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5 record.

6 **IN THE COMPETITION**

Case No. : 1236/5/7/15

7 APPEAL TRIBUNAL

1264/5/7/16

8 Victoria House,

1265/5/7/16

9 Bloomsbury Place,

1268/5/7/16

10 London WC1A 2EB

11 9 October 2018

12
13 Before:

14 **THE HON. MR. JUSTICE ROTH (President), PETER ANDERSON, SIMON HOLMES**

15
16 (Sitting as a Tribunal in England and Wales)

17 **BETWEEN:**

18 **1236/5/7/15 DSG Retail Limited and Another v MasterCard Incorporated and Others**
19 **1264/5/7/16 TFL v Mastercard**

20 **1265/5/7/16 Dixon Carphone PLC v Mastercard**

21 **1268/5/7/16 Europcar UK Limited v Mastercard**

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3 **HEARING - Day 2**
4

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6
7 **APPEARANCES**
8

9
10 Mark Hoskins QC (of Brick Court Chambers) Matthew Cook (of One Essex Court) appeared on
11 behalf of Mastercard
12

13 Meredith Pickford QC, Julianne Kerr Morrison (both of Monckton Chambers) appeared on
14 behalf of Dixons & DSG
15

16 Thomas de la Mare QC, Ajay Ratan (both of Blackstone Chambers) appeared on behalf of TfL /
17 Europcar
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Tuesday, 9 October 2018

(10.30 am)

Submissions by MR. PICKFORD (continued)

THE CHAIRMAN: Yes, Mr. Pickford.

MR. PICKFORD: Sir, members of the Tribunal, yesterday we were on the first of the five points that I was going to look at concerning why we say we should not be determining this application at this juncture, and I was looking at the *Arcadia* case. I am done with the *Arcadia* case, so the next thing for me to go onto will be to look at some other authorities that follow up on distinct points that arise in relation to *Arcadia*.

You should find that your authorities bundles have had some supplements added to them, and moreover I have also provided to my learned friends and the Tribunal a two-page, one and a half-page document entitled "Missing elements from the statement of claim". I am going to come to that in due course, but that is to put in writing the key points that we say we could not have pleaded as at 20 June 1997 and hopefully add some clarification on that issue for the Tribunal.

THE CHAIRMAN: Thank you.

MR. PICKFORD: Moving, then, to the relevant authorities.

The first one I would like to look at which is mentioned

1 in *Arcadia* is the *Johnson* case, which should be at
2 tab 3B of the first authorities bundle.

3 This case is unreported; a Court of Appeal decision.

4 It is unreported from *The Times* the best we can give you is the
5 version we have in the bundle.

6 The case arises in this context. Mr. Hoskins said
7 yesterday, referring to *Arcadia* which in turn referred
8 to *Johnson*, that there was a principle of narrow not
9 broad construction of the section 32, and he said that
10 what that means, he said, colloquially is that you
11 should not make it too easy for claimants to rely on the
12 provision.

13 That is what he says is the relevant principle. The
14 *Johnson* case is what is cited in *Arcadia* in
15 relation to the narrow not broad construction point, and
16 it is certainly not authority for the principle that
17 Mr. Hoskins urges on this Tribunal.

18 This case concerned the Guildford Four, and there
19 was an out of time plea for false imprisonment, and that
20 is the factual context.

21 If we could turn, please, to page 3. About halfway
22 down you will see the third paragraph begins:

23 "For my part, I accept ..."

24 Does everyone have that?

25 I am grateful:

1 "For my part, I accept Mr. Glasgow's submission that
2 in construing the section," and here he is referring to
3 section 32(1)(b), "there is no middle ground between
4 facts and evidence. It may be that the plaintiff's case
5 following the quashing of convictions would be
6 substantially stronger and have a better prospect of
7 success, I am able to accept Mr. Hytner's submission
8 that the quashing of the convictions adds anything to
9 his knowledge of facts relevant to his right of action.
10 Facts which improve prospects of success are not, as it
11 seems to me, facts relevant to his right of action.
12 Probably by January and certainly by October 1998, he
13 knew the facts relevant to his claim in false
14 imprisonment and in due course recited them, as I have
15 indicated in the statement of claim without in relation
16 to liability any reference to the decision of the
17 Court of Appeal (Criminal Division) or the matters which
18 then emerged.

19 "I accept that the construction proposed by
20 Mr. Glasgow is a narrow one, but unless it is correct it
21 is difficult to see what purpose is served by the
22 special provisions with regards to personal injury
23 actions which are contained in section 33 of the Act."

24 So what is being said there is that the construction
25 of section 32, which, as I showed the Tribunal

1 yesterday, talks about facts arising in relation to
2 a claim, which could be interpreted very, very broadly
3 and, indeed, the advocate Mr. Hytner in this case was
4 clearly asking for it to be interpreted very broadly to
5 include facts which improve the prospect of success but
6 were not essential to the statement of claim.

7 What the court said here -- this is the judgment of
8 Lord Justice Rose -- was that was not the right test, it
9 was a narrower one which confines itself merely to the
10 essential elements of the cause of action, and that is
11 what is meant by the reference to the narrow not broad
12 construction. It is not that you should not make it too
13 easy.

14 So, my Lord, members of the Tribunal, that is that
15 case. The next one is in the same authorities bundle,
16 which is the *Kriti Palm* --

17 THE CHAIRMAN: Just looking at the other judgments below,
18 two other Lord Justices.

19 MR. PICKFORD: Sir, it is the statement of Lord Justice Rose
20 that gets picked up in the subsequent authorities about
21 narrow not broad construction. It is discussed in fact
22 in *The Kriti Palm* and in a number of the other --

23 THE CHAIRMAN: Yes.

24 MR. PICKFORD: -- subsequent authorities.

25 MR. HOLMES: Are you saying that *Arcadia* got it wrong or

1 purely that Mark Hoskins' interpretation of *Arcadia*
2 was incorrect?

3 MR. PICKFORD: I am saying the latter. *Arcadia* does not
4 explain in that subparagraph that we looked at -- it is
5 very short, it just says it is a narrow not a broad
6 interpretation.

7 MR. HOSKINS: I am sorry to interrupt, but with respect this
8 is a windmill we do not need to tilt at. When I called
9 colloquialism "narrow", I was just trying to explain the
10 way in which narrow is to be understood in colloquial
11 terms.

12 I fully accept, and there is nothing between me and
13 my friend, it is the statement of case test. I am sorry
14 to interrupt, but I do not want to waste the Tribunal's
15 time in chasing up a rabbit.

16 MR. PICKFORD: I am very grateful for that clarification.

17 THE CHAIRMAN: Yes. The first proposition in
18 Mr Justice Simon's judgment in *Arcadia*, which we have
19 in the same bundle at tab 25, paragraph 24 in the
20 judgment, where the principle -- that is where the judge
21 set out his seven principles.

22 Now, the second one is clear, is what you have just
23 shown us, facts and facts which improve, or evidence.
24 The first one is put rather more generally,
25 section 32(1) (b) is a provision whose terms are to be

1 construed narrowly rather than broadly.

2 MR. PICKFORD: Sir, yes. My point is that that is okay on
3 its terms, but actually when you go back to look at
4 *Johnson*, really points 1 and 2 merge into the same
5 point. Because what is meant by narrow rather than
6 broad is in fact what is then said in subsection 2 of
7 paragraph 24.

8 THE CHAIRMAN: So it is narrow re the essential facts, not
9 more generally?

10 MR. PICKFORD: Not in the sense that you should not make it
11 too easy, which was the submission that I was meeting.

12 THE CHAIRMAN: Yes. Are we going to go to *C v Mirror*
13 *Group*?

14 MR. PICKFORD: I was not proposing to go to *C v Mirror*
15 *Group*. I do not think it really adds anything.
16 There are a number of quite important authorities that
17 I do need to go to.

18 THE CHAIRMAN: The other source of the first principle,
19 enunciated by Mr Justice Simon, the narrow
20 construction --

21 MR. PICKFORD: Sir, I read that as the public's interest in
22 finality and the importance of certainty, and we do not
23 demur from the fact that that is a public interest.
24 There is obviously also a public interest in the
25 claimants not being unfairly shut out from claims that

1 they could not properly have pleaded. That is the
2 *C v MGN case* . The reason I do not go to it is because
3 I do not take issue with that as a principle in its own
4 terms.

5 With the Tribunal's permission, may I go on to
6 *Kriti Palm*?

7 THE CHAIRMAN: Yes.

8 MR. PICKFORD: So that is to be found at tab 17 of the
9 authorities bundle and Mr. Hoskins helpfully provided
10 the background on that case yesterday. So I can jump
11 straight into the core provisions.

12 He yesterday drew the following proposition from
13 this authority. He said that it is authority that when
14 you are applying the statement of claim test, you do not
15 actually look at the statement of claim itself, you
16 rather consider a hypothetical generic cause of action
17 that could have been pleaded. But the point is you are
18 not supposed to go and actually base the statement of
19 claim test by reference to the statement of claim, and
20 we say that is an entirely wrong interpretation of this
21 authority.

22 So if we could go, please, to paragraph 305, which
23 is at tab 17 of the first bundle, paragraph 305.

24 So this is where -- I think it is Lord Justice Rix
25 is saying that having set out what the core elements of

1 the claim really are, that the reliance on this Cooper
2 retest seems like an unpromising basis for the
3 section 32(1)(b) point. He goes on to explain over the
4 page that the claimant in this case:

5 "... AIC has gone to intricate, almost exquisite
6 lengths to attempt to plead new causes of action which
7 seek to depend not on the real gravamen of AIC's
8 complaint, viz that ITS had provided an invalid
9 certificate and thus failed to certify the fuel that it had been
10 properly required to test, or had negligently performed
11 even the uncontractual D323 test for which it had been
12 employed, but on the non-disclosure of the Cooper retest
13 and its results."

14 So what is being said there is effectively this
15 statement of claim is something of a sham in that the
16 real complaint is being hidden in order to attempt to
17 rely on something that is not the real complaint to
18 bring it within section 32(1)(b) of the Limitation Act.

19 It does not go quite that far. The judge obviously
20 puts it in much more politic terms, but effectively the
21 essence of it is -- indeed, he says in terms -- that is
22 not the true gravamen of the complaint. It is something
23 else.

24 Notwithstanding that, he then goes on to say in
25 paragraph 307, which makes it very clear that one does

1 look at the pleaded causes of action:

2 "A further difficulty is that in his conclusion [the
3 judge's conclusion] on deliberate concealment, the judge
4 nowhere identifies in respect of which pleaded causes of
5 action he finds the deliberate concealment prevents the
6 running of the limitation period."

7 He then goes on a sentence later:

8 "This is important because the purpose of
9 section 32(1)(b) appears to be designed to cater for the
10 case where because of deliberate concealment the
11 claimant lacks sufficient information to plead
12 a complete cause of action for the so-called statement
13 of claim test. It is therefore important to consider
14 the facts relating to an allegation of deliberate
15 concealment vis-a-vis a claimant's pleaded case."

16 It could not be clearer that one still looks at the
17 claimants' pleaded case.

18 The second point to make is this. Even if one has
19 a case where the claimants' pleaded case is intended to
20 obscure what their true complaint is, and is really
21 confected in order to come within section 32(1)(b), what
22 one still has to do is understand what the gravamen of
23 the complaint is.

24 But there is no suggestion -- rightly so -- no
25 suggestion has been made in our case that we have not

1 pleaded the real gravamen of our complaint. This issue,
2 as the Tribunal will recall from yesterday's debate,
3 goes to the question about the UK MIF and whether the
4 restriction on the UK MIF was all part and parcel of one
5 cause of action, and we say it is not.

6 It is rightly not suggested by Mastercard that our
7 complaint about the effect of the EEA MIF on the UK MIF
8 is in some way a confection in order to bring ourselves
9 within section 32(1)(b). It is at the very heart of our
10 complaint. It is why we are here, because it is UK MIFs
11 that in the vast majority -- we do not know exactly what
12 yet because we have not got to trial, but the vast
13 majority of cases we were paying through the MSCs.

14 THE CHAIRMAN: You would know because you know what
15 proportion of your transactions were domestic and what
16 proportion were foreign. It is not something Mastercard
17 will know.

18 MR. PICKFORD: Sir, that is not actually quite right because
19 the way in which we were charged, as I understand it,
20 back in the time that we are talking about, as
21 I understand it matters have now changed, was on some
22 form of blended basis where we would not necessarily
23 know precisely -- we would not be able to identify
24 precisely how our charges had in fact been made.

25 THE CHAIRMAN: By your bank, you mean?

1 MR. PICKFORD: Sorry?

2 THE CHAIRMAN: By your acquiring bank, the way you were
3 charged?

4 MR. PICKFORD: Yes. Our acquiring bank may well have known,
5 but we did not necessarily know exactly which MIFs were
6 going into which MSCs.

7 MR. HOSKINS: Can we go to the evidence on this rather than
8 just having --

9 MR. PICKFORD: This is the point, we have not got there yet.
10 I am simply saying the Tribunal cannot make that
11 assumption because --

12 THE CHAIRMAN: Well, you have asked us, you have said that
13 we should assume that most of your claim is the UK MIF.
14 That is an assumption you are asking us to make. It
15 seems to me a logical assumption, but I would have
16 thought, because one would assume that certainly your
17 client and TfL, or the companies that are now within
18 TfL, London Underground and London Buses and so on, most
19 of their transactions were to people in the UK.

20 MR. PICKFORD: Yes --

21 THE CHAIRMAN: Whether that is true of the car rental I am
22 not so sure. It might be quite a different mix, just
23 thinking logically of who rents cars in the UK, quite
24 a lot of visitors from abroad.

25 But that is just off the top of my head. You would

1 have some sense to what extent your customers were
2 domestic or were from abroad.

3 MR. PICKFORD: So Dixons has led some evidence on the fact
4 that it was at the relevant time effectively a UK
5 business. It had a couple of foreign subsidiaries that
6 were not relevant to this claim.

7 THE CHAIRMAN: Yes.

8 MR. PICKFORD: I think one can infer reasonably from that
9 that we were generally paying UK MIFs, but I do not even
10 have to put it as high as that. The simple point is
11 that, rightly so, Mastercard does not suggest that our
12 claim in relation to UK MIFs is somehow a confection in
13 order to try and get round a limitation point to
14 demonstrate that we fall within the section 32 limit,
15 when in fact really the true nature of our complaint is
16 something entirely different, and we do not. They do
17 not make that point and it is obvious why they do not
18 make that point, because that would be an implausible
19 point to make in relation to a UK-based claimant such as
20 my clients.

21 Sir, members of the Tribunal, we say that there is
22 nothing in this case which should deflect the Tribunal
23 from looking at our pleaded cause of action. That is
24 what it says you do in terms, even in these somewhat
25 unusual circumstances and you certainly do it where

1 there is no suggestion that we are confecting our case
2 in order to create something that we do not really rely
3 on.

4 THE CHAIRMAN: Yes.

5 MR. PICKFORD: The next point --

6 THE CHAIRMAN: Do we look at Lord Justice Buxton's judgment
7 as well if you are on that page? He delivered
8 a separate sole standing judgment, I think.

9 MR. PICKFORD: It was from the passage that I just took you
10 to, sir, that Mr. Hoskins extracted his proposition that
11 you do not look at the statement of claim, you look at
12 a generic hypothetical statement of claim to avoid the
13 problem that he identified of confected causes of
14 action. So I have taken you to the same passage to show
15 you that that is an incorrect reading of that part of
16 the judgment. That is not what Lord Justice Rix was
17 saying and it would not apply on our case anyway.

18 THE CHAIRMAN: Yes.

19 MR. PICKFORD: Sir, if I may go then to the next authority,
20 which is the case of *Begum*, which is to be found at
21 tab 20A.

22 There are a couple of authorities here that I want
23 to go to to draw out the following key points. We say
24 that a cause of action is not merely the breach of
25 competition law, it is all of the essential factual

1 elements that entitle the claimant to claim its remedy.

2 If you have a different set of factual elements that

3 lead to a different restriction and/or --

4 THE CHAIRMAN: Just a minute. You say it is all essential
5 elements which entitle the claimant to claim its remedy?

6 MR. PICKFORD: Correct.

7 THE CHAIRMAN: Including all heads of loss?

8 MR. PICKFORD: I do not think one can generalise in terms of
9 heads of loss. There may be some cases where if you add
10 a head of loss, a mere head of loss, you have not
11 transformed your cause of action from one cause of
12 action to another. That, as I will come on to explain,
13 is not our case at all because in relation to the UK
14 MIF, the UK MIF is not merely an embellishment in terms
15 of an extra head of loss, it is a different cause of
16 action based on different rules with a different
17 restrictive effect.

18 THE CHAIRMAN: You say it is a different cause of action?

19 MR. PICKFORD: Yes.

20 THE CHAIRMAN: What is the cause of action?

21 MR. PICKFORD: The cause of action is the set of facts.

22 THE CHAIRMAN: No, sorry, what is the cause of action?

23 Cause of action as a matter of law. What is the cause
24 of action on which you claim the UK MIF?

25 MR. PICKFORD: I think we may be at cross-purposes. I am

1 using cause of action in the sense of *Letang v Cooper*,
2 which is the originating case where in fact all of this
3 discussion of what a cause of action is, for the purpose
4 of limitation, arises. What is very clear from that,
5 and indeed it is Lord Justice Diplock in *Letang v Cooper*
6 goes to pains to point out, is from a limitation
7 perspective what matters in causes of action is the
8 group of facts. He actually goes so far as to say it
9 does not matter what label you put on those facts, you
10 could take a group of facts and you could characterise
11 them in one particular legal way and say that gives you
12 an entitlement under this legal route, or you can take
13 the same group of facts and characterise them in
14 a different legal way which gives you maybe a different
15 legal route to the same remedy.

16 His point is that the legal characterisation is not
17 what one is concerned with for the purposes of a cause
18 of action, and that feeds through into limitation
19 because limitation is based on cause of action.

20 What we are concerned about is groups of factual
21 circumstances because that is what we have to plead.
22 The statement of case test is based on pleading facts.
23 We are not required really to plead -- typically in
24 a competition case you do plead some law because of the
25 complexities of the case, but ordinarily in simple cases

1 one does not plead any law, you plead the facts, and it
2 is the same concept that carries across in relation to
3 this statement of claim just as in any.

4 What matters is our knowledge of the facts that
5 gives rise to our ultimate cause of action.

6 THE CHAIRMAN: Yes, but I mean, the real question is are
7 those facts establishing further loss resulting from the
8 facts that establish the infringement, or are they facts
9 establishing another infringement?

10 MR. PICKFORD: Sir, I do not think that is quite the way it
11 is put. I do not think that is quite the right test,
12 and I am going to come on to the cases right now which
13 explain why I do not think that is quite the right test.

14 In any event, we say that in our case the seam that
15 runs through in relation to the UK MIF is different at
16 virtually every stage of the analysis. If you actually
17 look at it properly.

18 Mr. Hoskins has cleverly sought to persuade you that
19 it is really just about the final bit at the end in
20 terms of damages, and we say that even that alone is
21 enough to change the cause of action. But in any event
22 it is not just about that, it runs right through the
23 analysis in a way that he has glossed over.

24 THE CHAIRMAN: You want to go to Begum, which is B-E-G-U-M.

25 MR. PICKFORD: B-E-G-U-M. It is to be found at tab 20A.

1 I hope that should by now have been inserted into your
2 bundles.

3 THE CHAIRMAN: Yes.

4 MR. PICKFORD: It is a First Instance judgment of
5 Mr Justice David Richards, as he then was. It however
6 quotes extensively from the relevant Court of Appeal
7 judgments which are the key ones in the authorities
8 bundle. I will go to one or two.

9 In my respectful submission, it is actually a very
10 helpful way of going through a lot of the relevant case
11 law because it distils a number of the principles. I am
12 going to go through it on that basis.

13 This case concerned, one sees from paragraph 2,
14 an application to amend by HMRC in a VAT carousel fraud
15 case, and many people may be familiar with carousel
16 frauds, other less so. Essentially, from my
17 understanding from the many colleagues at Monckton
18 Chambers who did get involved in such cases, it involves
19 reclaiming input tax from HMRC on the export of goods
20 while simultaneously ensuring that the output tax is
21 never paid and could not be paid. Indeed, we see that
22 description in the judgment itself at paragraph 3.

23 Now, HMRC wanted to amend out of time and that
24 brought section 35 of the Limitation Act into play
25 because that deals with when you can amend to bring in

1 a new cause of action and when you cannot.

2 If we can go, please, to paragraph 27 we see the
3 beginnings of the debate being set up:

4 "Amendment after expiry of limitation periods
5 principles. HMRC rejects the suggestion that their
6 proposed amendments raise in either action a new claim
7 ..."

8 That is synonymous for these purposes with a new
9 cause of action. That is made good in the authorities:

10 "... for the purposes of section 35 of the
11 Limitation Act while the defendants submit that they
12 do."

13 I beg your pardon, new claim is broader. I take
14 back that submission. It is related to the cause of
15 action, but we see how in a moment:

16 "... while the defendants submit that they do. The
17 relevant provisions of section 35 are subsection (2).
18 In this section, 'a new claim' means any claim by way of
19 set-off or counterclaim and any claim involving either
20 the additional substitution of a new cause of action or
21 the additional substitution of a new party."

22 So that is how the issue of cause of action arises,
23 and one can readily see in the limitation context why it
24 is important to be able to identify between different
25 cause of actions because the way that section 35(2)

1 works is if the amendment is in fact an amendment
2 preserving the same cause of action, there is not
3 a limitation problem, whereas if it is out of time and
4 it is a new cause of action then it is not permitted
5 unless the exception that then applies later on in
6 section 35 applies; namely, that it is based on
7 essentially the same facts.

8 We do not need to get into the exception point
9 because what we are concerned with is causes of action.

10 If we turn then, please, to paragraph 29, we see
11 that the court says that:

12 "Section 35 and CPR 17.4 refer to a new claim and
13 a claim already made. Section 35 also refers to a claim
14 involving a new cause of action. For present purposes,
15 a claim is a new claim only if it involves the
16 additional substitution of a new cause of action.
17 Section 35(2) (a).

18 "The authorities establish that 'cause of action'
19 carries the meaning given by Lord Justice Diplock in
20 *Letang v Cooper*. That is simply a factual situation,
21 the existence of which entitles one person to obtain
22 from the court a remedy against another person, as
23 distinct from a form of action used as a convenient and
24 succinct description of a particular category of factual
25 situation."

1 So, sir, that is the point that I was making before.

2 THE CHAIRMAN: Yes.

3 MR. PICKFORD: What is absolutely essential is the set of
4 facts and the fact that one might then be able to bundle
5 up a particular set of facts and put a legal label on it
6 is not what matters. He goes on:

7 "An amendment to include a claim for damages in
8 negligence for personal injuries on facts already
9 pleaded where the claim in respect of the injuries has
10 been pleaded as a claim in damages in trespass to the
11 person would not involve a new cause of action. In
12 *Lloyds Bank v Rogers*, Lord Justice Auld noted that
13 what makes a new claim as defined in section 35(2) is
14 not the newness of the claim according to the type or
15 quantum of the remedy sought, but the newness of the
16 cause of action which it involves."

17 Then after referring to Lord Justice Diplock's
18 dictum in *Letang v Cooper*, he continued:

19 "It makes plain that a claim and a cause of action
20 are not the same thing. It follows, as Mr. Crowley
21 argued, that an originally pleaded factual situation may
22 disclose more than one cause of action, although one of
23 them may not be individually characterised as such or
24 the subject of a claim for a separate remedy."

25 We can skip down to halfway through the next

1 paragraph which is cited:

2 "What makes the claim a new claim is the newness of
3 the substituted cause of action. Thus a claim for
4 damages is a new claim even if the same amount as
5 originally claimed, if the claimant seeks by amendment
6 to justify it on a different factual basis from that
7 originally pleaded, but that is not, even if made for
8 the first time, if it does not involve the additional
9 substitution of an allegation of new facts constituting
10 such a new cause of action."

11 So, again, that reinforces the point that I have
12 been making to the Tribunal. It is then noted that that
13 statement is approved in the *Aldi* case, and we will
14 come on briefly to the *Aldi* case in due course.

15 Then in paragraph 30:

16 "Thus claiming the phrase 'any claim involving a new
17 cause of action' refers to the remedy sought, while
18 'cause of action' refers to the factual basis for the
19 claim."

20 Two-thirds of the way down:

21 "A change in the remedy may change the claim but not
22 the cause of action. A change in the essential features
23 of the factual basis rather than, say, giving further
24 particulars of existing allegations, will introduce
25 a new cause of action."

1 Then he goes on in paragraph 31 to note that:

2 "As well as referring to *Letang v Cooper*,
3 Lord Justice Millett in *Paragon Finance*
4 also cited the classic definition of a cause of action
5 given by Mr Justice Brett in *Cooke v Gill*, that
6 a cause of action has been held from the earliest time
7 to mean every fact which is material to be proved to
8 entitle the plaintiff to succeed, every fact which the
9 defendant would have a right to traverse."

10 Lord Justice Millett continued:

11 "I do not think that Lord Justice Diplock was
12 intending a different definition to that of
13 Mr Justice Brett. However it is formulated, only those
14 facts which are material to be proved are to be taken
15 into account. The pleading of unnecessary allegations
16 or the addition of further instances or better
17 particulars does not amount to a distinct cause of
18 action. The selection of material facts that define the
19 cause of action must be made at the highest level of
20 abstraction ... "

21 So Mr. Hoskins might think, aha, well, there we go,
22 the highest level of abstraction. Importantly, that is
23 then commented on in the following paragraph:

24 "This passage was commented on by Lord Justice Peter
25 Gibson in *Savings & Investment Bank v Fincken*. As

1 I see it, the exercise which is required is the
2 comparison of the pleading in its state before the
3 proposed amendment and the pleading in its amended
4 state. I do not think that it assists to look at the
5 endorsement on the writ. What must be examined is the
6 pleading of the essential facts which need to be proved.
7 To define the cause of action, the non-essential facts
8 must be left out of account as mere instances or
9 particulars of essential facts. That is what
10 I understand Lord Justice Millett to have meant by
11 stating the selection of material facts must be made at
12 the highest level of abstraction. Thus, to take the
13 example provided by the facts in *Letang v Cooper* as
14 discussed by Lord Justice Millett, the former report,
15 the facts material to be proved constitute the cause of
16 action for trespass to the person did not include
17 whether the trespass was intentional or unintentional.

18 "The exercise is to be undertaken in deciding
19 whether there is a new claim as defined in section 35(2)
20 is therefore to compare the essential factual elements
21 in the cause of action already pleaded with the
22 essential factual elements in the cause of action as
23 proposed. If they are the same, there is no cause of
24 action and therefore no new claim."

25 Then finally, it is the final paragraph that I need

1 to turn to in this judgment, there is reference in
2 paragraph 35 to the case of *NEC Semi-Conductors Limited*
3 *v IRC* where Lord Justice Mummery emphasised the
4 importance of proper particulars of claim.

5 If I might ask the Tribunal to read that to itself,
6 please.

7 THE CHAIRMAN: Yes. (Pause)

8 MR. PICKFORD: Sir, may I continue?

9 THE CHAIRMAN: Yes.

10 MR. PICKFORD: That is a reminder of the important
11 principles which also underpin your own judgment in
12 *Sel-Imperial* about precision in pleadings and making
13 sure that you plead the facts, the primary facts, not
14 merely the legal conclusions because the legal
15 conclusions do not take anyone anywhere. It is the
16 facts that define the scope of the debate between the
17 parties.

18 MR. ANDERSON: Mr. Pickford, can you help me with one thing.
19 That final sentence of the passage in *NEC*
20 *Semi-Conductors* to which you have just referred us,
21 the final sentence says:

22 "If the pleading has to be amended, it is reasonable
23 that the party who has not complied with well known
24 pleading requirements should suffer the consequences
25 with regard to such matters as limitation."

1 Does that not tend to support Mr. Hoskins' position
2 that what ought to be considered is how a pleading could
3 and should have been expressed, rather than the actual
4 pleading?

5 MR. PICKFORD: No, sir. With respect, it doesn't, because
6 what this is -- the whole context of this case, although
7 it deals with the question of cause of action, which is
8 obviously what we are concerned with in our section 32
9 context, is section 35 of the Limitation Act which is
10 dealing with when you are permitted to bring a new cause
11 of action out of time. Because there may be
12 circumstances when you want to amend but the defendant
13 says, well, that amounts to a new cause of action and
14 you are now out of time for that, and you have to pay
15 the price and that price may be very severe.

16 It may be you cannot actually bring that further
17 claim, at least as an amendment. What is being said
18 here is that if your original cause of action, you have
19 failed to plead something that is critical to your cause
20 of action, the one that you really want to plead,
21 then you may have to pay the price for that, which is
22 that you are not allowed to amend later on to introduce
23 the facts that you need because it is too late.

24 So actually it works against Mr. Hoskins because
25 what it makes clear is the rigour with which you are

1 required to plead your cause of action in the first
2 place. It will be no good potentially us coming along
3 having pleaded three-quarters of what we needed but
4 missed out a core element, say on the UK MIF, to come
5 along later and say, well, here is the missing piece of
6 the jigsaw, because unless we could rely on section 32
7 it will be said against us, well, you are out of time
8 now, so tough.

9 Actually, far from supporting Mr. Hoskins, those
10 words do quite the opposite.

11 THE CHAIRMAN: It might be helpful just for us to have to
12 insert in volume 2 of the authorities when we have got
13 extracts from the Limitation Act, to have section 35 if
14 someone can produce that.

15 MR. PICKFORD: Indeed, sir.

16 THE CHAIRMAN: For some reason it jumps from section 33 to
17 section 39. It would just be useful to have them
18 together.

19 MR. DE LA MARE: We are in the process of getting that, in
20 any event. We also have the commentary for CPR 17 for
21 all these cases which would be helpful.

22 MR. PICKFORD: I am grateful. I would like to turn to our
23 next authority, which is the case of Aldi which
24 Mr. Hoskins --

25 THE CHAIRMAN: So really you are relying on *Begum* not

1 for on the whole much that Mr Justice David Richards
2 said -- there is a little bit in paragraph 30 -- but
3 because he conveniently pulls together a lot of other
4 cases?

5 MR. PICKFORD: Yes.

6 THE CHAIRMAN: Thank you.

7 MR. PICKFORD: If we could then, please, go to the *Aldi*
8 case. Mr. Hoskins took you to this yesterday. The
9 conclusion he took you through, I think we start at
10 paragraph 21.

11 THE CHAIRMAN: Wait a minute, this is tab 9A?

12 MR. PICKFORD: This is tab 9A. At paragraph 21 we see
13 a quotation from *Lloyds Bank v Rogers* which I read out
14 a few minutes ago.

15 THE CHAIRMAN: Yes.

16 MR. PICKFORD: Then at 26, on these particular facts it is
17 said:

18 "In my judgment, the proposed amendments do not
19 introduce new causes of action and therefore do not add
20 new claims against WSP. As I see it, the amendments do
21 no more than add new heads of loss to those already
22 pleaded."

23 THE CHAIRMAN: Shall we look to see what the amendments
24 actually were?

25 MR. PICKFORD: Yes. It is quite involved. It is

1 a construction dispute.

2 Sir, in my submission, it is not actually the most
3 helpful thing to do with the limited time because the
4 difficulty is that the point I am going to make in
5 relation to this is that ultimately there is
6 a fact-sensitive exercise which has to be undertaken in
7 each case, and in this case it was obviously considered
8 that it did not add anything more than new heads of
9 loss.

10 If one goes over the page, we see at paragraph 30
11 a comment that:

12 "The only additional facts that were sought to be
13 introduced by the proposed amendments in the present
14 case are the reliance on advice of WSP to enter into the
15 royalties with B&Q and Granchester and the claim for
16 damages. But as I have said, the critical reliance
17 pleaded is that Holmes entered into the building
18 contract pursuant to which it was contractually bound to
19 execute the warranties."

20 I think it is quite hard for us to really unpick
21 that other than to trust that what is being said here by
22 the judge is that these were obviously not core facts
23 that underpinned the critical reliance which formed the
24 basis of the cause of action. They were merely
25 additional facts which introduced some amendments to add

1 new heads of loss.

2 One can well see in this context why the court might
3 have been sensitive not to shut out a claimant who was
4 seeking to extend the scope of its claim with what the
5 court considered to be obviously relatively minor new
6 facts.

7 That is very different, as I will come on to
8 explain, to our case where we say we simply could not
9 have pleaded the essential element of our claim which
10 entitles us to damages in respect of the UK MIF.

11 THE CHAIRMAN: Yes. It is a little hard without -- the
12 facts may be complex, although it is not a long
13 judgment, but it is a little hard from paragraph 26, for
14 my part, just to see how material or not material these
15 new facts were.

16 It says:

17 "All that Holmes is proposing by its amendments is
18 to say as a result of WSP's negligence it has suffered
19 damages not only in the form of its liability to pay
20 damages to Aldi, but also in the form of its liability
21 to pay damages to B&Q and Granchester."

22 That might be very, very significant. One could say
23 all that you would be doing if you brought a claim based
24 on the EEA MIF only, direct loss, and you do not want it
25 to amend, which is the parallel situation, to say, well,

1 we also want domestic transactions, all you are wanting
2 to do is say you have suffered damage in the form of
3 merchant service charge on your domestic transactions by
4 reason of the infringement of Article 85, or whatever it
5 was numbered at that time, as well as in the form of the
6 merchant service charge on cross-border transactions.

7 That shorthand conceals quite a lot. You say it
8 conceals a lot of rather material points. It is
9 a little hard to appreciate the distinction which is
10 being made without seeing what it is based on.

11 MR. PICKFORD: Sir, I accept that. The reason why I am
12 going to this is because this is an authority that
13 Mr. Hoskins took you to to draw some general principles.

14 THE CHAIRMAN: Yes, and you are saying it is very different.

15 MR. PICKFORD: I am saying you cannot assume that you can
16 just read it directly across because it is quite clear
17 that it is fact sensitive and that what the judge --
18 also, one can infer quite reasonably from the way that
19 the judge characterises the additional facts, is that in
20 his view they were not particularly significant.

21 In the limited time that I have, I entirely take
22 your point, sir, that it is quite hard to unearth that
23 without a very full understanding of the facts in the
24 case, and actually even when one reads the rest of it
25 I do not find it that clear. But I prefer just to leave

1 it at that, if I may, as what I say on that particular
2 judgment.

3 THE CHAIRMAN: Well, it is an extemporary judgment, I think.

4 MR. PICKFORD: Mr. de la Mare points out paragraph 47 of
5 Lord Justice Auld's -- 47 and 48.

6 THE CHAIRMAN: Yes.

7 MR. PICKFORD: If I might invite the Tribunal just to read
8 that to itself. (Pause)

9 THE CHAIRMAN: Yes. That gives us a bit more detail, does
10 it not?

11 MR. PICKFORD: It is a mini particularisation of further
12 damages and/or other relief. But exactly, it is very
13 much at the tail end of the legal analysis.

14 THE CHAIRMAN: Yes. Thank you.

15 MR. PICKFORD: I am grateful to Mr. de la Mare.

16 The next case, if I may, I would like to go to is
17 the *Steamship Mutual v Trollope* -- good name --
18 which is to be found at tab 3A. I trust that that has
19 made its way into the Tribunal's bundles.

20 THE CHAIRMAN: Yes. We have it. It was misfiled in one of
21 the bundles.

22 MR. PICKFORD: I am grateful.

23 So this is a judgment of Lord Justice May on appeal.
24 The issue one sees at the top of the second page. I am
25 afraid, again, we did our best last night, but overnight

1 the best version of this that we could provide was the
2 one that Westlaw has, which is this one. It claims to
3 have been reported, but the difficulty is the reported
4 version does not seem to contain the full judgment. It
5 seems to be a summary, and therefore this is the best
6 that we can offer.

7 THE CHAIRMAN: It is reported, what, in the Building Law
8 Reports or something?

9 MR. PICKFORD: Yes.

10 THE CHAIRMAN: They often do that.

11 MR. PICKFORD: So one sees at the top of page 2 -- there are
12 page numbers at least at the top of the report -- that:

13 "The judge below refused the appellants leave to
14 reamend their statement of claim in the terms of a draft
15 attached to their summons. The plaintiffs now appeal
16 from those two orders with the leave of the learned
17 judge below."

18 So it is the same type of context that we have just
19 seen in the previous case.

20 If we then please turn to page 9. About a third of
21 the way down, we see the dictum of Lord Justice Diplock
22 being quoted in the case of *Letang v Cooper*. Just
23 to make clear -- it is about a third to halfway down --
24 what is being referred to when I come on to a point
25 later on.

1 Do you have that on page 9? Sorry, I seem to have
2 a different -- I beg your pardon -- version.

3 THE CHAIRMAN: Yes, it is page 8.

4 MR. PICKFORD: It is apparently page 8. This is going to
5 make the next one possibly tricky, but we will do our
6 best.

7 So it is beginning:

8 "It is sufficient for the purposes of this
9 judgment ..."

10 THE CHAIRMAN: Yes, it is page 8.

11 MR. PICKFORD: I am very grateful. The point simply to note
12 there, that *Letang v Cooper* has been quoted again
13 and that sets up, what I hope will be on perhaps page 15
14 or 16, the key point that I wish to go to. No, it is
15 not because the page numbering is different.

16 It is:

17 "In the present case ..."

18 Where is that? If we go to page 12, please.

19 MR. ANDERSON: About a third of the way down.

20 MR. PICKFORD: Yes, a third of the way down we see:

21 "In the present case, if one remembers what a cause
22 of action is, for instance to refer back to the dictum
23 in *Letang*, if one looks at the size of this particular
24 building ..."

25 This is again a construction case and a dispute with

1 an attempt to amend to bring in new claims:

2 " ... to its complexities, to other matters of
3 degree, to the statement of claim before the proposed
4 reamendment to the attitude of the appellant's
5 solicitors in the correspondence at the material times
6 which I referred and avoids what I think are unnecessary
7 subtleties, I feel bound to agree with the learned judge
8 where he concluded, having referred to the cases on what
9 is a cause of action, the statement of claim in both its
10 original and amended form related only to air
11 conditioning. I think that its effect was to narrow the
12 causes of action so they became confined to breaches of
13 contract concerned with air conditioning and negligence
14 resulting in damages to the air conditioning. In the
15 light of the definitions of a cause of action already
16 referred to, I do not think one can look only to the
17 duty on a party ..."

18 This is the core point:

19 "... but one must look also to the nature and extent
20 of the breach relied upon as well as the nature and
21 extent of the damage complained of in deciding whether,
22 as a matter of degree, a new cause of action is sought
23 to be relied upon."

24 The point that I draw from that passage is obvious
25 and it is consistent with everything else that I have

1 said about the nature of a cause of action.

2 THE CHAIRMAN: Probably the next sentence:

3 "Thus, I conclude ..."

4 MR. PICKFORD: "Thus, I conclude that whether there is a new
5 cause of action in any circumstance is a mixed question
6 of law and fact".

7 Indeed.

8 Sir, if I may, I would like to move relatively
9 swiftly on to the next authority, although we are
10 getting very near the end of the authorities that I need
11 to go to.

12 MR. DE LA MARE: Can I also ask you to note for my
13 submissions the next two paragraphs about substantially
14 the same, and the judge reaches the conclusion they are
15 not substantially the same causes of action.

16 (Pause)

17 THE CHAIRMAN: Yes.

18 MR. PICKFORD: If we could then move on, please, to tab 11,
19 which contains the case of *Homburg*.

20 So this is a case that Mr. Hoskins did not refer to
21 in his oral argument but he does place quite heavy
22 reliance on in his skeleton argument, in particular
23 a speech by Lord Hoffmann.

24 Sorry, I am pausing just to check that all the
25 members of the Tribunal have the case.

1 THE CHAIRMAN: Yes.

2 MR. PICKFORD: I am very grateful. So the context for me
3 referring to this, this is not a case that I rely on,
4 this is a case that Mastercard rely on in its skeleton.

5 They seek to derive from this case a proposition
6 which I say it simply does not justify. So what
7 Mastercard say about this case is, effectively, it is
8 consistent with their general line of argument, that all
9 one has to do is identify a claim with some loss and
10 then the section 32 test is automatically satisfied.

11 As will be clear from everything I have said to the
12 Tribunal so far, we fundamentally disagree with that as
13 the test. The case of *Homburg* does not support
14 Mr. Hoskins' proposition.

15 So if we could pick it up, please, at paragraph 88
16 in the judgment of Lord Hoffmann, which is the passage
17 that is relied upon by Mastercard. What we say this
18 case is actually -- in fact, it is an application of the
19 principle that in claims of negligence you cannot
20 recover for economic damage, which is something that has
21 no relevance at all to our claim.

22 Therefore, as a result of that, if a person wishes
23 to sue negligence for damages for goods, he has to show
24 he had title at the time the physical damage occurred
25 otherwise he merely suffers non-recoverable economic

1 damage.

2 We see at paragraph 88:

3 "A person who sues for damage to goods must show he
4 had title of the goods at the time damage occurred
5 otherwise he has suffered economic damage rather than
6 physical damage to his property. He has paid for goods
7 that were damaged and therefore worth less at the time
8 when he acquired title. Such loss cannot be recovered
9 in an action for negligence."

10 I am going to come back to the judgment of
11 Lord Hoffmann in just a moment, but I would like to make
12 it clear that this is the issue that arose by reference
13 to the judgments of both Lord Hobhouse and Lord Steyn.

14 If we could briefly turn to those paragraphs and
15 then we will come back to the key paragraphs that
16 Mr. Hoskins relies on in his skeleton.

17 At paragraph 139, we are in the judgment of
18 Lord Hobhouse and he says, about a third of the way
19 down -- I think it is the sixth line:

20 "Before the judge, only the Hunter claimants failed
21 to recover. They were unable to prove that they had
22 acquired the title to the consignments in respect of
23 which they were claiming at the time before the end of
24 the voyage. They were in no better position than the
25 claimants in *Leigh & Sillavan* ..."

1 A case which has also been referred to by

2 Lord Hoffmann:

3 "In the Court of Appeal Lord Justice Rix pointed out
4 that the same reasoning applied as well to defeat the
5 *Donoghue v Stevenson* claims of the other claimants
6 except Makros Hout BV. They could not claim for bare
7 economic loss. They had to prove what actual damage had
8 been done to their consignments after they had acquired
9 their title to them. Having failed to do so, they could
10 not recover anything. Lord Justice Rix was clearly
11 correct."

12 I probably do not need to labour the point, but for
13 your note Lord Steyn at paragraph 64 makes the same
14 point about that issue.

15 If we could then come back to the judgment at
16 paragraph 88, we see at paragraph 90:

17 "My Lords, in agreement with the Court of Appeal,
18 I think that this was to treat ..."

19 So this is dealing with how it had been argued that
20 one should approach the matter of damage, which was that
21 each claimant was able to sue for damage notwithstanding
22 that it was not the owner of the cargo at the relevant
23 time, but that it could still sue for its loss when it
24 subsequently became owner:

25 "... I think that this was to treat the progress of

1 the damage as creating new causes of action which
2 accrued per diem in diem. But in my opinion there was
3 a single cause of action which accrued to the persons
4 who owned the cargo at the time when the negligent
5 stowage caused it any significant damage. That cause of
6 action comprised all damage caused by the negligent
7 stowage, even if some of that damage did not manifest
8 itself until after they had parted with ownership."

9 So all that is being said here is an application of
10 the floodgates principle in negligence, which is
11 familiar to students of tort law, that you cannot claim
12 in negligence for economic loss, and that subsequent
13 purchasers did not have title at the moment of physical
14 damage and so had no cause of action. This is not about
15 different causes of action, this is simply that the
16 subsequent purchasers did not have a cause of action.
17 The sole cause of action that was available in this case
18 accrued to the owner who had legal title at the moment
19 that the damage first occurred.

20 Mastercard in their skeleton ask you to accept that
21 *Homburg's* authority for the principle that
22 a statement of case claiming damage (a) and a statement
23 of claim claiming damage (b), where both types of damage
24 are in principle recoverable -- contrast with this
25 case -- necessarily constitute the same cause of action

1 for limitation purposes. As I explained, that is simply
2 not what *Homburg* says.

3 Indeed, there is obviously no rule that prevents
4 claims for economic loss for breach of competition law
5 because that is invariably what has been suffered. Just
6 to underscore that point, one can imagine how inapposite
7 it would be to try to apply *Homburg* in this context
8 because it would mean that subsequent indirect
9 purchasers could not claim damage on the basis that they
10 do not have a separate cause of action from the original
11 purchaser, and that is not the state of the law as
12 regards competition claims.

13 MR. HOSKINS: I am really loath to stand up, but this is
14 a complete misreading of paragraph 90.

15 THE CHAIRMAN: I was about to say that I think what the
16 issue in that case was, as I understand it, and I have
17 not read the lengthy judgments in the House of Lords,
18 that it was clear that to recover damage to goods you
19 had to show you had title and *Makros Hout*, who in some
20 way they are the claimant, I am not clear, they are not
21 the main claimant, whether the main claimant had title
22 through them, had title at the start of the voyage and
23 so could sue.

24 The question was, well, can they only sue them and
25 recover damage that was suffered while they had title,

1 or also damage that was suffered later? The cause of
2 action was due to the negligent stowage. That was the
3 breach, was it not?

4 MR. PICKFORD: Sir, no. That is not the question. The
5 question, as I tried to demonstrate but obviously,
6 I apologise, unsuccessfully, in particular by reference
7 to paragraph 139 of the judgment of Lord Hobhouse, was
8 that the question was: who of the various claimants
9 could claim?

10 THE CHAIRMAN: Yes. This is a question whether, of those
11 claimants, could --

12 MR. PICKFORD: If one looks at the headnote, one sees at
13 paragraph 3 on page 716 that it was held that:

14 "The cargo owners' cause of action in tort in
15 respect of the negligent stowage of the cargo had arisen
16 once and for all when more than insignificant damage had
17 occurred ..."

18 Once and for all:

19 "... and that accordingly, only the one claimant who
20 had obtained title to its goods before that time was
21 entitled to recover."

22 THE CHAIRMAN: Is it not therefore saying the one claimant,
23 I assume, is Makros Hout, is it not? We will have to
24 read it.

25 MR. PICKFORD: It is Makros Hout. One sees that in

1 paragraph 92, that only Makros Hout have a prima facie
2 claim in negligence. But the subsequent purchasers do
3 not because --

4 THE CHAIRMAN: And Makros Hout, their cause of action,
5 because they had to have a cause of action while they
6 had title, will embrace not only the initial damage but
7 also all subsequent damage.

8 MR. PICKFORD: That is correct. Because of this special
9 rule that applies in negligence cases, it derives from
10 the fact that you cannot claim in negligence for pure
11 economic loss. The only thing you can claim for is
12 physical damage and the losses that arise from that.
13 That is at paragraph 88, which sets up the point and
14 then there is the implications of that in this
15 particular case, and the implications of that are that
16 if you are a subsequent purchaser, you have not suffered
17 physical damage at the moment when the cause of action,
18 the sole cause of action, accrues to the only person who
19 is entitled to bring that cause of action.

20 THE CHAIRMAN: But there is the separate question of whether
21 the person who is entitled to bring the claim can only
22 recover for the damage while he had title or can also
23 recover as part of his cause of action for damage after
24 he has parted with title. Not whether other people can
25 recover, but whether his claim, which is a good claim

1 because he had title, embraces subsequent damage. That,
2 as I read paragraph 90, without, as I say, having read
3 the judgment as a whole, and therefore there may be much
4 more in the case, Lord Hoffmann is saying it is one
5 cause of action and that cause of action covers also
6 subsequent damage provided that the original damage was
7 any significant damage. Therefore it is all damage
8 caused by the breach, which was negligent stowage, even
9 if some of it came rather later and even if it some of
10 it in this case came after they had sold the goods or
11 parted with property.

12 MR. PICKFORD: Indeed, sir. But that is a function, in my
13 submission that is clearly a function, of the prior rule
14 of law that there is no cause of action that can be
15 pleaded that entitles you to a remedy for pure economic
16 loss.

17 MR. HOLMES: Are there not three separate questions there as
18 you clearly set out? One, who can sue? Two, what type
19 of loss can they recover, and you are saying not
20 economic loss? Then the third question is, having
21 established that someone can sue for this type of loss,
22 as I would understand paragraph 90, it is then going on
23 to say the person who can sue for this type of loss,
24 what can he recover? And the statement here is that
25 that cause of action comprised all damage caused by the

1 negligent stowage even if some of that damage did not
2 manifest itself until later.

3 Are those not three different propositions, and this
4 paragraph to which you are referring is just focusing on
5 the third of those points?

6 MR. PICKFORD: I do not think it is only focusing on the
7 third, but I do not think that matters as between what
8 is between my clients and Mastercard.

9 The simple point I am making is that this authority
10 is not authority for the proposition which Mastercard
11 derives from it, which is that all claims of loss
12 necessarily constitute one cause of action, and
13 therefore that once you have identified a loss, that is
14 it. The game is up under section 32. They say you
15 could have pleaded a loss, therefore everything else
16 that you could thereafter plead in relation to these
17 matters must all be part of the same cause of action,
18 and I say you cannot derive that general principle from
19 this case, which is a specific application of
20 a principle in negligence, which is that you cannot sue
21 if you are the subsequent purchaser because you merely
22 are claiming for economic loss.

23 THE CHAIRMAN: Are you saying, as you say, a special rule in
24 negligence but consequent upon the principle that you
25 cannot recover for pure economic loss?

1 MR. PICKFORD: There is no general principle, there cannot
2 be a general principle. This cannot be the general
3 principle that once you identify one form of loss, that
4 is it, that under section 32 all other loss necessarily
5 is part of the same cause of action in a competition
6 claim. Because I have taken you to the other
7 authorities which make very clear that it is a mixed
8 question of fact and law in each case what the cause of
9 action is, and it depends on analysis of all of its
10 constituent elements, both the duty, the breach,
11 causation and loss. They are all relevant.

12 THE CHAIRMAN: Is there not perhaps quite a separate
13 distinction that Lord Hoffmann says the judge's error
14 was in effect to treat the progress of the damages
15 creating new causes of action accruing, as one might
16 say, day by day, but in a competition case such as this,
17 this is a continuing infringement which is creating
18 a series of separate causes of action, is it not? Is
19 that right or not? Is it not a continuing infringement?
20 Are they separate claims?

21 MR. PICKFORD: So I think the point, sir, that you have made
22 is correct, but with respect it is not relevant to the
23 point of distinction that I make, because my clients
24 have a separate claim running at the same time for the
25 UK MIF and the EEA MIF. As I will come on to explain,

1 they are through very different routes, and Mr. Hoskins
2 says as long as we had a claim for the EEA MIF, that is
3 it, game is over, absolutely everything is time barred
4 to you. We say, with respect, that is totally wrong --

5 THE CHAIRMAN: Yes.

6 MR. PICKFORD: -- and that this authority does not support
7 that proposition.

8 This is an authority about effectively the
9 implications of the rule in negligence that you cannot
10 claim for economic loss. It is a particular application
11 of that rule. You cannot get round it -- effectively,
12 what the court is saying is you cannot get round that
13 rule. That is a rule which is fundamental in negligence
14 and you cannot get round it by saying but each
15 subsequent manifestation of loss is a new cause of
16 action. Basically saying, no, that does not fly, you
17 are not going to circumvent the underlying rule by that
18 argument.

19 Sir, is that a convenient moment for me to pause for
20 the transcript?

21 THE CHAIRMAN: Yes. We will say five minutes.

22 (11.50 am)

23 (A short break)

24 (11.57 am)

25 THE CHAIRMAN: Yes.

1 MR. PICKFORD: Sir, I am going to try and pick up the pace
2 a little. There is only one further authority I think
3 I need to go to in this section.

4 There is quite a lot of material still for me to get
5 through in terms of when we then apply all these
6 principles to the facts of our case. What I draw from
7 the authorities I have gone to on the statement of claim
8 test, and in particular what a cause of action is,
9 because that is what it all depends on, is that a cause
10 of action is not merely a breach of competition law, it
11 is all of the essential factual elements that entitle
12 the claimant to its remedy, as I said at the outset of
13 this part of my submission.

14 That matter is to be determined by examining the
15 pleading in issue and asking what are the essential
16 factual elements, primary facts, that entitle the
17 claimant to the remedy claimed.

18 We see from the authorities that even if one is
19 seeking to achieve the same remedy, a different factual
20 means of getting there constitutes a different cause of
21 action.

22 Sir, if I may, I would like to then move on to the
23 reasonable diligence point. The test for that is in
24 *Gresport*; it is tab 31. Hopefully we can go through
25 that relatively rapidly because you were taken to it --

1 THE CHAIRMAN: Second bundle, is it not?

2 MR. PICKFORD: It is the second bundle, tab 31.

3 Paragraph 41, just to recap. This is the judgment of
4 Lord Justice Henderson, and at paragraph 41 he refers to
5 the guidance given by Lord Justice Millett in *Paragon*
6 *Finance*. The key part of that quotation is down
7 towards the bottom, the last third. He suggested the
8 test was:

9 "... how a person carrying on a business of the
10 relevant kind would act if he had adequate but not
11 unlimited staff and resources and were motivated by
12 a reasonable but not excessive sense of urgency."

13 We are considering here the question of what
14 constitutes reasonable diligence.

15 Then if we could please turn on to paragraph 48.
16 You were taken to that yesterday, I believe, and then
17 paragraph 49, where it is said that
18 Lord Justice Neuberger added that:

19 "One must be --

20 THE CHAIRMAN: I think this was read to us yesterday.

21 MR. PICKFORD: Yes, exactly. We need to be very careful
22 about implying words in, but the key point is that there
23 needs to be something to put the claimant -- it is at
24 the end of that paragraph:

25 "... something to put the claimant on notice of the

1 need to investigate."

2 That is a question of fact in every case. Sorry, it
3 is a question of fact, and moreover, as we see from the
4 end of *Peco Arts*, what one has to look at, in that
5 case it was the buyer and possessor of valuable artwork,
6 but what the person would do having regard to all the
7 circumstances, including the circumstances of the, in
8 that case, purchase. But obviously the circumstances
9 will vary with the facts of the case.

10 We say that that is inherently a factual inquiry
11 which is not suitable for determination on a summary
12 basis in the light of the guidance to which I took the
13 Tribunal yesterday in the *Arcadia* case, where it sets
14 out that what we should not be doing on this type of
15 application is engaging in trying to determine the
16 facts. Indeed, Mastercard put its application very
17 clearly at a high level of abstraction, so we have not
18 sought to adduce the relevant facts in relation to this,
19 these sorts of issues.

20 A further point that I draw from this authority in
21 terms of its application here is because it is critical
22 that one engages with the reasonable diligence question
23 which, I might add, Mastercard did not do in their
24 skeleton. They only did it before the Tribunal now.

25 The reason why you need to engage in it is because

1 otherwise you are in danger of falling into the trap
2 that Mastercard then go on to fall into anyway, which is
3 that they engage in a pick and mix approach where they
4 say, well, with the benefit of hindsight, now knowing
5 what we now know about everything that has been analysed
6 by the European Commission, you could have perhaps
7 looked at that document over there, that fact from over
8 there and maybe that fact from over here, and there is
9 another fact that you could have had from over here and
10 perhaps another one from over there, and to mix all that
11 together and say "There you go, you have got all the
12 documents you need for your pleading".

13 I am going to come on to say I do not even agree
14 with their position that you can find all the facts from
15 all those documents they point to. But it is also, we
16 say, not the right approach if there is not anything to
17 put you sufficiently on notice that you need to engage
18 in that exercise in the first place. This is a question
19 which has essentially been glossed over, we say, by
20 Mastercard.

21 So that I think puts to an end the authorities.

22 We can go on to deal with the fourth of my five
23 topics on this part of the case, which is why the
24 Tribunal should not in fact be determining this question
25 now, which is the assumptions that are urged on the

1 Tribunal by Mastercard in order to try to make good the
2 fact that really what we should be doing is
3 investigating the facts properly at trial.

4 Critical in those is that it says, and it says in
5 terms in its skeleton, this is at paragraphs 83 to 84 --
6 I am not going to take you to it -- that the two
7 complaints that they rely upon from the British Retail
8 Consortium and EuroCommerce were publicly -- it said the
9 material relied on was publicly available in June 1997.

10 We know that the complaints were not publicly
11 available in June 1997 and we know that from
12 Mr. Cotter's witness statement, but it is helpful to go
13 to precisely what Mr. Cotter says about it.

14 THE CHAIRMAN: They are not saying the complaints were
15 publicly available. It is not Mastercard's case.

16 MR. PICKFORD: They have said it actually, but they seem --

17 THE CHAIRMAN: Well, because of what Mr. Cotter said, that
18 is not the case being advanced to us. You do not have
19 to address that. That is not their case. They made it
20 quite clear, Mr. Hoskins, what they are saying is what
21 BRC put forward, that it was available to BRC as
22 an association of retailers, it was equally available to
23 major retailers. That is what he says.

24 MR. PICKFORD: That is what he says but we do not know.

25 That is an assertion.

1 THE CHAIRMAN: Well, one looks at what the facts are that
2 are relied on. One looks at the newspaper articles and
3 so on. I mean, that is the way the case is put even
4 though it is pretty clear that your client could have
5 had access to the BRC complaint because it is a member
6 of BRC, or was.

7 MR. PICKFORD: Sir, that is a point that -- I will address
8 that and then come back to the general point, if I may.

9 THE CHAIRMAN: But that is not the case that was put.
10 That is how it was put. So the fact that the complaint
11 itself was not itself a public document, that is
12 accepted.

13 MR. PICKFORD: That has important repercussions which I will
14 come back to in a moment. If I can deal with the
15 question about what Dixons knew. Mastercard expressly
16 approached this application on the basis that it did not
17 seek to assess what information the claimants in fact
18 had. Those were Mr. Cotter's very words.

19 Subsequently we did not investigate who in Dixons
20 did or did not know what and what information could
21 ultimately be attributed to Dixons. Of course we have
22 other claimants here as well.

23 THE CHAIRMAN: No, of course, we accept that.

24 MR. PICKFORD: In the light of that it would be wrong, in my
25 submission, for the Tribunal to make findings at this

1 juncture about what we did or did not know.

2 THE CHAIRMAN: I am not saying you knew anything. I am just
3 saying Dixons as a member of the BRC would have been
4 able to ask for -- Whether they did, whether anybody
5 read it, I have no idea, but they could have asked for
6 it. That is all I am saying. That seems self-evident.
7 If your trade association puts in something on your
8 behalf of its members, a member can say "Please can we
9 have a copy".

10 MR. ANDERSON: Is the argument against you not that it is
11 a matter of reasonable inference that if BRC could come
12 up with this information, satisfying the test that you
13 have already taken us to, your client could similarly
14 have exercised that degree of diligence? That is how
15 I take the argument.

16 MR. PICKFORD: Indeed, that is Mr. Hoskins' case and that is
17 what he says: if BRC could do it, so could you.

18 THE CHAIRMAN: That is exactly the point Mr. Anderson makes.

19 MR. PICKFORD: Indeed, that is very pithily put and my
20 response to that is we simply do not know.

21 THE CHAIRMAN: Why --

22 MR. PICKFORD: We do not know where the information came
23 from for the BRC complaint.

24 THE CHAIRMAN: We have to look at the key information and
25 see what it was.

1 MR. PICKFORD: Well, we do and we will come on to it.

2 THE CHAIRMAN: BRC was able to obtain it and the question is
3 whether someone of the nature of Dixons, as a major
4 retailer, and indeed the other claimants before it who
5 are all significant enterprises -- we are not talking
6 about a corner shop bringing a case against Mastercard
7 owned by a sort of husband and wife business, whether
8 given their nature, one can say that it would be
9 reasonable for them to exercise the same diligence as
10 BRC.

11 MR. PICKFORD: But, sir, with respect, it is an important
12 point that we do not know where BRC got its information.
13 For all we know, the reason why BRC put it -- and I will
14 come on to deal with it, but there is a general point to
15 be made first which is for all we know the BRC got its
16 information because there was an ex-Barclaycard person
17 that they were able to call upon to assist them with
18 putting together their complaint.

19 We simply do not know where that information came
20 from. It is pure assertion to say it is necessarily in
21 the public domain because the BRC got it. The BRC
22 complaint itself was not in the public domain, and we
23 cannot simply -- it would be erroneous for us to simply
24 assume without proper factual investigation. We can
25 find these matters out or we can do our best at trial,

1 but we cannot simply assume that this document --

2 THE CHAIRMAN: We can only find out at trial if one is able
3 to get a witness who worked for BRC in 1995 or 1992, or
4 whatever it is. So we will probably never find out
5 where they got it or whether there was some inside
6 information from Barclaycard.

7 MR. PICKFORD: We may or we may not.

8 THE CHAIRMAN: That is not what is going to happen at trial.

9 MR. PICKFORD: Sir, in my submission --

10 THE CHAIRMAN: You carry on.

11 MR. PICKFORD: It would be wrong to shut out --

12 THE CHAIRMAN: But anyway, you carry on. You say we do not
13 know where they got it from.

14 MR. PICKFORD: Yes, and I say it would be wrong to shut out
15 that issue now merely by assumption when we are going to
16 have a trial, when we can do our best to prove our case.
17 I think I can put it no better than that.

18 I think the point is even more acute in relation to
19 the EuroCommerce complaint which is one step further
20 removed, because that is a European body of which the
21 BRC was a member. It is also a report which is dated
22 22 May and the cut-off date that we are arguing about is
23 20 June in the same year, 1997, and there will be, in my
24 submission, a legitimate factual inquiry which we may or
25 may not be able to determine, but again we will do our

1 best in relation to it, about whether a report that was
2 produced one month before the limitation period was
3 actually something that we could reasonably have taken
4 into account and based our claim on.

5 THE CHAIRMAN: But that is not the point, Mr. Pickford, as
6 Mr. Anderson made clear. It is not that you reasonably
7 should have seen the EuroCommerce complaint. It is that
8 if EuroCommerce could obtain and put together that
9 information, so could a major retailer by reasonable
10 diligence. That is the point being put. It may be
11 wrong, but that is the point being put against you.

12 So the date of the EuroCommerce complaint is
13 irrelevant.

14 MR. HOLMES: Is it not also relevant to consider not just
15 where EuroCommerce or BRC actually got that information
16 from? I accept one may not know that or that may not
17 even be knowable, but the question is whether or not you
18 could have, with due diligence, got the information
19 which was in fact sufficient to sustain the EuroCommerce
20 or BRC complaints.

21 MR. PICKFORD: If we could have done, on that basis, sir,
22 those reports are irrelevant because what Mastercard
23 should be doing is saying, well, here you go, here are
24 the true primary facts. Here is where BRC would have
25 been able to assemble it from.

1 THE CHAIRMAN: No, what they are saying is -- what you could
2 do, could have done, because we do not know what you
3 did, what you could have done is a hypothetical
4 question. They are saying in answering the hypothetical
5 question, it is powerful evidence to look at what
6 somebody else was able to do and if they are able to do
7 it, and look at the nature of the facts they put
8 forward. That is relevant in asking the question, well,
9 could you reasonably have done it?

10 That is the point. Not that you could have got
11 a copy of the EuroCommerce complaint, as you say, that
12 was just before the cut-off. That is not the issue.

13 MR. PICKFORD: We say that is an issue which depends on all
14 the circumstances which should be properly investigated
15 on the facts, rather than simply being determined on the
16 basis of assumption.

17 THE CHAIRMAN: We got that point.

18 MR. PICKFORD: I would also say that if one steps back and
19 thinks about it, that the case on the application,
20 I would suggest, is with respect somewhat unreal. We
21 are considering every single retailer and merchant of
22 one form or another that accepted Mastercard payment
23 cards, and the precise number does not matter but there
24 must have been tens of thousands, if not hundreds of
25 thousands of those people.

1 Mastercard does not point to a single person that
2 actually brought a claim in the entirety of the UK.
3 Indeed, it goes even further than that. Mr. Hoskins
4 yesterday went so far as to say that in effect we were
5 all turning a wilful blind eye to the claim.

6 With respect, that submission is not credible. Why
7 would every single retailer or other person that accepts
8 Mastercard credit cards in the UK, 1997, if they could
9 reasonably have been on notice of a potential claim and
10 could have put together the facts to plead their claim,
11 why did someone not do it? Someone, one out of the
12 hundreds of thousands? It is not remotely credible, we
13 say, that you could have brought a claim to the standard
14 that is required of bringing a claim in the courts, and
15 there is a substantial difference between making
16 a complaint to a competition authority where you can
17 simply assert effectively conclusions of law and say,
18 well, we think that this must be problematic and
19 actually knowing the underlying facts sufficiently well
20 to be able to plead a claim.

21 I am going to come on very shortly to the elements
22 of our claim against which I say that you should test
23 whether the statement of claim test is passed.

24 THE CHAIRMAN: Yes.

25 MR. PICKFORD: Sir, on that basis I may as well just go

1 directly to it. Does everyone have the one and
2 a half-side document entitled "Missing elements from
3 a statement of claim"?

4 What I am going to do is briefly take you through
5 that document and then I am going to go through our
6 pleading and show how that fits together in the context
7 of the pleading.

8 So there are four elements that we say were missing
9 from our ability to complete a cause of action. The
10 first was in respect of the agreement of the association
11 of undertakings.

12 It is important that there are certain elements of
13 the rules that are critical for the way that the other
14 elements in the chain follow. Because without certain
15 rules in the first place, you do not have the
16 restrictive effects that then follow from them and so
17 you cannot just ignore the rules altogether.

18 We begin with the point that we needed to know that
19 there was a board within Mastercard, or some entity.
20 I mean, I do not put any weight on board, but there was
21 something within Mastercard that comprised -- and
22 I should probably add in here -- the representatives of
23 the European banks that was responsible for deciding
24 upon the set of interchange fees comprising the EEA MIF.

25 What is important about that is it is the same

1 undertakings, including the acquiring banks who are
2 ultimately charging them, who also comprise the
3 decision-maker who is setting them. That is critical
4 because that is what gives rise to the decision of the
5 association of undertakings.

6 We needed to know that those decisions were binding
7 on the member banks because if they were merely advisory
8 rather than binding, we would not be able to deduce the
9 chain of causation that we then come on to in the next
10 part of our pleading.

11 We needed to know in particular these following
12 essential ingredients of how the EEA MIF functioned.
13 Firstly, as regards cross-border payments, that it was
14 a fallback interchange fee for such payments in the
15 absence of a bilateral agreement.

16 Secondly, that central acquirers who process
17 cross-border transactions must respect the rules of the
18 country of the issuing bank whose card transactions they
19 wish to process.

20 I will come on to explain why that is relevant
21 because that goes to its effect. Then for domestic
22 payments we needed to know that the rules were such that
23 it also functions as a fallback -- the EEA MIF, I beg
24 your pardon, functions as a fallback for interchange
25 fees for domestic payments in the absence of bilateral

1 agreement or multilateral domestic interchange fees.

2 That critical point conceded by Mr. Hoskins
3 yesterday is we did not know. The way he gets round
4 that is by saying, well, it does not matter, you can
5 plead some loss, and that is where we differ.

6 THE CHAIRMAN: You addressed us on that, yes.

7 MR. PICKFORD: So that is the agreement. It is important to
8 notice that even at this stage of the analysis, which is
9 defining the agreement, which is the rules that are part
10 of that agreement, we need to know about the
11 relationship between the EEA MIF and the UK MIF.

12 It has consequences that run through the entire
13 cause of action but it starts here, right at the
14 beginning. This is not merely a little tweak at the end
15 of the chain when we are just considering our loss, it
16 goes back to the beginning here when we are considering
17 what rules we were actually concerned with. That is the
18 agreement.

19 Then we needed to know --

20 THE CHAIRMAN: Just pausing there. (d), your claim is of
21 course here a breach of European competition law.

22 MR. PICKFORD: That is correct.

23 THE CHAIRMAN: I understand why the 1(d) is important for
24 your remedy, but on the question of whether there is
25 an agreement of an association of undertakings, and of

1 course the UK MIF is not part of that agreement, it is
2 said to be a consequence of it, why is 1(d) necessary to
3 plead that there was an agreement of an association of
4 undertakings?

5 MR. PICKFORD: Because there were two agreements -- so what
6 is comprised within the agreement is not merely the
7 agreement. It is a relevant agreement about rules that
8 operate in a particular way. That is the whole point
9 here. It is not an agreement about whether they went to
10 tea on Fridays, it is an agreement about relevant rules
11 that then impact on the consequent analysis in relation
12 to both restriction of competition and effects on us as
13 retailers.

14 The point here is that in fact there are two --

15 THE CHAIRMAN: Just pausing there. To establish
16 an agreement of an association of undertakings, how it
17 impacts on you as retailers, is that necessary to
18 establish that it is an agreement of an association of
19 undertakings?

20 MR. PICKFORD: No, sir, but the key point is this and this
21 is very important: that as we have seen in the
22 authorities, one set of facts pleaded in a statement of
23 claim can have multiple causes of action. Yes, it is
24 true that without the knowledge of (d) we could have
25 pleaded to a certain form of the agreement of

1 association of undertakings. If we had known (a) to (c)
2 but not (d) we could have pleaded an agreement. But the
3 point is that agreement is not in fact the pernicious
4 agreement that then has the restrictive effect that we
5 rely on under restriction and in the impact that
6 follows.

7 My point here is there are effectively two causes of
8 action that originate even at this early stage. You
9 could look at either. You could look at either first.
10 Sorry, you could not. You begin with (a) to (c), and
11 then (d) is a further element, but it is a further
12 element of the rules and therefore it is a further part
13 of the agreement.

14 THE CHAIRMAN: So (a) to (c) would enable you to claim for
15 the cross-border transactions?

16 MR. PICKFORD: Yes.

17 THE CHAIRMAN: Because you would have an agreement of
18 an association of undertakings, you would have the EEA
19 MIF?

20 MR. PICKFORD: Yes.

21 THE CHAIRMAN: You say, if I have understood it correctly,
22 to plead for the domestic transactions resulting from
23 the agreement of the association you need the additional
24 element of the agreement that is in (d)?

25 MR. PICKFORD: Yes.

1 THE CHAIRMAN: Is that the point?

2 MR. PICKFORD: That is correct, and it goes back to the
3 agreement. The content of the agreement is core in the
4 analysis that follows because obviously what we care
5 about is agreements which ultimately restrict
6 competition. We do not care about agreements which do
7 not.

8 THE CHAIRMAN: (a) to (c) does, because the EEA MIF is
9 a major restriction of competition --

10 MR. PICKFORD: In one way.

11 THE CHAIRMAN: -- indeed, it is what the decision was all
12 about.

13 MR. PICKFORD: It was also about (d). Not specifically
14 about the UK MIF, but the decision is quite clear that
15 there are two elements to the restriction, effectively.
16 There is the direct impact and then there is the
17 indirect impact on domestic interchange fees, and they
18 are both part of the decision.

19 THE CHAIRMAN: And the indirect impact is a breach of
20 European law as well.

21 MR. PICKFORD: Yes, indeed. That is absolutely critical.
22 The indirect impact is a breach. It is said -- it is
23 laid out clearly in terms in our pleading -- there are
24 a number of paragraphs we cross-reference to in the
25 decision and I am going to come on to the pleading in

1 just a moment.

2 So that is the agreement. The next point is the
3 effect. The effect of the agreement was to restrict
4 competition, and this is where, again, we see the
5 division between the two strands of the case.

6 So in respect of EEA transactions, we needed to know
7 that the EEA MIF set a de facto floor for interchange
8 fees because no issuer has an incentive to accept less
9 than the applicable fallback MIF given the rules that
10 I have just averred to in 1(c) above and thereby
11 artificially inflated the MSCs payable by merchants.
12 Because the prices set by acquiring banks would be lower
13 in the absence of the MIF than if there were an ex post
14 pricing rule in place. That is the way in which the
15 decision put the counterfactual by which you judge the
16 restriction.

17 The reason why the restriction follows from 1(c) is
18 because 1(c) deals with the fact that it is a fallback,
19 and moreover in relation to cross-border payments it is
20 a fallback where the issuers are given the power because
21 the central acquirers have to respect the rules of the
22 country of the issuing bank. So that means that issuers
23 have no incentive to accept anything other than the
24 fallback EEA MIF as a minimum because they know that if
25 they do not reach agreement, they can just say, well,

1 there we go, we will have a default there, please.

2 So that is the effect, the direct effect in relation
3 to the EEA MIF. But then there is also an indirect
4 effect in relation to domestic MIFs and the domestic
5 transactions that are affected by them, and that is in
6 (b), that the EEA MIF distorts competition and inflates
7 MSCs by applying indirectly because there is no domestic
8 MIF. Sorry, there were two ways in which it happens.

9 One is that if there is no domestic multilateral
10 interchange fees, as we understand is the case in some
11 countries. The EEA MIF just applies. So that is one
12 way in which it can feed through into a domestic
13 transaction. There is a second route which, as we
14 understand it, is how it in fact feeds through in the
15 UK, which is that there are other countries such as the
16 UK where there is a domestic fee but because the rules
17 say if you fail to reach agreement either on a bilateral
18 or on your own domestic multilateral, the EEA MIF will
19 apply. Again, it has the effect of inflating the levels
20 of the domestic interchange fees because there is no
21 incentive for -- when everyone gets together on the
22 domestic board and it considers what interchange fee
23 will we have, the issuers think, well, no point in
24 agreeing anything less than what we could get if we do
25 not reach agreement, so we will have multilateral fee

1 which is at least as high as the EEA fee.

2 THE CHAIRMAN: Would you need (b) (i), it may embellish your
3 case, but to establish the claim you make? I see why
4 you say you need (b) (ii) because there was a UK MIF.

5 MR. PICKFORD: In relation to the UK, I think that is
6 correct.

7 THE CHAIRMAN: We are looking at the period 1992 to 1997.

8 MR. PICKFORD: As I hope will be clear from our pleading
9 when we turn to it very shortly, we do not actually know
10 exactly when the UK MIF applied. So what the decision
11 tells us is that there are these two routes by which
12 an EEA MIF can affect the charges domestically.

13 THE CHAIRMAN: That has not come out in any of the lengthy
14 judgments? When the UK MIF came into effect? These
15 three long judgments on UK MIFs and Mastercard?

16 MR. PICKFORD: In relation to this period, I do not believe
17 it does because we are dealing with a period that
18 actually has not yet formed the subject of a complaint.
19 Because obviously in *Arcadia*, which was the lead case
20 and led to one of the three cases that went to the
21 Court of Appeal, different limitation arguments and they
22 were shut out far later on.

23 THE CHAIRMAN: I see. I was just asking. Yes.

24 MR. PICKFORD: So that is the next element which, again, we
25 say all the documents that Mr. Hoskins took you to do

1 not enable him to demonstrate. Indeed, in relation to
2 the domestic part of it, he will admit that. He just
3 says it does not matter.

4 Then we needed to be able to plead that the
5 restrictive agreement was not objectively necessary for
6 the operation of an open payment card scheme such as
7 Mastercard. You heard my submissions on that yesterday.
8 I do not intend to repeat them. There is a question of
9 law there. We say in reliance on the horse racing case,
10 the legal burden was on us and we needed to at least
11 state it and be able to believe it.

12 Indeed, I do not need to take you there but
13 I believe the authority, the horse racing authority, in
14 relation to the legal burden remaining on the claimant
15 but the evidential burden being on the defendant, is
16 approved in the Court of Appeal. Sorry, in
17 Mr Justice Popplewell's judgment in *Arcadia*, which was
18 one of the things that survived the Court of Appeal's
19 analysis.

20 Then, fourthly, we need to be able to demonstrate
21 the restrictive agreement caused loss to Dixons, and we
22 say in respect of our claim, in two different ways: one,
23 our payment of the EEA MIFs; secondly, our payment of
24 the UK MIFs.

25 Tracing through all the elements that begin with the

1 nature of the agreement and then its effect and then the
2 losses that it caused us, the UK MIF part of our claim
3 is a different cause of action to the EEA MIF part of
4 our claim.

5 We can test it, I think, this way. Suppose that we
6 had been aware of all the facts for the EEA MIF claim
7 and we brought that in time, and we had explained
8 everything about EEA MIFs. But if one looked at that
9 pleading and the facts there set out, that could not
10 possibly entitle us to claim in respect of different
11 parts of the rules which had a different restrictive
12 effect, as found by the Commission on UK MIFs, and that
13 led to different losses in respect of the payment of
14 those UK MIFs.

15 That, we say, applying all of the authorities that
16 I have taken the Tribunal through this morning, will be
17 a different cause of action.

18 Moreover, it cannot sensibly or fairly be said that
19 we are shut out of that entirely different cause of
20 action. On this assumption we knew enough to plead the
21 EEA. I do not accept that, but that is the assumption
22 for this submission, but that we did not know enough to
23 plead about the UK MIF cause of action that I have just
24 explained.

25 We say it would be quite unfair to shut us out from

1 an entirely different cause of action that we simply
2 could not have known about merely by virtue of the fact
3 that there was a further cause of action that we could
4 have pleaded. It simply does not make any sense. That
5 makes a nonsense of how section 32 must operate because
6 what it would do is it would effectively take its
7 operation from focusing on the claim to focusing not on
8 the claim, something else.

9 That would, in my submission, entirely subvert the
10 whole purpose of section 32, which is to not shut
11 claimants out from claims which they did not have the
12 facts to bring.

13 Sir, on the pleading point --

14 THE CHAIRMAN: If I may, for myself I find it very helpful,
15 this document.

16 MR. PICKFORD: I am very grateful.

17 So I was, with the Tribunal's indulgence because
18 I know that there is quite a lot I need to get on to in
19 relation to other issues, I could take the Tribunal
20 through our pleading and show them how it is
21 constructed, but I think hopefully because they have got
22 the references in this document, it may be sufficient
23 for you to see those essential elements there in that
24 note. But I am very happy if it would assist the
25 Tribunal to go to the pleading as well, but I do not

1 want to labour a point which is well understood.

2 THE CHAIRMAN: We do not need that. As you say, you have

3 given us the references, you have summarised it

4 helpfully.

5 MR. PICKFORD: I am very grateful.

6 MR. DE LA MARE: Sir, can I just interject. I have been

7 a bad person and I have not produced one of these

8 documents because, quite nakedly, I have wanted to see

9 whether this form of document attracted judicial

10 approval. We can easily provide our equivalent of this

11 with the equivalent route map to our like pleas.

12 THE CHAIRMAN: Your claim is essentially -- of course the

13 pleading reads differently but it is essentially the

14 same claim.

15 MR. DE LA MARE: It is.

16 THE CHAIRMAN: Whether it is spelt out in the same way as

17 a matter of just expression does not really matter. If

18 the facts are necessary to your -- you are obviously

19 claiming based on the UK MIF as well.

20 MR. DE LA MARE: Yes.

21 THE CHAIRMAN: So for myself, I do not think we need to

22 follow it through each one.

23 MR. DE LA MARE: I am grateful. Logically that must follow

24 since they are both follow-on claims.

25 THE CHAIRMAN: Unless Mr. Hoskins is going to take some

1 point on or that your pleading is differently set out,
2 and he can let you know. But it seems to me these
3 points may be good or bad, but they will apply to all
4 the cases.

5 MR. DE LA MARE: I am grateful.

6 MR. PICKFORD: I am very grateful, sir. Indeed, it would be
7 ironic if Mr. Hoskins were to seek to take such a point
8 because of course his decision is you do not even need
9 to look at the pleading claim, you simply need to look
10 at some kind of hypothetical claim.

11 THE CHAIRMAN: We have his point. Where are you going now?

12 MR. PICKFORD: So my next point is to look at the material
13 that Mastercard have relied upon. To some extent that
14 is obviously -- I could just stop and say: there you go,
15 that is my claim and he has not demonstrated those
16 points. But it probably is helpful for me to go through
17 and at least highlight some of the points where
18 Mr. Hoskins says this is sufficient and say by reference
19 to this why it is not sufficient.

20 The first point to make in this context is there are
21 obviously two elements that we need to consider. There
22 is the trigger point and then there is, following the
23 trigger point, whether there was sufficient to satisfy
24 the statement of claim test.

25 As I have already explained, the trigger point issue

1 was effectively ignored by Mastercard, but they have
2 sought to make that good in their oral submissions
3 yesterday and in their new note.

4 The point is that there needed to be something to
5 put us on notice sufficiently to investigate a claim.
6 In that regard, Mastercard rely principally on the BRC
7 complaint and the EuroCommerce complaint.

8 THE CHAIRMAN: I did not think they did. It was not my
9 understanding. I thought they relied much more on the
10 press reports.

11 MR. PICKFORD: Also press reports which, in my submission,
12 appear to have effectively been based in many cases
13 on the fact that there have been complaints. But let
14 us --

15 THE CHAIRMAN: Well, they might be, but what they are saying
16 is what would have put you on notice -- you are talking
17 about the trigger point -- is the press report because
18 it is reasonable to assume that in a company like Dixons
19 or Transport for London, there will be directors who
20 read newspapers and it is reasonable to assume that they
21 may read some of them, the sort of newspapers from which
22 extracts -- or they could have reasonably done so --
23 were placed before us. There is no question but those
24 newspapers are in the public domain. That is,
25 I thought, the way the matter was put.

1 MR. PICKFORD: Maybe. In that case --

2 THE CHAIRMAN: I do not think we need evidence that your
3 clients' directors did not read newspapers, or at trial.

4 MR. PICKFORD: That point I am willing to concede, sir.
5 That is fairly taken.

6 Sir, in that case I think the best way of doing it
7 is to go through the documents effectively broadly
8 chronologically, and I will start with the MMC report
9 which is at 3F, 29. This is the first report on which
10 reliance is placed, which is a report from 1980.

11 Does the Tribunal have the relevant tab? It is
12 tab 29 in bundle 3.

13 THE CHAIRMAN: Yes.

14 MR. PICKFORD: I am grateful. We can see very readily just
15 from page 5 -- I am using the external numbering -- that
16 this report from the contents concerned, as it then was,
17 Barclaycard and Access. It was not actually Visa and
18 Mastercard; these were different schemes, quite
19 potentially, one imagines, with different rules.

20 Now, if we look at page 7, we see the terms of
21 reference. This was a reference by the Director
22 General of Fair Trading, exercising various of his
23 powers under the Fair Trading Act 1973 and referring the
24 matter of the existence, or possible existence of
25 a monopoly situation in relation to supplying the United

1 Kingdom with credit card franchise services.

2 Then there were various particular things that the
3 MMC were being required to consider insofar as they
4 considered that a monopoly situation existed.

5 THE CHAIRMAN: I do not think Mr. Hoskins actually took us
6 to this report at all, did he?

7 MR. PICKFORD: It may be that I can go through it relatively
8 quickly, although there are a few points that I would
9 like to rely on.

10 THE CHAIRMAN: That is fine, but I do not think it was
11 particularly relied on against you. I know it features
12 in the evidence.

13 MR. PICKFORD: It features in the evidence.

14 THE CHAIRMAN: The strength of the case they particularly
15 advance is I think in the references in the note which
16 was not included.

17 MR. PICKFORD: Yes. I am happy on that basis to go through
18 it fairly briefly. Obviously I would not want it to
19 then come back to haunt me because I had not gone
20 through it at all.

21 THE CHAIRMAN: We would be relying on it on the basis that
22 it was not urged upon us by Mr. Hoskins just because it
23 features in a witness statement, so I do not think you
24 need take us to it to rebut a case. If there is
25 something that you think helps you in it that is

1 different.

2 MR. PICKFORD: Yes.

3 THE CHAIRMAN: I think the first one relied on was the 89
4 report.

5 MR. PICKFORD: Right. That will enable me hopefully to deal
6 with it in a matter of one or two minutes in that case
7 because there is something I would like to rely on,
8 which is if one turns to the external numbering,
9 page 182.

10 In this section, the MMC is considering the charges
11 paid by traders. That is the equivalent of our merchant
12 service charge in modern parlance.

13 If one looks at paragraph 1180, please, the point
14 being made there is the MMC investigated the charges and
15 decided that they did not see a problem with them.

16 Insofar as you are a keen follower of MMC reports,
17 which obviously we all are here, and it is suggested
18 implicitly by Mr. Hoskins that my clients would be too,
19 the situation that -- what you draw from this is that
20 there was not a problem with merchant service charges,
21 at least as had been investigated by the MMC back in
22 1980.

23 It is perhaps unsurprising that Mr. Hoskins does not
24 any longer place a great deal of reliance on that
25 report.

1 If we then go to the next report, which is the 1989
2 report which I think does feature, as, sir, you rightly
3 said. This is the MMC's report entitled "Credit card
4 services", a report on the supply of credit card
5 services in the UK.

6 We see at page 5 a summary. At this stage, in 1989,
7 Mastercard and Visa have entered the picture but only in
8 relation to international payments, and that is the
9 point I am going to come on to in just a moment. If one
10 looks, please, at paragraph 1.6 where it deals with,
11 amongst other things, MSCs, it says:

12 "As to the future, we neither advocate nor reject
13 charges for cards, discounts for cash or shorter
14 interest-free periods. Such matters, as well as rates
15 of interest and merchant service charges, should be left
16 to competition. Our recommendations have been framed to
17 promote such competition."

18 They did look at merchant service charges, but they
19 did not consider it was necessary to intervene in
20 relation to them.

21 If we then go, please, to page 14. This is
22 a paragraph -- I am afraid I do not recall whether it
23 was referred to by Mr. Hoskins yesterday. I do not know
24 whether it was. It was referred to in their evidence
25 which simply effectively refers to the fact that the

1 suppliers of Access credit card services, Mastercard and
2 Eurocard trade marks -- sorry, they used Mastercard and
3 Eurocard trade marks, and he then went over the page to
4 paragraphs 2.40, 2.41 and 2.42.

5 It is important to note here that this is under the
6 heading "The roles of the JCCC", which was the joint
7 merchant acquiring company, for Access cards, and then
8 within that it then discusses trade marks and what trade
9 marks are being used. So he talks about the Access
10 trade marks and the Mastercard trade marks and the
11 Eurocard trade marks, and the arrangements in that
12 context of licensing trade marks between MCI and ECI.

13 If our cause of action had been based on a complaint
14 in relation to trade marks, perhaps this might have
15 given us some insight into the relevant rules. But it
16 does not help us in relation to the rules that I took
17 you to, the agreement of the association of
18 undertakings, on page 1 of my note.

19 In particular, it is not about the collective
20 setting of interchange fees by the collective agreement
21 of banks, which is the association of undertakings and
22 its agreement of which we complain.

23 I think Mr. Hoskins then went to paragraph 2.60
24 which says that the Mastercard and Eurocard systems
25 determined the interchange fees to be paid for

1 international transactions. The points to note from
2 this are, firstly, the EEA MIF, which as we understand
3 it is a range of fees, is not specifically referred to
4 here. Secondly, these are in fact prior arrangements
5 that are applied as in 1989 and not those that apply,
6 that we complain about, as in 1992. One sees that very
7 clearly from the fact that in -- as Mr. Hoskins fairly
8 took us to, at the bottom of that page, there is
9 a reference to that, that:

10 "Up to now, domestic interchange fees have not been
11 paid between members of the Access scheme in the United
12 Kingdom."

13 So we did not even have domestic interchange fees at
14 all at this point, let alone a UK MIF which sits under
15 the EEA MIF in terms of the hierarchy of the set of
16 rules that I took you to at paragraph 1(d) of my note.

17 Again, here, even though it does say that Mastercard
18 and Eurocard determine the interchange fees to be paid,
19 what it does not explain, which is critical to our
20 competition complaint, is that those are set as binding
21 decisions by the banks themselves acting as an
22 association of undertakings. Because what is critical
23 from my pleading and from the points that I referred to
24 in paragraphs 1(a) and (b) of my note, is that these
25 were rates that were being set by the very banks that

1 were then levying them, and that was at the heart of the
2 complaint.

3 We then, I think, were taken to --

4 THE CHAIRMAN: Is it not being set by the JCCC, the
5 interchange fees?

6 MR. PICKFORD: The JCCC is a UK company which is effectively
7 the acquirer for Access.

8 THE CHAIRMAN: Whether it is a UK company or any other
9 company it is a company bringing together, is it not,
10 comprising a series of banks, is it not? Set up by
11 three banks: Lloyds, Midland and Natwest.

12 MR. PICKFORD: I think we have time to go through each of
13 the statements.

14 The first point is simply that Mastercard and
15 Eurocard systems determined the interchange fees to be
16 paid for international transactions. We are dealing
17 here with international transactions in this paragraph.

18 We are told by Mr. Hoskins that that includes the
19 EEA MIF, but if we are Dixons in 1997 we do not
20 necessarily know that. But let us just put that to one
21 side.

22 If we then move on to the next sentence:

23 "The JCCC currently pays 1% of the net value of the
24 transactions with a United Kingdom trader to the foreign
25 card issuer concerned."

1 So this is clearly cross-border only because it
2 concerns foreign card issuers, and the converse also
3 applies. What it is saying there is that there is
4 a sole acquirer, the JCCC, for Access cards and it pays
5 that international fee as set by Mastercard and
6 Eurocard. That is what it is saying.

7 Then it goes on to say what the international fees
8 are supposed to cover. But what it does not say is that
9 in fact, which is part of our claim in relation to
10 different arrangements that applied in 1992, that as
11 recorded by the European Commission there is a board
12 within Mastercard made up of the UK banks which decides
13 on its own set of interchange fees.

14 It is important not to lose sight of the fact that
15 the reason why 1992 is the critical date is it is those
16 rules which were notified to the European Commission and
17 which it examined and it is those rules on which we
18 found our complaint. As far as we understand it,
19 although we have not had to go back this far because our
20 claim does not go back pre-1992, there were different
21 rules in relation to the Access scheme as implemented
22 through the JCCC than the ones that were ultimately
23 notified to the Commission in 1992. Otherwise why did
24 the Commission not just take a decision going back
25 earlier?

1 The reason why it did not is because it looked at
2 a specific set of rules that were notified to it which
3 had, as I understand it, effect from that period.

4 So it is very important that we should not
5 (inaudible) the fact we cannot necessarily assume from
6 something here in 1989 that that is even talking about
7 the rules that ultimately found our cause of action.

8 Sir, I think there may be one or two further points,
9 but perhaps now is a convenient moment to --

10 THE CHAIRMAN: Do you want to finish off this document, this
11 report before we break? That would be sensible.

12 MR. PICKFORD: I am very happy to do so. Mr. de la Mare has
13 drawn to my attention a particular paragraph that would
14 be helpful for us to look at. Sorry, I beg your pardon,
15 in a different document. I misunderstood him.

16 THE CHAIRMAN: Have we finished with the 1989 report?

17 MR. PICKFORD: Just bear with me for one moment, I want to
18 check whether there is anything else.

19 No, I think I have made the points and, indeed, just
20 to emphasise that, the critical point in 2.60 is that
21 clearly these were different arrangements because they
22 were not even interchange fees domestically payable and
23 that is important.

24 Sir, I think in that case if that is convenient
25 I can pause there.

1 THE CHAIRMAN: How are you doing on time?

2 MR. PICKFORD: I think I have substantially improved my
3 position on time in the light of the indulgence the
4 Tribunal gave me, that I have not gone through my
5 statement of claim in excruciating detail. I think we
6 will, between me and Mr. de la Mare, run to time.

7 He originally gave me all but 30 minutes. I think
8 I can actually do better than that, so therefore
9 hopefully he can have a little more time himself.

10 THE CHAIRMAN: If we say 2 o'clock.

11 MR. PICKFORD: I am grateful.

12 (1.03 pm)

13 (The short adjournment)

14 (2.00 pm)

15 THE CHAIRMAN: Yes, Mr. Pickford.

16 MR. PICKFORD: Sir, members of Tribunal, thank you.

17 The next document we are due to go to is the BRC
18 complaint of 26 February 1992. That is to be found in
19 the bundle, volume 3, tab 31. If you could turn it up,
20 please.

21 This is said by Mastercard, certainly in its
22 evidence, to be the most revealing of the documents put
23 forward by Mastercard and, indeed, in its skeleton
24 argument it says that it only needed to be topped and
25 tailed with the appropriate formalities and to be

1 submitted as a properly particularised claim for the
2 High Court. Rather than me standing in front of
3 you, sir, or any other judge of the High Court defending
4 this document as a pleading, but we are going to come on
5 to it.

6 The suggestion, we say, that the BRC complaint could
7 stand as a properly particularised claim is not
8 sustainable when you look at it on its terms.

9 It begins in the introduction on page 12, if you
10 have that. It describes itself as a note, in the second
11 paragraph, that:

12 "... deals with the international interchange fee
13 ..."

14 Note it is not expressing referring to the EEA MIF
15 there:

16 "... operated by the card schemes Visa and
17 Mastercard ... [and explains how] we believe that
18 Article 85 of the Treaty of Rome may be infringed."

19 So it is put in slightly equivocal terms.

20 We then see at section 2 --

21 THE CHAIRMAN: I see, may be infringed.

22 MR. PICKFORD: The second paragraph of the introduction
23 at 1.

24 THE CHAIRMAN: I suppose in the letter they say infringed.

25 Yes.

1 MR. PICKFORD: It is important to bear in mind that what
2 this is, it is asking a competition authority to start
3 investigating, and that is something that is very
4 different to going to the High Court and saying "We
5 believe with sufficient certainty to be able to plead
6 them out and attest to them with a statement of claim
7 that the following facts that complete a cause of action
8 are all true".

9 That is a very different thing to do than simply
10 making a complaint to an authority saying "Can you look
11 at this some more because we have some suspicions about
12 it".

13 Then in section 2 under the card scheme services we
14 see in the third paragraph that we are told by the BRC:

15 "It is difficult to obtain factual evidence about
16 IIF rates since the card schemes do not publish
17 information on these matters. We are told, however ...
18 that the levy on cross-border transactions imposed by
19 each scheme are centrally determined, applies to all
20 members and is a single uniform rate ..."

21 That is an important point. We come back to that
22 because that is the essence of their complaint on the
23 next page:

24 "... and covers all EC member states and countries
25 in the world."

1 Notably there they are told this. They do not say
2 who by, and that goes to an exchange I had with the
3 Tribunal before lunch about being careful not to make
4 assumptions that whatever information the BRC was
5 relying upon was necessarily available to a retailer
6 such as Dixons, because we do not necessarily know how
7 it got its information.

8 It was told by someone apparently. Then if we turn
9 over the page, under 3.1 we are now going through the
10 various elements of Article 85 and we see:

11 "Association of undertakings. The card schemes are
12 associations within the meaning of Article 85."

13 That is a recitation of the legal test. It is not
14 pleading the underlying facts, just the primary facts,
15 which is what you are required to do in a statement of
16 claim, that justify that legal characterisation.

17 THE CHAIRMAN: If it is an organisation set up by a number
18 of issuers who combine to operate a common scheme, is
19 that not the fact that makes it an association of
20 undertakings?

21 MR. PICKFORD: That might, but going back to an exchange
22 that I had before lunch, what is key in this case is
23 there is an agreement between the association of
24 undertakings.

25 THE CHAIRMAN: Well, restriction or decision.

1 MR. PICKFORD: Okay. Indeed. A decision of an association
2 of undertakings.

3 THE CHAIRMAN: Yes.

4 MR. PICKFORD: Whether or not one has an association of
5 undertakings does not get one very far if there is not
6 a core decision which is what ultimately goes on to
7 cause the restriction of competition.

8 The way I put it in my summary of what we did not
9 know in my note was that there was an agreement, or in
10 fact I have to say I drafted this relatively quickly in
11 an early hour this morning. Probably better in point 1
12 of my note would be a decision of an association of
13 undertakings, rather than an agreement of an association
14 of undertakings.

15 In relation to that point, what is key is that there
16 is a decision in relation to particular rules; in this
17 case, that it is the banks themselves who are setting
18 the MIF that they then apply and that is what then feeds
19 through into it being a restriction later on.

20 THE CHAIRMAN: But I mean, if they have rules, that is
21 obviously decided by the card scheme, the rules of the
22 card scheme. The card scheme decides the rules.

23 MR. PICKFORD: Yes.

24 THE CHAIRMAN: If the card scheme is an association of
25 an organisation set up by a number of issuing banks, is

1 that not a decision of an association of undertakings?

2 MR. PICKFORD: Ultimately, sir, that has proved to be right
3 in law. But for about a decade or so it was argued by
4 Mastercard that merely having a decision of some form of
5 body that implemented an interchange fee did not
6 represent a decision of an association of undertakings.

7 Because what they did is in 2006 there was
8 an initial public offering and they changed their
9 structure, and so no longer did they have rules that
10 were set by the banks themselves. There was another
11 entity that then set the rules albeit all within
12 Mastercard, and at that point they said that is
13 something very different, that does not actually engage
14 competition law.

15 THE CHAIRMAN: Sorry to interrupt you. I was just going to
16 the assertion you are making that the statement in the
17 first line of 3.1, that sentence, is not enough, you
18 need the underlying facts, and I was suggesting the
19 underlying fact is simply it is their rules, the next
20 sentence, and the card scheme is an organisation set up
21 by a number of issuing banks in combination and those
22 are the central facts that make it a decision of
23 an association of undertakings, that is all.

24 MR. PICKFORD: Well, what I say is the essential fact that
25 actually makes this particular rule the decision of

1 an association of undertakings is that it is taken by
2 a board comprising of the banks themselves, and that one
3 does not find from this.

4 THE CHAIRMAN: Well, whether it is a board or
5 an organisation through a committee, does that make any
6 difference?

7 MR. PICKFORD: No, not whether it is -- but that it is
8 a decision taken by the banks themselves. That does
9 not, I would say, come through from this particular
10 document. That is my submission.

11 THE CHAIRMAN: It is an organisation of a number of issuing
12 banks that promulgates the rules, why is that not
13 enough?

14 MR. PICKFORD: Well, it is because Visa and Mastercard are
15 said to be major international card schemes operating in
16 the EC and that they have membership in terms of banks.

17 What is not said is that they are themselves run by
18 the banks setting the fees, and that is an important
19 point. It was an important point for Mastercard because
20 it was prepared to admit pre-2006 that if it was the
21 banks themselves that were setting the fees, that
22 mattered, but that once that was transferred to another
23 entity they said that that changed the legal analysis.

24 THE CHAIRMAN: Yes.

25 MR. PICKFORD: Sir, the next point is in relation to the

1 restriction of competition which is alleged by the BRC.
2 This is worth careful attention.

3 What is said at 3.3 is:

4 "The imposition by card schemes of a fixed single
5 IIF is a restrictive practice caught by the general
6 prohibition contained in Article 85(1)."

7 It is the fact that it is a fixed single rate.

8 They go on:

9 "The fact that the fee charged is fixed and uniform
10 distorts the market since the charge does not, and over
11 time cannot, reflect changes in conditions, practices
12 and usages of different undertakings involved in the
13 process of credit card funded purchases. The single
14 rate of IIF thwarts the free market by treating as
15 identical transactions arising from cards and systems
16 with varying levels of risk and security."

17 So that is the essence. It goes on to explain how
18 it is passed on, but that is the essence of the concern,
19 that it is fixed and uniform.

20 Now, there are two problems with that. One, so far
21 as I understand it, it is not actually factually
22 correct. There are a host of different EEA MIFs that
23 apply in different circumstances, insofar as the IIF can
24 be equated to the EEF in these circumstances.

25 But there is a more fundamental problem as well

1 which is that that is not the complaint that we make in
2 our claim. That is not the restriction that the
3 Commission identified or the one that we rely upon,
4 because what we complain about is the very existence of
5 an EEA MIF at all.

6 Our case is that it was not objectively necessary
7 for the functioning of a four-party payment scheme and
8 there should not have been one, and that the fact that
9 there was one restricted competition in the way that
10 I explained going through in my summary of particulars
11 and increased the charges that we paid.

12 That is an entirely different complaint to the one
13 made here, that there is an IIF, and the problem is that
14 it is allegedly and, as I understand it wrongly, said to
15 be uniform.

16 MR. HOSKINS: Sir, I should put it on the record we do not
17 accept that that is an accurate -- you do not have the
18 evidence before you, but I think it is important to know
19 that is not accepted. So we say it is accurate that
20 there was a uniform EEA MIF at that period in time.
21 That is my instruction.

22 MR. PICKFORD: There are two points that follow from that.
23 Firstly, that illustrates my earlier submission why
24 really this matter should be being determined at trial
25 on proper evidence rather than on a summary basis so

1 that we can actually have evidence of those sorts of
2 issues.

3 Secondly, that this discussion in February 1992,
4 based on whatever information the BRC had been told at
5 that stage, if it is correct that there was a single
6 rate that does not correspond to what is said in the
7 European Commission decision, which is what we rely
8 upon, about there being multiple rates.

9 So what that might well indicate is what information
10 might have been available on which to base a complaint
11 it was wrong.

12 MR. HOSKINS: I am sorry, there is an inconsistency. This
13 is 1992 and the decision relates to the period from
14 1992.

15 MR. PICKFORD: That is my very point. The decision -- and
16 my junior Ms Morrison will find the reference --
17 explains that there are a variety of EEA MIFs, there is
18 not a single MIF.

19 THE CHAIRMAN: Yes. Well, we do not have to spend time on
20 that.

21 MR. PICKFORD: In any event, the key point, as I sought to
22 emphasise, is that whether or not that is true or false,
23 that is not the complaint that we make that underpins
24 our restriction of competition.

25 THE CHAIRMAN: Yes.

1 MR. PICKFORD: The next point is that there is no proper
2 plea, we say, on objective necessity reflecting the fact
3 that you do not need, as we say, a MIF at all. We say
4 a MIF is not -- that is what we plead -- necessary for
5 the operation of a four-party payment scheme and that is
6 integral to our claim that it is restrictive because
7 obviously we would fall down fairly badly if it turned
8 out that in fact a MIF was necessary for the functioning
9 of a four-party payment scheme. It would no longer be
10 sustainable for us to say that it was restrictive
11 because there would not be the scheme in the first place
12 for there to be any complaint of competition about.

13 THE CHAIRMAN: Yes.

14 MR. PICKFORD: Again, entirely different from our case.

15 The next point is as regards the domestic
16 interchange fees. We see that in section 4. We see
17 under "Single market" on page 13:

18 "The card scheme rules do not define the domestic
19 interchange arrangements which are left to national
20 members to negotiate, but they do prescribe the IIFs."

21 As you will have seen, that is certainly wrong as
22 regards the period from 1992 onwards because the whole
23 point of our claim, the core or the basis on which we
24 bring a claim for the UK MIFs, is that it was part of
25 a hierarchy of rules where the EEF is the fallback to

1 domestic arrangements. That is the very basis on which
2 our claim is founded, and here we are being told the
3 very opposite by the BRC.

4 Again, two points. One, that appears to be simply
5 wrong unless the Commission decision is entirely wrong
6 and it is not open to Mastercard to challenge that
7 anymore. I think Mr. Hoskins will have to accept that
8 that is wrong. Secondly, it is not our case. Our case
9 is the opposite of that.

10 We say on a proper examination this document does
11 not provide a sufficient basis for pleading out a claim,
12 and therefore even if one makes the assumptions that are
13 made by Mastercard that everything in it could have been
14 known to us, which you will know I do not accept, given
15 that this is based on what they were told by someone,
16 even if we had known this, it would not have enabled us
17 to plead the claim that we plead.

18 Sir, the next document I would like to turn to is
19 the EC notice on the application of the EC competition
20 laws to cross-border credit transfers, and that is in
21 tab 32, which is the next tab, I believe, in the bundle.
22 It is at tab 32, page 283 and following. You were taken
23 to this by Mr. Hoskins yesterday.

24 The key point to make here is that this is
25 a document setting out points of law which very

1 deliberately does not contain factual material,
2 allegations of fact that we or any other merchant could
3 have relied upon pleading a particularised claim by
4 reference to primary facts because that was not the
5 purpose of this notice. It was to set out guidance on
6 the application of the law.

7 The next point to note in relation to it is that it
8 applies only to cross-border credit transfers. Again,
9 it has nothing to do with the key element of our claim
10 in relation to the domestic MIF, the UK MIF.

11 Even in relation to that narrow point, the passage
12 that is quoted by Mastercard, it was highlighted
13 yesterday --

14 THE CHAIRMAN: 40 to 42.

15 MR. PICKFORD: Thank you -- on multilateral interchange
16 fees, it said that:

17 "Intersystem competition could restrain such
18 anti-competitive effects provided the competing systems
19 do not themselves also contain similar multilateral
20 interchange fees."

21 How similar the fees levied by Visa were or not is
22 not in evidence on this application. What we have is
23 Mr. Hoskins referred us to the recent decision of the
24 Court of Appeal, which he obviously fairly noted is not
25 pre-1997, but said: there you go, that demonstrates that

1 the facts must have been in the public domain. But we
2 say that was assertion and it was not made good by
3 reference to the Court of Appeal judgment.

4 Insofar as we were supposed to be working out what
5 was going on in Visa as well, that is simply not
6 something that we have properly addressed on this
7 application.

8 Sir, if I may move swiftly on because I have got
9 a little bit more to cover. The next document is the
10 EuroCommerce complaint of 22 May 1997, and if we put
11 bundle 3 away, that is in bundle 4, at tab 33.

12 If we turn please to page 3, we see the first
13 reference, on the table of contents, 2.1, to the trading
14 conditions cartel.

15 Over the page on the summary, subsection 1, again,
16 reference at the bottom of that paragraph to a legal
17 trading conditions cartel.

18 Then, again, if one turns over to page 7, you see
19 halfway down the page:

20 "Stripped of its disguise ..."

21 It is the final sentence of that second paragraph:

22 "... the interchange fee becomes no more than an
23 ordinary cartel for fixing the price and trading
24 conditions connected to card payments. Each of these
25 elements will be explained hereafter."

1 That is how EuroCommerce is putting its case. It
2 was a cartel. That is not how we put our case. Our
3 case is based on its anti-competitive effects.

4 The second point to note, which has been conceded
5 but it is important to always bear in mind, nothing
6 about the critical relationship between EEA MIFs and UK
7 MIFs in this document.

8 The next point to make is that coming back to
9 a discussion that I had with the Tribunal earlier, it is
10 still I think something I would still like to emphasise
11 in relation to this, we do not know what the basis of
12 the information is that EuroCommerce relied upon. We
13 know from some of the press articles that Mr. Hoskins
14 took us to yesterday, and I am going to come to those
15 very shortly, that in 1992 five major retailers were
16 pressing to become acquirers. So for all we know by
17 1997 it is possible that there were members of
18 EuroCommerce who were also engaged in acquiring
19 activities, and potentially the information came from
20 them which would not have been information available to
21 non-acquiring retailers.

22 Again, that is a factual matter that would need to
23 be investigated and that is why this is something that
24 should be considered properly at trial and not now on
25 a summary basis. In my submission, that is an entirely

1 plausible issue that we will want to determine and one
2 could investigate.

3 The next point to make about this document is that
4 it is not tied to any underlying facts save for when one
5 gets to section 1.3, which says "proof". That is on
6 page 12.

7 What one knows from 1.3 is that the proof is
8 apparently a survey which is annex 3, which we did not
9 have. We were handed up before the short adjournment --
10 I was given a copy of annex 3. I am afraid, sir, I have
11 not read it. Mr. Hoskins tells me that they do not rely
12 on it, they just provide it for completeness because it
13 was asked for by the Tribunal yesterday. If they do not
14 rely on it, then I do not have to respond to anything
15 in it.

16 If there is nothing better than what is said there,
17 that simply proof is a survey, there are no sufficient
18 underlying primary facts that one could rely upon to
19 articulate the elements of the claim that are in my
20 note.

21 So that is what we say about the EuroCommerce
22 complaint.

23 THE CHAIRMAN: I think it was the second paragraph of 1.3,
24 the first sentence, that was the only fact. The card
25 issuers and banks clearly had an agreement or at least

1 a concerted practice amongst themselves on the charging
2 of the merchant service charge to merchants. That was
3 the fact.

4 MR. PICKFORD: Sir, that is not, in my submission,
5 an allegation of underlying primary facts. That is the
6 conclusion that there was a concerted practice. If that
7 were my pleading in the High Court I would expect to
8 have been quite, potentially rightly, criticised for not
9 having provided sufficient primary facts to back up that
10 plea.

11 Sir, those are the points that I have to make on the
12 EuroCommerce document. I am conscious of the pressure
13 from Mr. de la Mare who would like some modest airtime.

14 THE CHAIRMAN: You promised him extra time.

15 MR. PICKFORD: I promised him extra time if I could. How
16 much he is going to get is obviously -- one minute would
17 obviously be extra time.

18 THE CHAIRMAN: You want a narrow construction of extra time.

19 MR. PICKFORD: Indeed, sir.

20 If we could then turn, please, to the newspaper
21 articles and the reasonable diligence point, which is
22 best addressed by reference to Mr. Hoskins' note from
23 yesterday.

24 The reasonable diligence test, the issue that we
25 need to consider in this context is not just whether

1 there is a trigger point, although that is relevant, but
2 moreover, ultimately what this all goes to is
3 determining the question of fact in each case, and I am
4 simply quoting from Gresport here, whether, with
5 reasonable diligence, the claimants could have
6 discovered the concealed facts and pleaded their claim.

7 That is what we need to concern ourselves with,
8 whether with reasonable diligence we could have
9 discovered the concealed facts and pleaded the claim.

10 So under that heading "Reasonable diligence", we
11 have a Times article quoted first which basically says
12 that the retailers are not happy with the so-called
13 interchange fees and they are trying to get Mr. Ridley,
14 the trade secretary, to abolish it.

15 We say that proves pretty well the opposite of what
16 Mr. Hoskins would like to draw from that. What that
17 shows is that we were unhappy about an interchange fee,
18 but remember MSCs at least had been looked at already by
19 the MMC by this point twice and given effectively
20 a clean bill of health, and rather than thinking that we
21 potentially could bring some kind of competition action
22 of our own, we were complaining because you were asking
23 the trade secretary to simply intervene and abolish
24 them, which rather suggests we did not think we could
25 get the remedy directly ourselves because we wanted

1 someone else to do it on our behalf.

2 We say that does not suggest that it would be
3 realistic for us to be thinking in terms of bringing our
4 own private action.

5 MR. ANDERSON: Sorry, why not? It is one thing to say the
6 cheapest, easiest route for us might be to get the
7 government to do something about it, but why would that
8 necessarily exclude the opportunity of private action?

9 MR. PICKFORD: It does not necessarily exclude it. I am
10 saying the reasonable inference -- it goes back to the
11 point about the wilful blind eye: is it more realistic
12 that we did not think there was a competition claim that
13 we could plead, the matter potentially coming to
14 millions of pounds, or were we wilfully turning a blind
15 eye to it.

16 We say it is more realistic that not a single person
17 in this country sought to bring a claim that they did
18 not have sufficient facts to enable them to do that.

19 THE CHAIRMAN: They might have thought it is commercially
20 too risky to bring a claim. There are all sorts of
21 reasons why people do not start litigation. We are not
22 concerned with that. We are concerned with discovering
23 the essential facts. As *Arcadia* says, it may have
24 been commercially very sensible for *Arcadia* not to sue
25 until they got the decision of the Commission, but that

1 is not the test.

2 MR. PICKFORD: I obviously do not rest my case that
3 inference. I have taken you through the primary
4 documents and I say they do not show what we needed.
5 But my point is Mr. Hoskins puts his case and says look
6 at those documents, now supplement them by these press
7 articles and they demonstrate his overwhelming case.
8 I say no, actually you do not have to read them that
9 way.

10 I say that actually in the context, when we had
11 already been told twice by the expert competition
12 authority, the MMC, nothing to see here, that the
13 reasonable inference to draw, the reason why we were
14 saying to the Secretary of State please do something
15 about it, is because it was not apparent to us that we
16 did have a complete cause of action that we could bring,
17 and it is highly surprising that not a single person in
18 the UK brought such a claim if it really was so clear.

19 THE CHAIRMAN: You made that point before lunch.

20 MR. PICKFORD: Then very similar considerations apply to the
21 other complaints. Essentially, we have the Independent
22 saying that the retailer is taking banks to the EC, but
23 that is simply reporting the BRC complaint.

24 THE CHAIRMAN: So you accept you would have known about the
25 BRC complaint even though you say it is not clear that

1 you would have had a copy of it, but you would have been
2 aware of it because of the press article?

3 MR. PICKFORD: I certainly accept that it was --

4 THE CHAIRMAN: In the public domain that the BRC had made
5 a complaint?

6 MR. PICKFORD: Yes, that fact was, but that is different
7 from the complaint itself. Moreover, you have seen what
8 I have said about the BRC complaint.

9 THE CHAIRMAN: Yes.

10 MR. PICKFORD: Then we have a see also in relation to
11 various other press articles. I am not sure there is
12 an enormous amount more that I can say. It is really
13 very much more of the same in relation to the point
14 I made about The Times article.

15 For your note, but I do not think we need go to it
16 to demonstrate the point, it is not in dispute, it is
17 the Independent article of 3 August 1992 which is at
18 paragraph 33(b) which is the one that mentions retailers
19 wanting to break into the acquiring market.

20 I have also addressed the EuroCommerce complaint.
21 Sir, on that basis, I am going to use as many of the
22 last 25 minutes as I need, and hopefully not all of
23 them, for the last issue, the construction point.

24 This is the question about the interpretation of
25 Rule 31(4) of the 2003 rules. Of course if the Tribunal

1 has agreed with what I have said on either of my first
2 two points, either we should not be determining this
3 matter at all now, or that if we do I win because there
4 were not sufficient facts available to us to plead our
5 claim then this question does not arise. But if I am
6 wrong on those then we do need to determine those
7 issues.

8 The starting place is the introduction of
9 section 47A. If you could go to the second authorities
10 bundle. All the relevant materials I think are in the
11 second authorities bundle, please, at tab 33.

12 Given Mr. Hoskins' very clear introduction to these
13 issues yesterday, we should hopefully be able to canter
14 through these points fairly quickly, but obviously
15 I want to make sure the Tribunal has my responsive
16 submissions on board.

17 Section 47A was introduced into the Competition Act
18 by the Enterprise Act 2002. It took effect from
19 20 June 2003, and in particular at (3) it provided that:

20 "For the purposes of identifying claims which may be
21 made in civil proceedings ..."

22 Here we are talking about the Tribunal:

23 "... any limitation rules that would apply in such
24 proceedings are to be disregarded."

25 That is the beginnings of the analysis, because what

1 section 47A does instead of having the ordinary
2 limitation rules apply, is it provides for a new set of
3 limitation rules to apply which are based on the trigger
4 point of the final infringement decision.

5 That is what one goes on to see in paragraphs 5
6 through to 8. Obviously there is some quite complex
7 provisions there, but in essence the idea is that the
8 new trigger was that you needed to bring your claim
9 within two years of a final infringement decision having
10 been confirmed, and that means that if it was appealed,
11 the decision was appealed, then it had been two years
12 after the relevant court had finally adjudicated on the
13 appeal.

14 That is section 47A. If we then turn, please, to
15 tab 36 which contains the Limitation Act. The key
16 provision just to remind the Tribunal of here is on the
17 final page, 39:

18 "That this Act shall not apply to any action for
19 which a period of limitation is prescribed by or under
20 any other enactment, whether past, before or after the
21 passing of this Act."

22 So what that does is make clear that the more
23 specific limitation rules, where they exist, and in our
24 case they do exist in the form of section 47A and the
25 Tribunal's rules, take precedence over the more general

1 Limitation Act rules that would otherwise apply.

2 The next element in the jigsaw, then, is to turn to
3 the limitation rules that were included in the 2003
4 rules, and they are to be found at tab 37. So this is
5 the key provision and the one the interpretation of
6 which is in dispute between ourselves and Mastercard:
7 rule 31, and in particular 31(4), but it is worth
8 reviewing the whole of 31 to put it properly in context.

9 31(1):

10 "The claim for damages must be made within a period
11 of two years beginning with the relevant date."

12 That is completing the point about the relevant
13 limitation period that begins with section 47A.

14 Rule 31(2):

15 "The relevant --

16 THE CHAIRMAN: You do not have to read it out because we
17 have read it again and again.

18 MR. PICKFORD: I am grateful.

19 THE CHAIRMAN: But make your submissions on it.

20 MR. PICKFORD: So subsection (4):

21 "No claim for damages may be made if, were the claim
22 to be made in proceedings brought before a court, a
23 claimant would be prevented from bringing the
24 proceedings by reason of a limitation period having
25 expired before the commencement of section 47A."

1 Had it said "cause of action" where I emphasise
2 "proceedings", well, then Mastercard would be right.
3 Because you can chop up the cause of action under
4 English law in the way that we have all been basing our
5 submissions on, where the relevant cut-off date is for
6 limitation.

7 However, what it refers to is the proceedings, where
8 bringing the proceedings by reason of a limitation
9 period would be prevented.

10 We say that is a very clear choice of language and
11 it manifestly supports the construction that we put
12 on it.

13 MR. HOLMES: Can I ask you how you deal with the potential
14 objection that what prevents the claimants potentially
15 defeating the purpose of this provision by bundling
16 claims together in a single proceeding, so that as long
17 as you had some claims which were not time barred,
18 whatever that time limit may be, but some of them were
19 way outside the limitation period, again whatever that
20 may be, and you could contrive falling within time by
21 bundling good claims in time into a single proceeding,
22 what prevents that mischief on your interpretation of
23 31(4)?

24 MR. PICKFORD: If they were genuinely bad claims that were
25 there to contrive a limitation point those could be

1 struck out and then we would be in the position that we
2 were just left with the good claims.

3 THE CHAIRMAN: Is that not what they are trying to do?

4 MR. PICKFORD: Sorry?

5 THE CHAIRMAN: Is that not exactly what Mastercard have
6 tried to do?

7 MR. PICKFORD: These have not been contrived in any way --

8 THE CHAIRMAN: Not contrived in the sense they are sham
9 claims --

10 MR. HOLMES: Good claims but out of time.

11 THE CHAIRMAN: That is the point Mr. Holmes is making.

12 MR. HOLMES: Or would be out of time but for your
13 construction of 31(4).

14 MR. PICKFORD: Sir, to be clear, this only deals with follow
15 on claims. We are only concerned with follow on claims
16 in the Tribunal. This is not a rule of wider
17 application, and if one has a good follow on claim
18 against a defendant arising out of particular facts,
19 then you complete that and we should be entitled to
20 recover on the basis of it.

21 I think what is being suggested is there might be
22 some means of simply attacking on any old rubbish in
23 order to be able to bring oneself within -- no, well,
24 the President is shaking his head.

25 THE CHAIRMAN: That is the point Mr. Holmes is making,

1 saying if they brought a claim simply with regard to the
2 year's proceedings, claiming for the years 1992 to 1997,
3 then you say that would be defeated because that is the
4 proceedings, and then they bring a separate claim for
5 the years 1997 onwards, start separate proceedings for
6 the years 1997 onwards and that clearly would not fall
7 foul of Rule 31(4).

8 MR. PICKFORD: That would be obviously an inadvisable way to
9 bring one's proceedings if you were looking to claim --

10 THE CHAIRMAN: But that would be the result, would it not?
11 That the one then would be defeated because the whole
12 proceedings related to, subject obviously to the
13 section 32 point but we are leaving that aside, would be
14 out of time under the Limitation Act and then you would
15 have separate proceedings and those could continue.

16 I think Mr. Holmes' point is saying why should you
17 be any better off just because you have combined those
18 two proceedings in one?

19 MR. PICKFORD: Certainly we have not combined two
20 proceedings in one. We have simply brought what is
21 a natural set of proceedings, which is one claim. In
22 part, I think it could be answered by reference to the
23 comments of Lord Justice Rix in *The Kriti Palm*
24 where he was concerned with the possibility of
25 a confected cause of action and he said you have got to

1 look at the real gravamen of what is actually being
2 pleaded.

3 If it is the case that there might be potentially --
4 I have not thought it through because I have to say this
5 is a new point, certainly not been brought by
6 Mastercard. But if there were an argument that we were
7 confecting a case in order to subvert the limitation
8 rules, then there might perhaps be an abuse of process
9 point to be considered. But there is no suggestion that
10 on our facts we are doing anything of the sort.

11 We are simply doing what we say was envisaged quite
12 clearly by these particular rules which are supposed to
13 allow you to bring claims in relation to infringement
14 decisions, and the whole point of the new limitation
15 provisions, as contained in a combination of Rule 31 and
16 section 47A is that they replace a scheme which is based
17 on putting aside section 32, a six-year rolling period,
18 and they replace it with a scheme which is based on
19 focusing in on the decision and treating decisions, we
20 say, as a whole.

21 That is precisely what we have done. We are simply
22 treating the decision as a whole. There might be other
23 difficult cases where one had to consider whether, if
24 someone had confected some type of case in order to
25 attempt to circumvent a rule, whether that should be

1 permitted. But that is not our case.

2 Mastercard's argument in relation to this is that it
3 points to the *Yew Bon Tew* case and says that it has
4 established that statute should not be interpreted so as
5 to impair an existing right or obligation unless that
6 right is unavoidable in the language used.

7 We do not take issue with the principle, but we say
8 it is unavoidable on the language used because it refers
9 to proceedings and that is entirely consistent with the
10 whole new scheme that was being introduced that replaced
11 the idea of a rolling six-year limitation period.

12 What Mr. Hoskins says in response to that is that is
13 very counterintuitive, because on one day you might be
14 able to claim for the entirety of an infringement and
15 then the next day you cannot get any of it, and that
16 surely cannot be right. But that is precisely the form
17 of the regime that was introduced by the 2003 rules in
18 relation to the two-year limitation period from the
19 relevant date as defined depending on precisely when the
20 relevant decision was confirmed.

21 If you are one day within your two-year limitation
22 period, on its face, *prima facie*, you can claim for the
23 whole of the infringement subject to these sorts of
24 arrangements, and these are probably -- it is the first
25 case that has obviously arisen. But if you are one day

1 outside you get nothing in terms of follow on damage
2 action because you cannot bring your claim at all.

3 So there is nothing particularly counterintuitive
4 about that kind of regime. That is precisely the regime
5 that these rules brought into play.

6 That is the first limb of the construction point.
7 The second point purely concerns Rule 119, the
8 transition rules. I refer to it because it is relevant
9 to my claim because my interpretation of Rule 119 and
10 Rule 31(4) are consistent with one another. Even though
11 we do not actually have to apply Rule 119, it makes good
12 my point on construction.

13 Very briefly if I could turn to Rule 119, which is
14 at tab 38. This is the 2015 rules and the transitional
15 provisions, and the Tribunal I think will be well aware
16 from the debate I had with Mr. Hoskins yesterday that
17 the key here is that Rules 31(1) to (3) of the 2003
18 rules are preserved, but Rule 31(4) is not.

19 What Mr. Hoskins says is it would be very surprising
20 if Rule 31(2) allowed claimants with a later claim to go
21 back further than the earlier one. What I say in
22 response to that is that submission works against him
23 because, yes, it would be surprising if the effect of
24 Rule 119 was to give a free ride to people who came
25 later, after 2015, than people like my clients who

1 brought their claim in 2014.

2 But the point is it does not have that effect
3 precisely because I am right about the primary
4 construction of Rule 31(4). Mastercard does not have
5 a convincing answer in relation to the operation of
6 Rule 119 and the exclusion of the reference to
7 Rule 31(4), because once you take Rule 31(4) away from
8 the picture and say, okay, we will look at the
9 limitation rules and apply Rules 31(1) to (3) and we
10 will apply section 47(3), which was the rule that got
11 rid of all other limitation rules, what that leaves is
12 no limitation defence. It is only Rule 31(4) which is
13 what he clings to in order to bring in his accrued
14 rights defence. Without that, it is very clear what the
15 rules say and there simply would not be any accrued
16 rights at all.

17 We say there is an accrued right, but it is only in
18 relation to proceedings. So the reality is, although he
19 does not like to characterise it in this way, that
20 Mastercard's allegation is that Rule 31(4) was omitted
21 by mistake and that is something which the Tribunal is
22 not, we say, in a position to decide. It needs to be
23 abundantly sure that it understands the intended purpose
24 of Rule 119, that the omission of Rule 31(4) was
25 inadvertent, and that it knows what the substance of the

1 legislature would have enacted if the error had been
2 noticed.

3 The way that Mr. Hoskins put his case, as
4 I understand it, he does not seek to bring himself
5 within that test because he says it does not apply. But
6 we say the reality is that it does apply because that is
7 in essence what he is ultimately saying in relation to
8 31(4). It is a mistake that it is not there.

9 Sir, I have six minutes that I have kindly and
10 generously donated. Unless there are any other further
11 issues that I can assist the Tribunal with?

12 THE CHAIRMAN: No, thank you very much.

13 MR. PICKFORD: Thank you.

14 Submissions by MR. DE LA MARE

15 MR. DE LA MARE: Sir, it is probably wise of me to start by
16 an enquiry as to just how little extra time -- I do not
17 mean that pejoratively -- I might actually get because
18 I have a regular old clip to go through.

19 THE CHAIRMAN: I do not have the agreement that you made
20 between you in front of me.

21 MR. DE LA MARE: I had bid for half an hour and I am
22 thinking 45 minutes is perhaps more realistic.

23 MR. HOSKINS: The agreement was that the claimants combined
24 would have until 3.30 pm.

25 THE CHAIRMAN: Yes. You want an hour?

1 MR. DE LA MARE: Not an hour, 45 minutes.

2 THE CHAIRMAN: No, Mr. Hoskins says an hour in response.

3 Just a moment.

4 What we will do is we will give you 45 minutes and
5 sit until 4.45 pm so Mr. Hoskins has an hour.

6 MR. HOSKINS: I will try not to detain you.

7 THE CHAIRMAN: We are not concerned if we sit that long. We
8 cannot sit beyond 5.

9 MR. DE LA MARE: There are five topics I want to cover very
10 briefly. Firstly, I want to deal with just a few
11 factual points about the TfL and Europcar claims.
12 Then I am going to go back into this Rule 31(4) debate
13 we have been having, and that entails looking in
14 particular at the vexed issue of Rule 119(2). Then I am
15 going to address some headline points about the
16 unreality, in our submission, of the headline charge of
17 Mastercard, that a person of reasonable diligence would
18 have considered and brought protective proceedings in
19 1992 and following, and there are going to be a couple
20 of additional legal authorities I am going to need to
21 show you there to address the key parts of my learned
22 friend's legal architecture.

23 I am going to say next to nothing in topic 4 and the
24 question of stringency of pleadings because I know you
25 are well across that. Then last of all I am going to

1 address the particular topic of business attributes and
2 the objective standard of reasonable diligence.

3 Firstly, the dates of these claims. We know they
4 are brought after the commencement of the transitional
5 regime: 2 September 2016 for TfL and 9 September 2016
6 for Europcar.

7 It is important to see that the claims whose
8 temporal span --

9 THE CHAIRMAN: Did you say 2 September for TfL?

10 MR. DE LA MARE: Yes.

11 THE CHAIRMAN: I have down the 5th. It does not affect the
12 argument, but I just want to get it right.

13 MR. DE LA MARE: We will check. I will not get it out now.

14 If one turns up the particulars of claim tab 9, you
15 will see straightaway the important point that of all
16 the public transport utility entities brought together
17 now under the common hub of Transport for London, there
18 are in fact only four claimants who were in existence at
19 the relevant time and trading. There were only three.

20 The three who were trading were London Underground
21 Limited and Victoria Coach Station Limited, both of whom
22 were subsidiaries of London Regional Transport at that
23 time. Then there was DLR Light Railway which was
24 a company in existence, but the railway had not been
25 built so it was not trading. Lastly, you had London

1 Buses Limited which was the argument of LRT, as was,
2 that dealt with buses.

3 The world, if one can take oneself back in that time
4 machine, and we are going to have to do that a few
5 times, to 1992 to 1997, so Mr. Ratan is going to have to
6 put his hands in his ears because he was still in
7 kindergarten then probably, if one goes back to that
8 date you will remember that very few things, forgive the
9 pun, were the kind of bigger ticket items that you would
10 pay for using a credit card.

11 You bought your fares on the tube or on the bus in
12 cash. Occasionally maybe if you were buying a weekly or
13 monthly or annual travel card, you might use a cheque or
14 perhaps a credit card. There was no contactless
15 payment. Chip and pin, even that, let alone
16 contactless, has only been with us ten years.

17 As such, it was a very different experience and that
18 is why the evidence in Mr. Graham's statement that
19 credit card payments were a fractional part of TfL's
20 business is so obviously compelling and correct. It was
21 cash based. You could not pay for the bus in any other
22 way, and largely buying a machine ticket was a cash
23 affair.

24 THE CHAIRMAN: You are only claiming for that element of
25 credit card payments, debit card payments that was the

1 MIF in the merchant service charge.

2 MR. DE LA MARE: Absolutely.

3 THE CHAIRMAN: It is a very small claim.

4 MR. DE LA MARE: Very small figures.

5 THE CHAIRMAN: Not very important to your clients, this bit.

6 MR. DE LA MARE: No, in terms of their budget and their

7 concerns, vanishingly small, with respect.

8 The figures are that for the five-year period from
9 1992 to 1997 the entire calculated value of the claim
10 comes to approximately £500,000.

11 When one does the maths, as against the 1998
12 turnover figure, so five years of claim as against one
13 year of turnover, you get 0.05% of that turnover, which
14 we have rounded up to 0.1.

15 Then if you spread that between the five years, and
16 the reality is there is probably going to be more card
17 payments in 1997 than 1992, you get to a very rough
18 position where the spread over each year is 0.01% of the
19 turnover, which, if you multiply it by 100 on the basis
20 that the overcharge, the MIF, is about 1% of the overall
21 credit card turnover -- these are just approximations,
22 rules of thumb -- suggests that just about 1% of TfL's
23 business was transacted by credit card.

24 Just how much of that, those MSCs, were broken down
25 as between UK MIF and the EEA MIF we simply do not know.

1 There are two very good reasons why we do not know.

2 We do not have the documents because it is so very
3 long ago. That is unsurprising given all those
4 shenanigans in terms of all those corporation
5 reorganisations that TfL has been through, and its
6 subsidiaries that have been re-organised.

7 THE CHAIRMAN: I am sure they were not shenanigans. I am
8 sure they were entirely legitimate.

9 MR. DE LA MARE: You know the point I am driving at.

10 It is also unsurprising because we know, and you can
11 see this from the Visa decisions, that the merchants as
12 encouraged by Visa were not in the business of unpacking
13 what was in the MSC to explain what particular EEA or UK
14 MIFs play behind the MSC. That is recorded in the Visa
15 decision of 2002; bundle 5, tab 40, page 58, recital 15.

16 There is no reason to suppose Mastercard's charge
17 approach was any different. These were treated as
18 commercially confidential materials kept behind the wall
19 of commercial confidentiality.

20 Now, that being so, we totally agreed with the point
21 you made, sir, that it is reasonable to surmise that
22 some small percentage of that figure may be touristic
23 and therefore an EEA MIF, but in relation to TfL the
24 great preponderance, we would suggest, of MIFs in this
25 period would be UK-based MIFs.

1 Why is that? Tourists tend to travel for a day, or
2 a couple of days, or a week. They are not buying an
3 annual card on credit.

4 The Europcar story is similar but not so stark as
5 Ms Morris' statement at tab 28 of bundle 2 shows. If
6 you do the same maths, and again it is by reference to
7 five-year total claim compared to one year of turnover,
8 you get to an annual figure of about 0.06 per annum,
9 which equates to card turnover of approximately 6% of
10 the annual turnover total.

11 That reflects, as paragraph 12 of the witness
12 statement shows, that the business then was much more
13 personal and there was much more business done in cash
14 and by cheque backed by cheque guarantee card.

15 But we are quite prepared to accept, and again on
16 the same basis of sensible inference, that a higher
17 proportion of that commerce will be EEA MIF for the
18 simple reason that a higher proportion of that business
19 is likely be touristic in nature, and therefore will
20 entail someone coming from, say, Spain or somewhere like
21 that, presenting a Spanish credit card to pay for the
22 car.

23 But even there it is a very small part of the mix,
24 the same documentary problems, the same problems of
25 unpacking what is in the MSC, and we cannot provide any

1 further particularity. But we say that volume of trade,
2 that significance of trade, is a material factor when
3 you come to apply the Gresport test to a business of
4 this kind and character. Not to the particular
5 business, to business with the same sorts of general
6 features.

7 So that is topic 1. Topic 2 --

8 THE CHAIRMAN: So what you say is the overcharge for the
9 five years was about half a million.

10 MR. DE LA MARE: That is right.

11 THE CHAIRMAN: The overcharge for which you claim.

12 MR. DE LA MARE: For Europcar it is then compared to the
13 turnover for 1997. It is the 1998 figures that are used
14 for TfL.

15 THE CHAIRMAN: You are saying total turnover, not profit.
16 You are not giving the proportion of turnover which
17 I think you said for TfL about 1% of their business was
18 by credit card.

19 MR. DE LA MARE: That is right.

20 THE CHAIRMAN: Is there a equivalent percentage --

21 MR. DE LA MARE: The percentage reached for Europcar is
22 about 6%.

23 THE CHAIRMAN: So 6% of turnover was by credit card.

24 MR. DE LA MARE: Yes. Very rough order of magnitude
25 calculation.

1 THE CHAIRMAN: It is surprisingly low even for that period.

2 MR. DE LA MARE: It is. I think with the benefit of
3 hindsight one can forget how one used to routinely pay.
4 I still have my old cheque stubs, and you are surprised
5 by what one used to pay by cheque with a cheque
6 guarantee, not least because credit cards were not that
7 convenient. You had to do that process --

8 THE CHAIRMAN: I thought the issue with car rental was it
9 was not the payment for the car rental but they wanted
10 the guarantee as security for failing to return the car,
11 and that is why they wanted credit card, so they could
12 put through a further charge. 6%, is that in the
13 witness statement?

14 MR. DE LA MARE: It is. It is paragraph 11. If you compare
15 the five-year period 1992 to 1997 which, again, produces
16 a figure of £503,000.

17 THE CHAIRMAN: That is the overcharge.

18 MR. DE LA MARE: That is the overcharge. It is 0.3% of the
19 combined turnover for the year ending 31 December 1997.
20 So you have to do the same process multiplied by 100 for
21 the five years, takes you to 30%, then you have to
22 divide by five to reflect there are five years, and that
23 gives you approximately 6%.

24 THE CHAIRMAN: That is the overcharge, is it?

25 MR. DE LA MARE: No, that figure is what percentage turnover

1 roughly is attributable to credit cards.

2 THE CHAIRMAN: Because the overcharge is what proportion?

3 MR. DE LA MARE: About 1%.

4 THE CHAIRMAN: I see.

5 MR. DE LA MARE: The level of the MIF is about 1%.

6 THE CHAIRMAN: Yes.

7 MR. DE LA MARE: That is my topic 1.

8 Topic 2, I want to dive straight back into this
9 Rule 31(4) point while it is fresh in the mind.

10 Mr. Hoskins, when he addressed this, started his
11 analysis at Rule 31 and came indirectly to section 47A.

12 We say that is, with respect, entirely the wrong way
13 round. You have got to start this analysis of these
14 troublesome provisions with the public policy that lies
15 behind the Act and the changes that the Act makes.

16 The public policy being addressed by the
17 introduction of section 47A, indeed by the very creation
18 of this court, was to address amongst other things the
19 wholly deficient, indeed, exiguous enforcement of
20 private rights that flowed from competition law
21 breaches.

22 With respect, sir, you somewhat put your finger on
23 it earlier on in your exchanges with Mr. Pickford when
24 you said, well, there may have been all kinds of
25 tactical reasons why parties would not bring claims.

1 The costs risks might be excessive, the legal
2 uncertainty may be excessive. It may be picking
3 a battle with a big well-funded entity with a massive of
4 information asymmetry that you simply cannot fund.
5 Therefore, quite apart from section 32 considerations
6 about knowledge, there may be any number of reasons why
7 it is a fight that is not worth having.

8 That is the practical reality that was reflected in
9 the Act. The Act is predicated on the basis that for
10 picking off these types of big trophy disputes, because
11 these big trophy disputes because the regulators only
12 investigate big trophy cases: cartels, Google abuses,
13 matters of that kind. They allocate their resource
14 according to those areas of importance.

15 Those cases that they pick off for which this rule
16 benefits are inevitably either the ones that will not
17 overrun in a settlement because it is a fair cop, you
18 are a cartelist, you have been caught, or produces
19 battle royal of the kind that you have seen in
20 interchange, of the kind you are seeing in Google, in
21 Intel etc. Investigations that go on for years followed
22 by appeals that go on for years, and all of which are
23 productive of legal uncertainty.

24 The policy of the Act is very clear. You can bring
25 your claim and tuck in behind the regulator. When the

1 regulator makes a decision that sticks, at that point
2 you can bring your claim for damages.

3 It is a wait and see approach. Now, that is a very,
4 very different policy indeed from the policy of standard
5 limitation. It is why immediately the kind of
6 conclusionary comments you see at paragraph 107 of
7 *Arcadia* in the judgment of Mr Justice Simon have no
8 application here because the public interest balance
9 here is fundamentally different.

10 That is why you have got to start with section 47A,
11 and section 47A, both in the old form at bundle 2,
12 tab 35, or in the new form tab 34, it has a very simple
13 mechanic. It is all about identifying a follow on
14 decision of the EU Commission or domestic regulator.

15 Subject to a discretionary decision of the CAT you
16 are required to wait until that decision becomes final,
17 and we know from all the carbon graphite cartel cases
18 that that discretion is not lightly exercised.

19 Once it becomes final you then have two years to
20 bring the claim. That is the basic structure. Integral
21 to that is the disapplication of all limitation rules
22 that would otherwise apply. See subsection 3 of the old
23 rules and the identically-worded subsection 4 of the new
24 rules. The only change being a reflection of the fact
25 that Scotland is also affected by this, so it is not

1 only limitation rules, but rules relating to
2 prescription which are also expressly disapplied.

3 That is the regime. It is a comprehensive new
4 regime of limitation for claims governed by English law.

5 The only wrinkle, the one Mr. Hoskins spent some
6 time on, is the *Deutsche Bahn Peugeot* case, that
7 running sore from my perspective, in which the court
8 decided that the scope of the disapplication and the
9 scope of the reapplication of the new regime contained
10 in Rule 31 did not go so far as to displace the
11 statutory rules that applied to claims governed by
12 foreign law.

13 There is that exception, and the reason you accepted
14 that exception, sir, was because of the competing public
15 policy embodied in the FLPA and in the Private
16 International Law (Miscellaneous Provisions) Act, public
17 policy against extraterritoriality etc, which is set out
18 in the latter part of your judgment.

19 That wrinkle aside, there is no argument but that
20 this is a comprehensive regime of limitation. It is
21 against that backdrop you come to construe Rule 31(4)
22 and you come to construe Rule 119(2). We very much
23 agree with what my learned friend Mr. Pickford said,
24 that those two provisions have to be looked at together
25 because there is either a common legislative purpose

1 running through them that makes sense of them, or
2 a repeated incoherence.

3 My learned friend Mr. Hoskins identified
4 an incoherence that would flow from his reading of
5 Rule 31(4) combined with my reading of Rule 119(2), but
6 what he did not identify was the superfluity of his own
7 construction of Rule 31(4) on his own *Yew Bon Tew*
8 reading.

9 In his construction, Rule 31(4) itself is no more
10 than a statement of the obvious. It is no more than
11 a reinstatement of the general rule contained in the
12 Interpretation Act or in *Yew Bon Tew*. It is
13 an unnecessary step because it would not be required.
14 If the Act had been silent the limitation rights that
15 had already been accrued would have been preserved. But
16 that is not what the Act does --

17 THE CHAIRMAN: I don't quite follow that. If Rule 31(4) was
18 not there, then you still have prescribed under the
19 Enterprise Act and the other reason which you did not
20 refer to, why the *Deutsche Bahn* was decided the way
21 it was, was because of section 39 in the Limitation Act
22 which expressly disapplies the provisions of that Act
23 when there is special rules on limitation prescribed
24 under another Act, which there was not any equivalent in
25 the Foreign Limitation Periods Act.

1 MR. DE LA MARE: Yes.

2 THE CHAIRMAN: Section 39 is there. If 31(4) was not there,
3 you just have Rule 31 --

4 MR. DE LA MARE: You would have nothing, you are quite
5 right. I accept that.

6 The point then comes down to the deliberate choice
7 of words used in Rule 31(4), as to which we entirely
8 adopt Mr. Pickford's submissions and the written case of
9 Dixons. We say that the choice of words, the
10 distinction between claims for damages and then
11 proceedings, is entirely deliberate and it aligns
12 entirely with the philosophy of the Act.

13 I want to answer Mr. Holmes' question that you put
14 to Mr. Pickford: does this not create the risk of some
15 kind of arbitrariness of result? No. What is presented
16 as a change, and there is no getting away from this,
17 from the position under ordinary limitation, is this.
18 A claim that would straddle the section 32 boundary
19 under ordinary limitation, so some part out under the
20 *Arkin v Borchard* approach, some part in. That
21 claim is taken lock, stock and barrel into the new
22 regime so long as the claim can be brought at least in
23 some parts consistently with a new rule of limitation in
24 31(1) to (3).

25 There are sound reasons of policy for that because

1 those are still the very types of case where a party
2 will have in fact engaged in wait and see to see whether
3 or not the regulatory decision, the regulatory
4 investigation in question will result in their
5 vindication in circumstances where have a go hero, do it
6 alone enforcement against Mastercard, or whoever it may
7 be, is simply not plausible.

8 There is no potential within that for there to be
9 a bad claim of the kind you formulate if that is
10 substantive. Why? Because they are follow on claims
11 and their claims have to be grounded upon the temporal
12 span considered by the Commission or the other enforcer
13 in this decision, and the findings eventually reached.

14 That does mean from my learned friend's perspective
15 that there is some erosion of the section 32 position,
16 but it is principled, it is based on policy and it is
17 deliberate. It is consistent with the architecture of
18 this Act as a whole.

19 Once my learned friend disavows, as he clearly
20 has -- he was asked very clearly: do you put your case
21 under the Human Rights Act? No. Do you put your case
22 on the basis of ultra vires? Mr. Anderson's question.
23 No. With respect, *Yew Bon Tew* takes him nowhere
24 because the fit of the Act, the construction that you
25 are driven to both by the architecture of Rule 31(3)

1 combined with (4), and I take my learned friend the
2 President's point back to me, that is part of the fit.
3 But then the fit of the wording itself all militates
4 against any reading of the kind that Mr. Hoskins
5 advocates.

6 Were there any doubt in relation to that, we say it
7 is removed by the terms of 119(2) itself because
8 Rule 119(2) only makes sense if you are with us in
9 relation to the construction of Rule 31(4).

10 Of course, you should parse these two rules
11 together. Why? Because the very point of Rule 119 is
12 to decide which parts of Rule 31 to save or not to save.
13 It is headed "Savings", and therefore there must be some
14 philosophy in that that looks at and reads the intended
15 purpose of Rule 31 and decides which part of that rule
16 is required. It has to be a transitional provision
17 predicated on a proper understanding of Rule 31.

18 On our construction, Rule 119(2) and the express or
19 necessarily implied refusal to continue Rule 31(4) only
20 makes sense if you accept our construction of
21 Rule 31(4). Why? Because now the period of the best
22 part of 12 or 13 years has passed and there is
23 a practical impossibility of there being any follow on
24 decision now taken that would somehow offend the
25 originally sensibility of Rule 31(4). There is no

1 longer any practical need for it.

2 Any decision being made now is going to involve some
3 degree of, what I called earlier, straddle. If that is
4 the case it will be saved and even in the circumstances
5 where Rule 31(4) is not applied, and the rule makes
6 sense.

7 That is why we do not have to meet my learned friend
8 Mr. Hoskins' characteristically elegant strawman of: are
9 you really arguing for a circumstance in which Dixons is
10 time barred by the operation of Rule 31(4) and yet
11 somehow TfL, by the happy accident of having sued later,
12 is not time barred, and his delightful bon mot about how
13 that is not how limitation generally works.

14 Once you accept that Rule 119 is based on the same
15 philosophy of Rule 31(4) as we construe it, that
16 nightmare scenario fades away.

17 That being so, *Yew Bon Tew* does not help him,
18 and that being so he is obviously incapable of meeting
19 the Inco test.

20 The Inco test is a very high constitutional
21 standard. It says in terms that the courts should not
22 go about rewriting rules unless abundantly satisfied
23 that there is a mistake requiring correction. You
24 cannot be abundantly satisfied when there is a perfectly
25 consistent alternative policied, publicly interested,

1 principled interpretation of Rule 31(4) and Rule 119 on
2 the table.

3 You cannot go about filling gaps and ambiguities as
4 my learned friend would have you, because on its face
5 there is no ambiguity. There is an express and real
6 choice not to incorporate 31(4). That is not a gap or
7 an accident.

8 *Yew Bon Tew* therefore has no role, nor does the
9 Interpretation Act because there is a clear contrary
10 intention arising from the terms of the rule itself.

11 THE CHAIRMAN: We have to take a short break at some point.

12 Would that be a sensible point to do that?

13 MR. DE LA MARE: Yes. I am grateful.

14 THE CHAIRMAN: We are now moving to the issues concerning
15 section 32, I think.

16 MR. DE LA MARE: Yes.

17 (3.27 pm)

18 (A short break)

19 (3.33 pm)

20 THE CHAIRMAN: Mr. de la Mare, we will add the five minutes
21 to you.

22 MR. HOSKINS: We were just having that discussion.

23 MR. DE LA MARE: You are too kind, sir.

24 Topic 3. When it boils down to it, Mastercard's
25 approach is really one that says in effect the potential

1 actionability of its conduct was all along, 1992 to
2 1997, hidden there in plain sight, and that if someone
3 had looked they could have seen an arguable case for
4 an infringement of Article 101(1) and satisfaction of
5 each of its constituent elements which, if pleaded in
6 1992 to 1997, would have survived a strike-out.

7 That latter limb is going to entail something of
8 a mini time travel, because one has to go back to the
9 culture of relative hostility to competition act claims.
10 I suspect some of us in the room will remember well the
11 era of so-called euro defences when the pleading
12 requirements of a competition case were applied somewhat
13 more stringently than today because of an excessive
14 reliance upon them in unmeritorious circumstances.

15 It is only with the comfort that we have had since
16 the early 2000s of regularly seeing proper claims for
17 damages consequential upon cartels that that culture was
18 relaxed somewhat, and with respect, the cases of *Nokia* and
19 *KME* are manifestations of that, as well as the
20 reality of the fact that greater latitude will be
21 allowed both in relation to original pleadings and
22 amendments if the circumstances of the anti-competitive
23 agreement is one of a smoke-filled room, a conspiracy to
24 conceal, destroying key documents etc.

25 That is not this case. Yes, there is the edifice of

1 commercial confidentiality that constitutes deliberate
2 concealment for purposes of section 32. There is no
3 pejorative sense in that term. But it is not the kind
4 of case where the parties were talking in code and
5 destroying documents and where you have to infer what
6 you can from what little scraps remain.

7 It is a very different context, with respect. The
8 suppressed premise is also -- and this is, again, more
9 time travel; you have to take yourself back to the
10 pre-modernisation era -- what would have happened is
11 this claim would have been issued, and if it survived
12 the inevitable strike out application it would have been
13 immediately stayed on Masterfoods grounds. Why?
14 Because there has been a notification to the Commission
15 of the various scheme rules and the Commission has
16 rolled up its sleeves and is considering Article 81(3)
17 over which it has a monopoly.

18 Something of the scale of the task facing the
19 Commission, if not evident from the 15 years it took to
20 reach a decision, is also evident from recital 16 to the
21 decision that lists all of the various Mastercard rules
22 that were notified and formed the subject matter of
23 assessment.

24 It is worth turning up recital 16. Whilst we have
25 the decision open I will show you something else.

1 THE CHAIRMAN: It is bundle 6.

2 MR. DE LA MARE: That is right. The chronology of
3 notification is quite significant, with respect, because
4 you see recital 15 starts with the date of 30 March, the
5 notification of the BRC complaint.

6 I do not know where they get the 30 March date from.
7 It is later by a month than the document we have seen.
8 That complaint was later withdrawn. It addresses
9 certain practices of the multilateral interchange fees,
10 the so-called non-discrimination rules on all cards etc.

11 Then you can see in response, or subsequent to the
12 complaint, Europay notified the network rules. Then
13 there was a rolling programme of notification
14 culminating on 1 July 1995 with notification of all of
15 the rules for all of its payment systems.

16 Those, on any analysis, are the agreements for the
17 purposes of Article 81 or 101 analysis, and different
18 provisions in those different agreements will amount to
19 potentially different restrictions of competition. Just
20 like when you plead a contract, if you plead a breach of
21 clause 3 and then you plead a breach of clause 4 or
22 clause 5, each of those clauses amounts to a separate
23 cause of action. The identification of a different
24 provision containing a restriction in an agreement of
25 this kind will itself be a different cause of action.

1 So the chronology is interesting. It may explain
2 why it is that the BRC complaint is directed, as
3 Mr. Pickford explained to you, to a scheme with
4 seemingly different features. Remember how he
5 emphasised the fixed nature of the IIF, whereas we know
6 that what was subject to consideration by the Commission
7 was a backstop or fallback system that applied only in
8 the absence of bilateral agreements in the case of the
9 EEA MIF, or in the absence of bilaterals in domestic
10 MIFs in the case of domestic MIFs.

11 So that is one important thing you have not seen
12 from the decision. Another feature I do not think you
13 have been referred to in the skeletons or in the oral
14 submissions, and I must confess I only noticed it
15 relatively belatedly, every time you reread this monster
16 you see something you had not seen before.

17 Article 5, page 209 of the decision contains relief
18 requiring Mastercard to publish the information set out
19 in annex 5 of this decision on the internet as from the
20 first day after six months of the implementation period
21 of the order of Article 3 has lapsed and until the first
22 day following the publication of a non-confidential
23 version of the present decision.

24 It is a bit like that famous order Mr Justice Birss
25 invented in the *Apple v Samsung* case: an information

1 provision designed in itself to provide a remedy.

2 If you turn to the information in annex 5 of the
3 decision, it contains a summary -- it starts at page 236
4 of the decision -- of the key features of the decision.
5 In our submission, this is a reflection of the reality
6 as the Commission saw it, and indeed, I suspect the
7 reality of the position as Mr Justice Simon would have
8 seen it had this case been the focal point of the
9 *Arcadia* litigation, rather than the *Visa* set-up.

10 Because whereas in *Visa* the key event for the provision
11 of sufficient information to make a pleadable case was
12 the *Visa* 2002 decision, here it is only when the
13 non-confidential version of the decision is published,
14 identifying with particularity the features of the
15 scheme and the agreements in which they are contained
16 that contain restrictions, the markets that are affected
17 thereby and the effects of the agreement that lead to
18 an unjustified breach of Article 101(3), it is only at
19 that point that a party would have sufficient
20 information to bring a claim.

21 Obviously, in reflection of that, the Commission has
22 gone one step further and said because there is going to
23 be the inevitable to-do about the publication of
24 a confidential or non-confidential version of the
25 document, we have to get an enhanced press release out

1 so that people who are affected are told about the key
2 attributes of what is going on.

3 THE CHAIRMAN: The key attributes are set out in pretty
4 general terms.

5 MR. DE LA MARE: Yes. They are set out in general terms,
6 but there is key information, and in particular about
7 the nature of the restriction in annex 5, that appears
8 nowhere previously, not least the fallback nature of all
9 of these arrangements.

10 One would give one's eye teeth, and no doubt in due
11 course we will get to see the responses for the
12 justifications that Mastercard have put in over this
13 period. But one can well imagine that the fallback
14 nature and the contingency of the operation of the MIF
15 upon the failure of bilaterals, or upon the failure to
16 settle a domestic MIF, will be the key part of their
17 defence of the operation of the EEA MIF as a backstop.

18 It is that fallback nature that, on the other hand,
19 is identified as the factor affecting competition
20 amongst acquirers when engaged in cross-border
21 transactions, the core EEA scenario, but also
22 competition in the circumstances in which the domestic
23 MIFs and, indeed, for that matter, were they to exist,
24 the domestic bilaterals, are set. It is a removal of
25 the incentives to engage in that process of negotiation

1 that creates an effective floor.

2 Now, Mr. Hoskins has properly and rightly conceded
3 that you will find nowhere, nowhere in the materials,
4 any reference to those central attributes.

5 In my submission, that is the beginning and end of
6 his case on limitation. For this reason: we entirely
7 accept that the high point of his case is contained in
8 the two complaints. They represent, if you like, the
9 condensation of all of the hard work of those retailers
10 who are most concerned about the issues in question.
11 They are not a reflection of reasonable diligence of
12 an objective and average observer. They are
13 a reflection of the efforts of the best informed, most
14 highly motivated outlier within the pool of people
15 affected by this. Even they come nowhere close to
16 identifying this case.

17 But it is even stronger than that. When you step
18 back and look at the material objectively and fairly,
19 what you see is a very, very clear dislocation. The
20 dislocation is this. Issues about the MIF, the EEA MIF,
21 or the IIF, as it was formerly described, are perceived
22 asking about issues for the Commission and the subject
23 of the kind of stab in the dark complaint made by the
24 BRC and EuroCommerce.

25 Issues about domestic MIFs are seen as being issues

1 for the domestic regulators. They are put before the
2 MMC, they are put before the OFT when the OFT was using
3 its own powers, and necessarily, therefore, because we
4 are in the pre-modernisation era, they are about
5 domestic remedies because EU law does not apply, *Walt*
6 *Wilhem* allows domestic investigation. It is
7 a domestic remedy.

8 Ask yourself this question: what actionable right
9 did any party have in 1992 to 1997 for a breach of
10 domestic competition law? Apart from a case based
11 around non-notification, under the Restrictive Trade
12 Practices Act 1976 there was no actionable right in
13 domestic law. None at all. This was all regulation.
14 It was all policy. It was all unlitigatable if that
15 basic cleavage existed.

16 Go back and read all of that press material and you
17 will see that cleavage appear time and time again.

18 You remember I got up to point out that it was the
19 domestic remedies that were being served, it was the MMC
20 that was being encouraged to do a market investigation
21 etc. The purpose was not to say that there was not
22 sufficient smell in the room that something might have
23 to be done, that the regulators would not have to use
24 their powers; it was to point out that the problem was
25 conceived exclusively as a domestic problem when you

1 were facing UK MIFs.

2 That is why the 2007 decision is transformational,
3 because it collapses that bridge between the EEA MIF and
4 the domestic MIF, and it does so with information not
5 available to any party previously, which was the fact
6 that the EEA MIF was hard baked into the rate-setting
7 process for the UK MIFs.

8 To get out of that one, my learned friend has to
9 make three submissions of law. They are each bad
10 submissions of law. His first submission of law is to
11 dilute the cause of action or statement of claim test.
12 He has to do that because his case has to be something
13 that looks quite similar to your case is sufficient to
14 start the limitation clock running.

15 So we do not have to insist on any nicety of
16 exactness of the restrictions or the agreements being
17 analysed. It is enough, he says, if people thought
18 there was a problem and you are on notice that there
19 might be some problem in the room. So he has to dilute
20 the cause of action test, and he does that by his
21 adventitious argument that the reference in *Arcadia*
22 to "a prima facie pleading case" means any prima
23 facie case, rather than the prima facie case in fact
24 pleaded by the party.

25 That is wrong in law. I will show you some

1 authority that makes that absolutely plain. The second
2 device he employs is to say because we bear the
3 evidential burden on the question of objective
4 necessity, that is not part of the test even though it
5 was common ground before Mr Justice Simon in the
6 Court of Appeal that that was one of the elements of the
7 statement of claim test to be satisfied.

8 We say he is wrong in relation to that. It is
9 enough that we bear the legal burden.

10 A point that arises even in reply in the claimants'
11 case if it relates to an evidential burden can be part
12 and parcel of the essential facts in the case. We saw
13 in the *Begum* case how further and better particulars
14 can contain essential *Letang v Cooper* facts. They
15 can be anywhere in the pleadings. You have to analyse
16 the substance of what is going on, not the form or
17 document in which it appears.

18 His third argument is his *Aldi* argument that
19 once some damage is suffered in some way, and "some
20 damage" here means some overcharge in relation to the
21 EEA MIF, a further head of damage, damage in relation to
22 the UK MIF, well, that is just more of the same and does
23 not amount to a new cause of action. All three of those
24 propositions are wrong.

25 Let me deal with second and third very swiftly. The

1 second is wrong because of the *O2* case I provided,
2 those paragraphs I asked you to read. In a context such
3 as this where ancillary restraints are plainly at issue,
4 plainly going to be raised, the question of objective
5 necessity is part and parcel of the case that the
6 regulator must establish, and if they do not, the claim
7 is deficient. If the regulator's case under Article 81
8 or 101 is deficient, so too are the particulars of
9 claim. That is CJ/General Court authority in support of
10 the *BHB* authority. Indeed, probably going further
11 than the way the CAT has put it in *BHB* a year after
12 the *BHB* decision.

13 So that is bad. Third point: damages. You have
14 already been shown the authority whose name I have now
15 forgotten -- *Steamship*, which shows it is all
16 contextual on a question of fact and degree. In the
17 context of answering my learned friend's first point
18 I am going to show you a more recent decision of the
19 then Chancellor, now Master of the Rolls, making the
20 self same points over that.

21 I provided this authority this morning to
22 Mr. Hoskins and his team. I will do my other
23 housekeeping at the same time. I have, as promised,
24 excerpts from CPR 17.4 and section 35 of the Limitation
25 Act. (Handed)

1 THE CHAIRMAN: Just a minute. Where do you suggest this
2 should go?

3 MR. DE LA MARE: The Limitation Act should tuck in behind
4 the other provisions of the Limitation Act in --

5 THE CHAIRMAN: Tab 36.

6 MR. DE LA MARE: That is right. Why do we not stick
7 CPR 17.4 in the same place. (Pause)

8 THE CHAIRMAN: The annotation is from?

9 MR. DE LA MARE: The White Book.

10 THE CHAIRMAN: The Limitation Act in The White Book, is it?
11 (Pause)

12 Where is the annotation from?

13 MR. DE LA MARE: The part 17 stuff is from The White Book.
14 The excerpt from the Limitation Act is from Westlaw.

15 THE CHAIRMAN: Westlaw annotates the statute, does it?

16 MR. DE LA MARE: Yes, sir. (Pause)

17 I think it is probably in part 2 of The White Book,
18 is it not?

19 THE CHAIRMAN: No. Just let us put these away.
20 Those go in tab 36. The *Trilogy Management* case
21 I suppose would be a sort of 31A. We do not have a tab
22 for that, do we?

23 MR. DE LA MARE: I have some tabs if that is helpful.

24 THE CHAIRMAN: It would be. (Pause)

25 MR. PICKFORD: Sir, whilst that is going on, in case it is

1 of assistance we do in fact have an annotated version of
2 the Limitation Act at section 8 of volume 2 of The White
3 Book, in case --

4 THE CHAIRMAN: There is one?

5 MR. PICKFORD: There is one.

6 THE CHAIRMAN: I am sorry.

7 MR. PICKFORD: Section 8 of volume 2.

8 THE CHAIRMAN: Yes, 8.1.

9 MR. DE LA MARE: The reason I have given you section 35 is
10 section 35 is the governing provision for amendments.
11 The reason, I am sure you will recall, why there is
12 a provision dealing with amendments is to cater for the
13 problem of relation back. Because when you are given
14 permission to amend a claim, if permission is granted
15 the amendment is treated as if it was made on the date
16 on which the claim form was issued, and that is why
17 limitation issues arise. Because if you issued a fresh
18 form then obviously the limitation defence could be
19 asserted in relation to it. But if relation back occurs
20 you will steel a march in time.

21 What is absolutely clear is that the concept of
22 a new claim or cause of action under section 35 is
23 exactly the same as the concept of a claim in
24 section 32, like basic principles of consistent
25 statutory interpretation. The key point to note about

1 section 35 is it contains statutory criteria as to when,
2 where there is a new claim, the addition and the
3 relation back of that new claim shall be permitted.

4 That is in subsection (5):

5 "It will be permitted if the new cause of action
6 arises out of the same facts or substantially the same
7 facts as are already in issue in any claim originally
8 made in the original action."

9 THE CHAIRMAN: A new claim gets a definition in subsection
10 (2). But it is a definition for the purpose of this
11 section, not for the purpose of this part. But
12 specifically for the purpose of section 35.

13 MR. DE LA MARE: But the term used in that definition,
14 because it is a compendious definition, is:

15 "... cause of action or the additional substitution
16 of a new party."

17 The key notion here is the cause of action, because
18 section 35 provides different rules and different
19 considerations for adding parties or adding causes of
20 action. Either process is called a new claim. The
21 criteria relating to the adding a new claim are in (5),
22 the criteria for adding a new party are in (6). But the
23 test which then finds its way into CPR 17.4 is whether
24 the new claim arises out of the same or substantially
25 the same facts.

1 If the application of section 32 of the Limitation
2 Act in this case is going to make any sense, it is going
3 to have to make sense whether or not the section 32
4 defence is invoked in the abstract or whether it is
5 invoked in the context of a hopelessly pleaded claim
6 which you seek upon discovery of the information
7 contained in the decision to apply to amend.

8 The cause of action test, the *Letang v Cooper*
9 test, is used in both contexts. It is a strict
10 test that focuses upon the case in fact pleaded by the
11 party, not upon what they might have pleaded, not about
12 what some other claim might have been suggested etc. It
13 focuses on the claim in the actual claim or in the
14 proposed amendment.

15 The central vice in my learned friend's submission
16 is the minute you relax the concept of a new claim, so
17 the kind of flabby width he invites you to accept in his
18 submission, the totality of section (5) in paragraph 35,
19 indeed the whole, substantially, the same facts test,
20 becomes otiose.

21 Yet there is a mass of case law that shows, first of
22 all, the strictness with which the new cause of action
23 test is applied so as to generate consideration under
24 substantially the same facts threshold, which is
25 a discretionary threshold, and secondly, an abundance of

1 cases that show that even very closely related cases are
2 refused permission on the basis that the new claim does
3 not arise out of substantially the same facts.

4 The reason why building law produces so many of
5 these cases is because each separate breach of contract
6 or, indeed, each separate allegation of negligence
7 amounts to a separate cause of action, and it is not
8 enough in a big building project simply to add to
9 a claim that lists 30 breaches in the context of the
10 building contract, the building that has taken six years
11 to build, a further particular of negligence and say it
12 arises out of the same building contract and therefore
13 it is substantially the same cause or matter.

14 The investigation is much closer.

15 MR. HOSKINS: Sir, I am sorry to interrupt. We really are
16 starting to have a timing issue. I am in your hands.

17 We are where we are, but --

18 THE CHAIRMAN: Yes.

19 MR. DE LA MARE: I am very nearly finished.

20 THE CHAIRMAN: You can have five minutes.

21 MR. DE LA MARE: The fundamental problem my learned friend
22 has is he collapses that distinction by the width of his
23 test. Consider this: there is a necessary relationship
24 between the strictness of the cause of action test and
25 the quality of concealment that is required for the

1 proper operation of section 32. Because if we are
2 correct in saying the cause of action test is really
3 quite precise, he insists upon a focus on the actual
4 pleadings and the distinction factual allegations made,
5 it necessarily follows that a different factual
6 allegation will require a different consideration of
7 concealment as to the circumstances and knowledge in
8 relation to that particular fact.

9 The *Trilogy* case is a very good proof of both
10 that proposition and how amendment is very often the
11 manner in which that is addressed. The underlying facts
12 of this case are horrendously complicated. I would ask
13 you to read in particular -- I am not going to go
14 through it now in view of the pressure of the time --
15 from paragraphs 54 to 56.

16 THE CHAIRMAN: It refers to *Arcadia*.

17 MR. DE LA MARE: It does refer to *Arcadia*. In
18 particular, look at paragraph 55 which is formulated to
19 the particular terms of the cause of action, the
20 particular claim.

21 It says:

22 "Paragraph 17 and 20 of the particulars claim ..."

23 THE CHAIRMAN: We will read it to ourselves. We will
24 consider it afterwards.

25 MR. DE LA MARE: At 61 you have a reapplication of a case

1 called *Darlington*, which is itself an application of
2 the *Steamship* case you have seen already.

3 It makes again the point at the Court of Appeal
4 level, the Chancellor again makes the point, that
5 damages is not some fact-sensitive subject.

6 Lastly, from 63 and following there is
7 a consideration of when amendment is permitted and that
8 is all done by reference to the new facts being pleaded
9 and the consideration as to whether or not 17.4.2 is
10 satisfied.

11 THE CHAIRMAN: We will read it.

12 MR. DE LA MARE: With respect, my learned friend's construct
13 on which his whole case is built is wrong. The exercise
14 is one focused upon the types of detail my learned
15 friend Mr. Pickford took you through, and for that
16 reason his basic methodological approach is flawed.

17 That takes me to my last topic: reasonable
18 diligence. I will deal with it very swiftly indeed.
19 The *Gresport* test requires you to focus upon
20 entities with particular general characteristics of the
21 kind that the claimants possess.

22 I readily accept TfL, Europcar, they are sizeable
23 businesses. But we say as part and parcel of that
24 factual evaluation, which can only be conducted at
25 trial, you are going to have to look at factors like the

1 extent to which the relevant revenue stream contributed
2 to their overall turnover --

3 THE CHAIRMAN: You have given us that fact.

4 MR. DE LA MARE: I have given you those facts, but what we
5 do not know is the underlying UK MIF breakdown and that
6 is obviously material --

7 THE CHAIRMAN: It cannot be more than the figure you have
8 given us.

9 MR. DE LA MARE: It cannot, but in the case of TfL, if we
10 are right that the great preponderance of the tiny
11 fraction of business conducted on credit cards is UK
12 MIFs, and if we are right the context in 1992 to 1997 is
13 one where domestic MIFs are domestic complaints to
14 domestic regulators with domestic remedies, the entire
15 context is entirely understandable, indeed it is
16 entirely in accordance with standards of reasonable
17 diligence. Because there are no protective proceedings
18 to be brought, there is no notice that the issue is
19 linked back to the MIFs.

20 That is why you have to look at the facts of that
21 kind, and that is why the critical fact we come back to,
22 again, is the bridging between the EEA MIF and the UK
23 MIF that only becomes apparent with the publication of
24 the decision.

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

1 thank you.

2 THE CHAIRMAN: Mr. Hoskins, you have your hour.

3 Reply submissions by MR. HOSKINS

4 MR. HOSKINS: I understand. Thank you. I will endeavour to
5 be as quick as possible.

6 It is probably uncharacteristic of my profession,
7 but I am going to try very hard not to repeat any
8 submissions I have already made to you.

9 It seems to me most of the legal issues, you have
10 heard what I have to say, you have detailed submissions
11 from the other parties, I am not sure I can really,
12 maybe I am doing myself down -- going over the same
13 ground is not going to help and I am not going to do
14 that.

15 I am going to be bold, I hope, and try and grab the
16 bull by the horns and go to what I think is the probably
17 the real issue in this case. But give me a couple of
18 minutes to build up to those horns.

19 The proper approach is the essential statement of
20 case test. You have seen how that is defined in the
21 various authorities. I am not going to go back to that.

22 Quite clearly the central statement of case test is
23 not dictated by whatever a claimant chooses to plead,
24 which is what you might have thought from listening to
25 the submissions on behalf of Dixons, TfL and Europcar.

1 You have the definition of the essential statement of
2 case test in the authorities, and that is what I would
3 invite you to apply.

4 The next question is what are the essential facts
5 for pleading a prima facie cause of action in this case?
6 When I took you through the Mastercard note, at the end
7 of each section of the four elements I set out what we
8 submit are the essential facts for each of those four
9 elements.

10 You remember I did it actually by reference to the
11 Dixons pleading, and I said let us pretend it is
12 an anonymous pleading. So if you want to look at our
13 note, the relevant paragraphs in terms of identifying
14 the essential statement of case, you will see at
15 paragraph 10. We have done it at paragraph 10 for the
16 first element, we have done it at paragraph 18 for the
17 second element, 24 for the third element, 30 for fourth
18 element.

19 As I said when I made my opening submissions, what
20 we would invite you to do is a similar exercise: look at
21 what we are saying are the essential elements. If you
22 have material to add you will obviously add it. I would
23 be delighted if you want to take something away, but
24 I may not get away with that.

25 In terms of how you break through how to analyse

1 this case, you have to because of the legal test begin
2 with identifying those essential elements under each of
3 the four heads. Having identified the four essential
4 elements, what I would invite you to do is to go back up
5 in our note, each section, and look at the evidence we
6 have identified as to the facts which were available,
7 the primary facts.

8 If, having identified the essential elements, you
9 then see sufficient evidence in our note, tick, then the
10 essential statement of case test is satisfied. It may
11 not appeal to you, but that seemed to me a practical way
12 in which we can try and grapple with the issues to be
13 decided here.

14 THE CHAIRMAN: If we do that, perhaps you can help me on
15 paragraph 24 of your note where you set out what you say
16 is the essential statement, the last part:

17 "... moreover applies by default to domestic payment
18 card transactions in member states."

19 Because it was not quite clear to me how from the
20 passages above, or any others, that fact was one that
21 was discoverable.

22 MR. HOSKINS: I agree, my Lord. I think when I made my oral
23 submission -- if I did not, I will do it now -- put
24 a full stop after "because it covers cross-border
25 payments", full stop. Because we say they are not

1 essential elements.

2 The bull by the horns which I am about to come to is
3 what do we do about the UK MIFs.

4 THE CHAIRMAN: Yes, because I think they do not accept the
5 approach on your note. But on any view the claimants
6 would say the bit we have just bracketed was indeed
7 an essential element and your first thought was correct.

8 MR. HOSKINS: Those are the horns I am going to grapple
9 with. But what does this case really boil down to?
10 That is the issue and that is what I am going to
11 focus on.

12 THE CHAIRMAN: We have two parts. The CAT rules is one part
13 and then there is this.

14 MR. HOSKINS: I am assuming nothing. That is why I said
15 I was being bold. That is the bit I need to grapple
16 with.

17 Of course the next question, having done the
18 exercise I have suggested, is, well, what is said to be
19 missing? That is the Dixons note. Like you, I was very
20 grateful to get it. It is unfortunate we did not get it
21 a long time ago because that really begged the question
22 that really sits behind what you have to determine.

23 Lets go to their note. First of all, you have got
24 1(a) and (b), decision of an association of
25 undertakings. I am not going to trot through the

1 evidence again. Let me give you some references just to
2 jot down beside this. The 1989 MMC report,
3 paragraphs 2.40 and 6.327. That is bundle 3, tab 30.

4 THE CHAIRMAN: Sorry, 6.40 and?

5 MR. HOSKINS: Paragraph 2.40 and paragraph 6.327, bundle 3,
6 tab 30.

7 Second source indicated Mastercard note at
8 paragraph 8. A third point, just to remind you, is
9 *Arcadia*, paragraph 97, Mr Justice Simon, authorities 1
10 at 25, where he said the precise methods and manners etc
11 did not have to be known. You remember that was echoed
12 by the Court of Appeal.

13 THE CHAIRMAN: Yes.

14 MR. HOSKINS: The final, fourth, point: Mastercard note,
15 paragraphs 4, 6(a) and 7, which go in particular to
16 1(b).

17 In my submission that is all you need to get a
18 pleading on association of undertakings, or indeed
19 an agreement or a concerted practice.

20 Sir, your questions to Mr. Pickford sort of teased
21 out that point with him about how much detail do you
22 need. I will not go to the point. You have my
23 submission on that.

24 It is a fallback interchange fee, they say. Well,
25 it is difficult to see how that is necessary for a

1 decision of an association of undertakings. I will just
2 say this. The oddity of course about the fallback is
3 the fact it is a fallback, so it only applies if there
4 is not a bilateral exchange, actually makes the scheme
5 less objectionable from a competition perspective.

6 The vice which is alleged and is identified by the
7 Commission is not the fact it was a fallback interchange
8 fee, but the fact that the MIF was applied in practice.
9 It is the MIF that is the vice, not the fallback aspect
10 of the MIF.

11 The application of the MIF is redolent through all
12 the materials I have taken you through.

13 THE CHAIRMAN: Except the fallback takes it to domestic
14 payments.

15 MR. HOSKINS: I am going to deal with that. That fallback
16 reference is in relation to the EEA MIF as regards
17 cross-border payments.

18 THE CHAIRMAN: Is it?

19 MR. HOSKINS: Yes.

20 THE CHAIRMAN: Sorry, you are in paragraph?

21 MR. HOSKINS: 1(c).

22 THE CHAIRMAN: I am sorry, I was in 1(d). Excuse me.

23 MR. HOSKINS: 1(c)(ii):

24 "Central acquirers who process cross-border
25 transactions must respect the rules of the country of

1 the issuing bank whose card transactions they wish to
2 process."

3 The difficulty with that is that the central
4 acquiring rules which were referred to in the pleadings
5 were not actually in place during the relevant period
6 save in relation to car rental firms. So that might
7 make Mr. de la Mare -- he is looking very happy.

8 The problem for Mr. de la Mare is his pleadings on
9 behalf of Europcar contain no reference to the CAR. Do
10 not take my word for it, I am sure you will not --

11 MR. DE LA MARE: Take my word for it.

12 MR. HOSKINS: Central acquiring rule is the CAR, sorry.

13 I am going to show you that now. Authorities 2, tab 30.
14 It is Deutsche Bahn in the High Court,
15 Mr Justice Barling's finding. Paragraphs 104 and 105.
16 104 deals with debit cards:

17 "... the decision to introduce the CAR for Maestro
18 with effect from 1 April 2005. That decision is said to
19 have been made by the European Board in France in
20 February 2005."

21 So this is central acquiring issue only came in for
22 debit cards in 2005.

23 Then the history for credit cards you see in 105.
24 It was brought in piecemeal:

25 "However, Mr. Cook, who undertook the closing

1 submissions for the defendants in these factual issue
2 submitted, in my view correctly in the light of the
3 documentary material relied upon ..."

4 So this is a finding of fact by Mr Justice Barling:

5 "... that the CAR was originally approved in respect
6 of airlines, car rentals and hotels by the Third
7 Defendant's Board meeting in Lausanne, Switzerland in
8 June 1993."

9 You will see a reference to it being introduced for
10 different aspects, and it was only introduced for all
11 international merchants in 1999, which was after the
12 relevant period.

13 With respect, the reference to central acquirers and
14 the central acquiring rule cannot be an essential part
15 of pleading in relation to the period 1992 to 1997.

16 Come now to paragraph 1(d) which is where we get
17 into the domestic issue. The domestic issue comes up in
18 a number of places. So it comes up in 1(d) under
19 "Decision of an association of undertakings". It also
20 comes up in "Restriction of competition", in particular
21 2(b).

22 MR. PICKFORD: Can I clarify my understanding. Is it being
23 said against us there is a res judicata in other
24 proceedings we were not party to? I am not sure
25 I follow the point that is being made.

1 MR. HOSKINS: I am referring the Tribunal to a finding of
2 fact by Mr Justice Barling as to when the CAR came into
3 effect. I am inviting the Tribunal to rely on that
4 finding of fact in deciding this application.

5 MR. DE LA MARE: Sorry to get up. These are quite troubled
6 waters.

7 My learned friend has made an appeal on exactly this
8 type of ground, as I recall, in the Mastercard
9 litigation. In any event, a factual finding between
10 different parties has no binding status in proceedings
11 against different parties. That is trite law.

12 MR. HOSKINS: Sir, you have my submission. I have shown you
13 Deutsche Bahn.

14 My second submission in relation to that is that
15 neither TfL nor Europcar pleads the central acquiring
16 point. So either Mr. de la Mare's pleading is
17 strike-outable on that basis because it is lacking in
18 essential fact or it is not an essential fact.

19 Sir, I am coming on to the domestic issue which
20 strikes me is probably the principal issue that is left.
21 You would forget on a number of occasions when listening
22 to the submissions you have heard from the claimants
23 that this is a follow on action. The claimants can only
24 rely in these proceedings on an infringement in
25 Article 101 relating to the EEA MIF found in the

1 Commission decision. I have already referred you to the
2 Mastercard note. I have taken you to the paragraphs
3 where we say what the essential elements for a --

4 THE CHAIRMAN: To interrupt you, you say they can only rely
5 on the EEA MIF. I am not sure that is quite right.
6 They can only rely on the finding of infringement of
7 Article 85 --

8 MR. HOSKINS: I am coming there.

9 THE CHAIRMAN: If the Commission found that the domestic MIF
10 or the fallback rule for domestic transactions infringed
11 Article -- I think it was still 85, then they can rely
12 on that.

13 MR. HOSKINS: But if it does not make such an express
14 finding of infringement, they cannot.

15 THE CHAIRMAN: It would be helpful to be taken to the
16 passage.

17 MR. HOSKINS: That is what I am going to do.

18 THE CHAIRMAN: Thank you.

19 MR. HOSKINS: This really only came out clearly in
20 Mr. Pickford's submissions this morning because there is
21 two ways of looking at the way in which they try and
22 bring the UK MIFs in.

23 First of all, it could be that the claim in respect
24 of the UK MIFs -- because the UK MIFs are said to be
25 higher because of the EEA MIFs. That is a causation and

1 new head of loss point.

2 Now, of course the problem they have with that is
3 *Aldi* and the authorities which are relied on in
4 *Aldi*. So having no doubt seen that problem, when
5 it was put to Mr. Pickford that their pleaded allegation
6 in relation to the UK MIF was a separate restriction of
7 competition, he readily agreed and said yes, yes, it is
8 a new restriction of competition. But sir, as you have
9 correctly identified, that then leads you to the *Enron*
10 and *Newson* problem.

11 THE CHAIRMAN: I think you will need to explain what that
12 problem is. You can take us to the case, but if you
13 could summarise the problem in words. What do you mean
14 by "the problem"?

15 MR. HOSKINS: That is what I am developing now, if you will
16 let me just work through it.

17 Sir, the passages in *Newson* I wish to take you to
18 are paragraphs 21 and 22.

19 THE CHAIRMAN: We will put this at 31B.

20 MR. HOSKINS: Can I ask you please to read paragraph 21.

21 (Pause)

22 THE CHAIRMAN: Yes.

23 MR. HOSKINS: Sir, paragraph 21 quotes from the judgment of
24 Lord Justice Patten in *Enron*, which I am sure you
25 are very familiar with, but it is worth reminding

1 ourselves of the strictures for a fallback claim.

2 Just picking, in the quote for lines in:

3 "No right of action exists unless the regulator has
4 actually decided," actually decided, "that such conduct
5 constitutes an infringement of the relevant prohibition
6 as defined. The corollary to this is that the Tribunal
7 (whose jurisdiction depends upon the existence of such
8 a decision) must satisfy itself that the regulator has
9 made a relevant and definitive finding of infringement.
10 The purpose of section 47A is to obviate the necessity
11 for a trial of the question of infringement only where
12 the regulator has in fact ruled on that very issue."

13 Obviously I emphasise those words.

14 The problem the claimants have is they are between
15 the devil and the deep blue sea. If they plead a
16 causation and head of loss argument in relation to UK
17 MIFs they fall foul of *Aldi*. If they plead it is
18 itself a separate restriction of competition, they fall
19 foul of *Enron*.

20 Let us see what the decision does actually say on
21 this issue. The decision is at bundle 6. If I can
22 begin at the executive summary, it is page 4. If I can
23 ask you to read paragraph 1, please. (Pause)

24 THE CHAIRMAN: Yes.

25 MR. HOSKINS: Then Article 1, which is the dispositive

1 provision, which is on page 209.

2 THE CHAIRMAN: Yes.

3 MR. HOSKINS: Then I would ask you to keep the decision open
4 and we will cross-check it against the paragraphs of the
5 decision that are relied upon in Dixons' pleading.

6 So Dixons' pleading is in bundle 1 at tab 8. If you
7 also have Dixons' note on the missing elements, I will
8 show you the paragraphs they refer to in their note and
9 then I will take you to them in the pleading and then
10 I will take you to the decision.

11 Beginning with the Dixons' note on missing elements.
12 Dixons' note, 1(d) in relation to domestic refers to
13 claim 52.2. 2(b) refers to 77.5 (a) PoC and PoC
14 77.5(b).

15 If we go then to those paragraphs, paragraph 52.2 of
16 the Dixons' pleading on page 18, footnote 29, you will
17 see it cross refers to recital 122 of the Commission
18 decision. Recital 122 of the Commission decision is at
19 page 43 of the decision. There is no finding of
20 restriction or infringement in relation to domestic UK
21 MIFs in recital 122.

22 MR. PICKFORD: To be clear, we do not say that there is
23 because that is the part of my note that is dealing with
24 the decision, ie the rules. That is not dealing with
25 the restriction which is in paragraph 2.

1 MR. HOSKINS: Then if we come back to the Dixons'
2 particulars of claim, page 26, paragraph 77.5, they
3 refer to recitals 405, 417 to 420 and, over the page,
4 421. Let us cross refer those into the Commission
5 decision.

6 First of all, the recital 405 is at page 115. I'm
7 sorry to take this quickly but I am trying to get you
8 through the references in the time available.

9 Page 115, recital 405, you will not find there
10 a definitive finding of infringement in respect of UK
11 domestic MIFs.

12 MR. PICKFORD: Could you read the final two sentences of
13 405.

14 MR. HOSKINS: The Tribunal I have asked to read the whole of
15 the recital. Mr. Pickford asks you to pay particular
16 attention to the final two sentences, I am happy for you
17 to do so. There is no definitive finding of
18 infringement.

19 Then over the page, at page 119, you get recitals
20 417 to 421. In the time available I take you to them
21 but I just take you to them for what is not there.
22 There is no definitive finding of an infringement in
23 relation to UK domestic MIFs.

24 MR. PICKFORD: Sir, the references that you have been given
25 actually extend -- Mr. Hoskins has given you some of the

1 references in the relevant paragraphs but there are some
2 that are not in the footnotes. They extend also to
3 paragraphs 422 and 423. Of course the other point to
4 make is that this whole section follows paragraph 408,
5 which sets out the general assessment that the
6 Mastercard's MIF is a restriction of competition based
7 on its restrictive effects, and then it particularises
8 through a series of subheadings all of those effects.

9 So all the sections we are looking at are part of
10 the particularisation of the restriction of competition.
11 Obviously one has to read -- if one is going to construe
12 this document, you have to read it properly as a whole
13 by reference to the relevant opening paragraphs.

14 THE CHAIRMAN: This is the effects?

15 MR. PICKFORD: This is the restrictive effects section.

16 THE CHAIRMAN: Yes.

17 MR. HOSKINS: Sir, I am anticipating you are going to --

18 THE CHAIRMAN: I suggest we let Mr. Hoskins get on.

19 MR. HOSKINS: Of course you will go away and you will think
20 about this and you will read around it. I am grateful
21 to Mr. Pickford for indicating the further recitals he
22 would like for you to look at, but you have the
23 punchline, you will not find a definitive finding of
24 infringement in relation to UK domestic MIFs. That is
25 my submission.

1 Then you will see where this leads. They cannot
2 therefore say they are putting forward the UK MIF as
3 a separate restriction, because this is a fallback
4 action, which leaves them with an argument that the EEA
5 MIF has caused the UK MIF to be higher than it would
6 otherwise have been and that is a causation, a new head
7 of loss point and that is not open to them because of
8 Aldi.

9 It is catch 22, it is the devil in the deep blue
10 sea, it is Scylla and Charybdis however you want to
11 describe it.

12 THE CHAIRMAN: On the Aldi point, Mr. Pickford relied on the
13 *Steamship v Trollope and Coles* case .

14 MR. HOSKINS: He did, which is a judgment which came out in
15 1986. I have taken you to a number of Court of Appeal
16 authorities that postdate that judgment. The *Aldi*
17 case itself was referred to in the *Begum* case .

18 Insofar as it might even be suggested that there is
19 some sort of schism in the Court of Appeal judgments,
20 I would invite you to follow the later authorities.

21 Can I make these two sort of -- I call them
22 flourishes, but hopefully they will have more weight
23 than that: assume you find on all the facts, the way
24 I have put it to you, that the EEA claim is time barred.
25 They cannot claim damages in relation to the EEA MIF,

1 but assume that you find against me that the UK claim
2 for the UK MIF is not time barred, then we would have
3 the situation where the pleading in respect of the EEA
4 MIF for 92 to 97 could not be made, and I just ask the
5 rhetorical question, it is probably not an advocate's
6 function: the pleading in respect of the UK MIF for the
7 period 1992 to 1997 could not possibly survive if the
8 EEA MIF pleading for 1992 to 1997 had gone because this
9 is a fallback action and they have to have a follow on
10 action. I am sorry -- this is a follow on action and
11 they have to have an EEA MIF to get to the UK MIF.

12 That shows you, that example, that the UK MIF claim
13 is wholly parasitic on the EEA MIF claim.

14 Again, let me put another situation to you. Imagine
15 that the claimants --

16 THE CHAIRMAN: It could be parasitic, but it could still
17 involve an additional factual element that was essential
18 to the claim which, although all the facts you say are
19 essential to plead loss through the EEA MIF could have
20 been discovered reasonably, that additional essential
21 factual element could not have been.

22 So even though it is parasitic because it is follow
23 on, that must be right, it is still dependent on
24 an additional essential fact.

25 MR. HOSKINS: I think that is right and therefore my

1 indication that that was potentially a flourish is
2 probably correct. It is not a very dramatic flourish.

3 Objective necessity, I have a few quick homework
4 points you gave us. I have dealt with the bull's horns
5 and I probably have nothing else to say other than to
6 give you now my homework.

7 You asked us to check the first instance Mastercard
8 Retailer judgments as to whether there was anything on
9 the burden of proof and objective necessity.

10 The closest one gets is the *Asda v Mastercard*
11 judgment of Mr Justice Popplewell at paragraph 45. In
12 the interests of time I will just read that out to you.
13 Mr Justice Popplewell held or stated:

14 "It was common ground that the burden of proof lies
15 on Mastercard to bring itself within the ancillary
16 restraint doctrine."

17 As I said it was common ground. Then he said:

18 "This is however an evidential burden rather than
19 a legal one. The burden is on the claimant to establish
20 the restriction of competition which infringes
21 Article 101 (1)."

22 We are getting excited, but then he says see The
23 Racecourse Association and the Office of Fair Trading,
24 paragraph 131 to 133 which is the judgment you have
25 already seen.

1 I would like to look at that again just very quickly
2 because the way it was presented to you by the claimants
3 I think put somewhat of an important gloss on it. It is
4 authorities 1, tab 15. Paragraph 133. So, yes, the
5 overall legal burden to a prove an infringement is on
6 the OFT. But page --

7 THE CHAIRMAN: Just one moment. Tab 15, page 59.

8 MR. HOSKINS: The Tribunal held:

9 "It cannot be for the OFT to set up and disprove
10 a case founded on a necessity argument."

11 The OFT here is effectively in the position of the
12 claimants.

13 "If as the appellants claim, [they are effectively
14 in the position of Mastercard] any apparently
15 anti-competitive effect was justified with the necessity
16 of such dealing, it was for them to demonstrate it by
17 evidence. Once the evidence was before the OFT the
18 overall legal burden still remained on the OFT."

19 The last sentence:

20 "But unless the appellants first made out
21 a necessity case on the facts, no such case would arise
22 for consideration."

23 It is quite clear that unless Mastercard raises --

24 THE CHAIRMAN: Just one moment. Yes, sorry.

25 MR. HOSKINS: It is quite clear that unless Mastercard

1 pleads objective necessity, there is no need for the
2 claimants to deal with it. That is quite clear from
3 that passage. Again proof in the pudding, neither TfL
4 nor Europcar has pleaded to objective necessity. So if
5 objective necessity is an essential fact, those
6 pleadings are strikeout-able. It will not surprise you
7 to hear Mastercard is not bringing a strike-out on that
8 point any time soon.

9 The EuroCommerce annex, it is not a very exciting
10 read. If I had more time I would walk you through it
11 but just to say what we say about it. It is quite clear
12 that the main propositions which one finds in the
13 complaint, which I did take you to, are not dependent
14 upon the survey materials which you now have.

15 THE CHAIRMAN: Well then we need not --

16 MR. HOSKINS: Then, my shame and Mr. Cook's crowning glory,
17 the Interpretation Act 1978. To tease him a bit, he did
18 offer me Halsbury and Laws of England dealing with this
19 point and I did not think I would get anywhere with
20 that.

21 He came through because there is a website called
22 www.legislation.gov.uk which sets out various pieces of
23 legislation, including the Interpretation Act 1978, and
24 when it gives you section 16 of the Interpretation Act
25 1978, it has the legend beside it EWSNI, which tells you

1 it applies to all those four. We will give you
2 Mr. Cook's labours on that. I hope that answers the
3 point I have struggled with.

4 Unless you have any further questions for me that is
5 what I wish to say.

6 MR. PICKFORD: Sir, very briefly --

7 THE CHAIRMAN: Just a moment.

8 MR. HOSKINS: That is all I had to say.

9 THE CHAIRMAN: Thank you, that was commendably brief. Thank
10 you Mr. Hoskins.

11 Reply submissions by MR PICKFORD

12 MR. PICKFORD: Sir, I to hesitate to rise at this hour, but
13 extremely briefly there was a new authority and a new
14 point introduced by Mr. Hoskins in his reply on
15 Newson and the point now made, which has never been
16 made before, is that in fact we are not entitled to
17 pursue our UK MIF claim because it is not properly --

18 THE CHAIRMAN: No, it is not what is being said --

19 MR. PICKFORD: We are not allowed to pursue it in the way
20 that I say that we pursue it, which is because of its
21 restrictive effect. He says we can only pursue it as
22 a head of loss claim and it is not part of the
23 restrictive effect --

24 THE CHAIRMAN: No, what he says is it is not the violation
25 of Article 85.

1 MR. PICKFORD: Yes, and it will --

2 THE CHAIRMAN: If you look at the decision, that is not the
3 infringement. So he is responding to paragraph 1(d) of
4 your note saying that is not the decision that can
5 constitute the infringement because that is not the
6 finding of infringement. It is the effect of the
7 finding of infringement, which was the EEA. That is the
8 point.

9 MR. PICKFORD: That is his submission.

10 THE CHAIRMAN: Yes.

11 MR. PICKFORD: I would just urge the Tribunal to look -- he
12 took you properly to Article 1, but if one reads
13 Article 1, it does not preclude in any way the finding
14 of infringement that we rely upon and obviously what one
15 has to do is, in interpreting it, is it is expressed
16 very broadly, it says that:

17 "A finding of infringement by in effect setting
18 a minimum price that merchants must pay to their
19 acquiring bank for accepting payment cards in the
20 European Economic Area by means of the intra-EEA
21 fallback interchange fees for Mastercard branded
22 consumer credit cards, charge cards to the Mastercard or
23 Maestro branded debit cards."

24 We say, in order to interpret that properly -- that
25 is Article 1, volume 6 -- one has to look at the

1 recitals to the decision and when you do read the
2 recitals in the restriction part, which is in section 7,
3 read in context it is quite clear that the Commission is
4 identifying a series of restrictions and it relies on
5 all of them as building blocks for finding that overall
6 there is a restriction of competition. They include
7 both the direct effects and the indirect effects and
8 obviously one has to read the decision as a whole.

9 The fact we might not have referred to the
10 introductory paragraph that makes that clear, does not
11 preclude us from relying upon it. Ultimately it is this
12 Tribunal's decision, if it is going to decide a *Newson*
13 point is to construe the decision properly as a whole.
14 When one does that you see very clearly that the
15 restrictive effect that we plead is correctly made out.

16 THE CHAIRMAN: Yes.

17 MR. HOSKINS: Sir, my instructions has pointed out that you
18 have, as you saw, a redacted version of the decision.
19 If you want it we can provide you with a page that is
20 without. I think there must have been an arrangement in
21 place anyway. But if you wanted to see, there is
22 a reference to this member state or that member state,
23 without it being clear as to what it is, if you want it,
24 we will provide it to you.

25 THE CHAIRMAN: As far as I understand it, but correct me if

1 I am wrong, the claimants were relying on the public
2 version when you pleaded it, is that right?

3 MR. PICKFORD: Yes.

4 THE CHAIRMAN: With the redactions?

5 MR. PICKFORD: Yes.

6 MR. HOSKINS: My point would be if you want to decide the
7 issue of whether an infringement -- there is a specific
8 finding of infringement in relation to UK domestic MIFs,
9 you might want to see it. But you can raise it with us
10 if and when you need it.

11 THE CHAIRMAN: Yes.

12 Reply submissions by MR DE LA MARE

13 MR. DE LA MARE: I am going to exhaust your patience, sir.

14 Two very quick points about the new issues raised by my
15 learned friend.

16 The central acquiring rule point that he raised and
17 the judgment he referred to in relation to that;
18 I believe it is the judgment of Mr Justice Popplewell
19 that deals with the status of findings involving other
20 parties in Mastercard's litigation and he decided in
21 terms that the *Sainsbury's* findings were not
22 binding in relation to the matters before him. Exactly
23 the same analysis would apply in relation to the
24 findings of Mr Justice Barling in the judgment to which
25 you were shown.

1 The only evidence that you have or the matters that
2 bind you are the many, many, many recitals in the
3 decision dealing with the central acquiring rule.

4 That leads to the second point we make in relation
5 to the charge that our pleading is allegedly defective.
6 Insofar as it is said to be allegedly defective for not
7 having recited the contents of the decision, (a) so far
8 as respects the central acquiring law or (b) in relation
9 to objective necessity, which I think was also
10 suggested, it was all incorporated by reference
11 explicitly in a short and pithy pleading that does not
12 purport to summarise each and every respect of the
13 decision.

14 It being a follow on pleading, there is no reason
15 why it should do. Obviously the court will pick over
16 the contents and analysis contained in the decision in
17 the course of any substantive analysis of the case.

18 MR. HOSKINS: My submission of course is that Mr. de la
19 Mare's pleading is not defective, that is why I draw
20 attention to the absence ...

21 THE CHAIRMAN: I am pleased that you agree that
22 Mr. De la Mare's pleading is not defective albeit for
23 entirely different reasons.

24 I think that is then everything.

25 MR. HOSKINS: Thank you.

1 THE CHAIRMAN: You have given us a lot to think about.
2 Thank you for your very clear and helpfully expressed
3 submissions and for the work done by all the legal
4 teams. We will obviously take time to think about it
5 and you will be informed when we are ready to hand down
6 a judgment.

7 (4.55 pm)

8 (The court adjourned)

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