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5 **IN THE COMPETITION**  
6 **APPEAL TRIBUNAL**

Case No. : 1287/5/7/18

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8  
9 Salisbury Square House  
10 8 Salisbury Square  
11 London EC4Y 8AP  
12 (Remote Hearing)

13 Thursday 11 February 2021

14  
15 Before:  
16 THE HONOURABLE MR JUSTICE ROTH  
17 (President)  
18  
19 (Sitting as a Tribunal in England and Wales)

20  
21  
22 BETWEEN:

23  
24 **ASDA STORES LIMITED AND OTHERS**

Claimants

25  
26 v

27  
28 **MASTERCARD INCORPORATED AND OTHERS**

Defendants

29  
30  
31  
32 **A P P E A R A N C E S**

33  
34 Jon Turner QC, Christopher Brown and Max Schaefer (instructed by Stewarts Law LLP  
35 appeared on behalf of the Claimants)

36 Matthew Cook (instructed by Jones Day appeared on behalf of Mastercard)

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Thursday, 11 February 2021

(10.30 am)

### Housekeeping

**THE PRESIDENT:** Good morning. We will just wait for the livestream. Yes, it's now on.

I have to start as always with the warning, which will be familiar to many of those attending, that this is a hearing being heard remotely but it is as much a Tribunal hearing as if it was being heard in person in a courtroom in Salisbury Square House where I am now sitting. It follows it's a contempt of court to make any unauthorised recording, video or audio, of the proceedings. There is an official transcript that will be prepared in the usual way.

Also to mention that we will as usual take a short break mid-morning for everyone's convenience.

Who starts? What have you agreed?

**MR TURNER:** I think, my Lord, it's I who starts. It's our application. I appear with Mr Brown and Mr Schaefer and Mr Cook appears for Mastercard, the defendants.

**THE PRESIDENT:** Yes.

**MR TURNER:** My Lord --

**THE PRESIDENT:** You say it's your application. It is concerning a proposal to re-amend the defence, isn't it?

**MR TURNER:** It is not merely an amendment to the defence, it also includes a question of persisting with pre-existing allegations in the defence in the quantum stage.

**THE PRESIDENT:** So in a sense it's a mixture of Mr Cook's application for

1 permission to amend and your application for permission to -- not for  
2 permission, your application to, I don't know if it's to strike out or to say they  
3 have been resolved and they can't proceed on certain aspects. Is that right?

4 **MR TURNER:** Yes, that is right. The essential purpose of the hearing is to address  
5 our objections to parts of their case, in both its existing form and in proposed  
6 amendments which they intend to advance in the assessment of the quantum  
7 of loss in the Tribunal.

8 **THE PRESIDENT:** Yes. No, I see what it's all about, I am just -- technically, it's  
9 partly your application and partly Mr Cook's I think.

10 **MR TURNER:** Yes.

11 **THE PRESIDENT:** Insofar as it's in the defence it's yours and insofar as it's an  
12 amendment I think he needs permission and therefore it's his.

13 **MR TURNER:** Yes. My Lord, this immediately raises a point that you may have  
14 seen in the correspondence between ourselves and Mastercard, culminating  
15 in a letter from Mastercard's solicitors today concerning the jurisdiction on this  
16 application.

17 **THE PRESIDENT:** Yes, that's why I am raising it. I have not seen today's letter,  
18 there's been a flurry of stuff coming in. I have seen the correspondence up to  
19 today I think. There is something today I have just been printed out. That's  
20 a letter from your solicitors I think of the 10th and there's another one --

21 **MR TURNER:** Yes, there's one now from Mastercard's solicitors, Jones Day, this  
22 morning on the 11th I hope.

23 **MR COOK:** Sir, if I could interject very quickly just to note I am being told there is no  
24 sound on the livestream on the CAT website.

25 **THE PRESIDENT:** Thank you for telling me that. I think we will pause and try and  
26 sort that out. That will give me an opportunity -- I have found the letters -- to

1 read them. So I will just metaphorically rise while they try and resolve that.  
2 You may want to mute your microphones.

3 **(Pause)**

4 **THE PRESIDENT:** I am told the problem has been resolved so we are just waiting  
5 for the livestream to reconnect. Mr Cook, if the problem persists or recurs  
6 please let me know.

7 Yes, Mr Turner you were saying? I have seen the letters and there is a question of  
8 jurisdiction.

9 **MR TURNER:** Yes. This application or the business of the Tribunal today can be  
10 described as determining our application to strike out parts of the existing  
11 defence insofar as those are sought to be advanced at the quantum stage or,  
12 more generally, an application for an order that Mastercard be precluded from  
13 advancing certain allegations as a result of the principle of finality. Then there  
14 is, as your Lordship rightly says, Mastercard's application to amend to  
15 introduce allegations where our objection is the same.

16 In all cases the issues concern the same point, which is the application of the  
17 underlying principle of finality.

18 **THE PRESIDENT:** Yes.

19 **MR TURNER:** You will have seen from the correspondence, in particular  
20 Jones Day's letter today, that there is a potential jurisdiction point and at the  
21 end of their letter there is a hint that this point may be taken by them. We  
22 wish to avoid a fruitless hearing if it's going to result in a procedural appeal  
23 and so think that it's important to bottom this out now. Our position is that the  
24 Tribunal is perfectly equipped to hear these matters today, but that if there is  
25 any doubt and if Mastercard considers that that is wrong then it may be  
26 necessary for there to be a short adjournment so that the Tribunal is

1 constituted with three members rather than the President sitting alone.

2 Our case is this: the purpose of the hearing is to address our objections to parts of  
3 the case they intend to advance at the quantum stage. The basic rules of  
4 pleading in this case remain those of the High Court and the Civil Procedure  
5 Rules apply. We say that because this is not a case begun under section 47A  
6 of the Competition Act; it's not a claim under section 47A which is what the  
7 Tribunal's rules in Part 4 are entitled; it is a High Court case which is based on  
8 section 2 of the European Communities Act, as it was, and Article 101 of the  
9 Treaty and parallel provisions of national law, it has simply been sent to the  
10 Tribunal for the assessment of quantum.

11 **THE PRESIDENT:** Just if I can interrupt, there may be two aspects to this: one is  
12 whether the CPR applies as regards the pleadings. I would find it difficult to  
13 accept, but it may not be necessary to consider that the CPR applies in all  
14 respects to the conduct of the case and there are various aspects of Tribunal  
15 rules which may differ and may be relevant at some later stage. But once it is  
16 being heard here, I know it is a transferred case and you may say the rules,  
17 although they encompass transfer to the Tribunal, I think it's rule 72, I am not  
18 sure they actually entirely address the question of what happens  
19 procedure-wise when proceedings are transferred.

20 But to say that all the CPR apply and none of the Tribunal rules apply, for example,  
21 could the actual trial of quantum be heard by a Chairman sitting alone?  
22 I would have thought not. Though obviously if this was in the High Court it  
23 would be a judge alone and there's nothing in the CPR that says you need  
24 a Tribunal of three, for obvious reasons. So I think it's perhaps a slightly more  
25 confined point of whether the CPR applies to the pleadings, not to the totality  
26 of the case.

1 **MR TURNER:** My Lord, I agree. That is how we put our case. We say that the  
2 framework and the pleadings are what continue to be governed by the Civil  
3 Procedure Rules. We fully accept that the Tribunal rules apply more generally  
4 to the regulation of its procedure in handling this part of the case.

5 The point that the rules of pleading remain those of the High Court has sometimes  
6 been included in the transfer orders made from the High Court to the Tribunal.  
7 Mastercard refers to one such example in its letter. Another recent example  
8 is the Power Cables litigation where there is a provision stating that the  
9 pleadings remain governed by the CPR. If, my Lord, you wish I can produce  
10 a copy of that. But the point is --

11 **THE PRESIDENT:** But sorry, again can I interrupt you because this is a new point  
12 that I became aware of this morning so I am trying to think it through, which  
13 may or may not be helpful to you both.

14 If the CAT rules applied to the pleading, the pleadings are defective because they  
15 don't follow the form required by the CAT rules of appending relevant  
16 documents, for example. Those are the sort of rules that one has in mind  
17 when one thinks of pleading rules so that cases started in the CAT, the  
18 pleadings look rather different from High Court pleadings, and this amended  
19 defence is clearly, unsurprisingly, in the form of a High Court defence  
20 because that's where it started. So the idea that, for example, the defence is  
21 defective because it doesn't annex every document referred to and so on  
22 clearly wouldn't be engaged.

23 But the question it seems to me that arises now is this is effectively therefore a sort  
24 of strike out -- there are two aspects of it. Insofar as there is a new claim  
25 sought to be introduced such as there was, though I think it's not pursued, that  
26 argument or the defence about the effect of the IFR and that, as from that

1 date in December, that's the counter-factual, that was a new paragraph in the  
2 pleading, it hadn't appeared before and it's therefore an application to amend  
3 and that would in any event come within I think rule 32 or something, rule 32,  
4 yes, and it can be heard by a Chairman alone so there's no problem about  
5 that.

6 But insofar as you are saying, as you are, that a number of the matters that have  
7 been in the defence all along have now been resolved or the subject of  
8 decision by either Mr Justice Popplewell or the Court of Appeal and therefore  
9 cannot be pursued or resurrected under the guise of quantum, I am not sure  
10 that is a pleading question. It seems to me a more substantive question and  
11 it's more like a strike out, and that is where one has the position of rule 41,  
12 which is the rule that has been referred to where, for reasons that may or may  
13 not be well founded but at least back in 2015 when these rules were  
14 introduced, strike out and summary judgment require a full Tribunal.

15 So that is, it seems to me, one does not want to go paragraph by paragraph through  
16 the objected paragraphs to see which side of the line they fall. Some might  
17 clearly come within rule 32 and there's no problem, but we don't want to split  
18 this up. If we can't deal with the whole thing today, obviously it's sensible to  
19 constitute a full Tribunal. So it's really the question of even if the CPR applied  
20 to pleadings and amendment of pleadings, what is the position when we are  
21 looking at what is -- I don't know if it's technically a strike out, it probably is,  
22 that you are saying this claim cannot be proceeded with because it's been  
23 resolved?

24 **MR TURNER:** It can be conceived of as a strike out or more generally, although it  
25 comes to the same thing I confess, an application for an order directing that  
26 Mastercard is precluded from advancing certain allegations.

1 **THE PRESIDENT:** Yes.

2 **MR TURNER:** Which is another way of addressing the same point. If we focus on  
3 the Tribunal rules concerned with these points, we agree that on the question  
4 of amendment and where Mastercard may have the burden, there shouldn't  
5 be any concern about what the Tribunal does today with the President sitting  
6 alone. So far as we are concerned the issue arises because of rule 41, the  
7 power to strike out.

8 **THE PRESIDENT:** Yes.

9 **MR TURNER:** Rule 41 is limited in its terms to striking out part of a claim. It's  
10 interesting that it doesn't refer to the defence, and in that regard we see that if  
11 this proceeding is under the aegis of the Tribunal's rules, our part of this  
12 application, then the right approach is surely that the Tribunal is acting in  
13 accordance with rule 4 of its rules, which mirrors the overriding objective, and  
14 that is where the principle of finality comes into play. One then has rule 53,  
15 which provides that the Tribunal may at any time give direction as it thinks fit  
16 to secure that the proceedings are dealt with justly and at proportionate cost.  
17 And rule 115, which is the provision saying that, subject to the specific  
18 provision in the rules, the Tribunal may regulate its own procedure.

19 Now, on its face rule 41 applies only to the striking out of claims and not to defences.  
20 Therefore, the other provisions that I have just referred to would seem to be  
21 applicable. The reason we saw fit to raise this issue, so that it was surfaced  
22 before the hearing got underway, was to avoid any suggestion that part of this  
23 application is indeed governed by rule 41 and that certain consequences flow  
24 from that, including under rule 110 that the President sitting alone may not  
25 hear such an application.

26 **THE PRESIDENT:** Yes. It's very unfortunate this has arisen so late, isn't it?



1 **MR TURNER:** It is. It's something that we only saw yesterday. We wrote  
2 immediately to Mastercard about it. We did not think that it was inevitable that  
3 a procedural objection would be potentially taken and, indeed, if we hear from  
4 Mr Cook it may not be now and it may be that he agrees that rule 41 does not  
5 apply to any part of this hearing.

6 But if there is doubt about it, we certainly do wish to avoid a hearing that will lead to  
7 a fruitless appeal on a process issue.

8 **THE PRESIDENT:** Yes. Let me hear from Mr Cook because it's in nobody's  
9 interests to have a fruitless hearing.

10 **MR COOK:** Sir, Mr Turner is absolutely right to say that this a point that everyone  
11 should have appreciated much earlier and we are sorry that we didn't. Of  
12 course it arose in part because the discussion at the CMC on whatever it was,  
13 14 to 16 December, was in the context of AAM objecting to proposed  
14 amendments to our defences. In practice, the issues in relation to the  
15 proposed amendments have almost completely fallen away because they've  
16 either agreed to the amendment or some of them were taken off the table. So  
17 what's left in practice, other than there may be a couple of very small points,  
18 but what's left in substance are the three big points that we are fighting about  
19 today which are all applications for strike out or summary judgment in relation  
20 to sections of Mastercard's quantum pleading, which have been there in  
21 substantially the same form since 2012. We've made what are essentially  
22 trivial amendments to update the facts, for example, we are now dealing with  
23 zero MIF, not potentially a MIF that is somewhere between zero and the  
24 actual rate, but the substance of the points are exactly the same.

25 Now, my learned friend says he accepts this is in substance seeking to strike out  
26 parts of the defence. At one point he talked about the possibility that all he

1 was seeking was an order that we are precluded from advancing certain  
2 allegations. I would describe that as chopping words or chopping logic but, as  
3 I think he accepted when he came back to the point, that's in substance the  
4 same thing. I think he hangs his hat today on the distinction that this is  
5 a strike-out application and rule 41 talks about striking out a claim. So that is  
6 probably right to say that rule 41 talks about striking out in whole or in part  
7 a claim at any stage of the proceedings. What we do have, Sir, is rule 43,  
8 though, which deals with summary judgment. That's probably the rule which  
9 is more applicable here on its terms, which is that the Tribunal can give  
10 summary judgment against a claimant or defendant on the whole of a claim or  
11 on any particular issue if it considers in this context the defendant has no real  
12 prospects of successfully defending the claim or issue.

13 So what we are in the territory of, Sir, is essentially this is, in the context of these  
14 rules, if we were in High Court it might be characterised as a strike out under  
15 CPR 3.4 or an application for summary judgment with the wording of rule 41.  
16 Probably it would be wide enough, read generously, to talk about striking out  
17 a defence. But certainly summary judgment on an issue is governed by rule  
18 43. For present purposes, Sir, what's important is of course Tribunal rule 110,  
19 and Tribunal rule 110, as you would expect, Sir, expressly makes clear that  
20 only the Tribunal essentially can deal with applications under both rule 41 and  
21 rule 43. So while there are certain powers the President has sitting alone,  
22 rule 110 makes clear you don't have the power to strike out parts of a case or  
23 grant summary judgment.

24 So, Sir, that is the position. With respect, the point about whether or not certain  
25 parts of the CPR rules on pleadings apply or not, and it's right to say, Sir, for  
26 the most part where claims have been transferred to the CAT actually the

1 pleadings have in due course been updated to reflect the CAT procedural rule  
2 requirements, it's right to say we have not done so as yet here. But, Sir, we  
3 would say the important point here is I am afraid a jurisdictional one. The  
4 CAT is a statutory body and both the Tribunal and the President or  
5 a Chairman of the Tribunal only have the powers they are granted by statute  
6 or statutory instrument, in this case the CAT rules. So with respect, Sir, and  
7 it's the reason why I'm afraid -- it's not so much I take the procedural point as  
8 I recognise that this is a matter of statute, Sir, and if you do not have the  
9 power to act on your own, it's not in my gift, Sir, to give you powers that  
10 statute does not.

11 Now, Sir, we've no interest in having this hearing heard in a week's time instead. It  
12 does not advantage us in any way to push it off by whatever that may be, Sir.  
13 But nonetheless when one looks at the rules, it does seem to us that rule 110,  
14 for whatever reasons were in place in 2015, as you say, Sir, they may or may  
15 not be good reasons, but if they are not good reasons the rules will need to be  
16 changed. It might be convenient in the future for the President to indeed be  
17 able to determine issues of this kind but that would require a change of the  
18 rules. At the moment, Sir, the statutory power, with respect, we would say is  
19 quite clear: if my learned friend is seeking summary judgment, as indeed he  
20 is, equivalently, whether he uses the term strike out or summary judgment or  
21 some debarring order, with respect it's the same thing, Sir, and it's quite clear  
22 under rule 110 what the position is.

23 Sir, that's what I have to say on the point.

24 **THE PRESIDENT:** Yes. I think, Mr Turner, the problem is that the way the rules are  
25 framed at the moment -- and I say at the moment because, picking up  
26 Mr Cook's point, there is actually a review of the rules and a consultation on

1 reform of the rules that is going to go out in the next few weeks, when no  
2 doubt this is something that could be looked at -- is that case management  
3 issues can be handled by a Chairman alone but decisions that determine  
4 a claim or part of a claim need a full Tribunal and that is why strike out, default  
5 judgment, summary judgment, even withdrawal of a claim, if you look at 44,  
6 rule 44, if there's no consent, it needs the permission of the Tribunal and the  
7 President can only do it alone if no Tribunal has been constituted. So the  
8 whole thrust of the rules and the spirit of the rules is that an order that is  
9 determinative of what happens on part of the claim needs a full Tribunal, and  
10 while it is very regrettable it arises so late, I do see a potential problem which  
11 I had not myself appreciated until I read the letters this morning.

12 **MR TURNER:** May I make two further observations, my Lord. The first is the point  
13 I mentioned a few moments ago that rule 41 in its terms refers to striking out  
14 the claim, it doesn't refer to a strike out in relation to a defence. I make the  
15 point that the other provisions, the more general provisions, of the rules  
16 therefore would apply and not rule 41 because this is in substance a strike  
17 out.

18 The second point is this: it is entirely open to Mastercard to say that they will not take  
19 a point. They agree that it does not advantage them or justice for this hearing  
20 to be delayed even for a short while. There is no real purpose to be served in  
21 that and if Mastercard can therefore agree that it will not take a point, it would  
22 seem the practical solution for them to do so and for us to proceed.

23 **THE PRESIDENT:** Yes. I think although you say -- I mean this is a question of  
24 jurisdiction, Mr Cook. If we were to proceed and there were to be -- who  
25 knows, you may succeed, but insofar as you don't succeed, you were to  
26 accept that you will not seek to challenge an order on jurisdictional grounds

1 and seek to pursue aspects of your defence which the Tribunal holds you  
2 should not proceed with, then I don't think in that respect there would be  
3 a problem, because this is your case and you are able to in any event say,  
4 "Well, we are not going to pursue that part of the case". Indeed, as you've  
5 pointed out, you've just said that in the last few days on some of the  
6 objections that have been taken that you are not going to therefore pursue  
7 that point so we don't have to decide it any more.

8 So it's always open to you as a defendant to say that and if you agree to be bound  
9 by a ruling that I would make, then I don't think we have a problem. But if you  
10 say on instructions, "No, I am not prepared to make that concession", then my  
11 present view is we may have to find another date.

12 **MR COOK:** Sir, I am afraid my present understanding of what the position is here is  
13 that in circumstances in which you do not have a statutory power to do  
14 something, Sir, I cannot grant you powers beyond what you have. If you  
15 wanted me to go away and spend some more time looking at that particular  
16 issue and see if that altered the position then I could do so, but that's not  
17 something that we have had the opportunity to look at as extensively as we  
18 would have done if this point had risen earlier. But we do understand that's  
19 the position so we do say, Sir, it's a jurisdictional point.

20 Now, I can look at the point further, take further instructions possibly, Sir, but it does  
21 seem to me the rules are quite clear about what is meant to be done by  
22 particular different bodies within the CAT on these points, Sir. As I said, it  
23 does not advantage us to have this come on in a week's time, two weeks'  
24 time, the points will be the same, but nonetheless, Sir, that does seem to us to  
25 be the strict position.

26 **MR TURNER:** It may be worth clarifying, for the benefit of Mr Cook and those

1 instructing him, that the point perhaps is not purely one of statutory  
2 jurisdiction. We agree, my Lord, with what you described the position to be,  
3 that were you to find that certain allegations ought not to be pursued,  
4 Mastercard could voluntarily accept that it will not pursue them and choose  
5 not to take that process point on appeal, because it recognises that in  
6 substance that is the correct outcome. So we don't see it as something that it  
7 is beyond Mastercard's ability to say that it won't take a point on and if  
8 Mr Cook requires a few minutes to take instructions we would be happy with  
9 that.

10 **THE PRESIDENT:** I think that is the way it would have to work, Mr Cook. It would  
11 be that I would not strike out, I would give, as it were, a ruling that you should  
12 not be permitted to pursue these points because they are res judicata or  
13 because they should have been taken earlier, and you would then undertake  
14 not to pursue them at trial. That would get round I think the jurisdictional  
15 problem. But on that basis I think it would be something that would be -- yes.  
16 I mean, the issue arises if you did wish to appeal, not on procedural grounds  
17 but on substantive grounds.

18 **MR COOK:** Sir, that's exactly what I was just thinking, is that these are important  
19 points between us. They raise to some extent relatively novel issues but  
20 important points in terms of the value of these claims, and certainly I am not  
21 going to do anything that is going to limit my ability to bring a substantive  
22 appeal. And that's the difficulty, Sir, I do see a problem with appealing against  
23 a ruling that, with respect, Sir, you don't have jurisdiction to make and giving  
24 any form of undertaking to be bound by it. It's simply something -- Sir, one  
25 could always ask for instructions but I am simply not going to get instructions  
26 because I would advise my clients, in all honesty, not to do anything that

1 would limit their rights of appeal when we can come back in a short period of  
2 time.

3 **THE PRESIDENT:** I hope it would be a short period of time. Recent experience  
4 tells me listing these hearings is not always so straightforward because both  
5 of you have very busy practices, but at least it's only a two-party hearing.

6 **MR COOK:** Sir, there's actually one point in relation to that, because if you may  
7 recall at the hearing back in December that one of the points my learned  
8 friend was at that point suggesting is there should be a common issues  
9 hearing and, of course, actually the points we are now fighting about are ones  
10 that do arise and these are the common issues. I think my learned friend at  
11 the time was describing them as the shape of the market issues. So there is  
12 again an issue here, which is these points are going to arise in -- they  
13 certainly arise in Sainsbury's v Mastercard, and they arise to a lesser or  
14 greater extent in Sainsbury's v Visa. So simply, Sir, so you are aware of the  
15 fact these are the points my learned friend was suggesting in December  
16 needed to be heard in a single hearing.

17 **THE PRESIDENT:** No, I understand that. But that was the whole reason why it was  
18 important to establish whether they are issues that are live in this case. Not  
19 all issues arise in all cases. As you know, there is an exemption issue in one  
20 of these trials, there isn't an exemption issue in another one.

21 **MR COOK:** Sir.

22 **MR TURNER:** Yes, finality issue --

23 **THE PRESIDENT:** Having this determined before -- can you remind me, we fixed  
24 that joint CMC in all the cases, I think it's now been listed, hasn't it?

25 **MR TURNER:** Yes.

26 **THE PRESIDENT:** And someone will know, or let me just find out here, because the

1 référendaire will know.

2 I am told it's 31 March.

3 **MR TURNER:** Yes.

4 **THE PRESIDENT:** So this would have to be heard before 31 March, which does  
5 give us some time, and do you think now that some of the issues have fallen  
6 away, is it a full day or is it a half day? We have, of course, spent a lot of time  
7 now just talking about jurisdiction but actually when we get into it ... is it wise  
8 to set aside a full day?

9 **MR TURNER:** Essentially, as matters now stand there are three points; all of those  
10 three points turn on the finality principle in the AAM case. For my part,  
11 without knowing precisely the extent to which, my Lord, you have done the  
12 pre-reading and are familiar with these very detailed judgments, I would think  
13 it safer to allow for up to a day.

14 **THE PRESIDENT:** Yes. It may not make a lot of difference. I know it's very  
15 regrettable and unfortunate and it's regrettable that nobody thought of this  
16 earlier, but here we are. I think there are jurisdictional problems on the rules  
17 as they stand and if one has to infer a power, if it's analogous to rule 41, it  
18 seems to me that it should be the full Tribunal, even if it's not on a literal  
19 reading within rule 41, and arguably that should be construed in a more  
20 purposeful way as covering a defence as well. So I think we can't proceed.  
21 I think it does have to be refixed.

22 As regards the composition of the Tribunal, we are in a somewhat fluctuating state  
23 on these three cases. Your case is not for trial until I think is it early 2023  
24 now? So we have not yet appointed a Chairman to hear that case. It's by no  
25 means necessary that the Tribunal that is hearing this issue should be the  
26 same one that is case managing all three and looking at common issues,



1 which is at the moment the trial Tribunal for the first trial that I think takes  
2 place in October.

3 All I am saying in a somewhat roundabout way is that the Tribunal that will be  
4 constituted to hear these points that would have been heard today may not be  
5 the same Tribunal that considers common issues on 31 March. I will chair it,  
6 but the other two members may be different and I don't see that as creating  
7 any problem because we have not got the trial Tribunal yet constituted for this  
8 case, which I will not chair, and indeed it's I think important that the Tribunal  
9 members are different as between all three cases, otherwise the effect of the  
10 evidence in one spills over in their determination of the other.

11 I will adjourn it to be heard by a full Tribunal, but it will probably not be the Tribunal  
12 compromising the same two ordinary members as the Tribunal that is sitting  
13 on 31 March. But I don't see that as presenting any problem. Do you,  
14 Mr Turner?

15 **MR TURNER:** We see no problem with that.

16 **THE PRESIDENT:** Mr Cook?

17 **MR COOK:** Sir, I think there is probably a certain advantage from the perspective of  
18 the amount of work the Tribunal members would have to do. There is  
19 a considerable overlap between some of the issues that will arise and  
20 certainly if they were taken through by Mr Turner some of the detailed Court  
21 of Appeal and Supreme Court judgments for the purpose of this hearing and  
22 then a differently constituted Tribunal ended up hearing Mr Turner make  
23 essentially similar submissions on similar points on the 31 March, then that  
24 does take up more time and involve more pre-reading, so if it's possible, Sir --

25 **THE PRESIDENT:** Mr Cook, I don't think that is the case because the question for  
26 the applications that are now pending is whether they can be advanced and

1           whether, as a matter of law, in the trial. It's a legal question, looking at the  
2           previous judgments and the principles in Henderson v Henderson and so on.

3 The question on 31 March is knowing then what the issues are in all three cases,  
4           what issues can sensibly be heard in common. So it's a quite different  
5           question. I don't see that there is -- of course you have to understand the  
6           issues but that's not the point. The kind of argument that I am going to be  
7           hearing with two others is, looking at the previous judgments, is it open to  
8           Mastercard to advance these points now? The question on 31 March is we  
9           have three cases, we have these defences arising in these different cases,  
10          can any of them be sensibly heard in one hearing together or are they just too  
11          different they have to be heard separately? So it's an entirely different kind of  
12          exercise it seems to me.

13 But my question is not that, it's ultimately perhaps a decision for me as to how we  
14          constitute the Tribunal, but I don't see any jurisdictional objection to the fact  
15          that the two other members hearing these points will not be the same as the  
16          case management Tribunal that will be convened for 31 March.

17 **MR COOK:** No, Sir, there's no jurisdictional objections.

18 **THE PRESIDENT:** Whether we will have one or other of those same two I don't  
19          know but the critical question is availability, to get this on quickly. I will  
20          adjourn it. I will arrange later today that we write to both sides with proposed  
21          dates, and if you could also then consider when in the next four weeks you  
22          are available so we can bring this on quickly. Evidently, the sooner the better.

23 **MR TURNER:** My Lord, may I say that in the circumstances we agree this is the  
24          right decision. It was the purpose of us writing when we spotted it yesterday  
25          to flush the point out.

26 **THE PRESIDENT:** Yes.

1 **MR TURNER:** We will endeavour to refix this in conjunction with the Registry at the  
2 earliest possible date.

3 **THE PRESIDENT:** Yes. If you look at your dates this afternoon, obviously we have  
4 to contact two other Tribunal members to get some dates and we'll get to you  
5 either this afternoon or on Friday, tomorrow, yes. Very well.

6 **MR COOK:** Thank you, Sir.

7 **THE PRESIDENT:** I think as regards costs it's probably sensible to say, is it not,  
8 costs in this application?

9 **MR TURNER:** Yes.

10 **MR COOK:** Yes, Sir.

11 **THE PRESIDENT:** Yes. Very well. That's the order we'll make. At least,  
12 Mr Turner, this point was spotted before we started the hearing rather than  
13 afterwards.

14 **MR TURNER:** Yes, exactly.

15 **THE PRESIDENT:** Thank you, both.

16 **MR COOK:** I am obliged.

17 **(11.30 am)**

18 **(The hearing adjourned to a date to be fixed)**

19