IN THE COMPETITION APPEAL TRIBUNAL

Case No(s): 1441-1444/7/7/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Tuesday 13th December 2022

Before:

Ben Tidswell

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Proposed Class Representatives

Commercial and Interregional Card Claims I Limited ("CICC I")

&

Commercial and Interregional Card Claims II Limited ("CICC II")

V

Proposed Defendants

Mastercard Incorporated & Others

&

Visa Inc. & Others

A P P E A R AN C E S

Michael Bowsher KC & Derek Spitz (Instructed by Harcus Parker) appearing on behalf of the Proposed Class Representatives (Commercial and Interregional Card Claims I Limited and Commercial and Interregional Card Claims II Limited).).
Matthew Cook KC & Hugo Leith (Instructed by Freshfields & Jones Day) appearing on behalf of Mastercard Incorporated & Others.
Brian Kennelly KC & Daniel Piccinin (Instructed by Linklaters & Milbank) appearing on behalf of Visa Inc. & Others.

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Tuesday, 13 December 2022

(2.00 pm)

THE CHAIRMAN: Good afternoon, everybody. Can you hear me?

MR BOWSHER: I can hear you.

THE CHAIRMAN: Good, thank you. I had better start with the warning that you're all familiar with I expect.

These proceedings are being live streamed and they are being heard remotely. They are as much court proceedings as if everyone was here physically present in court. 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. Good afternoon, everybody. Mr Bowsher.

MR BOWSHER: Good afternoon. If I may start with introductions. I appear with Mr Derek Spitz for the proposed class representatives in these four claims. The other parties today are Mastercard, represented by Mr Matthew Cook KC and Hugo Leith; and Visa is represented by Mr Brian Kennelly KC and Daniel Piccinin.

You have skeleton arguments from us, although matters have moved on somewhat since then, but if I may just take one step back for a little introduction and by all means tell me if -- you'll be aware that this is the CMC concerning both the prospective opt-in and opt-out claims brought by my clients, fixed with a view to giving directions towards the CPO hearing. The background, as we understand it, is that at the recent hearing, where a number of parties bringing claims against Visa and Mastercard were heard with a view to giving directions towards the prospective

May hearing, there was a sense that the tribunal was trying to have us catch up as it were, albeit that the tribunal was not in a position to make directions at that time. You're probably in a better position than we are to know what the tribunal actually had in mind, but that was our understanding as to what we should be directing ourselves towards. So, we have come up with a timetable, or two rival timetables, which would at least in theory achieve that. There is considerable degree of agreement between the parties regarding the conduct of the proceedings, but there remain some significant outstanding matters. It may be it's helpful --

THE CHAIRMAN: It might be helpful just to run through those, so I can make a list. What I'd quite like to do, if it's convenient, is to do the easy stuff first, why don't we get that out of the way, and then there are a couple of things that may take a bit longer that we can focus on. Is that helpful?

MR BOWSHER: I'm always nervous at this point that we're all on the same version -- as the bundle has been updated more than once. I'm using the version updated again yesterday, and I don't know whether you have it electronically or in hard copy.

THE CHAIRMAN: I have both, but I think it was updated yesterday, so I'm hopeful that we're going to have the right documents in the right place. What would you like me to look at?

MR BOWSHER: If you take file A, you will see that there are two rival versions of the draft order. In the hard copy version at tab 2.1, page 5.1, that is ours.

THE CHAIRMAN: Yes.

MR BOWSHER: Taking the same ... the Visa/Mastercard rival version should be at 2.2.

THE CHAIRMAN: I know there's a little bit toing and froing about some of the timing points, but largely the difference is the further information application, as

I understand it?

MR BOWSHER: The points which remain outstanding, if one compares the two orders, if I just count them off -- you may be using our order, the one at 2.1, as the checklist. We're still asking for an early outline of the objections being made against us. We had in mind a list of the topics -- not the full reasoning, obviously that will come in the response, but just the list of the topics that we should be preparing for shortly after the new year. I'll come back to discuss that in due course.

Then there is an issue around publicity notices input by -- and that's only around the timing of input by the defendants and so forth.

THE CHAIRMAN: Yes.

MR BOWSHER: There's an issue about the confidentiality order, although I think that is probably no longer really an issue, because there was a draft confidentiality order produced by Linklaters last night, which we've looked at. I don't think we're going to be in a position to deal with that today. The draft is there, there is now a travelling draft which we will have to deal with, but I don't think it's likely we're going to be able to sign off on that today. To that extent, as you know, it's not been in dispute that in principle there would have to be a confidentiality order, it's just a question of establishing the terms of it.

Then paragraphs 9 and 10, there's an issue about the timing of the responses from the defendants to the CPO application and our response to them. We had said that if we received the objections on 10 February, then we would be in a position to respond by 13 March. I understand that's still contested by Visa/Mastercard, I believe.

There is an issue as to whether or not it is appropriate and/or necessary to list a CMC today, just to have it in the diary as a placeholder in case we need to come back for some procedural debate before the CPO hearing.

Those are the specific points other than, as you say, the request for information which emerged in correspondence in letters of 9 December, and that breaks into two parts: one as to provision of financial information and agreements, which I think has been dealt with, but we'll no doubt hear; and then the second is the more substantive issue around the requests which are reflected in the draft order produced by Visa and Mastercard. It's on page 5.6 of that, it's in green in the version I have.

THE CHAIRMAN: Yes.

MR BOWSHER: It's obviously largely repetitive, but it's the same request in slightly different formats in different ways.

THE CHAIRMAN: Yes, I noticed one of the characteristics of this, of the four cases, things do seem to be repeated quite a lot, and I do take the point, I think made by Mastercard, that there are separate proceedings and need to be treated as such. Certainly, if you feel you can remove duplication by way of cross-references, that would be welcome on our part.

There are some things we can get out of the way. So, forum I think everybody is agreed on, and there is a basis for that I think which is the relevancy of the PCRs, the majority of class members in England and Wales, the fourth to sixth Defendants being incorporated here and also, I think the Defendants' legal representatives are the points that I picked up. So I think we're all agreed forum is England and Wales and we can make that order; is that right?

MR BOWSHER: Yes, that's right.

THE CHAIRMAN: Just on that confidentiality ring, I would hope there's not a lot to argue about in relation to those documents, because there is a pretty well worn set of precedents, but obviously if there's anything you want me to look at then I'm happy to do that on the papers. Otherwise, if possible, we'll look at it when it's been agreed by the parties, and then I can make that order promptly.

Unless anybody wants to address any of those points today, do we need to deal with it all today?

MR BOWSHER: I don't think we need to deal with them today. I think in fact it would be more helpful, as it were, to get through -- if we have the directions from today, that will set the context for whatever we end up discussing around the confidentiality order.

THE CHAIRMAN: Yes, thank you.

There was, I think, an application that the cases be managed together on a joint basis and again, I think, I recorded the point that Mastercard made about making sure we remember they are separate cases for the purposes of certification. So, Mr Cook, I have that point on board. Subject to that, is there anything else that needs to be said about that, or can we make that order?

MR BOWSHER: I don't believe anything needs to be said about that.

THE CHAIRMAN: Good, excellent. Then I think on our agenda we did have, in relation to evidence -- and I note that we have Ross 2 and 3 in the bundles. I think that, Mr Cook, Mastercard gave an indication of -- I think you said a solicitor and possibly an expert report to give evidence for the purposes of the CPO hearing. I don't think, Mr Kennelly, you have given us any indication on that, which you may or may not feel comfortable doing. I don't think there's anything we particularly need to spend time on there, there doesn't appear to be anything that's contentious other than your point, Mr Bowsher, about getting an early view of what the grounds of objection are, and no doubt we'll come to that in due course.

MR BOWSHER: Indeed, you've anticipated, that's exactly what we would say.

THE CHAIRMAN: Then just a last point, it does seem that everybody's agreed we should try and do the CPO hearing I think 3 to 5 April. Maybe we should just have a conversation in due course about the timetable to that before we actually formalise

that. Just so you know, that is a date which is convenient to me and to the tribunal generally. As you'll appreciate, I'm sitting alone for the purposes of this hearing. Clearly for that we would anticipate there being a full panel. I don't yet know who that panel is, but it will be people who will be available on 3 to 5 April by definition. So, I think we can proceed on the basis that those dates do work for the CPO hearing.

MR BOWSHER: That's very helpful.

THE CHAIRMAN: Good. Okay. So that's the easy bits then, I think.

What order do you want to take the rest of those in, Mr Bowsher?

MR BOWSHER: We could run through our list of directions, draft order, and then deal I hope fairly swiftly -- if you'd like to deal with them one by one, I can make my submissions briefly and then my learned friends can come up to bat, as it were, immediately thereafter; if you'd like to do it that way, and we can run them off fairly quickly. I suspect the request for information is the bigger point.

THE CHAIRMAN: Yes, and I suppose that is strictly speaking probably an application by Mr Cook and Mr Kennelly. I'm in your hands really, but they may think it's appropriate to kick that off. I've read what's in the skeletons on that, but I don't think I've seen anything from you, Mr Bowsher, about what you actually say other than what's recorded in the skeleton, so we want to get to that fairly quickly. Let's do everything else and then come to that, and see if we can deal with that.

MR BOWSHER: Our skeleton went in on 7 December, and their applications -- the meat of their applications is in their correspondence of the 9th.

THE CHAIRMAN: Yes, no criticism at all, I'm just recording that that's where we are.

MR BOWSHER: Yes. If we go to paragraph 3 of our draft order, that's page 5.2, we would be looking for written outlines of their grounds. What we need is headlines. We need more than knowing "it's an economic point". We need to know are they

going to take a point about -- well, let's take pass-on, because we've been debating it recently, but there might be others. We would simply want to know as soon as possible in January what sort of material we would need to have ready, whether we would need a witness, making sure that witness is available for 3 to 5 April. It is just the practical mechanics of making sure that we're not taken by surprise too near to the hearing to be able to make appropriate arrangements, it's as simple as that.

THE CHAIRMAN: I suppose it would be a bit unusual, wouldn't it, in a way -- after all we are setting a date on which a response is going to be put in, and I'm sure you'll tell me that under rule 4 and various other associated provisions I could make such an order. But it would be pretty unusual to ask them to anticipate a document they were putting in in a few weeks' time, Mr Bowsher, so is there any particular reason why we should do that here?

MR BOWSHER: We only have a few weeks. I haven't done the calculation, 3 April can only be 10 or 12 weeks away. In terms of making sure the right people are available on the relevant days, both during that short period, because we will only have -- well, depending, we're about to have the argument -- three or four weeks in which to respond to their CPO response. So, we need to make sure that the right people are available to consider the matter in that window, and then we need to make sure that probably the same right people are available on 3 to 5 April. I don't think I can dress it up any more than that, it's as simple as that. Finding that out on 10 January is much more likely to enable us to get everyone lined up than if we end up having to rush around at the back end of February. It's as simple as that.

THE CHAIRMAN: Shall we deal with that point, or do you want to go on and deal with your other timing points? How do you want to deal with this?

MR BOWSHER: I can go on and deal with the other timing points.

THE CHAIRMAN: Why don't we do that, otherwise we'll be going round in circles.

Why don't you get through to the timing points and perhaps the publicity notices and the further CMC. Actually, the other point I have -- I don't know whether this is still a live point, there was the point about communication with class members. I think we would probably want to take that off and deal with that separately as well. I don't know if that's still a live point.

MR BOWSHER: I don't think it's a live point. The issue about the dates for publicity notices I think has now been swept up in the latest Visa/Mastercard draft on page 5.5, and that is reflected in what seems an order --

THE CHAIRMAN: 5.5 I think is your -- oh no, it's Mastercard. So, you're going to give them drafts, let them have drafts?

MR BOWSHER: We can let them have drafts by next week.

THE CHAIRMAN: Yes, and they have a couple of days to come back with any comments and then you'll give it to us for review between Christmas and New Year, which is very kind of you.

MR BOWSHER: That was the question, I think we put it somewhere or other -- we were conscious of that issue and did say: has anyone asked the tribunal whether there was anyone around to actually look at these things?

THE CHAIRMAN: I'm sure we can manage that, particularly if we have had a chance to look at them. I couldn't see them in the bundle, unless I'm mistaken.

MR BOWSHER: They're not in the bundle.

THE CHAIRMAN: If that's agreed between the parties and that works, that seems like a sensible way forward. Why don't we proceed on the basis that we will be able to give you any comments by the 30th?

MR BOWSHER: Yes, I can't imagine -- if it has to go back a couple of days because the tribunal needs it, I can't imagine that's the end of the world.

THE CHAIRMAN: Yes, just so I'm clear, you're going to give us the notices on the

30th, are you?

MR BOWSHER: The draft publicity notices we will be providing to the Defendants by the end of the 19th. They will submit any comments by the 21st, which is next Thursday. Do I have that right? The end of next Wednesday. We will then provide any comments to the comments by the end of the Friday, which is the 23rd, the last working day before Christmas, and we will submit to you ...

THE CHAIRMAN: Actually, I think you're going to work over Christmas, not me, according to this. We get it on 30 December. That presumably means you're not expecting it back until shortly into the new year, which we can do, obviously, as well.

MR BOWSHER: Sorry, I misread my own order.

THE CHAIRMAN: No, my fault, I think I started the hare running. If you're all happy with that, that certainly works for me. The only other thing I would say is I do think it's a helpful thing for the Defendants to share it with -- for the PCRs to share it with both Defendants, and certainly that has been the case in other actions in which I've been involved. This shouldn't be a contentious document, I would hope, we're all aiming to try and make it as clear and concise as possible for publication. So, hopefully, there will be little to argue about.

MR BOWSHER: Indeed.

Then the next date issue is what I've already referred to, which is in the Visa/Mastercard draft order, it's paragraphs 7 and 8.

THE CHAIRMAN: Yes.

MR BOWSHER: That's really -- we've said we will endeavour to get -- we will file our replies to the responses by 13 March. It seemed to us that that's a date which we're going to have to try to hit if we're going to hold on to 3 to 5 April. Obviously, our determination to do that is now reinforced, given what you've already said. But 24 February -- the proposal from the other side is that we would only have from

24 February to 13 March to put in all the preparation, including all the evidence that we might need to put in. I'm now reaching the point of being a broken record. We don't know at the moment, is that just evidence, more evidence from Mr Ross about book building, is it something about the corporate nature of the PCRs, is it economic evidence of one or more different categories? We just don't know.

It seems to us that 24 February to 13 March is a very tight timeframe, given all that's -- it's not just a question of arguing about a week or two here or there. Yes, it is only a week or two, but, in such a tight timeframe, our position is that we should be entitled -- as a matter of fairness, we should get a response by 10 February so that we have some reasonable time, basically a month, in order to work on it. Of course, it is only a month because February is obviously the short month.

THE CHAIRMAN: Yes, and 13 March is viewed as a long stop date on the basis we then start to butt up against 3 April; is that right?

MR BOWSHER: Exactly, yes, we're running out of time if we're going to do all the things that need to be done from then and following up to 3 April.

THE CHAIRMAN: Thank you.

MR BOWSHER: I'm not sure there's much more I can say. It isn't much more complicated a point than that, really.

THE CHAIRMAN: Okay, thank you. And then the other point is this question of the CMC.

MR BOWSHER: Again, this is not a die in the ditch point. We suggested it, we thought it was useful to put in the diary now so that it was in everyone's diary, a two hour hearing, maybe ten days before the CPO applications, because, apart from anything else, one would hope it might avoid the need for the first half day being taken up with the housekeeping sorts of things which sometimes plague these hearings. It was just a suggestion, it seemed to us to be a good suggestion, but not

everyone supported us.

THE CHAIRMAN: Yes, okay. There are two ways of dealing with this, aren't there? There's nothing novel about this. Either we put a date in the diary and either use it or don't use it, or we try and find some time if need be if the issue arises. We'll see what Mr Kennelly and Mr Cook have to say about that. I think that's possibly the choice, isn't it?

MR BOWSHER: Yes. I struggle to see that it's worth arguing too long about it.

THE CHAIRMAN: No, quite. Okay. Good, we shall perhaps then turn to the proposed defendants just to run through those points. I don't know who wants to go first? You're on mute, Mr Kennelly. It looks like Mr Cook is going first then.

MR COOK: Sir, in which case I hope you can hear me?

THE CHAIRMAN: Yes, I can.

MR COOK: That's a good start.

THE CHAIRMAN: Why don't you start off and hopefully Mr Kennelly can work out what's going on.

MR KENNELLY: Can you hear me now?

THE CHAIRMAN: Yes.

MR KENNELLY: Sorry, I was saying I'm happy for Mr Cook to go first. Since I have the floor, I may as well very briefly make two points before Mr Cook gets into the meat of the timetable.

On the early outline issue, just to reassure Mr Bowsher, his concerns may derive from some confusion on their part about the nature of the response, because of course it's not our defence, it's a response to the question of certification, and, as the tribunal knows very well, we are quite constrained in how we can oppose certification, the case law tells us that. So, it's unlikely that very detailed economic and factual evidence will be needed in the replies. It's for that reason, presumably,

that in no other case has a PCR needed this kind of outline in advance of the proposed defendants' responses. It's never been needed before, presumably because of the particular constraints on defendants opposing certification. We will be giving our responses in February by either of the dates proposed, subject to the tribunal, and our time is better spent producing those.

My final point is the time that Mr Bowsher says he needs in order to respond is provided for in the timetable, and that reflects the normal approach of the tribunal, and it's a period which in other complex cases has proved more than sufficient for the proposed class representative to respond to the responses. So, what Mr Bowsher is proposing is both unprecedented and, in my respectful submission, unnecessary.

Moving on to the question of the further CMC, the timetable is quite tight and our concern there was it's simply difficult to find a convenient date between the date of the PCR's replies and the hearing in April. We couldn't see a particular need for that further CMC, and normally housekeeping doesn't occupy a lot of time at the beginning of the certification hearing. So, since it's unnecessary and difficult to accommodate, we don't believe the tribunal needs to list one today.

I'll hand over to Mr Cook for the bigger question of the date for the responses.

THE CHAIRMAN: Yes, thank you.

MR COOK: Sir, just to say obviously I agree with Mr Kennelly, it's completely unnecessary for us to provide an early indication of the points we might take once we've developed all our arguments in due course; that just simply is unprecedented and unnecessary. The reality is that Mr Bowsher has already submitted witness statements from the director of the PCRs, solicitors, funders, and also an expert report from Mr von Hinten-Reed. It is impossible to imagine there is going to be need for anything more than those individuals who are obviously all very closely

involved in this case. So, his suggestion that he needs to be able to contact the relevant people, I've no idea simply which relevant people he's talking about other than essentially the group of people who are behind this case, plus Mr von Hinten-Reed as their economist. Those are the people who are going to be involved and know about these hearings. So, with respect, that's a bit of a canard in order to try and get an early sight of where we're coming from on this at a point when that will be developed in our responses, which is the appropriate time, sir.

Turning then to the timing of the response, to some extent, sir, we wish there was more time available, and obviously this is driven by the desire to have a CPO hearing at the start of April, driven by the fact that there is going to be a pass-on hearing in the umbrella proceedings, and, if there is certification of some kind or other in this case, clearly there's an advantage to that taking place and there being a ruling in good time before that pass-on and umbrella hearing.

The problem from Mastercard's perspective is that we have a confluence of hearings and deadlines in early 2023. There's the three to four day Merricks preliminary issue trial starting about 12 January, and that deals with limitation, choice of law, and exemption issues; and then there is the five to six week Asda and Morrisons Mastercard trial beginning on 30 June 2023. I have two sets of solicitors: Freshfields are involved in the Merricks preliminary issue, Jones Day are involved in the Asda and Morrison's trial. Counsel are involved in both, and both leading counsel are going to be involved in both of those hearings that we presently have. So, sir, it is ultimately primarily a practical matter that we, for reasons that are simply a matter of fact, have a lot of hearings in this tribunal for Mastercard coming up, which is why we seek a date of 24 February, in order to allow us, around those trial preparations, to ensure we've put together a document which fully covers all of the issues. It gives my learned friend two and a half weeks on our timetable, which is 24 February, to

respond to it. We say the history in the tribunal has shown that kind of timescale in far more difficult and complicated cases has been more than sufficient, as Mr Kennelly says.

So, that's the starting point for that deadline. The other matter, sir, that potentially plays into this is where we get to in terms of our requests for further information, because if you are minded to either order or encourage some or all of that information to be provided, then again, our timetable has built in scope for that to be provided, to be considered by us, and then incorporated and taken account of in our responses; and either it will be on the basis of the somewhat limited information that has already been provided, or more detailed information which realistically is probably going to come at the beginning of January.

So, again, we say that effectively there is a need to look at this in the context of there being early steps that need to be taken before we provide a response, which is something I will develop in due course. But for both those reasons, sir, we say – so, basically just availability of the legal client team and also the need to take account of the information we say is necessary to be provided so that we can then take account of it in response, are the reasons why we suggested a deadline of 24 February, rather than, as my learned friend wants, 10 February. The reality is there isn't much between us, but this is the type of case where a few days either way does matter on both sides, I recognise that. But from our perspective, trying to do it by 10 February would be a difficult ask with the other kind of limitations on our availability that exist, sir.

I think that picks up the point I wanted to make in response to Mr Bowsher.

In terms of the CMC, we're broadly agnostic in relation to this. At the moment it's relatively difficult to see why there would be a need for a CMC, that's not normally the practice of the tribunal, and we are going to be relatively tight in the run up to the

two to three day hearing on 3 to 5 April. There's a very good chance that we won't require it, in which case it obviously won't really make a difference, but just sort of putting something in the diary at the moment seems slightly unnecessary. But, as I said, we don't have very strong views. If it's not used, it won't make any difference at all.

THE CHAIRMAN: Okay, thank you. Mr Bowsher, anything you want to come back on?

MR BOWSHER: Yes, just briefly to respond to those points. Obviously, the Defendants have had these applications since July. They both have large legal teams, as we can see from the proposed lists of representatives attached to the draft CRO that was circulated last night, and the involvement of two leading counsel in a particular trial in our submission ought not to put the whole case in a situation where we're given such a short period to respond. The days do matter here. The timetable that we're being asked to sign up to is a timetable where we have two weeks and a weekend, effectively, to respond to their response to the CPO applications, because 24 February is a Friday and 13 March is a Monday. So, it is just two weeks and a weekend in which we're being asked to respond to their responses to an application, as I say, which they will by then have had for six months or so.

Mr Kennelly is absolutely right that there's obviously constraints on what can properly be brought forward in these applications, but, while the arguments that can be made are constrained, they cover a diverse range of topics. It isn't just, yes, we have a lot of witnesses who have already put evidence in, but are we to have them all waiting against the eventuality that they may or may not be the relevant witness, to have to kick off in that fortnight when we will have to get our responses going from scratch.

We are trying to find a constructive way of dealing with this, hence our suggestion for

the early outline. We do say that we will need longer than two weeks in order to be sure that we've put in a response which properly sets out the position and protects the position of the PCRs. Whether our position is catered for by allowing longer for that response to be prepared or by a provision of an earlier outline, we may be neutral. Ideally, we would like both. We understand these are difficult, but it seems to us that to expect us to respond in two weeks and two days is unreasonable.

THE CHAIRMAN: Yes, thank you.

There are three short items in dispute. The first concerns the request by the PCR for an early outline of the proposed defendants' grounds of objections to the CPO applications. The proposed defendants say that it is not needed, given the nature of the issues that will likely arise at the CPO hearing, it is not something for which there is a precedent, and indeed everybody who is likely to need to be available in the period leading up to it is known about already.

I agree with the proposed defendants. I do not think it is necessary. It is linked to the second issue, which is the question of the timing, which I will come back to, but it does not seem to me that it is something I should order the proposed defendants to do at this time, given the timetable of the CPO.

The second issue is that timetable, and particularly it concerns the dates for the filing of the response to the CPO application. The parties have identified 13 March as the last sensible date on which the PCRs can file replies to the Proposed Defendants' responses. So, the question is: what is the sensible date for the proposed defendants to file their responses? The competing dates are 10 February, as advocated by the PCRs, and 24 February, as advocated by the proposed defendants. That later date is largely on the basis of counsel commitments and other legal team commitments in relation to other matters taking place in the tribunal and also the need to deal with further information which may be the subject of

an order later in this hearing.

I am sympathetic to the position advocated by Mr Cook for Mastercard, that there is a lot to do for his team between now and April, and that date is of course being somewhat imposed by reference to the umbrella proceedings that Mr Bowsher's client is trying to catch up to. Having said that, I think, particularly given the period of time that the proposed defendants have had the application, and the tightness of the timetable, it would be sensible to provide that the proposed defendants file their responses by Monday, 20 February. That will give you, Mr Bowsher, you and your clients, an extra few days as well as allowing the proposed defendants that weekend of the 18th and 19th, so hopefully that gives enough time and is not too painful.

So, we will have responses from the proposed defendants to the CPO applications on 20 February at 4 pm and the replies from the PCRs on 13 March at 4 pm.

Shall we deal with the question of communication with class members. Is that still a live issue?

MR KENNELLY: Yes, sir, it is. Can you hear me?

THE CHAIRMAN: Yes, I can.

MR KENNELLY: Excellent. It is a live issue, and it does require, in our respectful submission, the tribunal's engagement now. I'm happy to address you on it now or wait until after Mr Cook has made his application for information on behalf of both of us.

THE CHAIRMAN: Why don't we deal with the class member issue now, Mr Kennelly, and get that done, and that will leave what I suspect is going to be the meatier discussion.

MR KENNELLY: The essential problem is that the tribunal's ruling in McLaren appears to prohibit us, without the tribunal's consent or the agreement of the PCRs, from communicating with proposed class members where that communication

concerns those proposed collective proceedings. There is a question, as you have seen from the skeletons, as to how that ruling applies in situations like this one, in which some proposed class members are already suing us in their own names, and others are sending us letters before action or otherwise communicating with us about claims that they are considering bringing in their own names.

Now the PCRs say that the ruling from the tribunal is a blanket prohibition and would prevent us from communicating with any of these proposed class members about their claims. I'll come to the detail of McLaren in a moment, but to the implications of that view, the PCRs' interpretation of the McLaren judgment would mean that Visa cannot settle claims brought by existing claimants in the umbrella proceedings, or even with merchants who have yet to bring claims but have contacted Visa with a view to settlement, where the settlement covers claims relating to commercial and inter-regional MIFs. We say that's unfair, not only to us but also to the merchants, if that's the implication.

So, either the tribunal takes the view that the ruling of McLaren doesn't go as far as that or we need the tribunal to allow us in advance to communicate with merchants who have already sued Visa, or who threatened to do so, even if that communication concerns the collective proceedings, because in any settlement we are entitled and it's normal for us to seek full and final settlement. So, in any settlement inevitably we will seek a settlement in respect of involvement in the proposed collective proceeding also.

With that brief introduction, may I take you briefly to McLaren so you can see the implications of the ruling. It's in the authorities bundle behind tab 4.

THE CHAIRMAN: I have it, thank you.

MR KENNELLY: Before I get into the restriction itself, just to recall what McLaren was about. If you open the judgment at page 78 in the bundle, paragraph 1, this

issue arose after the collective proceedings in McLaren had been certified. You see at paragraph 2 that the CPO certified that the proceedings would be on an opt-out basis for those domiciled in the UK.

At paragraph 3 the tribunal noted that the question of whether the proceedings should be opt-in or opt-out for those domiciled in the UK arose in connection with what were termed large business purchasers. The proposed defendants had argued that for the large business purchasers it should be opt-in. The tribunal ultimately ordered that it should be opt-out.

If you go over the page, you see, paragraph 4, according to the CPO, the date for those who are domiciled in the UK to opt out was 12 August of this year, so a period of about three months was allowed for the decision to opt out.

Then the defendants, you see this in paragraph 5, wrote letters to various large business purchasers. We see the gist of those letters summarised in the subparagraphs below paragraph 5. The letters basically said to these large business purchasers if they did nothing, they would be automatically within the proceedings. If they were in the proceedings, the defendants were likely to apply for disclosure against them, and the defendants pointed out to these large business purchasers that in considering whether to opt out they should bear in mind that if the tribunal was minded to order disclosure that would be an onerous task and it would involve time, effort and cost. That was the letter that was sent. The class representative objected.

Then we get to the ruling of the tribunal at page 83, paragraphs 14 and 15. These of course you've seen in the skeleton arguments already. The tribunal said, at paragraph 14, that the tribunal rules preclude any communication between a defendant or that defendant's legal representative and a member, actual or contingent, of a class identified or identifiable under a CPO, where that

communication concerns those collective proceedings, unless the tribunal orders otherwise or the parties agree subject to the tribunal's jurisdiction to supervise.

And then this, at 15:

"We consider that precisely the same restriction arises as between a proposed defendant (or that proposed defendant's legal representative) and a proposed member of the class (ie someone who could be a member if a collective order were made) from the time a collective proceedings application is made."

Our concern is that the effect of that ruling might potentially be very wide, because the opt-out and opt-in claim forms in this case don't exclude merchants who have existing claims against Visa, and the communications with them from Visa appear to be banned where they concern these collective proceedings, even if the proposed collective proceedings aren’t the main focus of the communication.

Of course, you see from paragraph 15 that proposed class members obviously include merchants who haven't sued us yet, but we receive letters from merchants, or their lawyers, threatening to sue us in respect of MIFs, including those covered by the proposed collective proceedings, and the object of those letters is often to secure an early settlement. We are required to correspond with such merchants as part of our pre-action duties anyway, and on one view even responding to a pre-action letter might be caught by the ruling in McLaren if the claim advanced in the pre-action letter was one that the PCRs were seeking to combine in their collective proceedings.

And of course, as I said a moment ago, in considering whether to settle, in communications in relation to settlement, if that's a full and final settlement, that would involve settling claims which the PCRs are seeking to combine in these collective proceedings. We're concerned that the restrictions in the McLaren ruling prevent us from doing that; and the PCRs certainly take that view, from their

skeletons and the correspondence that they have sent to us.

My short point is that the tribunal is unlikely to have meant the ruling to go that far. We are discussing a situation which is a long way from the facts of McLaren. If the PCRs are right that it goes that far, it would result in real inconvenience and even injustice, because a merchant with a possible claim is entitled to demand a quick settlement with Visa and to get their money immediately rather than be forced, against their own commercial interests, to wait for the tribunal's permission or for a contested hearing if the PCRs object.

In respect of the pre-certification period, it's not clear why the PCRs should have a veto or even a right to be informed that these settlements are taking place. Sure, after certification rule 94(1) tells us that any settlement of opt-out proceedings that have been certified has to be done collectively, but there's no restriction like that for opt-in claims at all, and obviously none for the period before certification in opt-out claims. That makes sense because in the period before certification the PCRs haven't even been deemed suitable by the tribunal to carry out that function. It would be very odd, then, if they could block the rights of individual merchants in respect of their own individual claims.

There's also a practical problem, because the settlement discussions are without prejudice, so it's difficult meaningfully to engage with the PCRs, even if that were appropriate, or the tribunal, in advance in individual cases; and it would be disproportionate in any event to have to contact the PCRs and/or the tribunal in every single case where we needed to write a letter to respond to a pre-action letter or have a settlement discussion with an existing claimant in the umbrella proceedings or a proposed threatened claimant.

So, if the tribunal does see the potential for McLaren to go that far, we do seek permission to allow us in advance to communicate with the merchants who have

already sued Visa or who have threatened to do so, even if that communication concerns the collective proceeding in the manner that I've described.

That's my short submission on that point.

THE CHAIRMAN: Thank you, Mr Kennelly. Is it the case that in -- would you be able to say with any confidence that in both those cases -- obviously if these merchants have sued you they are presumably legally represented already, certainly in an umbrella action. If they're threatening, would you be able to say in confidence they have legal advisers appointed? I assume these letters come from lawyers rather than from the companies themselves, is the question.

MR KENNELLY: If they've sued us already, unless I'm told otherwise, they are legally represented. But for the ones who are threatening to sue us, the pre-action letters that we get -- and you have the point, sir, that thousands of claimants have been suing us over the years. We do get these letters and many of them, for convenience reasons, are settled. I'll quickly take instructions.

For those who haven't sued us, who are simply writing to us threatening, some of those are not represented by lawyers, I am told.

THE CHAIRMAN: We can dispose with the point anyway, because I think, certainly with McLaren being as much about the membership of the class -- the underlying point I think that derives from McLaren is communications with a litigant directly where they are represented by somebody else, and you could view that within the lens of the legal adviser that acts for them, or indeed as a member of a class. I suppose that's the ambiguity that perhaps comes from McLaren as to whether the second point -- even if they're legally represented, does the structure that's set out in McLaren prevent you from dealing with their legal advisers. Obviously, that's not a complete answer because some of them are not advised, I understand you need more than that, but that is one way of looking at it.

MR KENNELLY: Yes, and in a way that's the most strange aspect of it, that it would prevent us from dealing even with the lawyers for people who have already sued us, because those merchants are within the class as currently defined by the proposed class representative. We would say that obviously we should be able to communicate with those lawyers, even if their clients are within the proposed class, but that does still leave the ones that aren't represented. In my submission for those -- this isn't a situation, just to be clear, where they are writing to us threatening to sue us and either directly or indirectly seeking an early settlement, we're not reaching out to them in the way that we see in the McLaren judgment.

So, the permission that I'm seeking is relatively limited. It is only in the situation where one of these merchants contacts us and we have to engage in pre-action correspondence with them. To the extent it involves a discussion about settlement, which pre-action correspondence is required to do, we should be able to settle them, and settle them fully and finally, which would involve a communication concerning the collective proceedings. I do seek permission to do that also. That can't possibly cause any injustice or cut across the thrust of what the tribunal was ordering in McLaren.

THE CHAIRMAN: I suppose this comes back to the expression "where the communication concerns those collective proceedings". The question is, if you are corresponding with somebody who is either threatening to sue you or -- in a way, it's easier if someone has already sued you and you have, sitting in the umbrella action, an action which is manifestly not the collective proceeding. I'm not sure what the answer is. What happens to an action that has already been brought before the collective proceeding orders are made? I'm not sure I know how this is going to work. If someone has already issued proceedings against you, does that become superseded by the collective proceedings order or is it carved out of it? Does

anybody know the answer to that question?

MR KENNELLY: It's up to them. One would expect them to carve out of their definition of a class representative merchants who have already sued the defendants.

THE CHAIRMAN: It would seem rather odd if the -- I'm not expressing any concluded view on this, but at first sight it would seem rather odd if somebody who had already issued proceedings separately was in any automatic or global way incorporated into the CPO, as one would presume that -- one starts on the premise that they want to proceed on their own account rather than in a collective action. That may not be Mr Bowsher's view, and indeed other people's view, but it's certainly where I'd start from.

MR KENNELLY: It's not automatic, sir. Rule 82(4) deals with class members, and it provides that a class member who has already brought a claim that raises one or more of the common issues set out in the collective proceedings order may not be a represented person unless the class member discontinues the claim or applies to stay that claim. It's not automatic, it requires those conditions to be fulfilled.

THE CHAIRMAN: Yes, okay, so that's the answer. So, for somebody who's already issued proceedings --

MR KENNELLY: I'm sorry to interrupt you, sir. Just to be clear, the McLaren ruling is broader because of course it applies to class members in the proposed proceedings, not represented persons. So, on its face, it includes people who are already suing Visa because there's no exclusion in the definition of proposed member of the class to exclude them. As things currently stand, on the current claim forms in these proposed collective proceedings all the merchants who sued Visa in respect of inter-regional MIFs and commercial card MIFs, they are included in the proposed class on the face of the claim form, and therefore caught by paragraph 15

of the McLaren ruling.

THE CHAIRMAN: But can you still say that your communication with them -- given the provision of 82(4), can you not still say that your communication with them does not concern the collective proceedings, it concerns the proceedings that were issued?

MR KENNELLY: That's the question, sir. If you said that you didn't think such a letter did concern a collective proceeding within the meaning of the ruling, that would be very helpful from our perspective, because we obviously don't want to breach this ruling; and that's a legitimate view, in my respectful submission. Really, we just want clarity so we know what we can legitimately do. If we're not allowed to do that by paragraph 15 or paragraph 14, then we do need the permission. The reason why I was concerned that it would concern collective proceedings was the settlement point. It really is only that, it's where we're engaged in a discussion which concerns settling the collective proceedings, the potential collective proceedings, and a full and final settlement, that communication would to that extent concern the proposed collective proceedings; and that's the concern, that's why we would be potentially caught by these restrictions in paragraphs 14 and 15.

THE CHAIRMAN: I suppose you don't know whether a person is going to continue or discontinue or not, is that the point?

MR KENNELLY: Exactly.

THE CHAIRMAN: Okay. That's helpful, thank you. Mr Cook, did you want to add anything on this point?

MR COOK: Mr Kennelly has taken the burden on behalf of both of us. Just one point I just wanted to make, sir, so you have it in mind. I'm sure you're familiar of course with the merchant umbrella proceedings, but all of the claims in there tend to cover things like domestic and cross-border within the EEA in addition to

inter-regional and commercial card MIFs. Obviously, this proposed collective proceeding is solely in relation to inter-regional and commercial card MIFs. So, this essentially is likely to be a subset of the wider claims that the existing claimant is pursuing. I say a subset, depending on the kind of merchant we're talking about, you will have some merchants where inter-regional and commercial card claims will be vanishingly small as a percentage of its business. Equally, at the other end of the spectrum, you will get some businesses for whom inter-regional and commercial card claims are the core of their business based on their clientele. So, a subset may either be very small or almost the entirety of the wider claim.

THE CHAIRMAN: Yes.

MR COOK: But yes, certainly from our perspective, subject to anything that of course you might say, sir, we do take the view that -- if we're in negotiations in relation to an existing wider claim, that is not a discussion in relation to the proposed collective proceedings. That's a discussion in relation to an existing claim, effectively it's a communication for another purpose. Certainly, sir, we would welcome guidance, either to be told we're wrong on that, if that's indeed the case, or clarification that this is indeed what we're allowed to do; and to some extent continuing doing, because I've no doubt discussions have been taken place historically since the claim form in these proceedings was issued in July.

THE CHAIRMAN: Yes, okay. That's helpful. Thank you.

Mr Bowsher, I suppose as a starting point, by all means I will invite you to respond to all of that. It would be useful to have a view from you. Is this something which you as a matter of principle are saying the proposed defendants shouldn't be able to do -- and that may depend a little bit on the scenario. If one takes the scenario of an existing proceeding in the umbrella action, where there is, as Mr Cook says, a broad range of claims involving commercial card and inter-regional MIFs as well as

other things, are you saying you're uncomfortable with the permission that Mr Kennelly is effectively seeking, but recognise he needs to get it and that you want oversight, or are you saying he shouldn't be doing it at all?

MR BOWSHER: Could I start from a slightly different position, I hope that I will address your question in this way. We have already suggested a carve out which goes some way towards Mr Kennelly's position. I don't know if that's a letter that you had in mind.

THE CHAIRMAN: I haven't seen correspondence about it, but I'm happy to turn it up.

MR BOWSHER: It's D, 3976.8, or, if you have it in pdf, it's page 237 of D.

THE CHAIRMAN: 3976?

MR BOWSHER: Point 8, which is a letter from us of 6 December.

THE CHAIRMAN: Yes, I have it.

MR BOWSHER: And that was our substantive response to the point of McLaren. We start by making all the points up to paragraph 4 -- and I make this point now. There still is not a proposed form of language in this draft order before you which we can properly test, and that we do say is problematic. The tribunal has spoken, there is no reason why we should look behind what is very clear language from the tribunal in paragraph 15 of McLaren. If we're going to try and unpack it and distinguish it in some way, we really need to do that by reference to some fairly clear and careful thought as to what the basis of that distinction is. But paragraph 5, we hoped to be pragmatic and at least indicate a degree of pragmatism in the concession we made there. Maybe I'll just let you read it.

THE CHAIRMAN: So, by that you mean that Visa can't communicate with merchants who have claims in the umbrella proceedings without -- you say subject to the tribunal's approval and supervising jurisdiction. Does that mean that they would

have general permission to do that or would you expect that there was scrutiny of what they were actually doing?

MR BOWSHER: They'd probably have to have an order. Subject to approval, there would have to be an order. I don't think every letter would have to be approved, that would be burdensome all round. But presumably there would have to be some point at which -- perhaps as part of the settlement, the correspondence was noted, that this correspondence had taken place, so that the tribunal could at least review the nature of the contact.

I can see, having listened to Mr Kennelly, and being as it were pragmatic on my feet, one might try and find a way of slightly extending the carve out, to extend it to those with competition claims in the Chancery Division covering inter-regional and/or corporate MIFs. To start drafting on the hoof -- I don't want to be difficult, but it is difficult when no positive suggestion for a form of carve out from what was a very clear provision from the tribunal has been offered.

THE CHAIRMAN: Yes, it is quite a tricky point, isn't it? I think in a way we may need to -- I suppose the interesting question for me is whether it's necessary to revisit McLaren, not in the sense of disagreeing with it, but actually clarifying how it applies to the situation. As I understand McLaren, it is dealing with a very -- I would say an obvious act, an act which is obviously not one the tribunal is going to condone, like people contacting class members directly. So, it seems to me it's not very difficult to get to a position where you accept what McLaren says and why it says it. It doesn't seem to me that that is likely, on the face of it, to cover the situation which I think your carve out is helpfully aimed at. Precisely how one gets to that point consistent with McLaren and making sure that we don't then complicate it further for those who come after, that's the challenge, isn't it?

There are two ways of doing it. One is for me to produce a ruling which explains

what the edges of McLaren are as they intersect with this, and the other is to reach some wording -- and I'm happy to produce a ruling if that would be a helpful thing to do. It may be that that is helpful because it may be that there are other situations in which this is going to come up.

I think what is not so easy is the situation in relation to the people who are writing the threatening letters, and that's obviously not dealt with by your carve out. So, these are people who presumably would either fall into the opt-in or the opt-out, and because McLaren is very clear that the rule that it sets out applies from the commencement of the proceedings, one would envisage, at least until these people had issued proceedings, that you can't rely on 82(4), and one has to assume there's a real likelihood they're going to end up in one of those classes. That's more difficult, isn't it?

MR BOWSHER: Yes, it is. That's why I'm genuinely uncomfortable as it were sort of undermining the position the tribunal has clearly thought through in McLaren, it's come up with a very clear ruling. It seems to us -- and we are trying to be constructive here. It seems to us that the right thing probably is to say, as we've worded there, that there is a class of person who it clearly makes sense to permit correspondence to, and I've indicated an extension. When we talk about approval and supervisory jurisdiction, I would suggest what that probably amounts to is a requirement that one or two things be said. The one that immediately leaps to mind, my junior reminds me, is the letter should certainly point out that there is an opt-in or opt-out claim available, no more than that, so that that has been highlighted to them. I don't see any reason why that shouldn't be a term of any correspondence.

In terms of supervision, I'm not suggesting that there be a sort of live commentary, but that there should be some point, certainly before a settlement, at which the

tribunal should be made aware of the circumstances. But if they haven't yet filed any claim, or issued a claim form, it is ... well, I'm not sure how one protects that position.

THE CHAIRMAN: Yes. Someone has just drawn to my attention 47B(3)(c) of the Competition Act. Section 47B(3)(c) provides:

"A claim which has been made in proceedings under section 47A may be continued in collective proceedings only with the consent of the person who made that claim."

Which I think reinforces the position of Mr Kennelly that there's no presumption that somebody who has issued proceedings is going to end up in the collective proceedings. I don't think it gets us around the point about class member as opposed to represented person, but it may be helpful. It certainly is consistent with that discussion, but it doesn't deal with the point about letters before action.

Is there anything else, Mr Bowsher, on that point?

MR BOWSHER: I'm anxious to find a practical way forward, given where we are in this timetable, without having to come back to the tribunal and argue it again. It may be that the sensible thing is for the tribunal to make a limited ruling providing for a carve out, maybe a little bit broader than we've indicated, providing for us to come back to the tribunal if the carve out is not sufficient, and we can debate it further. I hope we've made it clear we're not averse to some sensible discussion here, but the way this has emerged in the course of the last few days has not really made it very easy for us to define very clearly the limits of what might go into an order when there still isn't any drafting we can bat against.

THE CHAIRMAN: Yes, okay, thank you. Mr Kennelly, I think this is sort of easy but difficult, isn't it? I think the easier bit is the existing claims. It seems to me -- certainly as I presently consider the matter, I don't think that is what McLaren is aimed at. The ruling in McLaren is pretty obvious, and it doesn't extend to your clients or indeed Mastercard not being able to deal with existing claims against --

particularly where the parties are legally represented, not that that's a completely distinguishing factor, but it is certainly a factor. The question really is the letters before action which I think are more difficult while we have the issues of opt-in/opt-out and certification still in play. Part of that may be that there's an uncomfortable period where it is difficult for you to do anything, or, if you wish to press the point, then obviously I can consider whether any of your arguments might give rise to a similar position for letters before action as apply to the existing claims. It is more difficult, isn't it, because I think one can proceed without any criticism -- it seems to me it would be entirely fair for you to proceed to deal with parties who have issued proceedings against you and that have been in existence for some time, many years for some of them. To be prohibited from doing that in circumstances where there's a clear connection -- given the terms of 47B(3)(c) and 82(4), it doesn't seem to me to be really what McLaren is dealing with. I'm not sure you can quite so easily get there with the letters before action.

MR KENNELLY: I do press the point, sir, if I may. If one stops for a moment and thinks about the rights of the merchants that are sending us pre-action letters, we have pre-action duties towards them. We are required to engage with them, and the CPR encourages us to promote alternative dispute resolution. Where an early settlement is efficient, that is our duty to promote it and engage with them.

In my respectful submission what the tribunal in McLaren was trying to do was to ensure that the tribunal supervised these issues. Problems like these were to be brought before the tribunal so the tribunal could ensure there was no -- I hesitate to say the word abuse, but to ensure there was nothing that the tribunal would regard as oppressive or otherwise unhelpful, or might undermine the collective proceeding regime, which is what's happening here. We've come before you. Mr Bowsher, my learned friend, is expressing in a very helpful way the PCRs' desire to be pragmatic.

In my submission the tribunal is more than free, on the face of McLaren, to say, based on what you've been told, that to the limited extent I'm seeking permission, you are in a position to grant it. Because we are only dealing with a situation where merchants of their own volition are contacting the defendants in the umbrella proceedings but also proposed defendants in these proceedings, and vindicating their legal rights, which they're entitled to do, and only in that limited circumstance, and only in a circumstance where their proposed settlement will cover claims that would otherwise go into the collective proceedings, only then do we need permission and do we get permission to engage with them. That doesn't in any way undermine the proposed collective proceedings or cut across the duties which we owe to the proposed class members.

THE CHAIRMAN: So, if you had a merchant who contacted you -- and let's say in this hypothesis they were unaware of the collective action. I'm not suggesting for a moment that your client would take advantage of this, but there is a risk of or possibility of abuse, isn't there, that, without the merchant knowing that they might get the benefit of the collective action, you might obtain a settlement with them that was more favourable than the position they would get in either the opt-out or the opt-in action. So, that's the theoretical problem here, isn't it?

Is there a way of giving everybody more comfort about that point? So, for example, might it be the case that, as part of the supervision, your response to anybody who wrote to you with a letter before action was to advise them of the existence of the collective proceedings application and invite them to determine whether they want to continue to have discussions with you otherwise. You see the point I'm driving at? That's the sort of supervisory role I think the tribunal's going to have to apply, if we're going to deal with this situation.

MR KENNELLY: Sir, I'll take instructions on that helpful suggestion. While I wait for

the answer, I suppose I'll just make the point which I made a moment ago, which is that it's a very odd situation, because there's never been a concern really expressed previously that merchants that wrote to us individually, as one would in any commercial case, would be in any way prejudiced by a settlement with Visa. It's quite remote, the possibility that they would do better in a collective proceeding years down the line.

I'll see now if I have instructions on this. I have instructions that we can agree to the tribunal's suggestion, and we're grateful for it.

THE CHAIRMAN: I don't express that as a -- that's not necessarily a concluded outcome, I'm just floating it see what the premise is. I ought to ask Mr Bowsher if he has any view on something like that. Is that something you would consider workable, Mr Bowsher, or do you think that's not going to apply?

MR BOWSHER: Yes, I think it probably would. It would be a necessary part of the supervisory jurisdiction, I think, so that choice is available. While we're both in the business of saying it's just this, for us, where we are today, we're just freezing -- not freezing. We are simply putting in suspense the final position for four months, because it will all be out in the wash. It is really just making sure that, in this short period, these hypothetical people who are writing letters today are able to exercise their choice fully informed and not pre-empted by anything that happens in the meantime. That's really all that matters.

In those circumstances, it probably is a sensible reflection of McLaren that there should be a constraint -- insofar as one wants to guess what McLaren means in this particular context, it's probably what it does mean. It means that those actual or potential class members should be protected, and their choice should be protected during this three or four month period.

THE CHAIRMAN: Thank you. Mr Kennelly, it's probably something that I should

take away and give you a limited ruling on. I think what I might do -- if it's convenient for the parties, it would be helpful, if I am going to produce any form of guideline or rule, if you like, for the supervisory jurisdiction, to make sure that it's workable from the point of view of each of you. So, perhaps if I'm able to give you that in a draft -- I can do that pretty promptly, I think. If I can give you a draft, it would be helpful to have some comments on the proposed restrictions and anything you wanted to suggest about those in writing, before I finalise the ruling. Is that something you would be happy to do?

MR KENNELLY: Yes, sir, and, if I might say so, that would make things a lot easier for us too.

THE CHAIRMAN: Mr Bowsher, are you happy with that?

MR BOWSHER: I am, sir, thank you.

THE CHAIRMAN: Okay. Well, I will reserve a decision on that and I'll get back to you on it as soon as I can.

I forgot to deal with the third point, a short point actually, which is putting a CMC in the diary. My apologies for that. Mr Bowsher, I don't think we will put a date in the diary. The simple reason for that is I think if it is put in the diary, there's every chance that people will use it whether they need it or not and it will cost the parties a lot of money, and I don't think it's the right thing to do. Having said that, my availability in the second half of March, or indeed actually generally through the period, is pretty good. So, if we need something -- and I appreciate that might not be the case for all of you, but if there's something that needs to be aired, I expect we can find a short period of time at short notice -- or indeed if you want to do it on the papers, I would encourage that as well. There's not much, I would hope, that could arise that couldn't be dealt with on the papers. So, I won't put it in the diary at the moment, but I remain absolutely open if there is something for you to raise in either

of those ways.

We now have simply the question of further information and disclosure. I am just wondering if we should give the shorthand writers just a brief pause, and then maybe start with Mr Cook at 3.30, would that be convenient?

MR COOK: Yes, it would be for me, sir.

THE CHAIRMAN: Good. We will rise and start again at 3.30.

(3.20 pm)

(A short break)

(3.31 pm)

THE CHAIRMAN: Mr Cook, are we ready to go again? Can you hear me, Mr Cook?

MR COOK: I can, sir. You're not -- ah, you have now appeared on my screen. I could hear you but not see you, but now I can do both.

We now turn to my application and Visa's application for further information and disclosure. It's been agreed that I'll bear the burden of making submissions for both of us, though Mr Kennelly will no doubt chip in at the end with a couple of points that I've missed or horribly fouled up.

As you have seen, it's paragraphs 16 to 19 of our draft order, which you will find in bundle A at page 5.6. As you have already noted, sir, that is one paragraph, four times, essentially, in relation to the four different claims. There are distinctions in part in relation to the opt-in and the opt-out, otherwise there's a duplication between Mastercard and Visa; and clearly the duplication by Mastercard and Visa is easily removed by drafting the duplication between opt-in and opt-out. I'm sure, again, we could draft our way round to make it take rather less text than it does at the moment, although in practical terms that doesn't greatly alter the information that needs to be provided on the basis that I suspect we're not going to find that there is a radically

different list of potential claimants for claims against Mastercard than there is for claims against Visa. It would be surprising if somebody was keen just to pursue one, at least at this point in time. So, that's broadly the categories that we seek.

THE CHAIRMAN: Can I just check, I think where it's ended up -- I'm not sure it was necessarily always the case in correspondence. I think where it's ended up is the only difference between the opt-in and the opt-out is the damages-based agreement point, is that right, otherwise it is identical?

MR COOK: I think -- subject to reading it through, but I think broadly it is, yes.

THE CHAIRMAN: Obviously there are some differences, because there are differences in size of turnover and so on, but broadly speaking the things you want are not materially different in relation to the four different claims, apart from the damages-based agreement?

MR COOK: That's right, sir. In terms of the answer we have had, that makes a difference in the sense that certainly the response we have had at the moment indicates there's a much more clearly defined group of potential claimants who are opt-in potential claimants, 12 I think who have said broadly -- not quite definitively, but are certainly on the definitely yes camp, and a wider group of another 30ish or so who are potentially maybe, so in that category. So, the opt-in, there's a more specific number of individuals.

In terms of the opt out, we're told there have been discussions with a number of trade associations, but rather less direct contact with individual claimants, but to some extent of course the claimants or the PCRs can only give us the information that they in fact have in relation to these, and if they haven't made inquiries of various kinds, well they haven't made various inquiries.

Broadly, as you say, sir, the information we seek is the same in relation to both Mastercard and Visa and both the two categories apart from the DBAs. I don't think

there's going to be any dispute about the tribunal's power to order that. It's in my skeleton argument at paragraph 21, it comes from rule 53(3): the tribunal can ask the parties to provide information or particulars, for documents and papers relating to the case to be introduced.

Then the reason why we're seeking this information is by reference to or -- in order to allow us to make submissions to the tribunal about the matters the tribunal needs to be satisfied under rules 79(1) and 79(2), in order to certify whether or not proposed collective proceedings are appropriate, and certain claims are appropriate.

At paragraph 22, sir, I just note in particular, from rule 79(1), that the tribunal needs to be satisfied by the PCRs that the claims sought to be included in the collective proceedings, subparagraph b, raise common issues, subparagraph c, are suitable to be brought in collective proceedings. We say those are the particular points where the information we seek is going to be relevant to this, to flag particularly at that point, sir, in relation to the opt-in claim, presently that's proposed to include merchants both in the UK or anywhere else in the EU, at least in relation to the period prior to 2021. In relation to the opt-out, at the moment, that's currently UK only.

Common issues is going to be a particularly significant issue if one has a disparate group of foreign claimants, on the basis it's certainly historically been accepted that there are separate national acquiring markets in each country across the EU.

And then paragraph 23 of my skeleton argument, setting out rule 79(2), again the tribunal needs to be satisfied of various matters there listed. Collective proceedings are the appropriate means for the fair and efficient resolution of common issues, and that's going to be very much relevant to the question, given the history here that there have been thousands of individual claims by merchants, whether it's right to now proceed down the collective proceedings route, or whether or not it's going to be

appropriate to look at this, and basically saying if people want to join the umbrella proceedings, for example, that's more appropriate. Again, costs and benefits go into that issue. Whether any separate proceedings making claims of the same or similar nature have already been commenced by members of the class. Again, we need to know who they are to be able to comment on that consideration. And then the size and nature of the class, which is essentially something that we really only can look at, particularly on an opt-in basis, by knowing who it is potentially we're talking about. We recognise obviously the opt-in and opt-out date will be some time after any form of certification hearing, so the final date, but nonetheless it's quite clear there has been a book building exercise being carried out by the PCRs, which has come up with, certainly on the opt-out basis, a relatively discrete number of potential claimants who look at the moment like they wish to participate.

To emphasise, as I do at paragraph 24 of my skeleton, obviously the tribunal has what the Supreme Court described as the important gate keeping or screening role. So, these really are very much substantive -- well they're procedural, but these are important hurdles that the PCR needs to satisfy the tribunal on these points; and that's going to be the battleground for a certification hearing, these are the points the tribunal needs to be satisfied by.

In terms then of our requests for further information, they do split down essentially into two categories. The information we sought historically in relation to funding agreements, and it's fair to say that most of that has been provided. The one category left that's in that category is dealt with at paragraphs 35 and 36 of my skeleton, and that's the damages-based agreements, the DBAs. So, the question there is we say that's simply another type of funding agreement, and those are the kind of agreements that it is appropriate to be provided with to make arguments at all about whether or not the proposed funding arrangements are sufficient and

adequate for the type of claims that are being brought. So, we do seek those still, sir. We have had information of the more direct funding arrangements, but DBAs are another category of those and an important part of the picture that's provided there. And then there's the information we seek in relation to the potential claimants, which, as I say, essentially is similar whether they're opt-in or opt-out.

I'm conscious that I'm almost at the stage of reading out my skeleton argument, and the reason of course is that I don't have a target at the moment to shoot against. My learned friend said that this was a point that only emerged on 9 December. With respect, these requests were all originally made in letters of 11 November. You needn't turn them up, sir, but bundle D, tabs 92 and 93, is when these requests for further information were made. They were made more than a month before this hearing. So, they were pushed in correspondence, we had some limited response. It is perhaps surprising then that they haven't been dealt with in skeleton arguments. It's not right to say this came out a mere four days before today's hearing, this is something we've been pressing for well over a month now, sir. But as a result we do only have a limited idea of what's being said back against me.

To some extent, if I may, sir, I'm going to keep my powder slightly dry and say I'll come back when I'm told what the problem is with my application, because at the moment essentially all that's said in response is the information we seek is confidential. We explain in the skeleton argument, sir, why we say the information we seek is relevant to the tribunal's consideration of the factors that I've identified that the tribunal needs to address for the purpose of certification. It will tell us the kind of claims that are going to be combined, particularly potentially on the opt-in side, what the scale of those are, which countries we're going to be talking about, and the potential value of these claims, and whether or not there are issues like pass-on in terms of things like surcharging, which was prevalent in a number of the

sectors under primary consideration here. Travel and hoteliers were areas where one often sees surcharging of credit cards, particularly of commercial cards, and matters like that.

So, we do say, sir, that this is information that is going to be highly relevant to the tribunal's consideration. Effectively the only real answer we've had is "this information is confidential." With respect, sir, we don't understand how that can be said to be right. If it's confidential of course it can be protected with a confidentiality ring, but it's difficult to see, given this is information that is, we say, clearly relevant to the tribunal's consideration of these kind of factors, why it should not be provided, the names of people who are interested in bringing claims. Well, in standard non-collective proceedings, the identity of the proposed claimants is obviously set out in the claim documents, it's one of the first things you know about them. So, we simply don't understand why that is something that is so confidential it can't be revealed. If there is some sensitivity, it can be protected with a confidentiality ring, but we really can't see it is.

The kind of information we then seek beyond the names of the claimants is things like the domicile, location of their points of sale, transaction volumes -- and this is paragraph 31 of my skeleton -- the breakdown between commercial and inter-regional transactions, confirmation of pass-on. It's quite possibly the case that the PCRs don't have all that information, but it certainly appears that they have sought certain kinds of information, and that's set out at paragraph 32 of my skeleton. Main business activity, again, sir, that's an important piece of information to know, the extent to which these raise common issues if we have a claimant operating in the hotel industry in Germany versus somebody else who's an airline in Slovakia or something, the extent of the common issues is going to be very different in that kind of case. The critical issue is going to be whether or not individual

proceedings will be more suitable than collective proceedings. If the claims are very different, different countries, different industries, different pattern of payments, potentially to different issues of whether or not they engage in surcharging or not, those are the kind of considerations that will feed into that key question.

We're told the PCRs do know main business activity sector, average annual turnover; again important to know the size and value of the potential claims and also whether they wish to join the claim against Mastercard, Visa, or both. So, again, sir, we're told that kind of information is available, and there's simply no good reason why it shouldn't be provided. It will inform the tribunal about what it's really being asked to address, and the same thing then applies in relation to the opt-out class.

It appears that the opt-out PCR may have done less work communicating with individual companies, and if that's the case it will simply have less information to provide. But again this all provides a framework for the tribunal understanding the scale of the litigation, whether these are better brought as individual claims or not, the extent to which these are being brought by people for whom inter-regional and commercial transactions are a significant part of their business and how much, or not. So, we say all these things are just basic information that, if it's there, should be available to the tribunal; and it should then be provided to us so we can make submissions to the tribunal about it.

THE CHAIRMAN: There does seem to be, at least on the face of it, a distinction to be drawn between the opt-in and the opt-out, doesn't there? The opt-in, we know there's been a book building exercise, and that's obviously important as a practical matter to the opt-in proceedings. No doubt, as you say, we would learn quite a lot about those proceedings from knowing who had shown interest and who hadn't about the viability of those and the attractiveness of that to others.

It doesn't seem to me you have quite as easy a target in relation to opt-out. I'm not

saying it's not interesting or indeed useful, but it's not quite so obvious that opt-out provides the same target to aim for, both because you wouldn't have expected Mr Bowsher's clients to have done the same sort of work and because it's probably less meaningful, isn't it?

MR COOK: Certainly, I think it's right to say, sir, that in circumstances dealing firstly with the opt-in, as you say, there is a specific group of claimants that providing information about them is going to be informative for what the likely scale of the litigation is going to be, on the basis that there has been an active book building exercise. So, to that extent, sir, I absolutely agree that is clearly important information and accessible and available.

In relation to opt-out, there do appear to have been discussions that have taken place. To the extent that there have been positive confirmations of interest as a result of that, or equally the reverse, again, that is likely to be informative to the tribunal for where the scope of this case might be, which kind of industries, for example, have an active interest in pursuing this. Because there's this oddity, sir, which is the class as defined is essentially all industries, however the expert evidence that's been provided in support of the class is essentially limited to the travel and hotel sectors.

Now to some extent one can understand that those are the industries that are certainly likely to have the highest ratio of inter-regional transactions and they will have high levels of commercial cards, but at the moment there is a disconnect between the class advanced and the expert evidence that has been provided about the characteristics of that wider class, and to the extent that the information we get -- the information that's available to the PCRs, who do appear to have had a level of discussion with potential opt-out claimants, or groups that might present opt-out claimants, we do say that information is going to be of interest to the tribunal in

seeing where the scope of this claim may go.

THE CHAIRMAN: Just help me a little bit with that, because what it doesn't do -- as with the opt-in proceedings, it doesn't give you any particular indication about participation, unless you're saying we can infer from that that some people might opt out. That certainly so far isn't the history of these actions, and I think it would be quite a speculative thing to be -- you may well invite us to do that, but it seems quite speculative at the moment to try to work out whether there were enough people who would be interested in opting out for the opt-out proceedings not to be viable. So, you're getting quite a different sort of information, aren't you? I guess that's the point I'm making.

I'm not saying it's not interesting, I absolutely see why it would be interesting, and I'm not saying it doesn't go to the points in section 79(1) and(2), but it does seem to me to be different, and actually different to quite a material degree in terms of how interesting it is.

MR COOK: Sir, one of the issues that's potentially going to arise in the certification hearing is the question of whether opt-in is more appropriate than opt-out. So, the question of how far people are interested in opting in or opting out is clearly an important factor in that regard. We do say that kind of information is going to be informative.

This also, I would say, is likely to be a very different kind of claim from many that have taken place. The vast majority of claims that have come before the tribunal are essentially brought on behalf of consumers, and with the exception of proving whether or not you purchased -- in some cases like Merricks it doesn't matter what you purchased, but with the exception of proving that you actually purchased a certain number of the relevant widget or not, the consumer essentially has a free shot at the litigation, in the sense that they don't have to do any work, they don't

have to put up any money, and they might at the end of it get some money. Why would anyone opt out of proceedings like that? Maybe some people would, but, as you say, the experience is people have no particular reason to opt out of things that are: just put me in the lottery and I may win or I may lose, but I'm not going to be worse off than I am now.

The cases are going to be potentially quite different, sir, because there is going to be a need to get disclosure from the companies who participated, because there are going to be some quite significant issues, which we've already seen from the merchant umbrella proceedings, about the extent to which -- even if there is prima facie a cause of action here, there is prima facie an overcharge, whether merchants are the ones who actually suffered a loss. There's sort of the easy example of that, which is going to be things like surcharging. As I said, the primary industries this claim is sought on behalf of are the kind of industries that did surcharging during the claim periods.

If you have surcharging, absent considerations about the level of it, that's probably prima facie 100 per cent pass-on. So that, again, immediately is information. You may also get into questions, subject to the matters that are going to be considered by the tribunal in the umbrella proceedings and the pass-on consideration, which will require some claimants, particularly larger claimants, particularly some -- some have a sample basis to provide disclosure of what they would see to some extent as confidential financial information about how they run their business and profit margins et cetera.

So, this is a very different kind of case from one simply where it's simply: in five years' time you may get some money or not. People and merchants are potentially going to have to provide a significant degree of information in order to show that there's potential for a claim by them, and then in any event are going to have to

provide information to show the extent of the claim that they have --

THE CHAIRMAN: That's interesting. If you take Merricks, for example, you don't have this issue, and you're saying that's not just because of the aggregate award of damages principle, but it's also because they are not a consumer. You're saying it would be different here with retailers as the claimants. I'm talking about opt-out. I see the position might be different with opt-in, but with opt-out you're saying it would be different, even with the principle of aggregate awarded damages?

MR COOK: One of the issues the tribunal is going to have to consider is whether aggregate award of damages in a case like this would be appropriate or not, and that's one of the factors that may play into whether opt-in or opt-out is appropriate. But, certainly, issues like surcharging, issues like pass-on, are going to be the kind of issues that, whether it's an aggregate award of damages or not, are potentially going to play a significant role in that regard.

If you have a group of claimants that have information on that, there's going to be scope to try and seek disclosure from them. In essence, unless there is disclosure from those kind of claimants, those issues are going to be relatively difficult to resolve in any form of satisfactory way. So, these do involve -- and to some extent it was sort of the issue that arose in McLaren, where obviously there was overstepping about communication. The point that was being made by some of the communications with McLaren was: if you join this, then disclosure is going to be required and that's going to put a significant burden upon you. Obviously, we're not engaged in that kind of communication, but this is another case where -- and then this is something that has been no doubt a burden that many claimants have faced. The claimants that have brought proceedings against Mastercard and Visa, many of them have to do very substantial work providing confidential business secret information, and not every claimant wants to or is willing to do that. So, these are

important distinctions from consumer class action.

THE CHAIRMAN: Yes. Of course, we don't actually know whether the tribunal in McLaren is prepared to order disclosure. But I take the point. Is that a convenient point to see what Mr Bowsher has to say about it? Is there anything else you wanted to add?

MR COOK: No, sir, not at the moment.

THE CHAIRMAN: Mr Kennelly, do you want to add anything to that?

MR KENNELLY: Nothing to add, we adopt Mr Cook's submissions.

THE CHAIRMAN: Thank you. Mr Bowsher.

MR BOWSHER: Sorry, can I just take one second just to read something that's just been passed to me.

THE CHAIRMAN: Yes, of course.

MR BOWSHER: I don't want to take too long going through the procedural history, but I think it is important to note. It's not right to say that this has been an application that was made and then remained live. Yes, the matter was raised in November, and we responded to the correspondence that was raised with us by producing the witness statement of Thomas Ross, which is in the bundle at C. If you're using pdf it's C3651, and 3659 is the page number.

THE CHAIRMAN: I have read it, but do you want me to turn it up?

MR BOWSHER: I don't think we need to turn it up just for the moment, but just to make sure you have the reference.

THE CHAIRMAN: Yes, I have seen that, thank you.

MR BOWSHER: We may need to come back to it. The response to that was, without going to the correspondence, broadly speaking a reservation of position. We gave that as our answer to the request for information. It was not until the skeletons that, as it were, the position we set out in that evidence was further attacked. So,

that's why we are where we are procedurally and also why we didn't put, for example, Mr Ross's witness statement in recommended reading, because as far as we were concerned the position was reserved, it wasn't clear what was going to go forward. Anyway, we are where we are now.

Can I deal with the financial disclosure and the outstanding point on that, I think we'll try and put that one to bed.

THE CHAIRMAN: This is the damages-based agreements?

MR BOWSHER: DBA, exactly so. The DBA was provided by letter. It's page 3894, Tab 111 in file D. The specimen agreement was provided. That I think was 25 November. I don't think you need to pull it up, but we provided the specimen agreement because of course the final agreement would have to be approved. There was then further discussion about that in correspondence. This probably is worth pulling up, D, pdf page 304, which is page 3976.75. It's a letter of yesterday from Harcus Parker, it starts at 396.74 and deals with the follow up on these documents.

THE CHAIRMAN: I'm not sure ... hang on.

MR BOWSHER: Point 74 is the first page. Questions were being asked about the condition precedent and whether they had been waived, and we explained the position in paragraph 4 on page 3976.75.

THE CHAIRMAN: Just give me a minute, I'm getting there slowly.

MR BOWSHER: Sorry, the disadvantage of not being able to see --

THE CHAIRMAN: That's the letter of 12 December, I have that. I don't think I have a full set. Okay, carry on.

MR BOWSHER: In a sense all we had to say is that, it seems to us, answers the question. We have disclosed the specimen DBA, we've explained the position on the waiver position in that letter. At the moment it does not seem to us there's

anything more to be disclosed, and there couldn't be, because that is as far as we can go with that matter.

THE CHAIRMAN: As far as I understood it -- I think what you're saying is you've given them the draft, you've given them the format of the document, and you've told them that the condition is no longer required, but I think the question they were asking was whether you had actually entered into any.

MR BOWSHER: No.

THE CHAIRMAN: Are you able to say you haven't entered into them?

MR BOWSHER: We haven't entered into them, yes.

THE CHAIRMAN: So, that actually answers the question, or both of the points, then. As you say, that deals with the point.

MR BOWSHER: Unless I missed the point, I don't think there's anything left over.

THE CHAIRMAN: As I understood it, that was the point that was still being pursued, which was whether you had actually entered into any. If you say you haven't that seems to me to deal with the point, unless Mr Cook disagrees with me. We'll leave him to think about that --

MR COOK: Sir, I don't think I need to think about it. Subparagraph 16(d) of our draft order was if DBAs have been entered into, then various things followed. If they haven't been, then there's nothing further we seek an answer to at the moment.

THE CHAIRMAN: Good, thank you.

MR BOWSHER: Then going to the remainder, which is in a slightly different format in different places with a couple of slightly different questions in different claims, it can be seen from the defendant's draft order, 16(a) and (b) is effectively what we're talking about, although there are one or two differences. Plainly we're looking at a broad class, and therefore anything one does at the moment is not going to be comprehensive, that's why we produced the witness statement, which I'm grateful for

your indication that you've already had a look at, Mr Ross's witness statement, and you will therefore know we've provided evidence about the book building process so far, and it does fall into as it were two distinct lines of work, one in opt-in and one in opt-out.

Our submission is that that provides the material which the defendants can use properly to develop whatever points they want to make along the lines that my learned friend has already identified. To go further in the format set out is in our submission unduly onerous, intrudes on obviously confidential matters, and to a considerable degree gets into matters which the tribunal will not properly be looking at when it comes to the CPO.

It is worth just pausing to look at what Mastercard ask for. They're seeking an order for the provision of further information on specific matters relating to the composition of the proposed class, that's in their skeleton, paragraph 4. They say it's sought to investigate the degree of overlap between the proposed proceedings and those already brought, by seeking information as to the identity and details of the class members. That's paragraph 13 of their skeleton. But in our submission their requests go very much further than that.

As to overlap itself, if that's what they're interested in, they surely already have the information to hand, because they're already aware of all the claims, and as we've already discussed, they're aware of rather more than we will be aware of in terms of claims and would-be claims, so they will be already able to make the submissions that might be available as to what potential claimants or represented persons might be as it were overlapping persons.

THE CHAIRMAN: You mean overlapping between the collective proceedings and the umbrella proceedings?

MR BOWSHER: Absolutely. They know what that overlap is, they know better than

we do what that overlap it.

THE CHAIRMAN: I think what they're saying is they don't know whether any of the merchants who are approaching you are the people who have already issued proceedings in relation to the overlap. I'm sure there are other things they want to know, but they don't know that, do they?

MR BOWSHER: Maybe I misread the evidence, but I had understood that our discussions were not with parties who are currently claimants.

THE CHAIRMAN: That may be right, forgive me, I may not have picked that up from what Mr Ross said. Can we just, if one takes the opt-in and opt-out, because I do think it's worth looking at them separately, one can see why the proposed defendants are interested, if we're going to talk about what this opt-in class looks like and whether the issues are common, and how it's all going to work, it is more than interesting to know what sort of people are approaching you and saying they'd be interested in being involved, and also what sort of people are saying they're not interested and don't want to be involved. I don't think it's very difficult for Mr Cook to fit that into the sort of things they're going to be talking about when we come to decide whether or not to certify.

I do take the point about confidentiality, and particularly no doubt some of the larger -- because often we're talking about people by definition who have large turnovers, they're going to be large corporations and no doubt some of them might be sensitive about their relationship with Visa and Mastercard, so it may be there is a confidentiality point, but I struggle to see why either it isn't something that the tribunal should be looking at, which I think is your submission certainly in relation to opt-in, and secondly it's not clear to me why it should be unduly onerous, I think Mr Cook is only asking for information you already have, and one assumes that the sort of information he's asking for you either have or you don't have in a reasonably

digestible form. That's the bit I'm struggling with.

I think once you get to opt-out it does become a slightly different conversation, but just dealing with opt-in for the meantime and that book building exercise, why should the tribunal not be interested in who has actually told you that they might be in and they might not be in?

MR BOWSHER: Because, when looking at the decision, the current state of interest by one individual or another in our submission is not at the core of what the tribunal's looking at. It is looking at the points which you've already been taken to: is there an identifiable class of persons? That doesn't depend on who the conversations have or have not been with.

The point that is often referred to as the common issues point, but of course is much broader than common issues, and it's made clear from the rule that it's not just common issues, as was explained in Gutmann, which is why we put Gutmann in the authorities, do they raise similar issues or claims of a similar nature. And so, it goes beyond, you know, are you just dealing with the common issues point?

All of that one can understand simply by understanding what they already know from those entities that fall above the threshold. As I say, they'll be in as good a position now as they will be after we've told them whether or not those potential claimants and potential class members are going to be able to -- going to raise claims with those sorts of issues.

THE CHAIRMAN: I think that's why opt-out and opt-in are a little bit different, just as a matter of practicality. In relation to opt-out I can see the force of your point that the class is the class, and if Mr Cook wants to give an example of a Slovak airline and a Greek hotel, he's welcome to do so because they are by definition in the class.

But when you come to the question of opt-in, I think we really are talking about quite different things. Firstly, the indications that you're getting about people's interest in it

go to the very question as to whether this is something which is viable in the first place. In other words, if you were to come to us and say look, actually we've had 50 people get in touch and 49 of them are really quite keen and one of them has said no thanks, that is going to look different than if you come to us and say we've had 49 people come and say no thanks and one of them is warmly interested. That may be a fairly agricultural starting point to the discussion, but I don't think it's irrelevant.

Then I think you have the further point which Mr Cook develops, which is that particularly in relation to those common issues, if you have people who have expressed interest -- we really are going to end up in this class of opt-in claimants with Slovak hotels and Greek airlines, or whatever it is. You may say that doesn't matter, but it's a lot easier for us to understand the dynamic of it by having some sense of what the class is going to look like. I'm not saying it's the end of the point, I don't for a moment suggest that we would make a decision based on that, but it does seem to me to be quite important contextual material in the context of an opt-in certification. I'm just struggling a little bit to see why you don't think that's the case.

MR BOWSHER: The identity of the entity --

THE CHAIRMAN: I quite understand you may take some issue about the extent of things you've been asked about, and that may be partly because you haven't asked about them yourself, or maybe you feel it isn't actually necessary, but just as a point of principle, I think that some idea of who's expressed interest in being in, who's expressed interest in being out, in an opt-in context, given the size of the class that's advanced, doesn't that seem to be quite an interesting piece of information that should inform the discussion?

MR BOWSHER: Can I take two steps back. If we're just dealing with opt-in, and I'm trying to make clear what is already known in the evidence and what is not, what is in the evidence -- sorry, I've just closed Mr Ross's statement -- is that in the opt-in --

THE CHAIRMAN: Shall I get it up?

MR BOWSHER: It's in C at page 3659 printed, and 3651 in the pdf.

THE CHAIRMAN: You don't know which bundle, do you?

MR BOWSHER: Sorry, I haven't used the hard copy for a while. C2. 3659.

THE CHAIRMAN: You don't have a tab number for me, do you? 70.

MR BOWSHER: 70, thank you. That's the fourth statement. The third one is the one before, tab 69.

THE CHAIRMAN: 3569?

MR BOWSHER: Yes.

THE CHAIRMAN: Thank you.

MR BOWSHER: What you get from that, and of course I now can't see where the numbers are, there is an indication as to who -- paragraph 24. 37 have expressed interest, do you have that?

THE CHAIRMAN: Yes, I do. Yes, I have --

MR BOWSHER: (Overspeaking) expressed an intention, and somewhere, I can't now see it, someone's declined to be interested.

THE CHAIRMAN: Yes. You say you've gone some way to answer that question already.

MR BOWSHER: I'll come on to the confidentiality point -- I think it's in the paragraph before -- I'll come on to confidentiality in a moment, can I just park that.

We've provided that information, we've provided support as to the nature of what we've been doing. Let me then turn to what is actually asked for. I'm taking my submissions in a slightly different order than I had intended.

If one goes through what they ask for, 16(a), we have an issue about identifying the merchants for confidentiality reasons, which Mr Ross explains in his witness statement, and I will come back to that. Then, when we come to (b), they ask for

information which we've already explained in the statement, we haven't gathered all that information. At the moment we are just in the -- and in a sense why would we until we have certification, and why would anyone go to the burden of providing all of this information when we haven't yet had the CPO hearing?

THE CHAIRMAN: But that is easy, isn't it, because the one thing I think he's not asking you to do, as I understand it, is to gather information that you haven't gathered.

MR BOWSHER: The order does say, "the PCR is to use reasonable endeavours to provide".

THE CHAIRMAN: Perhaps I'm wrong about that. I had certainly understood Mr Cook to be asking for --

MR BOWSHER: If what is being asked for is to provide information in these categories if we have it, that may be a different matter, but the way it's worded at the moment suggests that we have to go back to all of those 37, and anyone else we talk to in future, and ask them to fill in a questionnaire which, frankly, would be wholly premature in advance of a CPO hearing, particularly when some of them involve things like points of sale. It's all quite -- location of points of sale is within the opt-in question, (b)(4)(i). In a business of 100 million turnover, that is self-evidently an onerous question to answer.

THE CHAIRMAN: I absolutely take the point about using reasonable endeavours, and I must confess I had missed that point. So, you're saying in relation to (b) you don't have the information, at least not in any substantial form, and you don't think it's appropriate to be asked to do it. In relation to (a), can we come back to the confidentiality point?

MR BOWSHER: Those discussions -- sorry, I'm asked to make this point, the number changes, we've had an approach today, so the number I gave you is no

longer an accurate number.

Confidentiality. These discussions are sensitive discussions. Obviously, the Defendants here are important business participants as far as many of these individuals are concerned. It is not necessarily some -- not all of the potential claimants are as enthusiastic about showing their willingness to bring a claim as those who have already brought individual claims. That is one of the reasons why the claim may be important.

That is why the understanding that these are confidential discussions has been important, and that's why Mr Ross has reiterated that I think twice in different parts, both in paragraph 7 and paragraph 30-something later on in his statement, he makes the point twice that these are all discussions that are conducted on the basis that the identity of these potential claimants is not for disclosure at this point.

So, we do say that confidentiality is at the heart of these discussions, and it is not something that we should be giving up when that was the basis upon which we have carried out this book building. As I say, obviously not all 37 will necessarily have the same level of sensitivity, but some will be very sensitive about Mastercard and Visa knowing that these discussions are going on. Some perhaps less so.

So, to order us to disclose those identities now is we say not only in a principle a breach of the confidentiality we've undertaken, but also goes to the heart of the book building process which we are undertaking. If these are claims, and this is a claim, which is serving an important purpose as pursuant to the statute, then it is of the nature of that purpose that we be in a position to have these discussions and to have them in a way which is relatively confidential.

THE CHAIRMAN: If I understand you, you're saying that if I were to order you to provide the sort of detail -- well, the names of the parties is really the point we're talking about here, then you would say that would have a chilling effect on what is

an important policy feature of the collective action regime?

MR BOWSHER: Yes, particularly where we haven't explained to them why their identities need to be disclosed, nor has it been explained in the application why the identity needs to be identified. We can perhaps indicate numbers by sector, and there may be more granular information, but obviously even that's problematic, we're talking about relatively few sectors where there won't be that many players. There's a danger that if we give too much information away, we start to identify people.

THE CHAIRMAN: Sorry to interrupt you, I wonder if one way of -- bearing in mind that this could sit quite comfortably within a confidentiality ring, and obviously the tribunal would be sensitive to the point you have made about -- and to the extent there really is a point about the chilling of the book building process, I think we would want to be very cautious and careful about that, but if you were able to provide us with not just the numbers that Mr Ross has, but also an indication of what sector they're in, their average annual turnover as you can best ascertain that, and, I would have thought, on the basis of the point Mr Cook is making, their principal location or locations, then that could all sit within a confidentiality ring. It's quite difficult to see that that would have the same chilling effect, isn't it?

MR BOWSHER: There's a number of points there to unpack. Can I come back to the confidentiality ring in a moment.

THE CHAIRMAN: Yes, of course.

MR BOWSHER: The concern here is obviously not to disclose identity. There are two sides to this. The defendants have not identified, they have not set out, why the actual identity of these claimants is relevant to certification. We've already explained, we've set out the position, the extent to which there's an overlap point, we've explained the lack of overlap. Beyond overlap, identity does not actually matter.

It may be that some qualities of those claimants are relevant, and it may be that we can provide some of that information, but it is important that that be done in a way that remains confidential and does not enable the identity of those parties to be identified, to be either aggregated or obscured. Firstly, for the simple point of principle, that this is a question of -- it's the way in which the discussion has gone on. But secondly, and this is coming back to the confidentiality ring point, this is not the typical sort of information that can be managed within a confidentiality ring. Typically, in a confidentiality ring, one is dealing with information, technical, financial, or whatever, which one as it were entrusts to the lawyers to manage and make the best they can of within the context of the proceedings, without it being shared with the business or whoever.

The difficulty here is we're talking about litigation information. I'm not for the moment saying that the lawyers for Visa or Mastercard are going to go off and do the sorts of things which were frowned upon in McLaren or in some of the other case law, but, for example, we've been discussing the possibility of discussion with potential claimants, or early-stage claimants today. If the people who are running that correspondence know already who we've been speaking to and know specifically who we've been speaking to, they can't un-know that information, and it inevitably will condition the way in which they approach any strategy they apply in trying to have that correspondence.

So, we've tried to be constructive in our carve out, but it undermines the very basis of the carve out that we've done, because we've been trying to be constructive to allow that correspondence to go on, but if the people doing it are able to use the identity, the very information which the party itself did not want them to know, then that goes to the heart of the problem.

We don't know who all these other entities might be, but that is our serious concern,

and it seems to us that a confidentiality ring does not necessarily address the problem, and it puts us in a very difficult position where we are trying to build that book to serve the purpose of the legislation in running this claim.

Clearly damage has been done to a number of people, or a number of people perceive that damage has been done to them. The statute has provided this as a vehicle for them to recover that loss, and many of them do not wish to immediately put their head above the parapet and tell the defendants today, "Oh, we're going after you". That's not unreasonable, indeed that's the very basis upon which this regime is put together, and there's a real danger that disclosing identities now undermines that. That very much goes to the opt-in, I've parked opt-out.

I don't think there's much more I can say about opt-in. That's what we say about opt-in.

THE CHAIRMAN: Yes. And then opt-out, is there anything you want to add? As I indicated to Mr Cook, it does seem to me to be different, that's not to say it's not interesting, but it does seem to me to be different. Is there anything you want to say on that?

MR BOWSHER: On opt-out?

THE CHAIRMAN: Yes.

MR BOWSHER: On opt out, if it's a word, "onerousness" becomes a bigger issue. Again, we've given evidence, our approach to book building is sensible, we've not gone direct to the individual businesses, we've gone to the trade associations, that evidence is in play. I'm not sure that really the questions which have been -- can I just, sorry ...

THE CHAIRMAN: Yes.

Maybe to just help you a little bit, I suppose the question is if one asks the same questions in relation to (b), am I right in thinking that if you haven't done it for opt-in,

then presumably you won't have done for opt out the things that are listed in (b)

MR BOWSHER: Absolutely.

THE CHAIRMAN: And so, the same point. And then in relation to (a), I think the question is are you aware of any individuals as opposed to trade associations, because I think -- again, maybe I have this wrong, but I don't read the request to cover trade associations.

MR BOWSHER: No, that's one of the reasons why we find it a bit peculiar, and to go back to the point that I made at the beginning, that having put the evidence in, it seemed to us a slightly odd order to seek, because we've explained what we've done. To then on its face require us to provide a whole lot of information, which self-evidently we wouldn't have, given what we've said about the way we approached book building, seemed --

THE CHAIRMAN: I think Mr Ross does talk about some people having registered their details on the claim website, but he says he hasn't contacted any of them.

MR BOWSHER: Yes.

THE CHAIRMAN: Okay, that's helpful. Is there anything else on that? I'm conscious of the time.

MR BOWSHER: I don't think so, you have the general point. We've explained what we've done, and again the points on identity apply just the same as they do in opt-out, if not more so. The contours of the case will be as well known to the Defendants there as they would be for opt-in, they already know the sorts of people who are paying MIFs of these types, or paid MIFs of those types in the temporal and geographical space that this claim occupies. Those points are available to be made, and self-evidently these questions don't really bear on the nature of the engagements and information which we've already explained. They're not really responsible -- we've tried to respond to what was said to us. This order doesn't

really take the matter forward, it goes in a different direction.

THE CHAIRMAN: Yes, quite. I understand the point you're making. I think it's probably more helpful if you work on the basis that you don't have the information than to argue about relevance. I think one can for example argue about whether 100 million was the right number, because when Mr Cook talks about whether an opt-in or opt-out order should be made, I'm assuming he means in part whether that's the right threshold and so on. But it seems to me that if you're saying you don't have any of the information which is listed in 17(b), and you haven't been in direct contact with any other than those described by Mr Ross, then that's the answer, I think that's your point on opt-out.

MR BOWSHER: No doubt we can provide an updated answer to what Mr Ross has provided in his witness statement at some point, and maybe that's an appropriate thing to do at some point, to update that answer, because it will change.

THE CHAIRMAN: That is another question, isn't it, as to whether that ought to happen at a later stage, because one of the problems with this is that no doubt Mr Cook is then going to say on 13 January, or whenever it is he wants the stuff, "Can we please have it on 13 February."

Let's see what Mr Cook has to say about all of that, unless there's anything else you want to add?

MR BOWSHER: I don't think so.

THE CHAIRMAN: That's been very helpful, thank you.

MR COOK: Sir, I'm conscious of the time, but just to canter through it as swiftly as I can. Obviously, the issues we're focussed on are points like common issues, whether or not there are existing claims by merchants, the relevant suitability of collective proceedings versus individual proceedings. So, those are the kind of issues that this is all going to be highly relevant to.

So, I think you have on board, sir, the reasons why that's relevant, and it was helpful to some extent that my learned friend showed you Mr Ross's statement, because I think my off the cuff examples were perhaps poor ones. Paragraph 27 indicates that -- there is reference to discussions in the EU with a national train provider, so that's going to be a train company in some member state, we don't know which one; a restaurant chain, again in another member state of some kind.

So, the examples I'm giving there, sir, they are broadly real ones, in the sense that we are talking about some of these companies being on the face of it entirely foreign claimants, which we do say these are points that are going to be very relevant to the question of whether these are common issues, whether they're suitable to be brought by way of collective proceedings.

With respect, sir, the reason we want the names, my learned friend said we haven't explained it, it's paragraph 30(a) of my skeleton argument, is because essentially the names are the gateway, obviously, to answer all these kind of questions, to know which sector somebody's in, which country they're operating in. My learned friend talked about knowing the location of all the points of sale. Obviously, we don't want addresses for a thousand points of sale, we want to know if their business is in Germany, or France, or Slovakia, or wherever it might be. Those are the points of relevance. Knowing the nationality of the company, knowing which countries it operates in, those are the kind of points.

So, the names are the route into identifying what industry somebody is in, which countries it operates in, points like that. It will give an indication of things like their financial resources, and therefore their ability to bring proceedings on an individual basis, particularly relevant in this case of course because there already are or have been thousands of individual claims that have been brought.

Then of course whether there's an overlap of claims. My learned friend says we

know all about the other claims, but of course we don't know who these 30 people are, to know if they have in fact brought other claims or not. We're told they haven't, but again that is one of those points that is specifically required by the rules, for the tribunal to consider whether there are existing claims that have been brought by potential class members. So, the names are basically the route in to knowing these kinds of points.

Obviously, one can provide alternative proxies if you're satisfied by the concern that the identity is a real issue of sensitivity, sir, such as their industry, approximate size, that kind of information could go into a confidentiality ring instead. At the very least that information should be provided. But I do say the idea that the names of the companies are so sensitive that they shouldn't even go into an inner confidentiality ring, with respect simply doesn't withstand any scrutiny at all, sir.

A couple of points on that. Firstly, an inner confidentiality ring would mean it only went to the lawyers, it wouldn't go to the Mastercard or Visa business. Secondly, the nature of the way in which credit card schemes operate is the relationships are with acquiring banks, not with the card schemes anyway. I think my learned friend, with respect, has picked up from McLaren where that was the case, where there were direct commercial relationships between potential claimants and the defendant there. Predominantly that isn't the case in this kind of industry at all, so it simply doesn't stand.

The names of these kind of companies are going to have to come out at some point. If they're going into the litigation thinking that they can keep their identity secret on an ongoing basis, then they're going in on a false premise in any event, sir. The PCR isn't in a position to guarantee them anonymity going forward. Issues like disclosure will certainly arise, obviously you don't need to decide today whether they will be granted, and when we discuss things like whether or not there should be

a trial of issues, we're going to need to know the countries in question and things like that, because the umbrella proceedings have of course hived off the claims in relation to a number of other countries, precisely because they are not entirely common issues, and that's obviously not the language there, but they're not issues that it's sensible to deal with in parallel with how the UK market operated, because they're going to be very much market-specific conditions.

So, this kind of information will certainly have to come out, so it's difficult to see why there's sensitivity in providing it before the decision is made on certification rather than slightly after that. With respect, it's difficult to see genuinely how chilling it would be to know that the lawyers on the other side will know the names of the companies now rather than in a few months' time.

My learned friend's attempt to try and create some kind of idea that there's going to be something inappropriate the lawyers will learn in knowing that somebody might be interested in the collective proceedings, I mean the reality is if there is a sensitivity about knowing that they're potentially coming to sue us, which with respect I say is nonsense, then they're not going to be the ones approaching us to try and settle. If they're the ones approaching us to try and settle, they're the ones who don't care that we know they're suing us, they have to tell us in order to try and come to a deal that gives them some financial benefit. But there's nothing that the lawyers are going to acquire that's going to benefit us in that kind of independent set of discussions about settling wider claims.

THE CHAIRMAN: No. I'm not saying this is the answer, but assume for present purposes the tribunal was prepared to give you and Visa permission to respond to letters before action, and one way of dealing with any concern that Mr Bowsher might have would be to put on a sort of blacklist the people who he has identified. If I were to order that you had those names, then they could be names that you would

not respond to without seeking the express permission of the tribunal, which could carve them out from the general permission. That's one way of dealing with that.

MR COOK: If you thought that was a legitimate concern, sir, that is indeed one way round it. As I mentioned, the problem is with a lot of these companies that inter-regional and commercial will only be a subset of their claim.

THE CHAIRMAN: Yes.

MR COOK: So, the issue is they'll be coming to us saying we want a claim in relation to everything, potentially, and so the discussion is going to be much broader, potentially, subject to how far the subset is actually a large or a small proportion of their credit card business, on a wider basis. But agreed, sir, it could be resolved in that kind of way.

THE CHAIRMAN: Yes, I'm not suggesting for a moment that this is anything, especially not an inner ring, so I'm not suggesting that there's any serious risk of this happening, or any risk of this happening, but from a perception point of view, it might be quite helpful, if one puts the two things together, the question of how you deal with McLaren in the context that we're in, which is obviously quite tricky, as we've discussed, and then put this alongside it, it would be unfortunate if the two things together did not look coherent, if they're not sending the right consistent message. We want it either in terms of the meaning of McLaren, or in order to provide any sort of chilling effect, whether that was felt realistically or unrealistically by the people perceiving it. So, I'm thinking about it in that way, rather than any material point.

MR COOK: I appreciate the tribunal wants justice both to be done and seen to be done. If there are any concerns I fully agree that there are routes the tribunal can put in place that addresses any sort of perceived concerns. I would suggest those concerns are misstated, or at best wildly overstated by my learned friend, but they can be addressed in those ways if you felt there was something in them, sir.

But the short point is there are a number of pieces of information here that it's clear that they do have, and that's admitted, and we refer to that at paragraph 32 of my skeleton. They have said they have main business sector, average annual turnover. So, there are a number of pieces of information they've acknowledged they do have, which would clearly be of interest. We do suggest currently that they should make reasonable endeavours to ask for a little bit more, such as information about transactions, points of sale, but only in the sense of which country they're in, and their information about commercial and inter-regional transactions, rather than simply a headline business turnover, on the basis that it entirely depends, business turnover is an interesting number, but the critical thing is what percentage of their business is actually covered by this claim.

So again, one would expect that's the kind of information that it's reasonable to ask people who are thinking about joining to provide. But certainly my application is they should certainly provide what they have. I would invite you to go further than that and ask them to use reasonable endeavours to get a couple of additional basic pieces of information. If you're against me in terms of positive steps, sir, they should at least provide what they have already.

That's the position in relation to people opting in. Opt-out, as you say, we do say it would be informative to know who has currently stepped forward, and to the extent anyone has said they've stepped out, that would be informative to know, sir, but I recognise the points that there is a less obvious discrete category of named companies in the way that there is for opt-in.

THE CHAIRMAN: Thank you, Mr Cook.

Mr Kennelly, is there anything else you wanted to add to that?

MR KENNELLY: No, sir. We adopt Mr Cook's submissions on behalf of Visa.

THE CHAIRMAN: Thank you all. I'm sorry we've run a little bit over time. In the

circumstances, rather than giving an answer on this now, I will ponder about the answer on contacting, the McLaren point, but I will get that to you promptly, because I know that with the period that is to come, I am sure you will want to know what the answer to that is. So, I will reserve the decision on that as well.

I think we've agreed, haven't we, 3 to 5 April, so if we're able to confirm that as part of the order. Is there anything else, Mr Bowsher, that we've missed?

MR BOWSHER: I don't think so. I believe that has covered the entire agenda.

THE CHAIRMAN: Mr Cook, anything else? Mr Kennelly?

MR KENNELLY: No, that's everything, sir, thank you very much.

THE CHAIRMAN: Thank you very much for your help, it's been very useful indeed, and I will get you something as soon as I can. Thank you.

(4.45 pm)

(The hearing concluded)