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5 **IN THE COMPETITION**

Case No: 1287/5/7/18

6 **APPEAL**

7 **TRIBUNAL**

8
9 Salisbury Square House
10 8 Salisbury Square
11 London EC4Y 8AP

12 Monday 12th December 2022

13 Before:

14 The Honourable Mrs Justice Bacon
15 (Chair)
16 Dr William Bishop
17 Tim Frazer

18
19 (Sitting as a Tribunal in England and Wales)

20
21
22 BETWEEN:

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24 **ASDA STORES LIMITED AND OTHERS**

Claimants

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26 v

27
28 **MASTERCARD INCORPORATED AND OTHERS**

Defendants

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34 **A P P E A R A N C E S**

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37 Jon Turner KC, Meredith Pickford KC, Christopher Brown, Laura Elizabeth John and Max
38 Schaefer (instructed by Stewarts Law) appeared on behalf of Asda Stores Limited &
39 Others

40
41 Sonia Tolaney KC, Matthew Cook KC and Ben Lewy (instructed by Jones Day) appeared on
42 behalf of Mastercard Incorporated and Others

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(10.30 am)

Pre-trial review

THE CHAIR: Thank you very much. Can everyone see and hear the Tribunal clearly? Or at least me?

MR TURNER: Yes.

MS TOLANEY: Yes.

THE CHAIR: I will start with a warning: these proceedings are being live streamed and are being heard remotely but they are as much court proceedings as if everyone was here physically in the Tribunal in Salisbury Square House.

There will be an authorised transcript prepared. It is a criminal offence and a contempt of court for anyone to make an unauthorised recording, whether audio or visual, of these proceedings and punishable as such.

Thank you very much. And thank you for your skeleton arguments.

Just before we proceed, I'm getting a lot of background noise. Is it possible for everyone who is not speaking to mute themselves and we will see if the problem is with one of us.

Mr Turner if you could hit your mute button as well, and Dr Bishop.

All right, that gets rid of the noise. So if anyone wants to speak, obviously please unmute yourselves but that will deal with the background noise issue for the time being.

Discussion on deadline for JES addendum

THE CHAIR: From the skeleton arguments it appears that there are at least four issues to decide this morning and I imagine that we will be able to rattle through

1 these relatively quickly. The first is the question of timetable. The second is the
2 question of how to deal with the expert evidence. The third is the issue of
3 confidentiality and the fourth not raised in your skeletons but you will have received
4 an indication that we want to deal with it, is the issue of page length for skeleton
5 arguments and closing submissions and related to that, the format of those written
6 submissions, what they should contain and what they should not contain.

7 Does anyone have any item for the agenda today which is not on the list that I have
8 just read out?

9 **MR TURNER:** My Lady, there is one. It's an additional point that is something
10 I noticed yesterday and emailed my friends about and they are content. It's a loose
11 end which isn't picked up in our respective skeleton arguments. In a nutshell, one of
12 the joint expert statements was finalised on an expressly provisional basis because
13 shortly before the deadline Asda discovered some highly relevant disclosure that had
14 been overlooked.

15 The experts are currently considering that material and they are asking clarificatory
16 questions about it. Once they understand it then, with the Tribunal's permission, the
17 hope is that they will file a brief addendum to the existing joint statement and the
18 action point for today is to ask the Tribunal formally for that permission and to
19 impose deadlines for the necessary actions, which I have liaised with Mr Cook about
20 and he's indicated that Mastercard is happy with. I floated the suggestion.

21 **THE CHAIR:** Well, in that case shall we deal with that first to get it out of the way.
22 What deadlines do you propose for the addendum to the expert evidence, and can
23 you just remind me which one of these is this that we're talking about?

24 **MR TURNER:** We're talking about the joint experts' statement on co-brand cards. If
25 you have the PTR bundle it's at tab 7. If you open tab 7 you will see this
26 immediately. You need to go to page 122.

1 **THE CHAIR:** Yes, I have that.

2 **MR TURNER:** Okay, so in the left-hand column you have the claimants' expert,
3 Mr Davies; in the right, the defendant's expert Mr Harman.

4 **THE CHAIR:** Yes, I see this. And a general note that Asda had disclosed further
5 information.

6 **MR TURNER:** Yes, so he deals with that there and the other expert is happy with
7 this. They're both asking questions about it. That process is underway. The
8 proposal is that all, substantially all clarifications from Asda must be given to the
9 experts by no later than 6 January with best efforts to provide it all before Christmas.
10 That's the retailers' busiest time and that's therefore realistic.

11 The experts then get two weeks to digest and process that information, liaise with
12 each other on a without prejudice basis and produce an addendum so that you have
13 a deadline for their brief addendum of 20 January. Then the parties have permission
14 to file not more than two sides of supplemental submissions by the 25th. This is all
15 obviously on the assumption that we're working to a 30 January start date for the
16 trial, which we have not yet discussed. If that's not the case then we will have to
17 work backwards from whatever start date the Tribunal fixes.

18 But we respectfully ask for a direction on those lines.

19 **THE CHAIR:** Yes. We are working from a start date of the 30th with a reading week
20 in the 23rd. My only concern is whether we're likely to get a lot of new information
21 which we would want to have towards the start of the reading period. That is
22 somewhat allayed by your proposal that it should only be two sides of supplemental
23 submissions but that is quite hard up on the trial timetable.

24 I am wondering if it's possible to bring everything forward by a day so that
25 clarifications to be given to the experts by --

26 **MR TURNER:** 5 January.

1 **THE CHAIR:** -- the 5th and then the addendum by the 19th and then any
2 supplemental submissions to be filed by close of business on the 24th.

3 **MR TURNER:** That will be -- I'm sure that that will be in order. Someone will shout if
4 that's not the case.

5 **THE CHAIR:** No. Well, no one shouted. So we will set those deadlines but
6 provisionally I just want to check with, in particular, Dr Bishop. Dr Bishop, do you
7 foresee any problem your end; does that impact on any of your preparation for the
8 economic evidence?

9 **DR BISHOP:** No. No, I see no difficulty. That seems fine to me.

10 **THE CHAIR:** No, all right. And Mr Frazer?

11 **MR FRAZER:** I'm fine with that.

12 **Discussion on Timetable**

13 **THE CHAIR:** All right. So we will set those deadlines but they must not slip
14 because I do want us to have sufficient time to consider the supplemental
15 submissions during the course of the pre-reading week, which is going to be a busy
16 week for all of us. All right.

17 So that deals with the one additional issue.

18 So shall we then turn to the timetable.

19 **MR TURNER:** Yes, my Lady. We will take it, then, that 30 January, the parties'
20 agreed proposal is acceptable to the Tribunal and we're only therefore talking about
21 the structure and length of the timetable?

22 **THE CHAIR:** Yes, exactly.

23 **MR TURNER:** Yes.

24 **THE CHAIR:** Yes. So we have looked at the timetable and our provisional view is
25 that we prefer the timetable put forward by Mastercard, which I'm just getting up.
26 The main issue seems to be the length of time for the preparation of written closing

1 submissions and we note that Mastercard, with a much smaller counsel team, seems
2 to think that it would be possible to prepare those, well, in either three days plus the
3 weekend or three days without the weekend. It's not clear to us from their
4 submissions which they propose, but we would have thought that three days without
5 the weekend, filing and servicing the written closing submissions by close of
6 business on 24 February should be sufficient, and on Asda and Morrisons' part
7 should certainly be sufficient with a counsel team of five but even without such
8 a large counsel team we think that that should be sufficient given the non-sitting days
9 that are built in to the timetable.

10 There will have been three non-sitting days before then, with of course the
11 pre-reading week as well. We are concerned that we should not be receiving
12 the Tribunal equivalent of War and Peace but should be having concise and focused
13 submissions which ought to be doable in those three days.

14 Can I have submissions from each of you in turn as to whether that is going to be
15 feasible.

16 Mr Turner.

17 **MR TURNER:** Yes, my Lady. May I just take one step back. We may be able to
18 live with that but there is a qualification on it and to be clear it's one of three distinct
19 timetable issues and I need to address the other two, as well.

20 It's my fault because those weren't obvious from the skeletons but if you have the
21 two draft timetables in front of you I just need to explain what those are. They raise
22 different issues. So it's at tab 8 and tab 9 of the PTR bundle. Ours is at tab 8, theirs
23 is at tab 9.

24 **THE CHAIR:** I have the versions that are appended to your skeleton argument. Are
25 they the same?

26 **MR TURNER:** Yes.

1 **THE CHAIR:** I hope they're the same.

2 **MR TURNER:** Yes.

3 **THE CHAIR:** All right.

4 **MR TURNER:** So if you look at the claimants' one, Asda and Morrisons, you will see
5 that week 1 comprises opening submissions, that's half a day apiece, and then the
6 claimants' factual evidence, four days. On our approach that includes the Friday, so
7 it's not a non-sitting day. I will need to explain that.

8 **THE CHAIR:** No, no, I had assumed that we would be following the Mastercard
9 version with inserting a non-sitting day there.

10 **MR TURNER:** Can I explain, then, the reason. If you continue with ours, because of
11 that you see that the Mastercard factual evidence can begin on Monday 6th. So that
12 their examination, which is three days, is the 6th, the 7th and the 8th. The 6th is
13 therefore an extra day on our approach and there is a reason for that, which is that
14 they have two witnesses who are going to be covering essentially the evidence of
15 the five factual witnesses on whom they rely for this quantum part of the case, a
16 Mr Douglas and Mr Willaert. We were told that Mr Douglas has booked a holiday in
17 Asia starting on 8 February. So he's gone from the 8th.

18 **THE CHAIR:** Yes.

19 **MR TURNER:** And it's likely that his cross-examination will take more than a day.

20 **THE CHAIR:** So he would have to go on the 7th.

21 **MR TURNER:** No, if he's on the 7th it's only a day because he's gone on the 8th.

22 **THE CHAIR:** I see. Is it being said that he is already leaving by the morning of the
23 8th?

24 **MR TURNER:** That's our understanding. I will be corrected if that's wrong. Mr Cook
25 is nodding.

26 **THE CHAIR:** That's really unfortunate given that this hearing has been in

1 everyone's diaries for a long time.

2 **MR TURNER:** My Lady, Ms Tolaney will comment, but that appears to be the fact
3 and on this first point therefore that's why we envisaged that that first Friday has to
4 be a sitting day.

5 **MS TOLANEY:** My Lady, I think the answer is that, yes, he is away from the
6 morning of the 8th, but obviously the trial was supposed to start earlier.

7 **THE CHAIR:** Yes, but we have your timetable which suggests a non-sitting day on
8 3 February but it seems to be your witness who can't actually be there any time after
9 the 7th.

10 **MS TOLANEY:** That is right, my Lady. What I would say is that I am doing the best
11 I can at the moment. You may think this is not good enough. I think that three days
12 for factual cross-examination of my learned friend's witnesses will probably be
13 enough.

14 **THE CHAIR:** Yes, but it's then in your hands because you need to be able to allow
15 sufficient time in the timetable for your witness to be cross-examined for the length of
16 time that Mr Turner wants with him, or Mr Pickford or whoever else is doing the
17 cross-examination of that witness, sorry, I'm not assuming that it will all be
18 Mr Turner. I am using Mr Turner in the generic sense of the word. Sufficient time for
19 their counsel team to cross-examine him, which you are now on notice will be more
20 than a day.

21 Mr Turner, what's the outside length of time that you will need with the particular
22 witness?

23 **MR TURNER:** We have said three days for the two of them. They're covering all
24 five witnesses' evidence. I expect that it may be a day and a half apiece but I'm not
25 currently able to narrow it more than that and there is a risk it might be slightly
26 longer. The Tribunal will also have questions. That is why, if he is away, it seems to

1 | be necessary for it to start on the 6th.

2 | **THE CHAIR:** Yes. Well, in that case, yes, so I think what we ought to do, and I am
3 | thinking aloud, but what we ought to do, provisionally, is to start with that witness on
4 | the 6th and that means that 3 February will be a provisional non-sitting day,
5 | Ms Tolaney, so that if you go over we can go into 3 February as necessary, so we
6 | will just put a bracket round that, so that's possible spillover.

7 | **MS TOLANEY:** Thank you, my Lady. I'm sorry to put the Tribunal out but thank you
8 | very much.

9 | **THE CHAIR:** Obviously we're just going to have to make sure that there is sufficient
10 | time in the timetable. So that will be a provisional non-sitting day. If you need that
11 | time then you will need to go into that day in your cross-examination. We will then
12 | start the Mastercard factual evidence on the 7th --

13 | **MR TURNER:** 6th.

14 | **THE CHAIR:** The 6th, sorry. We will have the 6th, the 7th and the 8th and the
15 | question is then whether we insert another non-sitting day or whether we crack on
16 | with the expert evidence. Now, can I have suggestions as to that, which would be
17 | preferable?

18 | **MR TURNER:** We're content to crack on with the expert evidence after the factual
19 | evidence closes. This is going to be the second point that wasn't apparent from the
20 | material you have read, which I need to mention, because there is another difference
21 | between these two drafts and that's that on the claimants' one you will see that there
22 | is seven days programmed for the expert evidence. If you turn over you see on
23 | Mastercard's there are six.

24 | That reflects our considered estimate that seven days overall is going to be needed
25 | for the expert part of the case. To break that down, our estimate is based on a hot
26 | tub lasting a day on the econometric evidence, and I know we're coming to that so

1 it's based on an assumption. That would comprise the questioning by the Tribunal in
2 the hot tub and some scope for limited supplemental cross-examination in
3 accordance with the Tribunal's practice in other cases. Then each side getting three
4 days apiece for the individual examination of the various opposing experts on the
5 remaining topics.

6 That's the counterfactual, value of commerce, the financing losses, the co-brand
7 cards for Asda and economic theory for pass on. So the assumption that we're
8 making is that the two rival economists, Mr Friederiszick and Dr Niels will give their
9 evidence on the econometric modelling concurrently, the point that we still have to
10 debate, potentially. We consider that if that is done it will make that aspect of the
11 case somewhat shorter than if there is individual cross-examination on the
12 econometrics of each of them in turn.

13 Mr Pickford will address this if there is a debate to be had. We had a useful call from
14 Mr Cook this morning, expressing substantial agreement with this proposal now but
15 we will need to iron out the details.

16 **THE CHAIR:** All right. So assuming for the time being that there is a hot tub, you
17 say seven days overall, one day hot tub and three days each on the remaining
18 topics.

19 Maybe I just need to hear from Mr Cook as to how many days he thinks is required
20 on -- well, the assumption that there is a hot tub and whether he thinks that there is
21 a difference in that estimate if there is not a hot tub, because that's his position, or at
22 least was his position in the skeleton argument, there shouldn't be a hot tub.

23 So, Mr Cook, if you're dealing with this point.

24 **MR COOK:** I think, Ms Tolaney, I should bow to her first on this.

25 **THE CHAIR:** Oh, I'm sorry.

26 **MS TOLANEY:** Don't worry, my Lady. I think the answer is that we were unhappy,

1 as you will have seen from our skeleton, in relation to hot tubbing on issues which
2 we felt were better suited to cross-examination. In particular I think that was item 2
3 of my learned friend's agenda. But we have since debated this with my learned
4 friend and we are content, subject to the Tribunal, to have limited hot tubbing on the
5 modelling issues but not on issues that we would be cross-examining on anyway,
6 which we think would just be unhelpful and duplicative. So we have reached
7 a landing, I think, on that basis, subject again to the Tribunal, that one day for hot
8 tubbing sounds sensible and we would be content with the seven day estimates and
9 starting immediately with cross-examination of experts on that day. So it won't
10 change the timetable.

11 **THE CHAIR:** All right. So if that is the case then we get to the end of 21 February
12 on both timetables. So, the experts then starting on the 9th, finishing on the 21st on
13 an agreed timetable. If, of course, it turns out that any of this goes short, then there
14 will be more time for the preparation of closing submissions.

15 That then gets us to the question of how long is needed after the expert evidence.

16 **MR TURNER:** Yes. So that then takes us to the issue we started with, my Lady.

17 **THE CHAIR:** Yes.

18 **MR TURNER:** Which is the third difference between the draft timetables. Both
19 these timetables envisage the evidence as you say closing on 21 February. The
20 difference is that our draft envisages four days for writing the written closings and
21 then they're delivered to you in Week 5. By contrast Mastercard allows three days.
22 Our view is, with respect, that that is likely to be too compressed and it's
23 an unnecessary stricture because it will be too short a period to produce a document
24 that will most assist you in writing your judgment and it's unnecessary to impose that
25 burden on the parties.

26 As you say, Mastercard says that we can write the closings as we go along because

1 | there will be the non-sitting days. We have now discussed that the first of those is
2 | actually likely to be a sitting day.

3 | **THE CHAIR:** Well, it's provisionally a sitting day.

4 | **MR TURNER:** Provisionally.

5 | **THE CHAIR:** Because Ms Tolaney has said at the moment her view is that it's likely
6 | to be possible to finish the A & M factual evidence after three days. So as I
7 | understood Ms Tolaney's submission, her starting point was that was the likely
8 | timetable so we were likely to get a non-sitting day but we would have that day in
9 | hand if necessary, on her part, yes. So her position is that we are likely to be getting
10 | a non-sitting day then.

11 | **MR TURNER:** It may be. Nonetheless after the expert evidence, to pull the things
12 | together, the strands together and produce a document that will be of most
13 | assistance to you, it does seem to us that a little bit extra time is going to be helpful
14 | to avoid undue pressure and to schedule the oral closing submissions for the
15 | Monday and the Tuesday of what will be Week 6, the week beginning 6 March, for
16 | one day apiece.

17 | **THE CHAIR:** All right. That's your position then.

18 | **MR TURNER:** Our position is that will help the Tribunal more and it will be
19 | an unnecessary stricture to do otherwise.

20 | **THE CHAIR:** All right.

21 | Ms Tolaney.

22 | **MS TOLANEY:** My Lady, our position is as set out. We don't think that much time is
23 | required and that it can be done more efficiently, particularly if it is a relatively crisp
24 | closing, but we're entirely in your Ladyship's hands.

25 | **THE CHAIR:** All right. Can I just move to the retiring room. I will just confer with the
26 | rest of the Tribunal and we will return in a couple of minutes.

1 **(Pause)**

2 Thank you, everyone for bearing with us. We will stick with the Mastercard timetable
3 subject to this question: Ms Tolaney, did you have in mind that the closing
4 submissions should be filed and served on the 24th by close of business or were you
5 envisaging that they should be filed with the Tribunal on the morning of 27 February?

6 **MS TOLANEY:** I think we had in mind the 24th but we are entirely relaxed about
7 that and if Mr Turner wants the weekend and the Tribunal won't read over the
8 weekend then that's entirely a matter for your Ladyship.

9 **THE CHAIR:** Well, I think my concern was not merely with whether the Tribunal is
10 going to read over the weekend but also whether it would be useful to the parties to
11 have a little bit more time to read the submissions.

12 I would have thought that given that they are submissions that will have been written
13 over some days, including in the previous weeks, it would be more helpful to
14 everybody, including those on both counsel teams, to have the weekend as well as
15 the 27th and the 28th to read the submissions.

16 **MS TOLANEY:** That's what we had in mind.

17 **THE CHAIR:** In order that the closing submissions can then be usefully focused and
18 not simply something that had been prepared earlier without reference to the written
19 closings.

20 So in that case we will say close of business on 24 February for written closing
21 submissions.

22 All right. So that deals with the timetable as far as I have -- is there any other issue
23 on the timetable that we need to discuss?

24 **MR TURNER:** None on our side, my Lady.

25 **THE CHAIR:** Ms Tolaney?

26 **MS TOLANEY:** No, my Lady. Thank you.

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Discussion on Expert Evidence

THE CHAIR: No, all right.

So we then turn to expert evidence. That seems to be now the subject of agreement between the parties. Is there now agreement that the expert evidence shall follow the proposal in paragraph 19 of the A & M skeleton argument?

MR TURNER: I will hand over to Mr Pickford for this who is currently on mute, my Lady.

MR PICKFORD: Subject to one modification, my Lady, that's correct. So what we propose is that the evidence of Dr Friederiszick and Dr Niels on the technical econometric issues be given concurrently in a process that's led by the Tribunal.

THE CHAIR: Yes.

MR PICKFORD: And in particular we anticipate by Dr Bishop, and obviously on other issues that they are subject to cross-examination in the normal way. That, I'm glad to say, is now agreed subject to one amendment, which is also now agreed, and the best way of dealing with that I think is if I can take the Tribunal to tab 12A in the bundle, which is the indicative agenda.

THE CHAIR: Yes.

MR PICKFORD: So it's now agreed between the parties that items 1 and then 3 to 9 should form the content of a hot tub and that therefore the only thing to be removed from that indicative agenda is item 2, which is the suitability of the cost proxies.

The reason for dividing the evidence in this way is that all of the remaining issues are substantially technical ones. There is a technical element to item 2, which is why we originally proposed that it be in the hot tub, it's in that part of the joint experts statement, but it is correct, it's a fair point that that's made by Mastercard, that there is some overlap there with some of the theoretical issues because the theoretical

1 issues inform the choice of proxy. We are certainly entirely content for the sake of
2 clarity to remove item 2 from the agenda. So it is quite clear that all of those issues
3 will be covered in cross-examination in the normal way. Then our proposal would be
4 that there will be a hot tub on, as I said, item 1 and then items 3 to 9.

5 I'm very much in the Tribunal's hands as to how much submission you would like
6 from me on this. Obviously I had prepared, on the basis of making quite substantial
7 submissions to persuade the Tribunal in the face of opposition from Mastercard, but
8 now we are in agreement it may be that I don't need to go on at quite such length.

9 **THE CHAIR:** Yes.

10 **MR PICKFORD:** But obviously it does impose some burden on the Tribunal. So I'm
11 very happy to explain in fuller submissions why we propose what we do.

12 **THE CHAIR:** All right. First of all can I just get the position of Mastercard on that?

13 **MS TOLANEY:** My Lady, we are, as Mr Pickford has outlined now, agreed that we
14 are content as long as those overlap issues come out and it is limited to modelling
15 and it's a day therefore on that discrete topic. We can see the sense so long as
16 the Tribunal is content with that.

17 **THE CHAIR:** All right. Dr Bishop, do you have any questions on that division of
18 issues or any concerns about the proposed excision of number 2 of the list from the
19 hot tub?

20 **DR BISHOP:** No. No, that's okay. I'm content to do it that way. That's fine.

21 **THE CHAIR:** Right. Mr Frazer.

22 **MR FRAZER:** That seems a sensible way of putting it. I'm happy with that.

23 **THE CHAIR:** All right. On that basis we are content with that proposal, so issues 1
24 and 3 to 9 will go in the hot tub issue. 2 will come out. In the sense that we are not
25 going to treat this list or anything else that we are given as constraining the Tribunal,
26 in particular Dr Bishop, in the questions that it puts to the economists in the hot tub.

1 What you're proposing is that we carve out issue 2 from the hot tub, which is fine.
2 For the remainder of the hot tub issues we are entirely happy to receive suggestions
3 from the parties as to the areas that may be covered in the Tribunal's questioning as
4 long as it's understood that there should be no expectation that those questions will
5 be comprehensively covered or indeed that those will form an exhaustive list of the
6 questions that the Tribunal might put.

7 **MR PICKFORD:** We are of course entirely content with that. Thank you, my Lady.

8 **THE CHAIR:** Then the next issue related to that is whether we can set a timetable
9 for the parties to provide any suggestions or any further suggestion that is they may
10 have for the issues to be covered in the hot tub.

11 We absolutely do not expect to get a list of questions, granular questions, to be put
12 to the experts, but rather that the list should address thematic issues and should
13 simply be a perhaps expanded version of what we already have at tab 12.

14 We had in mind something along the lines of 13 January. Is that date going to be
15 acceptable to both sides? If not, can I have submissions on whether you want
16 a date earlier or later.

17 **MR PICKFORD:** My Lady, from our point of view, given that I can't turn around,
18 what I am going to do is adopt the same approach as Mr Turner, which is that
19 sounds entirely acceptable to us. If anyone disagrees with me they can shout
20 virtually via WhatsApp or whatever and I will tell my Lady otherwise. But that sounds
21 very sensible to us.

22 **MS TOLANEY:** And I will take the same approach.

23 **THE CHAIR:** All right. So if anyone else in the counsel teams disagrees with the
24 comments of Ms Tolaney and Mr Pickford they better let their respective leaders
25 know.

26 No one shouting. All right. Well in that case we will say 13 January for any

1 suggestions as to the lists of issues to be addressed in the hot tub. Does that deal
2 with expert evidence?

3 **MR PICKFORD:** I believe it does, my Lady, yes.

4

5 **Discussion on Confidentiality & Page Length**

6 **THE CHAIR:** All right. The next issue on my list is then confidentiality. As far as
7 I understand it, the issue here is simply that Mastercard wants some deadlines to be
8 set for A & M's proposals as to confidentiality following its review of the relevant
9 documents. Can I have submissions from whoever is speaking to this from A & M
10 first of all.

11 **MR TURNER:** That's me, my Lady. I'm not sure what disagreement remains on
12 this. In essence, from their skeleton, Mastercard's counsel are dissatisfied with the
13 proposal by our solicitors to complete a review of the claimants' confidentiality
14 designations in the case by the second week in January next year, ahead of the trial,
15 which is now settled to commence on 30 January. They appear from their skeleton
16 to have wanted the Tribunal to impose an earlier hard deadline on our solicitors and,
17 secondly, to give guidance about the approach to the review that the solicitors
18 should be taking given that according to them all the information in the case is more
19 than five years old and so it's presumptively stale.

20 So specifically if you have their skeleton at paragraph 26 they say that the case
21 relates to a claim period terminating in January 2017 and therefore at the end even
22 the most up-to-date information available will be six years old by the start of the trial.

23 And in a nutshell our response is two-fold. First, the Tribunal absolutely does not
24 have to bring further pressure to bear on the claimants' solicitors who are working
25 very hard on this indeed. We have put in a witness statement from Mr Carson of
26 Stewarts, which you have at tab 11 of the bundle. You will have already looked at

1 that. If I go directly to page 148, paragraphs 14 and 15, you see that there the
2 solicitor outlines the scale of the task and the intensive efforts which Stewarts are
3 making to rereview the confidentiality designations ahead of the trial. And you see in
4 paragraph 15, 360 person-hours already have been spent on it since mid October
5 and the cost is described.

6 Now, Stewarts are highly diligent and are reliable. There is no foreseeable risk that
7 this task will remain incomplete by the trial, if the trial is starting on 30 January,
8 certainly, and it's not reasonably possible, let alone necessary, to force the
9 claimants' solicitors to work harder over the Christmas period. They're already
10 making Stakhanovite efforts.

11 As we told Mastercard in correspondence, the completion of the confidentiality
12 review will fit very well with Mastercard's counsel who are emerging from the
13 Merricks hearing that finishes on 16 or 17 January, according to them.

14 **THE CHAIR:** Yes. The issue is not that these documents haven't been disclosed,
15 it's simply the question of whether they are unredacted so that instructions can be
16 taken from Mastercard's clients on the documents. Is that right?

17 **MR TURNER:** Yes, and I think also arrangements for the trial in terms of preparing
18 your cross-examination and knowing what will need to be treated as sensitive at the
19 hearing itself.

20 So I think it is actually that very practical narrow issue and these matters will be
21 settled two weeks ahead of the trial in circumstances where Mastercard's counsel
22 are in any event, as they say, tied up until that period.

23 **THE CHAIR:** When you say settled, is it that you are saying that that is going to be
24 when you make your proposals as to which documents will be confidential, because
25 that's not settled at all; that's simply you coming forward with a proposal as to what is
26 confidential. If Mastercard want to come back on that then that leaves very little time

1 before the start of the trial for that to be resolved.

2 **MR TURNER:** My Lady, it means that by that time the documents which already are
3 designated as confidential will have been studied, discussed with the clients and
4 a client position will have been secured on whether those are strictly confidential or
5 not, properly directing themselves according to the right test of legitimate business
6 harm.

7 This is, in my experience, entirely normal and the idea that there would then be
8 a sort of mini hearing to discuss potentially multiple confidentiality arguments
9 between the parties prior to the trial is not efficient, is not normal and the way that
10 this ought to be done is, in the usual manner, that once these confidentiality
11 designations have been limited by the claimants' efforts, if there are arguments about
12 confidentiality of the hearing those will be exposed at the hearing itself. But there is
13 no reason to envisage a confidentiality hearing or arguments at some further hearing
14 prior to the trial.

15 **THE CHAIR:** Well, on your submission, Mr Turner. What would your position have
16 been if the Tribunal had wanted to start the hearing on the 23rd?

17 **MR TURNER:** The position would have been the same, that there is sufficient time
18 and one doesn't have confidentiality arguments -- I mean, there are hundreds of
19 documents here. We don't know which arguments are going to assume significance
20 at the hearing, in the usual way. When the trial takes place there may be
21 discussions of certain documents and if there is an issue of confidentiality then it will
22 emerge at the hearing. But to have a hearing in advance of the trial at which
23 hundreds of documents are potentially looked at because those are in the trial
24 bundle at the moment and are marked as confidential, is something that in my
25 submission is inefficient and unnecessary and this is --

26 **THE CHAIR:** Yes. Maybe I should just hear from Ms Tolaney because there are

1 obviously concerns on the part of Mastercard as to the designation of this many
2 documents as being confidential and how to deal with that going forward.

3 So, Ms Tolaney, what do you have to say about Mr Turner's proposal?

4 **MS TOLANEY:** My Lady, three points. The first is as your Ladyship has pointed
5 out, this is exceptionally late for a proposal to be coming forward and Mr Turner's
6 assertions really reveal an approach that I have not come across, which is that they
7 will assert it and there's nobody allowed to brook any objection to it in advance of the
8 trial.

9 My second point is that then led to him saying, as he did, oh well it will have to be
10 dealt with at the trial. Now, from our perspective, and I would have thought
11 particularly the Tribunal's perspective, that is a spectre of disruption that will
12 completely derail the timetable if there is any issue there.

13 If hundreds of documents are going to be designated as confidential, are we going to
14 be going in and out of purdah per hour, are we going to have all of the
15 cross-examination because it becomes time efficient to do that in purdah, and that's
16 completely contrary to the rules of open justice. It's just not acceptable to say we will
17 deal with it so close to trial and then we will all have to worry about the consequence
18 with very little time to do so.

19 I think the third point is that really there is no justification that's been advanced for
20 this. If this trial had been coming up with no real notice then one might think, well,
21 okay, we're all doing the best we can on an expedited timetable, but the point we're
22 making is this information goes back some 15 years and certainly more than six. If
23 it's confidential quite frankly that's surprising but it ought to be pretty clear now if it is
24 or it isn't and why.

25 And therefore the time that's been taken seems to be excessive, particularly because
26 it risks real disruption.

1 **THE CHAIR:** How long do you think that you need to deal with the proposals,
2 particularly if you are yourself in another trial around that time and realistically are
3 you going to be able to turn to it?

4 **MS TOLANEY:** Well, I myself may not be able to turn to it but obviously my
5 solicitors would wish to start with the process and it's not the same solicitors in the
6 other trial, so I think that point has limited merits because obviously my solicitors
7 take the view that there are issues then one can look at it between or around court if
8 it's urgent.

9 So it does seem to us that it needs to come forward we would have thought by 7 or
10 14 days, to allow building in some communication between the parties as to, A, if
11 there is an objection and try to narrow the scope of that so it doesn't take up a lot of
12 time at the hearing; and B, precisely what the practical ramifications are so that we
13 come to the Tribunal with a sensible proposal rather than simply arriving on Day 1 of
14 the hearing in a scrap.

15 **THE CHAIR:** Yes, well thank you.

16 Mr Turner, what I have in mind is that the proposals might be advanced by
17 seven days to the 6th, because I am concerned at the spectre of having a debate
18 about it at the start of the trial and it does seem to me to be much more helpful, not
19 least for preparation of things like the trial bundles -- I will come on to that, colour
20 coding and so on -- but I think it's going to be very difficult for that to be done at
21 breakneck speed at the last minute if there is there turns out to be some distance
22 between the parties on confidentiality and how that is to be handled.

23 I'm aware that according to Mr Carson everyone is going full steam ahead on this
24 and that there are, you know, a number of documents to review, but it seems to me
25 that given that this hasn't been an expedited trial everyone, as Ms Tolaney has said,
26 has had considerable time to look at these documents, it ought to be possible for this

1 to be done, for at least proposals to be put by the 6th and for then there to be some
2 discussion between the parties over the following weeks, so that by the end of the
3 following week or start of the week, beginning the 16th, if there is anything left to
4 dispute a short hearing can be listed to decide it before the start of the trial so that
5 everyone knows where they stand.

6 Could you comment on that, please.

7 **MR TURNER:** Yes, my Lady, gladly. I would, if I may -- I've just had instructions
8 that we will do that. So I don't need to trouble your Ladyship on it.

9 **THE CHAIR:** All right.

10 Ms Tolaney, you suggested 7 or 14 days. I have gone with 7 days forward so I trust
11 that that's also acceptable to your side.

12 **MS TOLANEY:** It is, my Lady. I am conscious of the Christmas period. That's
13 a sensible date.

14 **THE CHAIR:** All right.

15 Can I just check whether Mr Frazer and Dr Bishop want to say anything else on the
16 subject of confidentiality?

17 **MR FRAZER:** No, from my point of view I think we've got where we need to be.

18 **THE CHAIR:** Anything from Dr Bishop?

19 You're on mute.

20 **DR BISHOP:** Pardon me, I was having difficulty unmuting there. No, I have nothing
21 to add to that. I am fine.

22 **THE CHAIR:** All right, then 6 January it is.

23 Then that leaves the issue of page lengths. Can I have a bid on both sides for how
24 long you want as the maximum page limit for your opening skeleton arguments.

25 **MR TURNER:** My Lady, we have briefly liaised on that this morning. That was
26 myself and Mr Cook. Our draft is progressing. It stood at around 100 pages late last

1 week and we're cutting it down. We propose a page limit of 80 pages each side.

2 **THE CHAIR:** All right.

3 Mr Cook. Or should I be asking Ms Tolaney, I'm sorry. One of you.

4 **MS TOLANEY:** Mr Cook, you go ahead.

5 **MR COOK:** From our perspective, my Lady, we're happy with 80 pages as being
6 a sensible limit.

7 **THE CHAIR:** That is more or less what I had in mind.

8 Mr Frazer and Dr Bishop, can you just indicate your agreement with that?

9 Mr Frazer is happy.

10 **DR BISHOP:** I agree.

11 **THE CHAIR:** All right, 80 pages, very good.

12 There will be page length limits for closing submissions also. I would suggest that
13 we discuss that at the start of the trial, but just to note for yourselves and those
14 sitting behind you, it's likely to be of that ilk and I will not be expecting many
15 hundreds of pages of closing submissions.

16 So it would be a good idea when those behind you in particular start drafting to have
17 that in mind.

18 The only other point was to just discuss the content of the opening skeleton
19 arguments and closing submissions. I just wanted to raise two points and others
20 may have questions also.

21 The first point was that I do not want the Tribunal to have to be splicing together
22 a jigsaw of pleadings and submissions. We would like the whole of the parties'
23 cases to be set out concisely, obviously, in the written submissions for the trial.

24 We don't want to be in a situation where there is extensive cross-reference being
25 made back to the pleaded case to set out what the position is, not least -- well, firstly
26 because it means that we have to then look at multiple documents to try and find out

1 | what your case is.

2 | Secondly, in my experience, when that has been done it is inevitably the case that
3 | there will be discrepancies between the pleaded case as initially advanced and the
4 | parties' position by the time of the trial, so that seems unsatisfactory for several
5 | reasons.

6 | So I don't object, of course, to cross-references, footnoted or whatever, being made
7 | to the pleadings to indicate that a point has been pleaded if there is some doubt
8 | about it, but what I don't want to have to do is to look at the pleaded case in order to
9 | find out what the point is if that is intelligible.

10 | Secondly, I know that some judges would like the closing submissions to formulate,
11 | in one single document, everything that the parties say. I am mindful that that would
12 | mean that the document would be considerably longer and also then is likely to be
13 | repetitive of the opening submissions, so we would provisionally be content for the
14 | closing submissions to be read together with the opening submissions and therefore
15 | not to have to repeat matters of fact or law -- but particularly law, I imagine -- that are
16 | already rehearsed in the opening submissions, which might make the task of those
17 | behind you easier.

18 | We don't require to you reinvent the wheel. What we will want to see in the closing
19 | submissions is your submissions on the evidence as it has emerged at the trial and
20 | how that fits in with the legal submissions and any further legal submissions that
21 | haven't already been ventilated in the opening submissions.

22 | So those are the two comments that I had.

23 | Does anyone have any questions as to the content or format of the written
24 | submissions?

25 | **MR TURNER:** None from us, my Lady.

26 | **THE CHAIR:** No.

1 Ms Tolaney?

2 **MS TOLANEY:** Neither do I. That's very helpful, my Lady, thank you.

3 **THE CHAIR:** All right, so I think that covers the issues on the agenda and the other
4 points that parties have drawn to our attention.

5 Is there anything else that anyone wishes to raise? Can I first ask the other Tribunal
6 members: Mr Frazer and Dr Bishop, do you have any more questions that you need
7 to ask at this point?

8 **DR BISHOP:** No.

9 **MR FRAZER:** Not from me, thank you.

10 **THE CHAIR:** None.

11 So Mr Turner?

12 **MR TURNER:** None have been drawn to my attention, my Lady; no.

13 **THE CHAIR:** All right.

14 And Ms Tolaney? None from you.

15 **MS TOLANEY:** Nothing from me, my Lady.

16 **THE CHAIR:** All right.

17 Thank you, everyone, for your submissions; your helpful written submissions, your
18 oral submissions and the large measure of agreement which has enabled this PTR
19 to be conducted efficiently. You will receive an order from the Tribunal in due
20 course.

21 **(11.30 am)**

22 **(The hearing concluded)**

23