. TURNER: We have two external economists and assistants.

9 THE PRESIDENT: We will see how we get on, but this is a very serious matter and we must now
10 all, collectively, try to see how we can get this case done as economically and efficiently as
11 possible, as well as, of course, being as fair as we can be to everybody.

12 Very well, if there are no other applications or observations, we will adjourn for
13 today. Thank you very much.

14 (The hearing concluded at 12.10 p.m.)
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